REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 40 OF 2014

ELVIS KOSGEY.....1ST APPLICANT

VINCENT KOSGEY.....2ND APPLICANT

GILBERT KOSGEY.....3RD APPLICANT

VERSUS

BENJAMIN YEGON.....1ST RESPONDENT

REBECCA CHEPKEMOI MARITIM.....2ND RESPONDENT

JUDGMENT

(Claim for adverse possession; applicants claiming to have been born on the land and having occupied it since; evidence showing that their father was resident on the land but left at some point; not clear whether when he left, the applicants were left on the land or not; applicants developing houses but these developments being less than 12 years; no good account of the minimum 12 years required to sustain a claim for adverse possession; being born on land alone is not enough to support a claim for adverse possession; suit dismissed)

PART A : INTRODUCTION AND PLEADINGS

This suit was commenced by way of an Originating Summons filed on **19th August 2014** pursuant to the provisions of **Order 37 Rule 1** of **the Civil Procedure Rules, Section 28 (h)** of **the Land Registration Act** and **Section 38** of **the Limitation of Actions Act, 2012**. The orders sought are as follows :-

> *a) That this Honourable Court be pleased to declare that the applicants are entitled to a portion of land measuring approximately one (1) acre comprised in **L.R No. Kericho/Kapsuser/1696** registered in the name of Kibiegon Mutai (deceased) on whose behalf the respondents are sued as the legal representatives of the estate by way of adverse possession.*
>
> *b) That an order do issue directing that upon the finding and declaration that the applicants are entitled to the aforesaid parcel of land the title be cancelled and a new title be issued to the applicants to the extent of their entitlement.*
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> *c) That a permanent injunction to issue restraining the respondents either by themselves, agents, servants, assignees, representatives or nominees from trespassing onto, interfering with, dealing and or doing any other act which is prejudicial to the applicants' interest in the aforesaid parcel of land as it would be ascertained.*

*d) That in the alternative and without prejudice to the foregoing this Honourable Court be pleased to declare that the parcel of **land L.R No. Kericho/Kapsuser/1696** registered in the name of Kibiegon Mutai (deceased) registered in trust for the applicants (sic).*

e) That costs of the application be provided for.

f) That any other relief the court may deem fit and just to grant.

The Originating Summons is supported by an affidavit of Elvis Kosgey. Inter alia it is deposed that the late Kibiegon Mutai was uncle to the applicants with whom they lived with peacefully and uninterrupted for over 17 years on the suit land, where each of the applicants(also sometimes referred to as Plaintiffs) maintained a designated portion of the suit land without any interference, with a fence existing thereon. It is averred that the plaintiffs have been in exclusive, quiet , peaceful, uninterrupted and continuous possession of the suit land for more than 35 years and have made a lot of improvements such as planting tea, trees , and constructing residential premises. It is deposed that the land was demarcated with a fence in the year 1979 or thereabouts. He deposed that the plaintiffs have been on the land on the basis that the land was bought from their uncle in the year 1978 and a sale agreement dated **2nd July 1978** is annexed. It is further deposed that their late uncle married the 2nd respondent in the year 1994 together with the 1st respondent and they continued living peacefully for over 20 years until **2nd May 2014** when the plaintiffs received a letter from M/s C.K Korir & Company Advocates claiming that they were trespassers on the land. It is the view of the plaintiffs that since they have been on the land for over 36 years they deserve the land by way of adverse possession. In the alternative, it is their view that the late Kibiegon Mutai was holding the land in trust for them.

The respondents (whom I will also refer to at times as defendants) filed a Replying affidavit to oppose the Originating Summons. The same has been sworn by Benjamin Yegon the 1st respondent. He has deposed that his deceased father never sold 1 acre of land of the suit land to the applicants' father. He has refuted the signature in the sale agreement annexed by the plaintiffs and stated that his father used to sign his documents in a manner that was different from that in the sale agreement. He annexed a copy of the Identity Card of the deceased to demonstrate what he claimed was the proper signature of the deceased. He has averred that the sale agreement is forged and fictitious and put the plaintiffs to strict proof. He has deposed that the plaintiffs put up structures on the suit land in the year 2008 -2013, and before that time, they were not in occupation of the suit land. He denied that the plaintiffs planted tea on the land and averred that his father planted 600 tea bushes, and he himself later planted 928 tea buses in the year 2002, while his brother planted 800 tea bushes in the year 2013. He stated that the plaintiffs took advantage of his father's death in the year 1995 to start claiming the suit land which subject they never brought during the lifetime of his father. He denied that the plaintiffs have been in peaceful, uninterrupted, continuous and exclusive possession of the land for over 12 years. He pleaded that the plaintiffs should be restrained from further interference with the land as they are the rightful beneficiaries.

