



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**ENVIRONMENT & LAND COURT CASE NO. E002 OF 2021 (OS)**

**CHRISTOPHER KANGOGO CHEBOIBOCH .....APPLICANT**

**-VERSUS-**

**SUSAN CHEPICHI CHEPKIYENG ..... RESPONDENT**

**RULING.**

***[Notice of Motion dated the 18<sup>th</sup> February, 2021]***

1. The applicant seeks for the following orders vide the application dated **18<sup>th</sup> February, 2021**;

**(a) Spent.**

**(b) Pending the hearing inter partes and the determination of the application there be an order of injunction to restrain the respondent from trespassing into, evicting, removing, disposing, dealing with, demolishing or in any way dealing with land reference number IRONG/ITEN/1760.**

**(c) Pending the hearing and the determination of the suit there be an order of injunction to restrain the respondent from trespassing into, evicting, removing disposing, dealing with, demolishing or in any way dealing with land reference number IRONG/ITEN/1760.**

**(d) Costs of the application be borne by the respondent.**

The application is based on the six **(6)** grounds that the applicant has been a trespasser on a portion of land reference IRONG/ITEN/1760 since 2000; the occupation has been peaceful, exclusive, open and continuous; the respondent's title to the 0.02 hectares the applicant occupies on land reference Irong/Iten/1760 has been extinguished; the applicant has carried developments on that portion that risks being demolished; there is need to preserve the suit land and that he has a prima facie case with a probability of success. The application is supported by the affidavits sworn by the applicant on the 18<sup>th</sup> February, 2021 and 22<sup>nd</sup> February, 2021. The applicant deponed that he entered into 0.02 hectares out of land reference number IRONG/ITEN/1760 as a trespasser in the year 2000 pursuant to an agreement of purchase entered between himself and James Kipkoros Kenei over land reference Irong/Iten/911 which borders the suit land. That his occupation has been open, uninterrupted and continuous for over 20 years, without the permission of the respondent, and has been adverse to the respondent's title to the land. He annexed copies of the land register, certificates of official searches and photographs of the developments on the subject piece of land. He deponed that he is seeking to have the respondent restrained from evicting him from the portion of the land he occupies as the respondent has threatened to move to the suit property, and demolish the fence and the developments thereon. He deponed that he has demonstrated a prima facie case, and unless the subject matter is preserved, he shall suffer irreparable harm.

2. The respondent filed grounds of opposition dated the 19<sup>th</sup> March, 2021 and replying affidavit sworn on the 22<sup>nd</sup> March, 2021 in opposition to the application. The respondent states that the application is grossly and fatally defective, as there is a judgement of the court in **Iten PMC (E&L) No.13 of 2018** in which orders of eviction have been issued. That the applicant participated in that suit, and hence the current suit is an abuse of court process, as the court has pronounced itself on this matter. The respondent deponed that she is the registered owner of land parcel Irong/Iten/1760, that she bought and occupied. That she was issued with the title on the 14<sup>th</sup> September 1993. The land parcel **IRONG/ITEN/911** is registered in the name of **JAMES KIPKOROS KENEI** and is charged to STANDARD CHARTERED BANK, for a sum of Kes 1,860,000/- (**Kenya shillings One Million Eight Hundred and Sixty Thousand**), as per the entry of the 19<sup>th</sup> July, 2005. She further deponed that there is no registrable title measuring 0.02 Ha in agricultural land. The respondent averred that the applicant occupies land parcel number 1RONG/ITEN/911 with the consent of JAMES KIPKOROS KENEI, subject to the overriding encumbrance by STANDARD CHARTERED BANK. That a report by the County Surveyor dated 19<sup>th</sup> September, 2018 that was made pursuant to a court order in **Iten SPMC E&L No. 13 of 2018**, annexed to the affidavit, indicated that the illegal structures that encroaches onto her land were

put up by JAMES KIPKOROS KENEI in 1997. That there is a valid order of the court in **Iten SPMC E & L No. 13 of 2018**, requiring JAMES KIPKOROS KENEI to vacate from the suit land. That the applicant had participated in **Iten SPM E & L No. 13 of 2018** claiming he had bought land parcel IRONG/ITEN/911 from JAMES KIPKOROS KENEI, but the claim was struck out, and he was ordered to vacate. The respondent deponed that adverse possession has not crystallized, and the application herein should be dismissed.

