



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ENVIRONMENT AND LAND CASE No. 494 OF 2016**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CO-OPERATION....PLAINTIFF**

**VERSUS**

**REUBEN ARAP SIMOTWO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH CHEROGONY CHESEREM.....2<sup>ND</sup> DEFENDANT**

**WILSON KIPRONO CHESEREM.....3<sup>RD</sup> DEFENDANT**

**ZIPPORAH TUNGO AMDANY.....4<sup>TH</sup> DEFENDANT**

**KIPKOECH BENJAMIN TALAM.....5<sup>TH</sup> DEFENDANT**

**JOHN LEMRKOGO.....6<sup>TH</sup> DEFENDANT**

**WILSON RUTO CHERONO.....7<sup>TH</sup> DEFENDANT**

**SOLOMON CHELAGAT.....8<sup>TH</sup> DEFENDANT**

**MARK BUNE.....9<sup>TH</sup> DEFENDANT**

**AMOS TANUL.....10<sup>TH</sup> DEFENDANT**

**JAMES KIPSANG RONO.....11<sup>TH</sup> DEFENDANT**

**MEOS MUTOKO MUSA.....12<sup>TH</sup> DEFENDANT**

**GRACE CHEROTICH MWANGI.....13<sup>TH</sup> DEFENDANT**

**JOHN K. SOLIT.....14<sup>TH</sup> DEFENDANT**

**PST. FRANCIS KIBOR.....15<sup>TH</sup> DEFENDANT**

**SAMUEL SITIENEL.....16<sup>TH</sup> DEFENDANT**

**FLORENCE LIVWEKE.....17<sup>TH</sup> DEFENDANT**

**AARON KULEI.....18<sup>TH</sup> DEFENDANT**

**HENRY KOECH.....19<sup>TH</sup> DEFENDANT**

HOSEA KOECH.....20<sup>TH</sup> DEFENDANT

JOB KELONG.....21<sup>ST</sup> DEFENDANT

### JUDGMENT

1. The plaintiff herein is a state corporation established pursuant to the provisions of the Industrial and Commercial Development Corporation Act, Chapter 445 Laws of Kenya, for the purposes of facilitating the industrial and economic development of Kenya by the initiation, assistance or expansion or by aiding in the initiation, assistance or expansion of industrial, commercial or other undertakings or enterprises in Kenya or elsewhere. It commenced these proceedings through plaint filed on 15<sup>th</sup> November 2016. It averred in the plaint that it is the registered proprietor of the parcel of land known as L.R No. 498/1085 situated in Eldama Ravine Township within Baringo County for a term of 99 years from 1<sup>st</sup> June 1992. It further stated that the defendants, their families and agents have invaded the said parcel of land and have denied it access to its said land despite demands and the intervention of local administration.

2. The plaintiff therefore seeks judgment against the defendants for:

*a. A permanent injunction restraining the defendants either by themselves, servants, agents from encroaching, trespassing, entering, constructing, remaining on and disposing or dealing in any other way howsoever interfering with the plaintiff's quiet and peaceful occupation of its land being LR No. 498/ 1085 situate at Eldama Ravine*

*b. An eviction order to issue against the defendants, themselves, their families and or agents or assigns to evict them from the Plaintiffs land LR No. 498/1085*

*c. Any further or other relief to secure the Plaintiff's rights to peaceful and quiet occupation, use and enjoyment of its land aforesaid.*

*d. Costs of this suit*

3. The defendants filed a defence and counterclaim in which they admitted that the plaintiff is the registered proprietor of the suit property but added that they have been in possession of the property since 1973 and that the plaintiff had never taken any step to evict them besides filing this suit. They averred that consequently, the plaintiff's title to the suit property had been extinguished by adverse possession. They therefore urged the court to dismiss the plaintiff's claim.

