



REPUBLIC OF KENYA



KENYA LAW
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**Langat v Langat & 2 others (Environment & Land Case 9 of 2019)
[2023] KEELC 16099 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16099 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 9 OF 2019**

**MC OUNDO, J
MARCH 2, 2023**

BETWEEN

CHESILIM LANGAT PLAINTIFF

AND

FRANCIS K LANGAT 1ST DEFENDANT

JOSEPH K LANGAT 2ND DEFENDANT

PHILIP K LANGAT 3RD DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of Originating Summons dated 13th February 2019 and filed on the 15th February 2019 pursuant to the provisions of Order XXXVI Rule 3 and 3D of the Civil Procedure Rules and Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya claiming to be entitled to 0.28 hectares comprised in L.R No. Kericho/Kipsitet/216 and for the determination of the following questions;
 - i. Whether the Plaintiff is entitled to 0.28 hectares of land comprised in the land parcel L.R No. Kericho/Kipsitet/216 formerly owned by the late Agui Arap Chumo (deceased) by virtue of the Plaintiffs adverse possession of the said parcel in open, quiet and peaceful occupation for a period of over 40 years .
 - ii. Whether the title in respect of L.R No. Kericho/Kipsitet/216 should be cancelled in order to pave way for excision and transfer of the 0.28 hectares (nought decimal two eight) currently occupied by the Defendants.
 - iii. Whether the Plaintiff herein should be registered as proprietor of the said 0.28 hectares (nought decimal two eight) in place of the Defendants who are at present the registered owners/ proprietors of the said parcel of land.



- iv. That the cost of this suit be provided for.
2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting Affidavit of Chesilim Langat sworn on 14th February 2019.
3. The Defendant's Replying Affidavit sworn on the 20th June 2019 on behalf of his co-Defendants was to the effect that the whole suit was misconceived, frivolous, incompetent, vexatious and otherwise a gross abuse of the Court process and should be dismissed with Costs to the Defendants herein.
4. That the Defendants were among the heirs of the late Agui Arap Chumo who until his demise was the registered owner of parcel of land known as Kericho/Kipsitet/216 wherein they were all registered as joint owners of the land.
5. That the Plaintiff, who was their neighbor was a trespasser with whom they had had a long standing boundary dispute which was finally resolved sometime in December 2018 by a surveyor who had clearly demarcated the boundary and thereafter, the Defendants had fenced off the land in accordance to the surveyor's finding.
6. That the allegation or claim by the Plaintiff that he had bought the land from their late father was not true but was a gimmick to grab their land because if at all the allegations were true than he would not be laying claim to two different portions of land different from the one they possessed.
7. That the Plaintiff's parcels of land were Kericho/Kipsitet/218, 219 and 220 which shared a common boundary with their parcel No. Kericho/Kipsitet/216 by which the Plaintiff had been moving boundaries from all sides. That at the time, they could not resolve the issue since they had not taken out Letters of Administration.
8. It was their defence that the Plaintiff had approached the court with unclean hands so as to use the due process of the law to sanctify his encroachment. That there was no sale agreement produced by the Plaintiff and the faded copy of an application for consent to the land control board filed by the Plaintiff was a fraudulent attempt to justify his narrative as their late father used to thumb print because he was not literate. That the Plaintiff had not been in quiet and continuous occupation of the two portions he has trespassed upon as they had had a longstanding dispute involving elders and even the police. That the Plaintiff was a trespasser and should be treated as such and be evicted forthwith from the suit land. The Defendants sought that in the interest of justice and fairness, that the said Originating Summons be dismissed with cost to them.
9. Directions on how to proceed with the Originating Summons was taken on the 4th July 2019 and parties directed to comply with pre-trial directions.
10. The matter then proceeded for hearing on the 3rd November 2021 when the Plaintiff, Chesilim Langat testified as PW1 to the effect that he lived in Kipsitet within Kericho County and was a farmer. That he had filed suit against the Defendants who were representatives to the estate of Agui Arap Chumo because they had wanted to take back the land their father had sold to him.
11. He tendered in evidence a copy of the Certificate of Confirmation of Grant dated 10th October 2018 issued in Kericho High Court in Succession Cause No. 288/2004 as Pf Exh 1 and proceeded to testify that the said Agui Arap Chumo had sold to him a piece of land measuring 7 points of an acre in 1977, which land had been excised from parcel of land No. 216 Kipsitet registered to Agui Arap Chumo. That they had gone to the lands board in Sosit and further that he had conducted a search which had confirmed that the land belonged to Agui Arap Chumo. He produced a certified copy of register in



