



**Kangogo & another (Suing as Administrators of the Estate of the Late Richard Kangogo) v Kaino (Environment & Land Case 19 of 2022) [2023] KEELC 16460 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16460 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 19 OF 2022**

**L WAITHAKA, J  
MARCH 23, 2023**

**BETWEEN**

**CLARA JERUTICH KANGOGO ..... 1<sup>ST</sup> PLAINTIFF**

**CATHERINE JEPKEMOI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS ADMINISTRATORS OF THE ESTATE OF THE LATE RICHARD  
KANGOGO**

**AND**

**BOAZ KAINO ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated June 30, 2015 and filed on an even date, the plaintiffs instituted this suit seeking judgment against the defendant for:-
  - i. A declaration that the defendant never bought the parcel of land known as Elgeyo Marakwet/Iten/Township/196 from the late Richard Chelimo Kangogo.
  - ii. Payment of mesne profits to the estate of Richard Chelimo Kangogo calculated on monthly basis as from April 1999 until the case is concluded plus interest at court rate;
  - iii. An order of permanent injunction to restrain the defendant by himself, his servants and/or agents from interfering or in any way dealing with the parcel of land known as Elgeyo Marakwet/Iten/Township/196.
  - iv. Costs and interest.
2. The suit is premised on the ground that the parcel of land known as Elgeyo Marakwet/Iten/Township/196, hereinafter referred to as the suit property, was owned and is still owned (registered) in the name of Richard Chelimo Kangogo (deceased); that after Richard Chelimo Kangogo passed on,



the defendant informed the deceased's family that he had bought the suit property from the deceased. On the basis of the information given to the deceased's family by the defendant, the 1<sup>st</sup> plaintiff allowed the defendant to take possession of the suit property but requested him to avail evidence of purchase of the suit property which evidence the defendant failed to avail. That the plaintiff carried out investigation concerning the information given to the family by the defendant and established that the defendant had not purchased the suit property as claimed.

3. Upon being served with summons to enter appearance, the defendant entered appearance and filed a statement of defence and counter-claim.
4. In his statement of defence and counterclaim filed on August 31, 2015, the defendant admits that the suit property is registered in the name of the deceased and that after the deceased passed on, he informed the deceased's family that he had bought the suit property from the deceased. The defendant avers that jointly with one John Cheserem they bought the suit property from the deceased at Kshs 2,400,000/- whose half share of the suit property he later acquired by way of purchase. The mode of payment of the purchase price to the late Richard Chelimo is said to have been partly cash (Ksh 600,000/- from the Defendant;) Kshs 700,000/- by way of transfer of motor vehicle, Peugeot 504 station wagon valued at that amount and Kshs 1,200,000/- from John Cheserem.
5. The defendant admits that he took possession of the suit property with the consent/permission of the plaintiff and that he has been collecting rent therefrom since April 1999 but denies the contention of the 1<sup>st</sup> plaintiff that she later discovered that he did not purchase the suit property from the deceased.
6. The defendant contends that the reliefs sought in the plaint are not available as the plaintiff's suit is time barred, bad in law and incurably defective.
7. Through the counter-claim, the defendant contends that his use and occupation of the suit property has been lawful as it has been with the consent of the plaintiff and that he has acquired title to the suit property by adverse possession.
8. The defendant reiterates his contention that the plaintiffs suit is statutory time barred; prays that the plaintiffs suit be dismissed with costs to him and that he be declared the owner of the suit property by adverse possession.
9. The plaintiffs filed a reply to Defence dated September 7, 2015 reiterating the contents of their plaint in their entirety and denying the defendant's contention that he co-owned the suit property with John Cheserem.

## **Evidence**

### **The plaintiffs case**

10. When the matter came up for hearing, the 1<sup>st</sup> plaintiff relied on her statement recorded and signed on June 30, 2015 after it was admitted as her evidence in chief. The statement of the 1<sup>st</sup> plaintiff is basically a reiteration of the averments contained in her plaint dated June 30, 2015.
11. In cross examination, the 1<sup>st</sup> plaintiff stated that she gave the defendant possession of the suit property in 2000; That she was only paying rates to the county government and not the loan (contrary to her affidavit sworn on May 27, 2016); that she gave the defendant possession of the suit property because she believed what he had told her; that he had bought the suit property from the deceased. With time, she established that what the defendant told her was not true. She learnt that, when John Cheserem visited her place of work and told her that the defendant and he were partners in buying the suit property and that the defendant never paid any money for the land.



