



Soi & another (Suing as the Personal Representatives of the Late Linah Chelangat Kirui) v Keriri & another (Environmental and Land Originating Summons 124 of 2020) [2024] KEELC 6613 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 124 OF 2020
EK WABWOTO, J
OCTOBER 11, 2024**

BETWEEN

**ERIC KIPROTICH SOI 1ST APPLICANT
OSCAR KIBET SOI 2ND APPLICANT
SUING AS THE PERSONAL REPRESENTATIVES OF THE LATE LINAH
CHELANGAT KIRUI**

AND

**JOHN MATERE KERIRI 1ST RESPONDENT
MARGARET WAMBUI LINDIJER 2ND RESPONDENT**

JUDGMENT

1. The Applicant moved this Court vide an originating summons application dated 8th April 2020 and consequently amended on 24th November 2021, seeking injunctive orders and costs against the Respondents.
2. The said application was premised on the following grounds:
 - i. That the Applicant has for over twelve years been in continuous uninterrupted possession of the said parcel known as LR No. 2327/28/1, Original No. 2327/28/2, which he has used as a garden and later guard house and access road into the premises.
 - ii. That the Applicant has all along enjoyed quiet possession of the said parcel known as LR No, 2327/28/1, Original No. 2327/28/2 with the knowledge of the 1st and 2nd Respondents.
 - iii. That the Applicant has since by way of adverse possession acquired good title of the said parcel known as LR No, 2327/28/1, Original No. 2327/28/2



- iv. That following the acquisition of good title by the Applicant, she has since carried out improvements on the said parcel by construction of a 120 meter paved road, gate and guard house and access control security system to the tune of Twelve Million Kenya Shillings (Ksh 12,000,000)
 - v. That the Respondents have interfered with the Applicant's quiet possession by trespassing thereupon and
 - vi. That unless this Honorable Court intervenes and grants the orders sought herein, the Applicant will be dispossessed and stands to suffer irreparably.
3. The same was also supported vide affidavits sworn by Eric Kiprotich Soi on 8th April 2020 and 24th November 2021. The Applicant also filed a further affidavit sworn on 28th May 2021. It was averred that the deceased herein Linah Chelangat Kirui is the actual and ostensible proprietor of parcel of land known as LR No. 2327/28/1 by way of adverse possession having been in quiet possession for our twelve years. It was contended that LR No 23237/28/1, Original No 2327/28/2 has been used as a bush garden, later as a guard house and subsequently thereafter as an access road into their premises.
 4. It was the Applicant's case that they have enjoyed quiet possession of the property since 1990 and have by way of adverse possession acquired good title of the said parcel. It was also averred that in 2014, a 120 meter paved road, gate and guard house and access control security system to the tune of Kshs 12,000,000 was developed on the parcel.
 5. It was also the Applicant's case that on or about March 2020, the Respondents while seeking to undertake their own development on LR No 23237/151, LR 2327/152 and LR 2327/153 sought to forcefully and without any legal authority to trespass on the Applicant's parcel LR No 23237/28/1, Original No 2327/28/2 and thereby interfering with the Applicant's parcel.
 6. It was contended by the Applicant that the Respondents have alternative access to their premises LR No 2327/151, LR No 2327/152 and LR No 2327/153 via Koitobos road and are only seeking to trespass on the Applicant's property to illegally and unlawfully benefit from the improvement made thereon by the Applicant and cause damage to the said property.
 7. The suit was contested by the Respondents who filed grounds of opposition dated 27th October 2020 and a Replying Affidavit sworn by Margaret Wambui Lindijer, the 2nd Respondent sworn on 27th October 2020.
 8. The Respondents contended that the suit is predicated upon public land as provided for under Article 62 of *the Constitution* by virtue of the fact that the said land is an access road meant to serve LR No 2327/151 and LR 2327/152. It was also contended that the road in question does not fall under the category of private land as provided for under Article 64 of *the Constitution* of Kenya hence a claim for adverse possession can't stand. The road in question was a result of conversion of private land to public land by way of surrender hence the said land is a public access road. It was further contended that the land in question being public land falls under the exclusive management and administration of the National Land Commission pursuant to Article 67 of *the Constitution*.
 9. It was averred that LR No 2327/155 is actually the access road meant to serve LR No 2327/151 and LR 2327/152 and it has been demarcated as LR No. 2327/28/1, which road the Respondent has been using for over 15 years. It was also averred that the Respondents have been using the access road peacefully until the Applicant put up the guard house and the gate only 2 years ago as at the time of instituting the suit.



