



**Kiplagat v Kipsang (Environmental and Land Originating Summons
41 of 2022) [2024] KEELC 6480 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6480 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 41 OF 2022
L WAITHAKA, J
SEPTEMBER 23, 2024**

BETWEEN

FRANCIS KIMAIYO KIPLAGAT APPLICANT

AND

JOHN KIPRUTO KIPSANG RESPONDENT

JUDGMENT

Introduction

1. Francis Kimaiyo Kiplagat, hereinafter referred to as the applicant, took up the summons dated 25th May 2019, for determination of the followings questions: -
 1. Whether he (the applicant) has become the legal owner of the parcel of land known as Elgeyo / Marakwet/Kessup “B”/352 situated in Elgeyo Marakwet County (hereinafter referred to as the suit property) by adverse possession;
 2. Whether he (the applicant) should be registered as the sole proprietor of the suit property;
 3. Whether the respondent by himself, his agents, servants and/or employees should be restrained from interfering with his (the applicant’s) peaceful possession and occupation of the suit property; and
 4. Who should bear the costs of the suit/application?
2. The suit/application is premised on the grounds that the applicant had being in use and occupation of the suit property since 1995 when he acquired it by way of purchase from Benjamin Chemiso (deceased); that after he purchased the suit property, the applicant immediately took possession of it, fenced it and developed it by planting trees and cultivating a maize crop therein.



3. It is the applicant's case that he has enjoyed peaceful occupation and use of the suit property from 1995 to 2017 when the respondent illegally and unlawfully trespassed into the suit property, vandalized the fence he had erected therein and destroyed his maize crop.
4. The applicant has deposed that when he enquired from the respondent why he destroyed his fence and crop, the respondent informed him that he was the registered owner of the suit property, a fact he later established to be correct, after the respondent served him with a copy of certificate of title deed in respect of the suit property.
5. Explaining that he was shocked by the turn of events, the applicant contends that the respondent's title to the suit property had become extinguished by his adverse possession of the suit property for over 23 years.
6. The applicant has further deposed that the respondent did not offer any explanation why he took no action against his (the applicant's) use and occupation of the suit property. He stated that he reported the dispute to the Police, the area Chief and the District Land Registrar Elgeyo Marakwet and that the District Land Registrar decided the dispute in his favour.
7. Maintaining that he has become entitled to the suit property by adverse possession, the applicant urges the court to grant him the reliefs sought.
8. In reply and opposition to the suit/application, the respondent, John Kipruto Kipsang, filed the replying affidavit he swore on 10th July 2019. In that affidavit, the respondent has inter alia deposed that he is the lawful/registered owner of the suit property; that he acquired the suit property from Kwambai Lemiso (deceased) in 1995 and that in 2005, the applicant attempted to trespass into the suit property but he thwarted the attempt by engaging the services of an advocate, Chebii advocate, who issued demand letters to the applicant requiring him to vacate the suit property.
9. The respondent further deposed that in early 2017, he cleared the suit property and planted a maize crop therein.
10. The respondent acknowledges that the dispute between him and the applicant over ownership of the suit property was referred to the area Chief and the Land Registrar for arbitration but contends that he won the dispute preferred to the Land Registrar.
11. Terming the document annexed to the applicant's supporting affidavit and marked FK4 a new document unknown to him and not a genuine document, the respondent contends that other than the letter summoning them to appear for the meeting called by the Land Registrar, no official records of the proceedings were availed to them.
12. The respondent further deposes that the applicant interfered with his activities on the suit property causing him to file a suit in court to wit Iten PMCC E & L Case No.6 of 2019.
13. Terming the applicant's claim for adverse possession unmaintainable, the respondent contends that if time for purposes of adverse possession ever began to run in favour of the applicant, it began running on 10th March 2019 when the applicant forcefully occupied the suit property.
14. Pursuant to directions given on 13th October 2020 the suit was heard by way of viva voce evidence. In compliance with Order 11 of the Civil Procedure Rules, parties filed witness statements and lists of documents.



