



**Kiplagat & another v Murei (Environment & Land Case  
34 of 2020) [2023] KEELC 18694 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18694 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 34 OF 2020**

**EO OBAGA, J  
JULY 6, 2023**

**BETWEEN**

**JOSEPH KIPLETING KIPLAGAT ..... 1<sup>ST</sup> PLAINTIFF**

**SHADRACK KIPROTICH NGISIREI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**BIRGEN ARAP MUREI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs brought this originating summons against the Defendant in which they sought the following reliefs: -
  - a. That the Applicants Joseph Kiplating Lagat and Shadrack Kiprotich Ngisirei have obtained title by adverse possession over 1 (one) acre comprised in Kiplombe/Kiplombe Block 4 (KIPLOMBE) 51 having been in uninterrupted possession and use of the same since the year 1999.
  - b. THAT the Respondent's title over the aforesaid portion has been extinguished by dint of adverse possession as provided by the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
  - c. That the Applicants be declared to have acquired ownership of a portion measuring 1 care of land comprised in Title Number Kiplombe/Kiplombe Block 4 (Kiplombe) 51, through adverse possession having been in continuous uninterrupted occupation for 20 years.
  - d. That the 1(one) acre aforesaid belonging to the Applicants be transferred to them forthwith.
  - e. That a vesting order do issue vesting the disputed 1(one) acre to the Applicants.
  - f. That the Defendant/Respondent be ordered to sign the requisite transfer documents in favour of the Applicants for the 1(one) acre comprised in Kiplombe/Kiplombe Block 4 (Kiplombe)



51 and/or in the alternative the Deputy Registrar be allowed to sign the said documents on his behalf.

- g. That the Respondent be condemned to pay the costs of the originating summons.
2. The Defendant in a further affidavit sought dismissal of the Plaintiffs' originating summons, compensation for encroachment on to his land and eviction from a portion of one acre complete with removal of structures thereon.

### **Background;**

3. The Plaintiffs are sons of Ngisirei Bungei (Deceased) who owned LR. No Kiplombe/Kiplombe Block 4/61. The Defendant owns LR. No Kiplombe/Kiplombe Block 4/51 which is adjacent to the Deceased's land. In or around 1994, the sub-chief and chief of Kuinet Location convened a meeting where they unilaterally allocated the Deceased one acre from the Defendant's land. The action of giving the Deceased one acre from the Defendants land has been a source of conflict pitting the Defendant and the Deceased and later the Plaintiff and was the source of this originating summons.

### **Plaintiffs' case**

4. The Plaintiffs contend that the Deceased had been tilling the one acre (suit property) since 1994 until 1999 when he gave each of the Plaintiffs half an acre each. The Plaintiffs state that they took possession of their respective portions where they put up their houses where they reside today.
5. The Plaintiffs state that there was a land exchange between the Deceased and the Defendant and that from the time the Deceased allocated them half an acre each, they have stayed peacefully on the suit property for over two decades and that they have acquired the suit property by way of adverse possession. It is on this basis that they want the Defendant to give them title to the suit property failing which the Deputy Registrar of this court do sign the necessary documents to enable them get title to the suit property.

### **Defendant's case;**

6. It is the Defendant's case that in 1994, the Deceased claimed that most of his land was rocky. He needed a place where to farm. A meeting was convened where the area chief and sub-chief unilaterally allocated one acre of his land to the deceased. The Defendant stated that he has on numerous occasions complained to various authorities on this action but nothing seems to happen.
7. The Defendant stated that he has repeatedly asked the local chief to ask the plaintiffs to move out of the suit property but they have failed to do so. The Defendant even filed a case against the deceased but the same was dismissed as that was not the proper forum to file it.
8. The Defendant stated that the Plaintiffs constructed temporary structures on the suit property at night and that entry was forceful and that they have never enjoyed peaceful possession and that they cannot therefore claim the suit property by way of adverse possession.

### **Analysis and determination;**

9. The parties were directed to file written submissions. The plaintiffs filed their submissions on 11/4/2023. The Defendant filed his submissions on 17/4/2023. I have considered the submissions by the parties and the evidence adduced. There are two issues which emerge for determination. The first is whether the Plaintiffs have met the threshold for grant of orders based on adverse possession. The second is whether the plaintiffs and the Defendants are entitled to their respective claims.