Directions were taken that the matter do proceed by way of viva voce evidence and the Originating Summons be deemed a plaint and the Replying Affidavit a defence. Parties were also given the liberty to call additional witnesses.

PART B : EVIDENCE OF THE PARTIES

Elvis Kipkurui Koske, the 1st applicant, testified that the other applicants are his brothers. His evidence was that they have sued for adverse possession. He stated that they have lived on the suit land since birth. He testified that the respondents are the legal representatives of Kibiegon Mutai (deceased) who was their uncle and owner of the suit land. He stated that the two hold letters of administration to his estate. He testified that he was born in the year 1981, and his other brothers Gilbert Koske in 1978 and Vincent Koske in the year 1980. They were all born on the suit land. He testified that their father used to live on the suit land and had a house. He testified that they have never ceased living on this land and are still there to date. He testified that they have made several developments. They have built houses, planted trees and have a cow shed. He said there are trees demarcating their boundaries. He produced some 6 photographs to support his assertion. Together with his brothers, he stated that they have been occupying

about 1 acre of the suit land. He testified that his uncle lived on a separate portion of the land on its lower side and they had no problem with him until he died. He testified that it was on **2nd May 2014** when they received a letter asking them to leave. He pointed out that the letter states that they have been on the land since the year 1994 which thus shows over 20 years of occupation.

In cross-examination, he asserted that they claim the land under adverse possession. He was cross-examined on the sale agreement annexed to his supporting affidavit (which was never produced in evidence) and he stated that it was his father Johana Mutai, who purchased the land from the deceased. His father is alive and lives on a different portion of the land which was purchased from another one of his brothers. He testified that Johana initially lived on the land that they claim and left in the early 1990s. He testified that he is not pursuing this claim on behalf of his father. He was cross-examined on the houses which they have built and he stated that he built his house in the year 2013, whereas his brothers Vincent and Gilbert, built their houses in the early 2000s (not specific on the year). He testified that they supply tea to Tegat Tea Factory and that when one supplies tea, one is issued with a number. He stated that when their uncle died, their father lived on the disputed property.

PW-2 was Joseph Kipkemoi Koech. He testified that he knows the applicants as the sons of John Mutai. He testified that his land and the land in dispute are separated by a road. He testified that the three claimants came to the land in the year 1972/1973 and are still living on the land. He testified that the respondents have never lived on the land in dispute. He stated that they come from Nandi area. He testified that they came and lived here but never built a house and have never developed the land under dispute. In cross-examination, he testified that John Mutai(also known as Johana Mutai, the father of the Plaintiffs) used to live in the land under dispute but he moved away to another parcel of land. He did not know when the applicants developed their houses on the land. Neither did he know when the respondents came to claim the land.

PW-3 was Isaiah Kiplangat Koech. He is a retired teacher. He stated that he has known the applicants since they were young. He is a neighbour to them. He testified that the land in dispute was previously owned by the grandfather of the plaintiffs. He testified that the said land under dispute is occupied by John Mutai who is their father. He was shown the photographs produced and he stated that they identify tea that was grown by John Mutai. He also stated that John Mutai had built a house which is where the applicants were born. He now lives in adjacent land and the three applicants now live on the land in dispute. He testified that they have been living on it for a long time as it is where they grew up. He testified that the respondents live on the lower part of the suit land. They are living where the deceased used to live. He stated that there was no dispute when Kibiegon Mutai was alive and that they lived peacefully.

In cross-examination, he testified that the dispute started when Kibiegon Mutai died. He could not recall when John Mutai moved to the adjacent land where he currently lives. He testified that the houses of the applicants were developed from the year 2010. He did not know what arrangements John Mutai and his brother Kibiegon Mutai had for John Mutai to reside on the disputed land but he had lived there for a long time.

PW- 4 was John Kipkurui arap Chemosit. He is an immediate neighbor and he testified that he knows the applicants well. He testified that the land in dispute belongs to John Mutai, the father of the applicants. He stated that John Mutai used to reside on this land and that is where he got his children. At the moment, he lives in an adjacent portion where he moved to and build another house. It is now the applicants who live on the land, with the respondents living on the lower portion of it.

