REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

LAND CASE NUMBER 105 OF 2016

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF ADVERSE POSSESSION

AND

IN THE MATTER OF LAND PARCEL NO. KEIYO/MARAKWET/IRONG/KAPKONGA/117

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA

AND

IN THE MATTER OF CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO 3 OF 2012

AND

IN THE MATTER OF AN APPLICATION BY;

COSMAS CHERONO.....1ST PLAINTIFF

WILLIAM CHERONO.....2ND PLAINTIFF

BRIAN RONO.....3RD PLAINTIFF

-VERSUS-

VERONICA CHERONO.....DEFENDANT

JUDGEMENT

1. The Plaintiffs approached this Court by way of an Originating Summons dated 4th May, 2016 seeking for inter alia: -

(I) THAT by obtaining grant the defendant held in trust the estate of BARTORE CHERONO (deceased) for the benefit of the Plaintiffs herein.

(II) THAT the interests of VERONICA CHERONO have been extinguished by those of the Plaintiffs herein by virtue of having been in continuous, peaceful and uninterrupted occupation of the suit for a period of over 60 years, by virtue of adverse possession.

III) THAT the Plaintiffs herein have acquired title to that part of Land Parcel L.R. No KEIYO/MARAKWET/IRONG/KAPKONGA/117 measuring 5.5 acres by dint of adverse possession.

IV) THAT the Court do issue an order for the partition of the said land parcel equally amongst all beneficiaries of the estate of the late BARTORE CHERONO, in the following shares:

(a) 2.76 acres

(b) 2.76 acres

(c) 2.76 acres

(V) THAT the Honourable Court do issue a permanent injunction or restraining the defendant herein from dealing, selling, transmitting, disposing and or leasing all that land known as L.R. NO. KEIYO/MARAKWET/IRONG/KAPKONGA/117 to the exclusion of the Plaintiffs and interested parties herein who have continued to be in this suit land for over 60 years

(VI) THAT the costs of this application be borne by the defendant.

2. The originating summons was brought under **Section 38 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya, Order 37 Rule 7 of the Civil Procedure Rules 2010** and **Section 28 (b), (e) and (h) of the Land Registration Act No. 3 of 2012**. The application is supported by the affidavits sworn by the 1st Plaintiff herein. He avers that the suit property belonged to their late father, Bartore Cherono, who sometime in 1967, authorized their late brother, Joseph Rutto Cherono to register the land, and hold it in trust for all beneficiaries. That the grave of his father was left on another land across the road following the demarcation process. That he was born and brought up on the suit land. That the said Joseph Rutto Cherono passed on, and the suit property devolved to the defendant herein by way of transmission. That the defendant had filed a succession cause secretly in a magistrate's court that had no jurisdiction. That the Plaintiffs have been in continuous occupation of the suit property for 40 years, which extinguished the defendant's interest in the land.

3. On her part, the defendant opposed the application through her filed reply to the originating summons sworn on the 5th July, 2016. She depones that the suit property did not belong to Bartore Cherono, her late father-in-law, but to his son, who was her late husband, named Joseph Rutto Cherono. That her late father- in -law was buried in a separate piece of land currently owned by a 3rd party, which could never have occurred had the late father- in -law actually authorized her late husband to register the land in his name as trustee. That the 2nd Plaintiff stayed at Chebokokwo area, where all the plaintiffs were brought up. That the 2nd and 3rd plaintiffs have never lived on the suit land. That the 1st plaintiff's mother had been built a house on the suit land by the late Joseph Rutto Cherono, after she was dispossessed of her land, where her late husband grave was situated. That by then the 1st plaintiff was a young boy and was expected to move out of the land after he grew up, but now mischievously claims it. That the 3rd Plaintiff stays with his siblings at his late father's farm at Kitale, that was bought through a loan secured with the suit land's title. That the 3rd plaintiff's father failed to clear the loan forcing the defendant to pay it, so as to have the title discharged. That when she filed the probate and succession proceedings in respect of her late husband's estate, the Plaintiffs never raised any objection as they knew they had no claim over the suit property.

