



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 134 OF 2016**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**IN THE MATTER OF L.R NO MOIBEN/KIMNAI/387 FOR ORDERS THAT THE APPLICANT HAS ACQUIRED TITLE/ OWNERSHIP UNDER THE LIMITATION OF ACTIONS ACT IN RESPECT OF THAT PARCEL OF LAND KNOWN AS MOIBEN/KIMNAI/387**

HELENA SOTI CHERUIYOT.....1<sup>ST</sup> APPLICANT

DICKSON CHERUIYOT.....2<sup>ND</sup> APPLICANT

SAMUEL KIPKOECH.....3<sup>RD</sup> APPLICANT

ABRAHAM KOSGEL.....4<sup>TH</sup> APPLICANT

**VERSUS**

CHARLES YATOR CHEBOI.....1<sup>ST</sup> RESPONDENT

LAND REGISTRAR (ELGEYO MARAKWET COUNTY)....2<sup>ND</sup>RESPONDENT

**JUDGMENT**

1. The Applicants approached this court by way of originating summons dated 25<sup>th</sup> May, 2016 wherein they applied for orders that:

a. *“The Applicants have obtained title over that parcel of land No. Moiben/Kimnai/387 by way of adverse possession for having actually, openly, notoriously, exclusively and peacefully occupied the said parcel of land for a period exceeding 12 years (1970).*

b. *Consequently upon the foregoing, the applicants be registered as the sole, absolute and indefeasible proprietors of the aforesaid parcel of land No. Moiben/Kimnai/387 and declare the title held by Charles Yator Cheboi, the 2<sup>nd</sup> (sic) Respondent and his predecessor extinguished by virtue of adverse possession.*

c. *The 2<sup>nd</sup> Respondent to cancel/nullify the title deed issued on 8<sup>th</sup> March 2016 in favor of the 1<sup>st</sup> Respondent as the applicants have adversely, actually, openly, notoriously, exclusively and peacefully occupied the suit land hence the register should be amended to enter the name of the 1<sup>st</sup> Applicant, Helena Soti Cheruiyot as the proprietor of the said land parcel No. Moiben/Kimnai/387 in lieu of the 1<sup>st</sup> Respondent’s name.*

d. *The 1<sup>st</sup> and 2<sup>nd</sup> Respondents do pay costs of this suit.”*

2. The application is based on the seven (7) grounds on the face of the summons, among them that the Applicants had been in open, exclusive, peaceful and uninterrupted possession of land parcel No. Moiben/Kimnai/387, the suit property, since 1970; that Chemtei Masirget, the original owner of the suit land, passed away later in 1977; that they had acquired title over the suit land upon twelve (12) lapsing from 1970 by virtue of being in adverse possession; that the 1<sup>st</sup> Respondent has been registered as proprietor of the suit land, and title issued to him by the 2<sup>nd</sup> Respondent, oblivious of the fact that his title had been extinguished and acquired by the Applicants by operation of the law. The application is supported by an affidavit sworn by the Helena Soti Cheruiyot, the 1<sup>st</sup> Applicant, on the 25<sup>th</sup> May 2016, in which she among others stated that the late Chemtei Marsiget adopted Antony Cheruiyot, then aged two (2) years, upon the death of his mother; that in 1976, she met and got married to the said Anthony Cheruiyot, and settled on the suit land that was given to them by the owner, Chemtei Masirget, who later passed on in 1977; that she has lived peacefully on the suit land with her late husband, and her children till today; that the Chemetei Masirget family meeting of 2012 resolved that the Applicants were the *bona fide* owners of the suit property; that on

or about the 8<sup>th</sup> March 2016, the Applicants were shocked to learn that the 1<sup>st</sup> Respondent, who has no relationship with the late Chemitei Marsiget, had obtained registration and title to the suit land in collusion with the 2<sup>nd</sup> Respondent; that they had by then obtained ownership of the suit land through adverse possession and have no other land to live on; that the prayers sought should be granted.

