



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**CIVIL SUIT NO. 111 OF 2005 (O.S)**

**MATHEW KIPROP TONU.....APPLICANT**

**VERSUS**

**KIMUTAI ARAP TOO.....1ST RESPONDENT**

**ALICE CHERONO TOO.....2ND RESPONDENT**

**PETER KIBET TOO.....3RD RESPONDENT**

**JULIUS CHERUIYOT TOO.....4TH RESPONDENT**

**WILLIAM KIPKEMOI TOO.....5TH RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Plaintiff herein moved the Court by way of Originating Summons (O.S) dated 25th October 2005 seeking the following orders :-

*(a) THAT the Applicant has acquired title to land parcel number Kericho/Kipchimchim/1333 by adverse possession.*

*(b) THAT the Respondents be ordered to sign the necessary documents to effect a valid transfer in favour of the Applicant and in default the Deputy Registrar of this Honourable Court to do so.*

2. The said O.S was supported by the affidavit of Mathew Kiproton Tonui sworn on 25th October 2005. In the said affidavit, the Applicant deposes that he has been in continuous, open exclusive and uninterrupted adverse possession of the parcel of land known as Kericho/Kipchimchim/1333 for over 31 years.

3. He avers that he has developed the suit parcel of land and has fenced the same with eucalyptus trees and has also been grazing his cattle thereon. It was his further contention that on 18th January 2005 that the Respondents secretly and fraudulently obtained title to the suit land by failing to follow the right procedures and failing to inform him of the same.

4. Johana Kimutai Arap Too, the 1st defendant filed his Replying Affidavit sworn on 23rd November 2005 on his behalf and on behalf of the other defendants. In the said affidavit he avers that he sold the property title No. Kericho/Kipchimchim/1333 which belonged to his late father to the Applicant at an agreed price of Kshs. 1350 and when the Applicant refused to pay the balance of the purchase price, he rescinded the agreement.

5. He avers that the said agreement between himself and the Applicant was void as he did not have title to pass to the Applicant and secondly because the said transaction was not referred to the Land Control Board for their consent. He avers that the only remedy available for the purchaser in the circumstances is a refund of the purchase price.

6. He also denies the allegation that the Applicant planted any eucalyptus trees and instead avers that it was his late father who planted the same. He asserts that it is their cows that used to graze on the suit land and not those of the Applicant. He further avers that the boundaries demarcating their land from that of the Applicant are intact and for those reasons denies that the applicant has been in continuous, open and exclusive possession of the suit land as alleged.

7. The court directed that the suit would proceed by way of viva voce evidence. The O.S would be considered as the Plaintiff and the Replying affidavit as the Defence.

8. The suit was set down for hearing on the 19th March 2018 and despite being served with a hearing notice the defendant did not attend court. The suit therefore proceeded ex-parte.

9. PW1, Mathew Kiprop Tonui in his testimony stated that he bought the suit property from the 1st defendant in 1974 at Kshs 1350. He produced a Sale Agreement in support of this assertion. He further stated that PW2 signed the said agreement. It was his further testimony that he has been in occupation of the suit land since 1974. PW1 also claimed that he bought a grinding machine which was on the suit land from the defendants at Kshs 5,200.

10. PW1 stated that he referred the dispute for resolution by the Ainamoi Land Disputes Tribunal but the Defendants still refused to give him the land despite the Tribunal's findings that the land belonged to him.

PW2 ; Julius Kipkemoi Tonui corroborated the evidence of PW1. He stated that on 5th February 1974, he witnessed the sale of land parcel no Kericho/Kipchimchim/133 in the company of witnesses who are now deceased. PW2 further stated that the Plaintiff has enjoyed uninterrupted possession of the suit land since 1974.

11. Mr Siele-Sigira learned counsel for the plaintiff filed his submissions dated 30th April 2018. In the said submissions, counsel argues that the Plaintiff has been in quiet, uninterrupted, peaceful and continuous possession of the land parcel number KERICHO/KIPCHIMCHIM/1333 since the year 1974.

12. Counsel relies on Section 7 of the Limitation of Actions Act, section 28(h) & (j) of the Registration of Titles Act, 2012, sections 3,13,17, 18 and 19 of the Environment and Land Court Act, 2011 as well as sections 3 and 8 of the Judicature Act.

13. He relies on the evidence of PW2 Julius Tonui which he states was uncontroverted. He argues that the plaintiff indeed proved that he fenced the subject parcel wherein he grazed his cows and planted eucalyptus trees. He argues that the Plaintiff has been in quiet, continuous, open exclusive and uninterrupted adverse possession for over 44 years. It is his further contention that the Defendants failed to rebut his evidence on the same. He therefore argues that the Defendants failed to prove their case as required under sections 107, 109 and 112 of the Evidence Act. The Plaintiff relies on the case of **Kenya Power and Lighting Co. Ltd v Pamela Awino Ogunyo [2015] eKLR** wherein the court stated that the defendant had failed to file a defence and therefore the defence remains mere allegations.

14. He further argues that the Plaintiff has discharged the burden of proof to the required standard that he has been in adverse possession of the suit property for over 12 years and therefore the Defendant's title to the same has been extinguished. It is his further argument that the Defendants did nothing to assert their right to the suit land and did not attend court despite knowing of the hearing date.

