



Longorinyang (Suing as the Legal Representative and Administrator of the Estate of Longorinyang Mukemar) v Chepotumeyo & another (Environment & Land Case 20 of 2018) [2024] KEELC 875 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELC 875 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 20 OF 2018
FO NYAGAKA, J
FEBRUARY 23, 2024**

BETWEEN

SAMWEL LONGORINYANG (SUING AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF LONGORINYANG MUKEMAR) PLAINTIFF

AND

**SUSAN CHEPOTUMEYO 1ST DEFENDANT
SOLOMON KORINYANG PYATICH 2ND DEFENDANT**

JUDGMENT

1. Through an Amended Plaintiff dated 04/12/2021, Samuel Longorinyang, the Administrator and Legal Representative of Longorinyang Mukemar (Deceased) claimed that he was the owner of Plot No. West Pokot/Chepkono/773 measuring 10.01 Hectares (hereinafter referred to as ‘The Plaintiff’s Land). He claimed further that Susan Chepotumeyo and Solomon Korinyang Pyatich, the Defendants herein, were the beneficiaries of Plot No. West Pokot/Chepkono/12 measuring 9.91 Hectares (hereinafter referred to as ‘The Defendants’ Land).
2. He averred that the two parcels of land border each other.
3. He pleaded that in or about the year 2009, the owner of the Defendants’ land attempted to encroach on their land but was resisted. However, in the year 2015, the Defendants forcefully encroached and trespassed onto their land by removing posts and barbed wire and curved out 2½ acres of their land which they have remained in possession of to date.
4. He further pleaded that on 14/03/2020 and 21/10/2020, the Defendants invaded the suit land with the aim of removing the fence. Upon being reported to Kabichbich Police Station they were warned of their criminal conduct and asked to wait for the outcome of this case. He claimed further that on



- 08/06/2021, the Defendants invaded their land and maliciously cut down trees, uprooted the fence and cut the barbed wire on the basis that the Plaintiff had no rights and powers since the registered owner was dead.
5. The Plaintiff pleaded they referred the dispute to elders, the local administration, the land registrar, the County Surveyor and the police to no avail hence this suit.
 6. Further he averred that the Defendants were trespassers on the 2½ acres on their portion of land and this Court ought to order them out.
 7. They prayed for the following reliefs;
 - a. An Order of eviction of the defendants, their agents, servants and or employees from the 2½ acres of the Plaintiff's land being part of plot No. West Pokot/Chepkono/773 with the assistance the OCS Kabichbich Police Station and the Assistant County Commissioner Lelan Division, Pokot South.
 - b. General Damages for the trees maliciously cut and barbed wire destroyed.
 - c. An order of permanent injunction restraining the defendants, their agents, servants, employees and all those claiming under them from interfering with the Plaintiff's quiet enjoyment of the suit land.
 - d. Costs of the suit.
 - e. Any other relief that the honourable Court deems fit and just to grant.
 8. On their part, the Defendants filed an Amended Defence and Counter-claim dated 20/04/2022. They denied the Plaintiff's case by stating that they had been using the claimed 2½ acres of land forming part of the Plaintiff's land since the registration of the land in the year 1997, a fact well known to the Plaintiff. Again, that the trees they cut down in the portion measuring 2½ acres were planted by the late Pyatich Mukekamar.
 9. They pleaded that they had been in quiet possession of the portion of land in dispute for over 15 years and hence have acquired it through adverse possession. Further, that when the Surveyor confirmed the said portion of land, it came out clearly that it was theirs.
 10. In the Counter-claim, they pleaded that they have been in quiet, peaceful and uninterrupted possession of the portion of land measuring approximately 2½ acres or thereabouts part of the land known as West Pokot/Chepkono/773 since 1997. They reiterated that they had acquired it through adverse possession.
 11. They prayed for the following reliefs;
 - a. A declaration that the Defendants have acquired by way of adverse possession ownership of a portion of land measuring approximately 2½ acres or thereabouts Part of the land known as West Pokot/Chepkono/773.
 - b. An order that the Plaintiff do execute a valid transfer instruments for 2½ acres out of land known West Pokot/Chepkono/773 in favour of the defendants and in default the Executive Officer of the Honourable be authorised to execute transfer forms.
 - c. Costs of the suit.
 - d. Any other relief that this Honourable Court shall deem fit and just to grant.



The Plaintiff's Rebuttal

12. In his response to the Amended Defence and Counter-Claim, the Plaintiff filed the Reply to defence dated 27/06/2022. He stated that the Amended Defence constituted mere denials and did not raise any triable issues. He pleaded that the invasion by the Defendants was in the year 2009. He reiterated his averments in the Plaintiff and denied that the defendants have been in occupation for a period of 15 years.