3. The learned counsel for the applicant filed their written submissions dated the 9<sup>th</sup> April, 2021 and supplementary submissions dated the 26<sup>th</sup> April, 2021. The learned counsel for the respondent filed theirs dated the 12<sup>th</sup> April, 2021. The submissions are as summarized herebelow;

**A.** That it is the applicant's submissions that when he came into possession of land reference Irong/Iten/911, he was shown its boundaries that he later learnt included a portion of Irong/Iten/1760, the suit land. That he has taken that portion of land as part of Irong/Iten/911 and used it continuously, exclusively and openly since the year 2000, without permission of the respondent, which fact is not denied by the respondent. That the registered owner of land reference Irong/Iten/911 could not give him permission for the occupation of the respondent's parcel of land, namely Irong/Iten/1760, and that the two parcels are agricultural land. That the consent of the Land Control Board was required for the sale agreement between the vendor, James Kipkoros Kenei, and himself for it to become valid. That as none was obtained, the sale was nullified by operation of law, and he had acquired the same parcel through adverse possession. That when he became aware of the lower court suit and decree at Iten, he moved the subordinate court to have the judgment reviewed, set aside and his joinder as the 2<sup>nd</sup> defendant, so that he could be accorded a hearing, as the decree was as matter of fact to be executed against him as he was the one in possession and still occupies the disputed portion. That the subordinate court summarily struck his application, and he filed an appeal to this Court being Appeal Number 13 of 2021. That he has satisfied the requirements of a prima facie case in the case of **Giella -vs- Cassman Brown**, to be successful in the application. That since the dispute relates to a piece of land which has been developed with permanent structures, then if the order of injunction is not granted, he will suffer irreparable harm. That the balance of convenience tilts towards the preservation of the subject matter. That the court will get the opportunity to see what took place in the lower court case when hearing the appeal No. 13 of 2021. That this suit was filed while the appeal is pending because the subordinate court lacks jurisdiction to handle adverse possession claims. That he was not a party in the lower court suit, yet he has been in possession of the land he bought, and a portion of the suit land since 2000.

**B.** The respondent submitted that the application amounts to an abuse of court process. That the applicant is laying claim to a portion of land measuring 0.02 Ha, estimated to measure 4 meters by 50 meters strip of land, which portion is not registrable. That such a claim can be better dealt with under **section 18 of the Land Registration Act** as the applicant even occupies a much smaller portion of the land. The respondent submitted that contrary to what the applicant would want the court to believe, no determination of ownership of land parcel IRONG/ITEN/911 has been made. That the transfer of that parcel cannot be done until after the charge registered in favor of Standard Chartered Bank is discharged, and that the applicant's claim over the said parcel of land is null and void to the extent that it is by way of purchase. That the application is an abuse of the court process, as the applicant had participated in the case at Iten Law Courts in **Land Case No. 13 of 2018, SUSAN CHEPICH CHEPKIYENG vs JAMES KIPKOROS KENEI and CHRISTOPHER KANGOGO CHEBOIBOCH, (Proposed 2<sup>nd</sup> Defendant)**, wherein his application for review of the judgment was struck out. That by dint of the provisions of **Article 165 (7)** read with **Article 162 (2) of the Constitution**, this court can call for the file from the Magistrates Court to ascertain the status of the matter. That the applicant has not met the threshold set out in the case of **Giella vs Cassman Brown** which was re-iterated in **Nguruman Limited-vs- Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR**, where the Court of Appeal held that;

***“In an interlocutory injunction application, the applicant has to satisfy the triple requirements that is; (a), establishes his case only at a prima facie level, (b), demonstrates irreparable injury if a temporary injunction is not granted and (c), in case of any doubts as to (b), by showing that the balance of convenience is in his favour.”***

That the respondent also cited the case of **MRAO LTD –VERSUS- FIRST AMERICAN BANK OF KENYA LTD (2003) eKLR**, and submitted that the applicant has not discharged his burden of proof. That the fact that there is an order of the Magistrate's court to the effect that he vacates from the suit land, then that order runs contrary to his claim for adverse possession. That the applicant cannot seek orders of adverse possession after an order of eviction has been issued against him and his benefactor over the same land. That the Respondent cited the case of **Pius Kipchirchir Kogo versus Frank Kimeli Tenai (2018) Eklr**, in which the court stated;

***“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”***

That the respondent further submitted that as the applicant's case is that he bought land parcel IRONG/ITEN/911 in 2000, with the developments done by the vendor in 1997 for Ksh.1,500,000/, and as he has not demonstrated that he has done any other developments on the said portion of 0.01 Ha, then damages can be an adequate remedy. That the orders sought are so broad and in respect of the entire Irong/Iten/1760, while the disputed portion is a strip measuring less than 200 meters square (0.02 Ha), it will technically lock out the respondent out of her own home if granted. That the application lacks merit and should be dismissed with costs.

