



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA**  
**AT KERICHO**  
**CIVIL SUIT NO. 43 OF 2000 (O.S)**

BENJAMIN KIPSIGEI ARAP CHUMEK.....PLAINTIFF

VERSUS

REUBEN CHERUIYOT CHEPKWONY.....DEFENDANT

**JUDGMENT**

***(Claim for adverse possession; evidence of possession in excess of twelve (12) years demonstrated;  
judgment for the plaintiff.)***

This suit was commenced on 20th July 2000 by way of an Originating Summons taken out pursuant to the then Order XXXVI Rules 3, 3D and 12 of the Civil Procedure Rules, which provided for the procedure for commencing a suit for adverse possession. In the matter, the applicant (whom for ease of reference I will refer to as the plaintiff), sought orders that he is entitled to 8 acres of the land parcel Kericho/Kaitet/443 by way of adverse possession. The Originating Summons is supported by the affidavit of the plaintiff. He deposed that he purchased this claimed portion of 8 acres in the year 1982. He deposed that he immediately fenced the portion and has been occupying the same exclusively since the year 1982. He deposed that after the sale agreement, the parties proceeded to Chepalungu Land Control Board to subdivide the land and consent was issued.

In his replying affidavit, the respondent (whom I will refer to as the defendant) deposed that he only sold 5 acres to the plaintiff in the year 1982. He denied selling 8 acres. He further deposed that he was paid a sum of Kshs. 22,000/= leaving a balance of Kshs. 6,000/=. He denied signing any agreement. He deposed that he has not transferred the 5 acres that the plaintiff purchased because he is still owed a balance of Kshs.6,000/=.

The plaintiff filed a further affidavit. He deposed inter alia that the defendant has never asserted any claim over the 8 acres since the year 1982. He also deposed that the land was surveyed for subdivision to the 8 acres. The whole land is 16 acres and consent was given to subdivide the land into two equal shares.

On 31st October 2001, directions were taken that the matter do proceed by way of viva voce evidence and that the Originating Summons be deemed a plaint and the Replying Affidavit a defence. Similar directions were also given on 27 March 2014.

On 26th September 2002, the parties entered into a consent vide which it was agreed that the plaintiff is entitled to 4 acres of the claimed land by way of adverse possession. It was agreed that the balance of the

claim do proceed for hearing.

At the hearing of the matter, the plaintiff testified that the land in issue was being sold by Kaitit Ranch. He himself was not a member of the Ranch but the defendant's father was. He paid for the whole land which was 16 acres but because it was the defendant whose name was in the register, he was going to get a half of it, meaning 8 acres. On 6th November 1982, he was given the land. In 1985, the defendant asked for more money. They took accounts and entered into an agreement on 30th July 1985. They went to the Land Control Board for consent. He produced a copy of Consent to subdivide issued by the Land Control Board. He testified that he resides on his 8 acres and wants title to it.

Cross-examined by the defendant who is acting in person, the plaintiff stated that it was the defendant's father who inserted the name of the defendant in the register of Kaitit Ranch but the defendant did not have money and that is how he approached the plaintiff. It is after the plaintiff paid in full for the 16 acres that they wrote the agreement. The defendant however took title to the whole of the 16 acres.

PW-2 was Charles Chepkwony Chelule. He is a neighbor to the parties and knows their dispute. He stated that members were asked to register some of their children to get land and that is how the defendant was registered by his father. However, they did not have money and the defendant's father looked for the plaintiff to pay for the 16 acres. In cross-examination, an agreement showing 5 acres was put to him but he stated that there was an erasure on the acreage.

PW-3 was Richard Kipkemoi Kimetto. He was previously the Assistant Chief of Rongena sub-location where the land is situated. It is while he was Assistant Chief that members of Kaitit Society were subdividing their land. He is also a member of the Society. He testified that the original members were given land and then asked to have some land allocated to their children. The defendant's father, called Swaleh, assigned the second plot that he got to his son, the defendant. This was 16 acres. The plaintiff was not a member but Swaleh approached him and asked him for money on the understanding that he would get 8 acres out of it. The plaintiff then paid the sum of Kshs. 6,000/= for the 16 acres. The land was subdivided into two and he was given the 8 acres. A fence was put by the plaintiff. He was present when the survey was conducted and when the parties went to the Land Control Board. Problems started when the defendant changed his mind so as to give 4 acres. A meeting was held and the matter settled but when the defendant's father died, the defendant wanted to reclaim the 4 acres.

The defendant did not cross-examine PW-3.

With the above evidence, the plaintiff closed his case.

