Hinga & 2 others v Tirop; Tirop (Plaintiff to the Counterclaim); Hinga & 3 others (Defendant to the Counterclaim) (Environment & Land Case 260 of 2014) [2022] KEELC 975 (KLR) (2 March 2022) (Judgment)

Joseph Hinga & 2 others v Joseph Tirop [2022] eKLR

Neutral citation: [2022] KEELC 975 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 260 OF 2014

SM KIBUNJA, J

MARCH 2, 2022

BETWEEN

JOSEPH HINGA ..... 1ST PLAINTIFF

JACINTA GATHONI ..... 2ND PLAINTIFF

ISAAC KARIUKI ..... 3RD PLAINTIFF

AND

JOSEPH TIROP ..... DEFENDANT

AND

JOHN TIROP ..... PLAINTIFF TO THE COUNTERCLAIM

AND

JOSEPH HINGA ..... DEFENDANT TO THE COUNTERCLAIM

JACINTA GATHONI ..... DEFENDANT TO THE COUNTERCLAIM

ISAAC KARIUKI ..... DEFENDANT TO THE COUNTERCLAIM

JAMES MWANGI ..... DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. The Plaintiffs commenced this suit vide the plaint dated the 7th August, 2014 seeking for the following prayers;

> " i. "An order permanently restraining the Defendant, his/her servants and or agents from trespassing into, constructing upon, selling, transferring, leasing and or in any other manner whatsoever interfering with land parcel number LR No.39181/21;
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> ii. An order of demolition.
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> iii. Costs of the suit.
>
> iv. Any other further reliefs as the court may be pleased to grant."

The Plaintiffs avers that they purchased land parcel I.R No. 39181, the suit property, that measures 5.339 Ha. from one Richard Ruoro Waguru on the 1st November 1993, and are therefore the registered owners thereof. That in July 2014, the Defendant forcefully entered onto a portion of the land, constructed a pit latrine and deposited materials in readiness for construction without their permission or authority. That the Defendant's actions were illegal and their prayers should be granted.

2. The Defendant opposed the Plaintiffs' claim through his filed statement of defence and counterclaim dated the 15th September, 2014 as amended on the 14th March, 2018 pursuant to the leave granted on the 7th March 2018. The Defendant avers that the suit land is land parcel. R No. 8451/21, and is a portion of IR 39181/1. That the land had been bought by the family of James Mwangi alias Jimmy Mwangi in 1991 who lived on it with his family until 1992, when they relocated to Eldoret due to the tribal clashes. That the Plaintiffs are wife and children to the said James Mwangi. That the sale agreement of 1st November 1993 is falsified as the 1st and 3rd Plaintiffs were minors then. That in 1994 he entered into a sale agreement with James Mwangi under which the defendant was to buy the suit land measuring 5.339 hectares at Kshs. 200,000 per acre. The purchase price was to be paid in instalments. That the permanent house thereon was valued at Kshs. 2,000,000 for purposes of the sale. That on the 5th May 2010 the said vendor offered to sell the house and four (4) acres of land at Kshs. 2,750,000, but after further discussions and taking into account the Kshs. 1,300,000 Defendant had by then paid, and the length of time he had been in possession and the developments he had undertaken, they agreed that the vendor to retain the permanent house and seven (7) acres of the land, while the Defendant was to get six (6) acres. That the Plaintiffs' family then sold four (4) acres of their seven (7) acres to one Jackline Ohanga. That the Plaintiffs then resorted to asking the Defendant to vacate from the six (6) acres land claiming there was no sale agreement. That his entry onto the suit land in 2014 was lawful as it was pursuant to the sale agreement with James Mwangi, the husband to the 2nd Plaintiff, and father to the 1st and 3rd Plaintiffs. The Defendant therefore prays for the Plaintiffs suit to be dismissed with costs and judgment be entered in his favour in terms of his counterclaim as follows;

> " a. "A declaration that the Plaintiff (John Tirop) is the proprietor of 6 acres comprised in land parcel I.R. 39181 (LR 8451/21).
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> b. An order for specific performance compelling the Defendants to surrender original Title Deed in respect of land parcel I.R. 39181 (LR 8451/21) and to

carry out subdivision of land parcel number 8451/21 and to execute transfer forms and transfer 6 acres thereon to the Plaintiff.

c. In the alternative, a claim that the Plaintiff has been in peaceful, continuous, uninterrupted possession since 1994 and has acquired title to the said land by adverse possession.

d. Costs of the suit and costs of the counter-claim."

