



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC CASE NO. 75 OF 2015

ALEXANDER A. REUBEN.....PLAINTIFF

VERSUS

NGURIATUDO NGIROO.....1ST DEFENDANT

JOSEPH NGIROO CHACHAKIN.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. This is a suit in respect of a portion of land measuring **30.4** ha or thereabouts. The plaintiff's claim is based on trespass. He brings the suit on behalf of and as the administrator of the estate of **Kariwo Lokwanyang Keger**, (deceased) the registered owner of the suit land which is known as **West Pokot/Chemwochoi /269**.

PLEADINGS

The Plaintiff

2. The plaintiff filed this suit vide a plaint dated **3/6/2015** on the same date seeking the eviction of the defendants from **West Pokot /Chemwochoi /269** and removal of all illegal structures from that land as well as costs of the suit.

3. In his amended plaint the plaintiff pleaded that in or about the year **2009** the defendants trespassed on the suit land denied the beneficiaries of the deceased's estate of the use of the land and caused massive waste on the said land.

The Amended Defence and Counterclaim

4. By way of an amended defence and counterclaim dated **24/9/2018** the defendants denied the claim and in the alternative claimed that **Kariwo Lokwanyang Keger** was fraudulently and illegally registered as proprietor of the suit land. They further stated that they have been in occupation of the suit land since their birth, and by the time the title over the land was issued to Kariwo in **1986**, they were still in actual possession of the suit land. They state that they are heirs to the late **Ngiro Chachakin** whom they claim to be the rightful owner of the land and that the plaint does not evince a cause of action against them. In the further alternative, they claim adverse possession over the suit land and aver that the suit is barred by the law of limitation of actions. They pray for a declaration that they have obtained ownership of the suit land by way of adverse possession and an order directing the County Land Registrar West Pokot County to cancel the title deed in Kariwo's name and register the land in the joint names of the defendants, they also pray that they be awarded costs of the suit.

The Reply to the Amended Defence and Counterclaim

5. In his amended reply to defence and defence to counterclaim dated **1/10/2018** the plaintiff denied that the defendants ever resided on the suit land either prior or subsequent to the issuance of the title deed and he therefore asserts that the issue of adverse possession does not arise; he stated that the defendants have their separate parcels whose reference he gives as **West Pokot/Chemwochoi/349** and **West Pokot/Chemwochoi /233** where he alleges that they reside with their families.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. PW1, the plaintiff testified on **29/4/2019**. He stated that Kariwo Lokwanyang was his elder brother who died in **1996** and he took up letters of administration to his estate labelled (**P.Exh 1**) in **2015**. He owned the suit land which measures **30.4 ha** and whose copy of title was admitted by consent as **P.Exh 2**. The defendants are children of Ngiro Chachakin, also deceased; the defendants moved into the land in **2009** at separate times without the consent of the plaintiff. The plaintiff then complained to the police who advised him to obtain a Grant of Letters of Administration to his late brother's estate to enable eviction of the defendants. The defendants built and stayed on the land. Their land is however just adjacent to the suit land. The plaintiff's and the defendant's land is separated by a river. The plaintiff referred to an adjudication dispute that was conducted in **1980**, and an appeal subsequently filed (**Appeal No. 247 of 1980, P.Exh 3**) whose outcome was in favour of Kariwo and stated that the defendants have no right to stay on the suit land. He stated that the defendants' parents were buried on **plot no 233** but Kariwo was buried on the suit land.

7. Under cross-examination by Mr. Kaosa he stated that Kariwo was allocated the suit land by elders in **1971** and that the plaintiff has lived thereon since the land was demarcated. He is still living on it with his family. Addressing Mr. Kaosa's specific question on the issue, he admitted that none of Kariwo's family members are witnesses in this suit but was quick to add that they are involved in the succession cause. He also added that the members of Chachakin's family stated at the hearing of the **Appeal No. 247 of 1980** that they had no interest in the suit land and the land was therefore registered and title issued in Kariwo's name. On re-examination he stated that Kariwo's family resides on the suit land.

