



Cheruiyot v Jackson Kipkogei Kipkwony as the Administrator of the Estate Of Kabon Jepkorir Kapkwony & 7 others (Environment & Land Case 20 of 2015) [2022] KEELC 12695 (KLR) (24 May 2022) (Judgment)

Neutral citation: [2022] KEELC 12695 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 20 OF 2015**

MAO ODENY, J

MAY 24, 2022

BETWEEN

JOSEPH CHEPKOK CHERUIYOT PLAINTIFF

AND

JACKSON KIPKOGEI KIPKWONY AS THE ADMINISTRATOR OF THE ESTATE OF KABON JEPKORIR KAPKWONY 1ST DEFENDANT

JACKSON KIPKOGEI KIPKWONY 2ND DEFENDANT

JAMES K. CHEPKETEM 3RD DEFENDANT

HARON CHEBET 4TH DEFENDANT

ZACHARIAH CHEBET 5TH DEFENDANT

WILSON KIPNGETICH MUTAI 6TH DEFENDANT

KOIBATEK DISTRICT LAND REGISTRAR 7TH DEFENDANT

NATIONAL LAND COMMISSION 8TH DEFENDANT

JUDGMENT

1 By a plaint dated January 17, 2015 the plaintiff herein sued the defendants jointly and severally seeking the following orders: -

- a. A permanent of injunction to restrain the 1st 2nd 3rd 4th 5th and 6th defendants, their agents, or servants from ploughing, from selling, disposing, from leasing out the parcel of land and/or in any other manner dealing with the parcel LR No Lembus/ Sigoro Extension/90 in any manner at all.



- b. A declaratory order that the plaintiff is the legal and lawful proprietor to the LR No Lembus/Sigoroextension/90 and his title is thus absolute and indefeasible.
 - c. An order of vacation directed against all the 1st 2nd 3rd 4th 5th and 6th defendants to vacate the plaintiff's LR No Lembus/Sigoro Extension/90.
 - d. An order for compensation and/or mesne profits to be met by the defendants to the plaintiff for losses occasioned by the defendants' illegal acts.
 - e. Damages directed against the defendants for the violation of the plaintiff's right to protection of the right to private property.
 - f. Compensation for the trees/forest destroyed to be valued and/or assessed at the hearing.
 - g. Costs of the suit
 - h. Any other relief that the court deems fit to grant.
- 2 By an oral application on July 21, 2021 the plaintiff amended the Land reference number Lembus/Sigoro Extension/190 to read Lembus/Sigoro Extension/ 90.

Plaintiff's Case

- 3 PW1 Joseph Chepkok Cheruyiot adopted his witness statement and stated that he is the registered proprietor of LR No Lembus/Sigoro Extension/90 and has a title deed issued on August 23, 1982.
- 4 PW1 further stated that he bought the suit land in 1977 where he constructed two houses, kept livestock, planted trees and has been residing thereon until 1993 when the defendants trespassed on the suit land.
- 5 PW1 produced a copy of the title to the suit land, search certificate, map and payment receipts as exhibits and urged the court to grant the orders as prayed in the plaint.
- 6 On cross examination by Mr Maritim for the 1st to 6th defendants, PW1 stated that the 1st defendant was on the suit land when he bought the parcel of land. He also stated that the 1st defendant had parcel No 9 and that PW1's acreage increased while the 1st defendant's decreased but the title remained the same. Further that the 1st defendant signed the land control board consent and that the adjudication records show that he was given Plot No 90.
- 7 On reexamination, PW1 confirmed that the deceased did not have a problem with him but his children are the ones who trespassed on the land.

