



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO 320 OF 2013**

**KIPRONO ARAP SOI.....PLAINTIFF**

**VERSUS**

**PETER MURMUMET TOMPOI .....1<sup>ST</sup> DEFENDANT**

**LEIMIN OLE KAMPARO NAUSIET .....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

***(Claim for adverse possession; no extract of title annexed; suit fatally defective; plaintiff having been declared a trespasser and eviction order issued in previous proceedings; no quiet possession demonstrated; suit dismissed with costs)***

1. This suit was commenced by way of Originating Summons through which the applicant (whom I will refer to as the plaintiff) , has sought orders to be declared the owner of the land parcel Transmara/Kimintet (B)/842 by way of adverse possession. His Originating Summons was supported by his own affidavit. The respondent opposed the summons by way of filing a replying affidavit and directions were taken that the matter do proceed by way of affidavit evidence and submissions. It is imperative therefore that I assess the affidavits on record.

2. The case of the plaintiff as averred in his supporting affidavit, is that in the 1930s his parents moved to Transmara District and settled on the suit property which is where he has stated he now resides. He has stated that he was born and raised on the land. He annexed a document which he alleged showed that he was born on the suit land. In the year 1988, adjudication of the area commenced. He has deposed that the adjudication was unfairly done and he wrote letters of complaint. Despite his protests, the adjudication process continued and the title herein was created and registered in the name of Leimin Ole Kamparo. He has averred that he has annexed a copy of the title documents as "KAS-4." It is his position therefore that he has lived on the suit property for over 70 years which is a period beyond 12 years. He has averred that as way back as 1957 the colonial government allowed his father to settle on the property and as way back as the year 1976, he was residing on the suit land. It is his case that the respondent has never set foot on the land.

3. The replying affidavit is sworn by Peter Murmuet Tompoi, the 1st respondent. It is his position that the case of the plaintiff is baseless. He has stated that he purchased the suit property from the 2nd respondent. He has averred that they have had a long running dispute over the suit land. A criminal case for trespass, being Kilgoris Case No. 634 of 2000, was instituted and the plaintiff convicted. The 1st defendant also sued the plaintiff before the Kimintet Land Disputes Tribunal which determined in favour of the 1st

defendant. The award of the Tribunal was adopted by the Kilgoris Magistrates Court in the case Kilgoris Misc. Application No. 1 of 2009 and an order of eviction of the plaintiff was issued. The plaintiff appealed to the Provincial Committee but his appeal was dismissed. After obtaining the order of eviction, the 1st defendant moved to evict the plaintiff, but in the process, the plaintiff's sons tried to kill him and he was cut on the shoulder with a panga. While the 1st defendant was in hospital, the plaintiff returned to the land. The plaintiff and his sons were again charged with the offence of trespass in Kilgoris Criminal Case NO. 535 of 2009 and convicted. For the assault, the plaintiff's son, one David Rono, was charged with the offence of assault in Kilgoris Criminal Case NO. 739 of 2009 and convicted. He was sentenced to 10 years imprisonment. The plaintiff filed a Judicial Review Case being Nakuru High Court, JR No. 18 of 2011 which was dismissed. He then filed a case in Bomet court, being Bomet SPMCC No. 47 of 2012 for compensation and general damages for destruction of his property. The defendants have denied that the plaintiff was born on the suit property and neither did he inherit it from his parents. It is said that the applicant is a settler from Bomet. The 1st defendant annexed various documents to prove his deposition.

4. I have considered the matter alongside the submissions of Mr. Gai for the defendants as Counsel for the plaintiff did not file any submissions.

5. First, it is my view that the Originating Summons is fatally defective. In his supporting affidavit, the plaintiff stated that he has annexed a copy of the title document as "KAS-4". I have looked at that document and to me it looks like an area list, or a land adjudication document, showing the allocation of plots to individuals. The same does not even have the parcel No. 842 which is the suit property in this matter. The document annexed cannot by any stretch of imagination be a title document, and in any event it cannot be an extract of the register of the title. It is a mandatory requirement as set out in Order 37 Rule 7 that a person filing a claim for adverse possession, does annex to his supporting affidavit, a certified extract of the title to the land in question. That provision of the law is drawn as follows :-

***Adverse possession [Order 37, rule 7.]***

*(1) An application under section 38 of the Limitation of Actions Act shall be made by originating summons.*

*(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.*

*(3) The court shall direct on whom and in what manner the summons shall be served.*

6. There is no certified extract of the title to the land claimed herein and I am unable to tell who exactly is the registered proprietor and for how long such person has been registered. I am not certain that the persons sued as defendants are the proper persons to be sued in a claim for adverse possession but even if they were, the court must be satisfied about the identity of the land that is claimed, and I am afraid that this has not been done for I do not have an extract of the title in question.

7. The effect of the above is that the summons herein are fatally defective and on that ground alone, this suit fails.

8. But even assuming that there was annexed an extract of the subject title, the suit would still have failed. It is trite law that to support a claim for adverse possession, a person needs to demonstrate that he has been in quiet, open, peaceful and continued occupation of the land in question for a duration of at least 12 years. From the documents annexed by the defendant, it is clear to me that if there has been any occupation by the plaintiff, the same has not neither been peaceful or continuous for a duration of 12 years. Through the case Kilgoris Criminal Case No. 634 of 2000, the plaintiff was charged with the offence of trespass over the suit property. He was found guilty in a judgment delivered on 5 January 2001. Even assuming that from the date of that judgment he went back to the suit property and thereafter enjoyed quiet possession, a period of 12 years had not lapsed for this suit was lodged on 9<sup>th</sup> October 2012. But then, his possession thereafter, if any, did not remain undisturbed. Through the case Kilgoris Misc. application No. 1 of 2009, it was ordered that the plaintiff be evicted from the suit property and an

eviction order was signed on 14<sup>th</sup> May 2009. The decree was issued pursuant to the decision of the Land Disputes Tribunal, which decision was upheld in Nakuru High Court Judicial Review Case No. 18 of 2011, whereby the plaintiff attempted to overturn the said decree. The judgment in the judicial review matter was delivered on 6 March 2012.

9. It is apparent from the above that the plaintiff has had disputes with the defendant over the suit property and a few months before lodging this suit, he was declared a trespasser. Orders of eviction are in force against him. I cannot see how it can be said that the plaintiff has been in quiet possession for a duration of 12 years.

10. The plaintiff cannot seek refuge in the assertion that his parents settled on the suit land a long time ago and he was born on the suit land. That is irrelevant in a claim of this nature. What is important is that the plaintiff has not shown that he has been in open, continuous, and quiet possession of the suit property, for a period of 12 years before the filing of this suit.

11. There is no need to say more. It is clear that this suit has no legs upon which to stand on. I do not hesitate to dismiss it with costs.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 21<sup>st</sup> Day of January 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of -:**

Ms. Kipruto holding brief for Mr.Ochieng Gai for respondents.

No appearance on part of J K Bosek for applicant.

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**