



REPUBLIC OF KENYA



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**Kibarno v Kirwa & another (Environment and Land Case Civil Suit
113 of 2021) [2022] KEELC 3302 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND CASE CIVIL SUIT 113 OF 2021**

MN MWANYALE, J

MAY 31, 2022

BETWEEN

**NOAH KIPKOSGEY BARNGETUNY (SUING THE ADMINISTRATOR OF
ESTATE OF THE LATE GIDEON GARI KIBARONO ALIAS GARI
KIBARNO PLAINTIFF**

AND

STEPHEN KIPSS KIRWA 1ST DEFENDANT

THOMAS KIMARU SAWE 2ND DEFENDANT

JUDGMENT

1. *Vide* an Amended Originating Summons dated 1st December 2020, Noah Kipkosgei Barnge'tuny, the Administrator of the Estate of Gideon Gari Kabarno, sought relief against the Respondents Stephen Kipps Kirwa and Thomas Kimaru Sawe for declaratory orders for adverse possession in relation to 5.5 acres in the parcel of land known as Nandi/Ndalat/397.
2. A Reply through "a further Reply to amended affidavit in support of the Originating Summons" was filed having been deponed on 3rd March 2021 by Thomas Kimaru Sawe.
3. Direction in respect of the amended Originating Summons were taken and issued on 3/3/2021 where the Court directed that
 - a) the Amended Originating Summons together with the supporting affidavit were taken as the plaint, while the Replying Affidavit and the further Replying affidavit were converted to be defences.
 - b) The Applicant in the Originating Summons to be the Plaintiff and the Respondent to be the Defendant; and the suit was to proceed by way of viva voce evidence.



Plaintiff's Case: -

4. The Plaintiff's case as stated in the Supporting Affidavit to the Originating Summons taken out. Plaintiff Gedion Gari Kibarno before his demise is that;
- a) He had purchased Nandi/Ndalat/397 measuring 5.5 acres for valuable consideration of kshs 660/= from one Kimurgong Choge who in turn had purchased the same from the late Sawe Arap Cheruiyot Alias Sawe Kipchomber (now deceased) in 1960.
 - b) The suit property then had been registered in the name of the said Sawe arap Cheruiyot as he was yet to transfer to Kimurgong Choge (deceased).
 - c) After said purchase, the late Kimurgong Choge took the Plaintiff to be registered owner Sawe arap Cheruiyot (Sawe Kipchomber, who be informed of the purchase to effect transfer of the property, to the Plaintiff as opposed to Kimurgong Choge.
 - d) That the late Kimurgong Choge did not in his lifetime execute the transfer, but demanded for additional money before transfer could be made, but he in 1983 demanded to re sell afresh the suit parcel to the Plaintiff citing a appreciation of value.
 - e) That he had taken possession of the suit property in 1964 after purchase and has lived there on since that time.
 - f) That the Plaintiff on the advice of the District Officer Kabiyet, lodged a caution in 1991, after he was advised that he Sawe arap Cheruiyot intended to transfer the property to his daughter, one Prisca Jerono Cheruiyot.
 - g) That after the demise of Sawe arap Cheruiyot, his sons the Defendant became the Administrators herein and sought through their Advocates to evict the Plaintiffs.

The Plaintiff's claim is that heard his family has occupied the suit property for over 55 years and that the Defendant's title and interest in Nandi/Ndalat/357 has thus been extinguished.

5. The Amended Originating Summons equally pleads the same facts save for the substitution of Gari Kibarno with the Administrator of his Estate, Noah Kipkosgei, Bargetuny and therefore the Amended Originating Summons is the primary pleading for purposes of this matter.

Defendant's Case: -

6. The Defendant's case is contained in the Replying Affidavit and the further Replying Affidavit of Thomas Kimaru Sawe, deponed on 4th November 2019 and 3rd March 2021 respectively.
7. It is the Defendant's case that
- a) He is the legal and sole owner of land parcel No. Nandi/Ndalat/357 measuring 5.5. acres, having inherited the same from his late father Sawe A. Cheruiyotvide succession cause No. 66 of 2007.
 - b) It is the Defendant's case that the Plaintiff was to make payment of kshs 15,000 per acre but had only given a cow as part payment.
 - c) The Defendant further case is that his late father did not delay in executing any transfers forms, since it is the Plaintiff who had breached the agreement for sale in any event.