12. In a bid to resolve the dispute between her and the defendant, in 2014 they held a meeting with the defendant. In the meeting, which was attended by elders, she asked the defendant to return their land but the defendant refused to do so.
13. In re-examination, the 1<sup>st</sup> plaintiff stated that she allowed the defendant to take possession of the suit property on condition that he would later on come back and explain how he acquired the suit property from her husband.
14. The 1<sup>st</sup> plaintiff informed the court that the defendant never brought any documents to prove that he purchased the suit property from the deceased.

### **The Defendant's Case**

15. The defendant, who testified as DW 1, relied on his statement recorded on August 1, 2022, after it was adopted as his evidence in chief. He admitted that he has been collecting rent from the suit property and stated that it's the 1<sup>st</sup> plaintiff who gave him his first tenant.
16. The defendant produced the following documents as his exhibits:- Extract of the green card for the suit property (Dexbt 1); Certificate of Lease (Dexbt 2); Charge (Dexbt 3); Demand notice dated March 16, 2015 (Dexbt 4); Certificate of Official Search dated February 11, 2015 (Dexbt 5); Lease (Dexbt 6); Supporting Affidavit sworn on 27<sup>th</sup> May, 2016 (Dexbt 7); Police Abstract dated November 1, 2019 (Dexbt 8); cheques dated August 4, 2015, March 2, 2012; March 2, 2012; July 31, 2009 and February 28, 2012 as Dexbt 9(a) to (e) respectively.
17. He took possession of the suit property in 1997.
18. By the time this suit was filed, he had occupied the suit property for 19 years. Maintaining that he purchased the suit property, the defendant urged the court to hold in his favour.
19. In cross-examination, the defendant stated that after he paid the deceased and his co-purchaser John Cheserem the purchase price, he asked the deceased to allow him take a loan using the certificate of lease for the suit property. The deceased and his co-purchaser of the suit property, John Cheserem, gave him power of attorney to take a loan.
20. The defendant acknowledged that the power of attorney does not say he had bought the suit property. He also acknowledged that apart from the police abstract, he never produced any document showing ownership of the suit property by him. The defendant further acknowledged that the police abstract does not name the documents in respect of the suit property as some of the documents that got lost or name any of the documents that got lost.
21. Explaining that he had the sale agreements in respect of the suit property until 2019 when it got lost, the defendant acknowledged that he had a meeting with the 1<sup>st</sup> plaintiff in 2014 but he never availed a copy of the sale agreement to the 1<sup>st</sup> plaintiff then because it was not requested for.
22. In re-examination, the defendant stated that despite having not produced any document showing that he is the owner of the suit property, he purchased it.
23. He maintained that the deceased gave him a power of attorney to take a loan and explained that the deceased gave him the power of attorney because he intended to take a loan urgently. Unfortunately, the deceased died before he could transfer the land to him.
24. The defendant availed 6 other witnesses, whose evidence merely attests to the undisputed fact of the defendant having been the one in use and control of the suit property since 1999. These were:-



25. DW 2, Patel H Dhirubhai. He has been a tenant in the suit property, paying rent of Kshs 30,000/- per month to the defendant, from 2013.
26. DW 3 Reuben Chepkurui Chelanga. He informed the court that he was present in the meeting held between the plaintiff and the defendant. He was unable to identify the plaintiff.
27. DW 4 Susan Cheserem. She informed the court that she had information from her husband, John Cheserem, that the defendant and he had jointly bought the suit property from the deceased. She also had information from her husband that he had sold his share of the suit property to the defendant and that the defendant had finished paying for the suit property.
28. DW 5 John Kimeli Kogo. His statement is to the effect that he collected rent from the suit property on behalf of the defendant.
29. DW 6 Joseph Kipkosgei Yatich. He was collecting rent from the suit property on behalf of the defendant in 2000. He also attended the meeting held in 2014 between the plaintiff and the defendant. He stated that no documents were produced in that meeting.
30. DW 7, William Cheruiyot Chesonga, informed the court that he facilitated transfer of a motor vehicle to the deceased on instructions of the defendant. He acknowledges that his statement does not state that the motor vehicle handed over to Richard Kangogo (deceased) was in respect of the suit property. He further informed the court that the defendant is his friend and that he is not aware of the power of attorney which the defendant used to take a loan from ICDC. He further stated that the defendant and the deceased were great friends and that he did not know that the dispute between the plaintiff and the defendant would escalate to court.
31. After hearing closed, parties to the suit filed submissions, which I have read and considered.