The Evidence

13. The Plaintiff testified as PW1. He stated that the original plaintiff, Longorinyang Mukemar was his father. The Defendants invaded his father's land in the year 2009 and he chased them. His further testimony was that his father resolved the dispute with the 2nd Defendant's father but upon his demise, (the 2nd Defendant's father) the two defendants trespassed into his land.
14. When he tried to engage the Land Registrar, the Chief and the Surveyor, the Defendants chased them away. And when the Court ordered for survey to be done and it was, the Surveyors found the beacons were intact but the Defendants had encroached onto his land. Accordingly, he erected posts and fenced it using barbed wire but they all were removed by the Defendants after a short while.
15. The Plaintiff stated further that the Defendants cut down four big trees and upon reporting it to the Forestry Department, they assessed the cost of the trees as Kshs. 370,000/-.
16. To demonstrate ownership of the land, he produced The Title to the land as P.Exhibit 1 The Official Search as P.Exhibit 2 and the certificate of official search for Defendants' land as P.Exhibit 3. The Plaintiff further produced photos of the destruction and the report to police as P.Exhibit 7(a)-(g) and P.Exhibit 5 respectively.
17. In a bid to prove the correct demarcations, he produced the Surveyor's report as P.Exhibit 6. He added that despite agreeing with the Defendants on the boundary and slaughtering a goat to mark end of the boundary feud, the Defendants once again raised issues. He produced the 2nd Report by the Surveyor as P.Exhibit 7.
18. On cross-examination, he stated that he did not have anything to show that he had authority to sue on behalf of his deceased father. He however indicated that the green card shows that the land was registered on 12/02/1998 and the suit was instituted in the year 2018, a period of about 20 years.
19. He stated that the defendants were his relatives whom he used to remove from the land. As regards the value of the cut trees, it was his testimony that he did not have any evidence to prove that figure.
20. Samwel Kariwo testified as PW2. He stated that he is the chairman of peace committee in the area as well as the Chairman for Environment and Forestry in West Pokot County. He adopted his statement dated 04/12/2021.
21. His evidence was a reproduction of the Plaintiff's testimony hence the Court needs not repeat it here.

The Defendant's Evidence

22. The 1st Defendant testified as DW1. She adopted her statement dated 15/09/2022.
23. Her evidence was that the Plaintiff was a son to her deceased brother in law, Longorinyang Mkekamar who did not have land. She produced the Green Card as D.Exhibit 1 to lend credence to the fact that her deceased husband Pyatich Mkekamar is the owner.



24. In reference to the Sureyours's Report, produced as P.Exhibit 6, she stated that they only found the Surveyor, the Police and the Plaintiff surveying his land and did not participate in the survey.
25. Further, she testified that the whole land used to be hers but gave Longorinyang to be his forever.
26. During cross-examination, she stated that they got their title deed earlier than the Plaintiffs. She neither knew the size of their land nor that of the Plaintiffs. She however maintained that the contested 2½ acres are on her title deed.
27. She stated that it was Solomon (last born son) and herself who fell the large trees. However, she did not know who removed the barbed wire. She denied participating in any Mediation and signing any agreement to that end.
28. Solomon Korikwang testified as DW2. He adopted his statement signed on 15/12/2022 as his evidence. His evidence was that the land West Pokot/Chepkono/12 whose title is D.Exhibit 2 was their land and the Plaintiff was West Pokot/Chepkono/773.
29. The 2 ½ acres of land was theirs and they had been living on it since he was born. He denied participating in the Survey whose report was produced as P.Exhibit 6. He reiterated that they were not on Plot No. West Pokot/Chepkono/773.
30. He testified that they were invited to mediation but the Mediator was biased to one side and as such they objected to and did not sign the mediation agreement.

The Submissions

31. The Plaintiff and the Defendant filed written submission dated 28/09/2023 and 05/10/2023 respectively. Their tenor and import shall be captured in the analysis section of this Judgment.

Issues for Determination

32. Having appreciated the Pleadings, the parties' respective oral and documentary evidence and written submissions, the issues that arise for determination are as follows;
 - i. Whether the Plaintiff's claim of ownership of 2 ½ acres being part of West Pokot/Chepkono/773 is merited.
 - ii. Depending on (i) above, whether the Defendant's claim of Adverse Possession in respect of 2 ½ acres being part of West Pokot/Chepkono/773 is merited.
 - iii. Costs.
33. I will hence consider the issues sequentially.