4. In support of their case, **Cosmas Chepleting Cherono**, **William Kandie Cherono** and **Brian Kipkoech Rono**, the 1st to 3rd plaintiffs, testified as **PW1** to **PW3** respectively. Their case was that the suit land was their ancestral land and should be shared equally between the four sons of the late Bartore Cherono, represented by the three plaintiffs and the defendant herein. PW2 added that the defendant should get five acres, PW1 four acres, PW3 two acres, and him 2.75 acres from the suit land. They also called John Kiplangat, a senior chief, who testified as PW4. It was his testimony that he had participated in the meeting called to deliberate on how to share the suit land when it was decided that PW1 and defendant were to get 4 and 5 acres each respectively. That PW2 would not get any share as he had been adequately taken care of by his maternal uncles, and that the father to PW3 was to get 2 acres as he had another land at Kitale.

5. The defendant, Veronica Cherono, gave her evidence as DWI, and called William Chirchir and Maria Kimoi Sangot, who testified as DW2 and DW3 respectively. It is the defendant's case that the suit land belonged to her late husband, named Joseph Rutto Cherono, and now to her and her children, and not to her father-in-law, the late Bartore Cherono. That upon her marriage to Joseph Rutto Cherono, she learnt that after the death of Bartore Cherono, his widow and her children went to live with her brother-in-law. That later Joseph, her husband, welcomed the widow on a two acres portion of the suit land where he constructed a house for her, and educated her children. That when Martin completed schooling, Joseph allowed him to use the suit land title as security for a loan that he used to buy land in Kitale where he settled his family, including the 3rd plaintiff. That Martin failed to clear the loan forcing the defendant to pay it so as to have the title discharged. That the 1st plaintiff has continued staying on the two acres portion of the land given to his late mother by the late Joseph. That Maria Kimoi Sangut, who testified as DW3 is the sister to the late Joseph Rutto Cherono, the 1st and 2nd Plaintiffs.

6. That upon closure of the parties' cases, the learned counsel for the plaintiffs and defendant filed their submissions dated the 22nd June, 2021 and 15th July, 2021 respectively. The following are the main issues for determination by the court:

(a) Whether the Plaintiffs are entitled to the suit property by virtue of adverse possession, and

(b) Whether the Plaintiffs are entitled to the suit property by virtue of constructive trust.

(c) Who pays the costs of the suit?

7. The court has considered the pleadings, testimonies tendered by both sides, the learned counsel's submissions, superior courts decisions cited therein and come to the following findings;

(a) That from the pleadings and evidence tendered, the parties are related in that the 1st and 2nd Plaintiffs are brothers to the late

Joseph Rutto Cherono, the husband to the defendant, who is the registered proprietor of the suit property. The 3rd Plaintiff is a son to the late Martin Limo Rono, a fourth brother of the 1st and 2nd Plaintiffs. The 1st and 2nd Plaintiffs, the late Martin Limo Rono, and the defendant's husband were all sons of the late Bartore Cherono. That the pleadings and evidence tendered leaves no doubt that among the plaintiffs, only the 1st plaintiff has been in occupation and possession of a portion of the suit land upon which his late mother had been settled till her death by Joseph, the late husband to the defendant.

(b) That the concept of adverse possession has been explored in multiple cases in Kenya with the essential elements being laid down by various courts. In the recent decision of the Environment and Land Court at Mombasa in ***Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eKLR***, the decision of the Court of Appeal in ***Wambugu v Njuguna (1983) KLR 173*** on what constitute adverse possession was cited. The requirements for adverse possession have also been set out in the case of ***Mbira –v- Gachuhi (2002) IEALR 137*** in which the court held that:

> ***"……. 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 statutory prescribed period without interruption…."***

And in the case of ***Jandu –v- Kirplal & Another (1975) EA 225***, it was held that:

> ***" …. to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious."***

The Court of Appeal in the case of ***Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR*** held that:

> ***"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."***

That it is a well settled principle that a party claiming title to land under adverse possession ought to prove that the possession was ***"nec vi, nec clam, nec precario,"*** that is, without force, secrecy, permission, or alternatively put, not by force, nor stealth, nor the license of the owner.