#### **Issues for Determination**

15. Having considered the pleadings and the Plaintiff's submissions, I have distilled the following issues for determination:-

- (a) Whether the Plaintiff has been in adverse possession of the suit property for a period in excess of 12 years.
- (b) Whether the plaintiff is entitled to the reliefs sought.
- (c) Who should bear the costs of this suit?

#### **Analysis and Determination**

**Whether the Plaintiff has been in Adverse Possession of the Suit Property for a period in excess of 12 years.**

16. Section 7 of the Limitations of Actions Act provides as follows:-

***(a) " An action to recover land 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."***

17. After the expiration of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.

18. Section 38(1) of the Act states as follows;

***"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 a proprietor of the land."***

19. The Court of Appeal in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR** sought to define what constitutes adverse possession. The court stated as follows:-

*“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.*

*This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v Saikwa (2) (supra). In the first decision, the court was emphatic that 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 twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.*

*In the Wanje case, the Court went further and took the view that in order to acquire by Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.*

*Further, the court opined that a person who occupies another's person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.*

*What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession.*

*Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:*

*“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”*

20. The High Court in the case of Kahindi Ngala Mwangandi v Mtana Lewa [2014] eKLR considered the rationale of the doctrine and stated as follows:-

*The doctrine of adverse possession has been topical and controversial for a long period. The rationale for the law of limitation for and against the recovery of land has been varied. Neuberger J in the case of Pye(Oxford) Holdings Ltd vs Graham(2000) ch 676 stated as follows:*

*“A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely. However, if as in the present case the owner of land has no immediate use of it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing. I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.”*

*On the hand in Adnam Vs Earl of Sandwich(1877) 2 QBD 485, the court held as follows;*

*“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”*

*Closer home, the East Africa Court of Justice (E.A.C.J) in the case of Attorney General of Uganda vs Omar Awadh & 6 Others(2013) eKLR held as follows:-*

*“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of Article 30(2) of the EAC Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response.”*

21. The Court of Appeal in the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR stated as follows:-

**“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.”**

22. The Court of Appeal in the case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR** quoted with approval the dictum of the High court and stated as follows:-

*...The High Court in the case of Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B, where Kneller J. held that:*

**“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”**

23. The Court of Appeal in **Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR** was of the opinion that for a claim of adverse possession to succeed it was imperative for the Applicant to prove actual or constructive knowledge on the part of the registered proprietor. The court stated as follows:-

**Guided by the dicta as stated by Kneller J. herein above and as adopted by this Court in Francis Gicharu Kariri – v- Peter Njoroge Mairu, - Civil Appeal No. 293 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court.**

24. Where it is proved that the property was purchased then it is noted that the time starts to run and should be calculated from the date of payment of the purchase price. The Court in the Titus Kigoro case (supra) proceeded to state as follows:-

**“22. We observe and note that in the case of Public Trustee – v- Wanduru, (1984) KLR 314 at 319, Madan, J.A stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession.”**

25. Counsel for the Plaintiff submitted that the Plaintiff had been in quiet, uninterrupted, peaceful, continuous open and exclusive possession of the suit land for over 44 years since 1944. He argued that the evidence produced by himself and PW2 was uncontroverted.

26. The court was also of the opinion that adverse possession could also arise where the entry onto the suit property was consented to. The court stated as follows:-

**“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of Public Trustee – v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18<sup>th</sup> August, 1978 from Karuga Wandai & Co. Advocates. From 18<sup>th</sup> August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant’s title. Computing adversity from 18<sup>th</sup> August, 1978, we are satisfied that the plaintiff’s claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7<sup>th</sup> February,1991.”**

27. Counsel cited the cases of **Livingstone Kibii Soy V Alexander Tuei & Another Kericho HCCC No 420 of 1989** and **James Kibet Soi V Kipkurgat Mitey and Another Kericho HCCC No 27 of 2002** which also offer guidance on the doctrine of adverse possession.

#### **Whether the Plaintiff is entitled to the orders sought**

28. In the matter herein, the Plaintiff/Applicant argued that he has been on the suit land for over 44 years enjoying quiet, uninterrupted, peaceful, continuous, open and exclusive possession.

29. The Plaintiff’s evidence was uncontroverted and the statements in the Replying affidavit remain mere allegations.

30. The upshot is that the Plaintiff has proved his case on a balance of probabilities and is therefore entitled to the orders sought. I therefore enter judgment for the plaintiff and make the following final orders:

a) A declaration is hereby issued that the plaintiff herein, Mathew Kiprof Tonui has acquired title to land parcel number Kericho/Kipchimchim/1333 by adverse possession and shall be registered as the owner thereof in place of the persons currently registered.

b) The Respondents are hereby ordered to sign necessary documents to effect a valid transfer in favour of the Plaintiff within 30 days and in default the Deputy Registrar of this Honourable Court shall sign the said documents.

c) A copy of this judgment shall be served on the Land Registrar, Kericho in order for him/her to make the necessary changes to the title for land parcel no. Kericho/Kipchimchim/1333.

d) The costs of this suit shall be borne by the defendants.

**Dated, signed and delivered at Kericho this 30<sup>th</sup> day May 2018**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Miss Sitati for Mr. Siele for the Plaintiff
2. N/A for the Defendant
3. Court clerk - Rotich