Analysis and Determination

i. Whether the Plaintiff's claim of ownership of 2 ½ acres in West Pokot/Chepkono/773 is merited

34. There is no contention between the disputants that their respective parcels of land border each other. The cause of disagreement is where the boundary line lies.
35. The Plaintiff produced the Title Deed to his portion of land as P.Exhibit 1. I have keenly interrogated the document. The title number is West Pokot/Chepkono/773 and the approximate area is 10.01 Ha. The registration and ownership section indicate that it was registered to Longorinyang Mukemar, the



- Plaintiff's late father herein, on 12/02/1998 and the Title Deed issued to him by Kitale District Land Registry on 09/06/2004.
36. The Certificate of Official Search in respect of land Parcel No. West Pokot/Chepkono/773 was produced as P.Exhibit 2. It is dated 18/01/2018. Its contents are a mirror image of the registration details contained in the Title Deed.
 37. I have also perused the Certificate of Official Search in respect of land parcel No. West Pokot/Chepkono/12. It was conducted on 18/01/2018. It indicates that the said portion of land measures 9.91 Ha and was registered to Pyatich Mukemar on 03/10/1997 and the Title Deed issued on 03/03/2010.
 38. Pursuant to the Order of this Court of 02/03/2020 the Surveyor was directed to visit the land to conduct survey. That order was coined in the following way;

“For expedition the Surveyor may visit the land in the absence of the parties who after notice absents himself and subsequently avail his report to this Court. The Officer commanding station Kapenguria Police Station to accord the Surveying party security during the exercise”.
 39. The foregoing Order yielded the Surveyor's Report dated 13/03/2020. It is referenced 'Surveyor's Report West/Pokot/Chepkono/12 -vs- 773'.
 40. The Report shows that the members present during the exercise are two surveyors namely, R. Rono and S. Rono, the OCS Kapengurai Police Station and 8 other Police Officers, The Chief Kapyongen Location, The Plaintiff herein, Lomuke Maket the owner of land parcel No. 13, Petro Songok, Wilson Rotich and Samwel Kariwo who are neighbours and Benjamin Maiywa a son to Longorinyang Mukemar.
 41. Notably, both Defendants herein were absent during the exercise.
 42. I also have appreciated the contents of the Surveyor's Report of 29/05/2023. In attendance were Ken Chumo, the Land Surveyor, Elvis, Intern Surveyor, OCS Kabichbich Police Station, Four Police Officers, Ellihah Lomuton, the area Chief, John Tollim Assistant Chief, Reuben Tongokwang, Musa Matelenga, Elijah Mopuro.
 43. For the Plaintiff were Samwel longorinyang, Dennis Kibet, Samwel Kariwo, Kodokwang Roinokemer, Evanson Lochongo and Anerson lochongo.
 44. Present for the Defendants were Solomon Korikwang and Susana Chepotumeyo.
 45. I do note that the findings of the second report does not aid this Court in anyway whatsoever as regards the disputed boundary. It is silent about what is at the heart of this case. It neither indicates the correct boundary as per the map nor the disputed boundary. It fails to mention who among the disputants herein had eaten into whose land.
 46. Due to the centrality of the foregoing, I will rely on the first Surveyor's report of 13/03/2020. To that end it is necessary that I reproduce the relevant excerpts. The Surveyors observed as follows;

“With the guide of a RIM (Registry Index Map) sheet No. 72 and by use of hand held gps (garmin series), the boundaries of parcel number West pokot Chepkono/12 and 773 were established by taking linear measurements as from RIM. It was found out that the map is



in conformity with the ground. However, there is an encroachment of parcel 12 onto 773 over the entire boundary between the two parcels”.

47. The Surveyors drew a sketch map, albeit not to scale, showing the correct border line as per the map by use of continuous line and the encroached portion using a dotted line.
48. I have carefully considered the Defendant’s oral and documentary evidence against the Plaintiff’s. Firstly, the documents the Defendants rely on were the very documents the Plaintiffs adduced in evidence.
49. Having thoroughly scrutinized the evidence, there is nothing to demonstrate that the 2½ acres being part of West pokot Chepkono/ 773 is the Defendant’s lawful portion. DW1’s evidence that the two parcels of land used to be her husband’s land was baseless since no evidence was availed to this Court. Her only claim was that they had been in use of the 2 ½ acres and as such, had acquired it through Adverse Possession.
50. Deriving from the foregoing, I find that the Plaintiff proved on a balance of probability that his late father, Longorinyang Mukemar is the lawful proprietor of the portion of land West Pokot/ Chepkono/773 measuring 10.01 Ha.

ii. Whether the Defendants claim of Adverse Possession in respect of 2½ acres being part of West Pokot/Chepkono/773 is merited

51. In order to successfully claim ownership of land through Adverse Possession, a person must demonstrate uninterrupted quiet, exclusive and open possession in another person’s land.
52. The Black’s Law dictionary 11th Edition, defines Adverse Possession at page 67 in the following terms;

“The enjoyment of real property with a claim of right when that enjoyments is opposed to another person’s claim and is continuous, exclusive, hostile, open, and notorious.

