



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 141 OF 2014

JUDETHEUS KIPLAGAT MALAKWEN.....PLAINTIFF

VERSUS

NORMAN KIBITOK KOGO.....DEFENDANT

JUDGMENT

Judetheus Kiplagat Malakwen (*hereinafter referred to as the plaintiff*) has brought this suit against **Norman Kibitok Kogo** (*hereinafter referred to as the defendant*) claiming that he is the registered owner of land reference Number NANDI/KEBULONIK/251 and has been so registered since 1969. He states that on or about the year 2013, the defendant moved into the plaintiff's land NANDI/KEBULONIK/251 and started occupying a portion thereof measuring approximately $\frac{1}{4}$ an acre or thereabouts.

The plaintiff has asked the defendant to move out of his land to no avail. The defendant has no basis to occupy a portion of the plaintiff's parcel of land NANDI/KEBULONIK/251 and he ought to vacate it. The plaintiff is entitled to exclusive use and occupation of land reference NANDI/KEBULONIK/251. The plaintiff's claim against the defendant is for the defendant to move out of the land and an injunction preventing him from re-entering the parcel of land NANDI/KEBULONIK/251. The plaintiff avers that there is no suit pending nor are there previous proceedings between the plaintiff and the defendant over the same subject matter. That demand and notice to sue has been issued to no avail.

The plaintiff prays for the eviction of the defendant from land reference Number Nandi/Kebulonik/251. He prays further for a permanent injunction preventing the defendant from re-entering land reference Nandi/Kebulonik/251. He prays for costs of the suit.

The defendant denied the claims by the plaintiff and states that there is a dispute of ownership of the suit land. He claims to have been born on the land lived with the grandmother one Veronica Chebichii Kogo who is the *bonafide* owner of the land. The defendant avers that there are other suits touching on the same subject matter. In the *counterclaim*, the defendant states that he has been living on the suitland since 1983 when he was born and has been herding the family cattle, tilling on the land and raising his family on the land without interruption. Both parties live on the land. The plaintiff prays that the suit be dismissed with costs and that there be a declaration that land parcel number NANDI/KEBULONIK/251 belongs to the Family of Kogo. Moreover, a permanent injunction restraining the plaintiff from harassing the defendant or evicting him from the land he occupies. Furthermore, a declaration that the that the defendant has acquired ownership of 2 acres of the suit land through adverse possession and the same be conferred to him.

In the amended reply to amended defence and defence to counterclaim, the plaintiff reiterates the allegations in the plaint and states that the defendant has not been in occupation of the suit land for 32 years and that that Eldoret Court of Appeal Civil Appeal No. 82 of 2006 has nothing to do with the defendant and has been determined in the plaintiff's favor. Moreover, that Eldoret Civil Case No. 82 of 2006 has no relationship with the plaintiff. The amended defence has no triable issues and that the claim is not time barred. That there is no customary trust ascertainable by the Kogo family.

When the matter came up for hearing, **Juthedeus Kiplagat Malakwen, PW1**, stated that he was registered as the proprietor of the Suitland in 1969. He produced the certificate of official search to demonstrate that he is the proprietor. According to the plaintiff, the land is his and does not belong to the family. The land was bought by the plaintiff's father from one Kipngetich Arap Tanui. The defendant entered the land in 2013. The defendant uses $\frac{1}{4}$ of the land for dairy farming and maize farming. He has never worked on the land for 12 years or more.

On cross examination by Mr. Maritim, he states that his wife and children were living on the land. His grandmother known as Veronica Chebichii was also living on the land. He allowed her to live on the land. That was the close of the plaintiff's case.

DW1, Norman Kibitok Kogo states that he was born on the land on 7.6.1983. He used to live with the grandmother Veronica Chebichi Korir on the land and has lived on the land since then. He lives in the grandmother's house. He has constructed a store, he has planted maize and has cows. He married in the year 2006 on the land. He prays that the suit be dismissed.