- respect to Kericho/Kipsitet/216 produced as Pf Exh.2. That the total sum of the land had been Kshs. 19,000/= wherein he had paid Ks. 12,000/= in cash and also given four goats in 1977.
12. That after he had bought the land, he took possession of the same. He also confirmed having gone to Sosit lands Board in 1977 wherein there was consent and he had been given some documents which were later stolen by the Defendants who wanted to sell the land.
 13. The Plaintiff marked the application for consent dated 22nd December 1977 from the Land Control Board as Pf MFI 3 and proceeded to testify that he had never had any dispute over the land until when the Defendants had wanted to sell the land, a process which they had begun in 2002.
 14. That after they had appeared at the Land Control Board, no other steps had been taken to transfer the land to him although the vendor had accepted to transfer the land to him were it not for the certificate that was stolen, which certificate he had been given by Chumo to take to the Land Registrar. He clarified that the certificate had been stolen when his house had been broken into a long ago-he could not remember the date.
 15. That after he had taken possession of the property, he had planted sugar cane which was still on the ground. That he had used tires to place along the fence and the land was separated with terraces and had been demarcated immediately he had purchased it. That the Defendants had leased their portion of land.
 16. That he could not remember the year in which Arap Chumo died but that he had lived on the land for almost 20 years before the death of arap Chumo. That in the year 2002 was when he had learned of the Defendants' intention to sell the land, they had sold their portion at that time. That at the time, they had told him that they would include him in the succession proceedings and when he came to learn that they had not included him but were trying to visit the Land Control Board, he had gone to stop them.
 17. That in April 2020 when he was involved in an accident, and after he had filed suit in court and had obtained interim orders, the Defendants proceeded to fence of the piece of land and divided it into two portions. He confirmed that nobody lived on the land wherein he had only planted sugar cane.
 18. That all he sought from the court was his seven points which had been sold to him by the old man and which land had been recently surveyed when the Defendants went to fence it off.
 19. In cross examination, the Plaintiff responded that he did not remember when Agui Arap Chumo died, but that he had sold him land which he had lived on 20 years before his death. He confirmed that the representatives of Chumo were Francis, Joseph and Josea, who were all included in the document. That Philip the 3rd Defendant, was also one of the beneficiaries.
 20. He reiterated that he had bought the land in 1977, which date was indicated in the consent. That the witnesses to the sale of the land, Arap Soi and Kiberege were all dead. That at the time of the agreement the deceased's sons were not present since it was not possible to have them present because the old man was selling the land, but their mother was present. He confirmed to having bought 0.7 acres
 21. When referred to the surveyor's report dated 6th June 2019 herein marked as Df MFI, the witness had responded that he was occupying the area marked (a) and (b) in which he had planted sugar cane.
 22. That he had not been informed about the Succession Cause No. 288/2004 and that he did not complain because he was in occupation of his own land. That he had only been informed that his name would be included in the Succession Cause. That he was not aware of the Chief's letter that had listed the beneficiaries of the estate and neither was he aware that his name had not been included.



23. That in 1977, the cost of one goat had been about Ksh. 300/-and that he had paid all the money including the goats otherwise the old man would not have allowed him to occupy the land. He also confirmed that they had visited the Land Control Board in 1977 and that the certificate he was talking about was the original copy of the application and the title deed to parcel number 216. That his title had not been executed and that he had wanted the land board to give him title.
24. That he was the owner of Kericho/Kipsitet/218, 219, and 220 and that No. 218 shared a boundary with No. 216. He was referred to Kipsitet sheet No..... showing the 4 parcels of land where he responded that he could see his parcels of land which shared a boundary with 216 and that he was not encroaching. That the case concerned parcel No. 216, the other portions having been sold to him by the deceased's brothers.
25. He confirmed that whereas he was in one portion, the Defendants had fenced the land and divided it into two and that the dispute had been going on since 2002. That he had been in occupation of the land and the Defendants have never sued him because they knew that he had bought the land. That he was also not aware that the Defendants had reported the matter to the police. That although he owned a tractor, he had not encroached on the Defendants' land. He confirmed that he supplied the sugar cane to Muhoroni Sugar factory.
26. That although he had receipt to show that he supplied sugar cane, the same did not concern this case. He also confirmed that he was aware that the land was still registered to the Defendants and that he had evidence that they had been selling their land which evidence he did not bring to court because it didn't concern this particular land.
27. He confirmed that the land had been surveyed locally at home in 1977 and sought that he be given his 7 points out of the suit land and the rest of the land could be taken by its owners.
28. In re-examination, the Plaintiff reiterated that the 7 points had now been subdivided into two portions according to the map that he had been shown, but that he was still in possession of both portions of land which were separated by a barbed wired fence which had been put up by the Defendants. That the dispute in 2002 was before the Chief and had been called for because the Defendants had wanted to encroach on his land after having sold their portion.
29. That there had been an advocate who had wanted to sell the cows of the "old man" wherein he (Plaintiff) had paid the money amounting to Ksh. 7,000/= owed to the Advocate whereby the old man's animals had been returned, that thereafter they had bargained for the purchase of land wherein initially he had purchased ½ acre but after bargaining they had talked about the goats that he wanted to give out as dowry and that had been how they had come up with the 7 points.
30. The next witness Samwel Kipkurui Marisin, testified as PW2 to the effect that he too lived in Kipsitet within Kericho County and that he was a farmer. That Chesilim Langat the Plaintiff was his neighbor. That he also knew Francis, Joseph and Philip Langat who were also his neighbors. That he understood the dispute between the two parties which was over a parcel of land No. Kericho/Kipsitet/216 which land was registered in the name of the father to Francis Langat who was called Agui Chumo and who was now deceased.
31. It was his evidence that the Plaintiff had purchased 7 points of the land which is 0.7 of an acre, in 1977 from Agui Chumo. That he was present when the transaction had taken place. That Mr. Chumo's cattle were to be auctioned wherein he had asked him to purchase the land but since he was unable, he had taken the Plaintiff to Arap Chumo wherein he had purchased the land.