3. The Applicants' claim is opposed by Charles Yator Cheboi, the 1<sup>st</sup> Respondent, through his replying affidavit sworn on the 3<sup>rd</sup> June 2016 in which he among others stated he was the registered proprietor of the suit property having bought the same, obtained a transfer and registration to his name, and has been in occupation since then; that he is the complainant in a criminal case at Iten Law Courts, against Kiprof Cheruiyot, who had destroyed his barbed wire and fence that is pending since April 2016; that the Applicants have been in Matira, Koibatek location, Kapsowar in Marakwet, and Kipsoen in Keiyo District where Antony Cheruiyot, the 1<sup>st</sup> Applicant's husband was buried; that the Applicants have land at Kipsoen, Keiyo district; that he has cows, sheep, semi-permanent house and workers on the suit property.

4. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants testified as PW1 and PW2, and called Benjamin Cheboi and John Cheboi who testified as PW3 and PW4 respectively. PW1 to PW4 adopted the contents of their respective statements as their evidence in chief. The Applicants also produced some photographs to demonstrate that they were in occupation of the suit property, and a copy of the green card, plus certificate of official search of the land in dispute. The green card issued on the 27<sup>th</sup> October 2014, shows that the suit property, comprising 6.0 hectares, was registered in the name of Chemitei Marsiget on 27<sup>th</sup> March 1974, and that the title deed issued on the 3<sup>rd</sup> September, 2007. It further shows that on 14<sup>th</sup> April, 2010 a restriction was registered on the property, with the explanation being that the property was before the Land Disputes Tribunal at Kapsowar. This restriction was removed on the 27<sup>th</sup> February 2014 pursuant to a court order of 23<sup>rd</sup> April, 2013 in *Judicial Review No.16 of 2012*. The certificate of official search dated the 4<sup>th</sup> May, 2016 shows that the 1<sup>st</sup> Respondent was registered as proprietor of the suit property on the 8<sup>th</sup> March, 2016, and the title deed was issued on the same date.

5. The 1<sup>st</sup> Respondent testified as DW1 and called as witnesses, Thomas Kimitei and Chepkaitany Laduka, who testified as DW2 and DW3, respectively. They adopted the contents of their respective statements as their evidence in chief. DW1 produced a copy of the title deed to the suit property and copies of four (4) sale agreements dated 11<sup>th</sup> September, 2003, 3<sup>rd</sup> January, 2011, 17<sup>th</sup> March, 2012 and 10<sup>th</sup> February, 2013 under which he purchased the suit land. The agreement dated 11<sup>th</sup> September 2003 was between Thomas Kimitei and Joseph K. Mitei as vendors and the 1<sup>st</sup> Respondent as purchaser of two (2) acres of land at Kshs. 76,000. That the court notes that the parcel reference is not indicated on this agreement. The sale agreement of 3<sup>rd</sup> January, 2011 was between Thomas Kiprof, John Kipkemei and Joseph Kipruto Mitei as vendors, and the 1<sup>st</sup> Respondent as purchaser of five (5) acres of land parcel KIMUNAI/MOIBEN PLOT NO. 387, measuring 16 acres, for Kshs. 500,000. The sale agreement dated the 17<sup>th</sup> March 2012 is between Joseph Kipruto Mitei as the vendor, and 1<sup>st</sup> Respondent as purchaser over four (4) acres of MOIBEN/KIMNAI/387 at Kshs. 520,000. The last agreement dated the 10<sup>th</sup> February, 2013 is between Thomas Kiprof Kimitei and Joseph Kipruto Mitei as vendors, and the 1<sup>st</sup> Respondent as the purchaser over four (4) acres of MOIBEN/KIMNAI/387 for Kshs. 1,000,000. Which showed he was the registered proprietor of the suit property over an area of 6.0 hectares.

6. That after close of the parties' cases, the learned counsel for the 1<sup>st</sup> Respondent and Applicants filed their submissions dated the 25<sup>th</sup> November, 2021 and 6<sup>th</sup> November, 2021 respectively.