(c) That the place to start in determining this matter is whether the plaintiffs are in actual possession of the portions of the suit property claimed. That during the visit to the suit land on the 9th August 2019, it was established among others that the 1st plaintiff has a home, keeps livestock and cultivates on a portion of the suit land. That apart from a house that belonged to the late Martin, and some graves of persons buried there with permission, no factual evidence of occupation of the suit land by the 2nd and 3rd plaintiffs was noted.

(d) That from a keen analysis of the account of the site visit by the Deputy Registrar, the comments on the report thereof by the respective parties, and the evidence availed leads the court to find that the 2nd and 3rd plaintiffs have failed to establish actual possession of the suit property. They could not point out which houses they occupied during the site visit, and did not attempt to lay down what extent of the suit property was occupied by them and in what manner, unlike the 1st plaintiff who is admittedly still in actual possession of a portion of the land. Therefore, the 2nd and 3rd plaintiffs' claims under adverse possession fails at this point.

(e) The second question of inquiry is whether the actual possession of the suit property by the 1st Plaintiff was without permission, peaceful, notorious and uninterrupted for at least twelve (12) years. This court wishes to restate with approval the decision of the Kerugoya Environment and Land Court in ***Muchambindwiga & Another v Octavian Mwaniki Kariuki [2021] eKLR,*** wherein the learned judge, discussing issues on the nature of possession, cited the decision in ***Gabriel Mbui Vs Mukindia Maranya [1993] eKLR*** where the learned judge stated: -

> ***"a) ….***
>
> ***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 un equivocally 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." (emphasis added).***

(f) That having considered the dictates of case law as set out above and the evidence tendered by both sides of the dispute, his court finds that the 1st plaintiff's possession of the suit property was indeed initially, and during the lifetime of his mother, with permission of the then registered proprietor, the late Joseph Rutto Cherono, husband to the defendant. The defendant and her witnesses all agreed that the 1st plaintiff was taken in as a young child together with his late mother, by his elder brother, the late Joseph Rutto Cherono. That the late Joseph built a house for them on the two acres portion of the suit land after bringing the 1st Plaintiff's mother back from her parents' home, where she had relocated to after the burial of her late husband, and upon the land where he was buried being taken over by third parties. That indeed DW3, the sister to the 1st & 2nd plaintiffs, the late Martin and Joseph, confirmed in her

testimony that the husband to the defendant had built a house on two acres of the suit land and given it to the plaintiffs' mother/grandmother to live in and use. That further, the fact that defendant had participated in family meetings with the plaintiffs and local administration on the sharing and use of the suit property is a clear demonstration that she knew about the 1st plaintiff's occupation of that portion of the land and had initially condoned it, but later commenced **Iten Senior Principal Magistrate Civil Suit No. 10 of 2014** and **Criminal Case No. 450 of 2014** against the 1st plaintiff primarily for his eviction from the suit land. That the existence of the above cases alone, without any determinations or evidence of a determination that the 1st plaintiff was a trespasser, and an order of his eviction being issued, do not amount to an interruption of his occupation or possession of that portion of the suit land. That the foregoing leads the court to the finding that the 1st plaintiff's continued occupation of the two acres portion of the suit land after the death of his mother was without permission and therefore became adverse to the title of the registered proprietor.