10. It was contended that the right to utilize the said access road was as at the time of subdivision of the property the said portion having been designated as the road. The copy of the deed plan annexed as “EKS2’ was relied upon in support.
11. During the hearing of the suit, Erick Kiprotich Soi testified as PW1. He relied on his witness statement and affidavits filed in support of the Originating Summons. It was his testimony that he has been in the property since 1990 and that the disputed parcel was hived off from the property and further the subject property is not public land. No application was ever made to make it public land. He also added that the Applicant has adverse possession over the said property.
12. When cross-examined, he stated that he had filed the suit as a representative of Linah Chelagat Kirui who passed away on 24th February 2016. He also stated that the deceased lived on LR No 2327/28/1 and she was the registered owner of the said land. He also confirmed having a title to the said parcel which was registered in the name of the deceased. She also stated that the deceased acquired the property in 1990s as it belonged to the 1st Respondent. He stated that he would like to be granted access and rights to 2327/28/1 since the same is an access road.
13. When re-examined, he stated that the deceased started residing in the property from 1990 until at the time of her death. She also stated that no application has been made by the Respondents to make it a public road.
14. The 2nd Respondent. Margaret Wambui Lindijer testified as DW1. She relied on her affidavit sworn on 27th October 2020 as her evidence in chief. She added that the road is on LR No. 2327/28/1 and urged the Court to dismiss the suit.
15. On cross-examination, she stated that she had used the road for 15 years and that the Applicant has done development to the access road without her knowledge. She also stated that she did not put any injunction to the development because the land was public land and she did not have to make any application. The property was designated as public land when it was sub-divided. She also stated that she could not access the property through Koitobos Road.
16. When re-examined she stated that she had been using the road on Lamwia road to access the property.
17. Upon the close of the parties’ cases, the parties filed written submissions in support of their respective cases. The Applicant filed written submissions dated 6th September 2023 and 28th September 2023 while the Respondent filed written submissions dated 20th September 2023.
18. Counsel for the Applicant submitted on the following issues:
 - i. Whether the suit property is a public road or a road of access?
 - ii. Whether the Respondents are trespassers on the suit property and;
 - iii. Whether the orders sought by the Applicant are merited?
19. It was submitted that the suit property is a road of access and that the Respondents are not entitled to use the disputed land which was hived off from the Applicant’s suit property. The Applicant reiterated that the intention was to create access to their property in the event that they would want to sub divide the property further.
20. It was further submitted that for a public property to be classified as a public road for use by the public, an application ought to be made to the relevant authorities pursuant to Section 8 and 9 of the *Public Roads and Roads of Access Act* Cap 399 for consideration or creation of a public road and further Section 13 of the Act provides that save for the purposes of Section 9 of the Act, the said road of access



shall not be deemed to be a public road. It was further submitted that no such application was made under Section 8 and 9 of the Act and as such the disputed land cannot be deemed to be a public road in terms of Section 13 of the Act. Reliance was placed on the cases of Dellian Langata Limited vs Symen Thuo Muhia & 4 Others, Nairobi CA No 144 of 2014 (2018) eKLR and KipKirui Arap Koskei vs Philomen Kipsigei Targus & Another (2015) eKLR.

21. On whether the Respondents are trespassers to the suit property, it was submitted that the Respondents have not denied that they have been attempting to use the disputed strip of land to access their property and that indeed the Applicant has developed the suit property for their own use. The Court was urged to grant the prayers sought.
22. The Respondents in their submissions dated 20th September 2023, argued that the originating summons lacks merit and ought to be dismissed since the Applicant has no locus standi to institute the suit, the Applicant has not met the criteria set down by the law for granting of an injunction, neither have they established a prima facie case to warrant issuance of the other prayers sought.
23. It was submitted that the Applicant has no locus standi to move this Court regarding the suit property being LR No 2327/28/1. The Applicant had not annexed any title documents showing that he is the owner of the suit property which would entitle him to claim any rights over the property to the exclusion of the Respondents.
24. It was further submitted that even if the Court was to assume that the Applicant has title to the suit property, that property is an access road meant to serve LR No 2327/151 and LR No 2327/152. The property was surrendered at the time of sub division for use as an access road to serve LR No 2327/151 and LR No 2327/152 and upon surrender the proprietor ceased to have any proprietary rights herein. The case of Mary Njeru Gatuha & 3 Others vs George Muniu Mungai & 5 others (2017) eKLR was cited in support.
25. It was also submitted that the Applicant having quantified the value of their alleged investment on the suit land to the tune of Ksh 12,000,000 their loss cannot be deemed as irreparable.
26. In respect to the balance of convenience, it was argued that the Applicant is not the registered owner of the property he seeks to assert his right and there is no basis upon which the Court can grant the orders sought. The Court was urged to dismiss the originating summons with costs.
27. The Court has considered the amended originating summons dated 24th November 2021 and the evidence tendered together with the written submissions filed by the parties and is of the view that the following issues arise for the determination:
 - i. Whether the Applicant has proved his case to the required standard.
 - ii. Whether the reliefs sought are for granting.
28. The court shall proceed to determine the said issues simultaneously. It was the Applicant's case that he has for 12 years been in continuous uninterrupted possession of the parcel known as LR No. 2327/28/1 which he has used as a garden and later guard house and access road into the premises. He has enjoyed quite possession of the said parcel with the knowledge of 1st and 2nd Respondents and has acquired good title of the same by way of adverse possession. It was also his case that he has since carried out improvements on the said parcel by construction of a 120 meter paved road, gate and guard house and access security system to the tune of Kshs 12,000,000 and the Respondents have interfered with his quite possession by trespassing there upon.