4. On the day of the hearing of the suit, the parties recorded a consent in the following terms;

*By consent:*

*1. The statement of the plaintiff's property Manager Paul A. Okwiri dated 18<sup>th</sup> July 2018 and filed the same date be adopted as part of the plaintiff's evidence and the plaintiff's documents be also adopted as plaintiff's exhibits.*

*2. The plaintiff is the registered owner of the suit land having been registered in 1992 through a grant from the Government of the Republic of Kenya which land previously belonged to the Government prior to the plaintiff being registered as owner.*

*3. The plaintiff is a state corporation.*

*4. Attempts had been made by the plaintiff to remove the defendants from the land since it was registered as owner and the suit against the defendants was filed on 15<sup>th</sup> November 2016.*

*5. The parties acknowledge that at the filing of this suit, the defendants or their predecessors had been in occupation of the suit land for a period of over 12 (twelve) years.*

*6. The parties to file submissions on the issues of limitation and adverse possession.*

5. Paul Aloo Okwiri, the plaintiff's sole witness then took the stand. He adopted his witness statement dated 18<sup>th</sup> July 2018 as his evidence in chief. It is stated as follows in the said witness statement:

*1. That I am the property manager of the plaintiff herein*

*2. That I stand by the averments made in the plaint annexed herewith.*

*3. That the plaintiff is a state corporation established through an Act of Parliament, that is Cap 445 laws of Kenya*

*4. That I am fully conversant with the facts of this case*

*5. That the plaintiff is the registered proprietor of that lease comprised in LR No.498/1085 for a term of 99 years from 1<sup>st</sup> June 1992 which parcel of land is situate at Elda Ravine Township within Baringo County in the Republic of Kenya.*

6. That the defendants have unlawfully encroached and/ or trespassed onto the said parcel of land
7. That the Plaintiff had previously sought assistance of the provincial administration with a view to removing the defendants from the land.
8. That the defendants agreed to move out but on condition that they are paid some money.
9. That the defendants claim for monetary compensation is and was unconscionable and without legal basis as they had no right to encroach on the Plaintiff's land in the first place.
10. That the Defendants have been wasting the Plaintiff's land and causing damage thereof.
11. That the Defendants actions have further interfered with the Plaintiff's rights to peaceful occupation, use and enjoyment of the land as the registered proprietor.
12. That I believe that the Defendants actions complained off are violation of the Plaintiff's constitutional as well as property rights
13. That I believe the Defendants have no rights to encroach upon or remain in or cultivate the Plaintiff's parcel of land aforesaid.
14. That the Plaintiff has suffered and continues to suffer irreparable loss and damage on account of the Defendants actions complained of.
15. That I pray that the Plaintiff's claim be allowed and judgment entered against the Defendants as prayed in the Plaintiff.

6. The witness also produced the following documents as exhibits: Certified copy of Certificate of Lease for LR No. 498/1085, Official Search as at 27<sup>th</sup> October 2016 and copy of Letter dated 29<sup>th</sup> January 2016 from Town Administrator Baringo County. Under cross examination, he stated that he was not aware whether the plaintiff had filed any other suit against the defendants prior to 15<sup>th</sup> November 2016. The plaintiff's case was thereby closed.

7. The defendants closed their case without calling any witness. Parties thereafter filed and exchanged written submissions. It was argued on behalf of the plaintiff that as a registered proprietor it is entitled protection of its right to property under **Articles 40 (1), 2(a) and 60 (1) (b)** of the **Constitution of Kenya 2010** and **sections 24, 25 and 26** of the **Land Registration Act** and that the plaintiff is therefore entitled to judgment as prayed. Regarding the defendants' counterclaim, the plaintiff argued that the suit property is government land or land otherwise enjoyed by government and therefore protected from adverse possession by the provisions of **section 41** of the **Limitation of Actions Act**. The plaintiff further argued that the defendants claim cannot be sustained since they tendered no evidence.

8. For the defendants it was argued that in view of the consent on agreed facts, the only question for determination is whether **section 41** of the **Limitation of Actions Act** protects the plaintiff herein from adverse possession. They further argued that the plaintiff is not among the corporations listed in the **Limitation of Actions Act** as being included in the term 'government' and that therefore the plaintiff's suit is statute barred and should be struck out.

9. I have considered the pleadings, the evidence and the submissions in this matter. Arising from the consent between the parties, there is no dispute that the plaintiff is the registered proprietor of the suit land having been registered in 1992 through a grant from the Government of the Republic of Kenya; that the plaintiff is a state corporation; that attempts had been made by the plaintiff to remove the defendants from the land since it was registered as owner; and that as at the time of the filing of this suit the defendants or their predecessors had been in occupation of the suit land for a period of over 12 (twelve) years.