### **Analysis and Determination**

32. The issues arising from the pleadings, the evidence and submissions are:-
  - i) Whether the plaintiff's claim is statute barred?
  - ii) Whether there is proof that the defendant bought the suit property from the deceased?
  - iii) Whether the defendant has acquired title to the suit property by adverse possession?
  - iv) What orders should the court make?
33. On whether the plaintiff's claim is statute barred, on behalf of the defendant, reference is made to the pleadings filed in this case and the evidence adduced in support thereof showing that the defendant has been in use and occupation of the suit property from April 1999 and based on Section 7 of the *Limitation of Actions Act*, cap 22 Laws of Kenya submitted that the plaintiff's suit having been filed in 2015, more than 12 years after the defendant took possession of the suit property, is time barred.
34. Section 7 of *Limitation of Actions Act* aforementioned provides as follows:-

“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....”



35. The Court of Appeal, in the case *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR (M’inoti JA), stated:-

“... Section 7 of the Act (referring to *Limitation of Actions Act*, Cap 22 Laws of Kenya) is a classical limitation of actions provision, which prohibits actions for recovery of land after 12 years from the date when the cause of action accrued. The provision reads as follows:

“7. An action may not be brought by any person to recover land after the 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.”

The Court further stated:-

“Section 13 provides that a right of action to recover land does not accrue unless the land is in the possession of a person in whose favour the period of limitation can run. It is such possession, which under the Act is referred to as adverse possession.”

The court also stated:-

“Section 17 of the Act further provides that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.”

The court further stated:-

“Lastly section 38 (1), is a concomitant provision to the other three sections and enables a person who claims to have become entitled to land by adverse possession, (i.e. by being in open, peaceful and as of right, occupation of land for at least 12 years) to apply to the High Court to be declared and registered as the proprietor of the land, in lieu of the registered proprietor. That provision reads:

“ 38.

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

36. In the case of *Benjamin Kamau Murma & Others v Gladys Njeri*, CA NO 213 of 1996 (unreported) the stated as follows regarding the above provisions:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

37. What I gather from the above cited provisions of the law and the decisions of the Court of Appeal is that Section 7 of the *Act*, can only found a cause of defence or action to the defendant if his possession of the suit property was adverse to the title held by the registered owner for the stipulated period of time and not merely on account of lapse of 12 years of possession of land owned or registered in the name of another person.



38. That determination brings me to the second issue, which is whether the possession and use of the suit property by the defendant was adverse to the title held by the plaintiff as administratrix of the estate of Richard Kangogo, deceased
39. The Court of Appeal in the case of *Mtana Lewa* supra stated:-
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title of the owner.”
40. In the case of *Kasuve v Mwaani Investment Ltd & Four Others* 2004 1 K.L.R 184, the Court of Appeal stated:-
- “For claim of adverse possession to succeed the plaintiff must show that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”
41. In the case of *Wambugu v Njuguna* 1983 K.L.R 173, the Court of Appeal held:-
- “In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights 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 of which he intended to use it.
- The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”
42. When a party claims he came into possession is by purchase, it has been held in many cases that time for purposes of adverse possession does not begin to run until the final instalment is paid. In that regards see the cases of *Gabriel v Mukindia Maranya* [1993] e KLR; *James Maina Kinya v Gerald Kwendaka* [2018]eKLR and *Public Trustee v Wanduru Ndegwa* [1984]e KLR.
43. In the case *Public Trustee v Wanduru Ndegwa* (supra), the Court of Appeal held:-
- “The limitation period will begin to run from the date of payment of the purchase price in full or last instalment of it...”
44. In applying the above test to the circumstances of this case where it is not in dispute that the defendant’s possession of the suit property has been with the permission or consent of the plaintiffs arising out of a purchase agreement that allegedly existed between the plaintiffs deceased husband and the defendant; the question to answer is whether the defendant can urge a case of adverse possession in the circumstances of this case.



