



Togom (Suing as the Administrator of the Estate of the late Peter Kimutai Togom) v Jeptanui (Environment and Land Case Civil Suit 54 of 2021) [2022] KEELC 3305 (KLR) (31 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3305 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND CASE CIVIL SUIT 54 OF 2021
MN MWANYALE, J
MAY 31, 2022
FORMERLY ELDORET E & L CASE NO 202 OF 2016

BETWEEN

RAEL TOGOM PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PETER
KIMUTAI TOGOM

AND

SELY JEPTANUI DEFENDANT

JUDGMENT

1. Rael Togom the Applicant, in the Originating Summons dated July 14, 2016 took out the said summons, as an Administrator of the Estate of the Late Peter Kimutai Togom against Sally Jeptanui, the Respondent herein.
2. In response to the Originating Summons, the Respondent to filed a Replying Affidavit dated August 9, 2016.
3. Simultaneously with the filing of the Originating Summons the Applicant filed a Notice of Motion application under Certificate of Urgency seeking injunctive orders, against sale, subdivision transferring, charging and/or eviction of Plaintiff from the parcel of land known as Nandi/Baraton/858, the Respondent equally filed a response to the Notice of Motion vide a Replying Affidavit dated July 20, 2016.
4. Initially interim orders were issued on June 14, 2016 when the Notice of Motion was filed, later on by consent of the parties;



- i) A survey was to be carried out to establish the actual boundaries of the Nandi/Baraton 858 and Nandi/Baraton/859
 - ii) To establish the extend as well as the physical or existing portions occupied by the Plaintiff and the Defendants respectively over the two parcels of land.
5. The surveyor was to file a joint report on the items 4 (i) and 4 (ii) above.
 6. Parties did not take directions on the proceedings, of the originating summons but both parties called their witnesses who gave viva voce evidence.
 7. The Court thus directs that the Originating Summons be deemed to be the plaint and the Replying Affidavit be deemed to be the Defence, hence the Applicant shall now be the Plaintiff and the Respondent be the Defendant as was held in Eldoret Court of Appeal case No 4/2018 Shadrack Bungei vs Selina Jerotich C.

Plaintiff’s pleadings and case:-

8. It is the Plaintiff case, that she is the administrator of the Estate of the late Peter Kimutai Togom, who had purchased a portion measuring 6 acres or there about in Nandi/Baraton 179.
9. That subdivision of Nandi/Baraton 179 was done and the parcel of 2.33 Hactares was transferred and registered to him, which parcel became known as Nandi/Baraton 859. The remaining parcel became known as Nandi/Baraton/858.
10. Sometimes in 1998, the late Peter Kimutai Togom purchased additional 3.7 acres which was to be hived out Nandi/Baraton 858. The boundary of 859 was therefore moved so as to reflect the additional purchase, and was fenced off.
11. Since the said purchase, the late Peter Togom and is Dependants including the Plaintiff have had peacefully uninterrupted possession of the additional 3.7 acres, where they have planted trees maintained the barbed wire fences and his sons erected homes thereon.
12. The Defendant has now threatened to evict the Plaintiff from the 3.7 acres, which the Plaintiff had had possession for more than 12 years within Nandi/Baraton 858 hence this suit and the Notice of Motion application filed contemptuously.
13. The Plaintiff in the suit, thus seeks orders on the face of the Originating Summons inter alia, declaration that;
 - a) That the Defendants interest in the 3.7 acres compromised in Nandi/Baraton 858 stands extinguished by lapse of time.
 - b) That the Plaintiff has obtained title and ownership of that portion of land measuring 3.7 acre in Nandi/Baraton 858 by adverse possession.
 - c) The Land Registrar Nandi County be ordered to delete the name of Selly Jeptanui from the Register and amend the map so as to reflect the area so curved in favour of the Plaintiff. The Plaintiff has also sought costs.

Defendant’s pleading and case:-

14. It is the Defendant’s case that her title over the 3.7 acres claimed by the Plaintiff as the statutory period of 12 years have not been met by the Applicant.



15. The Defendant further indicates that the late Peter Kimutai Togom had not claimed the parcel for the 6 years since he bought in 1998 and died in 2003, the 12 years period had not lapsed.
16. That the building stated by the Plaintiff to be on Nandi/Baraton 858 are actually on Nandi/Baraton 859.
17. The Defendant further pleads that any Agreement for Sale between the Plaintiffs late husband and her late father, is null and void for lack of consent of Land Control Board; hence the same is a nullity and unenforceable.
18. It is the Defendant's claim thus that the Plaintiff has not acquired any proprietary right out of any part on portion of Nandi/Baraton/858 and the suit be dismissed.