- d) In paragraphs 55 of the further replying affidavit, the Defendant questions why the Plaintiff has taken 55 years awaiting execution of transfer documents.
- e) The Defendant further disputes holding the suit property in trust for the Plaintiff and seeks the dismissal of the suit.

Plaintiff's Evidence:-

- 8. The Plaintiff called a total of 3 witnesses.
PW1 was the Plaintiff himself, Noah Kipkosgei Barngetuny, he adopted his affidavit deponed on 1st December 2020 as his evidence in chief.
- 9. It was his testimony that his late father the original Plaintiff the late Gedion Gari Kibarno was his father, who had passed on 4th January, 2020.
- 10. It was his testimony that he had lived on the property Nandi/Ndalat/397 all his life the property at the time of filing suit was registered in the name of Sawe arap Cheruiyot.
- 11. He produced a copy of the title in respect of Nandi/Ndalat/397 as P exhibit 5.
- 12. In his affidavit that he had adopted as evidence in chief, it was his testimony that his late father had purchased Nandi/Ndalat/397 from Kimurgong Choge in 1964 and that the late Kimurgong Choge who had in turn purchased the property from the registered owner Sawe arap Cheruiyot also known as Sawe Kipchumber in the year 1960.
- 13. That at time of purchase, the property was still registered in the name of Sawe arap Cheruiyot AKA Sawe Kipchumber as he had not transferred the same to Kimurgung Choge.
- 14. It was the Plaintiff's further testimony that his late father had approached the late Sawe arap Cheruiyot to execute the requisite transfer documents to him (late father) but the late Sawe arap Cheruiyot declined, but demanded for payment of an extra amount so that he could sing the transfer, and his late father then gave him a cow and its calf.
- 15. It was his Plaintiff further testimony that his father and his family had settled on the property since 1964.
- 16. The Plaintiff further testified that the late Sawe arap Cheruiyot alias Sawe Kipchumba attempted to secretly transfer the suit property to his daughter Prisca Jerono Cheruiyot, but on the advice of the D.O. Kabiye and the area chief, the plaintiff's late father had lodged a caution.
- 17. It was his further testimony that the Defendant had through the firm of Ngeno Ondieki written a demand letter on 24/7/2019 (Exhibit 9) which demanded the Plaintiffs to give vacant possession.
- 18. In cross examination, he confirmed that he did not have the agreement for sale between his late father and the late Kimurgung Choge.
- 19. He further stated in Cross – examination that it was only in 2019, that they had realised that the property had been registered in the name of Thomas Sawe. He was not aware of the Succession and only realised that they were served with the demand letter, which provoked the filing of this suit.
- 20. In re – examination, he stated that his late father registered the caution as a purchaser, that he was born on 23/12/1956, and he had lived on the property there on from his child hood.



21. PW2, Meshack Kimaiyo arap Sang, also testified and adopted his witness statement of 6/9/2019 as his evidence in chief.
22. In his testimony in evidence in chief, he stated that the Plaintiff was his immediate neighbour having purchased land which borders his in 1973, he found the Plaintiff already in occupation and he was informed that the Plaintiff had purchased the parcel in 1964.
23. It was his further testimony that the Plaintiff is still in possession upto date, and the Defendant have never occupied the property in dispute.
24. In cross –examination, he stated that he has being a neighbour to the family of Gari Kibarno since 1973, when he was about 20 years old. In that period, the children of the late Sawe Cheruiyot have not claimed the suit property. He was not aware whether the Defendant held the title to the property.
25. In re – examination, he stated that the late Sawe’s family has not taken possession of the property and that the family of the late Gedion Gari’s family still lives on the Property.
26. PW3 Paul Kiptoo Kutoo, also testified, he equally adopted his witness statement dated 6/9/2019 as his evidence in chief, it was testimony that he is a village elder at Kapkorio village for the last 5 years. That from his childhood days, the property in dispute has always been occupied by the family of the late Gari Kibarno, that the family of the late Sawe Cheruiyot had not occupied the property at all.
27. In cross – examination, the witnesses, stated that he had been neighbours with the family of the late Gari Kibarno since childhood, that the family of the late Sawe has not occupied the property. He was not aware whether the family of Gari Kibarno had purchased the property or not.
28. In re – examination, the witness stated that no complaint had been brought to him as a village elder by Thomas Sawe in relation to the suit property and that in all these years, he had known the family of late Gari Kibarno to have occupied the suit property.
29. After the testimony of the three witnesses the plaintiff’s case was closed.