45. Concerning that issue, whilst the 1<sup>st</sup> plaintiff contends that she allowed the defendant to take possession of the suit property on account of misrepresentation made to her that he had bought the suit property from her deceased husband, a review of the totality of the evidence adduced in this case, comprised in the conduct of the parties before and after the 1<sup>st</sup> plaintiff's husband passed on; the 1<sup>st</sup> plaintiff's own evidence which more or less support's the defendant's to the extent that it suggests that the property was indeed on sale to the defendant and the said John Cheserem and the evidence of John Cheserem's wife confirming that John Cheserem indeed bought the suit property in partnership with the defendant, I am not persuaded by the plaintiffs claim that the defendant did not purchase the suit property.
46. Considering that the defendant was given ownership documents in respect of the suit property and even put in possession of the suit property way before the 1<sup>st</sup> plaintiff's husband died, at least going by the plaintiffs pleadings; and taking into account the conduct of the 1<sup>st</sup> plaintiff (it took her more than 12 years to raise the issue of want of evidence of purchase) and the basis for that claim (alleged information given to her by the co-purchaser that the defendant did not pay; I note that the informer did not tell the 1<sup>st</sup> plaintiff that the defendant did not purchase the suit property but that he did not pay the purchase price. That is not the same thing as saying that the defendant did not purchase the suit property.
47. It is my considered view that the information given to the 1<sup>st</sup> plaintiff, if proven to be true, would only support a claim for rescission of the contract of sale or a claim for payment of the balance of the purchase price, which case the plaintiffs hav not urged.
48. In the circumstances of this case, despite there being no written evidence concerning the contract of sale that existed between the plaintiffs deceased husband and the defendant, from the conduct of the parties and the confirmation by not any other person but the 1<sup>st</sup> plaintiff that she was informed by John Cheserem that the defendant and he were partners in buying the suit property, I entertain no doubt that there existed a contract of sale of the suit property between the 1<sup>st</sup> plaintiff's deceased husband and the defendant.
49. Noting that the contract was entered into way before Section 3(3) of the *Law of Contract Act* came into force, I find and hold that the failure by the defendant to produce documentary proof of that agreement cannot and did not vitiate the purchase agreement that existed between him and the plaintiff's husband, whether oral or written. What is important is that in formance of that agreement he was put possession. In that regard, see the case of *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014]e KLR where the Court of Appeal stated:-
- “...It is our view that section 3(7) of the *Law of Contract Act* makes exception to oral contracts for sale of land concluded before section 3(3) of the *Act* came into force...”
50. The defendant proved that he was given possession of the suit property in 1999, after paying the full purchase price. The plaintiff did not controvert the defendant's evidence that he was given possession of the suit property upon full payment of the purchase price.
51. The time for purposes of the defendant's case for adverse possession began to run in 1999. By the time the instant suit was filed, in 2015, the defendant had been in adverse possession of the suit property for more than 12 years hence entitled to be declared the owner of the suit property by adverse possession.
52. The upshot of the foregoing is that the plaintiffs case is found to be lacking in merit and is dismissed. On the other hand, the defendant's counterclaim is found to be merited and is allowed.



53. On costs, being of the view that the defendant was partly responsible for failing to present to the plaintiff documents relating to his claim to the suit property, I decline to award him costs of the suit and instead order that each party bears their own costs.

54. Orders accordingly.

**JUDGMENT READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**L. N. WAITHAKA**

**JUDGE**

**Judgment delivered virtually in the presence of:-**

**M/S Akinyi holding brief for Mr. Omusundi for the plaintiffs**

**Mr. Bulbul holding brief for Dr. Chebii for the defendants**

**Christine Towett – Court Assistant**

