



Mosbey & 6 others v Busienei & 2 others (Environmental and Land Originating Summons E019 of 2022) [2024] KEELC 6981 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6981 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2022**

EO OBAGA, J

OCTOBER 24, 2024

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

AND

**IN THE MATTER OF THE REGISTERED LAND KNOWN AS
MOIBEN/MOIBEN BLOCK 2 (SEGERO) 1472,1473 AND 1474**

AND

IN THE MATTER OF AN APPLCATION FOR ORDERS BASED ON ADVERSE POSSESSION

BETWEEN

**PIUS KIMAIYO MOSBEY 1ST APPLICANT
PHILIP KIPKORIR LAMAI 2ND APPLICANT
PHILIP KIPKEMBOI MUTAI 3RD APPLICANT
JOSEPH KINYOR MAHINDI 4TH APPLICANT
SELY JEPTOO TANUI 5TH APPLICANT
ROSA JEPKEMBEOI KEBENEI 6TH APPLICANT
WILSON KIPNGETICH SANG 7TH APPLICANT**

AND

**PAULO KIPLAGAT BUSIENEI 1ST RESPONDENT
BENJAMIN KIPKOSGEI LAGAT 2ND RESPONDENT
ELIAS CHERUIYOT LAGAT 3RD RESPONDENT**



JUDGMENT

1. The Applicants filed an originating summons against the Respondents in which they sought determination of the following questions: -
 1. Whether the Applicants have been in occupation of and/or in possession of parcels of land known as Moiben/Moiben Block 2 (Segero)1472, 1473 and 1474 measuring 1.145 (hectares), 0.607 and 0.456 (hectares) respectfully for a period exceeding thirty-three (33) years between 1989 and the year 2022 openly, peacefully, continuously, uninterrupted, without using force and/or with the knowledge of the Respondent?
 2. Whether the applicants herein have acquired title to the said portions of land measuring 2.5, 1.3, 0.75 and 1.0 acres, from land known as Moiben/Moiben Block 2 (Segero)1472, 1473 and 1474 by adverse possession?
 3. Whether the Respondents Paulo Kiplagat Busienei, Benjamin Kipkosgei Lagat and Elias Cheruiyot Lagat hold title to the said portions of land in trust for the applicants herein?
 4. Whether the titles of the Respondents in respect of the said portions of land got extinguished on expiry of 12 years after the Applicants moved into occupation of their respective portions.
 5. Whether the registration of the respondents as the proprietors of the parcels of land known as Moiben/Moiben Block 2 (Segero)1472, 1473 and 1474 should be cancelled and parcels of and measuring 2.5, 1.3, 0.75 and 1.0 acres, under the possession of the 1st, 3rd, 5th and 6th Applicants respectively and their agents be registered in their names?
 6. Whether the Respondents should be ordered to execute all such documents of transfer as shall facilitate the transfer of the portions measuring 2.5, 1.3, 0.75 and 1.0 acres, into the names of the 1st, 3rd, 5th and 6th Applicant's respectively and in default the Deputy Registrar of the court be empowered to execute all the relevant documents on behalf of the respondents?
 7. Whether the Respondents should be condemned in the costs of this suit?

Background;

2. The 1st Respondent was the registered owner of LR. No. Moiben/Moiben Block 2 (Segero) 154. This property was later subdivided and it gave rise to Moiben/Moiben Block 2 (Segero) 1472, 1473 and 1474. The 1st Respondent is father to the 2nd and 3rd Respondents. The 1st Respondent retained parcel 1472. He gave parcel 1473 to the 2nd Respondent and parcel 1474 to the 3rd Respondent.
3. Prior to this subdivision of parcel 154, the 1st Respondent had sold various portions of the same to the Applicants on diverse dates between 1995 and 2018. The Applicants are related to the Respondents. After the subdivision, the Respondents started disowning the sale to the Applicants. This is what prompted the Applicants to file this originating summons against the Respondents.
4. At the initial stages, the 1st Respondent swore an affidavit in response to the Originating summons in which he admitted that he had indeed sold land to the Applicants and that he was keen on giving them titles but he was misled by 2nd and 3rd Respondents. He later swore another affidavit in which he admitted some of the sales and denied other sales.