On cross examination by Mr. Momanyi, he states that he is not a brother to Judetheus but used to live in Veronica's house. His father was Reuben Kipng'etich Korir. Reuben Kipng'etich Korir was not born by Veronica Kipng'etich Korir. He is not Veronica's son. When Reuben went to live with Veronica, the plaintiff had not been born. He does not know who constructed Veronica's house. His father Reuben stays in another parcel of land. His father has eight children who live on their parcel of land. Veronica Chebichii Korir had parcel of land No. Nandi/Kebulonik/373, where she is buried.

DW2, William Kipkemboi Ngetich states that he knows both the plaintiff and the defendant in this case. That he was present in the year 1969, when the late husband of Veronica Chebichii Korir, Chelembach Arap Korir (deceased) sold 6 cows for the purchase of the suit parcel of land. That he cannot really tell exactly how much money was received from the sale the cows.

The proceeds from the sale of the 6 cows were given to Joseph Malakwen Lelei who was the son in law to Chelembach Arap Korir (deceased). He had married Chelembach Arap Korir's daughter Chesambu Kotwina. The Purchase agreement of the aforesaid parcel of land was reduced into writing.

Later on, the late Chelembach made arrangements for the payment of developments on that parcel of land. He was sent together with one Stephen Tero to go to Sarura to call Kipng'etich Arap Tanui to collect the money for the developments being trees and a house. He came and he was given the money which was later reduced in to writing.

In the year 1977, he moved to Chepterit. Judetheus Malakwen was a young boy and used to live in their father's land at Kaptildil. He would occasionally visit the Veronicah Chebichii Korir in the parcel of land that measured 15.5 acres called NANDI/KEBULONIK/251 and he helped Chelembach Korir and Veronicah Chebichii Korir move into the land after it was purchased and they started developing it.

The seller Kipng'etich Tanui(deceased) moved to Sarura and both Chelembach Korir (husband) and Veronicah Chebichii Korir (wife) lived in the land up to 18th December,1997 when Chelembach Korir passed on and Veronicah Chebichii Korir who passed on 5th March,2016. Chelembach Korir was buried in the suit parcel of land.

When the defendant was born in 1983, he lived in the land with Veronicah Chebichii Korir and Chelembach Korir upto the time of their respective demise and the defendant continues to live in it to date meaning under Nandi Customary law he is the son of Veronicah Chebichii Korir.

In the year 1993, this witness went to Vihiga to bring Judetheus Malakwen, the plaintiff home as he had been terminated from employment. That is when he came to settle in the suit land. It is his statement that both the plaintiff and the defendant have been living in the suit land.

The gravamen of the submissions of **Mr Momanyi learned counsel for the plaintiff**, is that the plaintiff did not acquire land for and on behalf of anybody else. He is the sole registered owner and nobody has beneficial interest on the suit property. The plaintiff is not a trustee for and on behalf of the Kogo family. Moreover, the defendant cannot agitate on behalf of the Kogo family as Chelembach Korir died without agitating for the family by claiming the land. Veronica Chebichii Korir who was his wife did not claim. She filed her case which abated. Creation of trust on agricultural land required consent of Land Control Board. The land in question is not ancestral.

Mr. Momanyi further submits that a claim under customary trust defends a claim under adverse possession. He submits that both claims are exclusive and a party ought to elect. The plaintiff moved into the land in 2013 hence adverse possession does not apply. The plaintiff was born in 1983 and therefore, adverse possession could not operate against him. Adverse possession could only apply when he became an adult and this was in 2001. The defendant has been tilling the land with the plaintiff's permission. Moreover, several cases have been in operation in respect of the suit property. According to the plaintiff, time stopped running in the year 2000.

Mr. Maritim, learned counsel for the defendant on his part submits that the defendant was born in the land some 30 years ago. He married in the land and used to live with his parents who are the plaintiff's grandparents. He later married and constructed a house in the land and still lives in the land. The plaintiff is the registered owner and never bought it for value. He was registered as the owner when he was 9 years old. The plaintiff's grandfather, who is the defendant's father was buried on the land. The defendant relies on Sections 27 and 28 of the Land Registration Act. The defendant submits that the defendant is in adverse possession.

According to the defendant, although he does not have title to the land, he is occupying having lived there for all his life and having established his home there, he has an interest in the land which the court can proceed by granting the prayers sought in the counterclaim. He claims both customary trust and adverse possession which cannot be registered and does not require the consent of the Land Control Board.

