



Kibor v Jepchirchir; Jepchirchir & another (Interested Parties) (Environment & Land Case 21 of 2022) [2023] KEELC 20988 (KLR) (19 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20988 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 21 OF 2022
MN MWANYALE, J
OCTOBER 19, 2023**

BETWEEN

MOSES KIPTOO KIBOR PLAINTIFF

AND

HELLEN JEPCHIRCHIR DEFENDANT

AND

JANE JEPCHIRCHIR INTERESTED PARTY

GAD KIPKEMBOI INTERESTED PARTY

JUDGMENT

1. Moses Kiptoo Kibor, the Plaintiff herein bought NANDI/CHEPTERIT/273 in a public auction and became the registered owner thereof, upon registration on 2/8/1988 and has now filed this suit vide his plaint dated 7/4/2021 seeking judgment against the Defendant.
 - a) a declaration that he is the legitimate owner of all that parcel of land known as NANDI/CHEPTERIT/273.
 - b) An eviction order to issue against the Defendant, her agents and/or servants from NANDI/CHEPTERIT/273.
 - c) A permanent injunction restraining the Defendant, their agents and/or servants from interfering with or in any other way dealing with the parcel of land known as NANDI/CHEPTERIT/273 in any manner detrimental to the Plaintiff.
 - d) Costs and interests of the suit.



Plaintiff's Case And Evidence: -

2. It is the Plaintiff's case that he is the registered as absolute proprietor of that parcel of land measuring 2.6 hectares, and is thus entitled to ownership and possession of the suit property, and that the Defendant had without any notice of color of right trespassed onto the said piece of land.
3. It is the Plaintiff's further contention that he had never had any transaction regarding the aforesaid parcel of land between himself and the Defendant.
4. The Plaintiff particularized fraud and/or illegality that he attributed to the Defendant as follows;
 - a) erecting structures on the suit land without the consent and/or authority of the Plaintiff who is legitimate owner.
 - b) laying a claim of ownership over the suit land without any legal and/or lawful justification.
 - c) caused to be erected on the suit property structures that are not approved by the relevant local authorities.
5. The Plaintiff thus prayed for an eviction order and the permanent injunction as set out at paragraph 1 of this judgment.
6. It is the Plaintiffs further case that there were two previous suits, to wit, Eldoret ELC No. 226/2016 (O. S) and Eldoret ELC 126/2012 formerly Eldoret High Court No. 87/2003 (OS) filed by the Defendant and/or person claiming through her which suits were dismissed for being frivolous and want of prosecution respectively.
7. The matter had partially proceeded before the ELC Eldoret but upon establishment of this Court at Kapsabet parties took directions that the same starts de novo and a hearing date was given. In the course of hearing before filing submissions parties (Plaintiff and Defendant) requested to attempt an out of Court settlement, but the same did not materialize.
8. While the matter was pending filing of submissions, the two interested parties filed a joinder application and joined the proceedings with one interested party giving testimony in the matter.

Plaintiff's Evidence: -

9. Two witnesses, the Plaintiff and another witness testified in support of the Plaintiffs' case.
10. PW1, Moses Kibor, the Plaintiff adopted his witness statement and produced the list of documents as exhibits (P Exhibit 1 to 7. He stated that he did not know the Defendant as she had not been living on the property.

In cross – examination, he confirmed that the late Rev. Father Jude Kibor was his brother but was not registered as an owner of the suit property. He maintained that he had bought the property in a public caution and the said Rev. Fr. Kibor had paid for the property on his behalf at the auction. The witness did not recognize document 6 on the Defendant's list of documents (a deposit slip for kshs 11,066/50).
11. He stated that he had paid kshs 90,000/= at the auction but did not take possession of the property.
12. When he bought the property in 1988 there was no house. He filed suit in 2017. He did not know who stayed in the property.