10. The issues that arise for determination are therefore firstly whether **section 41** of the **Limitation of Actions Act** protects the suit property herein from adverse possession; secondly, if not, whether the defendants herein have established entitlement to the suit property by adverse possession; thirdly, if the answer to the second issue is no, whether the plaintiff is entitled to the relief sought.

11. The law on adverse possession is well settled and is founded on **Sections 7, 13, 17 and 38** of **Limitation of Actions Act**. The Court Of Appeal discussed the circumstances under which the cause of action accrues as follows in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**:

*So when does the cause of action accrue? Section 13 provides that:*

*“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....” (Emphasis added)*

*Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of Benjamin Kamau Murima & Others vs. Gladys Njeri, C A No. 213 of 1996 where it was held that:*

*“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”*

Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; which provides that:-

*“(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”*

*[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)*

*[14] Consequently and as rightly submitted by the appellants’ counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...*

12. Arising from the agreed facts herein, there is no dispute that the plaintiff a state corporation and is the registered proprietor of the suit property, that the defendants have had 12 years of uninterrupted adverse occupation of the property. Ordinarily, that would be sufficient to extinguish a title. As a state corporation, the plaintiff herein is in a unique position. Do the provisions of **section 41** of the **Limitation of Actions Act** protect the suit property from acquisition by adverse possession? The section excludes government land or land otherwise enjoyed by the government from being acquired through adverse possession. It provides:

**41. This Act does not -**

**(a) enable a person to acquire any title to, or any easement over-**

**(i) Government land or land otherwise enjoyed by the Government;**

13. At section 2 of the Act, “the Government” defined to include “the Corporations”. The same section defines “the corporations” to mean the East African Railways Corporation, the East African Harbours Corporation, the East African Posts and Telecommunications Corporation and the East African Airways Corporation. Since the plaintiff is not in that list, the defendants contend that the suit property is not government land or land otherwise enjoyed by the government.

14. The answer to the defendants’ argument is found in the classification at **Article 61** of the **Constitution of Kenya 2010** of land in Kenya as being either public, community or private and further in the definition of public land at **Article 62(1)** as follows:

**62. Public land**

**(1) Public land is—**

**(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;**

**(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease; ... [Emphasis supplied]**

15. The Constitution further defines “**State organ**” at **Article 260** to mean a commission, office, agency or other body established under the Constitution. Does the plaintiff fit the description of agency or body of government? As a vehicle of government it certainly does. Since there is no dispute that it owns the suit property it logically follows that the suit property is public land since it is land lawfully held or used by a state organ. It is government land or land otherwise enjoyed by the government. Thus the answer to the first issue for determination is that **section 41** of the **Limitation of Actions Act** protects the suit property herein from adverse possession. That also disposes of the second issue for determination. The defendants herein have not established entitlement to the suit property by way of adverse possession.

16. The third and last issue for determination is whether the plaintiff is entitled to the reliefs quoted at paragraph 2 of this judgment. As a registered proprietor, the plaintiff is entitled to all the privileges that the law accords a registered proprietor under **Section 25** of the **Land Registration Act** which provides as follows:

**25. Rights of a proprietor**

**(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register;**

*and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

17. I am thus satisfied that the plaintiff is entitled to the reliefs of permanent injunction and eviction order. I therefore enter judgment for the plaintiff against the defendants as follows:

a. I grant a permanent injunction restraining the defendants either by themselves, servants, agents from encroaching, trespassing, entering, constructing upon, remaining on and disposing or dealing or in any other way howsoever interfering with the plaintiff's quiet and peaceful occupation of its land being LR No. 498/ 1085 situated at Eldama Ravine

b. The defendants, their agents and/or servants to vacate from LR No. 498/ 1085 situated at Eldama Ravine within 30 (thirty) days from the date of delivery of this judgment. In default, an eviction order to issue against the defendants, themselves, their families and or agents or assigns to evict them from the Plaintiff's land LR No. 498/1085

c. Costs of this suit.

18. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of September 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Matiri for the plaintiff

No appearance for the defendants

Court Assistants: Beatrice & Lotkomoi