



**Kipyasang v Chepkonga & 2 others (Environment & Land Case
273 of 2017) [2023] KEELC 16258 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16258 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 273 OF 2017**

EO OBAGA, J

MARCH 9, 2023

BETWEEN

KITE ARAP KIPYESANG PLAINTIFF

AND

REHEMA JEMAIYO CHEPKONGA 1ST DEFENDANT

WILLIAM KITE 2ND DEFENDANT

**RICHARD KIPROTICH KIBET (FOR AND ON BEHALF OF THE ESTATE OF
JOHN KIBET KIPYASANG) 3RD DEFENDANT**

JUDGMENT

1. By an amended plaint dated October 16, 2018, the Plaintiff sought the following reliefs from the Defendants.
 - a) A permanent order of injunction restraining the Defendant, his servants, workmen and agents, from entering, trespassing on, wasting, constructing on, cultivating, remaining on, alienating or otherwise interfering or dealing with the Plaintiff's property being Irong/Iten/3625.
 - b) Costs of this suit.
 - bb) A declaration that the Plaintiff is the legal owner of land known as Irong/Iten/3625.
 - cc) An order of eviction of the Defendants from parcel of land known as Irong/Iten/3625.
 - dd) General damages.
 - ee) Any other relief that this honourable court may deem fit and just.
2. By an amended counter-claim dated November 19, 2018, the Defendants claimed the following reliefs against the Plaintiffs: -



- a) The Plaintiff's suit be dismissed with costs.
And that judgement be entered in their favour as against the Plaintiff for:-
- b) And order of a declaration that the plaintiff holds land title no Irong/Iten/3625 on trust for the estate of John Kibet Kpyasang and on trust for the 1st, 2nd and 3rd Defendants and that the said trust be brought to an end.
- c) That the Land Registrar Elgeyo Marakwet County do rectify the register for the land parcel no Irong/Iten/3625 by cancelling the registration in the name of Kite Arap Kiplagat and registering the said title in the name of John Kibet Kipyasang, William Kiplagat Kite and Richard Kiprotich Kibet and Rehema Jemaiyo Chepkonga.
- d) In the alternative, for:-
- i. A declaration that 2nd and 3rd Defendants are the owners of Title No Irong/Iten/3625 through adverse possession of the same and the name of the Plaintiff be cancelled from the register.
 - ii. That the Deputy Registrar of this Honourable Court to execute all the necessary forms and/or vesting order in respect of the said Title No Irong/Iten/3625 in favour of John Kibet Kipyasang, William Kiplagat Kite and Richard Kiprotich Kibet and Rehema Jemaiyo Chepkonga.
- e. Costs.

Summary of evidence;

3. The 1st Defendant alleges to have purchased 1/8 each from the 2nd and 3rd Defendants out of Irong/Iten/3625 (Suit property). The Plaintiff is father to the 2nd Defendant and uncle to the 3rd Defendant.
4. The Plaintiff is the registered owner of the suit property. The origin of the suit property can be traced from Irong/Iten/401 which underwent a number of subdivisions.
5. The Plaintiff allocated the 2nd Defendant a portion on Irong/Iten/400. This property was later subdivided into LR No Irong/Iten/1999 to 2005. The 2nd Defendant sold the allocated portion and moved to the suit property where he has constructed temporary rental houses. The 2nd Defendant together with the 3rd Defendant each sold an 1/8 to the 1st Defendant at Kshs 700,000/= each.
6. The 3rd Defendant who is entitled to a portion which was meant for his late father had put up temporary structures which went beyond his boundary on to the suit property. The boundary dispute was taken before the local village elders, the Chief and upto the Assistant County Commissioner to no avail. It is on the basis of this that the Plaintiff has sued the Defendants for trespass.
7. The 2nd and 3rd Defendants on their part contend that the suit property was ancestral land which was subdivided from Irong/Iten/401. It resulted in Irong/Iten/1855 and 1856. Irong/Iten/1855 was further subdivided into Irong/Iten/2472 and 2473. Irong/Iten/2473 was subdivided and it resulted into Irong/Iten/3625 (suit property) and Irong/Iten/3626.
8. The 2nd Defendant claims that the Plaintiff separated with his mother and went to live at Kessup "B" with his second wife. He stated that he stays with his mother on the suit property. The rental houses are the source of income for him and his mother. He stated that he sold an 1/8 out of the suit property to the 1st Defendant.