13. In re-examination, he stated that he knew the Defendant when he sued her, and that he had bought the property in an auction in 1988. He was sued by Hellen the Defendant in 2017 and they were other previous cases.
14. PW2, Mark Kiprotich Kibor, adopted his witness statement as part of evidence in chief. It was his testimony that he had learnt of the auction in 1988 through the late Rev. Father Jude Kibor, the auction happened at K.C. B. Eldoret Branch, and they were the highest bidder, after which the Plaintiff, Rev. Father Jude and himself travelled to Cheptarit and saw the original registered owner Mr. Jimmy Keter who informed them that he had donated a power of Attorney to one of his son's Alexander Cheruiyot who had taken a loan which was secured by a charge over the property. At the time the property was vacant and no one was living thereon, after the visit they paid the auctioneer and title was registered in the name of Moses Kibor the Plaintiff. Alexander Cheruiyot commenced suit against the Plaintiff in the Land Disputes Tribunal, and they filed a Judicial Review in the High Court against the Tribunal's decision and the other suits went until 2017. Alexander Cheruiyot had tried to refund Rev. Father Jude who refused to accept the refund, and a banker's cheque had been prepared to refund the money paid to Rev. Father Jude Kibor by Alexander Cheruiyot.
15. On cross – examination, the witness stated that it was the Plaintiff who paid at the auction and not Rev. Father Jude. The mission at Cheptarit was to confirm whether the property really belonged to Mr. Jimmy Keter. Alex Cheruiyot and Rev. Father Jude Kibor did not agree on the refund that had been proposed by Alexander Cheruiyot. he stated that the owner of the property is Moses Kiptoo Kibor. That from 1988 to 1999 no one had occupied the property.
16. That a dispute arose in 1999 and Moses the Plaintiff went to the High Court in 2001 against the Kabiyet Lands Dispute Tribunal. He did not know when the Plaintiff had filed the suit.
17. In Re-examination, he stated that the Tribunal case was in 2001, that they had been other cases with the last case ending in 2017.
18. With the testimony of the two witnesses the Plaintiffs closed his case.

Defence Case And Evidence: -

19. The Defendant Hellen Jepkemboi Kerich, filed her stated of defence dated 5th May 2021.
20. The said Defence has a title “Defence to Counterclaim” but the Court understood it to be a Defence and Counterclaim. Since the Plaintiffs filed a reply to defence and defence to counterclaim dated 13th May 2021.
21. In her defence, the Defendant pleaded that the Plaintiff was the registered owner of the suit land which was originally registered in the name of their patriarch Jimmy Kipngetich Keter and it was charged to Thabiti Finance Company Ltd and Kenya Commercial Bank who had sold it to one Rev. Fr. Jude Kibor who had nominated the Plaintiff to registered as proprietor.
22. That the said father Jude Kibor was refunded kshs 111,006.50 through Ac No. 23105 at Standard Chartered Bank Limited.
23. The Defendant denied the particulars of illegality and fraud and pleaded that the Plaintiff was guilty of acquiescence and is estopped from complaining after 33 years. The Defendant pleaded that the dismissal of the High Court suits was for non-prosecution rather than on merit.



24. In her counterclaim, the Defendant claimed the Suitland NANDI/CHEPTERIT/273 by virtue of adverse possession having been in possession of it for more than 12 years. The Defendant thus prayed for a permanent injunction against the Plaintiff and sought for judgment against the Plaintiff's for
- a) that the Defendant owns the Suit land L.R. NO. NANDI/CHEPTERIT/273 by operation of law.
 - b) Plaintiff be barred by orders of permanent injunction from in any way interfering with the Defendant's possession, utility and ownership of the suit land.

