



**Jerop (Suing in her Personal Capacity and as the Administrator of the Estate of Isaac Kiplagat Muigei Deceased) v Kosgei (Environmental and Land Originating Summons 8 of 2023) [2023] KEELC 20986 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20986 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAPSABET**  
**ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 8 OF 2023**  
**MN MWANYALE, J**  
**OCTOBER 19, 2023**

**BETWEEN**

**LYDIA JEROP (SUING IN HER PERSONAL CAPACITY AND AS THE ADMINISTRATOR OF THE ESTATE OF ISAAC KIPLAGAT MUIGEI DECEASED) ..... PLAINTIFF**

**AND**

**KIMUTAI KOSGEI ..... DEFENDANT**

**JUDGMENT**

1. Lydia Jerop took out the Originating Summons dated 13<sup>th</sup> March 2023 in her personal capacity and as the administrator of the Estate of Isaac Kiplagat Muigei seeking for orders;
  - i) a declaration that the title of the said Kimutai Kosgei for freehold interests in 1.2 acres out of Land Registration No. Nandi/Mutwot/1529 has been extinguished by the Plaintiffs Adverse possession thereof for a period of more than 12 years in terms of Section 17 and 38 of the *Limitations of Actions Act*.
  - ii) A declaration that the Plaintiff has acquired freehold interests in a portion of Land Parcel Registration No. Nandi/Mujtwot/1529 measuring 1.2 acres by her adverse possession thereof for a period of more than 12 years which is from May 24<sup>th</sup> 2003 to date.
  - iii) An order do issue requiring and directing the Land Registrar Nandi County to register the Plaintiff Lydia Jerop as the owner of the portion of land measuring 1.2 acres out of Land Parcel Registration No. Nandi/Mutwot/1529 in place of Kimutai Kosgei.
2. The Originating Summons was served upon the Defendant who did not enter appearance and interlocutory judgment was duly entered and the matter proceeded as undefended by way of formal proof.



3. No directions for conversion of the Originating summons was issued under Order 38 of the [Civil Procedure Rules](#) but the Plaintiff having opted to call viva voce evidence, the Court deems the conversion of the Originating Summons to a plaint as was held by the Court of Appeal in the decision in the case of [Shadrack Bungei v Selina Jerotich](#) Eldoret Civil Appeal No. 4/2018.

**Plaintiff's Case and Evidence: -**

4. It is the Plaintiff's case that her late husband and herself purchased from the Defendant via an Agreement dated 24<sup>th</sup> May 2003 1 acre. Thereafter the Plaintiff and her late husband purchased additional 0.2 acres on 15/6/2003 thus making the total acreage purchased to 1.2 acres.
5. It is the Plaintiff's further case that they took possession immediately and developed the property and that they have lived thereon necvi, necclam and nec precario for over 12 years.
6. The Plaintiff testified as PW1 it was her testimony that while adopting her supporting affidavit as her witness statement. That she together with her late husband had initially purchased one acre from the Defendant and thereafter purchased an additional 0.2 acres thus making it 1.2 acres. In support of her claim she produced two sets of sale agreements for sale, that were part of her annexure in the supporting affidavit, together with the Grant ad litem, together with a copy of search as well as 3 photographs showing a permanent house built by the Plaintiff, mature indigenous trees planted by the Plaintiff in 2004 and blue gums planted in 2011, as contained in the supplementary list of documents which she produced in evidence.
7. PW2, Sabina Chepkoech Sartum equally testified and adopted her witness statement as part of her evidence in chief. It was her testimony that she had a role in the purchase by the Plaintiff's late husband in that she was a witness to the first agreement for sale (P Exhibit 1) and was the one given the purchase price to pay for the suit property.
8. The witness identified the photographs produced in evidence as a house belonging to the Plaintiff where the Plaintiff and her late husband resided together with trees planted on the said parcel.
9. The witness thus stated that after the purchase the vendor who is the Defendant relocated to Uasin Gishu and the Plaintiff and her husband took possession of the whole 1.2 acres that they had purchased.
10. After the testimony of the two witnesses the Plaintiff case closed and the Court directed the Plaintiff to make oral submissions. It was the Plaintiff's submissions that she had proved her case on a balance of probabilities, by tendering 6 exhibits to prove her entry and occupation of the property.
11. The Plaintiff's Advocate further submitted that the Plaintiff had proved her occupation for more than 12 years on the disputed property was peaceful, open and continuous and was thus deserving of the prayers sought in the Originating Summons now turned plaint, and urged the Court to enter judgement in favour of the Plaintiff.
12. Since the suit was undefended, the burden on the Plaintiff to prove his case did not change at all as was stated in the Court of Appeal in the decision in the case of [Karugi & another v Kabiya and 3 others](#) 1983 (eKLR) where the Court stated "the burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge when the matter is not validly defended, the burden of proof is not in any way lessened because this is heard by way of formal proof."
13. The Court shall now subject the evidence adduced in the matter against the above holding of the Court of Appeal with regard to an undefended suit.