9. The 3rd Defendant states that he is entitled to his father's share and that he has already sold 1/8 to the 1st Defendant out of the suit property. The 2nd and 3rd Defendants state that as they have constructed on the suit property, the title should be transferred to them. The 2nd and 3rd Defendants state that they put up their rental houses with the permission of the Plaintiff.
10. On her part, the 1st Defendant states that she is an innocent purchaser for value without notice. The three Defendant state that the Court should declare that the Plaintiff is holding the suit property in trust for them and that the trust should be terminated and title registered in their names and that in the alternative, the court should order that they have acquired the suit property by way of adverse possession.

Analysis and determination;

11. I have carefully gone through the evidence adduced by the Plaintiff and that of the Defendants. I have also gone through the submissions filed by the parties. This is a matter which should have been sorted out through mediation. The parties were given opportunity to settle out the matter through mediation but they failed to do so. The court has now to decide the matter based on evidence.
12. The issues which emerge for determination are firstly whether the suit property is ancestral land or whether it was purchased by the Plaintiff jointly with his late brother John Kibet Kipyasang. Secondly, whether the 2nd and 3rd Defendants had authority to sell the suit property to the 1st Defendant. Thirdly are the Defendants trespassers on the suit property. Fourthly, is the Plaintiff holding the suit property in trust for the Defendants. Fifthly, have the Defendants acquired the suit property through adverse possession. Lastly is the Plaintiff and or the Defendants entitled to the reliefs in their respective claims.
Whether the suit property is ancestral land or whether it was purchased by the Plaintiff jointly with his late brother John Kibet Kipyasang;
13. The 2nd Defendant was born in 1972 whereas the 3rd Defendant was born in 1974. According to the extract of the register, Irong/Iten/401 the register for this property was opened on 13th September, 1962. The 2nd Defendant testified that this property was registered in the name of Chepkonga Kitur because their grandfather had passed on and his father the Plaintiff herein was staying with his aunt at Cherangani. The title was later transferred to Tapsimei Kiplagat Lekegen. The said Chepkonga was a neighbour who held land in trust for the siblings of their grandfather.
14. The evidence of the 2nd Defendant as to how Chepkonga Kitur came to be registered as owner of Irong/Iten/401 was all hearsay. He did not say who gave him this story. He also did not bring any witness to corroborate his story of the registration. He was born ten years after registration had taken place. There is no credible evidence that the suit property which had its origin on Irong/Iten/401 was ancestral land.
15. The Plaintiff testified that he purchased the suit property jointly with his late brother John Kibet Kipyasang from Chepkonga Kitur. He testified that he contributed six cows and his brother contributed one cow. The sharing of Irong/Iten/401 was to be in accordance with the contribution made. As at the time of purchase, there was no requirement that an agreement for sale had to be in writing. I therefore find that the property which gave rise to the suit property was jointly purchased by the Plaintiff and his late brother John Kibet Kipyasang.
Whether the 2nd and 3rd Defendants had authority to sell portions of the suit property to the 1st Defendant;



16. The suit property was registered in the name of the Plaintiff on June 21, 2016. Section 24 of the [Land Registration Act](#) provides as follows:-
1. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 2. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
17. Section 25(1) of the [Land Registration Act](#) provides as follows:-
1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
18. Section 26 of the [Land Registration Act](#) provides as follows:-
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
19. The Plaintiff testified that he had a boundary dispute with the 3rd Defendant. The land for the later brother of the Plaintiff who is father to 3rd Defendant had been clearly marked on the ground. The Plaintiff engaged elders, the chiefs and Assistant County Commissioner to resolve the dispute. The resolution by the elders and chiefs and the assistant County Commissioner is what led to subdivision of Irong/Iten/2473 which resulted in Irong/Iten/3625 and Irong/Iten/3626. The 3rd Defendant's portion was Irong/Iten/3626 and the Plaintiff's was Irong/Iten/3625 (Suit property).
20. The problem which arose is that the 3rd Defendant had built some temporary structures which fell on the suit property. The 2nd Defendant had also built some temporary structures on the suit property. Both the 2nd and 3rd Defendants had no authority to construct on the suit property. They went ahead to sell to the 1st Defendant portions of the suit property without his consent.