8. PW2, Yusuf Longinyang, also testified on **29/4/2019**. His evidence is that he knew the plaintiff and Kariwo who are brothers; that the suit land is Kariwo's; that Chachakin owned a plot which is adjacent to the suit land; that the two lands are separated by a river; that Ngiroo's family still lives on his land; that Ngiroo's family members entered Kariwo's land after the latter died, but they later admitted that the land belongs to Kariwo and the dispute was therefore resolved. Upon cross-examination by Mr. Kaosa he maintained that the Ngiroo family never entered the land while Kariwo was alive and that each of the defendants has his own land. He stated that he could remember that Kariwo's father, *Kerger*, came onto the land first.

9. PW3, Philip Lomerinyang, testified on **16/9/2019**. His evidence is that he knows the deceased who was his neighbour as well as the plaintiff who is his brother; the deceased had land at Chemwochoi whose number he could not recall. He also knew the father to the defendants who had land adjacent to land owned by plaintiff. According to him a dispute arose between Kariwo and Ngiro over the land when the latter trespassed on the suit land. The case went before the Minister in an appeal and the land was thereby awarded to Kariwo whose wife and children live on the land. According to him the defendant entered the land later. When cross-examined by Mr. Kaosa he stated that he was a village elder chosen by other village elders to accompany lands officials during demarcation in the area. Kariwo was away during demarcation but his children were present on the ground. According to him dispute began in **1976** and the Minister's Appeal took place between **1977** and **1978** however he was not a witness in the case which was conducted at Kapenguria. Between his land and Chachakin's land are two farms and he knows the proprietors known by names as Tukei and Ngurakapel. According to him the defendants' live on the disputed, land having settled there between **1998** and **1999**. At that juncture the plaintiff closed his case.

The Defendants' Evidence

10. DW1, Joseph Ngiroo Chachakin, who is the 2nd defendant in this suit gave sworn evidence. He stated that he was born on the disputed land and his father died in **1980** and was buried on the suit land his mother was also buried on the suit land. His father had three wives. He found his parents living on the disputed land. According to him Kariwo's family lives on land situate far away from the suit land. He stated that he was present when the demarcation was done. He admitted that there were cases between his father and Kariwo. According to him, he only came to know later that the land had been registered in the name of Kariwo. He stated that nobody summoned them to attend the case before the Minister and that he and others were still in occupation by the time Kariwo obtained title in **1990**. He testified that he came from the suit land in the morning while coming to court. According to him Kariwo's family does not reside on the land. He prayed for the counterclaim to be granted. In cross-examination he maintained that the family was not summoned to the Minister's Appeal. He denied that Ngiro had any other land.

11. DW2, Nguriatudo Ngiroo who is the first defendant in the suit testified on the **14/10/19**. His evidence is that he has been living on the suit land since birth and his parents were buried on the suit land. According to him no other suit has ever been filed against him to remove him from the land. He prayed that a declaration be issued that the land belongs to the defendants. On cross-examination he again denied that he knew of the appeal case before the Minister or that the land had been given to Kariwo in an appeal. However he also admitted that he owns land, the full particulars and size of which he was initially reluctant to divulge to court. When pressed by Ms. Arunga for the plaintiff to reveal the details he stated that the number of that land is **349**. He also stated he lives on that land.

12. DW3, Domonyang Oyanyang, testified on **21st January, 2020**. His evidence is that he knows that the defendants are the sons of Ngiro who had land in Chemwochoi. In **1972** he was among six persons including one clerk appointed by the District Commissioner for demarcation of land in the area where the suit land is situate and Ngiro was one of the beneficiaries. By then people were already settled on the land, Chachakin being one of them. He was given the land and it was issued its number in **1974**. According to him only the defendants are on that land now. Kariwo was not on the land. His land was elsewhere. According to him **Yusuf (PW2)** was not among the appointed elders. Chachakin and his two wives were buried on the suit land. When cross-examined by Ms. Arunga it transpired that he did not know of the appeal before the Minister and he had never heard that the land was ever awarded to Kariwo. He was also unable to produce any papers to show that he had been appointed by the District Commissioner and the chief to the demarcation team.