32. He testified that although he had been present when they were transacting on the purchase of the land, yet his name was not included in the list of witnesses save for some 3 old men. That Arap Chumo had been given Ksh. 7,000/= by Chesilim Langat to rescue the cattle. After a short while, he had paid another sum of money which all totaled to Ksh19,000/= That he had also given Arap Chumo 4 goats. Thereafter, the Plaintiff took possession of the land in 1977, where he proceeded to fence and plant sugar cane. That he fenced land using tires and was still in possession of the land.
33. He testified that now there are posts erected on the land, wherein one side had barbed wire while the other side didn't have. That prior to the filing of this case, there had been a boundary dispute but it had been solved around 15 or 5 years ago. That the boundary had remained where it was as the village elders and the Chief had solved the boundary dispute. That after the boundary dispute, about 2-3 years ago, the likes of Mr. Langat the Defendants herein tried to remove the Plaintiff from the suit land claiming that the land belonged to them and had never been sold to the Plaintiff.
34. In cross examination, the witness confirmed his name but stated that he had not carried his identity card although he was born in 1961. That he was present in 1977 when the transaction of the purchase of land was going on. That the three old men present were Kiberenge Arap Kilel, Arap Soi and Kipnyobili Arap Rop a brother to Agui Chumo and that the recording was done at home on a letter which he did not have a copy. That he had nothing to show on the transaction of land on that day. He also confirmed that he was the Plaintiff's neighbor and that his land parcel was number 106 land which he bought in 1979 although he had no title to it.
35. He also confirmed that he had been the one who was supposed to have purchase the suit land and that the first installment paid by the Plaintiff had been Ksh. 7,000/= and later an additional Kshs. 12,000/= was paid totaling to 19,000/= plus four goats and that he did not get to know the cost of each goat. That in 1977, it depended on how parties agreed on the sale of a goat and he knew that the Plaintiff was given the land which he used to till.
36. He also confirmed that he knew Agui Arap Chumo but he could not remember the year he died. That for the 13 years the Plaintiff lived on the land, he had not been aware of any case filed against Arap Chumo by the Plaintiff seeking title. That the Plaintiff and Defendants had been living cordially.
37. That the dispute before the Chief had been in regard to the lost documents, which dispute had been resolved by the elders. He had no information that the Defendants were taken to the police and neither was he aware that the Plaintiff went back to the land because of the intervention of the court but he was aware of was that the Plaintiff came to court because of interference by the Defendants.
38. That he did not know whether the Plaintiff's stay on the land was quiet or not but after the passing away of Agui Chumo, the Plaintiff had continued staying on the land to date because he had been permitted by Agui to stay on the land. That he was neither aware of the Succession Cause of the late Agui, nor that the land was registered to the estate of the late Agui being his children or that there was no claim by the Plaintiff on the estate of the deceased as a purchaser.
39. In re- examination he reiterated that prior to purchasing parcel No. 106, he used to live at his home which was not far from the suit land although it was in same village as where the parties lived, in a place known as Chepterwo village which neighbored Kipsitet.
The Plaintiff thus closed its case.
40. The defence case was opened through he evidence of DW1 Kibet Isaac the Surveyor Kericho County, who testified that he prepared a report dated the 6th June 2019 pursuant to the orders of the court of 9th May 2019 which had directed him to visit the parcel of land No. Kericho/Kipsitet/216 to ascertain



the acreage in contention. That they had visited the site on the 4th June 2019 in the presence of the Defendants, the Plaintiff and a security team from Kipsitet Police Station, as well as the neighbors.

