



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC. NO.200 OF 2014(OS)

JAMES KIMAIYO BUNGEI.....APPLICANT

VERSUS

MARY JERONO MUREI

(Sued as the administrator to the estate of the late KIPTALAM ARAP MUREI.....1ST RESPONDENT

SAMSON KIPKOSGEI MUREI.....2ND RESPONDENT

JUDGMENT

1. The Applicant approached this court by way of Originating Summons dated 12th June, 2014 and amended on 30th June, 2015 seeking the following orders: -

- a. That the Applicant James Kimaiyo Bungei has obtained title by way of adverse possession to land reference **Nandi/Chemase/1233** which was subdivided from land reference **Nandi/Chemase/244** having taken possession thereof and having been in uninterrupted possession of the same since 1968. The land is currently registered in the name of the 1st Respondent by virtue of succession proceedings.
- b. The Applicant James Kimaiyo Bungei has obtained title by way of adverse possession of 1 acre out of land reference Nandi/Chemase/1232 which was subdivided from land reference Nandi/Chemase/244 having taken possession thereof and having been in uninterrupted possession of the same since 1968. The land is currently registered in the name of the 2nd Respondent by virtue of succession proceedings.
- c. The late Kiptalam Arap Murei's and the 1st Respondent's title to land reference Nandi/Chemase/1233 which was carved out of land reference Nandi/Chemase/244 has been extinguished by dint of the Applicant's adverse possession thereof since 1968.
- d. The late Kiptalam Arap Murei's and the 2nd Respondent's title over the portion of land reference Nandi/Chemase/1232 which was carved out of land reference Nandi/ Chemase/244 has been extinguished by operation of the law and the same ought to be transferred to the Applicant.
- e. Consequent upon the foregoing the late Kiptalam Arap Murei's title over land reference number Nandi/Chemase/244 and the 1st Respondent's title to land reference Nandi/Chemase/1233 has been extinguished by operation of law and the same ought to be transferred to the Applicant.
- f. Consequent upon the foregoing, the late Kiptalam Arap Murei's title over land reference number Nandi/Chemase/244 and the 2nd Respondent's title on one acre of land reference number Nandi/ Chemase/1232 has been extinguished by operation of law and the portion of one acre be on which title has been extinguished by operation of law and the portion of one acre be excised and transferred to the Applicant.
- g. A vesting order does accordingly issue vesting land reference Nandi/Chemase/1233 to the Applicant James Kimaiyo Bungei.
- h. A vesting order does accordingly issue vesting a portion of one acre or thereabouts of land reference Nandi/Chemase/1232 to the Applicant.
- i. The 1st Respondent, Mary Jerono Murei, be ordered to transfer to the Applicant, James Kimaiyo Bungei, one acre out of land

reference Nandi/Chemase/1233 and the land registrar Nandi County do issue a title deed to James Kimaiyo Bungei.

j. The 1st and 2nd Respondent Mary Jerono Murei and Samson Kipkosgei Murei be ordered to subdivide and transfer to the Applicant James Kimaiyo Bungei one acre out of land reference Nandi/Chemase/1232 and the Land Registrar Nandi County do issue a title deed to the subdivided one acre portion to James Kimaiyo Bungei.

h. The Respondents do pay the Applicant the costs of the Originating Summons.

2. The claim was supported by an affidavit sworn by the Applicant on 30th October, 2015. Therein, he avers that sometimes in 1950s, he began occupying a portion of land reference Nandi/ Chemase/244 measuring 5 acres which he has been in occupation till present day. He claims that sometimes between 1950 and 2014, the property was registered in the name of the late Kiptalam Arap Murei. He stated that his occupation of this property was open, uninterrupted and adverse to the interests of the late Kiptalam Arap Murei who he claims never exerted his proprietary rights over the suit property.

He stated that the parcel known as Nandi/Chemase/244 had since been subdivided to parcels number 1232 – 1238 pursuant to succession proceedings. He has produced the mutation form in evidence thereof. Consequently, the 2nd Respondent, a son to the late Kiptalam Arap Murei, is the registered owner of Nandi/Chemase/1232, and the 1st Respondent is the registered owner of Nandi/Chemase/1233. He therefore claimed for a portion of land reference Nandi/Chemase/1232 and the whole of Nandi/Chemase/1233.