1st to 6th Defendants' Case

- 8 DW1 adopted his witness statement and produced a copy of a title deed registered in 3 names and a search certificate. He stated that the title was issued in 2005 which is 7.6 hectares but on the ground it should be 20 acres with a deficit of 2 acres.
- 9 It was DW1's testimony that the plaintiff has not been on the suit land as he had leased it from 1983 to 1986 and that no one has ever told him to move out from the suit land. He urged the court to dismiss the plaintiff's case with costs.
- 10 On cross-examination by Mr Kuria DW1 stated that the title deed and the search are for Plot No 8 and not the suit land. He also stated that he had never seen the Lease Agreement that he mentioned and



- that he is not aware of the title that the plaintiff produced. DW1 claimed that the plaintiff fraudulently transferred the title to his name.
- 11 DW1 confirmed in reexamination that his parcel of land is Lembus/Sigoro/8 measuring 7.6 hectares and that his father did not sell any land to anybody. He also stated that Plot No 8 and Plot No 90 are separated by a road.
- 12 DW2 reiterated DW1's evidence and stated that the plaintiff was leasing the land and has never occupied the suit land. He also testified that his father died in 1990 while fighting for his land.
- 13 On cross examination DW2 stated that the search that he produced was for Plot No 9 which measures 3.0 hectares of which they are using 20 acres on the ground and demanding 13 acres. It was also his evidence that the lease agreement by the plaintiff was verbal from 1975 to 1986. Further that the plaintiff had a boundary dispute with his father and that his father was jailed for 6 months.
- 14 DW3 the district land registrar Koibatek testified and stated that the suit parcel of land was acquired *vide* adjudication process where a register was opened for parcel No Lembus/Sigoro/extension/90 on January 11, 1982 in the name of Joseph Chepkok Cheruyiot of PO Box 6 Eldama Ravine. DW3 produced certified copies of the original adjudication register and stated that the adjudication process was completed in 1977.
- 15 It was DW3's further evidence that the adjudication record and the land register for the suit land tally and that they have not received any complaints in respect of the suit land.
- 16 On cross examination, DW3 stated that if there was any complaint then it could have been registered in the adjudication record.

Plaintiff's Submissions

- 17 Counsel submitted on indefeasibility of title and relied on the cases of *Propwa Company Limited v Justus Nyamo Gatondo & Another* [2020] eKLR and *Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others* [2015] Eklr. Counsel further submitted that from the evidence on record it is clear that the plaintiff's title was acquired without fraud, without misrepresentation or through a corrupt scheme hence he is entitled to the orders sought.
- 18 Mr. Arusei submitted the 1st to 6th defendants are trespassers on the suit land as was held in the cases of *Mbira v Gachubi* Nairobi High Court Civil Case Number 2826 of 1997; [2002] EA and *M/S Gusii Mwalimu Hotel Kisii Ltd* (1996) eKLR . Counsel stated that the plaintiff took steps to recover his property by issuing several demand notices and complaints to various organs and that this suit was the last resort to seek justice for recovery of the suit land.
- 19 On the issue whether the defendants have acquired the suit land by way of adverse possession counsel submitted that for adverse possession to succeed it must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. Further that mere occupation and use of land does not establish adverse possession as was held in the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR
- 20 Mr Arusei further submitted that the 1st to the 6th defendants have failed to demonstrate that the plaintiff had lost his right to the land either by being dispossessed of it or having discontinued his possession of the land. Counsel therefore urged the court to find that the plaintiff has proved his case on a balance of probabilities and award him mesne profits of Kshs 4.8 Million and Kshs 5 Million and general damages together with costs.



