



**Ngetich v Barmasai & another (Environment & Land Case E004 of 2022)  
[2023] KEELC 21249 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21249 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE E004 OF 2022  
L WAITHAKA, J  
NOVEMBER 1, 2023**

**BETWEEN**

**MICAH NGETICH ..... APPLICANT**

**AND**

**SIMION BARMASAI ..... 1<sup>ST</sup> RESPONDENT**

**HARON KIPROP SAWE ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. Micah Ngetich, hereinafter referred to as the plaintiff/applicant, took up the summons dated 27<sup>th</sup> July, 2022 for determination of the following questions:-
  1. Whether he had acquired title to the parcel of land known as EM/Lower Muskut/317 (hereinafter known as the suit property) by adverse possession;
  2. Whether the respondent, his heirs, agents, assigns and or successors hold the title to the suit property in trust for him;
  3. Whether the title held by Simon Barmasai Sawe and Kiprop Sawe in respect of the suit property got extinguished on the expiry of 12 years after he (the plaintiff) took possession of the suit property.
2. The suit is premised on the grounds that the plaintiff had been in occupation of the suit property since 2004; that the plaintiff had openly, peacefully and uninterruptedly been in continuous occupation of the suit property for over 12 years and that he had openly utilized the suit property without force, secrecy and permission of the owner.



3. In support of the summons, the plaintiff swore an affidavit in which he inter alia deponed that he had been in possession of the suit property since sometime in 1988; that he had been grazing animals on the suit property as well as cultivating parts of it; that his occupation, use and possession of the suit property was continuous and in excess of 20 years.
4. The plaintiff further deponed that the 1<sup>st</sup> respondent had not used or utilized the suit property since 2008, when he was registered as the proprietor and complained that on or about 23<sup>rd</sup> July 2022, the respondents tried to gain entry into the suit property claiming that they were the registered proprietors. The 2<sup>nd</sup> respondent is said to have managed to put posts on the suit property.
5. In reply and opposition to the suit/application, the 2<sup>nd</sup> respondent, Haron Kiprof Sawe, filed the replying affidavit he swore on 14<sup>th</sup> September 2022. In that affidavit, the 2<sup>nd</sup> respondent has denied the applicant's contention that he has been in use of the suit property for over 12 years since it was registered in the name of the 1<sup>st</sup> respondent and deponed that the suit property belongs to their family and was held by the 1<sup>st</sup> respondent in trust for them.
6. The 2<sup>nd</sup> respondent has further deponed that they have been in peaceful occupation of the suit property and the subdivisions therefrom; that the applicant is in use and occupation of LR. NO. E/Marakwet/Lower Muskut/319 which is adjacent to the suit property.
7. Explaining that the suit property has since been subdivided into E/Marakwet/Lower Muskut/752, 753, 754, 755, 756 and 757 and subdivision numbers 753 and 755 registered in his name and the name of his brother, Basic Patrick Keitany respectively; the 2<sup>nd</sup> respondent has deponed that the other subdivisions are in the process of being registered in the names of his other family members who are in full occupation of the subdivisions.
8. Terming the application frivolous and lacking in merits, the 2<sup>nd</sup> respondent contends that the applicant has not made up a case for being granted the orders sought as he has not produced any evidence showing that he has occupied the suit property openly and peaceably.
9. Pursuant to directions given on 29<sup>th</sup> October 2022, the originating summons was converted into a plaint and the replying affidavit to a defence and the matter set down for hearing by viva voce evidence.