21. The 1st Defendant did not produce any sale agreement between her and the 2nd Defendant or the 3rd Defendant. The 1st Defendant merely claimed that the agreement was with the surveyor. Though she claimed that she had carried out a search on the suit property, she did not produce the same. The Plaintiff testified that he had given the 2nd Defendant his portion on Irong/Iten/400 which he sold. The 3rd Defendant had been given his portion in Irong/Iten/3626. The two therefore had no authority to sell part of the suit property to the 1st Defendant.

Whether the Defendants are trespassers on the suit property;

22. The 1st Defendant moved to the suit property in 2017 upon purchasing portions thereof from the 2nd and 3rd Defendants. It is the money given by the 1st Defendant that they used to put up temporary rooms for letting out. The 2nd Defendant testified that upon subdivision, the houses which the 3rd Defendant's father built fell on the suit property and that that is where the 3rd Defendant ought to remain. From the 2nd Defendant's evidence, he constructed his houses in 2016/2017. The suit property belongs to the Plaintiff. The 2nd Defendant having sold a portion he was given on Irong/Iten/400, he has no business laying claim to the suit property. The 3rd Defendant has his own portion in Irong/Iten/3626. He should also not lay claim over the suit property. The 1st Defendant did not give any evidence of purchase of the ¼ acre which she claims. There was no documentary evidence of the purchase. The three Defendant are therefore trespassers on the suit property.

Whether the Plaintiff is holding the suit property in trust for the Defendants;

23. While dealing with three issues above, I found that the suit property was not ancestral land. The property which resulted in the suit property was purchased jointly by the Plaintiff and his late brother John Kibet Kipyasang. The Defendants had no authority to sell it to the 1st Defendant. The 3rd Defendant has his own portion which is a share which was due to his late father. The plaintiff is therefore not holding the title in trust for the Defendants.

Whether the Defendants have acquired the suit property through adverse possession;

24. The Plaintiff obtained title to the disputed portion on June 21, 2016. The 1st Defendant alleges that she purchased ¼ an acre from the 2nd and 3rd Defendants in 2017. The 2nd Defendant in his own evidence claimed that he is on the suit property with permission from the Plaintiff. The 3rd Defendant has his own portion of land. If he was to claim any portion thereof by way of adverse possession, time for purposes of limitation would start running from 21st June, 2016 when the Plaintiff obtained title. This suit which seeks to evict the Defendants was filed on July 25, 2017. There is therefore no way any of the three Defendants can claim the land by adverse possession. A son cannot claim land from his father based on adverse possession as the son is on the land with permission of the father.

Disposition;

25. From the above analysis, it is clear that none of the reliefs in the counter-claim can be granted. The counter-claim is dismissed with costs. On the other hand, I find that the Plaintiff has proved his case on a balance of probabilities. He has proved that the Defendants have constructed temporary structures on his land. This in itself is trespass. There is proof of damages and wastage to the suit property. The Plaintiff is therefore entitled to general damages for trespass. The measure of damages for trespass is the difference in value of the Plaintiff's property immediately before and immediately after the trespass or the cost of restoration whichever is less. See *Hostler v Greenpark Development Company* 986 SW 2 d 500 (No Ct Appl 1999). The houses on the suit property are temporary houses. It will not cost



much to restore the site to its original state. I will therefore allow general damages of Kshs 150,000/= for trespass. I therefore allow the Plaintiff's claim in the following terms:-

1. A permanent injunction restraining the Defendants, their servants, workmen and or agents from entering, trespassing on, wasting, constructing on, cultivating, remaining on, alienating or otherwise interfering or dealing with the Plaintiff's property known as Irong/Iten/3625.
2. A declaration that the Plaintiff is the legal owner of property known as Irong/Iten/3625.
3. An order that the Defendants do remove their structures from Irong/Iten/3625 within 90 days failing which eviction to issue without any further recourse to court.
4. General damages of Kshs 150,000/= for trespass.
5. Costs of the suit and counter-claim.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 9TH DAY OF MARCH, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Rop for Mr. Wafula for Defendants.

Ms. Lagat for Plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

9th MARCH, 2023