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

- a. **Whether the Applicants are in possession of the suit land, and if so, from when.**
- b. **Whether the Applicants possession of the suit land is adverse to the title of the registered proprietor, and if so, from when.**
- c. **Whether the Applicants are entitled to any of the prayers sought.**
- d. **Who pays the costs of this suit.**

8. The court has carefully considered the parties' pleadings, evidence tendered by PW1 to PW4, DW1 to DW3, submissions by the learned counsel, the superior courts decisions cited, and come to the following determinations:

a. That from the pleadings and evidence tendered, the court finds there are certain facts that have been agreed upon. These facts include the fact that during his childhood, Anthony Cheruiyot, late husband and Applicants, lived with the late Chemitei Marsiget on the suit land; that the 1<sup>st</sup> Applicant married the late Anthony on the suit land, and the late Chemitei left the land for them; that the late Anthony would facilitate the demarcation of the suit property, and its registration in the name of the late Chemitei on the 27<sup>th</sup> March, 1974; that the late Anthony would stay on the suit property for at least 20 years until his death in 1995; that the 1<sup>st</sup> Applicant continued living on the suit property, and has never been evicted or any case filed against her over the suit property until the instant suit, and that the 1<sup>st</sup> and the 3<sup>rd</sup> Applicants are still on the said land.

b. That the question of whether one can claim title by way of adverse possession requires three fundamental requirements: that the possession has been notorious, without permission and uninterrupted for a period of more than 12 years. In the Court of Appeal decision in the case of *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another [2015] eKLR* which the 1<sup>st</sup> Respondent cited, the court set out what amounts to adverse possession as follows;

*“From all these provisions, what amounts to adverse possession? First, the parcel of land be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner....”*

That in this instant case, the court has the task of assessing whether these pre-requisites have been sufficiently demonstrated by the Applicants through the facts and evidence presented in this suit. That further, adverse possession is a limitation of civil action, meaning where the conditions creating such adverse possession exist, then whoever has the right to claim title to the suit property, so adversely occupied gets, precluded from ever raising a claim to the property. It is for this reason that the court in **Benjamin Kamau Murma & others vs Gladys Njeri, C.A 213 of 1996** which is cited in **Ruth Wangari Kanyagia vs Josephine Muhtoni Kinyanjui [2017] eKLR**, a decision that was cited by the Applicants, stated that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

Therefore, adverse possession begins once the possessing party’s presence on the property in question, is against the interests of whoever has title or a right to claim title of the property. With this in mind, then it is important to determine when time in favour of the Applicants herein started running, so as to consider whether there exists a limitation against any action being raised to challenge their ownership by adverse possession.

c. The 1<sup>st</sup> Applicant urges the court to calculate the time she claims they have been in adverse possession from 1976, when she married the late Anthony Cheruiyot, who was already on the suit property. This date is proximate to the date given by the DW2, a witness of the 1<sup>st</sup> Respondent and first born son to the late Chemitei Masirget, who put the date the 1<sup>st</sup> Applicant started living on the suit land to be in the late 1970’s. DW3, who represented the late Anthony at his marriage to the 1<sup>st</sup> Applicant, put the year of marriage as 1975. Therefore, 1976 is an acceptable year from the testimony raised in support of the cases of the adverse parties, the Applicants.

d. That the issue to be determined is when the 1<sup>st</sup> Applicant’s presence on the suit property became adverse to the interest of the registered proprietor or the person entitled to be registered as such. It is uncontested that initially, the late Anthony lived on the suit property on invitation of the late Chemitei Marsiget, and therefore the presence of the 1<sup>st</sup> Applicant during the lifetime of the late Chemitei Marsiget was by extension with his permission. The Applicants have claimed that Chemitei Marsiget would pass on in the year 1977. No alternative year has been provided by the 1<sup>st</sup> Respondent or his two witnesses. That as there is no challenge on the year of death of the late Chemitei Masirget, the court will therefore take it to have been in the year 1977.

e. That when the late Chemitei Masirget, the registered proprietor of the suit property passed on in 1977, the property in the suit parcel of land formed part of his estate, which his family were entitled to own through succession proceedings. Put differently, when the Late Chemitei passed on, only his successors in title had a right to claim property forming part of his estate, and actually had the right to do so under the *Law of Succession Act chapter 160 of Laws of Kenya*. Equally, when the Late Chemitei passed on, the permission to use the property that had been granted to the Anthony, and which was the shield under which the 1<sup>st</sup> Applicant was present on the suit property terminated or lapsed. The late Chemitei’s rights in the property ceased with his death, and his family gained full rights to own and deal with the properties subject to succession proceedings in accordance with the law.

