



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.109 OF 2015**

**MICHAEL KIPLANGAT CHERUIYOT.....PLAINTIFF**

**VERSUS**

**JOSEPH KIPKOECH KORIR.....DEFENDANT**

**JUDGMENT**

**(Plaintiff claiming to that he has title to the land which he occupies and seeking to have the defendant restrained from interfering with his occupation; plaintiff also making an alternative claim for adverse possession; defendant filing defence and counterclaim and asserting that what the plaintiff occupies is his (defendant's) land and seeking inter alia orders of eviction; survey of the land ordered; survey showing that the plaintiff occupies the defendant's land; plaintiff contesting this report but not bringing any evidence to contradict that in the survey report; plaintiff cannot succeed in his claim to have the defendant restrained from the land for the land belongs to the defendant; plaintiff's claim for adverse possession not tenable and dismissed; judgment entered for the defendant)**

1. This suit was commenced through a plaint which was filed on 10 April 2015. In the plaint, the plaintiff has pleaded that he is the registered owner of the land parcel Nakuru/Ngongongeri/1040 measuring approximately 2.02 Hectares (Ha). He pleaded that he processed and obtained title to the said parcel of land on 21 July 1997 and that he has from that time lived on this land and has developed it. He pleaded that the defendant has now threatened to dispossess him, yet what he (the defendant) owns, is the land parcel Nakuru/Ngongongeri/1026 also measuring 2.02 Ha. In the suit, the plaintiff has sought orders that he be declared the owner of the land parcel Nakuru/Ngongongeri/1040, a declaration that he has equally acquired ownership of the said land through adverse possession, and a permanent injunction to restrain the defendant from interfering with his enjoyment of this land.

2. The defendant filed defence in which he pleaded that what the plaintiff occupies is the land parcel Nakuru/Ngongongeri/1026 which he claimed belonged to him (the defendant). Through an application filed on 14 September 2015, the defendant sought orders to have a survey, in order to determine which land the plaintiff occupies, which orders I did grant on 8 March 2016. A report was filed showing that the plaintiff actually occupies the land parcel Nakuru/Ngongongeri/1026 and that the land parcel Nakuru/Ngongongeri/1040, which the plaintiff has title to, is about two kilometres away. The plaintiff however disputed this report and I ordered the matter to proceed for trial.

3. Perhaps because of the report, the defendant on 26 July 2016, amended his defence to introduce a counterclaim. He reiterated that he is the owner of the land parcel Nakuru/Ngongongeri/1026 (hereinafter simply referred to as land parcel No.1026) which he was allotted in the year 1997 and obtained title on 5 February 2014 He pleaded that in the year 2009, the plaintiff encroached into the land parcel No. 1026 and despite his efforts to have the issue settled amicably, the plaintiff has made this impossible. He pleaded that in the year 2010, he purchased the adjacent land and occupied it. In his counterclaim, he sought orders of eviction against the plaintiff from the land parcel No. 1026, mesne profits from the year 2009 to the date of judgment, and costs of the suit.

4. In his evidence, the plaintiff, a veterinary doctor, testified inter alia that his land is Nakuru/Ngongongeri/1040 (hereinafter simply referred to as land parcel No. 1040) and he produced the title deed in his name. He stated that he was allocated this land in the year 1997 (the area being a settlement scheme) and a surveyor, a Mr. Caleb Kotut, pointed out to him the boundaries. He mentioned that he was shown the land together with other people who had also been allotted land in the settlement scheme. He stated that he started living on the land in the year 1997 and has lived there peacefully. He testified that the plaintiff emerged in the year 2013 and took possession of the neighbouring land, which as far as he (the plaintiff) was aware, belonged to one Lorna. He testified that the defendant is a distant relative, and that when he emerged, he requested him (plaintiff) through the plaintiff's wife, to be allowed to cut some trees in order to split timber to enable him put up a house in that neighbouring land. Subsequently in the year 2014, the defendant threatened the plaintiff's worker and started claiming that the land in which the plaintiff resides was not the plaintiff's land but belonged to him (defendant) and that he held a title deed. He also had some letters from the local administration supporting his ownership of the land but the plaintiff dismissed these as forgeries. He wondered how the defendant could have obtained title in the year 2014 yet there was a caveat placed in the year 2013 stopping all transactions in Ngongongeri Settlement Scheme. Thereafter, the defendant gave the plaintiff's worker a notice to vacate through a letter dated 28 February 2015, which was replied to, and subsequently this suit was filed. On the survey that was directed by court, he claimed that no survey was done. Cross-examined, he stated that what he owns is the land parcel No. 1040 and he has no interest in the land parcel No. 1026. He refuted the survey

report which concluded that he is occupying the land parcel No. 1026.

5. One Isaac Kipchumba Rotich Lelkuto and Andrew Kibet Yator, testified as PW-2 and PW-3 respectively, and they affirmed that the plaintiff has been their neighbour. PW-2 stated that he was shown his parcel of land in the year 1997 together with the plaintiff, whereas PW-3 purchased land from an initial owner in the year 2002. PW-4 was Hillary Koske Kipkoech who testified that in the year 2014 he farmed in the land occupied by the plaintiff, but in the year 2015, the defendant stopped him from planting potatoes. PW-5 was Mr. Caleb Kotut, who testified that he is the surveyor who showed the plaintiff his land, and as far as he was aware, he did show him the land parcel No. 1040, for which the plaintiff holds title.