Defence Evidence: -

26. The Defendant Hellen Jepkemboi Kerich testified as DW1 and she adopted her witness statement as part of her evidence in chief and produced the documents listed in her list of documents as D Exhibit 1 to 8. It was her testimony that she had lived on NANDI/CHEPTARIT/273 for more than 30 years.
27. She stated that her late father in law Peter Ngetich had been awarded the suit property by the Lands Dispute Tribunal, but the decision of the Lands Dispute Tribunal was quashed by the High Court pursuant to a Judicial Review case filed by the Plaintiff.
28. Two previous suits were dismissed by the High Court at Eldoret, one for want of prosecution. It was her testimony that the suit property had been sold through a public auction in 1988 and that her father in law's brother had refunded kshs 110,006/50 to the late Rev. Father Kibor, the same was confirmed by D Exhibit 5, a deposit slip and as a family they had developed the property and her late husband was buried on the suit property.
29. On cross – examination, the witness stated that th4e suit property had initially been registered in the name of Jimmy Kipngetich arap Keter (now deceased) on 27/10/1970 and that Alexander Ngetich and Peter Ngetich were biological sons of the original owner Jimmy Kipngetich arap Keter. Her late husband Robert Bett was the son of late Peter Ngetich, and she was suing on behalf of descendants of Peter Ngetich but did not have a Grant of Letters of Administrations in respect of either the late Peter Ngetich and/or Jimmy Kipngetich.
30. The suit had been bought by Rev. Fr. Jude Kibor at the auction but was registered in the name of his brother Moses Kibor. In reference to D Exhibit 4 (the tabulation), the same was not signed neither did not bear the name of the person who prepared it, the document did not have the names of he people who were present when it was prepared and neither was it dated.
31. On D exhibit 5, no date is shown on when the payment was made. She stated that the redemption arrangements were made in writing but she did not have the same before Court although D Exhibit 6 appears to be the redemption arrangement but Moses Kibor did not sign the same. On D exhibit 4, the grand total is kshs 121, 006/50 and the amount paid as per D Exhibit 5 is less by kshs 10,000/=.
32. She gave a chronology of the Court cases and indicated that they have not had peaceful occupation of the suit property. She indicated that Moses Kibor was registered in 1988 and 12 years lapsed by 1/8/2000. The Tribunal case was filed while the 12 years had not lapsed.
33. The witness in further cross- examination indicated that the suit had been filed continuously. She stated that she was married in 1994.
34. In re-examination, she stated that she was sued by Mr. Moses Kibor, while the Tribunal Case had been filed by Mr. Alexander Ngetich. The computation D Exhibit 4 was prepared by the two families, that



3 people had been buried on the suit property without protests. She reiterated that the land was hers because they had redeemed the kshs 110,006/50 and have stayed thereon.

35. DW2, Richard Phillip Kipruto Biwott equally testified. He adopted his witness statement as part of his evidence in chief. It was his testimony that the late President Moi, had given Mr. Alex Cheruiyot kshs 110,000/= in his presence so as to redeem the property. The money was paid to the Rev. Fr. Jude through Standard Chartered Bank Eldoret. He stated that as he is retired, he lives near the suit property and the Plaintiff has not taken possession of the same.

It was his testimony that the property is owned by the family of the late Peter Ngetich who were bequeathed the same by the late Jimmy Keter, and the Defendant was a daughter in law of Peter Ngetich.

36. On cross – examination, the witness stated that the parcel belonged to Jimmy Keter who never lived on the property. Only his son Peter Ngetich did. The witness stated that property sold in public auction.

The witness stated that he did not know how the redemption was done, but stated that he was present when the funds were paid to the account supplied by Rev. Father June in 1990. He indicated that there was a document in writing from Moses Kibor authorizing the redemption. He stated that Mr. Peter Ngetich was living on the property with permission from Late Jimmy Kipngetich. He stated that he did not know the Account name where the funds were deposited.

There was a banker's cheque of kshs 111,006/50 drawn in name of Alexander Cheruiyot, he did not know how many times the family of Kibor visited the suit property, neither was he aware of the disputes, he indicated that there were about 2 or 3 houses built by the children of Peter Ngetich. The witness did not know whether the estate of Jimmy Kipngetich and Peter Ngetich had administrators and had been distributed.

37. In re-examination the witness indicated that he did not know who had authored D Exhibit No. 4. He stated that their deposit slip of kshs 111,006/50 had an account number, which account number was 23105, while D exhibit 4 had an account number. The account numbers were the same.

38. He further stated in re-examination that he had been shown a banker's cheque for kshs 111, 006/50 made on 5/8/2022 in favour of Alex Cheruiyot. He indicated that he was not shown proof that the cheque had been cashed. He reiterated that the property had been occupied by the children of the late Peter Ngetich.