Evidence

The Applicants' Case

15. When the case came up for hearing, the applicant who testified as P.W.1, relied on his witness statement recorded on 21st January 2021, after it was adopted as his evidence in chief. He informed the court that he started cultivating the suit property in 1994. He produced photographs showing his activities in the suit property as Pexbt 2.
16. The applicant informed the court that in 2017, the respondent claimed he had encroached on his parcel of land. As a result, a meeting was convened by the chief to resolve the dispute.
17. According to the applicant, the chief resolved that the suit property belonged to him (this position is not supported by evidence of P.W.5 and Pexbt 3- Minutes of the meeting were marked for identification as MFI 3. According to P.W.5 they were unable to resolve the dispute between applicant and the respondent.)
18. The applicant further informed the court that because the respondent was not satisfied with the decision of the chief, two more meetings were convened, which meetings the respondent failed to attend. The Chief referred the dispute to the Land Registrar.
19. The Land Registrar visited the site on 28th June, 2017 and resolved that the suit property belongs to him and should be registered in his name. In that regard, he produced the report of the Land Registrar as Pexbt 4.
20. In spite of the decision by the Land Registrar, the suit property is still registered in the name of the respondent. The applicant produced a green card and the title deed in respect of the suit property, attesting to that fact, as Pexbt 5 and 6 respectively. Pexbt 5 and 6 show that the suit property was registered in the respondent's name on 10th February, 1995 having purchased it from Kwambai.
21. Terming the allegation by the respondent that he is the owner of the suit property false, the applicant reiterated his claim that he had been in occupation of the suit property since 1994.
22. The applicant maintained that the respondent never complained about his use and occupation of the suit property until 2017 when he informed him that he had a title to the suit property.
23. The applicant further informed the court that he was not aware of the demand letters referred to in paragraph 6 and 7 of the respondent's replying affidavit and that he never stopped utilizing the suit property as alleged in paragraph 7 of the respondent's replying affidavit.
24. It was the applicant's testimony that the respondent did not cultivate the land as deponed in paragraph 8 of his replying affidavit and that he (the applicant) never stopped utilizing the land from 1994.
25. Concerning the case filed by the respondent seeking to evict him from the suit property and to permanently restrain him from trespassing into the suit property, which was consolidated with the instant suit on 9th July 2020 by Odeny J, the applicant informed the court that he is aware of the suit.
26. The applicant pointed out to the court that vide paragraphs 4 and 5, the respondent states that he (P.W.1) entered the suit property in 2015 and in 2016 vandalized the fence, cultivated maize which averments he denied.
27. In cross examination, the applicant stated that in his witness statement, he has only made reference to land parcel No. 344 which is registered in his name; that the portion claimed by the respondent is within his parcel, 344 and that the averments in paragraph 6 and 8 of his supporting affidavit are



- not true. He stated that before 2017, he was not aware that the land he was utilizing belonged to the respondent. All along he knew it was part of parcel No. 344, as shown to him when he purchased it.
28. In re-examination, the applicant stated that he purchased 2 acres from Benjamin Lemiso; that he does not know the acreage stated in his title deed for parcel number 344.
 29. He further stated that he does not know the measurement of the suit property; that the respondent's land is parcel No. 1884 measuring one acre and that the respondent's land does not border his.
 30. The applicant maintained that he had used the suit property for over 20 years before the respondent informed him he held title to it.
 31. Joseph Kipkoech Kwambai, informed the court that his father sold to the respondent 1 acre out of land parcel number 1884; that he is not aware that the respondent has a sale agreement and title deed for the suit property. According to her, the suit property belongs to the plaintiff/applicant.
 32. Benjamin Kipkosgei Chemisto, stated that he was aware that his father sold to the plaintiff/applicant 2 acres out of parcel number 344 in 1994. In 2017, the plaintiff/applicant informed him that the respondent was claiming $\frac{1}{4}$ an acre from the 2 acres his father sold to him.
 33. Philip Kibet Korir, informed the court that he was aware that the applicant bought 2 acres and that the respondent had encroached on $\frac{1}{4}$ of an acre of the applicant's land.
 34. Paul Cheruiyot Chebii, informed the court that he knew the parties to the suit; that there had been a long standing land dispute between them; that in May 2017, he received a report from the plaintiff that the defendant had invaded his farm. He summoned both parties for a meeting on 7th May, 2017 at the suit property. The parties attended the meeting together with village elders and neighbours. He chaired the meeting. Minutes were recorded in that meeting. He produced the minutes as Pexbt 3. He informed the court that the dispute was not resolved in the meeting.
 35. In cross examination, P.W.5 stated that each of the parties claimed they had purchased the land but from different families and that he had never seen any title deed held by the plaintiff. He asserted that no resolution was arrived at in the three meetings he convened. That's to say in the meeting of 7th May 2017, 16th May 2017 and 3rd May 2017.

The Respondent's Case

36. The respondent who testified as D.W.1, relied on his replying affidavit sworn on 24th September 2019 and witness statement recorded on 10th July 2019 after they were adopted as his evidence in chief. He informed the court that he purchased the suit property on 18th October 1994 from Kwambai Lemiso (deceased). He produced the sale agreement executed between him and the seller as Dexbt 1. On 10th February 1995, he was issued with a title deed for the suit property. He produced the title deed issued to him in respect of the suit property as Dexbt 2. In February 2005, the applicant encroached on the suit property and dug holes therein ready to plant fruit trees. He reported to his advocate, Chebii & Company Advocates who on 7th February 2005 issued a demand letter on the applicant requiring him to vacate. He produced the demand letter as Dexbt 3.
37. The respondent further informed the court that the plaintiff did not heed the demand. He returned to his advocates, who issued the plaintiff with another demand letter.
38. The respondent informed the court that upon receipt of the second demand letter, the applicant stopped utilizing the suit property until 2017 when he (the respondent) cultivated and planted on the suit property.



