



Chemenei & 4 others v Rono & another (Both sued as the administrators of the Estate of the Late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi) (Environment & Land Case 7 of 2023) [2023] KEELC 22155 (KLR) (7 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22155 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 7 OF 2023
A OMBWAYO, J
DECEMBER 7, 2023**

BETWEEN

**NANCY CHEMUTAI CHEMENEI 1ST APPLICANT
SOFIA CHERONO NGENO 2ND APPLICANT
BRIAN CHERUIYOT NGENO 3RD APPLICANT
KEVIN KIPKOECH 4TH APPLICANT
ALLAN KIPKORIR 5TH APPLICANT**

AND

**BENJAMIN KIPLANGAT RONO 1ST RESPONDENT
JUSTUS KIPKOECH RONO 2ND RESPONDENT
BOTH SUED AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE
ELIJAH KIPKEMEI MURBII AKA ELIJAH KIPKEMEI MURBI**

JUDGMENT

1. Nancy Chemutai Chemenei, Sofia Cheronon Ngeno, Brian Cheruiyot Ngeno, Kevin Kipkoech and Allan Kipkorir (hereafter referred to as the applicants) have come to this court against Benjamin Kiplagat Rono and Justus Kipkoech Rono (hereinafter referred to as respondents) with an application for adverse possession and precisely for orders that the applicants have become entitled by adverse possession to all that piece of land known as Shawa/Gicheha Block 2/28 measuring 3.054 hectares situated in Nakuru County.
2. The first applicants prays that she be registered as the proprietor and to hold in trust for her behalf and on behalf of the 2nd to 5th applicants of the said piece of land known as Shawa/Gicheha Block 2/28



measuring 3.054 hectares situated in Nakuru County. She further prays that the Deputy Registrar of the Honorable Court does execute all necessary documents to facilitate registration of the 1st applicant as the proprietor (in trust) of land parcel Shawa/Gicheha Block 2/28 measuring 3.054 hectares situated in Nakuru County. That costs of this application be provided for.

3. The facts of the case are that the 1st applicant is the widow of the late Samwel Kimutai Ngenoh (deceased), whereas the 2nd to 5th applicants are the children of the 1st applicant and the deceased. The brief history about the parcel of land known as Shawa/Gicheha Block 2/28 is that the late Moses Kiprotich Soi (deceased) was a member of Belbur Company Limited (a buying company) with shares equivalent to 12.8 acres of land.
4. When Moses Kiprotich Soi (deceased) passed on, on June 22, 1982, his name was deleted from the register of Belbur Company Limited and replaced with that of Leonard Kipkoech Rotich (now deceased), the son of the deceased person.
5. The 12.8 acres of the land allotted to the late Moses Kiprotich Soi (deceased) comprised of 2 parcels, each measuring 6.4 acres. The parcels are Shawa/Gicheha Block 2/27 and Shawa/Gicheha Block 2/28.
6. That unknown to the family of the late Moses Kiprotich Soi (deceased), the late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased) used his position as a Director and the then Chairperson of Board of Directors of Belbur Company Limited to be registered as the proprietor of the two parcels being Shawa/Gicheha Block 2/27 And Shawa/Gicheha Block 2/28.
7. The late Josiah Kipkirui Rono (deceased) purchased parcel no. Shawa/gicheha Block 2/27 from the son of the late Moses Kiprotich Soi (deceased) being Leonard Kipkoech Rotich. The widow of the late Josiah Kipkirui Rono (deceased) is in possession of this parcel of land to date.
8. That later, the late Josiah Kipkirui Rono (deceased) also acquired part of land parcel no. Shawa/Gicheha Block 2/28. Vide a sale agreement dated 28/7/1999, he purchased 3 acres of this parcel of land from Wesley Kipngeno Rotich, one of the sons of the late Moses Kiprotich Soi (deceased).
9. The late Josiah Kipkirui Rono (deceased) persuaded the late Samwel Kimutai Ngenoh (deceased) to apply for, and indeed facilitated, a transfer to Njoro Boys High School, in Nakuru County. He informed him of the parcel of land that he had acquired and that he could have him purchase it.
10. The late Samwel Kimutai Ngenoh (deceased) was persuaded by the idea of his maternal uncle. He transferred to Njoro Boys High School sometimes in the year 1999. He then purchased the 3 acres of land parcel no. Shawa/gicheha Block 2/28 from the late Josiah Kipkirui Rono (deceased). The sale was done immediately after the late Josiah Kipkirui Rono (deceased) had acquired it from Wesley Kipngeno Rotich. The late Samwel Kimutai Ngenoh (deceased) took possession of the 3 acres.
11. That in the month of November, 1999, the children of the late Moses Kiprotich Soi (deceased) being Leonard Kipkoech Rotich (now deceased) and Rose Cherono approached the late Josiah Kipkirui Rono (deceased) and informed him that they were disposing of the remaining portion of land parcel no. Shawa/Gicheha Block 2/28.
12. The late Josiah Kipkirui Rono (deceased) shared this with the late Samwel Kimutai Ngenoh (deceased). The late Samwel Kimutai Ngenoh (deceased) and the 1st applicant therein became interested and to raise the money to purchase the remaining portion, they disposed of their parcel of land at Kedowa Sub-Location to one Joel Sang on 21/11/1999 at a price of Kshs.162,000/=.
13. That part of the proceeds from the said sale was paid as purchase price for the remaining portion. The purchase price was Kshs.150,000/