### Issues for Determination: -

14. The Court frames the following as issues for determination; -
  - i) whether or not the Plaintiff has tendered evidence in support of the originating summons now converted to a plaint
  - ii) whether or not the Plaintiff has proven his case
  - iii) what reliefs ought to issue?
15. On issue number 1, the Plaintiff produced two sets of agreements for sale, a copy of the search revealing the Defendant as the registered owner of Nandi/Mutwot/1529, she further produced photographs of the house that she and her late husband had built in 2003, upon purchase of the property, photographs of trees that she had planted in 2004 and in 2011. She called one witness her late husband's grandmother who was a witness to the initial agreement of sale and actually delivered the purchase price to the Defendant.
16. PW2 was able also to identify the photographs P Exhibit 6 (9) as the house her late grandson and the plaintiff had constructed upon purchase of the property. She confirmed the occupation of the suit land by the Plaintiff from the time of purchase and construction of the house to date.
17. The Court finds that the Plaintiff adduced evidence in support of the originating summons (now converted to a plaint) and issue number 1 is answered in the affirmative.
18. On issue number 2, the Plaintiff claim is based on the doctrine of adverse possession. For such a claim the succeed as was held in the decision in the case of *Kimani Ruchine v Swift Thuther Food Company Ltd* where the Court held that the Plaintiff have to prove "that they have used this land which they claim as of right, nec vic, nec claim, nec plecario (no force, no secrecy, no permission), so the Plaintiffs must show that the Defendant had knowledge (or the means of knowing, actual or constructive) of the possession of the occupation. The possession must be continuous. It must not be broken for any temporary purposes by any evidence to interrupt it or by any recurrent consideration."
19. The above ingredients were upheld by the Court of Appeal in the decisions in the case of *Francis Gicharu Kariri v Peter Njoiroge Mairu Civil Appeal No. 293/202* as well as in *Titus Kigoro Munyi v Peter Mburu Kimani Appeal No. 28/2014*.
20. Has the Plaintiff proved the said ingredients? The initial entry of the Plaintiff on the suit property was pursuant to an agreement of sale, the entry was through permission, by way of the said Agreement for Sale, and the occupation was thus initially permitted.
21. In *Samuel Miki Waweru v Jane Njeri Richu* (2007 eKLR), the Court of Appeal held "in our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (i) of the *Land Control Act* for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transactions become void."
22. The last payment in respect of the purchase was made on 28/6/2003, hence time starting running 6 months thereafter in January 2004, and at crystalized 12 years later in January 2016. At the time the suit was filed the statutory period for limitation period had already crystalized.



23. As the suit was not defended, the evidence adduced by the Plaintiff was uncontroverted. There was prove of occupation and interrupted from 2004 to date, and no proof of the same having been discontinued.
24. The Court finds that the Plaintiff has proven the ingredients of adverse possession, noting that the Defendant had initially given possession was aware of the occupation by the Plaintiff.
25. Thus in answer to issue number 2 the Court finds that the Plaintiff has proven the ingredients of adverse possession.
26. What then are the reliefs to be granted:  
Having proven the ingredients of adverse possession, the Court enters judgment for the Plaintiff in terms as hereunder.

**Disposition: -**

- a) Judgement is hereby entered for the Plaintiff for 1.2 acres in Nandi/Mutwo/1529.
- b) The Defendants interest in a portion measuring 1.2 acres within Nandi/Mutwot/1529 occupied by the Plaintiff is extinguish under Section 17 of the [Limitations of Actions Act](#) under the doctrine of adverse possession.
- c) The County Surveyor Nandi County to sub divide Nandi/Mutwot/1529 and the Land Registrar to Register the resulting 1.2 acres occupied by the Plaintiff in her name and the remainder in the name of the Defendant.
- d) The Deputy Registrar of this Court to execute any documents necessary for the Land Control Board consents to subdivide and transfer and to execute the transfer documents in favour of the Plaintiff within 90 days from the date of this judgment.
- e) Costs of the suit are awarded to the Plaintiff.

**JUDGMENT DATED AND DELIVERED AT KAPSABET THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

**Hon. M. N. Mwanyale,**

**JUDGE**

**In the presence of;**

1. Mr. Rotich for the Plaintiff.