I have considered the pleadings, evidence on record and rival submissions and do find the facts of the case being that the plaintiff was registered as the proprietor of the suit property on the 17th of September, 1969 when he was a minor. He has lived on the suit land to-date. In the statement filed with the plaint, the plaintiff states that the defendant moved into his land but does not give the date the defendant moved into this land. In the plaint, the plaintiff states that the defendant moved into the plaintiff's land in 2013. The defendant on the other hand, pleads that he was born on the land to his grandmother one Veronica Chebichi Kogo who is the *bonafide* owner. The defendant states that he was born on the land on 7.6.1983. He lived on the land with his biological parents but when he was 6 years old, his biological parents moved out and left him on the land with his grandmother and grandfather who raised him as her child.

This court finds as fact that both plaintiff and defendant were born and brought up on the suit property. The evidence of William Kipkemboi Ngetich is very reliable as he was an adult in 1969 when the plaintiff was registered as the proprietor of the suit parcel of land whereas the the defendant had not been born. He states that Chelembach Arap Korir (deceased) sold 6 cows for the purchase of the suit land. The proceeds were given to Joseph Malakwen Lelei, a son in law to Chelembach Arap Korir. He married Chelembach Arap Korir's daughter Chesambu Kotwina.

The land was bought from the proceeds of the cows paid to Kipng'etich Arap Tanui, the owner of the land. The parcel of land was 15.5 acres

called Nandi/Kebulonick/251. He helped Chelembach Korir and Veronica Chebichii Korir move into the land.

Both Chelembach Korir and Veronica Chebichii Korir lived in the land upto 18th December, 1997 and on 5th March, 2016 respectively. Chelembach Korir was buried in the parcel land. The defendant lived on the land which Veronica Chebichii Korir continued to until death.

This court finds that the plaintiff was registered as proprietor of the suit land when he was a minor on 17th September 1969. The defendant was born on the land in 1983 and lived thereon with both Chelembach Korir and Veronica Chebichii Korir who were the purchasers of the suitland. The defendant became an adult in 2001 and that is when he could assert his rights under the principle of adverse possession.

In respect of this matter, 12 years of adverse possession began running in 2001 until the year 2013. Failure to initiate action against the defendant within 12 years from 2001 to 2013 amounted to laches and at the expiry of 12 years from 2001, the plaintiff's action is time barred.

The defendant has claimed adverse possession, the plaintiff is estopped from evicting him as his claim to the land is time barred and that the defendant is entitled to the land due to adverse possession.

Section 7 of the Limitation of Actions Act Cap 21, Laws of Kenya provides for limitation of Actions to recover land thus an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

The requirements for Adverse Possession in Kenya has 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....”

Likewise, in **Jandu –v- Kirplal & Another (1975)EA 225**, it was held:

....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 ingredients were recently discussed by the court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR** where it was 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.”

It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

The defendants counter claim is for Adverse Possession, he must show, and has shown that he has been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property.

On the issue of trust, I do find that the defendant is not entitled to a declaration of trust as the same is not pleaded and claimed in the counter claim. This court cannot grant what is not claimed. Parties are bound by their pleadings and prayers.

In conclusion, I do find that the plaintiff's claim fails for being time barred against the defendant who became an adult in 2001 and lived on the parcel of land in his own right, has developed his portion, married and lives with his family. The counter claim succeeds on the basis of adverse possession as the defendant has acquired prescriptive rights of 2 acres of the suit land at the expiry of 12 years from the year 2001.

Ultimately, I do grant a declaration that the defendant has acquired 2 acres of land parcel number NANDI/KEBULONIK/251 by virtue of adverse possession and therefore the plaintiff to cause subdivision of the suit property and the said 2 acres be transferred to the defendant.

Moreover, I do grant a permanent injunction restraining the plaintiff from harassing the defendant or evicting him from the said 2 acres he occupies. No orders as to costs as the parties are relatives. Orders accordingly.

Dated and delivered at Eldoret this 1st day of August, 2019.

A. OMBWAYO

JUDGE