The doctrine by which title to real property is acquired as a result of use or enjoyment over a specific period of time”.
53. The ingredients as defined above are quiet enjoyment of another’ land for a specific period of time. In Kenya that period is set by the *Limitation of Actions Act* at 12 years.
54. In Civil Appeal 56 of 2014, Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR, the Court of Appeal in Malindi referred to the Supreme Court of India and discussed the ingredients of Adverse Possession in the following terms;

The Supreme Court of India discussed the essentials of adverse possession in Karnataka Board Of Wakf v Government Of India & Others[2004] 10 SCC 779 and stated as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true



owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

55. Adverse Possession was further discussed by the Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, when the learned Judges remarked as follows;

“Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”

56. Lastly, in Civil Appeal 56 of 2014, *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the learned Court of Appeal Judges discussed validity of Adverse Possession as hereunder;

“...a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See *Kyeyu v Omuto*, Civil Appeal No. 8 of 1990. See also the present position in *Johnson Kinyua v Simon Gitura* Civil Appeal No.265 of 2005, where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it”.

57. Having appreciated the definition and the ingredients that satisfy a successful bid for adverse possession, this Court is convinced that the suit herein is nothing more than a boundary dispute.
58. The Defendant’s Defence and Counter-claim do not satisfy the threshold for adverse possession. I say so because, despite exhibiting the Title Deed of the Plaintiff and claiming that they have been in uninterrupted possession since the year 1997, there is no evidential proof of 12 years of continuous peaceful possession over it, a requirement codified in Section 7 of the *Limitation of Actions Act*.
59. To the contrary, there has been a sustained fight-back by the Plaintiff including reports to the Police Station and even local negotiations that culminated in the slaughtering of a goat to end the dispute. Further to the foregoing, the possession ought to be continuous. The Defendants have not availed evidence to show that from the year 1997, they have been in continuous possession.
60. The last question is that the claim by the Plaintiff for damages of Kshs. 370,000/- in respect the trees maliciously cut down and the barbed wire removed from his portion of the land was without proof.
61. It is trite law that Special damages must be pleaded and specifically be proved. The Plaintiff’s did not. How I wish they did, in the face of admission by the Defendants that they felled the trees! It would have been easy a claim to award. But alas! Both poor drafting of pleadings and lack of keenness on what kind of evidence to present before the Court have shot the claim down. That limb of the Plaintiff’s case fails.



62. The claim of trespass is easy: The Defendants admitted to the fact of being on the disputed portion of land. That was why they filed a Counterclaim. That notwithstanding one may think that the Court has shifted the burden onto the Defendants to disprove the Plaintiff's claim or removed the burden from the Plaintiff to prove the same on a balance of probabilities. Far from that. Instead, it is clear from the evidence of PW1 and PW2 that the Defendants are in occupation of the parcel of land from the year 1997. This Court has found that the land does not belong to the Defendants.
63. Trespass is an act of one being on another's property without the owner's permission and without justifiable cause. That is what the evidence of the Plaintiff demonstrates herein. I find that on that score his claim succeeds.
64. In the end, the Plaintiff partially succeeds. The Counter-claim is accordingly dismissed and the following final Orders hereby issue:
- i. The estate of Longoriyang Mukemar is the lawful proprietor of land parcel No. West Pokot/Chepkono/773.
 - ii. The Defendants are hereby found to be trespassers in the portion measuring 2½ acres forming part of West Pokot/Chepkono/773.
 - iii. An Order of eviction hereby issues against the Defendants, their agents, servants or employees from the 2½ acres being part of the Plaintiff's land of land Parcel No. West Pokot/Chepkono/773.
 - iv. An Order of permanent injunction hereby issues restraining the Defendants by themselves, their agents or servants from interfering with the Plaintiff's quiet possession of land parcel No. West Pokot/Chepkono/773.
 - v. The Plaintiff is hereby awarded general damages in the sum of Kshs. 200,000/- for trespass and destruction of property.
65. It is so Ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 23RD DAY OF FEBRUARY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

