



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELC CASE NO. 36 OF 2021 (O.S)

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT

(CAP 22) LAWS OF KENYA

AND

IN THE MATTER OF ORDER 37, RULE 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ADVERSE POSSESSION OF PARCEL NANDI/KILIBWONI/370

AND

IN THE MATTER OF THE APPLICANTS HAVING ACQUIRED PRESCRIPTIVE

RIGHTS BY WAY OF ADVERSE POSSESSION ON A PORTION OF LAND

COMPRISING 8.5 ACRES I PARCEL NUMBER NANDI/ KILIBWONI/ 370

BETWEEN

PAULINA JEPNGETICH KEINO.....1ST APPLICANT

DANIEL ROTICH.....2ND APPLICANT

VERSUS

STEPHEN CHERUIYOT KOROS.....RESPONDENT

(SUED AS THE ADMINISTRATOR OF THE ESTATE OF JEROP KOBOT CHUMO)

JUDGMENT

1. In this Judgment the Applicant referred to the Plaintiffs and vice versa and the Respondent referred to the Defendant, the suit having commenced by way of an originating summons.

2. The Applicants in the Originating Summons have taken out the said summons seeking orders that:

a. That the 1st Applicant be declared to have acquired ownership of a portion measuring 8.5 acres comprised in Land Parcel Number Nandi/ Kilibwoni/370 having acquired ownership and/or title through adverse possession having been in continuous, uninterrupted occupation for a period exceeding 40 years.

b. that the 2nd Applicant be declared to have acquired ownership of portion measuring 8.5 acres comprised in Land Parcel Nandi/ Kilibwoni 370 having acquired ownership and/or title through adverse possession having been in continuous, uninterrupted

occupation for 29 years as a beneficiary thereof.

c. That the said land parcel be registered in the names of the Applicants

d. Costs of this Originating Summons

APPLICANT'S CASE:

3. It is the Applicant's case that the Respondent is the beneficial owner of Land Parcel Number Nandi/ Kilibwoni/ 370 and the executor of the Estate of the Late Jerop Kobot Chumo alias Jerop Tambei.

4. It is the Applicants case that the Late Jerop Kobot Chumo alias Jerop Tambei divided the land parcel number Nandi/ Kilibwoni/ 370 measuring 17 acres in to two equal portions and gave 8.5 acres to her step daughter Anne Machii Tabarbuch Koiya, also known as Bot Sawe who is the only child of her deceased husband and co-wife in accordance with Nandi Customary Law.

5. It is the Applicant further case that the 1st Applicants husband the Late Lawrence Keino bought 8.5 Acres compromised in Land Parcel Number Nandi/ Kilibwoni/370from the beneficiary thereof Anne Machii Tabarbuch Koiya alias Bot Sawe.

6. That the 1st Applicant pursuant to that purchase has continuously uninterrupted occupied the said 8.5 acres comprised in Nandi/ Kilibwoni/ 370 for over 40 years.

7. The 2nd Applicant has had continuous uninterrupted occupation of the said 8.5 acres compromised in Nandi/ Kilibwoni/ 370as a beneficiary of the land parcel, for 29 years.

8. The Applicant thus plead that they have acquired possession of the 8.5 acres by way of adverse possession where of the Respondent's title has been extinguished by operation of the provision of the Limitations of Actions Act (Cap 22).

RESPONDENT'S CASE:

9. The Respondents case is that he is the registered owner of Nandi/ Kilibwoni/ 370. The Respondent denies that the Applicants have been in occupation of Nandi/ Kilibwoni/ 370.

10. The Respondent states that he inherited Nandi/ Kilibwoni/ 370from his grandmother Jerop Kopot Chumo and that he is not aware of any Ann Machi Tabarbuch Koiya also called Bot Sawe.

11. That if the Applicant had bought land the said Bot Sawe and are in occupation of it, they should pursue the same from Bot Sawe and not him.

PLAINTIFFS EVIDENCE:

12. The Plaintiff called a total of 4 witnesses.

PW1, the 1st Applicant testified. It was her evidence that her late husband had bought 8.5 acres from the family of the defendant and they had settled thereon since 1972. That her late husband had initially bought Nandi/ Kilibwoni/ 377 in 1970 and purchased another 8.5 acres in Nandi/ Kilibwoni/ 370, the same was bought from the share of Bot Machii who was a co-wife of Bot Chumo, the grandmother of the Defendant.