(g) That on whether the plaintiffs are entitled to the suit property, or a portion thereof, by virtue of constructive trust, the court cites with approval the position adopted by the Environment and Land Court in Muranga in the case of ***Alice Wairimu Macharia v Kirigo Philip Macharia [2019] eKLR*** wherein, faced with a claim based on constructive trust, the learned judge quoted several superior courts decisions and held that;

"18. The legal burden to prove the existence of the trust rests with the one who is asserting a right under customary trust. To discharge this burden, the person must proof that:- (a) the suit properties were ancestral clan land; (b) during adjudication and consolidation, one member of the family was designated to hold on behalf of the family; (c) the registered persons were the designated family members who were registered to hold the parcels of land on behalf of the family. In essence, one had to lay bare the root of the title to create the nexus or link of the trust to the title holder and the claimant.

19. In the case of Njenga Chogera –vs- Maria Wanjira Kimani & 2 Others [2005] eKLR which quoted with approval the holding in the case of Muthuita –vs- Muthuita [1982 – 88] 1 KLR 42, the Court of Appeal held that customary law trust is proved by leading evidence. Trust is a question of fact which must be proved by whoever is claiming a right under customary trust.

20. In the case of Isack Kieba M'Inanga Vs Isaaya Theuri M'Lintari & Another SCoK No 10 of 2015 the Supreme Court Justices held that;

"…each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in Kiarie v. Kinuthia, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favour of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:- (a) The land in question was before registration, family, clan or group land; (b) The claimant belongs to such family, clan, or group; (c) The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous; (c) The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances; and, (d) The claim is directed against the registered proprietor who is a member of the family, clan or group."

21. A trust can never be implied by the Court unless there was intention to create a trust in the first place. In Peter Ndungu Njenga vs. Sophia Watiri Ndungu [2000] eKLR where the Court held,

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parities to create a trust must be clearly determined before a trust is implied."

22. In Juletabi African Adventure Limited & Another v Christopher Michael Lockley [2017] eKLR, the Court also held that …. It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because: -

"The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

That in the instant case, the import of the foregoing precedents is that it is upon the plaintiffs to lead evidence proving that indeed a constructive trust existed. It was incumbent on the plaintiffs to demonstrate that the suit property was ancestral land, and that it was vested in Joseph Rutto Cherono to hold for the family. Importantly, the court is not obligated to imply the existence of a trust outside the express and clear intention of the parties.

(h) The plaintiffs' claim for trust is that the suit property belonged to Bartore Cherono, and that he granted the property to Joseph Rutto Cherono, who was to hold it in trust, and transmit to his three brothers their equal shares. They averred that these instructions were purportedly issued in 1967, and that their mother/grandmother, and other relatives were buried on the suit property, an indication that it was indeed ancestral land. The 1st plaintiff testified further that he started living in the land in 1950 when he was a toddler of one and half years. However, after his father's death they left when he was 9 years old and went to live in Kaptaywa for 5 years, and came back later to the suit property. He alleged that the land was not registered by the time his father died, but in the same breath claimed the father died in 1980. He testified further that he had filed a suit being Iten 202 of 2002, but he did not disclose the outcome of the said case, except that they had attempted to resolve the issues at home before the District Commissioner. On cross-examination, he stated that his father's land had been partially grabbed by an individual by the name Metrono Kipkoket (also referred to as Metrono Kipkalot), and subdivided into the 11-acre piece held by the defendant, and a 10-acre piece he holds to date.

He also conceded that the father to the 3rd plaintiff did not live on the said land, but on the land that he bought in Kitale with a loan secured by a charge on the title of the suit property. He also testified that the title to the suit property was issued in 1967 when he was 19 years old, but that he was unaware of the process involved in its issuance. The defendant refuted these claims, and averred that the property always belonged to Joseph Rutto Cherono who acquired it in 1966. That the land belonging to Bartore Cherono had been sold to a third party. She pleaded the fact that Bartore's grave was on the other land and not the suit land, to be indicative of the portion of land he owned. That Bartore Cherono's land was currently occupied by a third party.

