



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO.78 OF 2013

BENARD KEMBOI ROTICH.....1ST PLAINTIFF

JOSEPH CHIRCHIR KOMEN.....2ND PLAINTIFF

VERSUS

JULIUS KWAMBAL.....1ST DEFENDANT

KIBET KWAMBAL.....2ND DEFENDANT

FRANCIS KWAMBAL.....3RD DEFENDANT

CHEROP KWAMBAL.....4TH DEFENDANT

BENARD KANGONGO RUTTO.....5TH DEFENDANT

ROBINSON RUTTO.....6TH DEFENDANT

JUDGMENT

This suit was originally filed by the plaintiff in the High Court as Eldoret HCCA No. 380 of 1997 against Pius Birir (now deceased) claiming adverse possession over land parcel IRONG/KITANY/194 having lived on land parcel number IRONG/KITANY/ 194. The plaintiff further filed Eldoret HCCC No. 271 of 2000 seeking an order of injunction against the Defendants, damages for trespass and mesne profit.

On 17th May 2006 Eldoret HCCA No. 380 of 1997 (OS) was consolidated with Eldoret HCCC No. 271 of 2000 and Eldoret HCCC No. 271 of 2000 was selected as the lead file whereby the Pius Birir the Defendant in the Originating summons was made the 5th Defendant.

Pursuant to the establishment of the Environment and Land Court, the suit was given a new number being Eldoret ELC No. 78 of 2013. Pius Birir subsequently died and an application was made to have him substituted with Benard Kangongo Rutto and Robinson Rutto, the 5th and 6th Defendants respectively. The said application was allowed and the plaint amended accordingly.

Before the matter could proceed the initial Plaintiff, Kipchirchir Cherutich also died on 16th January 2017 and he was substituted by Benard Kemboi Rotich and Joseph Chirchir Komen.

By an amended plaint dated 14th February, 2020 the plaintiffs sued the defendants seeking for the following orders:

- a) THAT this Honourable Court do declare that the proprietor's interest of the late Pius Birir in land parcel Number IRONG/KITANY/194 situate in Iten Marakwet District is extinguished.
- b) THAT the 1st and 2nd Plaintiffs be registered as the absolute proprietors of the said land parcel number IRONG/KITANY/194 by way of adverse possession.
- c) A mandatory injunction compelling the Defendants, their agents and/or servants to vacate the parcel of land known as IRONG/KITANY/194 forthwith.

d) A permanent injunction to restrain the Defendants, their agents and servants from entering, constructing on, ploughing, removing the fence of, wasting, selling, alienating or in any other manner whatsoever dealing with the land parcel known as IRONG/KITANY/194.

e) Damages for trespass and mesne profits.

f) THAT this Honourable Court be pleased to make such alternative or further orders as it may deem just and equitable.

g) Costs and interests.

PLAINTIFFS' CASE

PW1 the late Kipchirchir Cherutich testified on 22nd November, 2004 in HCCC NO. 380 OF 1997 (OS) and stated that he entered into an oral agreement to purchase the suit land from the Changwony Cherop for Kshs. 550/= in the year 1961 who was not residing on the suit land at the time of purchase.

It was PW1's evidence that Changwony Cherop killed someone in 1961 and had to leave Kitany and PW1 took possession of the suit land in 1962. PW1 further stated that he fenced the land, started using it for farming and grazing his cattle but later learnt that his neighbour Pius Ruto Birir got a title for the suit land in his name

PW1 produced a copy of official search certificate as Pex 1 and that he was the one in occupation since 1962. PW1 also testified that one Francis Kwambai the son of the late Chepkwony Arap Cherop was aware that his father sold the suit land to him but the late Chepkwony Arap Cherop's grandchildren were not aware of the said purchase.

PW1 stated that on 17th November, 2000 Julius Kwambai built a house on the suit land since he claimed the suit land belonged to his father but upon completion he left the house unoccupied.

On cross examination, PW1 stated that he had no title to the suit plot No. 194 and sued the defendants seeking for an order of injunction when they constructed a house on the suit land. PW1 also stated that at the time he bought the land it did not have a number but it was later surveyed in 1965 and assigned a number.

PW2 Christopher Tuitoek Kiplagat adopted his witness statement and stated that the suit land was registered in the name of the late Pius Kwambai by mistake.