In cross-examination, he testified that John Mutai had a house which was pulled down. He did not know the year when the house was pulled down. He thought the dispute over the land started in the 1970s. He did not know when the houses of the applicants were constructed.

With the above evidence, the plaintiffs closed their case.

For the respondents, Rebecca Chepkemoi Maritim testified as DW-1. She is the wife of the late Kibiegon

Mutai. She testified that the land belonged to her late husband and has now been transferred into her name. She stated that she resides on this land and has been living on it for a long time. She stated that she lived together with her husband on this land and had 7 children. Benjamin Yegon, the 2nd respondent is their 2nd born child. She testified that he was born on the disputed property. She stated that she has developments on the land and has planted tea, trees and maize. She stated that her husband died in the year 1995 and before that, nobody came to claim the property. She denied that John Mutai has ever lived on the disputed property. She was not aware of any sale agreement between her husband and John Mutai. She testified that she currently occupies the land with her children but the applicants have intruded into the property. She stated that they entered the property in the year 2013 and constructed houses. They are also rearing cattle and have planted trees. She reported the dispute to the Chief who tried to arbitrate in vain. She testified that the applicants occupy about 2 acres and on her part she also occupies about 2 acres.

In cross-examination, she testified that John Mutai had his house but it was not in the land under dispute. She denied that the applicants entered the land in the year 1994 and stated that it was Benjamin(the 1st Respondent) who went to see the advocate for the demand letter to be written. She said Benjamin had to complain because the applicants were on their land and were bringing cows and planting trees. They had also started refusing them to pluck tea that she said was planted by her late husband. She testified that her son is about 20 - 22 years old. It is more than 29 years since she got married. She identified the photographs produced by the applicants and asserted that the tea was grown by her late husband. She stated that the applicants had their land which they sold. She stated that they never occupied the land while her husband was alive. She stated that her husband never complained about his brother living on the land because he never occupied it.

PART C : SUBMISSIONS OF COUNSEL

Counsel for the applicants submitted inter alia that the applicants are direct dependants of their father's property in accordance with **Section 29** of the Law of **Succession Act, Cap 160**. It was submitted that the applicants have proved through evidence that they have been living in the suit land and their occupation has been exclusive, quiet, peaceful , uninterrupted and continuous for more than 35 years. It was submitted that they are therefore entitled to the land and should be registered as proprietors. It was also submitted that they are entitled to the orders to permanently restrain the respondents from the land together with costs. I was referred to some two cases but the same were never annexed to the submissions.

Counsel for the respondents on the other hand reviewed the evidence and submitted inter alia that the evidence of the applicants is laden with inconsistencies. Counsel submitted that it is puzzling that despite the applicants' father, John Mutai (also known as Johana), being alive and well, he was never called as a witness or enjoined as a party. He submitted that the applicants assert that they took possession in the 1970s yet the sale agreement is one of **2nd July 1978**. He submitted that it is unclear when exactly the applicants took occupation of the suit land. He submitted that if it is the case that the applicants took over the land after their father had left, one would have expected them to have undertaken long standing developments on the land including a family home. He submitted that the developments of the applicants are fairly recent. He also pointed at contradictions on the year these houses were put up. He submitted that the alleged long occupation is not backed up by any evidence. He further submitted that given their relationship with the respondents, their claim for adverse possession cannot lie. He submitted that in the African society, it is common that people are at times allowed to utilize the land of their relatives without necessarily conferring upon them exclusive rights of ownership. He submitted that it had been shown that the applicants' father lived with the 2nd respondent without any quarrels perhaps under such arrangement. He referred me to the decision of Kuloba J, in the case of ***Mbui vs Maranya (1993) KlR 726*** cited and followed in the case of ***Rodgers Mwambonje vs Douglas Mwambonje (2014) eKLR***. He also cited the case of ***Grace Torome vs Titus Mbugua & Another (2016) eKLR***.

PART D : ANALYSIS AND DECISION

I have considered the pleadings, the evidence and the submissions of counsel. In the pleadings, the

applicants put forth two causes of action for claiming a portion of the suit property. The first cause of action was for adverse possession and the second cause of action was based on trust. However, it is apparent that the applicants have dropped their claim for a trust. This came out clearly in the evidence of the first applicant, as he stated both in examination in chief and in cross-examination, that their case is one of adverse possession. I need not therefore make any determination on the claim of trust. I will only determine this matter on the basis that this case is one for adverse possession.

