



**Cheboi v Boswony (Environment & Land Case 2 of 2022)
[2023] KEELC 20733 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT & LAND CASE 2 OF 2022
L WAITHAKA, J
OCTOBER 11, 2023**

BETWEEN

RICHARD RUTO ARAP CHEBOI PLAINTIFF

AND

STANLEY KELWON BOSWONY RESPONDENT

JUDGMENT

1. The plaintiff took up the summons dated 4th September 2014 for determination of the question as to whether he had acquired title to a portion of the parcel of land known as Baringo/Pemwai 47 (suit property) measuring approximately 0.49 hectares by adverse possession.
2. The summons are supported by the affidavit of the plaintiff sworn on 4th September 2014 in which the plaintiff has deponed that he has been in occupation of 0.49 hectares out of the parcel of land known as Baringo/Pemwai/47 (suit property) from 2003; that the suit property was initially registered in the name of Cheron Chesang before it was transferred to the respondent upon subdivision and transfer of parcel number Baringo/Pemwai/467; that he (the plaintiff) took possession of the suit property in 2001 and has remained thereon since that time.
3. The plaintiff further deponed that by the time parcel number Baringo/Pemwai/467 was curved out of the suit property, he had occupied the suit property for almost 12 years; that by the time the respondent acquired title to land parcel number Baringo/Pemwai/467, he had almost acquired title to the suit property by adverse possession; that he has been on the suit property for 13 years hence the defendant's title had been extinguished; that since 2001, the respondent as well as his predecessor in title had never been in occupation of the suit property; that the respondent's claim to the suit property had been extinguished by his adverse possession thereof; that on 3rd July 2013 the suit property was subdivided into Baringo/Pemwai/467, 468 and 469; that the portion of 0.49 hectares he has been in occupation of is comprized in Baringo/Pemwai/467; that his occupation of a portion of the suit property now comprized in Baringo/Pemwai/467 has been open and uninterupt-ed since 2001. Annexed to the



affidavit and marked RRC 1 and 2 respectively are copies of the register of land parcels number Baringo/Pemwai/47 and 467 respectively.

4. In reply, the respondent filed the affidavit (replying) he swore on 10th November 2014 in which he has deponed that he bought a portion of land measuring 0.49 hectares from Cherono Chesang excisable from Baringo/Pemwai/47; that upon subdivision of Baringo/Pemwai/47, the portion he bought was registered as Baringo/Pemwai/467; that at the time he bought the land, the plaintiff was cultivating the portion he bought as a lessee of the seller, Cherono Chesang; that on or about 10th December 2013 the seller gave notice to the plaintiff to vacate the suit property and the plaintiff complied and vacated the suit property; that on or about late September 2014, the applicant forcefully trespassed onto his parcel of land, fenced it and planted beans thereon; that he has information from the seller, Chesang Cherono, that the entry of the plaintiff to the suit property was with her permission/consent hence his claim for adverse possession is unfounded and that the plaintiff's occupation of the suit property was not continuous and/or uninterrupted as he had vacated for ten months pursuant to the seller's notice referred to herein above.
5. Directions were taken to the effect that the originating summon be converted into a plaint, the Replying Affidavit to a defence and the suit be heard by way of viva voce evidence.

Evidence

Plaintiff's Case

6. John Kiprotich Cheboi, recorded and signed a statement filed on 30th November, 2016. The statement was adopted as his evidence in chief. The documents contained in the plaintiff's list of documents filed on 5th September 2014 were adopted and produced as Pexbt 1 and 2 respectively.
7. informed the court that the plaintiff is his deceased brother. He urged the court to grant him the orders sought in the originating summons.
8. In cross examination, he stated that he is the administrator of the estate of Richard Rutto. He obtained grant of letters ad litem vide notice of motion dated 1st October, 2015 for substitution.
9. Parcel number 47 was subdivided into 3 portions one of them being 467. The land initially belonged to Cherono Chesang. The defendant was issued with a title for 467 on 3rd July 2023. He purchased the land from Cherono Chesang.
10. He stated that they have not filed any suit against Cherono Chesang; that he is not aware whether his late brother registered a caution before Cherono Chesang started subdividing the land; that Cherono Chesang is their relative.
11. He admitted that in the Originating Summons the plaintiff has not explained how he entered the land but he (witness) has explained in his statement.
12. He stated that he is not aware that parcel no. 47 was initially being cultivated by the plaintiff and the defendant's father; that it is not true that Cherono Chesang offered his brother the option to buy but he was unable to purchase it; that it is also not true that after the plaintiff was unable to buy the land, he approached his brother's son, Kibet, who was also unable to purchase it; that he is not aware that it is only after his brother failed to purchase the land that Cherono Chesang approached the defendant who purchased it.
13. He admitted that the suit property is about 2 kilometres from his house; that it is not true that paragraphs 5 and 6 of the supporting affidavit states that his brother had not been on the suit property