On cross examination, PW2 stated that the late Changwony Cherop cleared the suit land but he was forced to relocate from Keiyo to Uasin Gishu when he killed someone. He stated that it was agreed in the meeting held at the Chief's office that Pius Birir bought land from Soti Chemweno.

PW2 stated in re-examination that the late Kipchirchir Cherutich was not present at the land dispute meeting and further that although the suit land was erroneously registered in the name of Pius Birir, the Plaintiffs were the ones using the land.

PW3 Samuel Kangogo Ruto adopted his statement dated 7th June, 2016 and stated that he was a witness to the oral agreement for the purchase of suit land by the late Kipchirchir Cherop who paid the full purchase price, took possession of the suit land, constructed a fence and caused the suit land to be amalgamated with his land. PW 3 stated that the other parties who witnessed the aforementioned sale had since passed on.

During cross examination, PW3 confirmed that after Chengwony Cherop the initial owner of the suit land killed his brother, fled from Kaptagat to Uasin Gishu but that PW1 paid the purchase price for the suit land.

PW4 Joseph Kipchirchir Komen a son to PW1 produced a copy of PW1's death certificate as Pex 5 a copy of the Grant of Letters of Administration as Pex 6, and a copy of the official search over IRONG/KITANY/196 as Pex 7. PW4 further stated that Pius Birir is the owner of IRONG/KITANY/177 of which he produced a copy of official search

It was PW4's evidence that title over the suit land was erroneously registered in the name of Pius Birir and when Pius Birir learnt about the mistake, he did not remove PW1 and his children from the suit land. PW4 stated that at an elders meeting in 2013, it was resolved that the suit land belongs to the PW1 but plot No.177 belongs to Pius Birir. PW4 produced a copy of the acknowledgement as Pex 10 and a copy of the map for Kiptarakwa Kitany Area as Pex 11 and a copy of the sheet 3 and 4 as Pex 12(a) and (b).

PW5 Benard Kemboi Rotich testified and stated that PW1 was his grandfather and that he had been appointed an administrator over his estate. He further stated that they stay on plot No. 196 but that they graze their cows on the suit land. He confirmed that they have always been in possession of the suit land but in the year 2000, the Defendants built a house on the suit land which house they do not live in.

The plaintiffs closed their case and urged the court to grant the orders as prayed.

DEFENDANTS' CASE

DW1 William Kipyego testified on behalf of the defendants and stated that Changwony Cherop filed a complaint at the Chief's office where he stated that Soti Chemweno took advantage of his absence to register the suit land in the name of Pius Birir who was said to have bought the suit land from Soti Chemweno. He produced the minutes of the meeting dated 6th March, 1997 as Dex 1.

Upon cross examination, DW1 stated that he had no evidence to prove that he had been serving as a Chief and further that he was not aware that Chengwony Cherop had sold the suit land to Pius Birir. DW1 stated that the suit land was mistakenly registered in the name of Soti Chemweno who sold it to Pius Birir but Pius Birir did not occupy the land.

The defendants closed their case after the testimony of DW1

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiffs filed submissions and listed the following issues for determination:

- a) Whether the Plaintiffs have proved adverse possession of the suit property, IRONG/KITANY/ 194.
- b) Whether the Plaintiffs have proved trespass

On the first issue whether the Plaintiffs have proved adverse possession to the suit property, counsel relied on the provisions of Sections 7, 13, 17 and 38 of the Limitation of Actions Act Cap 22 laws of Kenya.

Section 7 of the Limitation of Actions Act provides that :

"An action may not be brought by any person to recover land after the end of twelve years front the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person"

Section 13 of the Limitation of Actions Act provide that:

"(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession....."

Counsel also cited the provisions of Section 17 which provides that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

Ms.Odwa relied of Section 38 which states:-

"38. (1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. "

Counsel further submitted that in order to establish adverse possession, a party has to demonstrate, exclusive possession, adverse rights of the paper (title) owner, intention to possess (animus possidendi). Ms. Odwa submitted that PW1 had lived on the suit parcel of land IRONG/KITANY/194 and 196 which parcels of land were adjacent to each other since 1962.

