



**Lelei v Rotich (Environment & Land Case 125 of 2021)  
[2023] KEELC 18127 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18127 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 125 OF 2021**

**MN MWANYALE, J**

**JUNE 8, 2023**

**BETWEEN**

**CHRISTOPHER KETER LELEI ..... PLAINTIFF**

**AND**

**CHRISTOPHER ROTICH ..... RESPONDENT**

**JUDGMENT**

1. Vide his Amended Complaint dated December 4, 2017, the Plaintiff Christopher Kipketer Lelei, sought judgment against Christopher Rotich Defendant for: -
  - a) A declaration that the Plaintiff is the bonafide owner of land parcel No Nandi/Kamobo/312, and the Defendant to be restrained by way of permanent injunction through himself, his agents and/or servants from laying any claim and/or intermeddling in any way with land parcel No Nandi/Kamobo/312.
  - b) Costs of the suits and interests therein.
2. Various interlocutory applications were filed in the matter including the application dated November 30, 2018 which sought the firm of Kipkosgei Choge to cease acting for the Defendant, and which application was allowed vide the ruling dated and delivered March 4, 2021.
3. An injunction application dated October 31, 2017 was withdrawn but an order of maintenance of status quo was issued.
4. At the time of hearing the suit the Plaintiff had engaged Messrs Bungei & Murgor Advocates to act for him, while the Defendant had engaged Messrs Rotich and Langat Advocates to act for him.
5. The file had an equal share of many letters written to various authorities mostly being complaints by the Plaintiff who while acting in person felt that the matter was not moving expeditiously. Including



letters to the Honourable the Chief Justice as well as a complaint to the Inspector General of police against the Defendant who was then a senior police officer but at time of hearing had retired.

6. Since the parties were neighbors the matter was initially referred to the Court annexed mediation, to see whether a solution would be forthcoming, but no settlement was reached hence the matter reverted to the Court for hearing.

During hearing the Court was informed of witness intimidation allegedly by the Defendant, who is said to have threatened witnesses not to attend Court to give evidence, and the Court referred the Plaintiff and the threatened witnesses to lodge to complaints with the police for investigation to commence.

7. It is the Courts hope that the police did investigate the complaints and recommended appropriate action, as witness intimidation is tantamount to obstruction of justice.

#### **Plaintiffs case and evidence:**

8. In his amended pleadings, the Plaintiff pleaded to be the bonafide owner of all that parcel of land known as Nandi/Kombe/312, Measuring approximately 0.37Ha; and that the Defendant was using his rank in the police force to encroach and/or claim his parcel of land; and he thus sought the sole prayer relief set out at paragraph 1 of this judgment.
9. The Plaintiff testified as PW1, it was his testimony while adopting his witness statement that he had bought LR No Nandi/Kombe/312 from Grace Kirumbi at a consideration of KShs 80,000/= . The sale was minute by an Agreement for sale dated 4/8/2007, which he produced as P Exhibit 1. At the time of the purchase the property was vacant after the Kirumbi family relocated after the murder of their Patriarch Wiliam Kirumbi in 1981. The property was still registered in the name of William Kirumbi at time of the said purchase.
10. The witness testified that the Grace Kirumbi, the vendor and widow of the late William Kirumbi thereafter took of succession proceedings vide Succession Cause No 12/2014 at the High Court at Eldoret and a certificate of confirmation of Grant was issued. He produced the Grant as P Exhibit No 2. The witness thereafter obtained the LCB consent on September 8, 2015, and he became the registered owner on September 17, 2015. He produced the consent as P Exhibit 3 and a copy of the title as P Exhibit 4.
11. It was the witness further testimony that after the purchase, he cleared the suit property and the Defendant fenced off the property denying him entry and use, because of the threats. The Defendant property borders the suit property. The witness produced two letters from the Chief one dated September 4, 2007 as P Exhibit 5 and one dated May 16, 2014 as P Exhibit 6, confirming that he was the owner. He prayed that the Defendant to deliver vacant possession to him.
12. In cross – examination, the Plaintiff indicated that at time of purchase the property was vacant. While clearing the bush, he indicated that he was threatened by person sent by the Defendant. The Register owner had died in 1981 and at time of the signing the agreement, the widow had not taken out letters of administration.
13. PW2, Grace Imali Kirumbi testified and corroborated the testimony of the Plaintiff. She adopted her witness statement, and indicated that she was the only surviving widow of the late William Kirumbi, hence the Matriach and together with her children resolved to sale Nandi/Kombe/312, because of the circumstances of the death of her late husband. She sold the property to the Plaintiff so as to buy another property. The property she sold was Nandi/Kombe/312 and she was given a grant vide Eldoret Succession Cause, whose details she had forgotten. Through she produced to Kenya Gazette Notice No 1454/2014 as P Exhibit 7.



