



**Kogo v Jepngetch (Sued as the administrator of the Estate of Kiptalam Kipchumba) (Environment & Land Case 405 of 2013) [2023] KEELC 20762 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20762 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 405 OF 2013  
EO OBAGA, J  
OCTOBER 18, 2023**

**BETWEEN**

**JEPKETER KOGO ..... PLAINTIFF**

**AND**

**HELLEN JEPNGETCH (SUED AS THE ADMINISTRATOR OF THE ESTATE OF KIPTALAM KIPCHUMBA) ..... DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. The late Kimwalo Kogo was the registered owner of LR. No. Nandi/Sarora/233 measuring 8.6 hectares. The late Kimwalo Kogo passed on on 1/11/1986. The late Kimwalo Kogo was a brother to Kiptalam Kipchumba. Kimwalo Kogo was husband to Jepketer Kogo. Upon the demise of Kimwalo Kogo, Kipketer Kogo processed and obtained grant of letters of administration in respect of his estate. The grant was later confirmed and she has distributed the estate of Kimwalo Kogo.
2. On 31/7/2013 Kiptalam Kipchumba filed an originating summons No. 405 of 2013 against Jepketer Kogo claiming that he had acquired 10 acres out of LR. No. Nandi/Sarora/233 (suit property) by way of adverse possession or that in the alternative, the late Kimwalo Kogo was holding the suit property in trust for him.
3. On 8/10/2013, Jepketer Kogo filed E&L case No. 475 of 2013 against Kiptalam Kipchumba in which she sought a declaration that Kiptalam Kipchumba and his family were trespassers on the suit property, sought an order of eviction and a permanent injunction restraining him and his family from in any way interfering with the suit property. Kiptalam Kipchumba filed a defence and raised a counterclaim in which he sought for a declaration that he was entitled to 7 acres out of the suit property, a declaration that Jepketer Kogo was guilty of fraud in that the succession proceedings in respect of Kapsabet PMCC No. 59 of 2011 were obtained unprocedurally and therefore null and void and for an order nullifying



entries made in respect of the suit property and for amendment of the same to reflect that he was entitled to 7 acres out of the suit property.

4. Kiptalam Kipchumba died on 23/8/2015. His wife Hellen Jepngetcih took out letters of administration ad litem and was substituted in his place in these proceedings. The two suits were consolidated on 23/7/2014.

#### **Plaintiff's case;**

5. The Plaintiff's case is that the suit property was purchased by her late husband Kimwalo Kogo who paid it by installments. When she was married to the late Kimwalo Kogo, she assisted in clearing the outstanding balance from proceeds of farming. Her husband was registered as owner of the suit property on 3/2/1983.
6. When the Plaintiff's husband died on 1/11/1986 he asked Kiptalam Kipchumba who was a senior bachelor to come and stay with her in order to protect her. She allowed him to utilize two acres which with time reduced to about 1 ½ acres. In 2009, she terminated the permission granted to Kiptalam Kipchumba to live in her husband's land. It is her evidence that the purchase money was solely raised by her husband who was working for a settler and through milk and farm produce through her efforts.
7. The Plaintiff called PW1 Samwel Sawe Arap Letting who was 105 years at the time of testifying. This witness testified on how he and the late Kimwalo Kogo acquired 20 acres each. The land belonged to a European settler. This witness used to be a tractor driver and they were staying in villages together. He is the one who looked for a wife for the late Kimwalo Kogo. They later balloted and were given their respective portions. He stated that the suit property was not ancestral land.
8. The Plaintiff called her two sons as PW3 and PW4. The two testified on how the late Kiptalam Kipchumba came to live on their land. The late Kiptalam was staying with her sister before he moved into the suit land after the demise of their father. During the memorial ceremony of their father, the late Kiptalam Kipchumba attended but he did not lay any claim to the suit property as is expected under Nandi Customary Law where one is claiming anything from a deceased person.

