REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 55 OF 2009

DANIEL KIPKEMBOI BETT ....1ST PLAINTIFF

DAVID KIBITOK KEMBOI ....2ND PLAINTIFF

JULIUS KIMELI .... 3RD PLAINTIFF

JOSEPH RONO .... 4TH PLAINTIFF

KIPKEMBOI KOGO .... 5TH PLAINTIFF

KIPTOO BARNGETUNY .... 6TH PLAINTIFF

BERNARD KITARIA........................... 7TH PLAINTIFF

TAMARTA CHEBICHII .... 8TH PLAINTIFF

VERSUS

MARGARET WANJIKU CHEGE................. DEFENDANT

J U D G M E N T

INTRODUCTION

1. This suit was filed on **17/4/2009** against the defendant by eight plaintiffs. Five of the plaintiffs that is the **3rd, 5th, 6th, 7th** and **8th** have since died and their names were struck off the record shortly before the hearing commenced. The plaintiffs are seeking the following reliefs:-

> **(a) A declaration that they are the rightful and lawful owners of L.R. No. 1800/3 Kaptien Farm and that the defendant is not entitled to 132.5 acres or any part thereof.**
>
> **(b) A declaration that the defendant is a trespasser in the 132.5 acres of the suit property and eviction order be issued against her.**
>
> **(c) A permanent injunction against the defendant, either by herself, agents, servants, relatives and any other person claiming under her from entering and/or encroaching and in any, other way whatsoever interfering with the 132.5 acres of the suit property.**
>
> **(d) Mesne profits**
>
> **(e) Costs of this suit**

(f) Any other relief the Honourable Court may deem fit and just in the circumstances.

2. **L.R. No. 1800/3** commonly known as **Kaptien Farm** which is about **408 acres** is registered in the names of the first and second plaintiffs. The property was bought in **1964** by a group of **18 members** who included the two registered owners. The defendant is occupying **132.5 acres** of the property (suit land).

PLAINTIFFS CASE

3. The plaintiffs testified that they bought **L.R. No. 1800/3** (the property) in **1964** from one **Denis Campbel.** The property was bought by a group of 18 persons who came together and raised some money. They also took a loan from the **Agricultural Finance Company (AFC)**. It was agreed that the property be registered in the name of the first and the second plaintiffs.

4. The loan due to AFC used to be repaid from proceeds of sale of milk from the members. In or around 1974 it became difficult for the members to raise money to repay the AFC loan. This was partly due to low milk yields and mismanagement of the farm by the leaders. AFC threatened to auction the property to recover the loan advanced to the members. The members then embarked on ways of raising money to repay the AFC loan. They approached a number of persons who could help them repay the loan. They finally settled on **Appollos Mwangi Muna (Appollos)** who had a neighbouring land **L.R. No. 1800/4.**

5. Each of the 18 members agreed to give out **6 acres** to Appollos on lease basis so that he could help them repay the AFC loan. The 18 members raised **108 acres**. There was a farm house which lay on a 12 acre parcel. This too was given to Appollos which made it **120 acres**. Appollos was to cultivate the 120 acres in return for him paying the loan which the members owed the AFC.

6. The farm house was being occupied by two members. Appollos requested to have the farm house for easy of management of the leased land. The two members who were occupying the farm house moved out. Appollos then brought in his son **Chege Mwangi** who came in with his wife **Margaret Wanjiku Chege** the defendant herein. Chege Mwangi died in a road accident on **11/10/1979**. He left the defendant on the suit land where the defendant is residing todate.

7. Appollos had been given three years to clear the AFC loan and move out of the leased portion. He did not clear the loan within the three years. He was left to occupy the leased portion as he repaid the loan. He later cleared the loan. He was asked to move out of the leased land but he refused to do so arguing that he had bought the land. In 1996 Appollos sent his workers to go and plough the suit land. His workers were chased away by sons of the members.

8. Appollos moved to Eldoret High Court where he filed a suit against seven individuals. He claimed that he was a shareholder of Kaptien Farm and that he was entitled to 132.5 acres. This case was transfered to Kitale High Court where it was registered as ***Kitale HCCC No. 35 of 1997***. The case was fully heard and the same was dismissed with costs to the defendants on **19/11/2002**. As at the time the judgment was delivered, Appollos had died. He died on **24/9/2001**.