13. It was the witnesses evidence that the suit property to wit Nandi/ Kilibwoni/ 370 originally belonged to the late Arap Tongoi, and after his demise the then unsurveyed and unregistered property was bequeathed to his two widows each getting a share of 8.5 acres.

14. The two widows were Bot Machii and Bot Chumo. Bot Machii thereafter died and her daughter Bot Sawe inherited her portion according to Nandi Customarily Law and the 1st Applicant's husband bought this share.

15. It was the PW1 further testimony that at the time of first registration the whole 17 acres now known as Nandi/ Kilibwoni/ 370 was registered to the surviving widow Bot Chumo, and their purchases interests in the 8.5 acres that they had purchased from the other widow who was deceased through her daughter was not noted.

16. In Cross-examination the Defendant confirmed that the property was not registered in the name of Bot Sawe, that at the time of purchase, she was not married but in 1975 when she was married she settled thereon.

17. She further stated that both title numbers Nandi/ Kilibwoni/ 370 and 377 were registered in 1977, and at the time of Registration, she and her late husband did not object. When she sued in 2015, the Late Jerop Chumo was still alive, and after demise the defendant Stephen Cheruiyot undertook succession alone and registered himself as the proprietor. When shown P. Exhibit 4 she stated that the same was a chief letter which indicated that she was a beneficiary of the Estate of Kobot Chumo but the nature of interests was not shown.

18. In Re-examination she indicated that the search certificate P Exhibit 3 shows that the suit property belonged to the late Jerop Chumo

from 26th April 1977 to 30th September 2015 when it was transferred to Stephen Cheruiyot the Defendant.

19. PW2, Daniel Rotich; the son of the 1st Applicant testified. His testimony is that he has sued jointly with the 1st Applicant seeking 8.5 acres in which he is in occupation.

20. In cross-examination, he stated that he was born in 1986 and at the time of purchase in 1972, he had not been born. He had not seen the Agreement for sale either. He had lived on suit property since birth. In Re-examination he stated that he had lived on the suit property.

21. PW3, Elizabeth Lagat; a farmer in Tuloi Kapchumba testified before Court. It was her testimony that she has known the first Applicant from 1975 when she got married to her brother the Late Lawrence Keino; and that after her marriage she has lived on the suit property and they built a house and settled from 1975 to date and that the late Lawrence Keino was buried on the suit property. That the occupation by the Applicant's have been undisturbed.

22. In Cross-Examination, she stated that she did not know number of the suit property, but it was bought in 1972, although no agreement was prepared.

23. She stated that her late brother had two properties, one had been brought from Arap Kogo and he had built a house thereon. That there is boundary between the properties initially bought from Arap Kogo and the one bought from Bot Sawe.

24. She further stated in cross-examination that Bot Sawe was the daughter of the co-wife to the Defendant's grandmother.

25. In Re-examination, she clarified that the property where her late brother was buried has a house a tea estate and livestock, and that it was bought from Bot Sawe the daughter of Bot Machii a co-wife to the Defendant's grandmother.

26. PW4, Simion Kipsang Lelei; also testified. It was his testimony that his mother, the late Anna Machii Koiya also known as Bot Sawe was the owner of the 8.5 Acres as the only child of her mother Bot Machii who was the co-wife of Bot Chumo the grandmother of the Defendant.

27. Her mother sold the property to the Late Lawrence Keino in 1972 and bought property in Uasin Gishu. It was his testimony that the property i.e. Nandi/ Kilibwoni/ 370, had been divided into two portions for each of the wife i.e. Bot Chumo and Bot Machii.

28. He further stated that Bot Chumo contracted a woman to woman marriage under the Nandi customary law and married the mother of Defendant. That the mother of the Defendant found the 1st Applicant and her family had already settled thereon.

29. In cross examination, the witness stated that he did not know the property number and that he was 10 years when the property was sold but he was not a witness. He further confirmed that his grandmother Bot Machii died first and that the defendants grandmother Bot Chumo died after the issuance of the titles.

30. After the testimony of the four plaintiff's witnesses, the Plaintiffs closed their case.

DEFENCE EVIDENCE

31. The defence only called the Defendant as its witness. It was the Defendant's statement that he knew the Plaintiffs as his neighbours who lived in the adjacent parcel number Nandi/ Kilibwoni/ 377. That his property was the adjacent property number 370 which he possessed through transmission after succession in relation to the Estate of his late grandmother who was the first registered owner.

32. It was his testimony that according to the green card, his late grandmother was the first registered owner and not the late Lawrence Keino nor the late Bot Sawe. During the process of succession the two Applicants filed objections which objection proceedings were dismissed.