Counsel submitted that the plaintiff entered into an oral agreement and that section 3 (3) of the Law of Contract was not yet in force and that the suit land had been registered in the name of Pius Birir. Further that PW1's evidence was corroborated by all the witnesses called to testify on behalf of the plaintiff.

On the second condition (adverse rights of the paper (title owner), counsel submitted that PW 1 upon taking possession of the suit land pursuant to the sale agreement between him and Kwambai Cherop, the said Kwambai Cherop neither dispossessed him of the land nor made any claim over the land. Further that when the land was subsequently registered in the name of Pius Birir on 14th December 1973, no attempt was made by Pius Birir to evict the Plaintiff despite knowing that the Plaintiff was in occupation.

Ms. Odwa submitted that as at the time of institution of the claim of adverse possession in 1997 the plaintiff had been in occupation uninterrupted for over 30 years hence he has proved his claim of adverse possession.

On the third condition (intention to possess - *animus possidendi*, counsel submitted that PW I has been in occupation of the land continuously, farming and rearing cows on it for over a period of 30 years.

Counsel relied on the case of **Public Trustee v Wanduru Ndegwa 119841 eKLR** where the Court of Appeal held that:

'.... adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August, 1978 from Karuga Wandai & Co.

Advocates. From 18th August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18th August, 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7th February, 1991.....'

Counsel submitted that there was no evidence tendered by the Defendants to deny that plaintiffs had been in occupation of the suit land for over 12 years. That the Defendants' only witness testified that he was the Chief who presided over a dispute between Changwony Cherop and Soti Chemweno who had sold plot No. 177 to Pius Birir but caused survey and subsequent registration of the suit land in favour of Pius Birir.

On the issue of trespass and eviction of the 1st to 4th defendants, counsel submitted that the 1st-4th Defendants nether led any evidence to counter the plaintiffs' testimony nor claimed any legal or equitable right or interest over the suit land. Counsel therefore submitted that the plaintiffs evidence was unchallenged hence the court should enter judgment based on the plaintiffs' evidence as presented.

Ms. Odwa cited a text Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at p923, where trespass to land is defined as follows :-

"Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another..."

Counsel submitted that the 1st - 4th Defendants were trespassers as they entered the suit land without permission. Counsel therefore urged the court to find that the 1st - 4th Defendants were trespassers and grant an order of injunction, damages for the trespass and mesne profits.

DEFENDANTS'SUBMISSIONS

Counsel for the defendants reiterated the evidence of the parties and submitted that the issues for determination are whether her the Plaintiffs have demonstrated their claim for adverse possession. and whether the Plaintiffs are entitled to damages for trespass and mesne profits plus costs.

Counsel further submitted that the Plaintiffs' claim for adverse possession must fail since they directed the claim against late Pius Birir's who was the registered as an owner but the rightful proprietor was the late Kwambai Cherop. Counsel relied on the case of **MTANA LEWA V. KAHINDI NGALA MWANGANDI [2015] eKLR** where the Court defined adverse possession as:

"Adverse Possession is essentially a situation where a person takes Possession of land, 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 12 years. "

Counsel also cited the case of **DANIEL KIMANI RUCHINE & OTHERS V. SWIFT RUTHERFORD CO LTD & ANOTHER [1977] eKLR** where the Court held that time does not start to run in a claim for adverse possession unless and until the true owner is dispossessed of his land. Counsel further submitted that from the evidence it is clear that the Plaintiffs have not been in continuous uninterrupted possession of the suit land for 12 years as time started running only after the rightful owner of the suit land, the late Kwambai Cherop came to learn of the mistake that resulted in the late Pius Birir being registered as the owner of the suit in the year 1997.

Counsel submitted that the plaintiffs evidence was contradictory on the amount paid as purchase price and relied on the case of **GACHUMA GACHERU V MAINA KABUCHWA [2016] eKLR** where the court held as follows:

"This is a clear testimony of material contradiction on the evidence of the appellant as to the exact amount he paid to the respondent. If the appellant cannot remember the actual sale purchase and amount he paid for the property he is claiming, he cannot be trusted to be telling the truth."

It was counsel's submission that in the event that the Court finds that an oral agreement for the sale of the suit land existed, then it operated as a licence or permission and as such the Defendants action of gaining access to the suit land in the year 2000 and their construction of a structure amounts to the repudiation of the sale agreement that may have existed therefore time begun to run in the year 2000 when the contract was repudiated.