39. DW3, Domyphila Jepkemboi Keter testified and adopted her witness statement. It was her testimony that Peter Ngetich and Alexander Ngetich were sons of her co-wife, as she was a wife to the late Jimmy Keter. She indicated that the property belonged to Peter's children who were on the property.

40. In cross – examination, she stated that the late Jimmy Keter had 4 wives, and she was the fourth wife. Jimmy had died in 1992, but she was not aware of any succession proceedings in respect his estate. The late Peter Ngetich had been gifted the property by his father. Peter had 2 wives and both wives had lived thereon NANDI/CHEPTERIT/273 and were now deceased.

41. After the testimony of the 3 defence witnesses the defence case closed. As earlier alluded elsewhere in the judgment, the Plaintiff and Defendant sought for time to attempt an out of Court Settlement, which did not materialize, an application dated 2/5/2023 for joinder of Interested Parties was filed and the same was not opposed by the parties, hence the Interested parties Jane Jephkirchir and Gad Kipkemboi joined the proceedings.



Interested Parties Case: -

42. The gist of the Interested Parties case and evidence is that there was no refund made to Alexander Cheruiyot in respect of the kshs 110, 006/50 and that the cheque drawn in the name of Alexander Cheruiyot, was not deposited in his account. The said cheque had been produced by the Plaintiff in evidence, as P Exhibit 7.
43. The 1st Interested Party called two witnesses, Gad Kipkemboi as Plaintiff who adapted his witness statement it was his testimony that the cheque was introduced after the demise of their father in 2018. And that his father had refunded Rev.Fr. Jude.
44. On cross – examination, the witness indicated that his grandfather did not contest the sale of the property through an auction in Court. The parties to D Exhibit 4, which was an instrument for redemption were not known.
45. PW2 was the Branch Manager ABSA Bank Eldoret who testified pursuant to witness summons which were issued by the Court.

It was her testimony that she could not confirm the drawer of the cheque neither could she confirm whether it was deposited as she could not retrieve the image of the cheque which was drawn more than 20 years ago.
46. On cross – examination by Mr. Simiyu, the witness indicated that she could not confirm the authenticity of the cheque.
47. On cross – examination by Mr. Tororei, she said that on the face of the cheque it looked genuine, but could not confirm its authenticity. She indicated that a cheque could be deposited to any commercial cheque, and a banker’s cheque is a guarantee that the sums are deposited with the banks are no longer available at the drawers account. The cheque was beyond the retention period.
48. After the testimony of the two Interested Parties witnesses, the Interested Parties case closed.
49. The Court invited the parties to file written submissions and the parties complied.

Plaintiff’s Submissions: -

50. In his submissions before Court, the Plaintiff has not framed any issues for determination but has largely submitted on the reliefs he seeks and whether the Defendant has proved adverse possession.

On adverse possession, the Plaintiff submit that the period where there were active suits, time ceased to run for purposes of adverse possession and have placed reliance in the case of David Nthiga vs John Njeru Mbugi 2022 eKLR which decision has quoted the decision of the Court of Appeal in the case of Mwangi vs Livingstone Ndeete. Thus, the Plaintiff submits that the Defendant has not proven the ingredients of adverse possession.
51. On the prayers sought, the Plaintiff submits that having proved ownership his title is protected under Section 24, 25 and 26 of the *Land Registration Act* and that he is entitled to quiet possession hence the prayer for injunction ought to be allowed. The Plaintiff has cited the decision in Isaac Gathungu Wanjohi vs Moses Kinoti Lempaso & 2 others (2021) eKLR.
52. On the declaratory prayer on ownership the Plaintiff submits that having been the owner thereof by virtue of purchase in a public auction he is the legitimate owner and prays for a declaration for such.



