



Salaash & another v Partoti & another (Environment & Land Case 79 of 2018) [2024] KEELC 7460 (KLR) (12 November 2024) (Judgment)

Neutral citation: [2024] KEELC 7460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 79 OF 2018
MN GICHERU, J
NOVEMBER 12, 2024**

BETWEEN

KORISA KAITUI SALAASH 1ST PLAINTIFF

LAMET ENE LAETUA SALAASH 2ND PLAINTIFF

AND

JULIUS MERITEI PARTOTI 1ST DEFENDANT

DAVID KARIUKI NGARI 2ND DEFENDANT

JUDGMENT

1. The plaintiffs seek the determination of the following questions.
 - a. Whether the applicants/plaintiffs are the rightful owners of L.R. Kajiado/Kaputiei-North/1952 by virtue of the principle of adverse possession.
 - b. Who should pay the costs of this suit.

This is as per the amended originating summons filed in court on 2/2/2016 but which is undated.

2. The plaintiffs' case is as follows. They are the 1st and 2nd wives of Salaash Kaitui who was the registered owner of L.R. No. Kajiado/Kaputiei-North/629. This land later mutated into L.R. No. Kajiado/Kaputiei-North/1952, 1953, 1954 and 1955. The plaintiffs and their children have always been living and farming on L.R. 629. The children include Mike Kaitui, Linus Kaitui, Leonard Kaitui and Moshira Kaitui. Secondly, on 20/5/014 the plaintiffs received a letter from the 1st defendant in which he claimed to be the registered owner of L.R. No. 1952. This was surprising because the plaintiffs were not aware that their husband had sold the land to the defendants. They had never been summonsed to the Land Control Board to give their consent to the transfer of the suit land to the defendants. Thirdly, the plaintiffs and the other family members have lived on the suit land in the excess of 12 years where they



- have established a home and a church. They have also buried their dead kin on the suit where they have graves.
3. In support of their case, the plaintiffs filed the following evidence.
 - a. Supporting affidavits by the 1st plaintiff dated 27/5/2015 and 19/6/2015.
 - b. Two photographs.
 - c. Supporting affidavit by the 2nd plaintiff dated 1/2/2016.
 - d. Copy of caution dated 16/6/2015.
 - e. Copy of certificate of official search showing the 2nd defendant as the registered owner of the land as at 3/11/2015.
 - f. Witness statement by the 2nd plaintiff.
 4. In opposing the summons, the respondent has sworn a replying affidavit in which he replies as follows. Firstly, he bought the suit land from United Insurance Company (now under statutory management) after it was advertised for sale. After the bid, a sale agreement was drawn between him and the sellers. He then paid the purchase price after which he took possession of the suit land after he was issued with the title deed. After he occupied the suit land, the husband of the plaintiffs, one Kaetui Salaash Nkereo kept threatening the defendant and his employees on the land. A letter was written to the plaintiffs' husband demanding that he should cease from trespassing on the land. As a result of the continued trespass, a Suit No. 252/2015 was filed at Kajjado Magistrates' Court. The plaintiffs' husband sold the land in the year 1992 to one Stephen Ntii Ole Rotiken who sold it to United Insurance in 1994. The plaintiffs have known all this history all along being the wives of the former owner. Finally, the claim for adverse possession cannot stand because the 1st defendant only became registered as owner of the suit land in the year 2014. He therefore prays that the summons be dismissed with costs.
 5. In support of his case, the 1st defendant filed the following evidence.
 - i. Copy of sale advertisement in the Daily Nation of June 29, 2012 in respect to the suit land.
 - ii. Copy of sale agreement dated 19/12/2012.
 - iii. Copy of receipt for the purchase price of Kshs. 7, 805.100 dated 5/6/2013.
 - iv. Copy of transfer instrument.
 - v. Copy of title deed dated 10/2/2014.
 - vi. Copy of demand letter dated 21/5/2014.
 - vii. Copy of order dated 11/6/2015 issued in Kajjado PMCC 252/2015.
 - viii. Copy of green card for the suit land showing the history of transfer from 30/6/1992 to 7/2/2014.
 6. At the trial on 27/2/2024, the 2nd plaintiff testified on her behalf and that of the 1st plaintiff. She reiterated her case as per the pleadings. The first defendant also testified on behalf of himself and his co-defendant. He too generally restated his case as per his pleadings. No amount of cross-examination could sway the parties from the material that they filed.
 7. Only the plaintiffs' counsel filed written submissions dated 21/6/2024. The defendant's counsel had not filed any submissions by the timeline of 30/9/2024. The plaintiffs' counsel has not identified the