29. On the other hand, the Respondents case was that the suit property was actually on access road meant to serve LR No 2327/151 and LR No 2327/152 and it had been surrendered as such during the subdivision hence it was public land. It was also the Respondents case that they had been in continuous and uninterrupted use of the said access road for over 15 years until the applicant blocked It by building a gate and guard house. It was also the Respondents' case that the Applicant is not the actual and ostensible owner of L.R 2327/28/1 and neither do they have adverse possession over the suit land. It was also submitted that there was no declaration that the Applicant had acquired the property by way of adverse possession.
30. From the evidence that was tendered during trial, the Applicant in cross –examination stated that his case was on adverse possession and that the deceased, Linah Chelangat Kirui owned LR No 2327/28/1 upon which he would like to be granted access and rights of the same. He also stated that before the deceased owned the property, the same belonged to the 1st Respondent. The evidence tendered herein clearly confirmed that LR 2327/28/1 was being used as an access road by the Respondents until the Applicant blocked it by constructing a gate.
31. It was also evident during trial that the Applicant was also seeking a declaration of adverse possession against 2327/28/1 having been possession for over 12years since 1990. The said suit is adjacent to LR No 2627/150 which is registered under the name of the deceased Linah Chelangat Kirui
32. From the analysis of the evidence adduced herein, the said access road on suit LR No 2327/28/1 was not a public access road as was averred by the Respondents. There was no evidence adduced before this Court that indeed the same had been compulsorily acquired and or surrendered to be used as a public access road. In view of the foregoing, this Court respectfully disagrees with the Respondents contention that the access road was indeed a public access road. There was also no evidence adduced that the road was ever classified as public road pursuant to Section 8 and 9 of the [Public Roads and Roads of Access Act](#) for consideration of creation of a public road.
33. The foregoing notwithstanding, the Applicant's case was fronted as a claim based on adverse possession, however, he sought for orders of a permanent injunction against the Respondents. The Applicant did not expressly seek any declaration on adverse possession despite the fact that his claim lies on adverse possession in seeking for the orders sought in the Originating Summons.
34. The ingredients of Adverse possession have been set out by the court of Appeal in the case of *Mtana Lewa –v- Kahindi Ngala Mwangandi* (2005) eKLR where it was held that:
- “ Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”
35. The same is replicated in the case of *Jandu –v- Kirplal & Another* (1975) EA 225, where it was held:
- “to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”
36. Equally in the case of *Mbira –v- Gachuhi* (2002) IEALR 137, the court held as follows;
- “a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open,



notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

37. It is trite law that any persons seeking to acquire any interest on the land by way of adverse possession must furnish the court with a title deed extract. In the instant case, the Applicant did not attach a copy of a title deed extract as required by law neither was this court furnished with the same during trial.
38. It is trite law that parties are bound by their pleadings. This ensures that in the course of trial, opposing parties are clear as to the disputed issues which they need the court or the tribunal to address. Indeed, courts and tribunals are bound by the parties’ pleadings. See the cases of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others [2014] eKLR, Ann Wairimu Wanjohi vs James Wambiru Mukabi [2021] eKLR and Daniel Otieno Migore versus South Nyanza Sugar Co. Ltd [2018] eKLR.
39. In respect to the main relief of a permanent injunction sought by the Applicant, it is worth nothing that A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected see the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR.
40. In the instance case, upon considering the totally and weight of the evidence tendered herein and as pronounced earlier in this judgment it is the finding of this court that the Applicant has not proved his case to the required standard as per the satisfaction of this court and as such the prayers sought are not for granting.
41. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that the Court file was among those that were misplaced during the Court’s transfer to a different station which involved movement of so many files within quite a short time.
42. In conclusion, this Court finds the Applicant’s reliefs sought as untenable and not for granting. Consequently, the Application fails and the same is dismissed in its entirety with an order that each party do bear own costs of the suit.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT VOI THIS 11TH DAY OF OCTOBER 2024.

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Nduati h/b for Mingo for the Applicant.

Ms. Mwadumbo for the Respondents.

Court Assistant; Judith.