In his submissions, counsel for the applicants submitted inter alia that the applicants are direct dependants of their father's property and **Section 29** of The **Law of Succession Act (Cap 160) Laws of Kenya**, was cited as authority. That provision of the law is drawn as follows :-

> ***29. Meaning of dependant***
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> *For the purposes of this Part, "dependant" means—*
>
> *a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;*
>
> *b) such of the deceased's parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and*
>
> *c) where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.*

Section 29 above falls in **Part III** of **The Law of Succession Act**. This part deals with provisions for dependants of a person who is deceased. **Section 29** attempts to define who comprises of those dependants. With respect to counsel, I really do not see where this section of the law comes into these proceedings. These are not succession proceedings for the estate of the father of the applicants, and it clearly cannot be, for the simple reason that the father of the applicants is very much alive. Neither are these succession proceedings for the estate of Kibiegon Mutai, whose estate was distributed in a separate succession matter. There is therefore no way that **Section 29** of the Law of **Succession Act** can apply to these proceedings.

The claim herein as pleaded, and as emphasized by the first applicant when he gave evidence, is one for adverse possession and is not one seeking a share in the estate of a deceased person. I think it was also misplaced for the applicants to sue the respondents as legal representatives of the Estate of the late Kibiegon Mutai. I have looked at the extract of the register of the suit land, which was annexed to the supporting affidavit of the applicants, and the same shows that the two respondents are now the absolute registered proprietors of the suit property. That register does not show that the two respondents are registered as holding the property for the estate of the said deceased. There is a fault in the manner in which the respondents have been described but I will not hold it against the applicants and will construe the case as one filed directly against the respondents in their own capacity.

It is trite law that for one to succeed in a claim for adverse possession, one needs to demonstrate that he has been in open, quiet, uninterrupted possession of the claimed land for a duration of at least 12 years. The latin phrase, *nec vi, nec clam, nec precario*, captures this required type of possession. The applicants therefore needed to demonstrate that they have been on the suit property, or at least the portion claimed, under the above circumstances. One needs to put forth clear and cogent evidence so as to table facts that will lead one to the conclusion that the person has been in possession for at least twelve years and that the possession meets the test required for one to acquire land by way of adverse possession.

In our case, the applicants have brought forth evidence that they are in possession of the land. That is not refuted by the respondents. The question that arises is whether that possession can count for at least 12 years and whether the same has been open , quiet and uninterrupted. The exact time when their

occupation commenced is very critical.

The evidence of the applicants is that they were born on this land and that they have been there since birth. I must state at this juncture, that the mere fact that one is born in certain land does not entitle him/her, through that basis alone, to be entitled to land by way of adverse possession. Be as it may, the applicants were born between the years 1978 and 1981. Given this position, the assertion by PW-2 that the applicants came into the land in the years 1972/1973 is clearly a fiction.

PW- 1 who is the first applicant, pointed at the demand letter which mentions that they have been on the land since the year 1994. In 1994, the oldest of the applicants was 16 years, and the youngest 13 years. I am not convinced, and evidence has not been led, that at this time, the three applicants, given their relatively tender age at that time, wanted to acquire this land as their own, independent of any occupation that their father may have had during that period. It has not of course been claimed that their father abandoned them on this land for them to fend for themselves.

It is hard to tell why the father of the applicants lived on the claimed land and why he left. The applicants of course allege that he came into the land pursuant to a sale agreement between himself and the deceased entered into in the year 1978. I am not persuaded by this because first there was no proof tendered of the sale agreement. The applicants chose not to rely on it during the hearing of the case. There is certainly the possibility that their father was permitted by his late brother to stay in the property, a scenario which is not strange in our African society, and which is revealed in the decision in the cases of ***Mbui vs Maranya (1993) KlR 726*** which was followed in the case of ***Rodgers Mwambonje vs Douglas Mwambonje (2014) eKLR.*** In the former case, Kuloba J, commented as follows :-

> *"Now, in this country, go to the countryside, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness. Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.*
>
> *To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given **these** things, because the owner knows that it does not matter for how long you borrow **these** things ; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession… I would be surprised if anyone pretended to be ignorant of these things…*
>
> *The keeping of our land of landless relatives, clansmen… for long periods of time until they are able to buy their own land is a custom we all know… The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society."*