3. The Respondents have opposed the claim deponing that the Applicant had never been on the suit property, as they are the ones who lived on the suit property. That the Applicant was their neighbor and resides on Nandi/Chemase/245, and his claim is aimed at disinheriting them. They also denied that the Applicant could have lived on the property for over 50 years adding that the land known as Nandi/Chemase/244 did not even exist then. That the suit property, Nandi/Chemase/244 has been subdivided into parcels 1232 to 1238. That the parcels 1232 and 1233 which the Applicant seeks have not been in existence for more than 12 years from the date of their registration for a claim of adverse possession to be legally possible. That the Applicant had filed another suit being *Eldoret Environment and Land Court Case No. 34 of 2014*, wherein he sought for 4 acres.

4. That during the hearing the Applicant testified as PW1 and called Mathew Kipserem Choge and Francis Kirwa Busienei who testified as PW2 and PW3 respectively. That during cross examination, the Applicant testified that he had a house at Chemase Ndurio. That the Applicant confirmed that it is the 1st Respondent who stays on the suit property, and that it was one Rael, who lived on his land. PW2 testified that the Applicant lived on the property Nandi/Chemase/244, which had since been subdivided into parcels 1232 and 1233. That he recently learnt that the Applicant was not living on the suit land. During cross examination PW2 stated that the suit land belonged to Kiprono's mother namely, Rael Chebore. That the said Rael was alive, and was not the wife to the Applicant, and that they did not have children together. He further stated that the land was in the name of the late Kiptalam, and that the Applicant had been tilling the land for over 50 years. He confirmed that 'Talam's sons' lived on the land. PW3 testified that the Applicant lived at Ndurio which is a separate location from Chemase where the suit property was located. He testified that the 1st Respondent stayed on Nandi/Chemase/244 in a house owned by the Applicant. He stated that there was sugarcane in the suit property but did not know to whom it belonged. He also testified that a Kiprono, is a son to the Applicant and Rael Chebore. That the house that belonged to Kiprono is now used by Respondents. On cross-examination, PW3 testified that the Applicant lived in Ndurio which was in a different location and sub-location from the suit property where he had a house. Whereas he claimed that the Applicant had a house at Chemase whose roof was destroyed, he went on to state that there was a man who he identified as Kiprono, who the late Kiptalam had given the house, whose roof was destroyed. He stated that the Applicant had been planting sugarcane on the suit property.

5. The Respondents never testified as they did not turn up for hearing of the matter after several adjournments and hearing dates being in the presence of their legal representatives.

6. The court gave directions on filing and exchanging submissions on the 19th October 2021, but only the learned counsel for the Applicant filed theirs dated the 5th November 2021.

7. The following are the issues for the court's determinations;

a. Whether the Applicant has demonstrated that he had been in adverse, that is notorious and uninterrupted occupation of the suit property for a period of 12 years.

b. Who pays the costs.

8. The court has carefully considered the grounds on the summons, affidavit, oral and documentary evidence tendered by both sides, the learned counsel's submissions and come to the following findings;

a. The doctrine of adverse possession arises from the *section 7 of the Limitation of Actions Act chapter 22 of Laws of Kenya*, which provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

The Court of Appeal in the case of *CHEVRON (K) Ltd v HARRISON CHARO WA SHUTU [2016] eKLR*, pronounced itself on the prerequisites to be proven for a claim of adverse possession to succeed as follows;

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. **Therefore the critical period for the determination whether possession was adverse is 12 years** and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued **his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.** See *Littledale v Liverpool College (1900)1 Ch.19, 21.*” (emphasis added)

b. The possession expected in a claim based on adverse possession has been expressed in the Latin phrase *nec vic, nec clam* and *nec precario*; to mean, without force, without secrecy or without permission. That evidently, the starting point has to be that for the Applicant to succeed, he/she has to be in possession of the suit property. The Applicant herein claims to have been on 5 acres of the property land reference Nandi/Chemase/244 for over 50 years. He produced two witnesses who wrote identical statements that the Applicant lived on the suit property since the 1950s. However, they did not identify the land in their statements. They only stated that the Applicant lived on land next to that of the late Kiptalam Arap Murei, the late spouse of the 1st Respondent and father to the 2nd Respondent, peacefully. The Respondents contends that the Applicant owns the land parcel Nandi/Chemase/245 that neighbours the suit land parcel Nandi/Chemase/244.

c. That it is apparent from the testimonies tendered, and confirmed from the copies of the green cards, that Nandi/Chemase/244 was first registered in the name of Kiptalam Arap Murei on the 20th August, 1968. The land was then transmitted to Mary Jerono Murei on the 1st October, 2013 and on the title closed on the 9th July, 2014 upon the parcel being subdivided into parcels 1232 to 1238. That the Respondents’ assertion that the said subdivision and registration under new titles meant the current titles are incapable of having been acquired through adverse possession, as they have been in existence for less than 12 years, is not supported by the law. The position is as expounded by the Applicant through the superior courts decisions he cited to the effect that time keeps running despite change of title so long as the possession is continuous, uninterrupted and adverse to the title holder’s interests.

