



REPUBLIC OF KENYA



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**Kipkurgat v Soi (Environment & Land Case 143 of 2021)  
[2023] KEELC 444 (KLR) (30 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 444 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 143 OF 2021  
MN MWANYALE, J  
JANUARY 30, 2023  
(FORMERLY ELD ELC CASE 57 OF 2019)**

**BETWEEN**

**SAMUEL KIPKURGAT ..... PLAINTIFF**

**AND**

**JOHN KIPKOECH SOI ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff Samuel Kipkurgat Soi, vide his plaint dated September 30, 2016 initially filed at Eldoret ELC as Eldoret ELC Case No 354 of 2016 and thereafter transferred to this Court at Kapsabet being case number 143 of 2021 sued his brother John Kipkoech Soi, seeking an eviction order against the Defendant is agent, servants and/or family out of Nandi/Chepkongony/472.
2. The matter proceeded before the ELC Court at Eldoret as undefended and judgment entered in favour of the Plaintiff on July 21, 2017.
3. The Defendant upon service of an eviction notice pursuant to the said judgment ,applied successfully to set aside the judgment and on July 22, 2019,the judgment was set aside and leave granted to the Defendant to file a defence, which the Defendant did file a defence and a counter claim on 31/7/2019.
4. When the matter was transferred to this Court for hearing and determination and upon the Court noting that the parties hereto are related being brothers the Court referred the matter to the Court Annexed Mediation where mediation failed. Later on a second time, upon request by advocates for the parties the matter was again referred to the Court Annexed Mediation before a different mediator, when mediation failed, leading the matter to proceed for full hearing before this Court.



### **Plaintiffs Case and Evidence: -**

5. In his plaint dated 30/9/2016, the Plaintiff pleaded that he is the registered owner of land parcel No Nandi/Chepkongony/472, where the Defendant with no legal rights whatsoever had entered and constructed therein.
6. The Plaintiff thus sought eviction orders against the Defendant.
7. The Plaintiff testified as PW 1 and called an additional witness P.W.2. It was his testimony while adopting his witness statement dated November 19, 2019, that he had purchased the suit property. Nandi/Chepkongony /1472 from one Kibet Rono in 1977 for a consideration of kshs 6,000/= and the whole property was transferred to him, and he obtained a title deed in his name on October 22, 1981.
8. That the Defendant who is his brother was involved in a road accident some time ago and he (the Defendant) requested to stay at the Plaintiffs farm in Nandi/Chepkongony/472 which the Plaintiff agreed. The Plaintiff further claimed that the occupation by the Defendant has not been peaceful and the claim of adverse possession if any is farfetched. In support of his case the Plaintiff produced as exhibits P Exhibit 1, decree dated 25/3/2016 in ELC No 412/2013, exhibit 2 – copy of title Nandi/Chepkongony/472, exhibit 3 – Agreement for sale dated 19/4/1977, Exhibit 4 – Application for consent, Exhibit 5 – Letter of consent dated 27/3/1980
9. Thus the Plaintiff sought that the Defendant be evicted from the suit land.
10. In cross – examination he indicated that the prayer for eviction he had sought in ELC No 412/2013 was dismissed. He was aware that the Land Disputes Tribunal at Aldai had awarded the Defendant the suit property and that the Defendant had been utilizing the suit property. In re-examine he stated that the occupation of the Defendant had not been peaceful.
11. PW2 Leah Jepkorir, a resident of Kaptumo equally testified. It was her evidence that the Plaintiff and the Defendant were her neighbors. It was her testimony that the property had been purchased by the Plaintiff while the Defendant was still in school.
12. In cross examination, she stated that the tea bushes had been planted by the Defendant; but the houses on the property had been built by the Plaintiff who has not lived on the property. She stated that she was not a witness to the Agreement for sale. She knew that the Plaintiff had other properties.
13. With the testimony of the two witnesses the Plaintiff's case was closed.