Defendant's Submission: -

53. The Defendant has framed the following as issues for determination; -
- a) whether the suit land initially belonged to Jimmy Kipngetich Keter before the auction of 26th January 1988.
 - b) whether Jimmy Keter refunded the Plaintiff the monies used in the auction for the purchase of the suit land
 - c) whether the Plaintiff ever returned back the monies if any to the late Jimmy Kipngetich Keter or any of his family members that was used in refund for the action.
 - d) what cause of action does the instant suit raise
 - e) whether the suit is statute barred
 - f) whether the Defendant has met the threshold for grant of orders of adverse possession.
55. On the first three issues, the Defendant submits, that Jimmy Keter was the previous registered owner of the suit property before the public auction. The Defendant further submits that Fr. Jude Kibor had told his congregants that he was refunded the money he had used to purchase the property and further that there was no evidence that the cheque of kshs 110, 006/50 in the name of Alexander Cheruiuyot was deposited by him at all.
56. On the cause of action, the Defendant submits that the Plaintiff's claim was for recovery of land and that the same is statute barred by virtue of Section 7 of the Limitation of Actions Act Cap 22. That the cause of action first accrued to the Plaintiff upon his registration on 29/8/1988.
57. On the issue of whether the Defendant has proven adverse possession in support of this limb of submissions the Defendant has cited the decision in the case of Gabrelo Mbui vs Mokindia Moranya (1993) eKLR, as well as section 38 of the Act.
58. The Defendant submits that the entry on the property was non- permissive, since the suit land was bequeathed to them by a person other than the registered owner.
The Defendant submit that their occupation has been since 1988.
59. The Defendants submits that from 2003, when the property was given by the Court to the Plaintiff, it is more than 12 years.

Interested Parties Submissions: -

60. As was observed at paragraph 8 of this judgment there was a joinder of two interested parties, who participated in the proceedings and testified as captures at paragraphs 43 – 48 of this judgment.
61. The Interested Parties filed their submissions. The Interested Party submit that the Estate of the 1st Interested Party refunded Rev. Father Jude Kibor kshs 110,066.50 and thus he was supposed to transfer the same, to the Defendants family his interested having been extinguished upon acceptance of the refund of kshs 110, 066.50/=



62. The Interested Party has framed and submitted on two issuers for determination.
- i) Whether the Plaintiff's interest in the suit land was relinquished by way refund.
 - ii) is the Defendant entitled to possession and occupation of the suit property?
63. On issue number 1 the Interested Party submit that the Plaintiff was refunded the purchase price of the land parcel which necessitated the Kilibwoni Land Dispute to deliberate on them. The interested Party submits that the Plaintiff's cheque to refund the deceased was fake and not honored by the bank. In support of this submission the Interested party places reliance on the decision in the case of Housing Company of East Africa Limited vs Board of Trustees National Social Security Fund & 2 others (2018) eKLR.
64. the Interested submits that the intention of the parties was to cure the transaction by way of a refund.
65. On the second issue, the Interested parties submit placing reliance on Section 120 of the *Evidence Act* that by his own representation the Plaintiff is estopped from denying the same; and the Interested Party has cited the Nairobi vs John Kimani Njoroge (2013) eKLR.
66. The Interested Party thus submits since the Plaintiff was refunded he is estopped from pleading otherwise.
67. The Court has considered the pleadings, evidence on record, submissions of the parties and authorities relied upon. As each of the parties had framed their own issues for determination in their submissions, the Court is obligated to frame its own issues for determinations.
68. Before framing the issues for determinations, a few uncontested issues were settled during the hearing, which issues the Court makes note of;
- i) it is common ground that the Plaintiff Moses Kiptoo Kibor is the registered owner of NANDI/CHEPTARIT/273, having purchased the same in a public auction, and become the registered owner thereof on 2/8/1988 and a title deed issued to him on 29/8/1988.
 - ii) It is also common ground that the suit was initially registered in the name of Jimmy Kipngetich Arap Keter (now deceased).
 - iii) It is not in dispute that there was a land dispute case commenced by the late Alexander Cheruiyot Ngetich against Rev. Father Jude Kibor and Moses Kibor, being case No. 4/2000 at Kilibwoni Land Disputes Tribunal, whose outcome was in favour of Alexander Cheruiyot but which decision was quashed by the High Court in JR. No. 40/2001 on 17/9/2003.
 - iv) It is also common ground that the Defendant has been sued in her own capacity and not on behalf of the Estate of the late Peter Ngetich and the counterclaim was for her own benefit too and not the benefit of the Estate of the late Peter Ngetich.
 - v) The issue of the refund or otherwise to Rev. Fr. Jude Kibor of kshs 110,006.50/ = and subsequent refund to Alexander Cheruiyot was not settled in the proceedings and shall form part of the issues to be determined.