33. It was his further testimony that his late grandmother had not sold the property and that the Applicants had only moved their boundaries into his property. He prayed that the Applicants move to their property and the suit be dismissed.

34. In cross-examination, he confirmed that his late grandfather was Chekurui Arap Tongoi. He was not aware that his late grandfather had two wives, Bot Machii and Bot Chumo. He only met Bot Chumo.

35. He stated that between Bot Chumo and Bot Machii, Bot Machii died earlier. The title to the property was issued in 1977 to Bot Chumo, the property measures 17.0 acres but his family live on 6.5 acres the rest being occupied by the Applicant and his family.

36. In further cross-examination, he confirmed that the Applicants have been living on the suit property since he was born. That he and his siblings live in the same property but they had not subdivided the same.

37. The witness insisted that it is the Applicant's who had moved their boundary but he had not filed a boundary dispute. He confirmed that his older siblings did not object to the Applicants being part of the succession cause, but he was the only one who objected as he was not aware of Bot Machii and Bot Sawe, during the proceedings at the chief.

38. In Re-examination, he stated that he did not know about the sale between Bot Sawe and Lawrence Keino. He did not have consent of his family members to participate in the proceedings.

39. After the testimony of the Defence witness. The Defence case was filed. Parties then filed their written submissions.

ISSUES FOR DETERMINATION:

40. No list of agreed issues was filed by the Parties. The Applicant in their submissions identified the following as the issues for determination.

- i. Whether the plaintiffs have in peaceful, open continuous, and uninterrupted possessions of Land Parcel Number Nandi/Kilibwoni/ 370 and whether they have acquired title to the said land by adverse possession.
- ii. Who is the lawful proprietor of the suit land and
- iii. Who bears the costs of the suit?

41. The Defendant; equally filed its submissions and identified the following as its issues

- i. Whether a party can claim adverse possession on the property purchased.
- ii. Whether possession is exclusive, notorious and with the knowledge of the owner.
- iii. Whether adverse possession can be against a Defendant who only became registered in the year 2016

42. There being no agreed issues for determination, the Court has framed the following as issues for determination:

- i. Whether a party can claim adverse possession on the property they purchased.
- ii. Whether the Applicant have been in open continuous occupation of the suit property.
- iii. Whether there is a boundary dispute between the Applicant and the Respondent
- iv. Whether adverse possession can be claimed against the Defendant who only became registered owner in the year 2016
- v. Who bears the costs of the suit?

PLAINTIFFS SUBMISSION:

43. It was the Plaintiffs submission that the Principles in relation to adverse possession are well settled. In this regard the Plaintiff has placed reliance on the decision of the Appellate court in Wambugu Vs. Njuguna (1983) eKLR. Where the court observed as follows:

“Adverse possession contemplates two concepts possession and discontinuance of possession.....”

The proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.....”

44. The Applicant further placed reliance on the decision in Maweu Vs. Liu Ranching & Farming Co-operative Society 1989 KLR 430 where the court observed :

“.....thus to prove title by adverse possession, it was not sufficient to show that some acts of possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law possession is a matter of fact depending on all circumstances.....”

45. The Plaintiff thus submits that they have been in possession of 8.5 acres purchased from Bot Sawe, who was the daughter of Bot Machii – a co wife to Jerop Kobot Chumo and both were the wives of the late Chepkoi Arap Tongoi.

46. The Plaintiff further submits that they have settled on the said portion of 8.5 acres from the time his late husband bought the same in 1972 or thereabouts. It is the Plaintiff further submissions that their occupation of the suit property was a matter of notoriety which was corroborated by PW3 and PW4 as well as DW1 in Cross-examination when he stated that the Plaintiffs had been in occupation since the time he was born, he found the Plaintiffs in possession of the suit property.

47. The Plaintiff pleads that by virtue of their uninterrupted occupation of the suit property, they have then acquired ownership by way of adverse possession; and for the above reasons, the Plaintiffs pray for the orders sought in their Originating Summons as well as costs of the suit.

DEFENDANTS SUBMISSION:

48. The Defendant submits that the Plaintiff case be dismissed. It is his submission that the property was never registered in the name of the Late Ann Machii Tabarbuch alias Bot Sawe; but it was registered in the name of the late Jerop Kobot Chumo in the year 1977 and registered in his name in 2016.