- for over 12 years and insisted that his brother's occupation was not seasonal but continuous and without the permission of the defendant.
14. He informed the court that the photographs taken on 2nd February 2015 annexed to the application dated 24th February 2015 show that the land is bushy and not cultivated; that he was present in court when Cherono Chesang testified but he's not aware that he testified that his brother vacated the suit property.
 15. He denied that his brother and his brother's sons invaded the land in 2014 and chased away the defendants. He stated that his brother's land borders the suit property and denied that the suit property was ancestral land.
 16. In re-examination, he stated that parcel number 47 was subdivided into 3 parcels. His brother occupied one acre comprized in 47 which later became 467. The other subdivisions were 468 and 469. He stated that the photographs shown to him by counsel for the defendant do not show the entire parcel of land.
 17. He stated that paragraph 7 of the supporting affidavit clearly states that his brother had been on the land for close to 13 years; that parcel number 467 borders his brother's land; that there is a fence between the two parcels; that the fence was put up by his late brother and that his brother continuously used the land together with his family from 1st January, 2001.
 18. Leah Sogome Rutto recorded and signed her statement filed on 30th November 2016. The statement was adopted as her evidence in chief.
 19. In cross examination, (she was uncooperative, and appeared untruthful) PW2 stated that the plaintiff was her husband; that the defendant is her grandson; that the late Cherono was her neighbour; that her late husband was utilizing the entire 467; that her husband and she entered the land peacefully as it was unoccupied and bushy. They were not given the land by Cherono.
 20. She acknowledged that she has a son known as Kibet who works for the Prisons Department but stated that it is not true that Cherono approached her son to buy the suit property.
 21. She acknowledged that they received a notice from the late Cherono in 2017 to harvest their crop and vacate the land; that they did not vacate. The defendant bought the suit property when the plaintiff was in occupation.
 22. She stated that it is not true that Cherono leased the land to her husband and denied being aware of any letter by the chief asking her husband to vacate.
 23. She stated that she is not aware that Cherono testified that her husband and she had not brought any suit or claim against him; that they brought the suit against the defendant because he knowingly purchased the land when they were in occupation and had used the land continuously without interruption.
 24. In re-examination, she stated that her husband and Cherono are not related; that her husband saw land which was bushy and belonged to no one and started cultivating it; that she is not aware of any discussion which took place between Cherono and her son and that the one acre they claim is now part of parcel number 467 registered in the respondent's name; that she is not aware that the land belonged to Cherono; that they only knew the defendant as the owner and that is the reason they sued him.
 25. She maintained that they did not heed the notice issued to them requiring them to vacate the suit property.



26. Brian Chebon Rutto, son of the plaintiff, had recorded and signed a statement filed on 30th November 2016 which was adopted as his evidence in chief.
27. In cross examination, he stated that Cherono was their neighbour; that they come from the same clan; that he was initially the owner of parcel number 47; that the suit property has an upper and lower part; that the defendant's father was cultivating the lower part. Cherono, who was living near the suit property, divided it into three portions but they were not aware when he did that. They did not place a caution on parcel no. 467; that his father entered the suit property in 2001; that notice to vacate was issued in 2013; that Cherono was an educated man but he was not close to their family and never visited or stayed in their home.
28. He informed the court that they have not built in the suit property as they used it for cultivation only; that he is not aware of the chief's letter telling them to stop using the land because it was sold; that they never chased the defendant from the suit property; that they did not sue Cherono because he never interfered with their use of the suit property; that they sued the defendant because he is the one who jointly with Cherono issued them with the notice to vacate the suit property; that he is not aware of any discussions between his brother and the late Cherono regarding purchase of the suit property.
29. In re-examination, he stated that parcel no. 47 was 4 acres; that his father was utilizing 1 acre. His father did not lease the land from the late Cherono; that parcel number 47 was subdivided into 3 portions. The portion utilized by his family is 467; that Cherono was a neighbour and was aware that his father was utilizing the land; that his father entered the suit property without objection from Cherono in 2001 and fenced it.