14. She confirmed that the property had been sold to Christopher Lelei, the Plaintiff not Christopher Rotich the Defendant and that Christopher Rotich had a separate neighboring property.
15. In cross – examination, she stated that her co-wife was the one who lived on Nandi/Kombe/312 with their husband, but she would visit hence knew the property. From 1981 when her husband died, she went back in 2007 before she sold to ascertain the property and it was vacant. The children of her co-wife had been settled elsewhere in Shim Village Vihiga.
16. PW3, Wilson Kiprobon Limo testified giving history of the ownership of the property which initially belonged to his brother a Mr. Paul Keter, who had sold it to the Defendant’s father, who in turn had sold it to a Mr Benjamin Kogo who then sold it to the late William Kirumbi. It was his testimony that the property belonged to the Plaintiff since he saw the Plaintiff erect a fence, which fence was destroyed by the Defendant. The Defendant was the one who was using the property.  
He stated that he was present when the Plaintiff was chased away, while erecting the fence, and that he had received threats from the Defendant even in Court.
17. In cross – examination, he stated that it was his brother who initially sold to the Defendants father. He did not know when William Kirumbi became the registered owner.  
He indicated that upon the death of William Kirumbi, everyone in the village could graze on the property. The community stopped grazing when the Plaintiff put the posts and the Defendant fenced.
18. In re-examination, he stated that a Mr. Benjamin Kogo had purchased the property but did not live there, the only house on the suit property was the one built by the late William Kirumbi.
19. With the testimony of the 3 witnesses the Plaintiff’s case closed.

**Defence case and evidence:**

20. The Defendant vide his Amended statement of defence dated December 20, 2017, denied all allegations of fact pleaded in the plaint, and pleaded that he was in possession and occupation of the suit land since 1981, having grown trees thereon.
21. The Defendant pleaded particulars of fraud on the Plaintiff as here follows;
  - a) Plaintiff procuring a title deed issued on December 6, 2010.
  - b) Uttering false documents in form of an agreement for sale to purchase the property.
  - c) Misrepresenting himself as an owner of the suit land.
  - d) Appearing before Hon. Judge allegedly as a purchaser of the suit land.
  - e) Falsing obtaining a certificate of confirmation of grant in his favour.
  - f) Unlawfully obtaining 2 titles in respect of the suit property.
22. The Defendant pleaded that the Plaintiff’s title was subject to his overriding interests, including right of user, possession and occupation since 1981 acquired by virtue of Limitation of Action Act or prescription.
23. The Defendant testified and called 2 witness to support his case.
24. It was the Defendant’s testimony while adopting his witness statement dated October 9, 2017 and December 15, 2021, which the Plaintiff had been irregularly issued to the Plaintiff on December 6, 2010; yet the Plaintiff had produced another title dated September 17, 2015.



25. The Defendant produced two Defence exhibits as per the list of documents filed on October 16, 2017 being pleadings and documents in Kapsabet Civil Suit No 1 of 2011, as D Exhibit 1 and certified copy of Register, Nandi/Kombe/312 as D Exhibit 2.
26. He prayed that the suit be dismissed with costs.
27. On cross – examination, the witness indicated that Nandi/Kombe/312 belonged to the late William Kirumbi and it was to be sold to him; to him by the late William Kirumbi’s eldest son who was to undertake succession.  
  
In re-examination, he stated that the Plaintiff was not in occupation of the suit land but he had been in possession since 1981.
28. DW2, Sammy Kirumbi, equally testified and adopted his witness statement made on December 15, 2021; as part of his evidence in chief. It was his testimony that he was the son of the late William Kirumbi; and Jane Kamonya. His late mother had been buried in the suit property. He was not aware of any succession proceedings but confirmed that the Defendant was their caretaker, pending sale to the Defendant.
29. In cross – examination, he stated that Grace Kirumbi (PW2) was his stepmother. He was not aware that the property had been sold, as there was no agreement of sale to the property. He was not called to their Shiru village home in respect of any meeting for sale of the suit property and was not aware of the letter from the Assistant Chief Shiru location. He was not aware of any succession proceedings. He indicated that the Defendant was taking care of the property and he only learnt that it had been sold in 2018.
30. In re-examination, he stated that his name was not on the letter of the Assistant Chief, and only his sister’s was mentioned in the letter. He was not involved in the sale, he indicated that the first title must have been procured fraudulently.
31. DW3, Raphael Arusei equally testified and adopted his witness statement dated December 15, 2021.
32. In cross – examination, he stated that as elders they had passed a regulation in 1981, that a village elder must be involved in the purchase of a property, but the Plaintiff did not follow the procedure hence they did not recognize the purchase by the Plaintiff, as the elders had indicated that the property to belong to the Defendant, since the registered owner had passed on, and the Defendant was the caretaker.  
  