f. The next question to answer is whether the family members of the late Chemitei, including DW2, who were entitled to the suit property after his death, extended any permission or license to the Applicants’ occupation of the said land. The answer is in the negative. It is important to note that permission in this case would denote first, the late Chemitei’s family asserting their right, then allowing the Applicant to enjoy it. That DW2, who happens to be the first born to the late Chemitei, and who testified on behalf of the family, confirmed that the late Anthony had exclusive occupation of the suit property for at least twenty (20) years by the time he died in 1995. That considering that the late Chemitei had passed on in 1977, and with his death the possession of the suit land by the late Anthony and his family became adverse to the title of the registered owner, then by the time he died in 1995, he and his family had been in non-permissive, and therefore adverse occupation of the suit property for a uninterrupted period of at least eighteen (18) years. That it follows that the title of the late Chemitei over the suit land, had become extinguished at the expiry of twelve (12) years in 1990 following his death in 1977. That DW2 testified that the only time permission to occupy the suit land was ever first sought was in 1995, after the death of the late Antony Cheruiyot, by the 1<sup>st</sup> Applicant. That though that claim was not confirmed by the 1<sup>st</sup> Applicant, it only shows that by the time the family of the late Chemitei purported to grant permission to occupy the suit property, the 1<sup>st</sup> Applicant and her family had been in adverse occupation of the suit property for over 18 years, which is a period over and above that set by the *Limitation of Actions Act chapter 22 of Laws of Kenya*, for her to have obtained ownership of the suit land by operations of the law. The position would have been different had the family of the late Chemitei asserted their right over the suit property at least by 1989, and thereafter either permitted the continued occupation of the 1<sup>st</sup> Applicant or moved to evict her.

g. That from the evidence tendered, the court finds that no attempts were ever made to evict the 1<sup>st</sup> Applicant from the suit property. This much is admitted to by the 1<sup>st</sup> Respondent and his witness, DW2, both in cross and re-examination. Therefore, this non-permissive use of the suit property was allowed to continue till 1995. That upon the death of the late Antony in 1995, DW2 claimed to have allowed the 1<sup>st</sup> Applicant to continue occupying the suit land for one year upon her request. It was indeed the evidence of DW1 that the 1<sup>st</sup> Applicant never vacated from the land after the year permission lapsed and nobody, including the 1<sup>st</sup> Respondent who allegedly started buying the suit land in 2003, and became registered as proprietor in 2016, had taken any legal steps to evict her from the land to date. Taking it that the year the 1<sup>st</sup> Applicant occupied the suit land with permission from 1995 came to an end in 1996, then from that date to the time she filed the suit in 2016, another period of about twenty (20) years, that she had possessed the land without permission had lapsed. That even if the title of the late Chemitei had not been extinguished during the first non-permissive occupation from 1977 to 1995 when the late Antony was alive, then it became extinguished upon the lapse of twelve (12) years after 1996, which was about 2008.

h. That before the Applicants filed this suit asserting their claim over the suit land, the parties herein, including DW2, son to the late Chemitei have confirmed that there was no other suit filed over the said land, and parties herein. The previous suits and disputes

mentioned by the 1<sup>st</sup> Respondent and his witness, DW2, were agreed to have related to another parcel of land described as number 318. That in view of the findings above, the 1<sup>st</sup> Respondent's assertion that adverse possession should be determined from the day he acquired title in 2016 is flawed logic, and not supported by the applicable law. The period for calculating adverse possession started running from the date notorious and non-permissive use of the suit property commenced. The permission contemplated here is obviously that of the person who at that moment in time of that notorious occupation of the suit property, was or would be entitled to evict the person in occupation. That in this case, that was the family of the late Chemitei, including DW2, who were entitled to apply and obtain a confirmed grant over the deceased's estate, after his death in 1977, and evicted the late Anthony Cheruiyot and or his family, including the Applicants, from the suit property. They did not do so.