41. That on the ground, the findings were as follows;
 - i. The total area was 0.49 acres which was a combination of two sections.
 - ii. One was portion A and the other was portion B.
 - iii. These sections were pointed out by the Defendant and Plaintiff.
 - iv. The two parcels of land were not joined.
 - v. There was no defined road touching on parcel B or C as per the figure 1 in their report.
42. That Phillip Talam was a surveyor in their office who went to the land on his instructions and he had therefore signed the report. He stated that point A and B was the land that was occupied by the Plaintiff, although it was not joined and the total acreage was 0.49 acres (both parcels combined). He produced the report as Df exh 1
43. In cross examination, he responded that the Plaintiff was in occupation of two portions of land in parcel of land known as Kericho/Kipsitet/216. That he did not know how long the Plaintiff had been in occupation of the two portions of land, but his conclusion was based on what he had found on 4th June 2019.
44. He confirmed that the order from the court was to visit the parcel to ascertain the acreage in contention. That the boundaries were shown to them by the two parties. That they were not able to pick any marks for example a fence demarcating the two portions. That as per the report, he could not tell whether there was any sugar cane crop on the disputed land.
45. When he was referred to Df Exhibit 1, he testified that there was parcel No. 'C' which was part of No. 216 but he could not tell its owner. That parcel No. A was still compromised in parcel No.216. That according to their map, parcel 'B' was on the lower end of No. 216 which bordered 218 and 219. That they did not establish the boundaries between 216 & 218 as that was not part of the order.
46. In re-examination, he confirmed that 0.28 hectares translated into 0.69 acres equivalent to 0.7 acres. That parcel No.216 was boarded by 220, 219 and 218. That on the upper side, 216 was boarded by 220 and parts A and B were occupied by the Plaintiff.
47. The next witness DW 2 Kipkoech Langat, the 1st Defendant adopted his witness statement of 5th September 2019 and proceeded to testify on his behalf and on behalf of Joseph Langat and Phillip Langat who were his blood brothers, that all the Defendants were children of Agui Arap Chumo who died in 1992 leaving behind 6 children. That the said Agui Arap Chumo had land parcel No.Kericho/ Kipsitet/216 measuring 1¹/₂ acres. That after Agui Arap Chumo passed away, they had conducted succession proceedings wherein they had been given letters of Administration dated 15th October 2018 in Succession Cause No.288 of 2004 which copy he produced as Df exh 2.
48. That he knew Chesilim Langat the Plaintiff herein, who was a farmer and used to plough land using a tractor. That they had a boundary dispute with him which started in 1992 after he had destroyed the boundary. He conceded that the Plaintiff's lands No. 220, 218 and 219 were near their land.
49. He however disagreed that the Plaintiff had bought land from their father stating instead that he had indeed bought parcels of land from their uncle after which he had destroyed the boundary and got onto their land on both sides which forced him (Defendant) to replace it (boundary). That they



- had subsequently reported the Plaintiff to the elders who had informed him (Plaintiff) that he had encroached onto the Defendants' land. Thereafter the Plaintiff had reported them to the police.
50. That the parties had been having issues every time and there had been no peace on the land. That after they got the grant, they had sought to transfer the land but the Plaintiff placed a caution on it on 13th December 2018. That the land was registered to their name as per entry No.4 of the certificate of search dated 13th November 2018 herein produced as Df exh No. 3. That after they had registered the land into their names, they did not call the surveyor, but continued with their daily activities.
 51. He confirmed that there was sugar cane on the land and that after they had placed a fence on the same, and informed the Plaintiff not to enter their land, that was what had prompted the Plaintiff to sue them. He was categorical that their father did not sell any land to the Plaintiff, they had not been shown any agreement and were not aware of any consent, or any monies paid to his father.
 52. That he was born in the year 1951 so in 1977 he was 26 years old. That he was not a witness to the sale of the land. That the Plaintiff took land that belonged to their father, which land he sought to be returned to them. He produced a map which was marked as DMFI 4 and stated that the Plaintiff had been planting on a portion of the land since 2004.
 53. In cross examination, he confirmed that they had fenced the subject property about 7 years ago and even after fencing it off, the Plaintiff had still been planting sugar cane on it. That the land did not comprises 0.7 acres, but that he had 3¹/₂ points on one side while on the other side he had 1¹/₂ points making it a total of 0.5 acres.
 54. That the succession proceedings were initiated in 2004 and therefore they could not have taken any action against the Plaintiff prior to the taking out of succession proceedings. That the Plaintiff was in occupation before 2004, he was evicted and came back again. That after the death of their father, he had been evicted.
 55. He confirmed that when their father was alive, they had no problem because the Plaintiff came into the land 5 years after the demise of their father wherein they had called the village elders in the presence of the Chief and then filed a case at the tribunal. He however had no evidence of the minutes.
 56. He stated that he was not aware that the Plaintiff had purchased 0.7 acres from his father in 1977 but stated that it was not true that there was land given to the Plaintiff (when questioned on the statement regarding a forged consent executed by his father). That at the time they heard there was a forgery, they did not take any action as they had no money. That they got to know about the forgery in the year 2004 and that was the year the Plaintiff came on the land wherein he had been in possession to date.
 57. He confirmed further that they had fenced of 1.5 acres including the Plaintiff's share. That he knew Samuel Marisin who lived in Kabor. That neither Samuel nor his mother, who was still alive, were their neighbors as their land was several miles away from their (Defendants') land.
 58. When re-examined, he reiterated that they had been fighting with the Plaintiff and the reason he had sued them was because they had told him not to enter into their land. That the Plaintiff had been in occupation of 0.5 acres and not 0.7 acres. That 0.5 comprises of 3¹/₂ and 1¹/₂ points on different portions of land. That they had sugar cane on the remaining portion of land. That he was not aware of any sale in 1977 or of a consent form which he had only seen after the case was filed. His evidence was that after he got the grant and had fenced of the whole parcel of land, there had been no peace since 1977.
 59. Joseph Chepkwony Kirui testified as DW 3 to the effect that he was an Assistant chief of Soim location and knew the parties to the suit who were his neighbors. That the Defendants were Agui Chumo's sons.