9. The defendant refused to move out of the suit land. A suit seeking her eviction was filed in 2004. This was ***Kitale HCCC No. 76 of 2004***. This case was however dismissed on a technicality. It is after the dismissal of this case that the present one was filed against the defendant. The plaintiffs contend that the defendant is a trespasser on the suit property and that she has illegally benefited from the same. This is why the plaintiffs are seeking mesne profits of about 8,000,000/= from the defendant.

DEFENDANT'S CASE

10. The defendant stated that she is a daughter in-law of Appollos. Appollos owned a farm called **Gutongorio** which was **1800 acres**. The farm was adjacent to Kaptien Farm. In 1973 the owners of Kaptien Farm approached Appollos to assist them repay a loan they owed AFC. The owners of

Kaptien Farm agreed to sell to Appollos 120 acres. Appollos sent the defendant and her husband to the **120 acres** in **1973.** There was a farm house which was occupied by Stanley Mosbei one of the members of Kaptien Farm. Stanley moved out of the farm house and the defendant and her husband took over. The defendant and her husband cultivated the land and gave the proceeds to Appollos who used to pay the AFC loan owed by the members of Kaptien Farm.

11. Appollos later bought 12.5 acres making the total to be 132.5 acres. The defendant's husband died in **1979**. The defendant has been cultivating the suit land since then to date. She testified that the loan re-payment was cleared in 1979. She contends that Appollos bought the suit land and that he never leased the 120 acres as alleged by the plaintiffs. She stated that she was never asked to move out of the suit land on completion of the lease which the plaintiffs allege was in existence.

12. In 1996, she was cultivating the suit land using Appollos tractors when some members of Kaptien Farm came and stopped the workers. Her father in-law (Appollos) went to court and filed a suit. An injunction was granted which enabled her carry on farming. She contends that she cannot be evicted from the suit land as it belongs to her and that she cannot pay mesne profits on a property which is hers. She prays that the plaintiffs suit be dismissed with costs to her.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

13. I have gone through the evidence adduced by the plaintiffs and the defendant in this case. I have also gone through the pleadings as well as submissions by the plaintiffs and the defendant. The plaintiffs filed their issues on 29/10/2013. The defendant filed hers on 25/11/2013. Issues for determination flow from pleadings and evidence of the parties.

14. One of the issues for determination is whether the first and second plaintiffs are the registered owners of L.R. No. 1800/3 and if so whether they are holding the same in trust for the other members. The defendant had contended in her defence that the two plaintiffs are not the registered owners of L.R. No. 1800/3. She contended that the property was surrendered back to the Government of Kenya and that as such, they are not the owners of the property. The plaintiffs produced a copy of certificate of title [Exhibit 1] which shows that the property was transferred to the first and second plaintiff on 14/9/1964. The entries on the register show that the certificate of title was surrendered to the Government in exchange of a subdivision scheme. It is therefore not true that the property was surrendered to the Government as alleged by the defendant in her defence. PW4 David Kibitok Kemboi while under cross-examination confirmed that he and the first plaintiff were registered as owners of the property on behalf of 16 other members. There is no one who is contesting that the property was bought by 18 members who are inclusive of the two registered members. Though the defendant had contended that the property was not registered in the name of the first and second plaintiffs, she concedes in her submissions that indeed the property was registered in the names of the first and second plaintiffs and that the certificate of title was only surrendered to the Government in exchange for a sub-division scheme. I therefore find that the property is registered in the name of the first and second plaintiffs who are holding it in trust for the other 16 members.

15. Another issue for determination is whether part of L.R. No. 1800/3 was leased to Appollos or whether any part of the same was sold to him in exchange for repayment of the loan owed to AFC by the members of Kaptien Farm. There is evidence from the plaintiffs that they took a loan from AFC to purchase the property. When it became difficult to repay the loan, they approached Appollos who agreed to have some 120 acres on lease basis in return for him helping the members to repay the loan. There is no contention that Appollos repaid the loan. This is confirmed by the fact that AFC who had the title as security for the loan called the registered owners who went and picked it. Appollos later filed a case seeking to be declared as owner of 132.5 acres out of the property. Some of the documents he produced included a document produced as Exhibit 1 in Kitale HCCC No. 35 of 1997. This same document was produced by the defendant as Defence Exhibit 6 in this case.

16. The court in Kitale High Court Civil Case No. 35 of 1997 found that Exhibit 1 was not a sale agreement. It was not signed by any of the persons listed on it or even by Appollos himself. The

evidence of Appollos in that case was clear that he had leased 120 acres from the members of Kaptien Farm. He only changed this position during cross-examination when he tried to state that he bought the 132.5 acres. He repeatedly maintained that he bought the 132.5 acres which he was claiming and that he bought other acres from individual members which acres were not subject of the suit before court. There were two different consents which were given relating to the alleged land which Appollos claimed that he had bought from the members of Kaptien Farm. These consents were found to have been irregularly obtained. The area list which had been presented was found not to be authentic and incapable of being acted upon. The court having considered all these documents arrived at a conclusion that Appollos did not buy the 132.5 acres as he claimed.

17. There was an argument by the defendant that Appollos bought the suit land and that is why he sent his son Chege Mwangi and his wife to reside at the farm house. It was argued that Appollos had a plot adjacent to the suit property and that he would not have sent his son to reside in the farm house if it was a lease. I do not think that this argument has any basis. There is evidence from the plaintiffs that Appollos requested that his son moves into the farm house for easy of management of the leased portion. The movement of Chege Mwangi into the farm house did not mean that Appollos had bought the suit land. There is a letter which the defendant produced as Defence Exhibit 2. This letter was addressed to her husband and not Appollos. If there were attempts by some unregistered members of Kaptien Farm to enter into a separate agreement with Chege Mwangi, then that is a different issue all together. The agreement was with Appollos and not his son. I therefore find that what was entered between the members of Kaptien Farm and Appollos was a lease in exchange of payment of loan owed to AFC by the members of Kaptien Farm.

18. Related to the above issue is the issue of estoppel and res judicata as regards to Kitale HCCC No. 35 OF 1997. The defendant is contending that Appollos bought the suit land i.e. 132.5 acres. This is the same argument which was raised by Appollos. The exhibits produced by the defendant were also produced by Appollos in Kitale Civil Case No. 35 of 1997. The court made a determination on the same documents. The defendant was a witness in Kitale HCCC No. 35 of 1997. She was supporting Appollos case that Appollos bought the suit land. She even stated that it was upon Appollos to decide on what land he was to give her out of the suit land. I find that in the wider sense of the doctrine of res judicata, her arguments in this case are res judicata. The issues were raised by Appollos in Kitale HCCC No. 35 of 1997. The same were decided on by a court of competent jurisdiction. It does not matter that the defendant was not a party to the suit. The subject matter of the suit is the same as was in the previous suit. The arguments the defendant is raising could have been raised in the former suit. If Appollos argument was that he was buying the suit land for his son Chege Mwangi the husband of the defendant, I see no reason why she was not made a party to the former suit. What the defendant is raising in this present suit could have been made a ground or grounds in support of the former suit.

19. The defendants position in the former suit had been that the suit land belonged to Appollos and that it was upon Apollos to decide on what portion to give to her out of the suit land. Appollos made a will in 1999 and bequeathed 30 acres to the defendant from the suit land. Appollos did this apparently in anticipation that he was going to win the case which was pending in court. There is no way Appollos could give out in a will that which was not available to him. The defendant is therefore estoppel from changing positions and claiming that she is entitled to the suit land in her own right.

20. In ***Nairobi Court of Appeal Civil Appeal No. 80 of 1988 between Pop - In (Kenya) Limited and 3 Others -vs- Habib Bank A.G. Zurich***, the plaintiffs who were appellants filed an appeal against a ruling of Justice Rauf whereby he ordered that the suit was barred by the doctrine of estoppel with the extended aspect of res judicata as a result of which he held that the whole suit had failed. There had been two suits which had been filed earlier on. Mr. Shah Advocate for first plaintiff argued that the doctrine of res judicata could not act as a bar to the institution of an action the subject matter of appeal as the plaintiff was not a party to the two originating summons filed earlier on. The Judges of Appeal in dismissing the appeal held that they could not see why the first appellant could not be joined in the two earlier suits. They dismissed the suit and affirmed the decision of the High Court which held that the first appellant had been barred by the doctrine of estoppel with the extended aspect of res judicata. As in the appeal hereinabove, I find that the defendant is barred from raising the grounds in her defence by

the doctrine of estoppel with the extended aspect of res judicata.