3. The Defendant's counterclaim is opposed by James Mwangi, the 4th Defendant thereof, through his filed statement of defence dated the 5th November, 2019 wherein avers that land parcel I.R No. 39181/1 (LR No. 8451/21) has never been registered in his name, but in the names of the Plaintiffs. He denied having ever entered into a sale agreement with the Defendant over the suit land in 1994, but knew that the Plaintiffs had allowed the Defendant to use the as a licensee until 2013 and therefore, he cannot claim to have acquired title under adverse possession. He therefore sought to have the counterclaim dismissed with costs.

4. That during the oral hearing, the 2nd, 3rd, and 1st Plaintiffs testified as PW1 to PW3 respectively, while the Defendant testified as DW1 and called Paul Lagat Kiplagat who testified as DW2. The 4th Defendant in the counterclaim testified as DW3.

5. The learned counsel for the Plaintiffs, who are also the 1st to 3rd Defendants in the counterclaim, filed their submission dated the 21st October 2021, while that for the Defendant, who is the Plaintiff in the counterclaim, filed theirs dated the 10th November 2021. The learned counsel for the 4th Defendant to the counterclaim filed their submissions dated the 19th November, 2021.

6. The following are the issues for the court's determinations;

a. Whether there exists a valid and enforceable sale of land agreement over the suit land or part thereof, between the parties or some of the parties herein;

b. Whether the Plaintiffs are the registered proprietors of the suit land;

c. Whether the 4th Defendant to the counterclaim had any legal interests in respect of the suit land, or part thereof, that he could enter into a sale agreement with the Defendant/counterclaimant over;

d. Whether the Defendant's claim of title to the suit land or part thereof, as an adverse possessor has been established;

e. Who pays the cost in the suit and counter claim.

7. The court has carefully considered the parties' pleadings, oral and documentary evidence, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions;

a. The Defendant's claim of rights and interest in the suit land are predicated upon the existence of an agreement entered into on 1st December, 2010. This document takes the form of the minutes confirming what transpired during a meeting that was held at the Defendant's house. The Defendant describes the meeting as being one where the dispute between himself and the 4th Defendant in the counterclaim was being mediated upon by the elders. Throughout the hearing of this matter, the Plaintiffs who are the registered owners of the suit land, adamantly insisted that they did not sell the suit land to the Defendant. The Defendant on the other hand, insisted that he had entered into an oral agreement with the 4th Defendant to the counterclaim, whom he presumed was the lawful owner, or one authorised to sell the suit land by the

registered owners, in the year 1994, upon which he took possession of the entire suit land. That in 1997, he started making payments towards the purchase of the suit land and had paid Kshs. 1,300,000 by the year 2010, when he learnt about the 4th Defendant's intentions of selling the suit land to another person.

b. The 4th Defendant submitted that the "agreement" that the Defendant sought to rely on offends the provisions of section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya. Section 3(3) of the Law of Contract Act provides that no claim on the basis of a contract of disposition of interest in land can be entertained unless the contract is in writing, executed by the parties and attested to. According to Section 3(7) of the Law of Contract Act, the provisions of Section 3(3) do not apply to contracts that were entered into before 1st June, 2003. If there was indeed a contract between the Defendant and the 4th Defendant in the year 1994, then it would be governed by the provisions of section 3(3), before its amendment in 2003. Before the amendment in 2003, Section 3(3) stated as follows:

> " No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it;
>
> Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract-
>
> (i) Has in part performance of the contract taken possession of the land or any part thereof; or
>
> (ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract."

c. The Plaintiffs and the 4th Defendant admitted that the Defendant took possession of the suit land in the year 1994. The 4th Defendant further admitted that he received a sum of Kshs. 1,300,000.00 from the Defendant between 1997 to 2010, but denied that the said amount was consideration for the purchase of the six (6) acres parcel from the suit land. That had the 4th Defendant's capacity to transact on the suit land herein not have been in issue, the oral contract between the him and the Defendant would not have violated or offended the provisions of section 3(3) of the Law of Contract Act.