The applicants never called their father to give evidence on the reason why he entered into possession in the first instance and the nature of possession that he had. Given the connection between the applicants' father and the deceased, it would have been useful for the applicants to demonstrate the nature of possession that their father had on the suit land. It must be remembered that the applicants are advancing their own cause; not that of their father. It means that it is them who must demonstrate that they (not their father) have accumulated 12 years of possession to lay a claim for adverse possession. If the possession of their father had been adverse to that of the deceased, who was then the registered owner, the applicants could probably have ridden on these years to accumulate the 12 year period required for a claim of adverse possession. The evidence of their father would have been critical, but for reasons which will remain unknown, they chose to leave out that very important bit of evidence. I cannot therefore add the previous possession of their father to the possession that the applicants have had to accumulate the 12 years required for a claim of adverse possession for the reasons that I do not know the nature of possession their father had.

The applicants also never called any evidence to shed light as to why and when their father left the property. All that the evidence shows is that their father left at some point. When he left was however not precisely disclosed. In cross-examination PW-1 stated that he left in the early 1990s. He also said that at the time the deceased died, which was in the year 1995, their father was still on the suit land. PW - 2 did not know when the applicants' father moved away. PW- 3 did not also know and neither did he know under what arrangement the applicants' father lived on the land. Neither did PW-4. It was said that the father of the applicants had a house which was pulled down. None of the witnesses could tell when this house was pulled down. It is therefore not clear, and I have no evidence which reveals to me, what happened after the father of the applicants left. Neither do I have any evidence to tell me when their father left and when his house was pulled down. I cannot tell whether the applicants continued living in the house that their father left before it was pulled down, and cannot tell whether they went with their father to the adjacent land that their father is said to have purchased then came back later to put up their houses. The nature of possession that the applicants had, if any, immediately after their father left is completely unexplained. What I am driving at is that the applicants have not precisely stated when their possession of the land, independent of their father, started.

It is not controverted that at some point, the applicants developed some houses on the land. It is from this time that their possession gets clearer. The first applicant in cross-examination stated that he built his house in the year 2013. He was however rather vague on the years that his other two brothers developed their houses. He only mentioned "early 2000s". PW- 3 in cross-examination stated that the houses of the applicants were developed after the year 2010 but he was not sure of the exact years. The applicants could probably have had some cause if they had demonstrated that they developed their houses and remained resident without interruption for at least 12 years. But they have not shown this. The cloudy evidence of the first applicant on the exact years that his brothers built their residences coupled with the evidence of PW- 3 that it was after 2010 brings one to doubt whether indeed 12 years had lapsed to the year 2014 when the applicants filed this case. As I mentioned earlier, no evidence was led as to where and how the applicants were living before they developed their residences, and the years prior to them erecting their structures cannot therefore be taken into account.

I am afraid that the applicants cannot hinge their claim, and they cannot deem their claim to have been supported, solely on the basis of the demand letter which gives the year 1994. The applicants of course stated that they planted tea on the land and have been harvesting it. But they never mentioned the year that they planted this tea, and never tendered any evidence to show that they have been making tea deliveries to any tea factory. All that was stated is that they deliver tea to Tegat Tea Factory and it was affirmed by the first applicant that when one delivers tea, there is some documentation. None was however shown by the applicants and I am therefore unable to tell when exactly they started harvesting the tea. If this had been tendered, it would have shown when the applicants gained possession, at least, of the area where the tea is situated.

It was also mentioned that the applicants have planted trees, but there is no evidence to tilt their scales since the 2nd respondent in her evidence testified that what the applicants have planted are the small younger trees. More evidence needed to be pressed by the applicants.

I think the applicants merely assumed that because they are on the land, and their father used to be on the land, then their claim for adverse possession is open and shut. I am afraid that is not the case. The test for claiming land by dint of adverse possession had to be met to the full. I am sorry to tell the applicants that they have not met that test. As I have pointed out, there is a lot of vagueness on the time actual possession by the applicants commenced and this does not help their cause. They needed to show, clear occupation, which is quiet and uninterrupted for a duration of at least 12 years. I am afraid that they did not tender sufficient evidence, on a balance of probabilities, to support their assertions.

For the above reasons, I have little option but to dismiss the applicants' case with costs. Not having demonstrated any right that would entitle them to be on the land, the respondents are free to apply for their eviction.

It is so ordered.

Dated, Signed and delivered on this 2nd day of September, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Ms Chelimo for the Applicants

Mr. Caleb Koech holding brief for Mr. E.K. Korir for Respondents

Court Assistant; Mr. Kenei