Defendants Case: -

30. The Defendant equally called 3 witnesses, the 1st Defendant testified as DW1 and the 2ND Defendant testified as DW2 and their other brother testified as DW3.
31. It was DW1 Stephen Kipps Kirwa’s testimony in a nutshell having adopted his witness statement of 3/3/2021 as his evidence on chief.
32. It was his further testimony that is late father had allowed the late Kimurgong Choge to use the property until 1974, when the late Kimurgung Choge relocated to Uasin Gishu, and that the late Gari Kibarno was thereafter allowed to use the property.
33. That a proposal was made to Gari Kibarno in 1976 to utilise Nandi/Ndalat/397 while he allows the family of the late Sawe Cheruiyot to utilise his parcel situated in Kibomet in Kitale, however Gari Kibarno did not agree, necessitating a visit in 1989, by the late Sawe Cheruiyot and his sons to the suit property where Gari Kibarno acknowledged that the property indeed belonged to Sawe Cheruiyot.
34. After the said visit Gari Kibarno requested the late Sawe Cheruiyot to sell him the suit property and a purchase price of kshs 60,000/= was agreed, but the late Gari Kibarno refused to pay the amount.
35. That in 1991, the late Sawe Cheruiyot intended to transfer the suit property to his daughter the late Prisca Jerono Cheruiyot but Gari Kibarno placed a Caution in 1992.



36. At the time of his late father's demise in 1996, there had been no sale to the late Gari Kibarno.
37. That plans were made to start the succession process and the late Gari Kibarno was taken to the chief in 2004, where the late Gari Kibarno was taken to the Chief in 2004, where the late Gari Kibarno sought for more time to make payment.
38. Succession was commenced in 2007 and the property was bequeathed to Thoams Sawe who was issued with a title deed in 2013.
39. That in 2019, his brother approached the Court for eviction orders via ELC No. 102/2019.
40. In cross – examination, the witness stated that the suit property, Nandi.Ndalar.397 belonged to his late father and that his brother Thomas Sawe is how the registered owner.
41. He stated that has never lived on the suit property, but he was shown the boundaries in 1989, his sister went to the property but did not live there. He stated further in cross – examination that from 1964, the suit property was in the hands of late Gari Kibarno. That the suit was filed only in 2019for eviction vide Eldoret case No. 102/2019 which matter was pending before Court, that this case was filed later than Eldoret ELC 102/2019.
42. DW2 the 2nd Defendant Thomas Kimaru Sawe indicated in his evidence in chief that he knew the Plaintiff and his late father for over 20 years. That their properties border each other in Kitale.
43. It was his further testimony that he is the registered owner of Nandi/Ndalat 397 and produced a copy of the title as D Exhibit 1. He acquired ownership through transmission, his older brother was the Administrator of the Estate; It was his further testimony that he lives in his brothers property. He stated that he sued the late Gari Kibarno in case No. 102/2019 Eldoret for eviction, but he has never occupied the property.
44. In cross – examination, the witness stated that the property belonged to his late father Sawe Cheruiyot, the property is 5.5 acres, he never notified the late Gari Kibarno about the Succession matter and neither did he disclose the same to the High Court. He become aware of the boundary in 1989, when he was shown the boundary.
45. That in all his 53 years, he had never lived on the suit property, he was aware of a caution placed by the lateGari Kibarno. He did not know Kimurgong Choge, but stated that the suit property was in the hands of the late Gari Kibarno did not anything.
46. In re- examination; he stated that late was Gari Kibarno did not pay anything on the property. In 1989 property was in the name of the Sawe Cheruiyot.
47. He has not developed the property since Gari Kibarno was on the property.
48. DW3, David Kiptoo Cheruiyot also testified. It was his testimony that he knew the late Gari Kibarno who was in the suit property and that in 1989, he together with is brothers visited the suit property for purposes of seeing the boundaries.
49. After that visit, the late Gari Kibarno visited their family and he agreed to pay kshs 60,000/= but did not pay anything, that after the demise of their late father they commenced succession proceedings in respect of their late father's Estate and that Nandi/Ndalat/397 become the property of his brother. Thomas has instituted a suit to recover the property but suit is still pending.