13. DW4, Ngurakapel Tongar, testified on **25th February 2020**. His evidence is that the land in question belongs to the defendants' father. It borders his own land which is on the lower side. His parcel is number **270** while the defendant's father's land is No. **269**. He and the defendant's father were shown their land on the same day in the absence of the plaintiff's brother. According to him he was born on the land and now is about **70** years old. He testified that Kariwo's land borders his land but it is on the other side of the river. He testified that he was not aware of the appeal before the Minister. At that juncture the defendants closed their case and the court ordered the parties to file their submissions.

SUBMISSIONS OF COUNSELS

14. The defendants filed his written submissions on **8/5/2020**. I have perused through the court file and found no submissions filed on behalf of the plaintiff. I have considered the pleadings, the evidence and the submissions.

DETERMINATION

Issues for Determination

15. The issues for determination in this suit are as follows:

- a. Whether the title to the suit land was obtained fraudulently.**
- b. Whether the defendants have acquired and deserve to be registered as proprietors of the suit land by virtue of adverse possession.**
- c. Whether the defendants should be evicted from the suit land.**
- d. Who should bear the costs of the suit?**

16. The issues are addressed as here below:-

a. Whether the title to the suit land in the name of Kariwo was obtained fraudulently

17. There is incontrovertible evidence that there existed a dispute between the defendant's father Ngiro Chachakin and Kariwo the current registered proprietor. The suit land was awarded to Ngiro during the land adjudication stage and Kariwo lodged an appeal to the Minister during the hearing of which, as the record reads, two sons of Ngiro attended and stated that they had no interest in the suit land as they had their own land elsewhere. The District Commissioner who was hearing the dispute on behalf of the Minister nevertheless heard the appellant's side and awarded Kariwo the land, thus leading to the registration of the land in Kariwo's name. A clear record of the proceedings and award in that appeal, being **Minister's Land Appeal Case Number 247 of 1980** was produced as **PEXh 3** at the hearing. I therefore find that there was no fraud in the registration of the land in Kariwo's name as the due process was followed in the registration and issuance of title to the suit land in Kariwo's name.

b. Whether the defendants have acquired and deserve to be registered as proprietors of the suit land by virtue of adverse possession.

18. The plaintiff has sought eviction orders and the defendants have opposed the same which implies that the defendants are in occupation of the land. There is no doubt that the suit land was registered on **8/5/1990** in the name of Kariwo, now deceased.

19. In order to establish that their cause of action in adverse possession lies the defendants must establish several conditions exist: they must show there was no forcible entry, that there was *animus possidendi*, that is, that their occupation of the land was hostile to the interests of the title holder and there was an intention to deprive him of possession and to defeat his claim thereto, and that they have been in uninterrupted possession of the land without the consent of the paper title owner for a period of at least **12** years.

20. First the question as to the length of the period of possession must be addressed.

21. The only person directly identified in the Minister's Appeal proceedings as having been in occupation of the land is Kedinyang, Ngiro's son. The evidence which the District Commissioner found to be uncontroverted in that appeal was that Kedinyang took possession of the land and was in such possession, along with the other sons of Ngiro by **1984**. The defendants are sons of Ngiro. Kedinyang is not party in this suit but since they belong to the same family it must be deemed that the defendants were in consort with him in entering the suit land. **1984** is the earliest established date from which the limitation period in this dispute can be computed subject to registration.