1st-6th Defendants' Submission

- 21 Counsel submitted on a preliminary objection as to whether the plaintiff's suit is time barred. Mr Maritim submitted that this suit is statute barred pursuant to the *Limitations of Actions Act* cap 22 where Section 7 of the *Limitation of Actions Act* expressly provides that an action may not be brought by any person to recover land after the end of 12 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.
- 22 Counsel cited the case of *Gathoni v Kenya Co-operative Creameries Ltd* (1982) KLR 104, where the court held that the law of Limitations of Actions is intended to protect defendants against unreasonable delay in bringing suits against them. Counsel further relied on the case *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR and submitted that a plaintiff should exercise diligence in pursuing a claim which the plaintiff has not complied with.
- 23 Mr. Maritim relied on the case of *Bosire Ongeru v Royal Media Services* (2015) eKLR where the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred, the court has no jurisdiction to entertain the same. Counsel therefore urged the court to find that the plaintiff's claim is time barred.
- 24 In response to the plaintiff's submission counsel submitted that the plaintiff did not rebut the defendants' evidence that they were *bona fide* purchasers for value. Further that the map shows land parcel Lembus/Sigoro Extension /90 is an excision out of land parcels Lembus/Sigoro Extension /8 and Lembus/Sigoro Extension /9 hence the suit land has no physical existence of demarcation. Counsel distinguished the cases relied on by the plaintiff and stated that they are not relevant to this case.
- 25 Mr. Maritim relied on the case of *Kenya Transport Association vs Municipal Council of Mombasa & Another* [2011] eKLR and submitted that the court cannot be used to rubberstamp an illegality and an unjust acquisition at the expense of a rightful owner. Counsel urged the court to dismiss the plaintiff's suit with costs to the defendants.

7th Defendant's Submissions

- 26 Counsel for the 7th defendant Koibatek District Land Registrar submitted that the 7th defendant, confirmed that the plaintiff acquired ownership of the said parcel of land in 1977 after complying with the relevant procedures and was issued with a title in 1982. Further that the plaintiff is the registered owner of the suit land parcel No LR No Lembus/Sigoro Extension/90 and that the 1st-5th defendants have never applied or registered as owners of the said parcel of land.
- 27 Mr Kuria reiterated the evidence of DW3 who confirmed that the first entry in the registry for the suit parcel of land was made on January 11, 1982 where the plaintiff was registered as proprietor and that the adjudication records tally with the land register. That the 7th defendant is only a custodian of public documents at Koibatek Land Registry and all the processes leading to the registration of the plaintiff's land was done in good faith in compliance with all the necessary procedural requirements and therefore the 7th defendant cannot be faulted.
- 28 Counsel relied on order 2 rule 15 of the *Civil Procedure Rules*, 2010 on power of the court to strike out pleadings and cited the cases of *Elijah Sikona & Another vs Mara Conservancy & 5 Others* [2013] eKLR and *DT Dobbie Kenya Co Ltd versus Joseph Mbaria Muchina & Leah Wanjiku Mbugua* (1982) KLR 1 where the Court of Appeal laid the basis for courts when deciding a claim that discloses no cause of action. Counsel therefore urged the court to dismiss the plaintiff's suit against the 7th defendant as it does not disclose a cause of action.



Analysis And Determination

29 The issues for determination are as to whether the plaintiff's suit is time barred, whether the plaintiff's suit is time barred, whether the plaintiff is entitled to declaratory orders that he is the registered owner of the suit land, whether the plaintiff is entitled to mesne profits and general damages.

30 The plaintiff is seeking for various reliefs in his plaint namely, a declaration that he is the absolute owner of the suit land, that the 1st to 6th defendants are trespassers, mesne profits, general damages, an order of eviction and costs of the suit. The plaint indicates when the alleged illegal activities or entry started and also states that the activities have continued unabated even though the plaintiff has been making complaints to the relevant provincial authorities to no avail. It is on record that the 1st defendant was arrested and jailed for 6 months in respect of the land dispute herein. This is therefore a dispute of trespass that has been ongoing from the date of the original trespass.

31 In the case of *Isaack Ben Mulwa v Jonathan Mutunga Mweke* CA Civil Appeal No 6 OF 2015 [2016 eKLR], the Court of Appeal stated as follows about such trespass: -

Each action of trespass constitutes a fresh and distinct cause of action. It is inconceivable that a claim based on an action for trespass committed in 2015 would be *res – judicata* simply because the same parties or their parents litigated over the same matter in 1985. It is well settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts.”

35 It is trite that each action of trespass constitutes a fresh and distinct cause of action. The defendants have continued to commit acts of trespass whereby the plaintiff has taken previous action and the defendants have continued with the trespass hence this case which was filed in 2015. I therefore find that the suit is not time barred as alleged by the defendants.