50. In cross – examination, he stated that he was born in 1968, though does not know whether Gari Kibarno was on the property. He went to the property in 1989, to the property so as to see the boundaries. He confirmed that it’s possible to sell a property but remain with the title.
- His father had tried to transfer the property to his sister Prisca Jerono but the transfer did not go through since there was a caution. That there was a family meeting in 2000 where their late father’s debts were discussed. Gari Kibarno did not attend hence his debt was not included.
51. He did not inform the succession court about the occupation of the suit property by late Gari Kibarno, he had personally not cultivated the property neither had his late dad. He was not aware of any happenings before 1989.
52. In re-examination, he confirmed that his brother had acquired title through transmission, he had not seen any agreement for sale between his late father and Gari Kibarno.
53. After the testimony of the 3 witnesses, the Defendants case equally close; thereafter the parties took directions to file written submissions.

Plaintiff’s Submissions: -

54. The Plaintiff in his submissions summarised the parties evidence and framed the following issues as issues for determination.
- a) whether the Plaintiff has been in peaceful, open and uninterrupted possession and use of the suit parcel of land hence entitled to the prayers he seeks.
 - b) whether the agreement for sale entered into by the Plaintiff and one Kimurgong Choge in the years 1964, and the subsequent agreement entered into by the Plaintiff and the late Sawe Cheruiyot in the year 1965 are valid hence capable of enforcement.
 - c) Does Eldoret ELC no. 102/2019 have any legal effect on the Plaintiff’s claim having been filed before the instant suit.
 - d) whether adverse possession is obtainable against an Estate of deceased person. In this the late Sawe Cheruiyot. Who should bear the costs of the suit.
55. The Plaintiff submits that for the doctrine possession to be proved the certain condition ought to be proved.
- In this regard the Plaintiff places reliance in the case of *Wambugu –vs- Njuguna* (1983) KLR 174 cited in *Karuntimi Riaji –vs- M’makinya* (2013) eKLR as well as the case of *Mtana Hewa –vs- Kabindi Ngala Mwangandi* (2015) eKLR where the Court stated the conditions and summarised them as follows;
- “ Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it, and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years.”
56. The Plaintiff submits that they took possession pursuant to an agreement of sale in 1964, from Kimurgung Choge, for kshs 600 and later on agreed with the late Sawe arap Cheruiyot for kshs 825 in 1965 so as to transfer, hence the period of 12 years lapsed in the year 1976 or 1978 respectively.
57. The Plaintiff submits that the Plaintiff’s Agreement for sale became void by virtue of Section 4 (1) (a) of the *Limitation of Action Act* after 6 years.



58. The Plaintiff further submits that Eldoret 102/2019, filed by the Defendant for eviction was time barred by virtue of Section 7 of the [Limitation of Acts Act](#).
59. On whether adverse possession is obtainable against an Estate of a deceased person, the Plaintiff submits that the relying on the decision in [Titus Kiguro Munyi -vs- Peter Mburu Kimani](#) (2015) eKLR, where the Court observed that under Section 7 of the [Limitation of Actions Act](#), the law relating to prescription affects not only present holders of the title but their predecessors – ([Peter Thuo Kairu -vs- Kenia Gacheru](#)).
60. Further the Plaintiff places reliance of the case of [Karunitmi Raiji -vs- M'makinya M'itunga](#) 2013 on Section 30 (f) of registered Land Act and Section 2 of the Law Reform Act.