In his evidence, the defendant testified that he became a member of Kaitit Ranch in the year 1982. The Society wanted immediate payment and he, not his father, personally went to the plaintiff. They agreed that the plaintiff pays him a sum of Kshs. 28,000/= in 1982. He testified that he was paid Kshs. 10,000/= on the spot and he paid the Society the sum of Kshs. 6,000/=. He stated that they then made an agreement for 5 acres at the price of Kshs. 5,600/= per acre. The total being Kshs. 28,000/=. He testified that he was paid in installments leaving a balance of Kshs. 6,000/=. The Plaintiff then exchanged his land with one Joseph Ngeno but he later came back. When he came back, he was shown 5 acres to occupy which he did occupy. The defendant could not however recall the year. He testified that he asked for his balance of Kshs. 6,000/= so that he can subdivide to the plaintiff the 5 acres. He stated that the plaintiff brought surveyors but he turned them away because he had not been paid. He stated that the dispute started in the year 1997. He denied having any agreement for sale of 8 acres to the plaintiff. He denied that the land was surveyed. He stated that he was not going to rely on any document.

Cross-examined, he testified that he became a member when a directive was issued to the Society to have sons included in the allocation of land. He was given 16 acres. He reiterated that he sold 5 acres to the plaintiff for Kshs. 28,000/=. He stated that he did not know why the plaintiff decided to exchange this land with that of Joseph Ngeno but when he was chased away from Ngeno's site, he came back and reoccupied the 5 acres. He refuted the signature in the agreement of sale produced by the plaintiff.

After cross-examination, the defendant applied to call witnesses. This was strongly resisted by Mr. Mutai for the plaintiff. I declined the defendant's request and stated that I would give reasons in the judgment which I proceed to do so.

It is the duty of every party in a suit to table his evidence in advance to the other party. This is provided for in the new Civil Procedure Rules of 2010. For the plaintiff Order 3 Rule 2 requires that a suit, except a small claim, be accompanied by the following :-

- (a) A verifying affidavit.
- (b) A list of witnesses to be called at the trial.
- (c) Written statements signed by the witness excluding expert witnesses.
- (d) Copies of documents to be relied on at the trial including a demand letter before action.

For the defendant, Order 7 Rule 5 applies. It provides that a defence and counterclaim be accompanied by the following documents :-

- (a) A verifying affidavit where there is a counterclaim
- (b) A list of witnesses to be called at the trial.
- (c) Written Statements signed by the witnesses except expert witnesses.
- (d) Copies of documents to be relied on at the trial.

There is a proviso that the statements of witnesses may with the leave of the court be furnished at least 15 days prior to the trial conference contemplated under Order 11.

I appreciate that this suit was commenced in the year 2000 before the current Civil Procedure Rules came into force in the year 2010. I also appreciate that this suit was commenced by way of an Originating Summons under the then Order XXXVI and there was no requirement to file any witness statements or documents. However, on 27 March 2014, after the new Civil Procedure Rules had come into force, directions were taken that the Originating Summons be heard by viva voce evidence. The parties were also given time to ensure compliance with the new Civil Procedure Rules. Before that, the Court had given directions for parties to comply with the new Rules. This was done on 27th February 2013. On 25th September 2013, the defendant asked for 21 days to comply. He was given this time. He did not file anything. It was the same scenario on 26th November 2013 when he asked for 30 days. Nothing was filed within this period. On 26th February 2014, the defendant asked for more time to engage an advocate. He was given 30 days. No advocate was appointed. On 27th March 2014 when the parties appeared before the court, the court felt that the defendant was not sincere with his numerous requests and that is when the court ordered the matter to proceed by way of viva voce evidence.

The defendant was adequately accommodated by the court. He cannot now ambush the plaintiff by asking to tender evidence which he has not disclosed before. Neither can I allow his excuse that he is a layman to circumvent the rules. The rules are made for both laymen and those who are not. The essence of the new Civil Procedure Rules is to stop trials by ambush. That is exactly what the defendant now wants to do. Accepting his request will certainly cause injustice to the plaintiff who has already tendered his evidence in the knowledge that no witnesses will be called by the defendant. If the plaintiff was aware of any other witnesses, he may probably have prosecuted his case differently.

It is for the above reasons that I declined the request by the defendant to call witnesses who had not been earlier disclosed and who remained undisclosed even at the time that the request was made.

I directed that the hearing of the matter do close. I also gave parties 14 days to file submissions. Only Mr.

Mutai for the plaintiff filed submissions of which I have taken note of. The defendant stated that he will not submit but will await the judgment.