22. However, the suit land was not titled by that time of entry and Kariwo became the registered proprietor on **8/5/1990**. The computation of the **12** year period of limitation requisite to warrant a declaration of ownership by way of adverse possession should commence on **8/5/1990**. A period of **12** years from **8/5/1990** would expire on **7/5/2002**. This suit for eviction was filed on **3/6/2015**, that is, **13** years outside the limitation period. I therefore find that the defendants have been on the suit land for a period in excess of **12** years and are eligible for further consideration, subject to the other factors discussed herein after, for registration as proprietors of the suit land by virtue of adverse possession.

23. The second issue to consider is the manner in which the defendants obtained possession of the land. From the appeal proceedings it is clear that possession of the land by members of the Ngiro family was not by way of consent obtained from Kariwo. The Minister's Appeal *per se* is evidence of this. Further, the evidence which the District Commissioner found to be uncontroverted and upon which the award of the land to Kariwo was premised showed that the Ngiro family took possession of the land by force after the boundaries between their father's land and Kariwo's were established by the elders. The evidence at the appeal was that Kedinyang, Ngiro's son, removed the boundary marks, demolished the Kariwo's houses thereon and subsequently he and his brothers brought some other people on the land and also stayed on the land. This is not by any means a peaceful means of entry to the land.

24. Therefore notwithstanding that the appeal shows that Ngiro's sons were on the land as at the year of the hearing of the appeal that is **1984**, and that they remained on the land for more than **12** years after the date of registration of Kariwo on **8/5/1990**, their forcible mode of entry onto the suit land vitiates their eligibility for a declaration that they are entitled to and can not thus form the basis for, the grant of the declaration of acquisition of ownership by way of adverse possession as sought in the defence.

25. All the ingredients of adverse possession must be considered conjunctively and not otherwise if a declaration in favour of the defendants is to be made. Therefore as the defendants have failed in establishing that their entry into the suit land was peaceful, there would be no need to examine whether their subsequent possession of the land was peaceful and uninterrupted, or whether there existed any *animus possidendi* on their part.

26. I therefore find that a declaration that the defendants are entitled to be registered as proprietors of the suit land by way of adverse possession can not issue in the circumstances.

c. Whether the defendants should be evicted from the suit land

27. The suit land belongs to Kariwo who is the registered owner. I have already found that the defendants do not deserve registration by virtue of adverse possession. Are the defendants otherwise legally in occupation of the suit land? They have not been granted a licence by the plaintiff who now desires that they be evicted. They never proved before this court at the hearing the existence of any other legal or equitable right by which they can hang onto their continued occupation of the suit land.

28. The rights of a registered proprietor of land are protected by law. **Section 26** of the **Land Registration Act** provides as follows:

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

29. In this suit the defendants have failed to establish that there was fraud or illegality in the registration of the suit land in the name of Kariwo, and his title is therefore clean.

30. **Section 24** of the Land Registration Act provides as follows:

Subject to this Act-

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

31. The administrator of the estate of Kariwo and the beneficiaries therefore have the right to possession and use of the land to the exclusion of the defendants if the rights protected under Section 24 of the Land Registration Act are to be realised in respect of the suit land. The defendants who are now ensconced thereon would therefore have to vacate the land or be forcibly evicted to pave the way for that realization of the genuine owner’s rights.

d. Who should bear the costs of the suit?

32. The costs should follow the event so the defendants having failed to erect a successful defence in the matter should bear the costs of the suit.

CONCLUSION

33. In the final analysis I find that the plaintiff has established his claim against the defendants on a balance of probabilities as required by law.

34. The upshot of the foregoing is that I enter judgment against the defendants jointly and severally and I issue the following orders against them:

a. An order that the defendants their servants, agents and any other person claiming under them shall vacate the land known as West Pokot /Chemwochoi/269 within a period of 90 days from the date of this judgment and in default they be evicted therefrom.

b. The defendants shall pay to the plaintiff the costs of this suit.

It is so ordered.

Dated, signed and delivered via electronic mail at Kitale on this 30th day of July, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE.