



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 6 OF 2003

CHERUIYOT CHEPKWONY alias MAPENGO.....PLAINTIFF

VERSUS

SARAH CHESIELE BARTA..... 1ST DEFENDANT

KIPLANGAT BARTA.....2ND DEFENDANT

RULING

(Application for eviction filed by defendant; plaintiff having filed suit for adverse possession and trust; suit dismissed; later plaintiff dies; application for eviction filed against several persons not parties to the suit; whether such application tenable; application dismissed as proper avenue is to file a fresh suit against the persons on the land since they are not parties to the suit)

This is an old case that was commenced by way of Originating Summons on **30th January 2003**. The case of the applicant in the Originating Summons (whom I will refer to as the plaintiff) was that he had acquired by way of adverse possession, 2 acres of **the land parcel Kericho/Kimulot/514**, which land in total measured 10.8 hectares. That land was registered in the name of the 1st respondent (whom I will refer to as 1st defendant). There was however a decree issued in the case **Kericho HCCC No. 32 of 1997** vide which the 2nd defendant in the present suit was declared to own half of the suit land. The case herein was heard by An'gawa J. In a judgment delivered on **3rd August 2009**, the Honourable Judge dismissed the plaintiff's case with costs. A Notice of Appeal was filed on **11th August 2009**.

On **6th February 2010**, the plaintiff died. An application for substitution was filed by one John Cheruiyot Chepkwony and the same was allowed.

In the meantime, the **land parcel Kericho/Kimulot/514** was subdivided into two portions, namely, **Kericho/Kimulot/1551** and **Kericho/Kimulot/1552**. This is following the decree obtained in **Kericho HCCC No. 32 of 1997** which will be recalled, ordered the subdivision of the said land equally between the 1st and 2nd defendant in this suit.

The 2nd defendant has now filed an application dated **26 April 2016**. The application is said to have been brought pursuant to the provisions of **Order 22 Rule 6 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya**. The respondents named in the application are Mary Chepkwony, Francis Cheruiyot and John Cheruiyot. The heading of the application describes them as the personal representatives of Cheruiyot Chepkwony alias Mapengo (deceased). The application seeks two principal orders which are prayers three and four. They are drawn as follows :-

i) That the ruling issued by this Honourable Court on 3 August 2009 be complied with to the full extent.

ii) That an eviction order be issued to remove the respondents his/their agents and/or servants from the parcel of land reference number **Kericho/Kimulot/1551**.

The application is based on the following two grounds :-

a) That the 2nd defendant/applicant is desirous to take possession of 5.4 hectares registered in the applicant's name as **LR No. Kericho/Kimulot/1551** formerly part of **Kericho/Kimulot/514**.

b) That the plaintiff has refused to deliver up vacant possession of the parcel of land to the defendant.

The application is supported by the affidavit of the applicant. He has deposed inter alia that the judgment in **Kericho HCCC No. 32 of 1997** has been effected and the **land parcel Kericho/Kimulot/514** subdivided into two portions. He is now the registered owner of the **land parcel Kericho/Kimulot/1551**. He has averred that "the defendant" (probably meant "the plaintiff") has adamantly refused to move out of the said portion and is not about to move out unless by eviction. It is said that he has issued a demand notice which has been ignored.

Grounds of Opposition were filed to oppose the application. They are drawn as follows :-

a) That the respondents being dissatisfied with the judgment issued by **M.A Ang'awa Judge** on the **3rd day of August 2009**, lodged a notice of appeal on **11th August 2009** and an order to stay execution of the judgment.

b) That the application dated **26th April 2016** to seek orders for removal of respondents themselves/their agents and/or servant from the parcel of **land reference number Kericho/Kimulot/1551** yet the appeal has not been prosecuted.

c) That it is in the interest of justice that the status quo as it obtains now be maintained pending the hearing and determination of the intended appeal.

d) That the application is misconceived bad in law and therefore is an abuse of the process of this court and the same should be struck off.

e) That the application is scandalous, frivolous and vexatious and is intended to delay the court process.

f) That the application is full of malafides and lacks merit both in fact and in law.

g) That the application is meant to delay the main appeal from being heard and determined on merits as the respondents have been incapacitated from filing the appeal since the proceedings and judgments have not been typed to date.

h) The applicant's supporting affidavit is full of half truths.

i) that the application herein is premature, misconceived and in bad taste and should be dismissed until the matter is finalized.

I took in the submissions of Mr. Mutai for the applicant and Ms. Chelimo, counsel holding brief for Mr. Motanya for the respondents. The latter urged me to dismiss the application to enable the respondents follow up the appeal.

I have considered the matter. First, contrary to the allegations in the Grounds of Opposition, it is difficult to see how it can be said that this application is a delaying tactic. I am at a loss as to what the applicant may be delaying by filing this application. I should also lay it clearly, that the case of the plaintiff was dismissed and there is no pending appeal filed. The applicant had filed an application before me for extension of time to lodge an appeal out of time which I dismissed. There is also no order of stay of execution that is subsisting in this case. There is therefore no way I can give an order of status quo pending appeal.

That said, I also find the application herein to be curious. First, I wonder why the respondents in the application are named as Mary Chepkwony, Francis Cheruiyot and John Cheruiyot. I already mentioned that they are described as personal representatives of the original plaintiff who died in the year 2010. I am aware that John Kibet Cheruiyot (I presume he is the same person named as John Cheruiyot in this application) made an application to be substituted for the deceased plaintiff and the order was granted. He holds a grant of letters of administration *ad litem* for purposes of this case. I have absolutely no evidence before me that Mary Chepkwony and Francis Cheruiyot are personal representatives of the deceased plaintiff. There is clearly no basis upon which they can be said to be respondents in this matter. They have never been parties to this suit and have never been mentioned before.

It is John Cheruiyot who continues to be in this case representing the estate of the deceased. I observe that the case of the deceased was one for a declaration of trust and in the alternative for adverse possession. The claim failed. I presume that the original deceased plaintiff could have been in possession of the suit land. If he was alive, then the applicant could have probably been entitled to seek his eviction through the avenue of this suit, given that he would have failed to justify his continued stay on the suit land. But he is now dead and clearly he cannot be evicted for he not in a state to be evicted. I do not think it is proper for the applicant to try and evict his personal representative through this application. Given that the matter is closed and judgment has been delivered, I think the only issue that the said John Cheruiyot can pursue is the appeal (if he is allowed to file appeal out of time by the Court of Appeal), and other incidental proceedings such as issues of taxation of costs. There is nothing else the said John Cheruiyot can do in this matter. I also do not see how an order of eviction can be issued against John Cheruiyot because he is merely a representative of a person who had a claim in the matter. Moreover, the application seeks to evict the persons named as respondents from a land parcel whose character has changed and is not in the form that it was in the pleadings.

Given that the original plaintiff is deceased, I think the proper avenue is for the applicant to file a fresh suit for the eviction of the persons who are on land that the applicant believes he should be in possession of. That case will be decided on merits and it is upon a successful conclusion of the matter that the plaintiff can be entitled to an order of eviction.

For the above reasons, I do not find merit in this application and it is dismissed. I make no orders as to costs.

It is so ordered.

Dated, Signed and delivered on this 29th day of July, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Joshua Mutai for Applicant

Ms Kitur holding brief for Mr. Motanya for Respondents

Court Assistant; Gladys Wambany