



**Kiratu v Kisorio (Environment & Land Case E008 of 2022)
[2023] KEELC 19119 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19119 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E008 OF 2022**

**YM ANGIMA, J
JULY 27, 2023**

BETWEEN

ESTHER WANJIRU KIRATU APPLICANT

AND

JOSEPHAT KIPKEMBOI KISORIO RESPONDENT

JUDGMENT

A. Applicant's Claim

1. By an originating summons dated February 8, 2022 grounded upon order 37 rule 7 of the *Civil Procedure Rules, 2010* and section 38 of the *Limitation of Actions Act* (cap 22) (LAA), the applicant sought of the following reliefs, that is:
 - a. A declaration that the applicant is entitled to be registered as the proprietor of a portion of $\frac{1}{4}$ acre of land to be excised from LR No Laikipia/Marmanet/5686 by virtue of the doctrine of adverse possession.
 - b. An order to issue compelling the respondent to execute all the necessary documents to vest ownership of the said $\frac{1}{4}$ acre of land out of LR No Laikipia/Marmanet/5686 to the applicant and in default, the Deputy Registrar of the honorable court be authorized to do so on his behalf.
 - c. That the County Surveyor and Land Registrar to dispense with the production of the original title deed for LR No Laikipia/Marmanet/5686 while subdividing and transferring the $\frac{1}{4}$ acre of land to the applicant.
 - d. The respondent to bear the costs of the suit.
2. The said summons was supported by an affidavit sworn by the applicant on February 8, 2022 and the exhibits hereto. The applicant pleaded that she had been in open, continuous, exclusive and



uninterrupted possession and occupation of a portion of ¼ acre out of the suit property which was registered in the name of the respondent for a period exceeding 12 years prior to the filing of the suit. It was her case that she had been in such exclusive possession for over 18 years without any interference from the respondent or any person claiming under him. She asserted that she had fenced and developed the said portion of land over the years and as such she had acquired adverse possession thereof through the doctrine of adverse possession.

3. The applicant further pleaded that she obtained possession of the land on account of purchase from an agent of the respondent's deceased father in 2004 but the sale agreement subsequently became void for want of consent of the Land Control Board (LCB) under the *Land Control Act* (cap 302). She consequently sought the various reliefs in the summons.

B. Respondent's Response

4. The material on record shows that the respondent did not enter appearance to the originating summons and did not file an answer thereto despite service. There is evidence on record to demonstrate that the respondent was duly served with the summons.

C. Applicant's Evidence at the Trial

5. At the trial hereof, the applicant testified on her own behalf as the sole witness. She adopted the contents of her affidavit sworn on February 8, 2022 in support of the originating summons as her evidence in-chief. She also produced the 6 annexures to the affidavit as exhibits and urged the court to allow her claim for adverse possession.

D. Issues for Determination

6. The court has considered the applicant's originating summons dated February 8, 2022 together with supporting affidavit and exhibits thereto. The court is of the opinion that the key questions for determination in the suit are the following:
 - a. Whether the applicant has proved her claim for adverse possession.
 - b. Whether the applicant is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.

E. Analysis and Determination

a. Whether the applicant has proved her claim for adverse possession

7. The court has considered the material and submissions on record on this issue. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa No 2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land....”



8. Similarly, in the case of *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR it was held, *inter alia*, that:

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

9. The court has considered the applicant’s evidence on her claim for adverse possession. Although her initial entry was with the permission of the owner pursuant to a sale agreement dated January 29, 2004 the consent stood terminated by operation of law upon expiry of 6 months from the date of the agreement for want of the consent of the LCB consent in terms of section 6 of the *Land Control Act*. See - *Situma v Cherongo* [2007] KLR 84.
10. It is evident that the applicant’s evidence on the elements of adverse possession was not challenged at the trial since the respondent did not attend the trial to question its credibility. It is further evident that the applicant’s evidence was not controverted since the respondent did not attend court to offer contrary evidence. In the premises, the court is inclined to accept the applicant’s evidence on her claim for adverse possession.
11. The court accepts that she has been in open, continuous and exclusive possession of the portion of ¼ acre out of the suit property for a period exceeding 12 years from the date the relevant sale agreement became null and void. The court also accepts that her possession was adverse since she fenced and developed that portion of land and continued utilizing it as her own.
12. There is no evidence on record to demonstrate that her possession has ever been interrupted in the legal sense. There was no evidence to show either that the registered owner had made a peaceful and effective entry into the land or that he had instituted legal proceedings for recovery thereof. What appears on record is a demand letter by the respondent’s advocates which is not sufficient to interrupt the applicant’s possession in the legal sense. (See *Ndeete v Gitbu* [1984] KLR 776). The court is thus satisfied that the applicant has proved her claim for adverse possession to the required standard.

b. Whether the applicant is entitled to the reliefs sought in the suit

13. The court has already found and held that the applicant has proved her claim for adverse possession of the portion of ¼ acre she is seeking from the suit property. It would therefore follow that she is entitled to the reliefs sought for the purpose of facilitating her registration as the proprietor of that portion of land. The court is thus inclined to grant the applicant all the necessary reliefs to facilitate her registration as proprietor under section 38 of the LAA.

c. Who shall bear costs of the suit

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). a successful party should ordinarily be awarded costs of an action unless the court, for good reason,



directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. It is evident from the material on record that the suit was not defended since the respondent neither entered appearance nor filed an answer to the originating summons. In the premises, the court is of the opinion that the appropriate order to make is that there shall be no order as to costs.

F. Conclusion and Disposal orders

15. The upshot of the foregoing is that the court finds and holds that the applicant has proved her claim for adverse possession to the portion of ¼ acre out of the suit property. Consequently, the court makes the following orders for disposal of the originating summons:

- a. A declaration be and is hereby made that the applicant has become entitled to be registered as proprietor of a portion of ¼ acre in her possession to be excised from title No Laikipia/Marmanet/5686 on account of the doctrine of adverse possession under section 38 of the [Limitation of Actions Act](#) (cap 22).
- b. An order be and is hereby made directing the respondent to execute all necessary forms, documents and instruments to facilitate the transfer of the said portion of ¼ acre out of title No Laikipia/Marmanet/5686 to the applicant within 30 days from the date hereof in default of which the Deputy Registrar of the court is hereby authorized to do so on his behalf.
- c. The County Land Surveyor and the County Land Registrar – Laikipia shall dispense with the production of the original title deed for the suit property, the respondent’s national identity card, pin certificate, passport size photos and all documents in the possession, control or custody of the respondent for the purpose of subdividing and transferring the portion of ¼ acre to the applicant.
- d. There shall be no order as to costs.

It is so decided.

Judgment dated and signed at Nyahururu and delivered via Microsoft Teams platform this 27th day of **July, 2023**.

In the presence of:

Mr. Waichungo for the Applicant

N/A for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

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