Counsel cited the case of **MAGABE CHACHA JOSEPH V JOSEPH BOGERE KERARIO [2015] eKLR** where the Court quoted with approval the Principles of Conveyancing Hand Book, Law Africa Vol II at Page 97 as follows:

"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission the occupation can only be either with permission or adverse, the two concepts cannot co-exist. "

Similarly, in the case of **SAMUEL KATANA NZUNGA & 102 OTHERS V SALIM ABDALLA BAKSHWEIN & ANOTHER [2013] eKLR** the Court stated as follows:

"Reiterating the holding in the case of Samuel Miki Waweru v Jane Nieri Richu CA No. 122 of 2001 (UR) the court said:-

"It is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of

the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further as the High Court correctly held in Jandu vs Kilipal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of Sisto Wambugu vs Kamau Njuguna [1982 — 8811 KLR (172)]...seems to be that a purchaser of land under a contract of sale in possession of the land with the permission of the vendor (can lay a claim for possession of such land) only after the period of the validity of the contract unless and until the contract has been repudiated...adverse possession starts from the date of the termination of the contract."

On the plaintiff's claim for mesne profits counsel submitted that the same is untenable since mesne profits should be pleaded and proved as was held in the case of **CHIEF LAND REGISTRAR & 4 OTHERS V NATHAN TIROP KOECH & 4 OTHERS [2018] eKLR** where Court stated as follows:

"A claim for mesne profit is a claim akin to special damages. It must be pleaded and proved. (See Mohammad Amin and Ors —v- Vakil Ahmed and Ors 1952(1) SCR1133). The 1st to 4th respondents did not plead the sum of Ksh. 500,000,000/= awarded by the trial judge as mesne profits. They also did not satisfy the trial court that they ought to be awarded the sum of Ksh. 2,690,603,339/= pleaded in the amended Petition as mesne profit.. "

Counsel therefore urged the court to dismiss the plaintiffs' case with costs to the defendants.

ANALYSIS AND DETERMINATION

The issues for determination that arise from the pleadings, the evidence and submissions by counsel are:

- a) Whether the Plaintiffs have established their claim for adverse possession.
- b) Whether the Plaintiffs are entitled to an order of injunction, damages for trespass and mesne profits.

The principles of adverse possession are well settled. In Kenya the doctrine is anchored in sections 7, 16, 17 and 38(1) and (2) of the Limitations of Actions Act Cap 22. A party claiming under the doctrine of adverse possession must establish laid down ingredients as has been held in many judicial authorities like in the case of **GABRIEL MBUI V MUKINDIA MARANYA [1993] eKLR** where the Court held as follows:

- a. *The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.*
- b. *The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression "colour of title" in law means, that which is title in appearance but not in reality.*
- c. *The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.*
- d. *The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the dispossessed owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.*
- e. *The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land*
- f. *The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.*
- g. *The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession."*

Similarly, in the Court of Appeal case of **TITUS MUTUKU KASUVE V MWAANI INVESTMENTS LIMITED & 4 OTHERS [2004] eKLR** stated thus:

"In order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – Wanje v Saikwa (No 2) [1984] KLR 284.

It should be noted that the plaintiff's evidence was corroborated by the evidence of the 4 witnesses PW2 to PW5. Their evidence was consistent on the sale, occupation, possession and the length of time of the possession and occupation. This evidence was uncontroverted by the defendants who chose not to give evidence. DW1 who gave evidence was not a defendant but a witness who stated that he was a Chief of the location where the suit land is situated. His evidence did not carry any probative value hence it did not help challenge the plaintiff's evidence.

From the evidence on record, the plaintiff and his witnesses stated that the Plaintiffs have been in occupation of the suit land since 1962 which they have fenced and have been cultivating and rearing cattle. No evidence was tendered by the Defendants to the effect that the Plaintiffs are not in possession and occupation of the suit land. This being so I find that the plaintiffs have been in continuous and exclusive possession of the suit land.