6. With the above evidence, the plaintiff closed his case.

7. The defendant on his part testified that he owns the land parcel No. 1026 which he was given in the year 1997 after being shown the same by one Joseph Kimkung the Provincial Surveyor. He then put up a temporary structure but moved to Kericho. He came back in the year 2009 and found the plaintiff has built on this land. He however took possession and lived on the land till the year 2012, when the plaintiff told him that he must be confused, as that he (defendant) is on the plaintiff's land. He testified that at the moment, he is in occupation of the land parcel No. 1372, which is an adjacent land. He wished to purchase this adjacent land from the owner (one Lorna) but she informed him that she had surrendered it back to the Government. He approached the District Commissioner who gave him an okay to use it. He informed the plaintiff that he was residing on his (defendant's) land and also complained to the Land Registrar and the provincial administration. He acknowledged stopping the plaintiff's worker from cultivating the land and also writing to the plaintiff a letter of demand. He stated that he has suffered loss for being unable to use his land.

8. DW-2 was one Benson Njue Nyaga, a Government surveyor. He testified that he is the one who implemented the court order that directed a survey of the land. He testified that upon survey, he found out that the two parcels of land in dispute are two kilometres apart and that the plaintiff occupies the land parcel No. 1026. He testified that what the plaintiff owns is the land parcel No. 1040 which he found occupied by a caretaker on behalf of one James Agai.

9. With the above evidence, the defendant closed his case though it is worth mentioning that the plaintiff filed an application to call additional evidence which I dismissed as I was not persuaded that it was merited. I invited counsel to file written submissions, which they duly did, and I have considered these before arriving at my decision. I take the following view of the matter.

10. From the evidence that has been tendered before me, there can be no other conclusion other than that in so far as title is concerned, the plaintiff is the registered proprietor of the land parcel Nakuru/Ngongongeri/1040 whereas the defendant is the registered owner of the land parcel Nakuru/Ngongongeri/1026. This comes out clearly from the title deeds that both parties presented. There is also no doubt that what the plaintiff occupies is the land parcel No. 1026, of which it is the defendant who is the registered proprietor. I have seen that in his evidence, the plaintiff vehemently denied that he is in possession of the land parcel No. 1026 and insisted that what he is in possession of is the land parcel No. 1040, but this is not true. The fact that he is in possession of the land parcel No. 1026 and not the land parcel No. 1040, is clearly demonstrated in the survey report and I have no other contrary report.

11. In his pleadings, the plaintiff wished to have an order that he is the registered bona fide owner of the land parcel No. 1040, and that this is the one that he occupies on the ground, and not the parcel No. 1026. I am not averse to giving him the order that he is the registered proprietor of the land parcel No. 1040, subject to any other interests that may not have come out in this case, but the plaintiff cannot succeed in his prayer that it be declared that what he possesses on the ground is the land parcel No. 1040, for as I have mentioned, what the plaintiff occupies is the land parcel No. 1026. Given that the plaintiff is possessing land of which he is not the registered owner, the plaintiff cannot be granted an order allowing him to continue his possession of this land, unless he succeeds in his prayer for adverse possession, which I will now turn to.

12. In his prayers for adverse possession, the plaintiff has specifically pleaded that it should be declared that he has acquired ownership of the land parcel No. 1040 by dint of the said doctrine. Now, he clearly cannot succeed in such a prayer for what he occupies is not the land parcel No. 1040 but the land parcel No. 1026. If he wished to have the land parcel No. 1026, then he needed to be specific that he is seeking adverse possession to the land parcel No. 1026, which is not the case here. His claim for adverse possession automatically flops on that ground alone.

13. But even if I was to construe that the plaintiff's pleadings were inelegantly drawn, and that what he actually wished to have are orders that it be declared that he owns the land parcel No. 1026 by way of adverse possession, the plaintiff would still fail in this quest. He would fail because the title displayed by the defendant in respect of the land parcel No. 1026, shows that the defendant got title on 5 February 2014. It is common ground that the suit land is in a settlement scheme, meaning that the Government ceded ownership of the land in the year 2014. It follows that time started running in favour of the plaintiff when the Government gave up ownership of the land, which was 2014, and it cannot be argued that he plaintiff has accumulated 12 years since then, to support his claim for adverse possession. It should be remembered that one cannot benefit from the running of time when the land is under the Government. This is articulated in Section 41 (a) (i) of the Limitation of Actions Act, Cap 22, Laws of Kenya.

From my above analysis, it will be seen that the plaintiff's prayers must fail.

14. I will now turn to the defendant's counterclaim. In his counterclaim, he has asked for orders to have the plaintiff evicted from the land parcel No. 1026 and for mesne profits. I have no reason to deny the defendant the order of eviction, for I have already held that the plaintiff is in possession of this land parcel No. 1026, and I have not seen any right that would support his continued possession of it. I therefore give the plaintiff 30 days to vacate the land parcel No. 1026 and in default, an eviction order may issue against the plaintiff.

15. On the claim for mesne profits, I have not been given any specifics of what the defendant may have lost by the continued possession by the plaintiff of the defendant's land. I am thus unable to ascertain exactly how much financial loss this has occasioned the defendant. I will not therefore make any order in respect of mesne profits.

16. I believe that I have dealt with all issues save for costs. I order the plaintiff to pay the costs of both the main suit and of the counterclaim.

17. Judgment accordingly.

**Dated, signed and delivered in open court at Nakuru this 1<sup>st</sup> day of October 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Okiro present for the plaintiff.

No appearance on the part of M/s Maragia Ogaro & Co. for the defendant.

Court Assistants: Nancy Bor/Alfred Cheron.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**