Defendants Submission: -

61. The Defendant equally filed his submissions, and in them reiterated the evidence adduced and on record. The Defendant framed the following as issues for determination.
 - a) whether the Plaintiff had obtained the parcel of land by [Limitation of Actions Act](#) and by application of adverse possession.
 - b) whether Plaintiff is entitled to be registered as the proprietor of the property against the Respondent.
 - c) whether there should be a Court order that should compel Deputy Register not to execute all the appropriate documents to effect the transfer of the parcel of land.
 - d) whether the Plaintiff obtained the said parcel by way of purchase as alleged.
62. The Defendant submits, that the under Section 37 and 38 of the [Limitation of Action Act](#), does not in substance apply for the change of proprietary rights.
63. The Defendant further submits that as the entry of the Plaintiffs on the suit property was by virtue of purchaser's interest, his claim of adverse possession does not arise.
64. In this regard the Defendant cites the decision in [Gabriel Mbui -vs- Mukindia](#) as well as [Wambugu -vs- Njuguna](#)

Issues Of Determination: -

65. As both parties framed different issues in their respective submissions, and no list agreed issues was filed, the Court frames the following as the issues for determination.
 - a) whether the Plaintiff in the Amended Originating Summons can claim Adverse possession under a purchaser's interest?
 - b) If answer to (a) above is in the affirmative when did time start running for purpose of Adverse possession?
 - c) If answer to 1 (a) above is in the negative when did the time start running for purposes of Adverse possession?
2. Did the Defendants assert their rights over the suit property;
 - a) by their entry in 1989 to be shown the boundaries
 - b) by filing ELC 102/2019



3. Has the Plaintiff proved his case on the required standards of proof
4. Can the order sought be issued in absence of Land Control Board Consents
5. who bears the costs of the suit.

Analysis And Determination: -

66. The primary pleadings in respect of his suit is the amended Originating Summons dated 1st December 2020 as the plaint and further reply dated 3rd March 2021 as the defence.
67. The Plaintiff and the Defendant and their witnesses therefore based their testimonies and evidence based on the primary pleadings. The Plaintiff and his witnesses indicate that the Plaintiffs family and the late Gari Kibarno settled on the suit property in 1964 after a purchase of the same from the late Kimurgong Choge who has purchased the same from the late same arap Cheruiyot.
68. However the Plaintiff not having been a witness to the Agreement for sale and none of his witnesses having testified on the sale, and the agreement thereof having not been produced in evidence and having been contained in the Original Originating Summons and affidavit of Gari Kibarno which were not the primary documents, that fact of purchase in 1964 was not proved.
69. The testimony of PW2 and PW3 on the settlement of the Plaintiffs family and his late father suggest that the settlement must have been in the 1970's. This is because PW2 bought his property in 1973, which neighbours the Plaintiff's and he found them thereon, PW3 was born in 1968, and testified that he knows that Plaintiff has settled on the suit property from his childhood days.
70. The Plaintiff himself was born in 1958, and could not speak authoritatively on the occupation in 1964 having been in six years old only, but it was his testimony that he had lived thereon from that time, I understand the Plaintiff entry as a minor he could not own his own property, his occupation on the suit property can be recognised from the time he attained the age of majority in 1976.
71. In their submissions the Plaintiff have submitted 1976 as the year when the time started running for adverse possession based on the original Originating Summons pursuant to the Agreement of sale, but as the same was not adduced in evidence, save for the affidavit of Gari Kibarno (deceased) who did not testify, hence his affidavit and annexures not adduced in Court.
72. Coupled with the fact that PW2 and PW3 equally testified that the Plaintiff has lived on the suit property from around 1973 as per PW2 and about the same time for PW3 who was born in 1968.
73. The Court finds 1976 as the time, that time of occupation by the Plaintiff in the Amended Originating Summons.
74. In answer to issue No. 1 the Court finds that whereas occupation by the Plaintiff in the amended Originating Summons was in 1976, that occupation was pursuant to his late father stay on suit property and not pursuant to an Agreement of sale between the late Gari Kibarno and the late Kimurgong Choge as that testimony was contained in the supporting affidavit to the Originating Original Summons which was not proved in Court, as the Plaintiff proceeded based on the Amended Original Summons. The Court answers issued no 1 (a) in the negative.
75. Having answered issue no 1 (a) in the negative, the Court turns to issue no 1 (c) when did time start running for purposes of adverse possession?
76. As was held in the case of *Mtana Lewa, -vs- Kabindi Ngala Mwangandi*, cited by the Plaintiff "Adverse possession is essentially a situation where a person takes possession of land asserts rights over it, and



the person having title over it omits or neglects to take action against such person, in assertion of his title for a certain period (12) years in Kenya.”