21. The defendant in her defence contended that she has acquired the suit land by way of adverse possession and therefore the plaintiffs suit is statute barred. She had also averred in her defence that the property had been surrendered to the Government of Kenya and therefore it was not the property of the first and second plaintiffs. The issue which emerges for determination is whether the defendant has acquired the suit land by way of adverse possession. To start with, a party is bound by his or her pleadings. In the case of **I*ndependent Electoral and Boundaries Commission and Another -vs- Stephen Mutinda Mule (Civil Appeal No.219 of 2013 2014 eKLR, the Judges of the Court of Appeal*** had this to say regarding pleadings. They quoted with approval the decision of **Judge Christopher Mitchelle JSC in Nigeria Case of Adetoun Oladeji (NIG) Limited -vs- Nigeria Breweries PLS S.C.91/2002.**

"........... It is now a very trite Principle of Law that Parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

The judges went on to state:-

" As the authorities do accord with our own thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce."

22. The defendant had averred that the property was Government Property. She cannot be allowed to depart from her pleading without any amendment. A party cannot seek adverse possession on a Government land. In the case of ***Faraj Maharus -vs J. B. Martins Caless industries & 3 Others (Civil Appeal No.130 of 2003),*** the Court of appeal sitting in Mombasa held as follows:-

" ***Secondly that there can be no adverse possession on Public or government Land however long one may have been squatting thereon without let or hindrance from the Government. Therefore the appellant cannot benefit from the long period of his occupation of the disputed property."***

23. The defendant has been sued in her individual capacity as a trespasser. The estate of Appollos was not sued and is not a party. The evidence on record is that it is Appollos who put her in possession of the suit land. Even if she has been on the suit land since 1973 or 1974 as she claims, she has been on the suit land as a licencee of Appollos who was himself on the land on lease basis with permission of members of Kaptien Farm. Apollo remained the controlling person in as far as the suit land was concerned. This is why he had to file a suit in 1996 against some individuals from Kaptien Farm. Appollos died on **24.9.2001**. The defendant therefore remained a licencee of Appollos until his death. If the defendant has to raise a claim of adverse possession in her own right, then that can begin from the time Appollos died on 24.9.2001. Time will then start running in her favour after 24.9.2001. The question which arises then is whether the defendant has acquired the suit land by way of adverse possession. The law requires that she ought to have been in continuous, peaceful and uninterrupted possession for a period of 12 years. In the year 2004, the plaintiffs filed a suit against her seeking her eviction. This suit was however dismissed on a technicality. About five years later the plaintiffs brought the present suit against her. Even if we were to assume that the 2004 case was not there, the defendant would have been on the suit land for a period of about 8 years which is short of the statutory period required for one to acquire land by way of adverse possession.

24. The defendant is not the administratrix of the estate of Appollos and she cannot therefore purport to claim adverse possession on behalf of his estate. She cannot equally purport to claim on behalf of the estate of her late husband who died in 1979. I have already found that she was a licencee of Appollos and neither she or the estate of her husband can claim the suit land on grounds of adverse possession. Besides this, the law is clear that one cannot claim adverse possession in a defence. That

claim has to be brought by way of Originating Summons. It cannot be brought in a counter-claim. This was the holding in ***Nakuru Court of Appeal Civil appeal No. 231 of 1999*** between ***Njuguna Ndatho -vs- Masai Itumo & 2 Others*** where the High Court allowed a claim of adverse possession founded on a counter-claim. On appeal the judgment of the High Court granting the defendant's claim in the counter-claim was set aside.

25. The defendant urged the court to find that the Plaintiff's were holding the suit land in trust for the estate of Appollos. I have already said herein-above that the estate of Appollos is not a party to this suit. The defendant is sued in her personal capacity as a trespasser to the suit land. She cannot agitate a claim on behalf of the estate of Appollos which is not a party. Even if the estate of Appollos was to be a party, there is no basis upon which the estate of Appollos could claim that the suit land is held in trust for the estate. Appollos himself during his lifetime filed a suit seeking to be declared owner of 132.5 acres. This claim was dismissed by the court. The claim was not dismissed because Appollos had not included the first and second plaintiffs in the suit. It was dismissed because the court found that Appollos had not bought the land from the members of Kaptien Farm as claimed. The whole process which was put in place in a bid to transfer land to Apollos was faulted. A consent purporting to transfer the property to one of the witnesses who testified in favour of Appollos in the 1997 case was found to have been unprocedurally given. It was addressed to persons who were not registered owners. The registered owners were not involved. This consent was too produced in the present case as a defence exhibit 7.