The witness indicated that the son of the registered property had authorized the Defendant to be the caretaker. He stated that he did not witness any agreement between the Defendant and the sons of Kirumbi, who had not gone back to Kombe since their father’s death.
33. In re-examination, he said the regulation they passed was to vet purchasers.
34. After the testimony of the 3 witnesses the defence case was closed.
35. Parties were directed to file submissions, only the Plaintiff filed his submissions, while the Defendant who was supposed to have filed submissions by March 27, 2023 sought extension to March 28, 2023 but nevertheless did not file submissions.

**Plaintiff’s Submissions:**

36. In their submissions before Court the Plaintiff framed three issues for determination, as follows;-
  - a) Whether Defendant is entitled to adverse possession of the suit property



- b) Whether the Plaintiff has a valid title to the suit land.
  - c) What orders ought to issue?
37. As regards the issue of adverse possession, the Plaintiff submits that the Defendant has not proved adverse possession, as the Defendant indicated that he had agreed to buy the same with the eldest son of William Kirumbi once succession had been undertaken. And DW2 the said son Sammy Mahila Kirumbi indicated that the Defendant was their caretaker.
38. The Plaintiff submits that the Defendant occupation was interrupted with the filing of Kapsabet PMCC Suit No 1 of 2011, between the Plaintiff and the Defendant and as the suit was withdrawn in 2011 and this suit commenced in 2017.
39. On issue number 2, the Plaintiff submits that he proved ownership and valid title, and that the Defendant did not prove the particulars of fraud he pleaded in the Defence, neither did the Defendant pray for cancellation of the title issued to the Plaintiff nor did he plead adverse possession by way of counterclaim.
40. The Plaintiff thus submits the Defendant is bound by his pleadings and has no relief sought.
41. With regard to the 3<sup>rd</sup> issue, the Plaintiff prays that he be awarded damages and cited the case of Oludhe vs Jubilee Jumbo Hardware. Where the Court held that “where trespass is proved, a party need, not prove that he suffered any specific damage or loss to be awarded damages. The Court in such circumstances is under a duty bound to assess the damages awarded depending on the unique facts and circumstances of each case.”
42. As indicated earlier in the judgment the Defendant did not file submissions.
43. From the pleadings, evidence on record as well as submissions, the Court frames the following as issues for determination;
- i) Whether the Defendant has proved his defence of occupation to be entitled to have overriding interest in the suit property.
  - ii) Whether or not the Plaintiff has proved his case on a balance of probabilities
  - iii) What reliefs ought to issue?
  - iv) Who bears the costs of the suit?

**Analysis and determination:**

44. Vide paragraph 8 of the defence the Defendant pleaded that he had occupied and has right as user possessor and occupier since 1981 and his right should be treated as overriding interests not required to be noted in the register.
45. In his testimony before Court the Defendant testified that he had occupied the suit property Nandi/ Kombe/312 since 1981 upon the demise of the then registered owner William Kirumbi; with the knowledge and concurrence of the late William Kirumbi eldest son who was to undertake succession proceedings to enable him purchase the suit property.
46. The Defendant’s testimony was corroborate by DW2, Sammy Kirumbi, the eldest son of the late Willima Kirumbi, who described the Defendant as the caretaker to suit property.