The Court frames the following as issues for determination; -

- i) whether or not the refund of kshs 110, 006/50 being the redemption price of NANDI/CHEPTARIT/273 constituted a binding contract between the families of the Plaintiff and the Defendant.
- ii) What is the import of the cheque of kshs 110,006/50 made to Mr. Alexander Cheruiyot?
- iii) when did the Plaintiff's cause of action accrue and is the Plaintiff's claim statute barred?
- iv) Does the Defendants occupation on the suit land constitute trespass and/or continuing trespass or does it amount to adverse possession?
- v) What reliefs ought to issue
- vi) who bears the cost of the suit?

Analysis And Determination: -

69. In his witness statements, PW2, indicated that after the auction he together with his father and the late Rev. Fr. Jude Kibor visited the family of the late Jimmy Kipngetch Keter to inform him of the purchase of the property. PW1 stated that whereas he is the registered owner of NANDI/ CHEPTARIT/273, It was his brother, the late Rev. Father Jude Kibor who paid the money at the auction. DW2 indicated that he had accompanied the late Jimmy Keter and Alexander Ngetich to source for funds and so as to refund the payments made by Rev. Father Kibor for the purchase of the property. DW2 testified that he was present in the meeting with the late Rev. Fr. Kibor who gave them the Standard Chartered account where the refund of kshs 110, 006/50 was made.
70. The Plaintiff acknowledges the payment but stated that the funds was immediately refunded to late Alexander Cheruiyot through a cheque.
71. The computation for the refund as well as the deposit slip were exhibited as D Exhibit 4 and 5. The same do not bear any date as to when the refund was made.
72. D Exhibit 6, a letter from the then District Officer Kabiyet dated 13/2/1990 alludes to the refund having been made. It must be deemed therefore that the refund was made before the D Exhibit 6 as written but in any event in early 1990.
73. The question to be answered is whether the refund of the money constituted a contract/agreement for purchase of the suit property by the family of late Jimmy Ngetich. The Plaintiff submits relying on the doctrine of privity of contract that he was not involved and did not authorize Rev. Fr. Jude Kibor to receive the same.
74. The Defendant's submissions were silent on this while the Interested Parties took the view that the intention of the parties was for the Defendants family to redeem the suit property and that the redemption was concluded by the said refund.
75. The Court has observed in the proceeding paragraphs that Rev. Fr. Jude Kibor, was the one who made the payment at the auction on behalf of his brother Moses Kibor the Plaintiff, a fact that the Plaintiff acknowledged in cross – examination. PW2 another of the Plaintiffs brother and brother to the late Rev. Fr. Jude Kibor in his witness statement stated that he accompanied the Late Rev. Fr. Kibor and his own father to the home of Jimmy Keter to inform them of the purchase at the auction.