- That he was a surveyor from 1970 – 1982. That thereafter he had become an Assistant chief of Soin in 1982 and was in charge of Kipsitet sub-location. That when he was a surveyor, he was involved in the survey of Kipsitet land. That he knew about land No.216 which belonged to the late Agui Chumo. That his parcels of land were numbers No.214, 215, 213, which boarded land parcel 216. That there was a river between parcel No.218 which belonged to Agui's brother called Elijah, but which was now registered to the Plaintiff who had also bought parcels No. 219 and 220 from Agui Chumo's brother.
60. That since he was an Assistant chief anybody who wanted to sell land would go to his office. The Plaintiff and deceased however never went to his office and thus he did not have any documents on them. He proceeded to testify that after Agui passed away and since the Plaintiff was a good farmer with a tractor, he had moved the boundaries of the Defendants because they were young children. That often he would also remove the Defendants from cell after the Plaintiff had caused their arrest when they questioned his trespass activity.
 61. He also confirmed that he had helped the Defendants to file their succession cause wherein they had been issued with a Grant. That thereafter when the surveyors sought to survey the suit land the Plaintiff had started to complain wherein he had asked him to let the surveyors do their job. That parcel No.216 belonged to Agui Chumo and he had been on site when the surveyor went there.
 62. In cross examination, the witness confirmed that it had been a long time since the passing away of Agui and that had been when the Plaintiff started encroaching on the suit land. He also confirmed that the Plaintiff had bought land from Agui Chumo's brother. That they had been three of them but they had not gone to his office when they transacted the sale agreement with Agui Chumo's brother. That he would not know if the Plaintiff & Agui Chumo entered a sale agreement.
 63. His evidence, although he had no evidence to that effect, was that the Plaintiff had formed a habit of reporting the late Agui's children to the police. He was however sure that the Plaintiff always used his tractor to plough and/or move the boundaries.
 64. He also testified that the Defendants were illiterate and that was why they did not go to court. That he had only advised them to make a report to the police. That he did not know how much of the land the Plaintiff had encroached on. That the surveyors would be in a better position since they had visited the suit land which was at the time the parties had started putting posts on the land which had no fence.
 65. In re-examination the witness confirmed that the Plaintiff had gone onto the land after Agui Chumo's death. That he had no title to the same and that the case had been purely a boundary case for a long time. That he did not have any OB number of the cases at the police station but that he had visited the police station severally to bail out Joseph Langat after Plaintiff had reported him. He confirmed that the late Agui Chumo belonged to the Chumo generation and that when he died in 1992, the Defendants were still young.
 66. The defence closed its case after which parties were directed to file their written submissions

Plaintiff's submissions.

67. The Plaintiff framed his issues for determination as follows;
 - i. Whether the Plaintiff has been in occupation of a portion measuring 0.28 hectares (0.7 acres) comprised in all that property known as Kericho/Kipsitet/216 for a period of at least 12 years.
 - ii. Whether the Plaintiff's occupation, if any has been quiet, peaceful, uninterrupted, hostile and/or exclusive; and