49. That Plaintiff have their own property to wit Nandi/ Kilibwoni/ 377 registered in the name of the late Lawrence Keino husband to the 1st Plaintiff. The Defendant submits that the Plaintiff moved the boundaries so as to appear as if they are in occupation of the defendant's land.

50. With regard to the issue whether a purchaser can claim adverse possession, the Defendant submits citing the decision in Sisto Wambugu Vs. Kamau Njuguna 1982 – 1988/ eKLR - where the court observed that :

“.....seems to be that a purchaser of land (Under a contract of sale in possession of the land with the permission of the vendor (can lay claim for possession of such land) only after the period of validity of the contract unless and until the contract has been repudiated Adverse possession starts from the date of termination of the contract.....”

51. The Defendant in further support for the proposition that purchaser cannot claim adverse possess, has also tied the case of Samuel Miki Waweru Vs. Jane Njeri Richu where the Court of Appeal held that

“it is trite law a claim of adverse possession cannot succeeds 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.....”

52. On the strength of the above decisions the Defendant submits that as a purchaser the Plaintiff's are not entitled to claim the adverse possession.

53. On whether the Plaintiff possession has been exclusive, notorious and with the knowledge of the owner, it is the Defendant's submission relying on the decision in Ernest Wesonga Kweyou Vs. Kweyu Omuto Court of Appeal Civil Appeal No. 8 of 1990 that the same has not. The Defendant further places reliance in the case of Gabriel Mbui Vs Mukindia Muranya, to buttress the submission above.

54. The Defendant equally places reliance in the decision in Wilson Kazungu Katana and 101 Others Vs. Salim Abdalla Bakshwein & Another. Where the Court of Appeal established the Principle to successful plead adverse possession. The court held that:

“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 in an open manner adverse to the title of the owner....”

55. The Defendant submit that since he lives on the suit property, the Plaintiff thus has no exclusive possession of the suit property.

56. Lastly the Defendant submit that he was registered as the owner of the suit property in 2016 and that a claim of adverse possession can only materialize after 12 years upon such registration.

ANALYSIS AND DETERMINATION:

57. Having gone through the rival submissions, pleadings and the evidence on record, the court now analyses the same based on the issues earlier framed by the court.

a. WHETHER A PARTY CLAIMING ADVERSE POSSESSION ON A PROPERTY THE PURCHASED:

58. It is the Plaintiffs claim that the 8.5 acres the occupy within Nandi/ Kilibwoni/ 370 was purchased by one Lawrence Keino from Bot Sawe, as the daughter of Bot Machii the Co-Wife of Bot Chumo, both of whom were wives of the Late Arap Tungoi. The original owner.

59. The said purchase was made in 1972 or thereabouts. The property was then registered wholly to Bot Chumo in 1977, after the demise of her husband and her co-wife.

60. The Defendant submits that a purchaser cannot claim adverse possession and has relied on the decision in Sisto Wambugu Vs. Kamu Njuguna cited above.

The Plaintiff did not make any submissions on this point. The decision in Sisto Wambugu above, suggests that a person can claim adverse possession, only after the validity of the contract adverse possession starts from the date of termination of the contract.

61. In the instance case, if the purchase was in 1972, as has been the testimony of the PW1, PW3 and PW4 under the limitation of Actions Act, the contract was unenforceable after expiry of 6 years, to wit 1978. The title in respect of the property was issued in 1977, hence the Land Control Board consents ought equally to have been obtained within 6 months as required under Section 6(1) of the Land Control Act. Failure to which under both Section 6(1) of the land control and Limitations of Actions Act. The contract for sale and purchase was thus unenforceable and void from 1978.

62. It follows that adverse possession in respect of the 8.5 acres claimed by the Plaintiff commenced in 1978. In reaching this conclusion, the court is guided by the Court of Appeal decision in Peter Mbiri Michuki Vs Samuel Mugo Michuki where the court observed that interalia

“.....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.....”

63. This position seems to have support. In the decision in Samuel Miki Waweru Vs. Jane Njeri Richu 2007 eKLR where the court 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 lesser pending completion and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent for the Land Control Board such permission is terminated by operation of law and the continued possession if not illegal becomes adverse from the transaction become void.”

64. Consequently, the court answers the issue Number 1, in the affirmative, that a purchaser who takes possession of land can claim adverse possession once the contract has become void by virtue of lack of Land Control Board consent and or unenforceable due to lapse of time under the Limitation of Actions Act. And time starts running from the time the contract was word in this case time started running in or about 1978.

b. WHETHER THE PLAINTIFFS HAVE BEEN IN OPEN CONTINUOUS OCCUPATION OF THE SUIT PROPERTY.