36 The issue for determination is whether the plaintiff is the absolute owner of the suit land. It is not in dispute that the plaintiff is the registered owner of the suit land. What the 1st to 6th defendants dispute is that the plaintiff acquired the title to the suit land fraudulently. The plaintiff produced a title deed to the suit land registered in his name, a search certificate and a map in respect of the suit land.

37 The plaintiff's evidence was corroborated by the evidence of DW3 the Land Registrar who confirmed that the plaintiff acquired ownership of the said parcel of land in 1977 after complying with the relevant procedures and was issued with a title in 1982. Further that the plaintiff is the registered owner of the suit land parcel No LR No Lembus/Sigoro Extension/90 and that the 1st-5th defendants have never applied or registered as owners of the said parcel of land.

38 DW3 also stated that the suit parcel of land was acquired *vide* adjudication process where a register was opened for Parcel No Lembus/Sigoro/extension/90 on January 11, 1982 in the name of Joseph Chepkok Cheruyiot of PO Box 6 Eldama Ravine. The Land Registrar being a custodian of the government records confirmed that all the procedures for registration were complied with therefore there was no fraud or impropriety on the part of the plaintiff.

39 In the case of *Hubert L Martin & 2 Others V Margaret J Kamar & 5 Others* [2016] eKLR the court held that;

‘A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that



brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or certificate of lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

40 The plaintiff established the root of his title which was fortified by the Land Registrar and is therefore entitled to enjoy the rights of an absolute owner of the property as is provided by sections 24 and 25 of the [Land Registration Act](#). Section 24(a) of the said act provides as follows: -

41 Subject to this act: -

The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:”

42 Further as an absolute proprietor's right can only be defeated by operation of the law as provided under section 25(1) of the [Land Registration Act](#) which provides as follows: -

25.

(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: -

- a) to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and
- b) to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.

43 Further section 3 (1) of the [Trespass Act](#), Cap 294 provides that:

Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

44 The defendants has no business being on the plaintiff's land as they are trespassers.

45 On the issue of mesne profits, it is trite that mesne profits are special damages which must be specifically pleaded and specifically proved. A claimant seeking mesne profits must tabulate the amount in the plaint and specifically prove the same by tendering evidence.

46 In the case of [Karanja Mbugua & another v Marybin Holding Co Ltd](#) [2014] eKLR stated as follows with regard to mesne profits: -

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of order 21, rule 13 of [Civil](#)



Procedure Rules. The said provisions state as follows with regard to a decree for possession and mesne profits:

- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-
 - a. For the possession of the property.
 - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
 - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until: -
 - i. The delivery of possession to the decree-holder
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

47 Similarly, in the case of Peter Mwangi Mbutia & another v Samow Edin Osman [2014] eKLR, the Court of Appeal while dealing with the issue of mesne profits held as follows:

We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established.”

48 The plaintiff sought for an order for mesne profits and general damages but did not indicate the amount of loss that he wanted the court to award him. I therefore find that the claim for mesne profits is not proved and is declined. An order for compensation of trees is also declined as this was not proved.

49 I have considered the pleadings, the evidence and the submission by counsel together with the relevant law and find that the plaintiff has proved his case on a balance of probabilities. I therefore grant the following specific orders: -

- a. A permanent of injunction is hereby issued restraining the 1st 2nd 3rd 4th 5th and 6th defendants, their agents, or servants from ploughing, from selling, disposing, from leasing out the parcel of land and/or in any other manner dealing with the parcel LR No Lembus/ Sigoro Extension/90 in any manner at all.
- b. A declaratory order is hereby issued that the plaintiff is the legal and lawful proprietor to the LR No Lembus/Sigoroextension/90 and his title is thus absolute and indefeasible.
- c. The defendant to give vacant possession to the plaintiff within 45 days failure to which eviction notice to issue.



d. Costs of the suit to be paid by the 1st to 6th defendants

DATED, SIGNED AND DELIVERED AT MALINDI THIS 24TH DAY OF MAY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