#### **Defendant's case;**

9. The Defendant testified that the suit property was purchase by her father in-law. The father in-law moved to the suit property with her mother in-law. The father in-law later decided to relocate to Masai land. Her mother in-law went to stay with one of her sons called Kiptisia. Her husband and the Plaintiff's husband were left on the suit property.
10. The defendant went on to state that after the Plaintiff's husband died, the Plaintiff started harassing her husband. Her husband reported the matter to the elders. A dispute was taken to Kipkaren Land Disputes Tribunal which passed a verdict that her husband was entitled to 7 acres. The Plaintiff later moved to the High Court and had the verdict of the elders quashed.
11. It is the Defendant's contention that the Plaintiff's husband was registered as owner of the suit property to hold it in trust for the family. She stated that they used to cultivate 7 acres but that after the High Court quashed the verdict of the Kipkaren Land Disputes Tribunal, the Plaintiff took away five acres leaving them with 2 cares only. She therefore states that she should be given back the five acres.
12. The Defendant stated that they had enough witnesses to testify in their favour but most of them have died and that the remaining ones are too sick to come to court to testify, one of them having come out of ICU recently.



### **Analysis and determination;**

13. At the conclusion of hearing on 11/5/2023, the court directed parties to file and exchange written submissions within 30 days. The matter was fixed for mention on 11/7/2023. Come 11/7/2023, only the Plaintiff had filed her submissions. The Defendant's counsel were given 7 days to file their submissions. As at 23/8/2023 when writing this judgement, the Defendant had not filed any submissions.
14. The Plaintiff's counsel submitted that the Plaintiff obtained title to the suit property through transmission after obtaining grant of letters of administration in Kapsabet PMC Succession Cause No. 59 of 2011. The grant was subsequently confirmed and it is on this basis that she distributed the estate of her husband Kimwalo Kogo. On the issue of the existence of another grant being Kapsabet P.M Succession Cause No. 11 of 1991, the Plaintiff's counsel submitted that this grant was obtained in the joint names of Plaintiff and that of the Defendant's husband because her children were young and that in any case, this court has no jurisdiction to entertain issues arising from succession matters as this is a preserve of the High Court. She submitted that if the Defendant has any issue with the two grants, the proper forum is the High Court or Succession court.
15. The Plaintiff through her counsel submitted that the Defendant's husband was permitted to come into the suit property after the demise of the Plaintiff's husband. She therefore submitted through her counsel that a party who has been permitted to be on one's land, that person cannot seek to have any part of the land by way of adverse possession. The Plaintiff's counsel further submitted that the Plaintiff being a sister in-law of the Defendant's husband, he could not seek to be registered as owner of the suit property by way of adverse possession.
16. The Plaintiff relied on the case of Samuel Miki Waweru –Vs- Jane Njeri Richu (2007) EKLR where the Court of Appeal stated as follows:-

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner...” (our emphasis)
17. The Plaintiff's counsel also relied on the case of Samuel Kihamba – Vs- Mary Mbaisi (2015) eKLR where it was stated as follows:-

“We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives” (Our emphasis).
18. The Plaintiff's counsel further relied on the case of Wairimu Mburu –Vs- Chege Thaiya (2019) eKLR where Lady Justice Kemei held as follows:-

“Similarly, person who occupies as licensee cannot claim land by didn't of the doctrine of Adverse possession. This was settled in the case of Hughes V. Griffin (1969) ALL ER 460 where it was held that a licensee or tenant at will, does not have time running in his favour, for the purposes of a claim for Adverse possession.