65. To answer this issue, as it is an issue of fact, the court has examined the evidence of the witnesses. The testimony of both PW1 and PW2 was corroborated b PW3 and PW4 who all confirmed that the Plaintiff have in open continuous occupation of the suit property.

66. It is to be noted that the Plaintiffs are not claiming the entire 17 acres but 8.5 acres, and the Defendant are also in occupation of the same suit property with regard to the 8.5 acres. The plaintiffs are in exclusive possession as confirmed by the Defendant who stated in Cross-examination that he and his siblings are in occupation of only 6.5 acres thereabouts and the rest have been occupied by the Plaintiff, and they been in occupation since the time he was born in 1986, he found them in occupation.

67. It follows there from that the plaintiffs have been in open continuous and exclusive possession of 8.5 acres in Nandi/ Kilibwoni/ 370, in addition to being the proprietors in of Nandi/ Kilibwoni/ 377, by virtue of being members of the family of the late Lawrence Keino.

c. WHETHER THERE IS A BOUNDARY DISPUTE BETWEEN THE PLAINTIFF AND THE DEFENDANT:

68. In answer to this issue, the Defendant submits that Plaintiff moved boundaries into their property. The evidence on record, from the plaintiffs and their witnesses is that the Late Lawrence Keino, had purchased two properties, the 8.5 acres in Nandi/ Kilibwoni/ 370 and another adjacent property Nandi/ Kilibwoni/ 377. PW3 the Late Lawrence Keinos sister confirmed that the Plaintiffs had been in occupation of both parcels.

69. It was the Defendant evidence in cross examination, that no boundary dispute had been registered by himself and his late grandmother, as the first registered owner.

70. There been no registered boundary dispute and there having been no protest on the occupation of the Plaintiff of the 8.5acres a fact confirmed by the Defendant; the issue of a boundary dispute is an afterthought and is not supported b evidence. The issue of boundary dispute was not pleaded either.

71. I do not find that there is any boundary dispute, as the same was only introduced in evidence and submissions and not in the initial pleadings by the Defendant.

D. WHETHER ADVERSE POSSESSION CAN BE CLAIMED AGAINST THE DEFENDANT WHO ONLY BECAME REGISTERED IN 2016.

72. It is the Defendants submission that he was only registered in 2016 and the 12 years against his title have not lapsed. The Plaintiff did not submit on this issue. THE Defendant did not cite any legal authority to back the submissions.

73. The Court has looked into the legal position and the legal position is as stated by the Court of Appeal in the case of Peter Gichuki Wanjohi Vs. Juliah Mumbi Muturi (2021) eKLR. The stated

“.....that under the doctrine of adverse possession a claimants claim to the land runs against the title ad not necessarily the current holder of the title.....”

74. Similarly in Kairu Vs. Gacheru (1988) eKLR the court held that a claim for adverse possession subsists not only against the present holders but also the predecessors in title.

75. This position was also echoed in the case of Mwangi Githu Vs. Livingstone Ndete 1980 eKLR, where the court held that:

“..... the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.....”

76. From the above decision, the submission by the Defendant that having been registered in 2016, adverse possession cannot run against

him, is thus not founded I any legal principle and must fail.

DISPOSITION:

77. Having thus answered all the issues and having examined the law, the pleadings and submissions of the learned counsel, the court finds that on a balance of probability that the Applicants/ Plaintiffs have proved their case and merit the orders sought in the plaint, in the following terms.

i. Judgment is entered for the Applicants in the originating summons in terms that: -

a) The 1st and 2nd Applicant have acquired ownership of 8.5 acres in Nandi/Kilibwoni 370 by the operation of the doctrine of adverse possession.

b) The Land Registrar Nandi County to rectify the Register, by subdividing Nandi/Kilibwoni 370 into two portions measuring 8.5 acres each and registering the Plaintiff jointly in one portion measuring 8.5 acres, where they are currently occupying, and the other 8.5 acres to be registered to the Defendant and his siblings as they may agree on acreage, within 30 days of this Judgment.

c) Costs of the suit are awarded to the Plaintiffs in any event.

Judgment accordingly.

DATED AT KAPSABET THIS 17TH DAY OF MARCH 2022

M. N. MWANYALE

JUDGE

DELIVERED IN THE PRESENCE OF:

MR. YEGO FOR THE PLAINTIFF

MR. LAGAT FOR THE DEFENDANT