



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 16 OF 2012 (OS)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

A N D

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 LAWS OF KENYA

A N D

IN THE MATTER OF ALL THAT PARCEL OF LAND KNOWN AS LR. NUMBER

CHERANGANY/ KAPKANYOR / 55

A N D

IN THE MATTER OF ANY APPLICATION FOR AN ORDER THAT TITLE OVER LAND

**PARCEL NO. CHERANGANY / KAPKANYOR / 55 HAS BEEN ACQUIRED BY WAY OF
ADVERSE POSSESSION BY BARNABAS MUNGO LONGIT**

B E T W E E N

BARNABAS MUNGO LONGIT PLAINTIFF

VERSUS

STANLEY TANUI DEFENDANT

J U D G M E N T

INTRODUCTION

1. The defendant is the registered owner of **LR.No. Cherangany/ Kapkanyor/55** (suit land). The suit land was a subdivision of **LR. No. Cherangany/ Kapkanyor/23** which was owned by one **Kibiwott Kimutul**. The defendant was registered as owner of the suit land by way of transmission. The suit land was initially registered in the name of **Kiptanui Arap Kimaget**, the defendant's father.

2. The plaintiff brought this suit against the defendant seeking an order of the court that he had acquired the suit land by way of adverse possession.

PLAINTIFF'S CASE

3. The plaintiff testified that he bought the suit land on **13.3.1972** from his step father **Kibiwott Kimutul**. The plaintiff was then a civil servant working in the prisons. He brought his father and younger brother who occupied the suit land in **1975**. His father and brother remained on the suit land until 1996 when the defendant and his brothers attempted to forcefully enter the suit land following the death of their father. The incident was reported to **Kapcherop Police Post**. The defendant and his brothers were claiming that the suit land had been bought by their father from **Kibiwott Kimutul**.

4. The plaintiff went to the lands registry and carried out a search which revealed that the defendant's father had obtained title to the suit land in **1992**. The plaintiff and his father filed a suit against the defendant's brothers in Eldoret. This case was filed in **1996**. The case was transferred to Kitale High Court where it was registered as **Kitale High Court Civil Case No.27 of 1997**. The plaintiff and his father were seeking to be registered as owners of the suit land by adverse possession. This case was however struck out.

5. When the defendant's father died in **1996**, the defendant and his brothers started the process of succession vide **Kitale Succession Cause No. 61 of 2005**. The plaintiff petitioned the court in the cause seeking to be recognized as one of the beneficiaries of the estate of **Kiptanui Kimaget**. The Plaintiff's petition was dismissed in a ruling delivered on **23.9.2011**. The judge in the said ruling observed that if the plaintiff was claiming any interest in the suit land which was a subject of the succession cause, then he should file a civil suit to agitate his claim. This is what prompted the plaintiff to file the present Originating Summons.

DEFENDANT' CASE

6. The defendant's contention is that the plaintiff has no case against him. The defendant testified that he was registered as owner of the suit land by way of transmission. This followed the death of his father **Kiptanui Arap Kimaget** who had bought the suit land from **Kibiwott Kimutul** who is a step father of the plaintiff. The defendant testified that when **Kibiwott Kimutul** died, the plaintiff's father **Lotenangiro Longit** who was a brother to **Kibiwott Kimutul** came and inherited his brother's wife. The plaintiff's father resided on plot No. **Cherangany/Kapkanyor/54** which neighboured the suit land which his father had bought from the late **Kibiwott Kimutul**. The defendant testified that the plaintiff had never been on the suit land. The plaintiff started laying claim to the suit land in 1996 following the demise of his father. It is during this period that the plaintiff's brother came to the suit land and destroyed a grass thatched house belonging to his elder brother. The same persons also later destroyed a corrugated iron sheets house belonging to the defendant's brother. This incident was reported to Kapcherop Police Post. The defendant's brother was advised to re-construct his houses which he did.

7. The defendant testified that there has been a long standing boundary dispute between the plaintiff who was residing on **LR.No Cherangany / Kapkanyor / 54** on the one part and their family on the other part. This dispute was referred to a Private Surveyor who came and surveyed the boundary between plot Nos **Cherangany/Kapkanyor /54 and 55**. The surveyor found that the plaintiff had encroached on to the suit land by two acres. The plaintiff had put up two semi permanent houses and planted trees on the suit land. The defendant denied that the plaintiff has been on the suit land since 1972 when he alleges to have bought the suit land.

ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION

8. The plaintiff is basing his claim on a purchase which took place on **13.3.1972**. The defendant is contending that there was no such purchase by the plaintiff. The first issue which then emerges for determination is whether the plaintiff purchased the suit land from **Kibiwott Kimutul** on **13.3.1972**. The plaintiff testified that on **13.3.1972** he entered into a sale agreement with his step father **Kibiwott Kimutul** in which his step father agreed to sell to him 30 acres at a consideration of **3400/=**. The plaintiff testified that he paid **Kshs.1500/=** on **13.3.1972** and paid the balance on **19.5.1973**. The plaintiff produced the said agreement [Plaintiff Exhibit 1]. A look at this agreement shows that it does not refer to any particular plot. The same is not signed though there are persons listed as witnesses. The agreement does not indicate when possession was to take effect.

9. The plaintiff called his brother as witness. This is PW2 **Renson Cheror Longit** who testified that he was present when his brother bought 30 acres from their step father **Kibiwott Kimutul**. This witness testified that his name appears at number seven on the agreement. This witness testified that after negotiations, there was no money paid by his brother. His brother went away and later sent him Kshs.1500/= through post office. He went and paid the Kshs.1500 to his step father after a month from the date of negotiations i.e. 13.3.1972. He further testified that he does not know how the balance was paid.

10. The other witness, who was called by the plaintiff is **PW7 Sanyiego Kibiwott**. This is the wife of **Kibiwott Kimutul** who testified that she was present when the plaintiff bought the suit land from her husband. She testified that the plaintiff paid kshs.1500/= at the time of purchase and later paid the balance of **9000/=**. The evidence of these two witnesses i.e **PW2** and **PW7** contradicted that of the plaintiff. Whereas the plaintiff testified that he paid Kshs.1500/= during the day of negotiations, his brother PW2 claimed that the plaintiff sent him cash 1500/= through Post Office after one month and that he is the one who took the money to **Kibiwott Kimutul**. The demeanour of the two witnesses was wanting. PW2 appeared evasive when being asked questions. PW7 also struck me as a witness who could not speak the truth. At first she claimed that she had only four children but when she was pressed in cross examination, she admitted that she had six children two of whom were sired by the plaintiff's father.

11. The plaintiff testified that when **Kibiwott Kimutul** died in 1975, the defendant's father came out to claim that he had bought the suit land from **Kibiwott Kimutul**. The plaintiff then went and had a caution registered against the title for the suit land on 8.11.1976. The plaintiff produced an application for registration of caution dated 1.9.1976 [Plaintiff Exhibit 2]. It is important to note that this application was not commissioned or attested as required. This is the application which the plaintiff claims to have resulted in registration of a caution registered on 8.11.1976. I do not think that it will have been possible for a caution to be registered based on an application which was not commissioned or attested as required. The plaintiff produced an extract from the registrar in respect of the suit land [Plaintiff Exhibit 5(b)]. The extract shows that the suit land was a sub-division of Plot No. 25. This is not correct as the suit land is a sub-division of Plot No. 23. Plot No. 25 belonged to Kiptanui Arap Kimaget. It is therefore doubtful that the plaintiff caused registration of a caution on the suit land in 1976 as he alleges. This extract was obtained on 24/7/1997 for purposes of the suit land which the plaintiff and his father had filed against the defendant's brothers. I therefore find that there was no valid caution registered at the instance of the plaintiff in 1976. The application for registration of caution shows that the plaintiff was declaring that he was seeking registration of a caution against the title to the suit land pending finalization of the case which was pending in court. There was no case pending in court as at 1.9.1976. The case the plaintiff was referring to in his declaration in Exhibit 2 is **Kitale HCCC. No. 27 of 1997**. The plaintiff was trying to back date the application to align it to the alleged agreement of 13.3.1976 as well as the illegal entry in the extract from the register which he obtained on 24.7.1997.

12. Section 3 of the Law of Contract Act provides as follows:-

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless:-

(a) the contract upon which the suit is founded:-

(i) is in writing

(ii) is signed by all parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract is signed by such party”.

The plaintiff tried to explain that the agreement was not signed as the parties and witnesses were illiterate. This is not a reason for not signing. If the witnesses were unable to sign, they should at least have thumb printed the same. The truth of the matter is that there was no sale agreement between the

plaintiff and Kibiwott Kimutul and this is my finding based on the reasons given hereinabove.

13. The next issue for determination is whether the plaintiff has been in possession of the suit land and if so for how long. The plaintiff testified that he moved to the suit land in 1975 when he took possession of the suit land. He said that he took possession through his father and younger brother Richard Kemoi who came in with their cattle. The plaintiff himself has never been in occupation as he was a civil servant working with Prisons. When his father died, his workers continued to stay on the suit land to date. The plaintiff did not call any of his workers who are said to be on the suit land or his brother Richard Kemoi. The defendant contends through his elder brother DW2 John Tanui Kosgey that when Kibiwott Kimutul died, the plaintiff's father who was a brother to Kibiwott Kimutul came and inherited his brother's wife. He never settled on the suit land. He settled at Kibiwott Kimutul's land which is Cherangany/Kapkanyor/54. When the plaintiff filed Kitale HCCC No. 27 of 1997, the area chief of Sengwer swore an affidavit which was filed in that suit. The said chief deponed on how the plaintiff's father came and inherited the wife of Kibiwott Kimutul and sired with her two children. It is therefore not true that the plaintiff's father went to settle on the land which the plaintiff had bought.