## **Evidence**

### **The Plaintiff's Case**

10. When the suit came up for hearing, the plaintiff who testified as P.W.1 relied on his statement filed on 14<sup>th</sup> April 2021, after it was adopted as his evidence in chief. He produced an official search certificate in respect of the suit property and photographs showing how he had used the suit property as Pexbt 1 and 2(a) to 2(d) respectively.
11. He stated that he had been in use and occupation of the suit property since 1988; that he has cows on the suit property and that in the past he was cultivating cotton and groundnuts in the suit property; that the suit property is registered in the name of the 1<sup>st</sup> defendant whom he does not know and that the 2<sup>nd</sup> defendant, whom he knows, visited the suit property in 2022. Further, that the suit property was subdivided into parcels Nos. 752, 753, 754 and 756 in 2021.
12. In cross examination, he stated that he lives in parcel number 319 which belongs to his father; that the cows in photographs he produced as Pexbt 2a and 2d are in parcel number 319 and that he did not produce any evidence showing that he was cultivating the suit property.



13. He acknowledged that he tried to deceive the court by stating that the pictures in the photographs he produced as Pexbt 2a and 2d show his activities in the suit property. He admitted that he has not put up any structures in the suit property and that the trees in the suit property were not planted by him, are natural.
14. In re-examination, he stated that his case is based on use of the suit property and not living thereat.
15. Dinah Kiprono, informed the court that the plaintiff had been farming and utilizing the suit property since 1988.
16. In re-examination she stated that she all along knew that the suit property belonged to them.
17. She stated that they had not cultivated the suit property for a long period of time (about 10 years) but had been utilizing it for grazing.
18. Joseph Kemboi, informed the court that the suit property was being utilized by the plaintiff and his family (plaintiff's family) for grazing and growing crops.
19. He contradicted himself by stating that the plaintiff is living in the suit property while at the same time stating that the plaintiff doesn't live there.
20. In re-examination, he stated that there is no boundary between Parcels 317 and 319.
21. Kipkurui Toroitich Kibos, informed the court that the plaintiff lives in land that belonged to his father and grandfather; that the trees in the suit property were not planted by any person and that the suit property is fenced using live sisal plants.

### **The Defendant's Case**

22. D.W.1, informed the court that the suit property is family land and is registered in the name of his elder brother, Simon Barmasai; that the suit property was subdivided into parcels number 752, 753, 754, 755, 756 and 757; that he is the registered owner of parcel number 753 and that the plaintiff's land is parcel number 319.
23. He further informed the court that the suit property and the plaintiff's parcel 319, are separated by a road and parcel number 318 which belongs to Kipkurui Cherotich.
24. They conducted a search in May 2021 and established that there was no restriction registered against the register for the suit property.
25. He further stated that the plaintiff has neither entered the suit property, erected any structures thereat nor cultivated it.
26. On the plaintiff's contention that the 1<sup>st</sup> defendant has not defended the suit, he stated that he is not aware that the 1<sup>st</sup> defendant has not defended the suit and explained that he is in court in his own capacity and on behalf of the 1<sup>st</sup> defendant.
27. He admitted that he did not file any authority to appear or plead on behalf of the 1<sup>st</sup> defendant.
28. Maintaining that the plaintiff does not graze his cows in the suit property, he stated that they do not graze their livestock in the suit property every day because they live away from it, 3km away.
29. He maintained that the 1<sup>st</sup> defendant held the suit property in trust for them.
30. In re-examination, he stated that the replying affidavit he swore on 27<sup>th</sup> July 2022 was deemed as his reply to the originating summons.



31. He further stated that before he fenced the suit property, there was a live fence that divided the suit property and parcel number 318 belonging to the plaintiff's brother.
32. At close of hearing parties filed submissions which I have read and considered.

### **Submissions**

33. From the pleadings filed in this case, the evidence and the submissions I find the sole issue for the court's determination to be whether the plaintiff has made up a case for being granted the orders sought.

### **The Plaintiff's Submissions**

34. Concerning that issue, the plaintiff through his submissions filed on 27<sup>th</sup> June, 2022 inter alia submits that the plaintiff, through his own testimony in case and that of his witnesses, proved that he had been in use of the suit property, exclusively, openly, peaceably and without the permission of the 1st respondent for the requisite period of time required to acquire title to land by adverse possession. Terming his case against the 1<sup>st</sup> defendant/respondent who was the registered owner of the suit property before it was transferred in the name of the 2<sup>nd</sup> defendant and others undefended, the plaintiff urges the court to grant him the orders sought.