- iii. What remedies are available to the parties herein?
68. The Plaintiff proceeded to summarize both the evidence adduced in support of his case as well as that which was adduced in support of the Defendant's case and to respond the first issue for determination; he submitted that he had been in occupation of 0.7 acres comprised in the suit property for a period of at least 40 years from 1977 to 2019 when he filed suit at the expense of the estate of Agui Arap Chumo(deceased), represented by the Defendants herein. That he had developed the suit property by planting and harvesting sugarcane from 1977 until 2018 when the Defendants interfered with his possession.
69. That in as much as he did not produce a written agreement evidencing the sale of the 0.7 acres to him in the year 1977, yet he did enter into an agreement with the Defendants' father which consequently led to him being given vacant possession of the suit land immediately; which land portion he had been occupying from 1977 to date. Reliance in support of his submission was placed on the case in Henry Kipngetich Terer v Cecilia Soi & Stanley Ngeno(2017)eKLR.
70. That contrary to DW1's testimony that he only occupied 0.49 acres, he had been in occupation of 0.7 acres for a period of more than 40 years. That indeed although the Defendants had admitted that he had encroached on their land, they never tendered any evidence of their attempts if any, to remedy the Plaintiff's actions. The mere assertion therefor that he only occupied 0.49 acres as opposed to 0.7 acres pleaded, could not dislodge the Plaintiff's claim. His submission was that the Map that had been relied upon had not been drawn to scale.
71. That it was clear from evidence that the Defendants had taken advantage of the his vulnerability, after he was in an accident sometime in 2018, to remove the boundary marks delimiting his portion, which action had explained the surveyor's findings that there were no boundary marks delimiting the land the Plaintiff was in occupation.
72. Reliance was placed on the decided case in John Mbwiri Z. Kamundi vs. Joseph Kinja [2022] eKLR to confirm that the Plaintiff had been in occupation of 0.7 acres comprised in LR.N. Kericho/ Kipsitet/216 since 1977 to date.
73. On the second issue for determination as to whether the Plaintiff's occupation, if any; had been quiet, peaceful, uninterrupted, hostile and/or exclusive, the Plaintiff placed reliance on the decided cases in David Kiplangat Soo vs Rael Cheptanui Soo and Another [2022] (sic) and Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR to submit that in the instant case, it was manifest that he had had uninterrupted, exclusive possession of 0.7 acres (0.28 ha) for a period of at least 40 years from 1977 to 2019 when this suit was filed, at the expense of the estate of Agui Arap Chumo(Deceased), represented by the Defendants herein wherein he had undertaken extensive developments on the suit property including but not limited to, ploughing, planting and harvesting sugarcane from the year 1977 when he purchased it to date. That the Defendants neither disputed this fact nor tendered any evidence to the contrary. That in fact, DW 2 in his testimony had admitted to have known the Plaintiff as the one who used to plough the land using a Tractor.
74. The Plaintiff further submitted that being a Purchaser, the period of limitation ran in his favour from the year 1977 when he completed payment of the purchase price for the acquisition of the subject parcel of land. The Plaintiff relied on the decided cases in Public Trustee vs. Wanduru (1984) KLR 314 and Stephen Mwangt Waweru v Omart Abdullah Muchiri [2019] eKLR to submit that the Defendant's title (as legal representatives of the estate of Agui Arap Chumo (deceased) ought to be extinguished by dint of his adverse possession thereof for a period of at least 40 years for the reason that he had been manifestly in open and notorious occupation of the subject property.



75. That in view of the fact that the instant claim was raised against the estate of Agui Arap Chumo(Deceased), reliance was placed on the findings of the Court of Appeal in *Mate Gitabi vs. Jane Mburu Muga and 3 Others* Nyeri Court of Appeal Civil Case No. 43 of 2015 cited in *Phyllis Wanjiru Kamau vs. Wilson Gichuht Gachagwe & 2 others* [2019] eKLR, that the claim was sustainable and certainly justiciable and that the mere change of ownership of land which was occupied by another person under adverse possession did not interrupt such person's adverse possession as was held in the case of *Githu vs. Ndeete* [1984] KLR. That since the Plaintiff had been in occupation of the land from 1977 to date, the running of the time was cumulative against both the original owner and the successors in title.
76. The Plaintiff sought that his Originating Summons dated 13th February, 2019, be allowed as prayed.

Defendant's submissions.

77. The Defendants framed their issue for determination as to whether or not the Plaintiff had acquired title by way of adverse possession whereby they placed reliance on the provisions of Section 7 of the Law of *Limitation of Actions Act* and the Court of Appeal decision in *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another* [2015] eKLR to submit on what constituted adverse possession.
78. Further reliance was placed on the case of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* [2017] eKLR to submit that a person claiming adverse possession needed first to demonstrate actual occupation of another's land without the consent of that other, and in such a manner as the occupation was open and peaceful and secondly that such occupation remained unbroken for a period not less than 12 years.
79. That in the case of *Samuel Miki Waweru vs. Jane Njeru Richu* Civil Appeal No. 122 of 2001 (sic) the Court of Appeal had delivered the dictum that a claim of adverse possession could not succeed if the person asserting the claim was in possession with the permission of the owner, or in (accordance with) provisions of an agreement of sale or lease or otherwise. That was it in evidence that the land was sold to the Plaintiff, who then took possession of the suit property thereafter, this would clearly illustrate that there was no wrongful disposition of the owner. That there was consent from the other party (vendor) to settle on the property hence the claim of adverse possession would be extinguished by that fact.
80. That in this case, there had been disputes between the Defendants and the Plaintiff over the suit land herein hence the possession had not been continuous and uninterrupted.
81. The Defendant further relied on the decision in *Public Trustee vs. Wandugu* (supra) to submit that time started running for the purpose of determining these rights from the date of payment of the purchase price. That a purchaser in possession of the land purchased, after having paid the purchase price, was the person in whose favour the period of limitation could run.
82. That the Plaintiff had not proved his claim for adverse possession, although he testified that he took possession of the suit land in 1977 after he had entered into a sale agreement with Agui Arap Chumo (deceased). That he had not produced any sale agreement to substantiate his claim for the purpose of computing time when the adverse possession began to run. That the issue of the sale was even doubtful as the Plaintiff was at pains to tell the court how much he had bought the land. That it was inconceivable that in 1977 a land measuring less than an acre could cost Ksh.19,000/= as alleged by the Plaintiff.