14. The 1st applicant herein applied for a transfer from Kericho District then to Nakuru in the year 2000, which was approved. She then moved with her children to join her husband in Nakuru County and they settled on the suit property herein.
15. The late Samwel Kimutai Ngenoh (deceased), together with his family, the applicants herein, on the basis of the agreement between himself and the late Josiah Kipkirui Rono (deceased), stayed on the property, openly and peacefully, without any interruption by the respondents, until his demise on June 30, 2012. That upon the demise of Josiah Kipkirui Rono (deceased), the applicants continued to remain in possession and use of suit property.
16. That all along, Samwel Kimutai Ngenoh (deceased) and the applicants have been demanding for a title from the late Josiah Kipkirui Rono (deceased) and later from his family. The title was however, not forthcoming,
17. That sometimes in the year 2017, officials from Kenya Electricity Transmission Company (Ketraco) visited the suit property. The said officials informed the 1st applicant herein that that a power line shall pass through the suit land.
18. That this is when trouble began and aware of this, the 2nd respondent, who is in possession of one of his father's property being Shawa/Gicheha Block 2/13, and who in fact have custody of the title deed of the suit property, informed the 1st applicant herein that the suit property belonged to his late father and that she should vacate it.
19. That a meeting was held at the Assistant Chief's office at the beginning of 2020. Three meetings were held on 14/2/2020, 28/2/2020 and 12/5/2020. The issue of the suit property was discussed extensively. The respondents herein and their siblings were present in the said meetings. It was confirmed by the widows of the late Josiah Kipkirui Rono (deceased) that the suit land was sold to the 1st applicant's husband. The other family members of the late Murbi also confirmed that the land was sold to the late Josiah Kipkirui Rono (deceased),
20. That in the month of September, 2020, the 2nd respondent entered into the suit property, cultivated it and planted beans, which caused uproar from the neighbours. A meeting was convened on September 7, 2020 where the 2nd respondent was informed to desist from interfering with the property of the late Samwel Kimutai Ngenoh (deceased).
21. The respondents however, could hear none of it. In the year 2022, they lodged in court Nakuru Chief Magistrate's Succession Cause No. E210 of 2022. The grant was issued to the respondents herein and on June 22, 2023, the grant was confirmed.
22. In the confirmed grant, the suit property herein has been listed as one of the properties of the deceased and in fact distributed to 6 beneficiaries, including the respondents herein,
23. From the foregoing, the respondents, as the administrators of the estate of the Late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased), perceive and in fact believe that the suit property belongs to the late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased).
24. The suit property is registered in the name Kipkemei Murbii aka Elijah Kipkemeimurbi (deceased). The circumstances under which he was registered as the owner however, are unclear.
25. That whereas land parcel no. Shawa/Gicheha Block 2/27 was also registered in the name of Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased), the deceased however, acknowledged that the property was not his but belonged to the late Moses Kiprotich Soi (deceased). Because of this acknowledgement of the deceased, the 2nd respondent herein handed over the title of land parcel no.