26. The other issue for determination is whether the defendant is a trespasser on the suit land. There is evidence on record that the defendant was on the suit land at the invitation of her father in-law Appollos. Appollos had been allowed on the land on lease basis in return for him assisting the members of Kaptien Farm to repay the loan which members owed to the AFC.The initial period of stay was 3 years but this period extended because Appollos did not repay the loan within the 3 years given. There is a letter from AFC plaintiff exhibit 2 which confirms that the loan was cleared in 1978. The clearance of the loan was not brought to the attention of members of Kaptien Farm until 1994 when The AFC wrote to the registered owners asking them to collect their title. Though the plaintiffs did not seek to remove Appollos from the suit land in or around 1994, the members were impatient with his stay. Two years after they received the title deed for their land; members of Kaptien Farm tried to stop Appollos from utilizing the suit land. This prompted Appollos to file a suit in 1996. This is the suit which was dismissed in 2002. Appollos was trying to claim that he had purchased the land. Appollos lost the case. There was no appeal preferred against the court's decision. The import of this judgement is that it rendered all those who were on the suit land trespassers because they had no ground for remaining on the suit land. One of the people who are still on the suit land is the defendant and her children. They have no lawful basis for remaining on the suit land. I have demonstrated herein-above that the defendant has not acquired any known rights over the suit land. Appollos was clear in his testimony that the 132.5 acres he was litigating on was not part of the portions he bought from individual members of Kaptien Farm. He was asking the court to declare that he bought the 120 acres which the plaintiff's were contending that they leased to him and that he bought a further 12.5 acres making it 132.5 acres. Appollos could not adduce any evidence ofpurchase of the 12.5 acres or the 120 acres. The court therefore found that he had not proved that he bought the 132.5 acres which he was laying claim to. The 132.5 acres which Appollos wanted to wrest from plaintiffs are the same acres being occupied by the defendant. Having found that the defendant has no basis of staying on the suit land, I find that she and anyone claiming to be on the suit land through her is a trespasser.

27. The other issue for determination is whether the plaintiffs are entitled to mesne profits. Mesne Profits are awarded to a successful litigant against a defendant who has been unjustifiably benefiting from a property which is found to belong to the claimant. I have found that the defendant became a trespasser to the suit land as from the date the court decreed that Appollos who had allowed her to be on the suit land had no claim to the 132.5 acres. The defendant has been on the suit land since then. She has been growing maize on about 122 acres of the suit land which is all arable as per theevidence of **PW5 Bonface Kapiri Wafula Muse** a Professional valuer who valued the land. He found out that about 10 acres were reserved for the homestead. The valuer valued the property in 2013. He produced his report as exhibit 3. This witness testified that he has been around the area since the year 2000 and he

therefore knows about the rental income if one were to lease out. An acre would fetch between 3000/= to 8000/= in 2014. He therefore found that the profits accrued from the suit land between 2003 and 2013 will be 8,000, 000/=. The Mesne Profits are being considered in the year 2015. This is a period of about 2 years from the date of valuation. During cross examination, the defendant confirmed that she had leased out 5 acres to someone at kshs.8,000/= per acre. This confirms the findings of the valuer when he put the income per acre at 8,000/= as at 2013. The defendant has been utilizing the suit land since the 1970s. The plaintiffs are only claiming mesne profits from 2003 to 2013. I do not find any, ground to fault the valuer's assessment. He is an expert in the field. I therefore award the plaintiffs mesne profits of **Kshs.8,000,000/= (Eight Million).**

DETERMINATION

28. The evidence as analyzed above has led me to make a finding that the plaintiffs have proved their case against the defendant. I accordingly grant the following reliefs:-

(a) A declaration that the plaintiffs are the rightful owners of 132.5 acres which are part of LR.No.1800/3 commonly known as Kaptien Farm and that the defendant has no claim to the said 132.5 acres.

(b) A declaration that the defendant is a trespasser in the 132.5 acres and that she should be evicted from the same.

(c) A permanent injunction is issued against the defendant, her servants or agents or any one claiming under her from in any manner interfering with the 132.5 acres.

(d) The plaintiffs are hereby awarded Mesne Profits of kshs.8,000,000/= (eight million).

(e) The defendant shall pay costs of the suit. Interest on mesne profits to be calculated at court rates from the date of this judgment.

(f) The eviction order granted in (b) shall take effect upon expiry of three months from the date of this judgment.

Dated, signed and delivered at Kitale on this **23rd** day of **September 2015.**

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for defendant and Mr. Wafula for Mr. Bosek for Plaintiffs.

Court Assistant – Winnie.

E. OBAGA

JUDGE

23/9/2015