(i) That the date of death of Bartore Cherono has not been agreed upon in the pleadings, affidavits in support or opposition to the originating summons and notice of motion, and oral testimonies. Did he die in 1952, 1962, 1967, 1980 or another year? That it is difficult to establish whether he died before the commencement of land adjudication and demarcation or after, so as to have issued the alleged instructions that the late Joseph be registered with his land as trustee. That the fact that some family members were interred on the suit land upon their demise is not on its own evidence that the land was ancestral land. The defendant has explained in her evidence that some of those family members were buried on the land through the consent of her late husband, and others on the directions of village elders, and that has not been challenged.

(j) That the plaintiffs' inability to pinpoint the year of death of their father/grandfather in order to contextualize the date instructions were purportedly issued to Joseph Rutto Cherono to hold the land as family land, leaves doubt as to whether any such instructions were ever given. That further, and given that the 1st plaintiff went to live with Joseph Rutto Cherono after the father's death, and more-so at a young age of one and a half years, he could not, and he admitted as much, have known how the process that led to the acquisition of suit land's title in the name of his elder brother, Joseph Rutto Cherono, occurred. That from the foregoing the court is convinced that the suit property could not have been ancestral land and the plaintiffs' claim of constructive trust has not been established. That moreover, and given that the plaintiffs did not file any objection to proceedings for confirmation of grant to the defendant in Iten Resident Magistrates Court in Succession Cause No. 4 of 2001 over the suit property, the court finds that they knew that they were not entitled to any share of the estate as beneficiaries. That the plaintiffs having failed to establish that the suit property was ancestral land, their claim for constructive trust must also fail.

(k) That however, the evidence tendered by both sides of the dispute leads the court to the finding that the act of the late Joseph Rutto Cherono of bringing their mother from her parents, and settling her on the two acres portion of the suit land, which she used exclusively and uninterrupted with his permission until her death, was with the intention of her to own it. That while it is not clear who between her and the late Joseph passed before the other, there is no doubt the 1st plaintiff, who had then matured continued in occupation and possession of the two acres, and it is the finding of the court that the registered proprietor of the suit land continued to hold the two acres portion in trust for the 1st plaintiff's mother.

(l) That upshot of the foregoing is that the 2nd and 3rd plaintiffs have failed to prove their claims over portions of the suit land under adverse possession and constructive trust, and their suit is hereby dismissed. That the 1st plaintiff has however proved his claim of entitlement to the two (2) acres portion of the suit land where his late mother was settled by the late Joseph Rutto Cherono, which is still under his possession and occupation.

(m) That though under **Section 27 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya**, the 1st plaintiff and the defendant would be entitled to costs for successfully prosecuting and defending the suit respectively, the court is of the view that due to their close family relationships, this is an appropriate case for each party to bear their own costs.

8. That from the foregoing findings, the court orders as follows;

(a) That the 2nd and 3rd plaintiffs have failed to prove the case to the standard required by the law of a balance of probabilities. That their suit against the defendant is therefore hereby dismissed.

(b) That the 1st plaintiff, Cosmas Cherono, has proved his claim over the two acres portion of the suit land where his late mother was settled by the late Joseph Rutto Cherono, and is hereby declared the owner of that portion. That the defendant is directed to apply for and obtain the necessary consents to subdivide and transfer the two acres of the suit land to the 1st plaintiff within six months, and in default the Deputy Registrar of this court is hereby authorized to sign all such documents necessary to give effect to this order on behalf of the defendant.

(c) That each party do bear his/her own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 3RD DAY OF NOVEMBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF;

PLAINTIFFS: ABSENT

DEFENDANT: ABSENT

COUNSEL: DR. CHEBII FOR THE PLAINTIFFS

MR. CHEMWOK FOR THE DEFENDANT

CHRISTINE: COURT ASSISTANT