10. The court of Appeal in the case of Mtana Lewa –Vs- Kahindi Ngala Mwangadi (2005) eKLR stated as follows:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts right over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for certain period, in Kenya is twelve (12) years. The process brings into action essentially by default or inaction of the owner, the essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

11. In Mbira –Vs- Gachuhi (2002) EALR 137, the court stated 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 statutorily prescribed period without interruption.”

12. In Gabriel Mbui -Vs- Mukindia Maranja (1993) eKLR, Justice Kuloba stated as follows: -

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from the mere exercise exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use and defacto occupation must be shown.”

13. In Kasuve –Vs- Mwanani Investments Limited & 4 others IKLR 184 it was held as follows: -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after disposing the owner or by discontinuation of possession by the owner on his own volition.”

14. In Richard Wefwafwa Songoi -Vs- Ben Munyifwa Songoi (2020) eKLR the Court of Appeal stated that a person who claims adverse possession must establish the following: -

- a. On what date he came into possession;
- b. What was the nature of his possession;
- c. Whether the fact of his possession was known to the other party;
- d. For how long his possession has continued and;
- e. That the possession was open and undisturbed for the requisite 12 years.

15. It is on the basis of the above quoted authorities and the evidence that I will decide whether the plaintiffs have acquired the suit property by way of adverse possession. The Defendant’s evidence is that the deceased was forcefully given the suit property by the area chief and sub chief. Soon after the Deceased was given the suit property, the Defendant moved to Eldoret High Court where he filed Miscellaneous Application No. 206 of 1995. The application targeted the Chief of Kiplombe Location and the Assistant Chief of Kuinet location as well as the Deceased. In a ruling delivered on 9/8/1996,



Justice Nambuye (as she then was) dismissed the same not on merits but that the same had been filed in a wrong forum and that it was over a dispute pitting two private individuals.

16. As late as 11/11/2019, the County Surveyor was trying to settle the dispute over the suit property. On 26/9/2019, the Chief Kiplombe Location summoned the plaintiff's father as well as his sons and the Defendant and his sons. The Chief summoned the two parties over the dispute regarding the suit property. This chief testified as PW3. He stated that the dispute between the parties had been settled by the assistant chief and that he personally never presided over the dispute between the two parties.
17. While being cross examined, the witness stated that a surveyor came to the ground but he did not conclude the survey exercise as there was a confrontation. This therefore confirms that the plaintiffs have not been enjoying a peaceful stay on the land. It is the assistant chief and chief of Kiplombe location who unilaterally decided to give away the Defendant's one acre which is now the suit property. PW3 became a chief in 2004 long after the previous chief of Kiplombe location and assistant chief of Kuinet sub location had given away the suit property to the Deceased.
18. The Defendant who struck me as a truthful person started fighting for this suit property in 1994 soon after it was given away by the assistant chief Kuinet sub location and the chief Kiplombe location. The plaintiffs cannot therefore claim that they have been enjoying the suit property peacefully. It is a well settled principle that a party seeking a property through adverse possession must prove that his possession was nec vi, nec clam, nec precario that is peaceful, open and continuous.
19. Possession which is taken by force cannot be said to be peaceful, open and continuous. The Defendant has not discontinued his possession as demonstrated by the numerous attempts to reclaim his land some of the attempts which had led into confrontation. I therefore find that the plaintiffs have not acquired the suit property by way of adverse possession.
20. The Plaintiffs' father was imposed on the suit property by the area chief and sub-chief. The plaintiffs have sought to remain on the same land by force as confirmed by PW3 who stated that when the County Surveyor sought to resolve the dispute, there were confrontations. There was no evidence of the alleged land exchange between the Deceased and the Defendant. If there was any such exchange, the Plaintiff would have shown the portion which the Defendant was given in exchange for the suit property. The Defendant is entitled to have his one acre back.

#### **Disposition;**

21. From the above analysis, it is clear that the plaintiffs have failed to prove their claim. I proceed to dismiss the same with costs to the Defendant. The Defendant has been kept out of the suit property for over two decades. I direct that the Plaintiffs be evicted from the suit property within 60 days if they cannot voluntarily move out and demolish their structures. As it is clear that the plaintiffs are trespasser on the suit property, I grant the Defendant general damages of Kshs 1,000,000/= (One million).

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 6<sup>TH</sup> DAY OF JULY, 2023.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of;

Ms. Too for Plaintiff

Ms. Rop for Mr. Misoi for Defendant.

Court Assistant –Laban



**E. O. OBAGA**  
**JUDGE**  
**6<sup>TH</sup> JULY, 2023**