5. When the originating summons came up for hearing on 24.1.2024, counsel for the Respondents confirmed that he was ready to proceed with the hearing. The matter was then allocated hearing at 10.00a.m in open court. As at 10.30a.m, the counsel for the Respondents had not come to court and there was no word as to his whereabouts. The Applicants' advocate tried to call him on his cellphone but he was not picking. The hearing therefore proceeded ex-parte.
6. The Respondent made an application to have the ex-parte proceedings set aside but the application was dismissed and the court directed parties to file written submissions. It is only the Applicants who filed written submissions.

Applicants' case;

7. The 1st Applicant is the one who produced the documents which the applicants had filed. He adopted his affidavit sworn on 2.9.2022. He produced green card in respect of parcel 154 (exhibit 1), sale agreement between 2nd Applicant and 1st Respondent (Exhibit 2), agreement between him and 1st Respondent dated 6.1.2007 (exhibit 3), agreement dated 16.1.2012 (exhibit 4), the agreement dated 27.7.1995 (exhibit 5), agreement dated 22.10.1997 (exhibit 6), agreement dated 1.2.2008 (exhibit 7), agreement dated 22.2.2010 (exhibit 8).
8. The 1st Applicant stated that they have developed their respective portions where they reside. He produced photographs of his house (exhibit 9 (a)) those of the houses of the 2nd Applicant (Exhibit 9 (b)), those of the houses of the 3rd Applicant (exhibit 9 (c)) and those of the houses of the 5th Applicant (Exhibit 9 (d)). He also produced an agreement dated 2.7.1994 between the 3rd Applicant and the 1st Respondent (Exhibit 10). He also produced an agreement dated 7.1.1998 between the 5th Applicant and the 1st Respondent (Exhibit 11).
9. The 2nd Applicant adopted his witness statement dated 23.3.2022 and stated that he purchased ½ an acre from the 1st Respondent. The 3rd Applicant was stood down after being sworn and was never recalled back to testify.
10. The 4th Applicant adopted his witness statement dated 22.3.2023 and stated that he purchased 0.2 on 22.10.1995. On 22.10.1997, he purchased another 0.2. On 12/1/2008, he purchased 0.5. On 22.2.2010, he purchased 0.1 of an acre making a total of one acre. He subsequently exchanged the one acre with the 1st Applicant. The 1st Applicant then moved into the one acre and took over his developments where he is staying to date.
11. The 5th Applicant testified that he purchased 0.2 of an acre and later bought 0.3 of an acre. She amalgamated the two which became 0.5 of an acre. She later purchased 0.25 of an acre where she settled her son who is the 7th Respondent who resides on the 0.25 of an acre.

Analysis and determination;

12. The Applicants filed their submission dated 15.7.2024. The applicants submitted that the 1st Respondent had admitted the applicants' claim but later changed and swore another affidavit in which he contradicted the earlier one. They therefore submitted that as there was no evidence adduced on the part of the Respondents, the applicants' claims remain uncontroverted.



13. On change of title from parcel 154 to parcels 1472, 1473 and 1474, they submitted that the change did not affect the running of time. They relied on the case of Registered Trustee, Catholic Diocese of Muranga –Vs- Micere Njau & 3 others (2022) eKLR where it was held as follows:-

“It has been held again and again for purposes of limitation of Actions time does not stop to run on account of change of ownership of the land. a claim for adverse possession runs with the land irrespective of the change of ownership. A mere change of ownership does not affect a claim for adverse possession. The taking out of succession proceedings by the defendants in H. C succession cause No. 282/2006 (Embu) and the subsequent issuance of new titles to the resultant parcels was tantamount to nothing but an exercise in futility. The purported new titles were tiger papers which did not stop time from running for purposes of adverse possession.”