76. From the foregoing, it is clear that Rev.Fr. Jude Kibor was involved in the transaction on behalf of the Plaintiff by making payment for the Plaintiff acted as an agent thereof and similarly by engaging in the redemption negotiations and accepting the refund he acted as an agent of the Plaintiff. The agency created herein being an exception to the doctrine of privity of contract.
77. The Court finds that the intention of the parties was for the Defendants family to redeem the property and by accepting the refund the Plaintiff Interests in the property were extinguished and the Plaintiff was obligated to complete the redemption by transferring the property back to the family of the late Jimmy Kipngetich Keter.
78. In arriving at the above conclusion the Court is guided by the decision on the case of Soter vs Manchester City Council (iiWLR) a decision cited by the Court of Appeal in the case Peter Kimani Kairu vs Anne Marrie Cassede & another 2018 (eKLR) where it was held
- “in contracts you do not in a man’s mind you look at what he said and did. A contract is formed when there is to all outward appearance a contract. A man cannot get out of a contract by saying “I did not intend to contract,” if by his words he had done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough.”
79. In their witness statements PW1 and PW2 indicate that Fr. Jude Kibor immediately refunded the fund of kshs 110,006/50 by drawing a cheque to Mr. Alexander Cheruiyot, a son to the late Kimmy Kipngetich Keter who spearheaded the redemption negotiations.
80. The refund amounting to the redemption of the property made to Fr. Jude Kibor was made before the 18/2/1990, while the cheque P Exhibit 7 to Alexander Cheruiyot was dated 5/8/2002. This refund was thus made 12 years later and was inconsequential, since under Section 1 (4) as read together with Section 7 of the Limitation of Action Act, that payment in order to recover the suit property was time barred.
81. The refund by way of the cheque was made unilaterally by the Plaintiffs who longer had interest in the suit property, the same having been redeemed by the refund made to Rev. Fr. Jude Kibor.
82. in arriving at the said conclusion I am guided by the sentiments of the Courts in the decisions in the cases of Eldo City Limited vs Corn Products Kenya Limited and Another 2013 (eKLR) where the Court stated;
- “in my view, the uphold the position that a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the word of commerce. To my mind, that freedom should be limited up to a point the parties are still negotiating, once all terms have been agreed and settled, that freedom should dissipate...”
83. Similarly, in Kenya institute of Management vs Kenya Reinsurance Corporation 2008 eKLR where Nambuye (as she then was) held
- “.....the Trial Court would have gone a long way to fortify this principle by establishing that although a property owner has a right to sell or not sell it, he has no right to dangle it with impunity before the eyes of intending buyer and when he does so, he had to be made to meet the consequences for his impunity by either being put on hold in the exercise of his right of sale to a 3rd party...”



84. On issue number 3, the Court having found that the refund to Mr. Alexander Cheruiyot in 2002 did not entitle the Plaintiff to the property, the Plaintiff however become entitled to the property after the judgment by High Court in Eldoret JR. case No. 40/2001 which quashed to LDT decision. The LDT decision had been registered on the green card (P Exhibit 5) in favour of Alexander Cheruiyot but the High Court quashed the LDT decision thus restoring the proprietorship to the Plaintiff. It follows that a new cause of action thus accrued to the Plaintiff on the date of the said judgment.
85. In his statement, the Plaintiff placed the entry of the Defendants and/or her family in 1999.
86. So in 2003, when the judgment was entered in his favour the Plaintiff ought to have founded an action based on the said judgment as a new cause of action under Section (4) of the Limitation of Action Act, the Plaintiffs new cause of action having accrued on 17/9/2003 became time barred on 16/9/2015. The inevitable conclusion is that the new cause of action having been founded on the judgment dated 17/9/2003 became time barred on 16/9/2015 and the Plaintiff suit having been filed in 2017 is thus time barred.
87. On issue number 4, does the occupation of the Defendant amount to trespass or continuing trespass or is it adverse possession?
88. As noted earlier in the judgment, the Defendant was sued in her own right and not on behalf of the Estate of Peter Ngetich or Jimmy Keter. Her entry to the property was through marriage in 1994, and the Plaintiff puts the entry to be sometime in 1999. At the time of entry in 1999, or in 1994, through marriage, the family of the late Jimmy Keter had in 1990 redeemed the property and no refund had been made. Thus, her entry was not as a result of trespass and it is certainly not a continuing trespass either.
89. The Plaintiff's new course of action arose pursuant to the judgment in 2003, and the Court shall now consider whether the occupation by the Defendant from 2003 up to the time of filing of the suit has constituted adverse possession.
90. The ingredients to be proved in a claim for adverse possession were stated in the decision in the case of Kimani Rucine vs swift Tutherford Company Limited & another, which decision was followed by the Court of Appeal decisions in Francis Gicharu Karirir vs Peter Njoroge Mairu Civil Appeal No. 293 of 2022 as Munyi vs Peter Mbaru Kimani Civil Appeal No. 28/2014.
- “The Court stated used this land which they claim as of right ne vo ne clam nec plecano (no force no secrecy no permission). So, the Plaintiffs must show that the Defendant had knowledge, nor the means of knowing, actual or constructive of the possession of occupation. The possession must be continuous. It must not be broken for any temporary purposes of by any evidence to interrupt it or by any recurrent consideration.”
91. The Defendants testified that her entry was in 1994 by way of marriage and the Plaintiff pleaded that the Defendants entry was in 1999.
92. The Court has found that upon redeeming the property, the Plaintiff ceased to have a right on the property until a new cause of action arose pursuant to the judgment in Eldoret HCCJR 40/2001 on 17/9/2003, by this time the Defendant had already entered but for purposes of adverse possession the Defendants entry shall be deemed to have commenced on the date the Plaintiff's new cause of action arose.
93. It is the Plaintiffs submissions that the period between 2001 – 2015 could not count since time ceased to operate by virtue of cases that were filed in Court.