I have considered the matter. This is a case of adverse possession for 8 acres of the land parcel Kericho/Kaitet/443 which is land measuring 16 acres or thereabouts. It is the defendant who is the registered owner of the suit property. The plaintiff's case in a nutshell is that he entered into possession of the suit property after purchasing it in the year 1982. The defendant denies this and states that he only sold 5 acres to the plaintiff which was not paid in full. In the course of the trial, the defendant agreed to give 4 acres to the plaintiff. The question for determination is whether the plaintiff is entitled to the balance of the 4 acres.

The plaintiff gave evidence that he has been in exclusive occupation of the whole of the 8 years since 1982. He testified that the land was purchased as shares and he was then entitled to a half share of it. He testified that the purchase price was Kshs. 6, 000/= which he paid in full. However, the agreement that he produced as exhibit No. 1, shows that he was buying 8 acres at the sum of Kshs. 6,800/= per acre, total cost being Kshs. 54,400/=. This of course contradicts his oral evidence that he paid Kshs. 6,000/= for the whole of the 16 acres. The plaintiff of course did not produce any receipt to show that he paid this Kshs. 6,000/=. Neither did he comment on the agreement that shows that he was to purchase the land for Kshs. 54,400/=. It was further his evidence that they went to the Land Control Board and the land was subdivided into two portions of 8 acres. I have looked at Land Board Consent produced as plaintiff's exhibit No. 2. It appears to be a Consent to Transfer issued by the Chepalungu Land Control Board on 21 November 1990 on an application dated 22 October 1990. The transferor is shown to be the defendant and the transferee the plaintiff. However, the land parcel indicated therein is the land parcel Kericho/Kaitet/697. The claim herein relates to the land parcel Kericho/Kaitet/ 443 and not Kericho/Kaitet/697. If the two are related, I have not been given any evidence of the same. This consent is not the same as that which was annexed to the plaintiff's affidavit in reply to the defendant's replying affidavit at the initial stages of the proceedings. In his evidence, the plaintiff never referred to this consent. It must be remembered that there was an order that the hearing be conducted by way of viva voce evidence and not affidavit evidence which means that it is the consent produced as exhibit No. 2 which the plaintiff is relying on and not the consent annexed to his affidavits. Going back to exhibit No. 1 which is the agreement, the same shows that the sale was for Kshs. 54, 400/=. The plaintiff does not purport to have paid this money and has not tendered any proof of payment of it. In fact, his case is that he did not pay this sum for what he paid was Kshs. 6,000/= only into the Kaitit Society for the whole 16 acres.

However, the discrepancies I have noted above are actually not material. The transaction entered into by the plaintiff involved an agreement of sale over agricultural land. It is trite law that in our country, such sales are subject to the consent of the Land Control Board. No consent of the land control board was availed by either plaintiff or defendant and I assume that none was granted. If ever there was any agreement, the same became void after six (6) months. If there was no agreement, it doesn't matter. With regard to computation of time, time started running immediately the Plaintiff took possession. See **Public Trustee V Wanduru (1984) KLR 314.**

What is important in this case is that the plaintiff has stated that he has been in exclusive use of 8 acres of the suit property. This has actually not been seriously denied by the defendant. The defendant only restricted his evidence to demonstrating that the agreement of sale was not followed. But what we have here is not a claim based on the agreement; in other words, the plaintiff is not attempting to enforce the agreement but seeks to have the land by the doctrine of adverse possession. The agreement for sale in my view is only useful to demonstrate the time and the manner in which entry was made.

To succeed in a claim for adverse possession, one needs to demonstrate that he has been in exclusive possession of land for a period of at least 12 years. This possession must be quiet, open and uninterrupted. In our case, there is ample evidence that the plaintiff has been in use and occupation of the 8 acres claimed, exclusively, in excess of 12 years. The 8 acres is clearly defined as there was a survey at some point. It is also fenced. As I stated earlier, the defendant has not called any evidence to demonstrate otherwise.

Considering all the above, I am of the view that the plaintiff has demonstrated that he is entitled to 8 acres of the suit property by way of adverse possession. He is entitled to be registered as proprietor of this portion. I order that this 8 acres be carved out of the suit property by the District Land Registrar and District Land Surveyor and a separate title to it be given to the plaintiff.

For the avoidance of doubt, this award of 8 acres is inclusive of the 4 acres that the defendant granted to him in the consent of 26th September 2002.

The plaintiff will also have the costs of this case.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**In the presence of:**

1. Mr. Joshua Mutai present for Plaintiff.
2. Defendant acting in person present.
3. Mr. Kenei- court assistant.