77. Having found that in 1976 the Plaintiff has attained the age of majority and not under the disability of a minor, it follows from that time for adverse possession as against him started running 12 years from 1976, which rights crystallised in 1988.
78. All the 3 of defence witnesses indicated that it is the Plaintiff and the family of the late Gari Kibarno who had occupied, utilised openly and are still in occupation of the suit land.
79. Accordingly from 1988 the Plaintiff’s rights to adverse possession had crystallised. The Court answer issue number 1 (c) as 1988.
80. Did the Defendant assert their rights over the suit property.

In *Mwangi Githu –vs- Livingstone Nderitu* (1980) eKLR, the Court of Appeal the Court of Appeal stated that “ time ceased to run under the *Limitation of Action Act*, either when the owner asserts his right or when his right is admitted by the adverse possessor, assertion of rights is when the owner takes legal proceedings or makes an effective entry into the land.”

81. In the course of their evidence, the Defendant and his witnesses stated that they together in the company of their late father visited the suit property in 1989 and were shown boundaries, by the late Gari Kibarno’s son Philip.
82. That act of entry is what was contemplated in the *Mwangi Githu –vs- Livingstone Ndeete*, effectively that was an assertion of the Defendants right. In 2019, the Defendant equally sued the Plaintiff in ELC 102/2019 for vacant possession, that equally qualified to be an assertion of a right, under the *Mwangi Githu –vs- Livingstone Ndeete* case.
83. The act, of assertion of person right as observed in the *Mwangi Githu –vs- Livingstone Ndeete* however must be construed in light of Section 7 and 17 of the *Limitation of Actions Act*.
84. The act of assertion, contemplated in *Mwangi Githu –vs- Livingstone Ndeete* is actually the action provided in Section 7 of the *Limitation of Actions Act*.
85. Having found that time for adverse possession in respect of the Plaintiff in the Amended Originating Summons crystallised in 1988, the title to the Defendants was by operation of their late father visited the suit property in 1989 and were shown boundaries, by the late Gari’s Kibarno’s son Philip.
86. Law extinguished in 1988, and the entry in 1989 did not revive, the time. Similarly the suit filed in 2019 by the Defendant to recover the property been an action to recover land is time barred by section 7 of the *Limitation of Actions*, the title having been extinguished under Section 17 of the *Limitation of Action Act*.
87. It follows there from that the action of entry in 1989 by the Defendant and his brothers and the suit filed in 2019, have no legal effect, it was too little too late, and the answer to issue numbers 2 is that the Defendant did not assert his right.

88. Has the Plaintiff proved his case on a balance of probability.

The Court finds that on a balance of probabilities the Plaintiff has proved his case, as all his 3 witnesses as well as the Defence witnesses testify that he had been in occupation of the suit property, openly and continuously, and the ingredients of Adverse possession have been proven.

89. On issue number 4, having found that the Plaintiff has proven his case and that the Defendants title has been extinguished the Defendant has no interest to transfer that would require the Land Control



Board consent as his title and the interest compromised there on have been extinguished by operation of law. The Court therefore finds that the Plaintiff is entitled to the prayers in the plaint and to be registered as the owners.

Disposition

90. The Court finds that the Plaintiff has proved his case on the required standard of proof and enter judgement for the Plaintiff in terms that;
- i) The Defendants title to Nandi/Ndalat/357 be and is hereby extinguished by provisions of Section 17 of the *Limitation of Actions Act*.
 - ii) The Land Registrar Nandi County is directed to rectify the Land Register in relation to Nandi/Ndalat/397 by registering the Plaintiff Noah Kipkosgei Bargentuny as the new owner thereof, and in trust for the beneficiaries of the Estate of Gari Kibarno (deceased).
 - iii) Each party to bear its own costs.

JUDGEMENT ACCORDINGLY.

DATED AT KAPSABET THIS 31ST DAY OF MAY, 2022.

HON. JUSTICE M. N. MWANYALE

JUDGE.

No appearance for the Parties/Counsel