83. That in his supporting affidavit dated 13th February 2019 at paragraph 10 the Plaintiff had stated that the vendor, Agui Arap Chumo died in 1990 which was 11 years after he had sold the land to him. In his evidence however the Plaintiff had contradicted the statement by stating that he had stayed on the land for almost 20 years before the death of Arap Chumo. Later he had testified that he occupied the land after the demise of the deceased owner. That this contradiction clearly indicated that the Plaintiff was trying his luck to illegally acquire land.
84. Finally the Defendants submitted that the Plaintiff was not entitled to the prayers sought in the Originating Summons as he had not provided evidence indicating the time he took possession of the property in question so as to allow for computation of time. It was their submission further that they were the rightful beneficiaries/owners of all that parcel of land known as Kericho/Kipsitet/216 as they were not privy to any agreement between the Plaintiff and their deceased father. That no plausible and justifiable ground had been given by the Plaintiff that would entitle him to lay any claim on the suit land.
85. The Defendants sought that the Plaintiffs claim be dismissed with costs and there be an order of eviction issued against him.

Determination.

86. This is a matter in which the Plaintiff herein seeks for orders that he be registered as proprietor to 0.28 hectares of land comprised in the land parcel L.R No. Kericho/Kipsitet/216 formerly owned by the late Agui Arap Chumo, (deceased) by virtue of his adverse possession of the same on allegation that he had been in open, quiet and peaceful occupation for a period of over 40 years.
87. The Plaintiff's evidence was that he had purchased a piece of land measuring 7 points of an acre in 1977, for Kshs. 19,000/= wherein he had paid Ks. 12,000/= in cash and also given four goats, from Agui Arap Chumo and which land was to be excised from parcel of land No. 216 Kipsitet. That after he had bought the land, he had taken possession of the same. That although they had gone to Sosiot lands Board in 1977 for an application for the consent, he had been given some documents which were later stolen by the Defendants who wanted to sell the land. No other steps had been taken to transfer the land to him. But that he lived peacefully on the land until a dispute arose when the Defendants wanted to sell the land, in a process they had begun in the year 2002.
88. That after he had taken possession of the property, he had developed it by planting sugar cane which was still on the ground, he had used tires to place along the fence and the land was separated with terraces and had been demarcated immediately he had purchased it.
89. The Plaintiff's claim was opposed by the Defendants who were the children and legal representatives of the deceased Agui Arap Chumo who was registered proprietor to land parcel No. Kericho/Kipsitet/216, land which the Plaintiff sought to excise 7 points of an acre. The Defendants' case was that their father, Agui Arap Chumo had land parcel No. Kericho/Kipsitet/216 measuring 1^{1/2} acres. That after Agui Arap Chumo passed away, they had conducted succession proceedings wherein they had been given letters of Administration dated 15th October 2018 in Succession Cause No.288 of 2004. That the Plaintiff herein was known to them a farmer who used to plough land using a tractor. That they had been having a boundary dispute with him since 1992 after he had destroyed the boundary. They conceded that the Plaintiff's lands No. 220, 218 and 219 were adjacent to their land.
90. That the Plaintiff did not buy any land from their father but had bought parcels of lands from their uncles after which he had destroyed the boundary and started annexing their land on both sides which forced him (1st Defendant) to replace it the boundary. That they had subsequently reported the



- Plaintiff to the elders who had informed him (Plaintiff) that he had encroached onto the Defendants' land. Thereafter the Plaintiff had reported them to the police.
91. That the parties had been having issues every time and there had been no peace on the land. That after they got the grant, they had sought to transfer the land but the Plaintiff placed a caution on it on 13th December 2018. That subsequently the land had been registered to their name on 13th November 2018. That despite having fenced the subject property about 7 years ago the Plaintiff had still been planting sugar cane on it. That the Plaintiff had been in occupation before 2004 wherein he had been evicted but got back again onto the land. He confirmed that when their father was alive, they had no problem because the Plaintiff got into the land 5 years after the demise of their father.
92. Joseph Chepkwony Kirui, the Assistant chief of Soim location testified as DW 3, to the effect that as the in charge of Kipsitet sub-location, he knew about land No.216 which belonged to the late Agui Chumo. That as an Assistant chief anybody who wanted to sell land would first report to his office. That neither the Plaintiff nor the Deceased Agui Chumo went to his office. However long after the death of Agui Chumo in 1992, Plaintiff who was a good farmer and had a tractor moved the boundaries of the Defendants land because they were young children. That this culminated into disputes and he would often remove the Defendants from the police cell after the Plaintiff arrested them when they questioned his trespass activities. His evidence had been that the Plaintiff was in the habit of reporting the late Agui's children to the police. That parcel No.216 belonged to Agui Chumo and he had been on site when the surveyor went there. He further confirmed that the Defendants were illiterate and that was why they did not go to court, but that he had only advised them to make a report to the police. He was categorical that the parties herein had been having a long standing boundary dispute.
93. The surveyor who testified as DW1 confirmed that the Plaintiff occupied a total acreage of 0.49 acres, which was a combination of two sections of land comprised in LR No. Kericho/Kipsitet/216 and that the two parcels of land were not contiguous (next to each other) and had no defined road.
94. The court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:
95. Section 7 of the *Limitation of Actions Act* provides as follows:
- “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...”
96. Section 13 of the *Limitation of Actions Act* aforesaid further provides that:
- A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
97. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court (Read Environment and Land) Order vesting the land in him/her.