Counsel for defendant submitted that the Plaintiffs claim must fail since the Plaintiffs directed their claim for adverse possession against Pius Birir (the registered proprietor of the suit land) instead of directing their claim against Changwony Cherop (the rightful proprietor). With due respect to counsel this is an argument that works against the defendant as it is trite that adverse possession claim should be against the title holder. That is why there is a requirement that an extract of the register, copy of title or an official search must be attached to ascertain the registered owner of the suit land.

In the case of **JOHNSON KINYUA V SIMON GITURA RUMURI [2011] eKLR**, the Court of Appeal found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search.

Counsel for the Defendants argued that the Plaintiffs have not met the threshold for *animus possidendi* since they do not reside on the suit land, the plaintiff's evidence and the uncontroverted evidence of use and cultivation/grazing since 1962 is sufficient as was held in the case of **WILSON NJOROGE KAMAU V NGANGA MUCERU KAMAU [2020] eKLR** the Court observed that:

“The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated his animus possidendi in developing the suit land through Planting and tending tea bushes, growing trees and practicing subsistence farming on the suit land as though it was as of right. That he has done this since 1971 to date openly and without interruption by anyone, least of all, the Defendant, is not under challenge. Evidence was led that the Defendant had knowledge of the Plaintiff's occupation of the suit land.”

In the case of **JAMES KIHU NGANGA & ANOTHER V ESTHER NJERI NGAHU & 2 OTHERS [2019] eKLR** the Court made a determination that the Plaintiffs had exclusive control and occupation of the parcels of land in a situation where the Plaintiffs did not reside on the suit parcels of land.

Having said that I find that the plaintiffs have proved that they have acquired the suit land vide the doctrine of adverse possession.

This matter was consolidated HCC No 271 of 2000 where the plaintiff had sued the 1st to 4th defendants for trespass, injunction, general damages, mesne profits and eviction. Having found that the plaintiff has acquired the suit land by way of adverse possession, the plaintiff is therefore entitled to quiet possession and enjoyment of the suit land. The plaintiff is granted an order of injunction against the defendants restraining them from interfering with the quiet possession of the suit land and any party illegally on the suit land shall vacate within a specified period given by the court.

On the issue of whether the plaintiffs are entitled to damages for trespass and mesne profits, it is trite that when a party is suing for adverse possession you cannot in the same breath claim for trespass unless and until you have been declared as such. Before such a declaration is made, that party can also be deemed as a trespasser. The court cannot therefore declare such rights in the same suit.

Having said above that the plaintiff could not claim for this, just for academic purpose, mesne profits are special damages which must be specifically pleaded and proved. The plaintiff generally pleaded for mesne profits but there were no specifics and the purpose for which it was claimed. The plaintiff did not lead evidence on this limb. In the case of **MISTRY VALJI V. JANENDRA RAICHAND & 2 OTHERS [2016] eKLR** the Court of Appeal stated:

“Mesne profit is defined in section 2 of the Civil Procedure Act to mean; - “in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession”. ... Measure for mesne profit was described in the Privy Council decision in Invergue Investments v Hackett (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (supra) as follows:

“This is form of an ordinary claim for mesne profit, that is to say, a claim for damages for trespass to land... The question for decision is the appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess mesne profits down to the date when possession is given.”

The prayer for damages and mesne profits therefore fails.

I have considered the pleadings, the evidence and the submissions by counsel and I therefore enter judgment for the plaintiff in the following specific terms:

- a) A declaration is hereby issued that that the proprietary interest of the late Pius Birir in land parcel Number IRONG/KITANY/194 situate in Iten Marakwet District is extinguished.

b) An order is hereby issued for the 1st and 2nd Plaintiffs be registered as the absolute proprietors of the said land parcel number IRONG/KITANY/194 by way of adverse possession.

c) The defendants, their agents or servants to give vacant possession of the suit land known as parcel No. IRONG/KITANY/194 within 45 days' failure to which eviction to issue.

d) A permanent injunction is hereby issued restraining the Defendants, their agents and servants from entering, constructing on, ploughing, removing the fence of, wasting, selling, alienating or in any other manner whatsoever dealing with the land parcel known as IRONG/KITANY/194.

e) Costs of the suit to be paid by the defendants.

DATED and DELIVERED at ELDORET this 8TH DAY OF NOVEMBER, 2021

M. A. ODENY

JUDGE