47. DW3, a village elder equally testified and confirmed that the Defendant's occupation and possession of the suit property was as a caretaker.
48. Thus the occupation by the Defendant on the suit parcel from 1981 was by permission from the sons of the registered owner, as a caretaker pending eventual purchase, if the same was to materialize which it did not. A caretaker's position in relation to overriding interests is similar to a relative's occupation of suit property. In both cases, their occupation cannot be regarded as adverse, as in the caretakers position it is occupation by an express permission, while in the relatives position it is occupation by an implied permission. In both cases there is permission and/or consent that negates the elements of adverse possession. Section 28 of the Land Registration Act provides for recognition of overriding interest that need not be registered, the overriding interests pleaded by the Defendant of paragraph 8 of the Defence, is the occupation entitling him to acquire interest by Limitation of Actions Act or by prescription.
49. As noted above being a caretaker the Defendant is not entitled to seek recognition of the rights under Section 28(h) of the *Land Registration Act*, by virtue that his occupation was with permission as was recently held in the decision in the case of *Davis Mwatala Dzuya & Another vs Salim Anjarwalla (sued as the Administrator of Hussein Karimbai Anjarwalla)* (Mombasa ELC Case No 132/2019)(un reported).
- The Defendants other claim on the suit property is by virtue of a promise made by the late William Kirumbi's son DW2 to sale the suit property to him. The said intended sale never materialized as DW2 was has not taken letters of administration in respect of the Estate of William Kirumbi, which letters were already taken by Grace Kirumbi PW2 in any event.
50. Thus in answer to issue number 1 the Court finds the occupation by the Defendant on the suit property from 1981 to the date of bearing was on a caretaker basis pending purchase which purchase did not materialize and thus has no occupiers rights capable of recognition as overriding interests under Section 28 (h) of *Land Registration Act* in respect of the suit property.
51. In answer to issue number 2, the Plaintiff in his testimony adduced evidence of purchase of the suit property through an Agreement for Sale (P Exhibit 1) although the agreement was executed by a party who was not an Administrator of the estate thus entered into by a party without capacity and hence a nullity as there was no valid agreement for the sale of Nandi/Kombe/312 between the Plaintiff and the Administrators as required under Section (3) (1) of *Law of Contract Act*.
52. The Plaintiff produced the Grant of Letters of Administration, issued to the Administrator (PW2) as P Exhibit 2, the LCB consent as P exhibit 3 and a copy of the title as P Exhibit 4. There is evidence that the suit property was later on transferred to the Plaintiff by the Administrator of the Estate of William Kirumbi.
53. Thereafter the Administrator transferred the property to the Plaintiff, the Court finds that the Plaintiff acquired interest in Nandi/Kombe/312; by virtue of the said transfer to him by the Administrator of Estate of William Kirumbi, and subsequent issuance of the title to him as under Section 26 of the Land Registration Act, a certificate of title is prima facie evidence of ownership and the particulars of fraud having not been proved, and neither a irregularly or through a corrupt scheme.
54. The Defendant produced as D Exhibit 2 a copy of the register of Nandi/Kombe/312, the said register shows entries in respect of the parcel from 1971 and confirms the testimony of PW3 as to the previous registered owners. The Defendant had pleaded that the Plaintiff had been issued with the two title deeds in respect of the suit property; and the Court notes entry number 5 made on 3/12/2010 showing the Plaintiff as having been registered and issued with a title at entry number 6. The said entry was



however reversed at entry number 7 and presumably after the certificate of confirmation of grant was issued to Grace Kirumbi, at entry No 8 thereof and the Plaintiff registered as owner at entry number. 9.

56. The entry number 5, having been rectified, it follows that only one title deed now exists in relation to suit property Nandi/Kombe/312 (P Exhibit 4) which was issued to the Plaintiff.
57. The Court finds that the Plaintiff was proven ownership of Nandi/Kombe/312 and is entitled to quiet possession of the same.
58. The Court notes that the reliefs sought by the Plaintiff in the Amended Plaint relates to Nandi/Kamobo/312 while the Plaintiff and all the evidence adduced related to Nandi/Kombe/312, The Court thus enters judgement in favour of the Plaintiff for;
  - a) Declaration be and is hereby issued that the Plaintiff Christopher Kipketer Lelei is the bonafide owner of Nandi/Kombe/312.
  - b) The Defendant Christopher Rotich is hereby permanently restrained through himself, his agents and/or servants from laying any claim on Nandi/Kombe/312.
  - c) The Defendant to deliver vacant possession of the suit property Nandi/Kombe/312 to the Plaintiff within 30 days from the date of this judgment.
  - d) The Plaintiff shall have costs of this suit.
59. Judgement accordingly.

**DELIVERED AND DATED AT KAPSABET THIS 8TH DAY OF JUNE 2023.**

**HON. M. N. MWANYALE,**

**JUDGE.**

**In the presence of;**

**1. Mr. Rotich for the Defendant**

**2. Mr. Mugor for the Plaintiff.**