d. That by his own admission during cross-examination, the Applicant does not live on the suit property. This was also confirmed by his witnesses, PW2 and PW3, on cross-examination. The veracity of evidence is tested through cross-examination, and the fact that this came out in at that stage, and aligns with the position taken by the Respondents, leads the court to find that the Applicant is not in possession, and probably has never lived on the suit property. The one who probably lived at the place the Applicant claims was one Kiprono and his mother Rael, who are not parties in the proceeding.

e. That in the case of *GABRIEL MBUI V MUKINDIA MARANYA [1993] eKLR*, Kuloba J, while commenting on what amounted to possession stated that;

“Accordingly, possession taken must not be clandestine; it ripens into a prescriptive title only if it is juridical, and must have none of the vicia possessionis such as clam, vi, aut precario (by stealth, violence or supplication). If in its inception it is vitiated by its clandestine, violent or permissive character, it must lose that character and become open, peaceable and as of right, before it can cause time to run (**Chanan Singh, J, in Jandu v Kirpal and another, [1975] E A 225 at p 234**). As one reads the decided cases clear requirements may be culled from the cases. That is to say, adverse possession in order to be put up as a plea on which title to land may be claimed, or as a defence to an ejection suit or suit to recover land from a stranger holding it each of the following requirements must be established on a balance of probability by the person who says that by adverse possession a cause of action has arisen or that a suit against him is barred. The elements to be proved are these:

(1) the intruder resisting suit or claiming right by adverse possession **must make physical entry and be in actual possession or occupancy of the land for the statutory period.** Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant. **Adverse possession rests on de facto use and occupation by an entrant. The rule that his entry must be followed by possession and appropriation to his use** is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable. Possession is a matter of fact, depending on all the particular circumstances of the case, and the type of conduct which indicates possession varies with the type of land. **That there must be actual possession (which requires some sufficient degree of physical occupation for the requisite period) has been well-established in series of cases, of which ATHMAN BWANA and ALIM BWANAHAVE v HAJI ABDULLA IBRAHIM and HUSEIN HAJI ABDULREHMAN, (1948) 15 E A C A 7 (Sir G Graham Paul, C J) at p 9 Ahmed Abdulkarim and another v Member for Lands and mines and another, (1958) E A 436, at p 441 (per Forbes, J A); Salim v Boyd and another (1971) E A 550, at p 552 (Kneller, J (as he then was); Jandu v Kirpal and another, [1975] E A 225 at p 233 (Chanan Singh, J); Gatimu Kinguru v Muya Gathangi [1976] Kenya L R 253, at pp 257, 258 (per Madan, J (as he then was); Ishmael Ithongo v Geoffrey Ithongo Thindiu C A Civ Appeal No 16 of 1981 (per Law, JA); Boniface Oredo v Wabomba Mukile, CA Civ Appeal No 170 of 1989 (per Gicheru JA), and Ernest Wesonga Kweyu v Kweyu Omuto, CA Civ Appeal No 8 of 1990 (per Gicheru, JA), are but a few examples.**” (emphasis added)

I am persuaded to agree with the foregoing reasoning. The Applicant by his admission does not actually and physically occupy the suit property. He admitted on cross-examination that the 1st Respondent lives on the land. His own witnesses confirmed that he never lived on the suit property which is in Chemase, instead stating that he has a house and land at Ndurio, in a different location and sub-location. The witnesses also confirmed that the 2nd Respondent lives on the suit property. That Rael Chebore, mother to the late Kiprono who reportedly occupies a portion of the suit land has not lodged any claim over the property in question and the Applicant’s claim herein is not a representative one by any definition.

f. That though the Respondents did not testify in their defence, the Applicant has failed to prove his case to the standard required of a balance of probabilities as obligated under *section 106 of the Evidence Act chapter 80 of Laws of Kenya*. That as the Respondents had filed their responses to the claim and participated in proceedings, they are entitled to costs under *section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya*.

9. That in view of the foregoing this suit is obviously misconceived as without possession, a claim of adverse possession cannot succeed. That the Applicant's claim against both Respondents, not having been proved, is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 23RD DAY OF FEBRUARY, 2022

S.M.KIBUNJA, J.

ENVIRONMENT & LAND COURT - ELDORET

IN THE VIRTUAL PRESENCE OF;

APPLICANT:

RESPONDENTS: Absent

COUNSEL:

COURT ASSISTANT: ONIALA.

S.M.KIBUNJA, J.

ENVIRONMENT & LAND COURT - ELDORET