Following the above principle of law, it means that the period between 1972 – 2007 the Plaintiff and her husband occupied the land as a worker and a spouse of the worker respectively. Therefore, they occupied with the permission and under licence of the owner, the Defendant herein. I do not agree with the submissions by counsel of the Plaintiff



that the Plaintiff has locus to seek adverse from 1972 to date on her own right. Her previous occupation cannot be divorced from the permitted occupation and possession of her husband as an employee (in our case, as a relative). Her licence then expired with the demise of her husband in July, 2007..." (Emphasis added)

19. The Plaintiff's counsel further submitted that there was no trust proved as required by law and that the Defendant's husband became a trespasser upon the permission for him to stay on the land was withdrawn.
20. On the issue of fraud which the Defendant attributed to the Plaintiff, the Plaintiff's counsel submitted that though the alleged particulars of fraud were pleaded, there was no evidence led to prove the same. In support of this, the counsel relied on the case of Kuria Kiarie & 2 others –Vs- Sammy Magera (2018) eKLR where the Court of Appeal stated as follows: -

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria -Vs- Nansingh Madhusingh Darbar & Another (2001) eKLR, where Tunoi, J.A (as he then was) stated as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis added).

21. I have carefully considered the Plaintiff's case as well as the opposition to the same by the Defendant. I have also considered the submissions by the Plaintiff. The following are the issues which are to be determined in this case:-
  - a. Whether this court has jurisdiction to give reliefs arising out of a succession matter.
  - b. Whether the suit property was purchased by the father in-law of the Plaintiff and the Defendant and if so, is the suit property held in trust for the children of the parties father in-law.
  - c. Had the Defendant's husband acquired any portion of the suit property by way of adverse possession.
  - d. Are the Defendant and her family members' trespassers on the suit property?
  - e. Are the Plaintiff and the Defendant entitled to their respective claims?
  - f. Which order should be made on costs.

**a. Whether this court has jurisdiction to give reliefs arising out of succession matters;**

22. In the counter-claim filed by the Defendant who is the Plaintiff in the counter-claim in ELC 475 of 2013, the Plaintiff in that claim is alleging that the Defendant therein acted fraudulently by filing Kapsabet PMC Succession Cause No. 59 of 2011 while there was another cause pending in the same court being Kapsabet RMC Succession Cause No. 11 of 1991. The file in respect of Kapsabet RMC Succession Cause no 11 of 1991 was produced as defence exhibit 3. It is clear from the file that a grant of letters of administration in respect of the Estate of Kimwalo Kogo was issued to Jepketer Kogo and Kiptalam Kipchumba. There is also no contention that another grant was obtained in the same court vide Kapsabet PMC Succession Cause No. 59 of 2011.



23. The Plaintiff in the counter-claim in E&L case No 475 of 2013 is inviting the court to annul the latter grant and order cancellation of title obtained through that grant. This court's jurisdiction is set out in the *Environment and Land Court Act* which was enacted pursuant to Article 162 (3) of *the Constitution*. The court does not have jurisdiction to deal with matters relating to succession of the Estate of deceased persons. That is a preserve of the High Court or Magistrate's court which has the requisite pecuniary jurisdiction to entertain the cause.
24. In the case of Samuel Kamau Macharia & another –Vs- Kenya Commercial Bank Limited & others (2012) eKLR the court held as follows: -
- “a court's jurisdiction flows from ether *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. –it cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law...”
25. The *Environment and Land Court Act* has not given this court jurisdiction to deal with succession matters or annul grants issued in succession matters. I therefore find that I do not have jurisdiction to entertain any matters touching on succession or granting any relief arising therefrom.

**b. Whether the suit property was purchased by the father in-law of the plaintiff and Defendant and if so, is the suit property held in trust for the children of the parties' father in-law;**