### **Defence Case and Evidence: -**

14. In his defence, the Defendant pleads that the suit is bad in law for being *res judicata* as the Plaintiff had filled an earlier suit being Eldoret Environment and Land Case No 412 of 2013 seeking similar orders, the Defendant further pleaded that the suit is time barred as he had been in possession since 1977.
15. By way of a counterclaim, the Defendant pleaded that he purchased the property from Isaac Rono in 1977 for kshs 6,000/= and is thus entitled to the property by virtue of adverse possession.
16. The Defendant further pleads that he had occupied the property with the knowledge of the Plaintiff, continuously and openly and uninterrupted occupation and that the Plaintiffs title had been extinguished by virtue of Section 17 and Section 38 of the *Limitation of Actions Act*. On the strength of the above, the Defendant sought for orders of dismissal of the Plaintiff's suit, and a declaration that the Plaintiffs interests in Nandi/Chepkongony/472 had been extinguished by adverse possession, and an order directing the land registrar, Nandi County to register the Defendant as the owner thereof.



17. The Defendant testified as DW1 and called two witnesses. It was his evidence while adopting his witness statement dated October 30, 2019 that, he bought the property from Isaac Rono in 1977 but the Plaintiff registered himself. It was his testimony that he sold his property in Kericho for kshs 10,000 and got a top up of kshs 6,000 from the Plaintiff to purchase the property.
18. That he had requested his brother the Plaintiff to purchase the property on his behalf and gave him kshs 16,000, but the Plaintiff bought the land and registered himself instead.
19. That the Plaintiff secretly registered himself as the proprietor of Nandi/Chepkongony/472 and the Defendant went to the Aldai Land Dispute Tribunal which ruled in his favour and the decision thereof was adopted in Kapsabet LDT No 34/1999.
20. The witness produced seven exhibits, the search of Nandi/Chepkongony/472 as D exhibit 1, a copy of the green card for Nandi/Chepkongony/472 as D exhibit 2, copy of decree in Kapsabet LDT No 34/1999 as D Exhibit 3 the proceedings for the Lands Dispute Tribunal held on 10/9/1999, as D exhibit 4, the Plaint in Eldoret Environment and Land Case No 412 of 2013 D exhibit 6, decree of Eldoret Environment and Land Case 412 of 2013 D exhibit 7, Chief's letter dated 18/4/2019.
21. In cross – examination the witness indicated that he had sold his parcel in Kericho but did not know the parcel number that he had sold, he further stated that he had bought the suit property from Issac Rono but did not have an agreement for sale. He could not remember how much he had in his pocket at the time he got involved in the accident, that he went to the property in 1977 as he worked for his brother and he learned about his brother's registration on 19/10/1981. He indicated that he is not living peacefully on the parcel.
22. In re-examination he indicated that when he left Kericho before getting involved in the accident he had kshs 10,000/= that he intended to pay Rono, and that his brother the Plaintiff visited him at the hospital and took the money, that he lives on the property alone together with his children.
23. DW2, William Koskei, gave evidence on behalf of the Defendant and adopted his witness statement dated 30/10/2019. It was his testimony that he was not related to the Soi's but was just a neighbor. It was his testimony that the Defendant purchased property known as Nandi/Chepkongony/472 from Isaac Arap RoNo
24. That the Defendant had been involved in a road accident in 1977 and that the Defendant has lived on the suit property with his family since 1977 to date.
25. In cross – examination, the witness stated that he had known John Soi since 1969, when he used to stay with his brother. He was not a witness to the Agreement for Sale, that John Soi was involved in a road traffic accident while going to purchase the property. The accident was in 1977, and thus the property belonged to John Soi.
26. In re-examination, the witness indicated he was aware of the dispute.
27. DW3, Mr. Daniel Chumo Kipkemoi testified in the matter, he adopted his witness statement dated 30/10/2019.
28. It was his testimony as captured in the witness statement that the Defendant John Soi had been involved in a road traffic accident and broke his leg in 1977.
29. The witness sated that he knew that the defendant had been living on the suit land since 1977 same when 2019 when the house was destroyed by fire, and that he had hired on the property from 1977 and had planted tea business on 5.9Acres which is matured



30. On cross-examination by Mr. Tallam for the plaintiff, he stated that he was not a witness to the purchase of property by John Soi from Isaac RoNo He stated that he met John while working for his brother and that John married his cousin. He stated that he knew that dispute that Samuel Soi the plaintiff was registered owner while the property belonged to John Soi.
31. With the testimony of the three witnesses the Defendant closed his case, and parties were directed to file written submission and the Judgment was initially reserved for 23/01/2022, but deferred for delivery on January 30, 2022.

