



**Cheruiyot v Hasham Lalji Properties Limited (Environment & Land
Case 2 of 2021) [2023] KEELC 17468 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 2 OF 2021**

JM ONYANGO, J

MAY 17, 2023

BETWEEN

SAMUEL KIPTANUI CHERUIYOT APPLICANT

AND

HASHAM LALJI PROPERTIES LIMITED RESPONDENT

JUDGMENT

1. The Plaintiff instituted this suit by way of Originating Summons dated December 18, 2020 seeking the following reliefs:
 - a. That the Applicant has obtained title over land parcel No Eldoret Municipality Block 5/168 by way of adverse possession for having occupied the said land nec vi, nec clam, nec precario for a period of over 13 years since May 2007.
 - b. The Respondent's title over land parcel No Eldoret Municipality Block5/168 has been extinguished by operation of the law.
 - c. Consequent upon the foregoing, the Applicant be registered as the sole absolute and indefeasible proprietor of the aforesaid parcel of land being Eldoret Municipality Block5/168.
 - d. The County Land Registrar Uasin Gishu do enter the name of Samuel Kiptanui Cheruiyot as the proprietor of land parcel No Eldoret Municipality Block5/168.
 - e. Costs of the suit and interest be borne by the Respondent.
2. The Originating Summons is based on the Applicant's Supporting Affidavit sworn on the December 18, 2020.
3. In the said affidavit he avers that the suit property is registered in the name of the Respondent. He further avers that he entered the suit property in 2007 without the Defendant's consent and he has



been in peaceful, open and continuous occupation thereof since then. He has annexed an extract of the register for the suit property and photographs of the house where he stays. He therefore avers that the Defendant's title has been extinguished by operation of the law.

4. The Respondent was served with the Originating Summons by way of substituted service but he never filed any response. The court then directed that the suit be disposed of by way of viva voce evidence.
5. The Applicant testified as the only witness in support of his case. He relied on his supporting affidavit as his evidence in chief. He produced a copy of his National Identity Card, an extract of the register in respect of the suit property and photographs of the house in which he lives on the suit property as plaintiff's exhibits 1 to 6. He stated that he moved into the suit property in 2007 and by the time he filed suit in 2020, he had been living on the suit property peacefully and without any interruption for a period of 13 years.
6. At the close of the Applicant's case the Plaintiff filed his submissions through the firm of Kibii & Co Advocates.
7. Learned counsel for the Plaintiff submitted that the Plaintiff had met the threshold for adverse possession. He relied on the case *Gachuma Gacheru v Maina Kabuchwa* (2016) eKLR where the court cited with approval the case of *Maweu v Kiu Ranching and Farming Cooperative Society* (1985) for the proposition that adverse possession is a fact to be observed upon the land. It is not to be seen in a title.
8. Similarly, in the case of *Gabriel Mbui v Mukindia Maranya* 1993 eKLR the court held as follows:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use and de facto occupation must be shown.”

9. He submitted that the Applicant had demonstrated that he had been in continuous and exclusive occupation of the suit property for a period of over 12 years and the fact that he had developed the land shows that he has animus possidendi.

Issues for Determination

10. Having considered the pleadings and evidence on record, the main issues for determination are:
 - i. Whether the Applicant has met the threshold for adverse possession
 - ii. Whether the Applicant is entitled to the reliefs sought.

Analysis and determination

11. The doctrine of adverse possession is provided in section 7, 13 and 38(1) of the *Limitation of Actions Act* which provide as follows:

Section 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.

Section 13. “A right to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run, (which possession is in this Act referred to as adverse possession), and where under sections 9,10, 11 and 12 a right of action



to recover land accrues on certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land”

Section 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 of this Act, 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.”

12. In the case of of *Kasuve v Mwaani Investments Limited & 4 Others* 1KLR 184 the Court of Appeal held that:

“In order to be entitled to land by prove adverse possession, the claimant must prove that he has been in exclusive possession of the land openly, and as of right 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”

13. In Kisumu Civil Appeal No 27 of 2013 *Samuel Kibamba v Mary Mbaisi* [2015] eKLR w the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

14. In Kisumu Civil Appeal No 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR the court observed that a person who claims adverse possession must inter alia show:

- (a) on what date he came into possession.
- (b) what was the nature of his possession”
- (c) whether the fact of his possession was known to the other party.
- (d) for how long his possession has continued and
- (e) that the possession was open and undisturbed for the requisite 12 years.

15. In the instant case, the Applicant testified that he had been on the suit property since 2007 and that he entered the land without the owner’s consent. He stated that the registered owner of the land was aware of his presence on the land but they had not chased him away or interfered with him. That he has been in open peaceful and uninterrupted occupation of the land for more than 12 years and he has developed the land by building a house thereon and improving the house he found on the land. This clearly shows that he has animus possidendi or the intention to possess the land thus dispossessing the registered owner thereof.

16. I am therefore satisfied that the Applicant has met the threshold for adverse possession and he is there entitled to the reliefs sought.

17. Consequently, I enter judgment for the Applicant and make the following final orders:



- a. A declaration is hereby issued that the Applicant has obtained title over land parcel No Eldoret Municipality Block5/168 by way of adverse possession.
- b. A declaration is hereby issued that the Respondent's title over land parcel No Eldoret Municipality Block5/168 has been extinguished by operation of the law.
- c. Consequent upon the foregoing, the shall be registered as the sole absolute and indefeasible proprietor of the aforesaid parcel of land being Eldoret Municipality Block5/168.
- d. The County Land Registrar Uasin Gishu County is directed to enter the name of Samuel Kiptanui Cheruiyot as the proprietor of land parcel No. Eldoret Municipality Block5/168
- e. The costs of the suit shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF MAY 2023

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J.M ONYANGO

JUDGE

In the presence of;

Miss Rop for Mr. Kibii for the Plaintiff

No appearance for the Defendant

Court Assistant: A. Oniala