Defence Case

30. D.W.1's statement filed on 11th November 2014, adopted as his evidence in chief. He stated that he had an oral lease agreement with the deceased.
31. D.W.2, Stanley Kelwon Boswony had sworn and signed a replying affidavit dated 10th November 2014 which was adopted as his evidence in chief. He stated that he bought the suit property from Cherono Chesang.
32. D.W.3, Targok Koros, relied on her witness statement recorded and signed on 18th January 2017 after it was adopted as her evidence in chief. She informed the court that Cherono Chesang (deceased) is her elder brother and that the plaintiff is her cousin while the defendant is her nephew; that the suit property initially belonged to her father; that her brother was registered as the proprietor of the suit property during land demarcation (the court observed that the defendant looked confused and was unable to give flowing evidence).
33. She stated that her brother sold the suit property to the defendant; (court points out that reference to defendant is reference to P.W.3's father and another); that they were not able to raise the money and he eventually sold the land to the defendant.
34. In cross examination, she stated that she did not know whether her brother allowed the plaintiff to enter the land or leased it to him but stated that her brother had planted trees in the suit property.
35. At close of hearing, parties filed submissions which I have read and considered. The sole issue arising from the pleadings, evidence and the submissions is whether the plaintiff has made up a case for being declared the owner of the suit property by adverse possession.



Plaintiff's Submissions

36. Concerning that issue on behalf of the plaintiff, it is submitted that the plaintiff proved his case on a balance of probabilities and the court is urged to grant him the reliefs sought. In support of the plaintiff's case reference is made to the cases of Ng'atu Farmers Cooperative Society Ltd v Ledidi & 15 others [2009]e KLR; Githu v. Ndeete [1984]KLR 776; Kairu v Gacheru [1988]KLR 297 and Waweru v. Richu [2007]1 EA 403. The cases are on principles that undergird a case for adverse possession.

Defendant's Submissions

37. In reply, the respondent submits that the evidence adduced comprised in the oral testimony of the original owner of the suit property and the conduct of the parties shows that the applicant's entry into the suit property was by consent/or permission of the owner hence incapable of forming the basis of the applicant's claim for adverse possession. The evidence is also said to show that the plaintiff and the respondent were relatives. Based on the dicta in the case of Rodgers Mwamboje v. Douglas Mwamboje [2014]e KLR and the case of Mbui v. Maranya [1993] KLR 726, it is submitted that because the plaintiff and the respondent were relatives, the burden was on the plaintiff to prove that his occupation of the suit property was not with the consent of the owner. In the circumstances of this case, it is reiterated that the owner had allowed the applicant, who is his cousin, to cultivate the suit property on request and on payment of a stipend both in cash and in kind. The applicant is said to have failed to controvert the original owner's evidence that his entry into the suit property was with the permission of the original owner.
38. The orderly use of portions of the suit property by the plaintiff and the respondent's father dictated by the deceased, is said to be further proof that the applicant's entry and occupation of the suit property was with the permission of the deceased.
39. The plaintiff is faulted for failing to make the deceased a party to the suit yet his course of action, if any, arose when the parcel he claims to have acquired title to was registered in the name of the deceased.

Analysis and determination

40. Upon analysis and consideration of the evidence adduced in this case, I do find as a fact that the plaintiff and D.W.1 were relatives. That fact, though disputed by the plaintiff's wife (P.W.2) was confirmed by P.W.1 and P.W.3. The totality of the evidence also shows that the deceased was in actual control of the original parcel of land as he had divided it into two portions, upper and lower portion. I find the evidence adduced to the effect that the deceased had allowed the plaintiff and the respondent's father to use the upper and lower portions of the original parcel respectively to be credible compared to the account offered by the plaintiff to the effect that he entered the suit property when it was bushy and unoccupied. I also find the account offered by P.W.2 to the effect that they did not know that the suit property belonged to the deceased incredible on account of the evidence of P.W.1 and 2 to the effect that the plaintiff and the deceased were relatives/from the same clan.
41. The only reasonable conclusion that can be drawn from the totality of the evidence adduced in this case is that the plaintiff's entry and occupation of the suit property was with the permission and consent of the deceased hence incapable of forming a basis of his claim that he had become entitled to the suit property by adverse possession.
42. The upshot of the foregoing is that the plaintiff's claim has no merit and is dismissed with costs to the respondent.

RULING READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 11TH OCTOBER, 2023



L. N. WAITHAKA

JUDGE

Judgement delivered virtually in the presence of:-

Mr Wainaina holding brief for Mr. Momanyi for the plaintiff

Mr. M. K Chebii for the defendant

Christine – Court Assistant