**Plaintiffs Submission: -**

32. In his submission, the Plaintiff has identified issues as follows;
  - a. Where the Plaintiff acquired the suit property validly.
  - b. Whether the Defendant has been adversely in occupation of the suit land.
  - c. Whether the Plaintiff deserves the order of eviction against the Defendant.

On issue number 1, the Plaintiff submits that he acquired the suit property validly and in support relied on the agreement for sale – Plaintiff exhibit No 3 to support his claim of purchase.

33. The Plaintiff further submits that he holds title over land parcel number Nandi/Chepkongony/472 and relied on Section 24 of the [Land Registration Act](#) as well as Section 26 of the [Land Registration Act](#) to buttress his point.
34. On the second issue as to whether the Defendant, has proved adverse possession, it is the Plaintiff submission that the occupation by the Defendant was with his permission and it has never been peaceful. There has been various Court cases, including a Lands Dispute Tribunal award which was quashed by the High Court in Eldoret.
35. The Plaintiff submits that the occupation by the Defendant on the suit land was forcefully and not peaceful by use of threats and wildness and therefore did not meet the threshold set out in the case of [Mtana Lewa vs Kabindi Ngala Mwangandi](#) (2015) eKLR as well as [Maweu vs Liu Ranching and Farming Co-operative Society](#) 1985 KLR 430.
36. On the 3<sup>rd</sup> issue, the Plaintiff submits that he has proven his case on a balance of probabilities and is deserving of the eviction orders sought.
37. The Plaintiff has submitted that the Defendant is his blood brother and is ready to give the Defendant 1 acre of the suit land. The Plaintiff places reliance of Court of Appeal decision of [Samuel Kihamba v Mary Mbaisi](#) (2015) eKLR, where the Court stated

“we are persuaded by various dicta which we have quoted and relied upon in this judgment and must state it would create havoc for families and the society of Kenya generally if the principles of adverse possession applied within families against close relatives.....”
38. In conclusion the Plaintiff submit that the Defendant has not proved adverse possession and should be evicted from the suit property.

**Defendant’s Submission: -**

39. In his submissions, the Defendant through his Counsel, has framed the following as issues for determination.



- a. Whether the Plaintiff's suit is *res judicata*
  - b. Whether the Plaintiff's suit is statute barred by virtue of Section 17 as read with Section 7, 13,18,26 -31, 38 and 39 of the [Limitation of Actions Act](#) Cap 22.
  - c. Whether the Plaintiff's title over Nandi/Chepkongony/472 has been extinguished by the doctrine of adverse possession
  - d. Whether the Defendant has acquired title over Nandi/Chepkongony/472 under the doctrine of adverse possession.
40. On issue number 1 the Defendant submits that this suit offends the provisions of Section 7 of the [Civil Procedure Act](#), as there was a previous suit to wit Eldoret ELC No 412/2013 between the same parties over the same subject matter and the prayer of eviction had been sought therein and was dismissed.
41. The Defendant therefore submits that this suit is *res judicata* and has placed reliance on the decision in the case of the Independent Electoral and Boundaries Commission vs Maina Kiai to support his case. On account of *res judicata* the Defendant submits that the Plaintiff suit should be dismissed.
42. On issue number 2, the Defendant submits that the Plaintiffs suit is statute barred by virtue of provisions of Section 17 of the Limitation of Action.
43. The Defendant submits that he started occupying the suit property in 1977, and has been on the suit property since hence by virtue of the suit being time barred under Section 7 of the [Limitation of Actions Act](#); which provides that;
- “an action may not be brought to recover land after end of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims to that person....”
44. The Defendant submits that the Plaintiff having been registered as proprietor on 19/10/1981, time started running on that date and he ought to have filed an action for recovery on or before 18<sup>th</sup> October 1993 and any claim brought post that date is statute barred as per the provisions of Section 9 of the [Limitation of Actions Act](#).
45. The Defendant places reliance on the decision in the case of [Bosire Ogeto vs Royal Media Services](#) (2015) eKLR.
46. The Defendant submits on the last two issues jointly that having occupied the suit property for more than 12 years the Plaintiffs title has been extinguished by virtue of adverse possession and that he is entitled to be registered as the proprietor. In support of this the Defendant submits that he had been in occupation from 1977 which fact was corroborated by his two witnesses and that he thus ought to be registered as the proprietor of the Nandi/Chepkongony/472.