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

***(a) Whether the applicant has made out a prima facie case with a probability of success, for the injunctive orders to issue at this interlocutory stage.***

***(b) Whether this application amounts to an abuse of the court process.***

**(c) Who pays the costs.**

5. That I have considered the grounds on the application, affidavit evidence, grounds of opposition, submissions filed, superior courts decisions cited thereon and come to the following conclusions;

(a) That it is apparent that instead of the parties restricting themselves to the application for stay, they appear to have majorly submitted on the main suit commenced through the originating summons which is not yet heard.

(b) That it is not disputed that there was a matter before the Senior Principal Magistrate's Court in Iten, being ***Iten SPM Land Case 13 of 2018 SUSAN CHEPICHI CHEPKIYENG vs JAMES KIPKOROS KENEI and CHRISTOPHER KANGOGO CHEBOIBOCH (Proposed 2<sup>nd</sup> Defendant)***. It is also not disputed that the parties in the said suit were Susan Chepichi Chepkiyeng and James Kipkoros Kenei, and that the applicant in this matter only filed an application for joinder and review, upon learning of the delivery of the judgment, whose net effect would have had him evicted from the suit property. That upon the application being struck out, the applicant filed an appeal against the said order that declined to enjoin him to the suit and review the orders of the court. The appeal is ***ELC Appeal Number 13 of 2021***, and is pending hearing and final determination before this court. That I notice that the applicant has not tendered reasonable explanation as to why he did not seek the orders he prays for in the instant application through the pending appeal file.

(c) That the applicant has indicated that the reason for filing this new matter before this court is because the Magistrate's Courts have no jurisdiction to hear claims for adverse possession. The question that arises is therefore whether this application amounts to an abuse of court, and whether it ought to be entertained by the court and orders sought issued. That the parties appear to be in agreement that the subject matter of the suit herein is within the pecuniary jurisdiction of the Magistrates' Courts. That the parties have also agreed that there is ***Appeal No. 13 of 2021*** pending before this court, arising from the orders made by the Magistrates' Courts in ***Iten SPM Land Case 13 of 2018 SUSAN CHEPICHI CHEPKIYENG vs JAMES KIPKOROS KENEI and CHRISTOPHER KANGOGO CHEBOIBOCH (Proposed 2<sup>nd</sup> Defendant)***.

(d) That from an analysis of the issues in this matter as can be gleaned from the respective parties' submissions, I am of the view that it is fair and reasonable that the applicant awaits the determination of the appeal he preferred against the orders from the trial court in the Iten Land Case before filing another suit on the same subject matter. That will help avoid a situation whereby the court is embarrassed, or put in a difficult position by entertaining an appeal on the other hand, and also handling a similar matter in an adverse possession suit relating to the same property. That as was held by the Court of Appeal in ***Refrigeration and Kitchen Equipment Utensils Ltd vs Shah & Others 1990 LLR 294 (CAK)***;

***"It is Essential for the maintenance of the rule of law and good order that the authority and the dignity of the court are upheld at all times."***

(e) That from the evidence availed, the applicant's possession and occupation of the suit property started by way of purchase. That his claim is now anchored on a claim of adverse possession. That these issues ought to be investigated and determined, but this court cannot close its eyes to the fact that there is a pending appeal relating to the same suit property, that is yet to be heard and determined by this Court. That whereas the pending appeal, and this suit do not yet fit to be classified as *res judicata*, it is only reasonable that the first matter to be filed should ordinarily be dealt with to finality, to avoid putting the court in a difficult situation by having both matters run concurrently.

(f) That in any event, upon the determination of the appeal by this Court, the applicant can appropriately move the appropriate court for the necessary orders. Further, nothing stops the applicant from seeking the orders sought in this application in the appeal, that is pending hearing and determination so as to have the suit property preserved.

(g) That on the issue of jurisdiction of Magistrates' Courts to handle adverse possession claims, I am of the considered view that the magistrates gazetted in accordance with the law to deal with environment and land matters do have the jurisdiction to hear and determine adverse possession claims, that are within their pecuniary limits. That on this position I am persuaded by the decision of the court in ***Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & Another [2020] eKLR***, where *Ohungo J*, held that;

***"12. The judicial system in Kenya also includes the magistrates' courts as established under Article 169 of the Constitution of Kenya, 2010. Pursuant to Article 169 (2), parliament is mandated to enact legislation conferring jurisdiction, functions and powers on the magistrates' courts. In that regard parliament legislated the following provisions at Section 26 (3) and (4) of the Environment and Land Court Act, 2011:***

***(3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.***

***(4) Subject to Article 169(2) of the Constitution, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —***

***(a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and***

***(b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.***

***13. Indeed, the Chief Justice has, by various gazette notices, made appointments pursuant to Section 26 (3) and (4) of the***

Environment and Land Court Act, 2011. ....

