



**Kerario v Seria (Sued as the Representative of Seria Boroye Sinda
- Deceased) (Environmental and Land Originating Summons
E028 of 2021) [2025] KEELC 3570 (KLR) (28 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E028 OF 2021
FO NYAGAKA, J
APRIL 28, 2025
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF ACTIONS ACT**

BETWEEN

THOMAS KERARIO PLAINTIFF

AND

SAMWEL WILSON SERIA DEFENDANT

SUED AS THE REPRESENTATIVE OF SERIA BOROYE SINDA - DECEASED

JUDGMENT

1. By an Originating Summons dated 29th June 2021 the Plaintiff sued the Defendant over a claim for adverse possession. He brought the Summons under Order 37 Rule 7 of the Civil Procedure Rules, Section 38 of the *Limitation of Actions Act*, Section 28 of the *Land Registration Act* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. He prayed for this Court to determine whether he had acquired a portion measuring 7 1/2 acres being part of land parcel No. Bukira/ Buisaboka/77 by way of adverse possession and therefore wanted the court to determine the following issues:-

1. That the rights of the defendant to recover a portion of land being part of Bukira/ Buisaboka/77 measuring 7 1/2 acres is barred under the provisions of the *Limitation of Actions Act* and the Defendant's title thereto is extinguished on the grounds that the plaintiff had been an open, peaceful, quiet, uninterrupted and continuous possession and occupation thereof for a period of more than 21 years hence, this court ought to make a declaration accordingly.



2. That having been in such occupation and possession of the portion of the suit property in the manner aforesaid, the plaintiff's interest in the property amounts to an overriding interest as envisaged under the provisions of the *Land Registration Act*, merits registration and the court should make a declaration accordingly.
 3. That this court, upon finding that the title of the Defendant over the portion of the suit property measuring 7 1/2 acres had been extinguished by effluxion of time, does order for the subdivision and transfer of this portion to the plaintiff.
 4. An order be issued for a permanent injunction restraining the Plaintiff (sic) himself, his agents, servants, employees and family members, or any other person claiming under him or acting with his express and or implied authority from alienating, transferring, entering, reentering, trespassing, disposing of in any way, or interfering with the plaintiff's possession or occupation and quiet enjoyment of the portion of the suit property measuring 7 1/2 acres.
 5. That in furtherance of the issues herein and in default of the Defendant executing such requisite documents and instruments to the effect that the subdivision or transfer of the portion of land to the Plaintiff, the Executive Office of this Court directed to execute the said documents and instruments.
 6. That costs of these proceedings be borne by the defendant.
2. The Applicant brought the Summons on eleven (11) grounds which were that he acquired the portion of the suit property by way of purchase for value sometime on or about 10th September 2000. The acquisition of the parcel was from the Defendant's father who was, at the time of filing the claim, deceased. The Defendant's grandfather was the registered proprietor at the time of purchase. The Defendant had since taken out Letters of Administration of the Estate of the deceased grandfather. The Defendant's father died before the portion was subdivided and transferred to the plaintiff. However, the Plaintiff was in possession of the portion of land. It was clearly demarcated on the ground. He had maintained the possession and occupation to date. The transaction of the subject was subject to the provisions of the *Land Control Act* and the consent of the relevant Land Control Board for the subdivision of the transfer was mandatory. But the consent was neither applied for nor obtained by the parties prior to the death of the Defendant's father or thereafter.
 3. Pursuant to the purchase and occupation by the Plaintiff of the land his occupation, however, persisted and the defendants never took any steps to commence any proceedings to terminate the same. In the circumstances such position and occupation was adverse to the rights of the Defendants. The Plaintiff, having been in open, uninterrupted, quiet and continuous occupation of the sold property for a period of 21 years, had since acquired the title to the position by way of adverse possession and the same merited the instant application.
 4. The Plaintiff supported the Summons by his Affidavit which he swore on the same date. In addition to the contents of the grounds in support of the Summons he added that the land parcel No. Bukira/Buisaboka/77, measuring approximately 40 hectares was originally registered in the name of Sereria Boroye Sinda (deceased.) He annexed a copy of the green card and marked it TNK1. He added that the Defendant had become the Administrator of the Estate of Sereria Boroye. He annexed and marked TNK2 a copy of the Grant of Letters of Administration of the Estate. Further, he was aware the Certificate of Confirmation had been issued. He annexed as TNK 3 a copy of the Certificate of Confirmation. He entered into the agreement of sale on 10th September 2000 for the purchase of 7 1/2 acres. He annexed and marked TNK4 a copy of the sale agreement. He paid the sum of Kenya shillings 102,000 in installments of which he made the final one on 10th January 2001. He maintained