14. I have carefully considered the evidence adduced by the Applicants and the only issue for determination is whether the Applicants have proved their respective claims. The law of evidence is that even where a case proceeds by way of formal proof, the applicants are bound to prove their case to the required standards. In the instant case, those who are claiming land by adverse possession are the 1st, 3rd, 5th and 6th Applicants.
15. The 1st Applicant is seeking a total of 2.5 acres. According to his evidence he got one acre from the 4th Applicant who is his brother. He also got 0.6 of an acre from the 2nd Applicant who is also his brother. He purchased 0.5, 0.1 and 0.1 of an acre on 14th August 2004, 6th January, 2007 and 16th January, 2012 respectively. The three purchases from the 1st Respondent are supported by agreements.
16. The evidence by his brother who is the 2nd Applicant is that he purchased 0.5 of an acre from the 1st Respondent on 13th January, 1989 but the payment of Kshs.8500 was confirmed on 18th June, 1989. There was no evidence of purchase of 0.1 of an acre by the 2nd Applicant. The 4th Applicant purchased 0.2, 0.2, 0.5 and 0.1 of an acre on 27th July 1995, 22nd October, 1997, 1st February, 2008 and 22nd February, 2010 respectively. It is therefore clear that the 1st Applicant has successfully proved that he is entitled to 2.4 acres.
17. In the pleadings, it was alleged that the 3rd Applicant purchased 0.1, one acre and 0.2 of an acre on 18th January, 2000, 2nd July, 1994 and 1st March, 2010 respectively. This witness did not record a witness statement and was stood down never to be recalled. There was no evidence adduced in support of the purchase of 0.2 of an acre on 1st March, 2010. The alleged 0.1 purchased on 18th January, 2000 was not by him. The purchase was made by the school committee. However, there is an agreement dated 2nd July, 1994 in support of one acre. This agreement was produced in evidence by the 1st Applicant. The 3rd Applicant has therefore succeeded in proving purchase of one acre plus 0.1 which the Respondents have admitted.
18. The 5th Applicant is claiming 0.7 of an acre. She purchased 0.2 of an acre on 7th January, 1998 and there is an agreement to that effect. The Respondents have admitted that the 7th Applicant who is son to the 5th Applicant is entitled to 0.2 of an acre. The 5th Applicant claims to have purchased 0.1 of an acre on 1st October, 2018. She has not occupied the 0.1 of an acre for 12 years and is not therefore entitled to it. The purchase of 0.3 of an acre has been admitted by the Respondents. I therefore find that the 5th Respondent and 7th Respondent are cumulatively entitled to 0.7 of an acre.



19. The claim for one acre by the 6th Respondent has been admitted by the Respondents. I therefore find that the 1st Applicant is entitled to 2.4 acres, the 3rd Applicant to 1.1 acres, the 5th Applicant to 0.7 of an acre and the 6th Applicant to one acre.

Disposition;

20. The 1st, 3rd, 5th and 6th Applicants have acquired 2.4, 1.1, 0.7 and 1 acres respectively in land comprised in L.R No. Moiben/Moiben Block 2(Segero) 1472, 1473 and 1474 by adverse possession. The Respondents are hereby ordered to execute transfer documents to facilitate registration in the Applicants names in the portions specified and where they are occupying on the ground within 60 days failing which the Deputy Registrar of this court is hereby empowered to execute the necessary documents on their behalf. The Respondents shall pay the costs of the Originating Summons to the Applicants.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 24TH DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

Ruling delivered in the virtual presence of: -

Mr. Gitonga for Mr. Murgor for Applicants

Court Assistant – Laban

E. O. OBAGA

JUDGE

24th OCTOBER, 2024