14. Some four years after enactment of the Environment and Land Court Act, 2011, parliament also enacted the Magistrates' Courts Act, 2015 so as to among others give effect to Articles 23 (2) and 169 (1) (a) and (2) of the Constitution and to confer jurisdiction, functions and powers on the magistrates' courts. The Act came into operation on 2<sup>nd</sup> January, 2016 and its Section 9 (a) provides:

A magistrate's court shall -

(a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Court Act (Cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to -

(i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(ii) compulsory acquisition of land;

(iii) land administration and management;

(iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(v) environment and land generally.

15. The upshot of the provisions at Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 is that magistrates who are duly gazetted and have the requisite pecuniary jurisdiction have jurisdiction and power to handle cases involving occupation of, and title to land. Claims in the nature of adverse possession involve title to land since the claimant ultimately seeks an order that he be registered as the proprietor of the land. ...

16. Although Section 38 (1) of the Limitation of Actions Act specifically refers to the High Court without mention of the magistrates' courts, it must be remembered that is an old statute that came into operation way back on 1<sup>st</sup> December 1967 compared to the more recent Environment and Land Court Act, 2011 and the Magistrates' Courts Act, 2015, both of which were enacted after promulgation of the Constitution of Kenya, 2010. ...

17. Since Section 38 (1) of the Limitation of Actions Act predated the Constitution of Kenya, 2010, its interpretation must be guided by Section 7 (1) of the Sixth Schedule of the Constitution of Kenya titled Transitional and Consequential Provisions which provides:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

18. The alterations, adaptations, qualifications and exceptions referred to above must give Section 38 (1) of the Limitation of Actions Act conformity to Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015 both of which were enacted to give effect Article 162(2) (b) and Article 169(1) (a) and (2) of the Constitution. So as attain that conformity, Section 38 (1) of the Limitation of Actions Act must be construed as not depriving magistrates who are duly gazetted and have the requisite pecuniary jurisdiction of the jurisdiction and power to handle cases involving occupation of, and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with Article 259, which enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles.

19. Among the principles of the constitution is devolution and access to services. Articles 6(3) and 48 of the Constitution have the combined effect of requiring devolution of and access to judicial services as well as access to justice for all persons. Allowing magistrates' courts to handle adverse possession claims will certainly make it possible for more litigants to access justice since magistrates' courts are more widely distributed in most parts of the country as opposed to this court which is yet to be stationed in all the counties. ...

...

21. Even if one were to argue that the procedure for commencing and prosecuting adverse possession claims as provided for under Order 37 Rules 7, 16, 17 and 18 of the Civil Procedure Rules requires that such proceedings be commenced and prosecuted before a "judge", I note that the word "judge" is defined at Section 2 of the Civil Procedure Act to mean "the presiding officer of a court". Thus, as used in the Civil Procedure Act and the rules thereunder, "judge" does not exclusively refer to judges of the High Court or the Environment and Land Court as established under Article 162 of the Constitution. It includes a magistrate.

...In view of the foregoing discourse, there are ample reasons based on the express provisions of Section 26 (3) and (4) of the Environment and Land Court Act, 2011 and Section 9 (a) of the Magistrates' Courts Act, 2015, the principles of interpretation of the constitution as well as the principles of the constitution such as devolution, access to services and access to justice for all

**persons, to find as I hereby do, that so long as presided over by a magistrate who is duly gazetted under Section 26 (3) of the Environment and Land Court Act, 2011 and who has the requisite pecuniary jurisdiction, magistrates' courts have jurisdiction and power to handle cases involving claims of adverse possession."**

(h) That the upshot of the foregoing is that the application dated 18<sup>th</sup> February, 2021 is without merit and therefore fails in its entirety. That the respondent should have the cost of the application in view of the provision of **section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya.**

7. That from the foregoing, the Notice of Motion dated the 18<sup>th</sup> February, 2021 is hereby dismissed with costs.

**DATED AND DELIVERED VIRTUALLY THIS 16<sup>TH</sup> DAY OF JUNE, 2021.**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**IN THE PRESENCE OF:**

**APPLICANT: ABSENT**

**RESPONDENT: ABSENT**

**COUNSEL: MR. MOMANYI FOR PLAINTIFF/APPLICANT.**

**MR. MARITIM FOR DEFENDANT/RESPONDENT**

**COURT ASSISTANT: CHRISTINE**