d. The crucial question that the court must address itself to at this point is whether the Defendant acquired any enforceable rights of ownership over a portion of the suit land measuring six (6) acres under the transactions between him and the 4th Defendant, when the 4th Defendant was neither the registered owner of the suit land nor was he an authorised agent of the Plaintiffs who are the owners of the suit land duly mandated to transact on their behalf. The court take note of the fact that the 4th Defendant is the husband of the 2nd Plaintiff, and the father of the 1st and 3rd Plaintiffs. PW 1 testified that the suit land was bought by the 4th Defendant and registered in names of the Plaintiffs. DW 1 testified that he believed that the suit land belonged to the 4th Defendant, until the time he subsequently learnt that his belief was not accurate.

e. The Plaintiffs submitted that the Defendant's claim must fail since it offends the principle of nemo dat quad non habet" (no one can give what he does not have). The principle of nemo dat

quod non habet is embodied in the provisions of Section 23 of the Sale of Goods Act Chapter 31 of Laws of Kenya which stipulates as follows:

> " 23(1) Subject to the provisions of this Act where goods were sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell."

That it was the testimony of the Defendant that on one occasion, the 2nd Plaintiff told him that she had been sent by the 4th Defendant to ask him for money and that on 31st July, 1997, he gave her Kshs.300,000 for onward transmission to the 4th Defendant. The 4th Defendant confirmed having received a total of Kshs.1,300,000 from the Defendant, but he insisted that the amount was a gift to him, and not consideration for the purchase of a portion of the suit land.

f. That in the case of Daniel Kiprugut Maiywa v Rebecca Chepkurgat Maina [2019] eKLR, the court made the following pronouncement:

> " The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to land holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the land while the person who received the invalid title owns nothing. However, the law provides some exceptions to this rule in the following certain circumstances; For example where a person buys the land in good faith believing that the person who sold it to him was the owner or authorized agent of the owner; where the land is sold by a mercantile agent who is in possession of the goods or documents of title; sale by a joint owner who sells the land with the permission of the co-owner or sale by a person in possession of goods or land under a voidable contract. This principle was applied in the case of Haul Mart Kenya limited v Tata Africa Kenya limited [2017] eKLR and Katana Kalume v Municipal Council of Mombasa [2019] eKLR."
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> That unfortunately, the circumstances of the instant case do not fall within the exceptions to the principles of nemo dat. The court comes to the finding that the 4th Defendant had no title in the suit land to pass on to the Defendant, when the alleged agreement that the Defendant relies on was made.

g. A person intending to purchase land is ordinarily required to conduct what is commonly referred to as due diligence, which is an exercise that entails at the minimum, obtaining an official search to confirm details of the registered owner of the land, and or whether the land is encumbered in any way. Had the Defendant conducted an official search before making any payments to the 4th Defendant, he would have saved himself a lot of turmoil, as he would have known from the onset who the legally registered owners of the suit property were. In view of all the foregoing, the court finds that the so called agreement for sale of land of 1st December, 2010 is not a contract, capable of being enforced by a court of law. That in the Defendant's efforts to rely on the so called agreement of 1st December, 2010 to obtain orders of specific performance to compel the Plaintiffs to hand over the original title deed in respect of the land parcel number I.R. 39181 (LR 8451/21), he cited the decision in the case of Reliable Electrical

Engineering Ltd. V Mantrac Kenya Limited (2006) eKLR, but the court finds that decision is not applicable in this case he has not proved the existence of a valid enforceable contract to warrant the exercise of the court's discretion to issue an order of specific performance.

h. That in the case of Gabriel Mbui V Mukindia Maranya [1993] eKLR, the court made the following observation:

> "... it is possible to define 'adverse possession' more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it."

The law on adverse possession is anchored on Section 7,13,17,37 & 38 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya, and Section 28 (h) of the Land Registration Act No. 3 of 2012. Any party claiming to have acquired rights of adverse possession must prove the ingredients of adverse possession to the satisfaction of section 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya. The Court of Appeal in the case of Mtana Lewa V Kahindi Ngala Mwagandi [2015] eKLR held as follows:

> "... Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs 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 or 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."

And in the case of Manason Ogendo Afwanda V Alice Awiti Orende & Another [2020] eKLR, the court cited with approval the decision of the in the case of Tabitha Waitherero Kimani v Joshua Ng'ang'a [2017] eKLR, where the ingredients of adverse possession were outlined as follows:

> "(A) Open And Notorious Use Of The Land. For this condition to be met the adverse party's use of the land is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the land by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the land, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
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> (B) Continuous Use Of The Land – The adverse party must, for Statute of Limitations purposes, hold that land continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous

possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true land owner and the date on which he returned.

