



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Civil Case 218 of 2000

KANDA KIMAMET PLAINTIFF

VERSUS

CHEPKIYENG KIMAMET (KIMAMET) CHEBOBEI DEFENDANT

JUDGEMENT

This is an Amended Originating Summons dated 3rd November, 2000 under the Provisions of Order 36 Rules, 3D, 7 and 8 of the Civil Procedure Rules. It seeks the following main order:-

(a) There be an order that the Plaintiff be registered as the proprietor of the registered land Title number Moiben/Kimnai/45 approximate area 9.0 hectares in place of the Defendant who is registered as the proprietor of such piece of land.

In his affidavit sworn on 7th September, 2000, he states inter alia that:-

- he has been in possession of the suit land for over 26 years from 27th March, 1974 and before then to date.
- The Defendant has since 27th March, 1974 and even before been at Kipsaiya Location and has never been on the suit land since then to date.
- He made developments including fencing on the suit land and has been in possession and using the same since 1968.
- The suit land borders L. R. No. Moiben/Kimnai/41 which is the Plaintiff's property.
- That the Defendant fraudulently, unlawfully and secretly reduced L.R. No. Moiben/Kimnai/41 by about 6½ acres and registered as part of the suit land without the Plaintiff's knowledge.
- In March, 2000 the Defendant, Surveyors and other strangers went onto the land without prior notice and between March to July, 2000 put fencing poles/posts along a boundary which never existed on the suit land since 1968.
- If allowed he would be deprived of his 6½ acres of maize crop and land.

The suit was opposed by the Defendant who stated that:-

- The land has been in his use since 1974 and never allowed the Plaintiff to enter the same.

- That the title deed was issued to him in 1999.
- That it is true he lives in Kipsaiya Location but it is not reason for anybody to make on his land.

In his testimony during the trial, the Plaintiff stated that the Defendant was his brother who lives in Kipsaiya. He said that during the registration of his land Moiben/Kimani/41 and that of his brother, Moiben/Kimnai/45, he was away. He said that his brother registered the land and took part of his land measuring 6½ acres. He said that his brother never lived on his but Plot 45 and therefore also the 6½ acres.

He testified that he fenced his land and cultivated upon it. He said that all he wanted was his 6½ acres to be removed from his brother's land. He said that the Defendant only came to the land in 2000 to carry out a survey and fence the land. He said his original land was thirty (30) acres but now seven (7) acres had been hived off into his brother's land.

The Defendant in his testimony denied the Plaintiff's allegations. He said that he allowed another person, Arap Moek to cultivate on the land. He said that he did not encroach on his brother's land. He says that a Musa Francis and Arap Moek have cultivated the land for the six (6) years before the trial.

The Defendant called his son as a witness. He testified that he is the one who lives on the suit property. He said that he was born on the land. That the Defendant does not live or cultivate the land. He added that Arap Moek is also on the said land. He said that his father lived on another piece of land in Kipsaiya. He said that each of the parties was given his land during demarcation and adjudication.

He said he was born in 1972 and has ever since lived on the land. He said that Francis Musa was his brother in law.

I have considered the testimonies of the Plaintiff and the Defendant's witnesses (DW 2 and DW 3).

I do hereby find as a matter of fact that the Plaintiff and Defendant are brothers and that each of them got his land from their family. It was ancestral land.

Each of the parties got his piece of land after demarcation and land adjudication. The suit property was registered in the name of the Defendant on 27th March, 1999 though the title deed was issued on 6th August, 1999.

I do find that though the Defendant is the registered owner, the Plaintiff has been in occupation and had possession of about 6.5 acres of the Defendant land from 1968. He was in occupation and had the use of the land even before registration of the land in the name of the Defendant. After registration he remained on the said portion without any interruption or interference until March, 2000 when the Defendant went to survey the land and erected a fence boundary.

The Plaintiff admitted in his testimony that he lives in Kipsaiya and not the suit land. He was still at Kipsaiya even during the trial.

I find that DW 2 the Defendant's son did not tell the truth when he claimed that he was born on the suit property and that he has a house on the land where he lives. If he did then it was after the commencement of this suit and on the other portion of the suit land. The suit land Plot 45 is 9 hectares (which is 22.23 acres). The Plaintiff's claim as far as adverse possession is concerned is 6.5 acres.

I find that neither the Defendant, his son, Arap Moek nor Francis Musa ever occupied, used, cultivated or had possession of the 6½ acres which the Plaintiff claims he has had exclusive and uninterrupted possession of. He has reasonably identified the portion he occupied. He says that he had fenced the said portion.

In Volume 24 of Halsbury's Laws of England 3rd Edition at P. 252 it is stated that:-

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by a person entitled for the purpose for which he had a right to use it Fencing off is best evidence of possession of surface land but cultivation of the surface without fencing off has been held sufficient to prove of possessions.”

I find that at the time that the Plaintiff filed this suit he had maize crops on the land. The Defendant for the first time since being registered as proprietor in 1974 purported to enter the said portion and fence off the same. Before that he did nothing to assert his right to the said portion which had been in possession of the respondent until these proceedings were commenced.

I find that the Plaintiff was in occupation and possession of the land for a period of about thirty two (32) years from 1968. With registration of the said portion as part of the Defendant’s land, the Plaintiff continued to have use and occupation of the said portion with the knowledge of the Defendant. He continued being on the land without consent of or licence of the Defendant and he did this openly and defiantly. Yet the Plaintiff took no action.

It is over twelve (12) years from 1968 and also from 1974. I hold that the Plaintiff has established title to the 6.5 acres of the suit property namely Moiben/Kimnai/45 and which he occupies.

For the said reasons I hereby enter judgment for the Plaintiff and order:-

1. That the suit land Parcel No. Moiben/Kimnai/45 be sub-divided so as to vest in the parties as follows:-
 - (a) Kanda Kimamet – 6.5 acres
 - (b) Chepkinyeng Kimamet Chebobei – the remainder
2. The defendant shall pay the costs of the suit to the Plaintiff.

DATED AND DELIVERED AT ELDORET ON THIS 27TH DAY OF JANUARY, 2009.

M. K. IBRAHIM

JUDGE

In the presence of:-

Mr. Rotich holding brief for Mr. Kitur for the Defendant

No appearance