39. When he began cultivating the suit property, the applicant reported him to the area Chief and they were called for a meeting. At the meeting, he produced a sale agreement and title deed to prove his interest in the suit property.
40. The respondent informed the court that the plaintiff registered a restriction against the register of the suit property and reported to the Land Registrar that there was a boundary dispute between them over the suit property.
41. The Land Registrar summoned them to a meeting for resolution of the boundary dispute. He produced the letter from the Land registrar, dated 24th May 2017 as Dexbt 4. The letter invited him for a meeting to be held on 13th June 2017, which did not take place. The Land Registrar issued them with another letter dated 13th June, 2017 (Dexbt 5) inviting them for a meeting on 17th June, 2017. He attended the meeting in which the boundary dispute was resolved leading to removal of the restriction that had been registered against the title to the suit property. He produced a certificate of search dated 15th March 2019 as Dexbt 6, attesting to that fact.
42. Sometime in 2018, his fence was destroyed at night. He produced photographs as Dexbt 7a and 7b attesting to that fact.
43. He reported the incident at Tambach Police Station. The police wrote to the County Surveyor to confirm ownership of the land.
44. On 13th March 2019, the police wrote to the Land Registrar regarding an earlier boundary dispute which he had with the applicant. He produced the letter as Dexbt 8.
45. He also instructed his lawyer who filed a case in court to wit Iten SPM ELC Case No.6 of 2019. He produced the plaint filed in that suit as Dexbt 9. His case was referred to mediation. During the pendency of mediation proceedings, the instant suit was filed.
46. Terming the case between them a boundary dispute case, the respondent asserted that the applicant had not been in use of his land for over 12 years.
47. In cross examination, the defendant maintained that he bought the suit property in 1994 from Kwambai Lemiso; that the seller showed him the land in the presence of his (seller's) father and that they signed an agreement-Dexbt 1; that there were witnesses; that one of the witnesses was P.W.2 and another lady called Rosaline and that the witnesses did not sign anywhere.
48. He got to know James Lelemit (John Lelemit is the person who sold the land to the plaintiff) in 2017. Later he purchased 1 acre from the late Kwambai. The land he purchased (land parcel No.1884) from Kwambai is where he currently lives. They did not record a sale agreement. He bought the parcel at Kshs.65, 000/-.
49. He did not utilize the suit property until 2017. Although he had earlier on written demand letters to the plaintiff, their major problem began in 2017. He had no affidavit of service to prove that he served the applicant with the demand letters. That notwithstanding, he maintained that the applicant was served with the demand letters.
50. He attended a meeting held on 7th May 2017 where the applicant was present. In that meeting, there were other people whose names he could not remember. Some of the witnesses in that meeting stated that the land belonged to the family of Kaplegich.



51. He acknowledged that the Land Registrar and surveyor visited the disputed parcels on 28th June 2017. The applicant and he were present during the visit. The visit was also attended by the children of the late Kwambai and others.
52. As to whether the Land Registrar gave a report in respect of the visit, he stated that the Land Registrar did not record anything during the site visit and that he is not aware of any report by the Land Registrar.
53. Concerning Pexbt 2 (the land registrar’s report), he stated that it is not authentic.
54. Regarding the photographs he produced as Dexbt 7a and 7b, he stated that they do not show that they were taken on the suit property.
55. With regard to Dexbt 8, he stated that the police appear to be saying that the plaintiff is the bona fide owner of the suit property as per the ruling of the Land Registrar.
56. The respondent acknowledged that the applicant has never been charged for the alleged trespass to the suit property.
57. In re-examination, the respondent maintained that he purchased the suit property in 1994; that he is the owner of land parcel number 1884 which has no dispute (his land is not being claimed by the family of Kwambai) and asserted that the dispute between him and the applicant was a boundary dispute and it started in 2017.
58. He further stated that he bought the suit property from Kwambai Lemiso and not Chellelmit James as alleged by the plaintiff and that the parcels of land in dispute are not the same.
59. Regarding Dexbt 2, he stated that it relates to a boundary dispute and not ownership of land parcel 352.
60. With regard to the Land Registrar’s ruling, he stated it was not about boundary dispute but land ownership.