94. The Plaintiff has cited the decision in the case of Mwangi Githu vs Livingstone Ndereta (1980) eKLR; where the Court of Appeal held “time ceased to run under the Limitations of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possession. Assertion of rights is when the owner takes legal proceedings or makes an effective entry into the land.”
95. Did the Plaintiff assert his rights over the property for time to lease running, the Plaintiff submits that time ceased to run because of the cases that had filed and only began to run in 2017 when the last of the cases were dismissed.
96. The Court finds no evidence of entry by the Plaintiff in the suit property, neither does it find any legal proceedings commenced by the Plaintiff apart from the judgment that gave rise to the new cause of action and this suit.
97. The suit commenced by the Defendant being case in. 226/2016 was commenced after the right had crystallized in 2015.
98. Having found that the occupation by the Defendant was open as confirmed by PW2, and the Interested Parties without permission and no force with knowledge of the Plaintiff and continuous without interruption for 12 years, the Court finds that the Defendant has proved adverse possession.
99. The adverse possession herein was pleaded in the counterclaim which procedure was allowed by the Court of Appeal in the case of Chepkwony vs Malenya (Civil Appeal No. 90/2018) 2021 (KECA) 47 KLR. Where the Court of Appeal held as follows; -

“As we have already alluded to above, it is evident from the record that the Respondents ascertain of entitlement on the suit property was not founded on an originating summons but a defence or rebuttal in Appellant’s reply to defence. It is also evidence from the record that the Respondent sought leave to amend the defence to include a counterclaim a position not objected to by the appellant leme was indeed grant4ed to her..... in light of the above exposition, it I our view that the current jurisprudential position on these issues as gather from the above case law. Is that a party claiming adverse possession founded on a defence is entitled to relief where such claim is founded on evidence. It is this same vein that we hold that on the record as laid before us, the Respondents claim for adverse possession was well founded in law. The Learned Judge therefore fell in no error when he sustained that claim as presented in a defence and rebuttable through a reply to defence as opposed to presentation by way of originating summons....”

100. On the issue of what reliefs ought to issue.

The Court having found that the Plaintiffs claim is time barred and that the Defendant has proven adverse possession thus enter judgement in favour of the Defendant.

Disposition: -

- i) The Plaintiff suit is hereby dismissed with costs to the Defendant; and judgment is entered in favour of the Defendant.
- ii) The Plaintiff as the proprietor of title NANDI/CHEPTARIT/273 is holding the same in trust to the Defendant/Plaintiff in the counterclaim and his proprietary interest and rights in NANDI/CHEPTARIT/273 are extinguished under Section 17 of the Limitation of Acti9on Act and the title in the name of Moses Kiptoo Kibor is hereby cancelled.



- iii) The Land Registrar Nandi County to rectify the register of NANDI/CHEPRARIT/273 and accordingly register Hellen Jepkemboi Ngetich as the proprietor of NANDI/CHEPTARIT/273, for herself and in trust of the Estate of Peter Kibet Ngetich.
- iv) The injunction prayers sought in the counterclaim are granted.
- v) The Plaintiff shall bear the costs of the original suit and the costs of the counterclaim.

JUDGMENT, DATED AND DELIVERED AT KAPSABET THIS 19TH DAY OF OCTOBER, 2023.

HON. M. N. MWANYALE

JUDGE