26. The Defendant claimed that the suit property was purchased by her father in-law who paid the initial deposit. She stated that the suit property was registered in the name of the Plaintiff's husband as he was the only one who had an identity card. She stated that her husband made contribution towards the purchase in form of providing cows. She claimed that her father in-law re-located to Masai land whereas her mother in-law went to stay with one of her sons leaving the Plaintiff's husband and her husband on the land.
27. The evidence of the Defendant was all hearsay. The Defendant was born in 1982. When the Plaintiff's husband died in November 1986, she was only 4 years. She had not been married by her husband who was then 49 years old having been born in 1937. The Defendant's husband died on 28/8/2015 aged 78 years. The Defendant herself testified that she was married to her husband who was too old. She therefore did not know how the suit property was acquired.
28. Prior to the death of the husband of the Defendant, he had recorded a statement in which he claimed that he was residing in the suit property since 1956 and that his father re-located to Masai land while his mother went to stay with one of his brothers. He alleged that the suit property was purchased by his father who was introduced by a relative called Arap Ross. He had stated that in 1992, the Plaintiff attempted to harass him but that he filed a suit before Kipkaren Land Disputes Tribunal which found that he was entitled to 7 acres.
29. He went on to state that in 2010 the Plaintiff again started harassing him. There is evidence from PW1 a man aged 105 years at the time he testified. He clearly stated that it is the Plaintiff's husband who purchased the suit property and paid all the money by himself. There is evidence which has not been shaken that the Defendant's husband was invited to come to the suit property with the permission of the Plaintiff. This is after the Plaintiff's husband had died. The evidence of PW1 is clear that he and the sister of the Defendant's husband asked him to come and take care of the children of the late Kimwalo Kogo.
30. In 1989, the Defendant's husband caused a caution to be registered against the title to the suit property. He was claiming a licensee's interest. If indeed the suit property had been purchased by his father, he



should not have stated that his interest in the land was that of a licensee. Trust is a matter of fact which has to be proved through evidence. There was no evidence adduced to show that the Plaintiff's husband was holding the suit property in trust for his other father's children. In fact, out of the seven brothers and one sister, it is only the Defendant's husband who was trying to lay claim to the suit property.

31. The Defendant stated that she did not know how the suit property was acquired. While being cross-examined, she conceded that her husband was on the land with permission of the Plaintiff. She also conceded that none of her brothers' in-law was claiming that land and that even her husband was not interred on the suit property. I therefore find that the suit property was never purchased by her father in-law. I also find that the Plaintiff's husband was not holding the suit property in trust for his siblings.

**c. Had the Defendant's husband acquired any portion of the suit property by way of adverse possession;**

32. The Defendant's husband came to the suit property with the express permission of the Plaintiff. This is after she had lost her husband who was brother to the Defendant's husband. In the Plaintiff's own words, she invited the Defendant's husband to her home as she needed a supporter and protector. When the Defendant's husband started laying claim to part of her land, she withdrew that permission in or around 2009. The law is clear that a person who is on another's land with permission of the owner cannot claim adverse possession. Equally, a close relative who has been living in the land of another relative cannot claim adverse possession. This was the holdings in the cases of Samwel Miki Waweru (Supra) and Samuel Kihamba case (Supra) respectively.

33. When the Defendant's husband caused registration of a caution to be registered against the suit property on 27/6/1989, he was claiming interest as a licensee. He cannot therefore lay claim on any portion of the suit property through adverse possession. This was the holding in the case of Wairimu Mburu (Supra). It is therefore clear that the claim for adverse possession is misconceived and this is why the Defendant did not pursue the same in her evidence.

**d. Are the Defendant and her family member's trespassers on the suit property;**

34. The Defendant's husband and his family became trespassers in 2009 when the Plaintiff withdrew her licence for the Defendant's husband to be on the suit property. The continued stay of the Defendant's family on the suit property is not justified. They are mere trespassers who are liable to be kicked out any time.

**Disposition;**

35. From the above analysis, it is clear that the Plaintiff has proved her case on a balance of probabilities. I allow the Plaintiff's claim in ELC 475 of 2013 in terms of prayers (a) (b) and (c) of the amended plaint dated 16/1/2019. On the other hand, I find that the Plaintiff in originating summons in ELC 405 of 2013 and counter-claim in ELC 475 of 2013 has failed to prove her case on a balance of probabilities. The two suits are dismissed. Due to the fact that the parties herein are related and given the fact that the Defendant's husband had a cordial relationship with the Plaintiff lasting over two decades, I direct that each party to bear their own costs.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18<sup>TH</sup> DAY OF OCTOBER, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual absence of parties who were aware of the date of delivery of judgment.