- Shawa/Gicheha Block 2/27 to the widow of the late Josiah Kipkirui Rono (deceased) sometimes in the year 2020 but refused to hand over title of the suit property to the 1st applicant claiming that he could not hand it over by himself but in the presence of his siblings.
26. That despite several meetings over the issue, the respondents and/or their siblings have refused to have it resolved. They are adamant that the property belongs to their late father, and now should be transmitted to them as inheritance.
 27. That this is despite the fact that the applicants have always been in peaceful and open possession, occupation and use of the suit property to the exclusion of the respondents for a period of over 20 years.
 28. The respondents have never attempted to assert their rights over the suit property since the year 2000 when the applicants took possession. The only time the 2nd respondent attempted to assert his right was in the year 2020, but was repulsed by the 1st applicant. Even then, the applicants had been in possession for a period of 19 years.
 29. The applicants herein did not enter the suit property with the permission of the late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased) but on the basis of an agreement the late Samwel Kimutai Ngenoh (deceased) had with the late Josiah Kipkirui Rono (deceased).
 30. The applicants aver that they have a case for adverse possession for reasons that the suit property is registered in the name of Elijah Kipkemei Murbi aka Elijah Kipkemei Murbi (deceased). A title was issued in the name of the deceased person on October 6, 1993.
 31. The applicants' state that their mode of entry was as a result of a sale agreement between the late Josiah Kipkirui Rono (deceased) and Samwel Kimutai Ngenoh (deceased). It was certainly not with a permission of the late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased), the registered owner of the suit property. It is trite that a claim of adverse possession to suffice, the claimant must demonstrate that the same was nonpermissive and non-consensual and without license. The applicants herein first gained entry of the suit property in the year 2000. The applicants have been in possession, occupation and use of the suit property for a period of over 20 years now, which is in excess of 12 years as required in law.
 32. The applicants claim to have been in open, continuous and exclusive occupation of the suit property. They 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.
 33. That at the time the applicants entered the suit property, the late Elijah Kipkemei Murbii aka Elijah Kipkemei Murbi (deceased) had already been registered as the proprietor of the suit property in the year 1993. The time for purposes of adverse possession thus started running immediately the applicants gained entry in the year 2000. The applicants have structures on the suit property, planted trees, and have been farming on the land to the exclusion of the respondents. In that period of over 20 years, time has never stopped running. There has been no interruption by the respondents. The respondents have never attempted to evict the applicants from the suit property or even tried to assert proprietary rights over the suit property by bringing an action in court against the applicants.
 34. The land the applicants are laying a claim on is an identified land, surveyed and boundaries established. The land measures 3.054 hectares and the applicants are in occupation and use of the entire piece of land. For a claim of adverse possession to issue, it is important that the said land is clearly identified, and in this case, it has clearly been identified. There is an extract of the title deed which has been filed herein.



35. The respondents were served with the Originating Summons but did not respond. The matter came up for hearing on December 4, 2023. The defendant were served with a hearing notice but did not come to court.
36. The applicants come to court and Nancy Chemtai Chemenei testified that she is a teacher by profession. She relied on the supporting affidavit which was adopted as evidence in chief. The court gave directions that the applicant files submissions which she did on December 4, 2023. The respondent was served but failed file a response and to attend court.
37. I have considered the evidence on record and do find that the applicant have been in possession of the suit property for more than 12 years.
38. Section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that:-

7. Actions to recover land

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 provides that:-

13. Right of action not to accrue or continue unless adverse possession

- (1) A right of action to recover land does not accrue unless the land is in the 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 of this Act a right of action to recover land accrues on a 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 adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

39. Section 38 of the *Limitation of Actions Act* only specifies the High Court as the court before which a person who claims to have become entitled to land by adverse possession may seek an order that he be registered as the proprietor of the land. The section provides as follows:

38. Registration of title to land or easement acquired under Act.

- (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.
- (2) An order made under subsection (1) shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.



(3)

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section

40. The claim of adverse possession must satisfy the following conditions, namely: -

Open and notorious use of the property

41. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge this element is met. This condition is further met by fencing, opening or closing gates or any entry to the property, posted signs, crops buildings, or animal that a diligent owner could be expected to know about. The plaintiffs have demonstrated that they are in open and notorious use of the property.

Continuous use of the property

42. The adverse party must for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land now how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. The plaintiffs herein have never been dispossessed for more than 12 years they have been in possession.

Exclusive use of the property

43. The adverse party holds the land to the exclusion of the true owner, if for example, the adverse party builds a barn on the owner's property, and the owner then used the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as in common, so long as the other elements are met. The plaintiffs are not sharing the property with the respondents.

Actual possession of the property

44. The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The applicants are living on the land and therefore they are in actual possession.

Non permissive use of the property

45. The adverse party must demonstrate that the use of land is without the permission of the land owner. In this matter the applicants entered the land through a sale agreement and not the land owners permission.

46. I do find that the plaintiffs have satisfied the above said conditions. I do find that the land in question is clearly identified and that the extract of the title has been annexed on the supporting affidavit.



47. Ultimately, I do find that the plaintiffs proved their case on a balance of probabilities hence, I do grant judgment in the terms that the applicants have become entitled by adverse possession to all that piece of land known as Shawa/Gicheha Block 2/28 measuring 3.054 hectares situated in Nakuru County.
48. That the 1st applicant be registered as the proprietor and to hold in trust for her behalf and on behalf of the 2nd to 5th applicants of the said piece of land known as Shawa/Gicheha Block 2/28 measuring 3.054 hectares situated in Nakuru County.
49. That the Deputy Registrar of the Honorable Court does execute all necessary documents to facilitate registration of the 1st applicant as the proprietor (in trust) of land parcel Shawa/Gicheha Block 2/28 measuring 3.054 hectares situated in Nakuru County. That there be no order as to costs of this application.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF DECEMBER 2023.

A. O. OMBWAYO

JUDGE

