



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO. 185 OF 2015**

**JOELE KIPKORIR KOECH.....PLAINTIFF**

**VERSUS**

**RACHEL NGENO.....1<sup>ST</sup> DEFENDANT**

**ANNAH C. SANG.....2<sup>ND</sup> DEFENDANT**

**DENNIS K. KIBET.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff commenced suit by way of Originating Summons seeking a determination of the following questions:

- a) Whether the Plaintiff is entitled to 12.5 acres of land comprised in L.R No. KERICHO/SOSIOT /205 registered in the name of the deceased by virtue of the plaintiff's adverse possession of the same in open, quiet and peaceful occupation for a period of over 40 years.
- b) Whether the said plaintiff should be declared as proprietor of the said 12.5 acres in place of Kibet Arap Sang –deceased who is at present the registered proprietor thereof.
- c) That the costs of this suit be provided by the defendants.

2. The Plaintiff's claim to the suit land is based on his assertion that it is ancestral land which was originally owned by his grandfather, Kipsang Arap Siriko although the same was never registered in his name as he died before the adjudication process commenced. The said Kipsang Arap Siriko had 3 sons namely; Kibet Arap Sang, Kipkoech Sang and Mochi Sang who all lived on the suit property.

3. In 1972, the suit property was registered in the name of of Kibet Arap Sang long after the death of Kipsang Arap Siriko. The Plaintiff's father, died and was buried on the suit property, while his uncle Mochi disappeared from home and has not been seen or heard of for the last 30 years. The Plaintiff's other uncle Kibet Arap Sang died in 1991 and left behind his widow and children who include the defendants herein.

4. In 1997, the family of Kibet Arap Sang started harassing the plaintiff and demanding that he leaves the suit property. It is against this background that the plaintiff instituted this suit.

5. The suit proceeded by way of viva voce evidence and the Plaintiff testified and called 3 witnesses. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants also testified but did not call any witnesses.

6. In his testimony the Plaintiff stated that the is defendant is his aunt, while the 3<sup>rd</sup> defendant is his cousin. The 2<sup>nd</sup> defendant is the wife of the 1<sup>st</sup> defendant through a woman-to-woman marriage pursuant to Kipisigis customary law. He stated that he was born on the suit property and has been living on it all his life. The said land was registered in the name of the Kibet Arap Sang who is the 1<sup>st</sup> defendant's late husband and father of the 3<sup>rd</sup> defendant. He testified that his father died while he was still young and he was brought up by his late uncle, Kibet Arap Sang. He has been living of the suit property with his wife and 9 children and he has no other home. He stated that even though they had lived in harmony during his uncle's lifetime, in 1997 the 1<sup>st</sup> defendant started claiming that the Plaintiff had no right to the suit property and demanded that he vacates the same. He stated that even though the title indicates that the suit land is 12.5 acres, on the ground it is 17.5 acres. This was confirmed by a surveyor who visited the suit land and filed a report to that effect.

7. Upon cross-examination he stated that since the suit land belonged to his grandfather, it ought to be shared among his grandfather's two

sons, that is his late father Kipkoech arap Sang and the 1<sup>st</sup> defendant's late husband, Kibet Arap Sang. This is because the 3<sup>rd</sup> son, Mochi Sang disappeared more than 30 years ago and his whereabouts, are unknown.

8. PW2 Andrew Rop testified that he is a retired chief, Chagaik Location where the parties to this suit hail from. He stated that he has known the parties to this suit for a long time and that the Plaintiff has lived on the suit land since he was born. He stated that the Plaintiff's late father also lived on the suit land and after his death, the plaintiff continued living there with his uncle Kibet Arap Sang and the defendants. He testified that the suit land is family land which was inherited from the Plaintiff's grandfather who was also the 1<sup>st</sup> defendant's father-in law.

9. PW3 Daniel Malakwen Chepkwony a neighbour of the parties corroborated the evidence of PW2 and confirmed that both the Plaintiff and defendants have been living on the suit land since he knew them. He clarified that Mochi Arap Sang's share ought to be divided between the families of his two brothers, that is Kibet Arap Sang's family represented by the 1<sup>st</sup> defendant and Kipkoech Arap Sang's family represented by the Plaintiff. He stated that since Kibet Arap Sang had two wives, including one who died and left a daughter called Margaret, Margaret's share would be carved out of her late father's share.

10. PW4 Kimalel Arap Siele, a senior citizen aged 93 years who is a neighbour of the parties to the suit also corroborated the evidence of the plaintiff and the other witnesses. He stated that the Plaintiff was occupying his late father's share of the suit land as that is where his father was buried.

11. Upon cross-examination he stated that the suit land was registered in the name of Kibet Arap Sang to hold it in trust for his brothers, as one (the plaintiff's father) had died, while the other brother, Mochi had disappeared.

12. The 1<sup>st</sup> defendant confirmed that the plaintiff is her late husband's nephew and she found him living on a portion of the suit land when she got married in 1984. According to her, the Plaintiff was given 7 acres by the 1<sup>st</sup> defendant's late husband. She categorically stated that she was willing to give said 7 acres to the Plaintiff although she was aware that he was laying claim to more than 7 acres.

13. The evidence of the 3<sup>rd</sup> defendant was inconsequential as he seemed to contradict himself by stating the suit land was not family land yet he concedes that the plaintiff is entitled to 7 acres thereof and that his uncle Mochi is also entitled to a share of the suit land.

14. At the close of the hearing, the plaintiff's counsel filed his written submissions but the defendants' who were unrepresented stated that they did not wish to file any submissions.

#### **Issues for Determination**

15. I have considered the pleadings, evidence and plaintiff's submissions and two issues fall for determination:

1. Whether this is a proper suit for adverse possession.
2. Whether the 1<sup>st</sup> defendant's husband Kibet Arap Sang deceased held the suit property in trust for the plaintiff.

#### **Analysis and Determination**

16. Section 7 of the Limitations of Actions Act provides as follows:-

***(a) An action to recover land 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 “.***

17. After the expiration of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.

18. Section 38(1) of the Act states as follows;

***“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 a proprietor of the land.”***

19. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

***“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v saikwa (2) (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of***

*possession by the owner on his own volition. In the Wanje case, the Court went further and took the view that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.*

*What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:*

*“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”*

20. Based on the above authority and the evidence on record, it is my finding that the suit herein is not one of adverse possession.

21. On the second issue, it is common ground that the suit property is family land which ought to be divided equally between the plaintiff on the one hand and the defendants. The purport of the 1<sup>st</sup> defendant's evidence is that her late husband, Kibet Arap Sang was holding the title to the suit land in trust for his 2 brothers. One of these brothers, Mochi, disappeared more than 30 years and even though no one wants to presume him dead, it is preposterous to expect that he will reappear and claim a portion of the suit land.

22. In the interest of justice and guided by Article 159 2b which enjoins the Court to administer substantive justice, it is my finding that the suit land ought to be divided between the plaintiff whose father was the 1<sup>st</sup> Defendant's brother-in law and the 1<sup>st</sup> defendant. Upon visiting the suit land, the surveyor confirmed that it measures 17.5 acres. I therefore direct that the same be surveyed and sub-divided equally between the plaintiff and the 1<sup>st</sup> defendant. The parties ought to complete the process of Succession in respect of the estate of Kibet Arap Sang so as to divide the suit property between the 1<sup>st</sup> defendant and the Plaintiff.

23. As this is a suit between family members, each party shall bear their own costs

**Dated, signed and delivered at Kericho this 27<sup>th</sup> day of June 2018**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Chelule Adams for the Plaintiff
2. N/A for the Defendants
3. Court assistant – Rotich