### **The Defendant's Submissions**

35. In his submissions filed on 22<sup>nd</sup> June 2023, the 2<sup>nd</sup> respondent has submitted that the plaintiff failed to prove that he was in actual occupation of the suit property; that his use, if at all he was in use of the suit property, was notorious and open and that the use was for a continuous period of 12 years. It is pointed out that the plaintiff departed from his pleaded case to the effect that he took possession of the suit property in 2004 by leading evidence that he took possession of the suit property in 1988.
36. It is further submitted that the plaintiff failed to prove that he entered the suit property with the intention to acquire it. Based on the decisions in the case of Christopher Kioi and another vs. Winnie Mukolwe and 4 other (2018) e KLR where it was inter alia stated that where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner's title, the defendant submits that based on the pleadings and the weight of evidence adduced, the plaintiff failed to establish any claim of adverse possession over the suit property. The court is urged to dismiss the plaintiff's suit with costs to the defendants.

### **Analysis and determination**

37. For the plaintiff to be declared to have acquired title to the suit property, he needed to prove that the title owner had been dispossessed of his title by his adverse possession of the suit property or by his discontinued possession of the suit property. In that regard see the case of Wambugu v. Njuguna 1983 (KLR) 171 where it was inter alia held:-

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose which he intended to use it.”

38. As was observed in the case of Josinter Atieno Ouma & another v. Joshua O. Omiti & another (2018) e KLR, the possession by the adverse possessor must be continuous, open and uninterrupted for a period not less than 12 years and the adverse possessor must over the period engage in acts in regard to



the property which are inconsistent with the right of the true owner. The acts must be hostile to the rights and interests of the real owner.

39. In the circumstances of this case the plaintiff pleaded that he took occupation of the suit property in 2004 and had been using it to graze animals and cultivate parts of it until 23<sup>rd</sup> July, 2022 when the 2<sup>nd</sup> defendant entered the suit property and put posts in the suit property.
40. When the case came up for hearing he led evidence to the effect that he entered the suit property in 1988 and had been in use of the suit property from that time until sometime in 2022 when the 2<sup>nd</sup> defendant visited the suit property. That evidence was clearly at variance of the plaintiff's pleaded case. The plaintiff also pleaded that his use of the suit property included planting trees therein. However, during hearing, he admitted that the trees in the suit property were natural and had not been grown by anyone. He also produced evidence allegedly showing his activities in the suit property but admitted that the photographs were not taken in the suit property. Those gaps in the evidence of the plaintiff painted the plaintiff and his witnesses, particularly P.W.3, who claimed that the plaintiff was cultivating in the suit property, thereby contradicting the evidence of P.W.2 to the effect that they had not been cultivating the suit property for a long period of time (more than 10 years) as unbelievable witnesses.
41. Whilst it is possible that the plaintiff might have occasionally used the suit property to graze his animals there in, an assessment of the totality of the evidence adduced by the plaintiff did not paint him as a person who, if at all he entered the suit property, he had the intention to dispossess the 1<sup>st</sup> defendant his title to the suit property. The fact that he never undertook any serious development in the suit property like erecting structures therein, growing trees therein coupled with his long period without carrying his alleged crop growing activities therein, though not necessary for purpose of proving his pleaded case of adverse possession, nevertheless, coupled with the gaps listed herein above, make this court have reason to believe that his use and possession of the suit property, if at all he was in use and possession of the suit property, to have not been accompanied with the necessary animus possendi.
42. The upshot of the foregoing is that the plaintiff has not made up a case for being granted the reliefs sought. Consequently, I dismiss his case with costs to the 2<sup>nd</sup> defendant/respondent, who defended it.

**DATED, SIGNED AND DELIVERED AT ITEN THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2023.**

**L. N. WAITHAKA**

**JUDGE**

Ruling read virtually in the presence of:-

Mr. Korir for the plaintiff

Mr. Kigen for the defendants

Court Assistant – Christine