(C) Exclusive Use Of The Land – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's land, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

(D) Actual Possession of The Land – The adverse party must physically use the land as a land owner would, in accordance with the type of land, location, and uses. Merely walking or hunting on land does not establish actual possession."

The testimonies given by PW1 to PW3 is conflicting on whether the Defendant's possession or occupation of the suit land in 1994 was with their permission. It is however probable that the Plaintiffs had not themselves leased out the suit land to the Defendant. That on the other side, the confirmed interactions between the Defendant and the 4th Defendant to the counterclaim leaves no doubt that the latter had authorised the former to use the land. The exact nature of their understanding has not come out clearly, but the fact is that the 4th Defendant received Kshs.1,300,000 from the Defendant, which he called a gift from one elder to another. That it follows that so long as the Defendant's possession of the suit land was on the basis of the permission from the 4th Defendant who he believed then to be the owner of the land or with authority of the owners to transact on it, the time for adverse possession could not start to run in his favour.

i. That the Defendant's claim is that he took possession of the entire suit land in the year 1994, that was interrupted in the year 2010, when his occupation was reduced to only a portion measuring six (6) acres. That thereafter a portion of the remaining seven (7) acres of the suit land was sold to one Jackline Ohanga, and another part where the 4th Defendant's permanent house was sold to another. The said Jackline and that other purchaser are not parties, or witnesses in this proceedings. PW 3 testified that DW 1 is still in possession of the suit land to date, but the Defendant confessed that it was his son who is in occupation of the six (6) acre portion of the suit land, and who has built a permanent house thereon. That from the foregoing, it is clear the Defendant's possession of the suit land falls into two stints. The first one being for the period between 1994 to 2010, when he was in possession of the entire suit land. The second stint is over the six (6) acre portion whose possession he continued beyond the 2010 to the 2014 when this suit was filed. That while the periods covered in the two stints comes to 16 and 20 years respectively, and therefore exceed the period of twelve (12) years required by statute in a claim for adverse possession, the Defendant's possession throughout the period was pursuant to the authority or permission obtained from the 4th Defendant to the counterclaim, and therefore never amounted to adverse possession against the title of the registered proprietors, the Plaintiffs.

j. That as already held above, the 4th Defendant had no legal interest or title over the suit land that he could sell and transfer to the Defendant when he received a sum of Kshs. 1,300,000, which he referred to as a gift from an elder to another. That sum of money that he acknowledged having received could not have been a gift as he alleged, but was meant to be purchase price of six acres of the suit land, which was never registered in his name. The Defendant is definitely

entitled to get his money back with interest at courts rates from the dates of receipts to the date of full reimbursement.

k. That in view of the central role played by the 4th Defendant, who is husband to the 2nd Plaintiff and father to the 1st and 2nd Plaintiffs, and his apparent relation with the Defendant, the court finds this is a suitable case where each party should bear their own cost in both the suit and counterclaim, notwithstanding the provisions of section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya.

8. That flowing from above the court finds as follows;

a. That the Plaintiffs have proved their case against the Defendant, John Tirop, to the standard required under the law. That accordingly the court orders that;

i. The Defendant do vacate the suit land, or any part thereof in his possession, within the next ninety (90) days, and give vacant possession of the suit land to the Plaintiffs, who are the registered proprietors, and in default eviction and demolition orders to issue.

ii. That each party in the Plaintiffs' suit to bear their own costs.

b. That the Defendant, who is the Plaintiff in the counterclaim, has failed to prove his case against the Plaintiffs, who are 1st to 3rd Defendants in the counterclaim, to the standard required and his claim on all prayers is dismissed, with an order that each party bears their own cost.

c. That having become apparent from the evidence tendered, and on admission by the 4th Defendant in the counterclaim that he received a total of Kshs. 1,300,000 from the Defendant, Plaintiff in the counterclaim, the court finds this an appropriate instance to order the said amount be refunded to the Defendant, John Tirop, by the 4th Defendant, James Mwangi, with interests at courts rates from the date of receipt until payment in full.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 2ND DAY OF MARCH, 2022

S.M.Kibunja,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

Plaintiffs: Absent

Defendants: Absent

Counsel: Ms.Kiptoo for Plaintiffs

Mr. Yego for Defendant

Mr.Aseso for 4th Defendant

COURT ASSISTANT: ONIALA

S.M.Kibunja,J.

ELC ELDORET