Analysis and Determination

61. From the pleadings and the evidence adduced in this suit, the sole issue for the court’s determination is whether the applicant has made up a case for being granted the orders sought.
62. For the applicant to be declared to have acquired title to the suit property by adverse possession, he needs to prove that the title owner had been dispossessed of his title by his adverse possession of the suit property or by is discontinued possession of the suit property. In that regard, see the case of Wambugu V Njuguna 1983 (KLR) 171 where it was inter alia held:

“In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose which he intended to use it.”

63. A detailed account of the principles and/or elements of the doctrine of adverse possession is given in the case of Gabriel Mbui V Mukindia Maranya (1993) e KLR where the court inter alia stated: -

“The statutory provisions show clearly that adverse possession is a statutory method of acquiring title to land by occupation of the land for a statutory period for one’s own use in consistent with the owner’s interest under certain conditions, without buying for the land in the traditional sense, and doing so not under licence from the owner, and consciously



intending to exclude all persons from the land.....The following requirements must be established on a balance of probability by the person who says that by adverse possession a cause of action has arisen or that a suit against him is barred. The elements to be proved are: -

1. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period....;
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to evoke the doctrine of adverse possession as against everyone else....;
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e without permission from the true owner of the land occupied....;
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people....;
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purposes for which he intended to use it....;
6. The possession by the person seeking to prove title by adverse possession must be visible, open, notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land....;
7. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period....;
8. The rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period....;
9. The rightful owner must know that he is ousted....”

64. In applying the above cited principles to the circumstances of this case, the totality of the evidence adduced in this case shows that as early as 2005, the applicant was in possession and use of the suit property, In fact, according to the applicant, he was in use and possession of the suit property since 1994, when he bought it.

65. The possession and use of the suit property by the applicant appears to have been on account of a claim of right of the suit property arising from his claim that he bought his parcel No. 344 and was shown the suit property as part of his parcel of land.

66. The totality of the evidence adduced in this case comprised in the witness statements of the plaintiff's witnesses, the plaintiff included, and the documentary evidence, particularly the report/ruling of the Land registrar (Pexbt 4), shows that the plaintiff was in use of the suit property for a long period of time.



67. The defendant acknowledges that the plaintiff/applicant was in use of the suit property as early as 2005, a fact laid bare by the letter from his advocate. A part from stating that the applicant attempted to trespass into the suit property sometime in 2005, the respondent he does not give an indication as to when the applicant entered the suit property.
68. The respondent, in his testimony in court, claimed that the applicant vacated the suit property after his advocate issued a demand letter requiring him to vacate but had nothing to prove that indeed the applicant moved out of the suit property after the demand letter was served, if indeed it was served to him.
69. In his replying affidavit, the respondent deponed that the applicant failed to vacate from the suit property after being issued with the first demand letter necessitating him to go back to his counsel who issued the applicant with another demand letter. The respondent did not produce in evidence the second demand letter allegedly issued on the applicant or prove service thereof. In the circumstances, I find the evidence that the applicant moved out of the suit property in 2005 to be unsubstantiated.
70. Other than the evidence adduced showing that there arose a dispute over ownership of the suit property between the applicant and the respondent, there is no evidence that the respondent evicted the applicant from the suit property. In the circumstances, time for purposes of adverse possession, which had begun to run in 2005 or before (could be in 1994 going by the uncontroverted evidence of the plaintiff) and which evidence I find to be credible on account of his claim to his right to suit the property on account of purchase of plot No. 344 which he reasonably believed to be part of the suit property and did not stop until sometime in 2019 when the respondent filed a suit to restrain him from dealing with the suit property, had lapsed or accrued in favour of the applicant.
71. In view of the foregoing, I find and hold that the applicant has made up a case for being declared the owner of the suit property by adverse possession. Consequently, I make the following orders: -
1. That the applicant has become the legal owner of the parcel of land known as Elgeyo/ Marakwet/Kessup "B"/352 situated in Elgeyo Marakwet County by adverse possession.
 2. That the applicant be registered as the sole proprietor of the suit property in place of the respondent; and
 3. That the respondent by himself, his agents, servants and/or employees are hereby restrained from interfering with the applicant's peaceful possession and occupation of the suit property.
72. Noting the circumstances that led to filing of this suit, that is, error in registration of the defendant as the owner of the suit property, which error made the defendant lay a claim to the suit property, I will not condemn the defendant to pay the costs of the suit. Instead, I order that each party bears his own costs of the suit.
73. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 23RD DAY OF SEPTEMBER, 2024.

L. N. WAITHAKA

JUDGE

Judgment delivered virtually in the presence of:-

Ms. Sang holding brief for Ms. Kesee for the plaintiff

Mr. Kipnyekwei for the defendant



Court Assistant: Alex