i. The upshot of the foregoing is that the family of the late Chemitei never exercised their rights over the suit property after the death of their patriarch in 1977. When the year 1989 turned, thirteen (13) years had lapsed and they were forever barred from claiming any legal interest over the suit land by section 7 of the Limitation of Actions Act, as the title of the registered proprietor had been extinguished. This section 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.”***

In this case the late Chemitei's family right of action to recover their late father's land accrued in 1977. That more than twelve (12) years had lapsed by the time they purported to permit the 1<sup>st</sup> Applicant to live on the property for a year in 1995, and by that time they had no right over the suit property, in exercise of which they could give her that permission to possess it.

j. That likewise, the family of the late Chemitei had no right to sell the suit property to the 1<sup>st</sup> Respondent, or any other person after 1989 in view of the provision of section 17 of the Limitation of Actions Act that provides that:

***“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”***

That as the family of the late Chemitei, including DW2 and the other two brothers, who were vendors under the four sale agreements produced by DW1 as exhibits, had no title to the suit property after 1989, then they could not sell the land or parts thereof as they pretended to do under the four agreements of 2003, 2011, 2012 and 2013 and or pass good title over the said land to the 1<sup>st</sup> Respondent in 2016. That accordingly, the 1<sup>st</sup> Respondent's registration with the title to the suit land in 2016, when ownership of the said land had already passed to the 1<sup>st</sup> Applicant's family by operations of the law after 1989, means he was registered and holds the title in trust for the 1<sup>st</sup> Applicant.

k. That under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, the cost should follow the events. That though the Applicants are successful in their claim, and considering how the 1<sup>st</sup> Respondent came to be involved with the suit land, the court finds this an appropriate case where each party should bear their own case,

9. Based on the foregoing, this court finds that the Applicants have successfully proved their claim of adverse possession over the suit property against the 1<sup>st</sup> Respondent. The court enters judgement for the Applicants and against the 1<sup>st</sup> Respondent in the following terms;

a. That the Applicants have been in adverse possession of the land parcel Moiben/Kimnai/387, the suit property, for over twelve (12) years from 1977, when the then registered proprietor, Chemitei Masirget, died.

b. That the title of the late Chemitei Masirget to the suit property became extinguished by operations of the law on or about 1989, and the family of the Applicants assumed legal ownership by adverse possession.

c. That the registration of Charles Yator Cheboi, 1<sup>st</sup> Respondent, by Land Registrar, Elgeyo Marakwet, the 2<sup>nd</sup> Respondent, as proprietor of the suit land on the 8th March 2016, and the issuance of title to him on the same date, did not confer upon him good title, and the title he holds is therefore in trust for the Applicants.

d. That Land Registrar, Elgeyo Marakwet, the 2<sup>nd</sup> Respondent, is hereby directed to rectify the register of the suit property by cancelling/revoking the registration of Charles Yator Cheboi, 1<sup>st</sup> Respondent, as proprietor of the said land under entry No. 6, and recall the title issued to him under entry No. 7, both of 8<sup>th</sup> March 2016, and register the land parcel MOIBEN/KIMNAI/387 with Helena Soti Cheruiyot, 1<sup>st</sup> Applicant, as proprietor and trustee for her children with the late Antony Cheruiyot, including Dickson Cheruiyot, Samuel Kipkoech and Abraham Kosgei, the 2<sup>nd</sup> to 4<sup>th</sup> Applicants herein.

e. Each party to bear their own costs.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 9TH DAY OF MARCH, 2022**

**S.M.KIBUNJA,J.**

**ELC ELDORET.**

IN THE VIRTUAL PRESENCE OF;

APPLICANTS: .....Absent.....

RESPONDENTS: ..Absent.....

COUNSEL: ...Mr. Omboto for the Plaintiffs/Applicants and Mr. Cheptarus for the 1<sup>st</sup> Defendant/Respondent.....

COURT ASSISTANT: ONIALA

**S.M.KIBUNJA,J.**

**ELC ELDORET**