



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 22 OF 2015 (O.S)

IN THE MATTER OF SECTION 36 OF THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA

BETWEEN

GILBERT KIMUTAI KOECH.....APPLICANT

VERSUS

WILSON KIPNGENO KOECH.....RESPONDENT

JUDGMENT

1. The Plaintiff commenced this suit by way of Originating Summons on the 9th June, 2015 seeking a determination of the following questions:

- 1. Whether the Plaintiff herein is entitled to 0.58 hectares of all that parcel of land known as KERICHO/KAPTEBENGWET/450 registered under the Registered Land Act in the name of the Defendant/Respondent and situated in Bomet county.*
- 2. Whether the said Respondent should be de-registered as the proprietor of L.R No. KERICHO/KAPTEBENGWET/450 and whether the applicant GILBERT KIMUTAI KOECH should be registered as proprietor of the 1.58 acres comprised in land parcel number KERICHO/KAPTEBENGWET/450 in the name of WILSON KIPNGENO KOECH.*
- 3. Whether a permanent injunction should be issued against the defendant, his agents and/or servants, restraining them from evicting, alienating and/or in any other manner interfering with the plaintiff's quiet possession, occupation and use of the land in issue.*
- 4. Whether the costs of this suit should be provided by the Defendant.*

2. The Originating Summons is supported by the Plaintiff's affidavit sworn on the 9th June 2015. In the said affidavit the plaintiff deposes that the defendant is his step brother. He further deposes that in 1999 the defendant illegally registered himself as the owner of the suit property without the family's consent. He deposes that he has been in open, exclusive, peaceful and continuous occupation and use of the suit property for more than 35 years and had made various developments thereon. He deposes that he only learnt that the defendant was registered as the owner of the suit property in 2014 when he was in the process of preparing succession proceedings. In respect of the estate of their late father. He therefore claims that he is entitled to the suit property by virtue of adverse possession.

3. In his Replying Affidavit dated 14th July 2015, the defendant deposes that the suit property was transferred to him by their late father in 1999 and he was duly registered as the proprietor thereof on 5th May 1999. He deposes that their father had three wives and the plaintiff belonged to the second house while the defendant was from the third house. He states that prior to his demise, their father divided his land among his three wives and each of them lived on their respective parcels without any problem.

4. He deposes that he allowed the plaintiff to stay on his land and there had been no problem until their father died in 2006. He states the plaintiff being his brother cannot claim his land by adverse possession.

5. The suit was canvassed by way of viva voce evidence and the plaintiff testified and called two witnesses while the defendant was the sole witness.

6. The plaintiff testified that the defendant is his step brother but he has never lived on the suit property. He testified that he has lived on the parcel of land that gave rise to the suit property since birth. He stated that the suit land was carved out of land parcel number KERICHO/KAPTEBENGWET/38 along with 12 other resultant parcels. He testified that he has carried on various developments on the suit property including his house and his mother's house. He has also planted trees and he keeps some cattle. He stated that he discovered that his

late father had transferred the suit property to the defendant in 2014. In the same breath he denies that the suit property is family land. He claimed that he has lived on the suit land since 2000. He denied that the defendant had authorized him to occupy the suit property. He testified that his father was buried on the suit property.

7. The plaintiff's witnesses corroborated his evidence that he has lived on carried on developments on the suit property. They also corroborated the plaintiff's testimony that the defendant does not live on the suit property. PW1 testified that the plaintiff's father lived on the suit property before he died. He stated that the plaintiff's father transferred the suit property to the defendant during his lifetime and there had been no complaint by the plaintiff. In cross-examination, PW3 stated that the defendant allowed the plaintiff to stay on the suit property because they are brothers.

8. In his testimony the defendant stated that he consented to the defendant's occupation of the suit property even though it was registered in his name. He stated that he had moved to Londiani with his mother in 1986. He testified that his late father had built a house on the suit property which he bequeathed to him. He stated that the plaintiff had moved to the suit property in 2006 after the death of their father.

ISSUES FOR DETERMINATION

9. I have evaluated the evidence and the submissions filed by both counsels and the following issues emerge for determination:

i. Whether the plaintiff has established a case of adverse possession in respect of land parcel number KERICHO KAPTEBENGWET/450

ii. Whether the plaintiff is entitled to the land parcel number KERICHO KAPTEBENGWET/450 by adverse possession

iii. Who should bear the costs of this suit

ANALYSIS AND DETERMINATION

10. In the case of **Jaber Mohsen Ali & Another V Priscillah Boit & Another (2014) eKLR** the court observed as follows:

“For one to prove adverse possession, he must demonstrate that he has occupied the land openly, without force, without secrecy and without the licence or permission of the land owner. That is contained in the phrase nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi or the intention to possess the land.

In our statutes adverse possession has its basis in sections 7,13, and 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya. The general position of the law is that if a person has been in possession of land for a duration of 12 years then he can claim the land by way of adverse possession”

11. Thus far the plaintiff would appear to have satisfied most of the conditions for a claim for adverse possession. However, the main challenge that arises in this case is that the plaintiff is the defendant's step-brother and the defendant and some of the plaintiff's witnesses testified that the defendant consented to the plaintiff's occupation of the suit property. This would seem to negate the adverse nature of the plaintiff's occupation. In the case of **Mbui V Maranya (193) KLR, Justice Kuloba** observed as follows:

“Now in this country, go to the country side where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the country side, 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 that 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 even think of claiming or losing title by adverse possession....I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.

The keeping on 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 and sound cultural foundations and destabilize the society..”

12. In yet another decision in the case of **Rodgers Mwambonje V Douglas Mwambonje (2014) eKLR** the court stated as follows:

“In a case of adverse possession one must be a trespasser who enters the land of another person, peacefully, and without permission and stays thereon for a period of 12 years without being interrupted by a notice by the registered owner to move out and vacate the land”

13. I associate myself with the above decisions.

14. In the instant case the plaintiff is not a trespasser in the strict sense of the word. He is a family member whom the defendant says he

allowed to live on the land he was given by their late father. How then does a claim for adverse possession arise in such circumstances? Allowing the claim for adverse possession in this case would amount to bastardizing the doctrine of adverse possession. I therefore find and hold that the plaintiff's occupation of the defendant's parcel of land does not amount adverse possession.

14. Consequently, the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

Dated, signed and delivered at Kericho this 18th day of May, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Miss Kitur for the Plaintiff
2. N/A for the Defendant
3. Court Assistant - Abdi