- that he took possession of the land and remained in occupation of the 7 1/2 acres from the date of purchase to the date of filing the Summons. He added that he had extensively developed the parcel of land by putting up structures and carrying on farming activities on it. He annexed and marked TNK5 a bundle of photographs evidencing such developments. He prayed for the Summons to be allowed.
5. The Defendant filed a response by way of Replying Affidavit which he swore on the 4th August 2021. He deposed that he was the Administrator of the Estate of Seria Boroye Sinda, the first deceased. He had a Certificate of Confirmed of Grant issued to him vide Succession Cause No. 721 of 2014. He annexed and marked SWS 1 a copy of the Certificate of Confirmation of Grant dated, 3rd March 2021. He added that Wilson Seria Boroye, the 2nd deceased, was not an Administrator of the Estate of Seria Boroye. As such he had no capacity to deal with or sell any portion of the suit land comprised in the property of the deceased. Further, any such dealings amounted to intermeddling of the Estate of a deceased person contrary to Section 45 of the Law Succession Act. Again, the Plaintiff's occupation on the land had been met with hostility, as evidenced in Migori High Court ELC No. 3 of 2017, Kehancha PM Crim. Case No. 676 of 2015, Criminal Case No. 795 of 2014, Criminal Case No. 77 of 2014 and Criminal Case No. 475 of 2014 and the Applicant was not entitled to adverse possession. He filed a List of Documents dated 4th August 2021 to which he annexed copies of documents referring to the five cases and a letter dated 7th September 2015, issued by the Area Chief.
 6. The Plaintiff testified as PW 1 on 4th July 2023. He adopted his Supporting Affidavit and the contents of the Originating Summons. He relied on the documents he had given in support of Summons. He closed his case. The Defendant did not testify. His case was closed.
 7. The Plaintiff filed his written submissions dated 12th November 2024. The Court has carefully considered the submissions, the parties' pleadings, the law and the evidence. It is of the view that only two issues commended themselves for consideration. The first one was whether the originating summons is merited. The second one is who to bear the costs of the originating summons.
 8. The starting point of the determination herein is to restate two points of law, being that Section 107 of the *Evidence Act* provides that whoever desires to prove that a fact exists or does not, the burden lies on him to do so, unless the law specifically places it on another person. The second one is that where a party files pleadings but does not testify or adduce evidence in support of them they remain mere allegations which the Court cannot rely on to determine the matter in favour of the party along the facts alleged. This is still closely related to the import of Section 107 of the *Evidence Act*. Thus, the Defendant/ Respondent having not adduced evidence herein failed to prove the allegations in the response to the Originating Summons. It therefore goes without saying that the suit proceeded as though it was formal proof. That notwithstanding the Plaintiff was required to prove his case to the required standard – a balance of probabilities.
 9. In *Netah Njoki Kamau & another v Eliud Mburu Mwaniki* [2021] eKLR, it was held,

“Pleadings are mere allegations. Pleading do not prove an allegation which can lead to the entry of judgment unless the allegation/the claim is undefended and is a claim for liquidated demand. In the case before the trial court, the claim was for damages due to alleged negligence of the respondent.”
 10. The Response, even if it was by way of an affidavit, remains a mere allegation in so far as the matter was supposed to be heard. It ought to be adopted as evidence and be tested by way of cross-examination, if at all the adverse party wishes to do so. Regarding the first issue, the plaintiff filed the Originating Summons in which he pleaded that he bought the suit parcel of land from the defendant's father on 10/09/2000 and he paid the last installment of the purchase price of KShs 102,000/= on 10/01/2000.



It is evidenced by the sale agreement which he annexed. This turns me to referring to one or two authorities on the issue.

11. In *Kamataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 the Court stated as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is averse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

12. In *Mbira –v- Gachuhi* (2002) IEALR 137 it was that:

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

13. Regarding adverse possession, the Court of Appeal in *Kweyu Versus Omutut* (1990) eKLR observed as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

14. Guided by the decision of the Court of Appeal, by which I am bound, and persuaded by the others, I am of the following view. The evidence of the Plaintiff shows that he got into the suit land in an open manner, at first through the purchase transaction, and upon completion of the agreed price remained on it adversely without any permission from the owner(s). He has been in quiet possession since the year 2000. The period is over 12 years. There is no evidence that he faced hostility or even any court



process aimed at removing him during that time. Therefore, I find that he has proved his case on a balance of probabilities.

15. The upshot is that the Plaintiff is entitled to judgment in his favour. I now enter judgment for the Plaintiff against the Defendant as follows:
1. A declaration is hereby issued that the rights of the defendant to recover the portion of land being part of Bukira/ Buisaboka/77 measuring 7 1/2 acres occupied by the Plaintiff and his title thereto are extinguished, and the Plaintiff has acquired the portion by adverse possession.
 2. The suit land is to be surveyed, at the cost of the Plaintiff, and subdivided forthwith to excise the portion measuring approximately 7 1/2 acres and the said portion be transferred in the name of the plaintiff.
 3. An order is hereby issued for a permanent injunction restraining the Defendant, his agents, servants, employees and family members, or any other person claiming under him or acting with his express and/ or implied authority from alienating, transferring, entering, re-entering, trespassing, disposing of in any way, or interfering with the plaintiff's possession or occupation and quiet enjoyment of the portion of the suit property measuring 7 1/2 acres occupied by the Plaintiff.
 4. The Defendant is hereby directed to execute the relevant instruments to the effect the transfer of the subdivision in favour of the Plaintiff within thirty days from the date of survey of the portion, in default the Deputy Registrar of this Court to execute the said documents and instruments.
 5. The cost of this Originating Summons or suit are to be borne by the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THE 28TH APRIL 2025.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

S. M. Onyango for the Plaintiff.

No appearance for the Defendant

