



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 113 OF 2011

JOSEPH KIPROTICH YEGON.....PLAINTIFF

VERSUS

TABARNO CHEPKIYENG.....DEFENDANT

RULING

Joseph Kiprotich Yegon filed an Originating Summons dated 9/5/2011 which was amended on 15/6/2011. By the Originating Summons, the applicant seeks to be declared as the legal owner of 2 acres occupied by him for the last 36 years out of **LR. No. Lembus/Poror/9** together with all developments thereon. He also seeks both a temporary and permanent injunction to issue against the defendant/respondent, Tabarno Chepkियeng, to restrain her from interfering with the applicant's quiet occupation of the said land pending the hearing of the Originating Summons and plaint. He also filed the Chamber Summons dated 31/5/2011 seeking to restrain the respondent from interfering or evicting the plaintiff from the 2 acres of land until the Originating Summons is heard and determined.

The application is supported by the affidavit of the applicant dated 31/5/2011 in which he depones that he has been in uninterrupted occupation of the suit land since 1973; That the defendant became registered owner in 2000 having inherited the land from her late husband and that by the time the husband died, the applicant was already in occupation. He exhibited photographs (JKY II) to demonstrate that he has built houses on the said plot and planted many trees. He contends that the respondent has invited the District Surveyor and Land Registrar to subdivide the portion and evict him and that if that were to happen, he would suffer irreparably.

In opposing the application, Eric Chepkियeng, filed two affidavits dated 7/6/2011 and another filed on 27/6/2011 having been given Power of Attorney by the defendant/respondent who is his mother. He deponed that this application is an abuse of the court process because similar orders were sought on 29/4/2010 but the application was dismissed and that the applicant has been to the court over the same issue in Land Dispute Case No. 27/08, and CA 112/08 and that the grounds now raised should have been raised earlier in the earlier dispute; That the allegation that he has been in uninterrupted occupation of the suit land since 1973 is not true because there was a dispute before the District Commissioner Baringo, Appeal No. 240/1973 and a ruling dated 29/2/1980 (EC4) was rendered. The respondent is also of the view that the applicant has not challenged the decision of the Land Disputes Tribunal No.27/08 and CA 112/08.

In the further affidavit, the applicant denies having been party to any previous proceedings; that CA 112/08 is in respect of a boundary dispute between his late father Kimulwet Arap Kipyegon and Kapror Chepkियeng, the father of the respondent, Erick. The applicant denies being party to the proceedings there before.

The applicant was represented by Kimatta Advocate but the respondent appeared in person.

Having considered all the affidavits filed herein, the exhibits and submissions by the parties, it is apparent that there has been a long standing dispute between the family of the applicant and that of the respondent. Before the applicant and respondent came into the picture, their fathers had been drawn in a land dispute in the 1970s. The father of the applicant was Kimulwet Kipyegon, while the father of the respondent was Kapror Chepkiyeng. The respondent exhibited a ruling of the District Commissioner Baringo, Mr. Waiganjo dated 28/2/1980. It was an appeal case No. 240/1973 **Kapror Chepkiyeng (the appellant) V. Kimulwet Arap Kipyegon (the respondent)**. The District Commissioner found that the appellant had been allocated 28 acres of land while the respondent had 20 acres but the Demarcation Officer had later altered the boundary and given the respondent more land from that of the appellant. The District Commissioner ruled that the boundaries revert back to where they had been before the interference so that the appellant would get back his two acres. In that case the respondent's father won the appeal and got back his land to what it had been, 28 acres.

The matter was not put to rest. Thereafter, a dispute was preferred before the Land Disputes Tribunal, Koibateck in respect of Plots 9 and 4 which belonged to the respondent's father, Kapror Chepkiyeng and Kimulwet Kipyegon, respectively, Kapror Chepkiyeng (Plot 9) and Kimulwet Kipyegon (Plot 4). A fresh survey was done and Plot No. 9 was found to be 28 acres (11.20 Ha) while Plot 4 was found to be 24 acres (9.60 Ha). That decision was made on 20/1/1997. There was an appeal against the decision of the Land Disputes Tribunal and on 17/6/2008, the **Land Disputes Appeals Committee No. 26/2001, Erick Chepkiyeng V. Joseph Kipyegon**, again found in favour of the respondent who was never representing Tabarno chepkiyeng's family while Joseph Kipyegon, represented the family of Kimulwet Arap Kipyegon. It is the above decision which was adopted by the Chief Magistrate's Court LC No. 27/08, **Kiprop Chepkiyeng V. Joseph Kipyegon**. The applicant's attempt to have that decision stayed in CA 112/08, **Joseph Kipyegon V. Erick Chepkiyeng** was dismissed by J. Mugo. There has been a long standing dispute over 2 acres (in Plot 9) allegedly transferred to the applicant's father by demarcators and it was ordered returned to the respondent's family by the ruling of 28/2/1980. The letters annexed to the respondent's further affidavit (C2) dated 21/6/1993 addressed to the applicant's father, clearly shows that the applicant's father was warned against constructing houses on the disputed property. They must be the houses in the photographs exhibited by the applicant. There is also the letter dated 28/8/1990 written by the Chief of the area indicating that either of the parties have been interfering with the boundary set which has brought confusion as to where the boundary is.

After considering all the documents on record, it is this court's view that the applicant is guilty of material non-disclosure. He never disclosed the long history of disputes that have existed over the said piece of land between their parents and now taken over by the sons. The applicant is also not candid. In his affidavit in support of the application, he deponed that he occupied the land in 1973. In the further affidavit, he deponed that he occupied the land since 1970. In an application for adverse possession the date on which possession took place is very material.

The applicant then deponed that he has not been party to any proceedings between his father and the respondent's father. However, the documents exhibited by the respondent tell the contrary. In the proceedings before the Land Disputes Tribunal, Koibateck (EC5), the applicant was involved, he was the respondent in the appeal before the Appeals Committee No. 26/01, he is the one who filed CA 112/08 and all communications from the disputes were addressed to him. The applicant seeks an order of injunction which is an equitable remedy. He has not come to court with clean hands. He who comes to equity must come with clean hands. At this stage the court finds that the applicant has not demonstrated that he has a prima facie case with a probability of success or that the balance of convenience tilts in his favour.

For the above reasons, I decline to grant the prayer of injunction sought in the Chamber Summons dated 31/5/2011 and it is hereby dismissed. Costs to the respondent.

DATED and DELIVERED this 18th day of November, 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

Mr. Mukira holding brief Mr. Kimitta for the plaintiff.

The defendant in person.

Kennedy – Court Clerk.