**Issues For Determination: -**

47. From the pleadings, the evidence adduced as well as the submissions of the parties, the Court frames the following as issues for determination the first two issues having been raised as preliminary objections by the Defendant; in his defence to wit;
- i. Whether the suit is *res judicata*
  - ii. Whether the suit is time barred. Under Section 7 of the [Limitation of Actions Act](#).



The additional issue will be

- iii. Whether the Defendant has proven adverse possession so as to extinguish the Plaintiffs title over Nandi/Chepkongony/472.
- iv. Whether the Defendant is entitled to the reliefs sought in the counterclaim.
- v. Who bears the costs of the suit?

**Analysis and Determination: -**

48. On issue number (i), the Defendant has vide paragraph 4 of the Defence and counterclaim pleaded that his suit is *res judicata* in view of an earlier suit Eldoret Environment and Land Court No 412 of 2013, which was filed between the same parties, over the subject matter and sought similar orders. Indeed the Plaintiff produced as P Exhibit number 1 the decree in Eldoret Environment and Land Case No 412 of 2013. In the said decree the Court notes that the Plaintiff was one Samuel Kipkurgat Soi who is the Plaintiff in this matter, the 1<sup>st</sup> Defendant was the Chairman Aldai Land Dispute Tribunal, the 2<sup>nd</sup> Defendant was John Kipkoech Soi and the Land Registrar, Nandi County as the 3<sup>rd</sup> Defendant.
49. The claim in the decree was for;
  - a. Declaration that the award of the entire proceedings in LDT No 34/1999 against land parcel Nandi/Chepkongony/472 is null and void.
  - b. The Land Registrar to remove the entries of the decree against the Plaintiff's land parcel Nandi/Chepkongony/472.
  - c. Eviction of the 2<sup>nd</sup> Defendant out of land parcel Nandi/Chepkongony/472.In the judgment delivered on 1/6/2016 A. Ombwayo J allowed prayer of the suit and dismissed prayer (b) and (c).
50. The Plaintiff's submission on the issue of *res judicata* were silent, while the Defendant submitted that in view of the earlier suit Eldoret Environment and Land No 412 of 2013 this suit was *res judicata* .
51. The Defendant in submitting so placed reliance on Section 7 of the *Civil Procedure Act*, as well as the Court of Appeal decision in Independent Electoral and Boundaries Commission vs Maina Kiai. Where the elements of *res judicata* to be proved were held to be;
  - a. The suit or issue was directly and substantially in issue in former suit.
  - b. That former suit was between the same parties or parties under whom they or any of them claim.
  - c. Those parties were litigating under the same title
  - d. The issue was heard and finally determined in the former suit.
  - e. The Court that formerly heard and determine the issue was competent to try the subsequent suit or the suit in which the issue is raised.
52. Applying the above elements to our present case, the Plaintiff and the Defendant were also the parties in Eldoret Environment and Land case No 412 of 2013. The relief sought herein, to wit, eviction was also a relief sought in Environment and Land Case No 412 of 2013, thus the issue here, to wit, eviction of the Defendant from Nandi/Chepkongony/472 was also an issue in the previous suit.