98. The onus was on the person or persons claiming adverse possession:

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

The main the elements of adverse possession that a claimant has to prove include:

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

Has the Plaintiff herein demonstrated the said elements?

99. I find the issues arising for my determination as being:

- i. Whether the Plaintiff has been in open, continuous, uninterrupted and exclusive occupation, possession and use of 0.28 hectares of land comprised in the land parcel L.R No. Kericho/Kipsitet/216.
- ii. Whether the Plaintiff has acquired title by way of adverse possession 0.28 hectares of land comprised in the land parcel L.R No. Kericho/Kipsitet/216.

100. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

101. I have considered the fact that there was no consensus as to when the Plaintiff's took possession of the suit land. I say so because whereas the Plaintiff is categorical that he took possession in 1977 after the sale agreement, and lived on the land for almost 20 years before the death of Agui arap Chumo, the Defendants case on the other hand was that he trespassed onto the suit land after the death of their father, the original proprietor who died in the year 1992. Indeed the evidence of the Assistant chief, DW3 was that after Agui had passed away the Plaintiff had moved the boundaries of the Defendants' land, using his tractor, because they were young children. I have also considered the fact that the Defendants herein being administrators to the estate of Agui Arap Chumo, time, on adverse possession, started running against them as at the time of occupation which in this case could be either be in 1977 or after 1992, despite the fact that they were now the registered proprietors of the suit land.

102. In the case of Titus Kigoro Munyi vs. Peter Mburu Kimani (2015)eKLR it had been observed that:

“It must be noted that under Section 7 of the [Limitation of Actions Act](#), the law relating to prescription affects not only present holders of the title but their predecessors”

103. Whether the prescriptive period for adverse possession is counted from 1977 or after the year 1992 to when the suit was filed in 2019, it is indeed evident that the period of 12 years had lapsed. However



the next question that needs to be asked would therefore be whether the Plaintiff herein had used this land which he claims as of right *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion).

104. In *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR additional observations were made in the manner of occupation by a claimant for adverse possession as follows:

- “ a) The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c) The occupation of land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupant.
- d) The non-permissive actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable *animus possidendi*. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by advise possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period.
- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.”

105. It is evident from the evidence adduced herein that the answer to this question would be in the negative. I say this because evidence has been adduced that the Plaintiff herein having bought parcels of land from the Defendants’ uncles being parcels No. 218, 219 and 220, which lands share a common boundary with the suit land herein, he had proceeded to encroach stealthily onto the suit land from different directions while using a tractor wherein he had demolished the boundaries and taken possession of a combination of two sections of land comprised in LR No. Kericho/Kipsitet/216 which two parcels of land were not contiguous (next to each other) and had no defined road. That this in turn had sparked disputes wherein at one point he had been evicted from the land but had subsequently returned. That there had been several meetings held to solve the dispute and at times the matter had been reported to the police wherein the Defendants had been locked up in the police cells at the behest of the Plaintiff when they questioned his acts of trespass. That there had been a time when the Defendants had replaced the boundary after the Plaintiff had destroyed it thereby warning him not to trespass onto their land. It is thus evident that the Plaintiff’s occupation of the suit Properties has not been peaceful but has been dodged with one dispute after another. In fact in my view the possession was a kind of invasion on the suit land going by the surveyor’s report herein produced as Df exh 1 and the evidence adduced by the defence.

106. Secondly it is also evident that whereas the Plaintiff claims adverse possession of 0.28 hectares to be excised from the suit parcel of land, according to the surveyor, he occupied a total acreage of 0.49 acres,



which was a combination of two sections of land comprised in the suit land. 0.28 hectares translated to 0.691 acres which was a larger area than what he occupied. The Plaintiff herein did not discharge the burden of proving and specifically identifying the size of the possession from the larger suit premises that he sought to be decreed to him.

107. It is trite that a claimant for adverse possession must state specifically the acreage occupied. Indeed in *Jane Wanjiru Gitonga & another v Machakos Ranching Company Ltd* [2017] eKLR, the court had held that;

“To succeed in a claim of adverse possession, the Applicants should have specifically stated the acreage of the land that they claim to have occupied for more than twelve (12) years.”

108. For the above reasons and the authorities herein cited, I find that the Plaintiff/Applicants' Originating Summons dated 13th February 2019 is devoid of merit and is hereby dismissed with costs.

109. The Plaintiff shall vacate from land parcel L.R No. Kericho/Kipsitet/216 with immediate effect upon delivery of this judgment and in default, an order of eviction be issued against him.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 2ND DAY OF MARCH 2023.



M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

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