



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 132 OF 2014 (O.S.)**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF  
ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF LAND PARCEL NO. WEST POKOT/SIYOI/518**

**BETWEEN**

**SIMON PKITE CHEMELTOR .....PLAINTIFF**

**VERSUS**

**WILLIAM LOISHAKOU .....DEFENDANT**

**J U D G E M E N T**

**I N T R O D U C T I O N**

1. The defendant is the registered owner of **LR No. West Pokot/Siyoi/518** measuring about 35 acres. On 19/3/1980, the Plaintiff bought six acres comprised in the above title from the defendant. The purchase had started in 1977 but was completed on 19/3/1980. The Plaintiff brought this suit against the defendant seeking orders that he had obtained ownership of the six acres by adverse possession.

**PLAINTIFF'S CASE**

2. The Plaintiff testified that after completion of payment for the six acres, he was put in possession of the six acres and that he has remained so. He paid a consideration of Shs 10,200/= for the six acres where he rears animals and has planted trees on the same. The defendant never took him to the Land control board for consent.
3. In 2002, the defendant filed Kitale HCCC No. 9 of 2002 against him. He was seeking orders compelling him to accept refund of the purchase price in return for vacation from the six acres.

The case proceeded ex-parte and the defendant obtained judgement allowing the plaintiff (now defendant) to deposit Kshs 10,200/= in court to be collected by defendant (now plaintiff).

There was also an order that he vacates the land. This judgement was however set aside and the plaintiff allowed to file defence and counter-claim.

4. The plaintiff's lawyer later raised a preliminary objection on the ground that the plaintiff's suit was statute barred. The preliminary objection was upheld and the suit was dismissed.

The plaintiff who was the defendant in that suit was at liberty to proceed with his counter-claim.

He never pursued the counter-claim which was later dismissed.

### **DEFENDANT'S CASE**

5. The defendant does not deny that he sold six acres to the plaintiff. He admits that in 1980 he sold six acres to the plaintiff. Later his wife complained that the plaintiff was occupying more land than he had purchased. He brought in a surveyor who found that the plaintiff was occupying 11 ½ acres instead of six acres sold to him.

In 2002, he filed a suit against the the Plaintiff seeking to have him compelled to take back a refund of the purchase price.

This case proceeded ex-parte but the judgement obtained was later set aside. The Plaintiff was allowed to file defence and counter-claim. The counter-claim was later dismissed for want of prosecution.

6. The defendant contends that the plaintiff's stay on the land has never been peaceful and that he does not have any land for the plaintiff.

### **ANALYSIS OF THE EVIDENCE, THE LAW AND ISSUES FOR DETERMINATION**

7. There is no contention that the defendant sold six acres to the plaintiff in 1980. There is also no contention that the defendant is the registered owner of the land known as **West Pokot/Siyoi/518** part of which the plaintiff is claiming six acres. The only issue for determination in this case is whether the Plaintiff has acquired the six acres he claims by way of adverse possession.
8. For one to succeed in a claim of adverse possession, there must be evidence that he has been in possession of the land openly, peacefully and uninterrupted for a period of 12 years from the time of possession. In the instant case, the plaintiff started the process of purchasing the six acres in 1977. This process was completed on 19/3/1980 when he was put in possession. He remained in peaceful possession until 2002 a period of 22 years after which the defendant moved to court seeking orders of court compelling the plaintiff to take a refund of Shs 10,200/= being the purchase price and moving out of the six acres.
9. There is no evidence that prior to the filing of this suit, the defendant had in any way tried to assert his claim over the six acres. Infact even during cross-examination, he said that this matter should not have come this far were it not for his wife who was pressurising him to kick out the plaintiff. The defendant's wife testified as DW2. She claimed that when she learned that her husband had sold the six acres without her permission, she went to the Lands office where she protested about the sale. There was no evidence when she did this or if she did it in the first place. The only time when the defendant tried to claim back the land was in 2002. The plaintiff had already been in possession for over 22 years and had done developments on it and that is why the defendant obtained eviction orders against the plaintiff. This was however set aside.
10. The filing of Kitale HCCC No. 9 of 2002 only served the purpose of stopping time from running for purposes of a claim for adverse possession under section 38 of Limitation of Actions Act. The question which seeks to be answered is whether at this time, the defendant's right to six acres had been extinguished. The answer to this question is simple. The defendant's claim to the six acres had already been extinguished as at the time he filled the suit against the plaintiff in 2002.

The plaintiff had been in peaceful and continuous occupation for over 22 years.

*In Nairobi Civil Appeal No. 27 of 2002 Between Mbugua Njuguna And Elijah Mburu Wanyoike & another, the Court of Appeal judges held that the limitation period for purposes of adverse possession begins to run on the day the claimant is put in possession. The judges went on to state that time ceases to run under the Limitation of Actions either when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor – see Githu – Vs – Ndeete cited in the above case.*

11. There is an issue which has been raised in the defendant's submissions touching on res judicata. It is argued that this case is res-judicata.

The defendant mentions a case he filed in **Kapenguria Principal Magistrate's court case No. 9 of 2002** between the same parties. In both cases, the plaintiff who is the current defendant obtained judgement ex-parte. In both cases, the ex-parte judgements were set aside. It cannot therefore be argued that the present case is res judicata. The same were never decided on merits and in any case the judgements were both set aside. The plaintiff's counter-claim in **Kitale HCCC No 9 of 2002** was dismissed for want of prosecution. This cannot make the present case res judicata. The counter-claim was never determined on merits.

### **DECISION**

12. I find that the plaintiff has proved his case to the required standards. The defendant is holding the six acres in trust for the plaintiff. As the plaintiff has acquired the six acres by way of adverse possession, the trust is hereby terminated and the defendant is hereby ordered to transfer the six acres to the plaintiff. If he does not do so, the Deputy Registrar of this court is hereby authorised to sign all documents to ensure that the six acres are transferred to the plaintiff. The plaintiff shall have costs of this suit.

Dated, signed and delivered at Kitale on this 30th day of March 2016.

**E. OBAGA**

**JUDGE**

In the absence of Parties. Parties can read the judgement at the registry.

Court Assistant – Isabellah

**E. OBAGA**

**JUDGE**

**30/3/16**