53. The parties were litigating under the same title before the Environment and Land Court in Eldoret, a Court of competent jurisdiction, and concurrent jurisdiction to this, and the issue was heard and finally determined in the previous suit.
54. From the above analysis, it follows that this suit is thus *res judicata* .
55. On issue number 2, having as to whether the suit is time barred. This Court having already found the suit to be *res judicata*, thus leaving no issues for determination, will not dwell on the issue of whether the suit was time barred or not as that would be an academic exercise; should be found wrong, on the issue of *res judicata* and it falls on me to determine whether the suit is time barred; the Plaintiff in his testimony stated that the Plaintiff started occupying the suit property in 1977, the Plaintiff was registered in 1981 as the owner of the property and in accordance with Section 7 of the [Limitation of Actions Act](#) any action for recovery of land ought to have been commenced within 12 years hence this suit ought to have been filed in 1993, but it was filed in 2016, 23 years late and it is obviously time barred and the Court agrees with the Defendant submission that the suit is time barred.
56. Having dealt with the two issues that would lead to the dismissal of the Plaintiffs suit, the Court now turns to the issue number 3 as to whether the Defendant has proved adverse possession so as to extinguish the Plaintiffs interest in suit property.
57. For a claimant to prove adverse possession the elements to be proved as was held in the decision in the case of [Peter Mbiru Michuki vs Samuel Mugo Michuki](#) (2014) eKLR and several other decisions are that;
- “the Plaintiffs have to prove that they have used this said land which they claim as of right, *nec, vi, ne clam, ne precario* (no force no secrecy no persuasion; Plaintiff must show that;
- i. The owner had knowledge or means of knowing of actual construction of the possession or occupation.
  - ii. The possession must be continuous
  - iii. It must not be broken for any temporary purposes or any endeavours.”
58. The Defendant has been in occupation of the suit land from 1977 and it is more than 12 years. His occupation has been continuous albeit wrangle with suits and proceedings before the tribunal and ELC Case No 412/2013 aforementioned.
59. The of entry and occupation of the Defendant on the suit land was initially with permission of the Plaintiff as the Defendant worked for the Plaintiff and evidence showed that at the time of his entry the Defendant was still in school.
60. The permission thus must be deemed to have been withdrawn in 2013 when the Plaintiff filed or eviction. Consequently time started running for adverse possession in 2013 and by the time the suit was filed in 2016, 12 years had not lapsed. In arriving at the said finding the Court is guided by the decision in the case of [Wairimu Mburu vs Chege Thaiya](#) (2019) eKLR 87/2018 where the Court observed that;
- “similarly a person who occupies as licence cannot claim land by dint of the doctrine of adverse possession.”
61. For that reason, the Defendant claim on adverse possession has not been proven as the termination of the permission was deemed to have been done with the filing of the case in 2013.



62. Should I be found wrong on this finding, the Court finds that the Plaintiff and the Defendant been blood brothers, and thus close relatives, adverse possession against close relative is not permissible as was held in the decision in the case of *Samuel Kihamba vs Mary Mbaisi*; where the Court of Appeal held that;

“Could the doctrine of adverse possession apply against the parties to the suit, before the learned Judge who were related by being mother and stepson? We think not, we are persuaded by various dicta, which we have quoted and relied upon in this judgment and must state, it would create havoc for families and society in Kenya generally if the principle of adverse possession applied within families against close relatives.”

63. The Court observes that the parties herein would have benefited greatly through the Court annexed mediation and/or Alternative Justice System recognized under Article 159 (2) (c) of the *Constitution of Kenya*, but since the parties refused to take part in the Court annexed mediation, the end result is that;

Disposition: -

- a. Having found the Plaintiff's claim to be *res judicata* and time barred the Plaintiff's suit is dismissed.
- b. Having found that adverse possession has not been proven, the counterclaim by the Defendant is equally dismissed.
- c. Each party shall bear its own costs.

Orders accordingly.

**DATED AT KAPSABET THIS 30<sup>TH</sup> DAY OF JANUARY, 2023.**

**HON. M. N. MWANYALE,**

**JUDGE**

**In the presence of;**

Mr. Tallam for the Plaintiff

No appearance for Mr. Rotich duly served.