issues for determination in his written submissions. However, one may discern the following issues after perusal of the prose submissions.

- i. Whether the transfers were blessed with the consent of the Land Control Board.
 - ii. Whether the plaintiffs are in occupation of the suit land.
 - iii. Whether the plaintiffs have occupied the land for more than 12 years.
 - iv. Whether the plaintiffs enjoy an overriding interest in terms of Section 30 (g) of the Registered *Land Act* (cap 300), now repealed and Section 28 of *Land Registration Act*.
8. I have carefully considered all the evidence adduced in this case by both sides including the affidavits, witness statement by the second plaintiff, documents and the testimony at the trial. I have also considered the written submissions by the plaintiffs' counsel. I make the following findings on the four issues raised in the written submissions.
9. On the first issue, I find that the absence of the consent of the Land Control Board was never raised in the pleadings or in the trial. It is nowhere in the body of the suit. It has been brought up abruptly in the written submissions. This is not proper or fair. An issue that was not raised at the trial should not be raised at the tail end of the case when the adverse party has no chance of responding to it. The suit does not challenge the registration of the defendant as the owner of the suit land. It is based on the alleged continuous occupation of the suit land by the plaintiffs for a period exceeding 12 years. It was upon the plaintiffs to allege the absence of consent of the Land Control Board and then prove it. They did not plead it let alone prove it.
10. The Plaintiffs claim to be in occupation of the suit land. This occupation is disputed by the 1st defendant. Even though the plaintiffs claim to have filed photographs of graves in their list of documents dated 7/2/2023, I did not see any such photographs filed. Even if they had filed such photographs there is no proof that they are on the suit land and not on any other land. We are told that the plaintiffs' husband owned L.R. No. 629 which was subdivided into L.R. Nos. 1952, 1953, 1954 and 1955. There is credible evidence from the 1st defendant that on 11/6/2015, he obtained an order in Kajiado PMCC 252 of 2015 restraining the plaintiffs' husband from interfering with the 1st defendant's use and occupation of the suit land. In contravention of Order 4 rule 1 (f) of the Civil Procedure Rules, the plaintiffs filed this suit without disclosing that there was a previous suit over the same land and that their husband was a party. I am not satisfied that the plaintiffs are in occupation of the suit land and if they are, they are in contravention of the order dated 11/6/2015 issued in PMCC 252 of 2015.
11. It is trite law that for a claim of adverse possession to succeed, the respondent must have been the registered owner of the suit land for a period of over 12 years because adverse possession is against the respondent's title. In this case, the suit was filed before the expiry of 12 years. Since the 1st defendant was registered as the owner of the suit land on 10/2/2014 and the suit was filed on 27/5/2015 only one year and 3 months had elapsed. Even if it had been proved that the plaintiffs are in occupation of the suit land, such occupation is not for 12 consecutive years since the 1st defendant's registration as owner of the suit land.
12. On the final issue, since occupation has not been proved, the question of overriding interest cannot arise. Moreover, it is the plaintiffs' husband who sold the land to Stephen Ntii Ole Rotiken who sold to United Insurance who sold to the 1st defendant. The plaintiffs have not proved that they are entitled to the suit by way of overriding interest.

For the above reasons, I find no merit in the plaintiffs' suit and I dismiss it with costs to the defendants.



DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY 12TH DAY OF NOVEMBER
2024.

M.N. GICHERU

JUDGE