14. The plaintiff in his pleadings claims that the defendant's brothers started interfering with the suit land in 1996. He claims that a report was made to Kapcherop police post. He annexed a report marked "BML3" as one made by his people. The plaintiff was not being honest. This report was made by John Tanui (DW2) upon the plaintiff's people destroying his grass thatched house and corrugated iron sheets house. The plaintiff produced the report [Defence Exhibit 6]. This report had been prepared following a request by the defendant's lawyer vide letter dated 16/1/1996 [Defence Exhibit 7].

15. The defendant's people had all along been staying on LR. No. Cherangany/Kapkanyor/54. They encroached on to the suit land which became an issue of boundary dispute. The plaintiff's witnesses conceded in cross-examination that there has been a boundary dispute between the defendant's family and their neighbours in Plot No. 54. A surveyor was finally taken to the ground. He is DW3 Kenneth Nyabera. He found out that the plaintiff had encroached on to the suit land by about two acres. The plaintiff had constructed two semi permanent houses and planted trees. He produced his report [Defence Exhibit 2]. The plaintiff in his evidence conceded that he is utilizing about 3 acres of the suit land. The evidence on record shows that the plaintiff started laying claim to the suit land upon the demise of the defendant's father. If he had indeed bought the suit land in 1972 as he claims, he will not have kept quiet until 1996 to start claiming the same. The plaintiff is trying to claim the land which Kibiwott Kimutul had sold to the defendant's father. I have demonstrated hereinabove that the sale agreement and the alleged caution were non-existent. This was all a scheme by the plaintiff to fraudulently lay claim to the suit land. He is trying to recover it so that it is back to the family. Unfortunately his documents such as Exhibit 2 have betrayed him. I find that the plaintiff has not been in possession of the suit land since 1975 as he claims. The plaintiff encroached on to the suit land on or around 1996. The plaintiff caused a caution to be registered on L.R. No. Cherangany/Kapkanyor/54. During the hearing, he tried to explain this by claiming that he placed a caution to safeguard the interest of the wife of Kibiwott Kimutul. The plaintiff is trying to defeat the interest of the defendant in the suit land. The wife of Kibiwott Kimutul was pretending that she was not aware of any sale between her husband and Kiptanui Arap Kimaget. There are documents which show that Kibiwott Kimutul bought the suit land. This suit land was later transmitted to the defendant. The wife of Kibiwott Kimutul cannot therefore turn round and claim that the suit land was sold to the plaintiff.

16. The other issue for determination is whether the plaintiff has been in peaceful occupation of the suit land or any part thereof. The plaintiff testified that he is in occupation of three acres. The plaintiff's evidence is confirmed by that of the surveyor who went to the ground and found that the plaintiff is occupying 2 acres of the suit land. The plaintiff's occupation of the suit land has not been peaceful. The plaintiff himself conceded in his evidence that there had been disputes which had been reported to the then provincial administration even to the police. The law is clear that for one to succeed in a claim for adverse possession, he has to demonstrate that he has been in open, peaceful and continuous occupation of the land claimed for a period of 12 years and that the owner of title has known about it and or that the adverse possessor has dispossessed the true owner of his title. In the instant case, the plaintiff has not given any credible evidence that he has been in continuous and peaceful occupation of the suit land for a

period of 12 years. The defendant's brother has been in occupation of the suit land and now the defendant. Prior to the defendant's brother moving in to construct houses on the suit land, they were using the land to graze their animals. The suit land was properly demarcated and had a clearly marked boundary of barbed wire fence. The plaintiff merely encroached on to the land and his stay since the encroachment has never been peaceful. I therefore find that he has not acquired any title to any part of the suit land by adverse possession.

DETERMINATION

Having found that the plaintiff did not purchase the suit land as claimed and that his occupation of the two acres has not been peaceful, I find that he has failed to prove his case. The same is hereby dismissed with costs to the defendant. On the other hand, I find that the defendant has succeeded on his counter-claim predicated on paragraph 23 of the replying affidavit which was treated as defence and counter-claim. I therefore order that the plaintiff be evicted from the two acres of the suit land which he is occupying. The plaintiff to pay costs of this suit to the defendant as well as costs of the counter-claim.

Dated, signed and delivered at Kitale on this **17th** day of **September, 2015**.

E. OBAGA

JUDGE

In the presence of Mr. Kiarie for defendant and Mr. Wanyama for the plaintiff. Court Assistant – Winnie.

E. OBAGA

JUDGE

17.9.2015