Plaintiff's evidence:-

19. The Plaintiff testified and she called an additional witness, while the County Surveyor having prepared a joint survey report was called as a common witness.
20. PW1 the Plaintiff Rael Togom testified and adopted her witness statement dated November 12, 2021 as her evidence in chief.
21. It was her evidence that her late husband had purchased initially 2.33 Hectares in Nandi/Baraton 179, which was transferred to him on October 2, 1981 upon subdivision and that the resultant titles; were Nandi/Baraton/859 and the remaining portion was Nandi/Baraton 858. Her portion now measures 2.33 Hectares and is Nandi/Baraton/859.
22. That her late husband additionally purchased a further 3.7 acres within Nandi/Baraton 858 and that the boundary was thus moved to reflect the additional 3.7 acres.
23. In support of the purchase, for the 3.7 acres the Plaintiff produced a payment plan as P Exhibit 3 which was objected to by Mr Melly for the Defendant, and the objection was upheld.
24. That the Plaintiff and her husband fenced of the additional 3.7 acres as to include the same since 1998 and her sons have built there on.
25. There was a dispute as to the boundaries in 2015, where the village elders minuted the dispute and she produced, the minutes as P Exhibit 3.
26. The dispute was resolved in her favour. The Plaintiff had produced P Exhibit 1 her husband's death certificate and P Exhibit 2 the grant of letters of Administration at the start of her testimony.
27. That during the lifetime of the original vendor Kimeli arap Keter the Defendant's father, no dispute arose but the dispute only arose after his demise.
28. In cross – examination, the Plaintiff started that she brought the said on behalf of her deceased husband. She further stated that she lived on the portion of 3.7 acres since the time her husband purchased in 1998 to date.
29. In re-examination, she started that she had lived there peacefully, since 1998 till the time she filed suit.
30. PW2 Paul Kipitok Songok testified and adopted his statement as his evidence in chief. It was his testimony that the Plaintiff was his neighbour and that he knew both the late Kimeli arap Keter and the late Peter Kimutai Togom, it was his testimony that the Plaintiff was his neighbour and that he leased Nandi/Baraton Nandi/Baraton/858 from the late Kimeli arap Keter in 1997. In 1998, when he went for negotiate another lease, he was advised that the said portion had been sold. He witnesses the



late Peter Togom fence the property, he had purchased and he (Paul) was shown a different portion to cultivate, that the late Peter Togom fenced and planted trees and lived there on, and there was no dispute between Kimeli arap Keter and the late Peter Togom.

31. He was cross – examined and stated that he was a native of Baraton from birth in 1964, and he had bought Nandi/Baraton 1312 in 1994 which borders Nandi/Baraton/858. The leases from Mr Kimeli arap Keter, were verbal, and that sometimes in 1998, the property that he was leasing was sold to Peter Togom, but he could not remember the acreage. There was no dispute in 2003, and late Kimeli who died in 2003, and late Kimeli who died in 2012. The dispute arose between the Plaintiff and the Defendant. There were other buyers who had bought from Kimeli arap Keter equally.
32. After the testimony of the two witnesses, the Plaintiff's case was closed.

Defence case:-

33. The Defendant testified and called two more witness, and the Land Surveyor, who was a common witness.
34. DW1 the Defendant Sally Jeptanui testified. It was her testimony whilst adopting her witness statement as evidence in chief, that, she was the registered owner of Nandi/Baraton/858 and she produced the certificate of Official Search dated September 10, 2019 as D Exhibit 1.

She produced a copy of the green card of Nandi/Baraton 858, dated July 11, 2016 as D exhibit 2, she was registered as the owner in 2015, after the demise of her late father.
35. It was her testimony that upon demise of her dad, she asked all the occupants to show proof of purchase, but the Plaintiff did not have an Agreement for sale.
36. It was her further testimony that everyone who purchased had an Agreement for sale save for Rael Togom the Plaintiff.
37. She further stated that there was a meeting that was held on May 9, 2015 to discuss the issue, but the plaintiff refused to attend and instead she Plaintiff sued. She consented to a joint survey on the she indentified the survey report. She was not aware what the Plaintiff wanted in Court.
38. In cross- examination she stated that she did not live in Nandi/Baraton/858 during the lifetime of her father and never was she a witness to any of the agreements. She was not aware whether the development were in 858/ or in 859; and whether her father had sold to Peter Togom. She confirmed that from 1998 to 2015 there was no dispute between her late father and the Plaintiff family. She wanted to subdivide so that the other purchasers could get their titles.
39. In re- examination, she stated that the Plaintiff was not a beneficiary and that there was no development on the 3.7 acres, that she had not seen any Agreement between Rael Togom and her late father and that she was not aware when Rael Togom took possession.
40. PW2 Benjamin Kipsang Letting testified and adopted his witness statement dated December 15, 2021, as his evidence in chief. It was his evidence that the property originally belonged to the late Kimeli arap Keter the father to the Defendant who had sold a portion to Peter Togom about 6 acres and a subdivision was prepared when the resultants titles were Nandi/Baraton 858 and Nandi/Baraton 859.
41. The witness was not aware of any additional parcel purchased by Peter Togom but is aware that Rael Togom is living in 858 and her property is 859.



42. In cross – examination he, that he was an uncle to the Defendant, originally born in Baraton but left for Mosoriot in 1998. He was not a witness to the Original Agreement for sale, he knew of the dispute through a meeting which he attended.
43. He was no longer the Assistant Chief of Baraton in 1998.
44. On re- examination, she stated that he visited Baraton but did not go to Rael’s portion, and he cannot confirm whether Rael utilises, part of Nandi/Baraton/858.
- 45 It was DW3 Edmond Kiprotich Sang’s testimony that the Plaintiff does not utilises 858, that she utilises 859.
46. In cross examination, DW3 stated that he had bought his parcel in 2007, and that he used to live in Baraton area even before the purchase of the 6 acres by Peter Togom.
47. He was not aware of all the dealings of the late Kimeli arap Keter and that the Plaintiff moved boundaries as there is no agreement for sale. The witness stated that he did not know where the original boundaries.
48. In re- examination, the witness stated that he had bought the parcel in 2007 and that Kimeli arap Keter died in 2013. That there was no boundary moved before 2013, and the boundary movement was in 2013 after the demise of Kimeli arap Keter.
49. DW4, the County Land Surveyor Bernard Kiplimo also testified. His testimony shall be treated as the testimony of an expert witness, as he was ordered by the Hon. Court to conduct a survey so as to;
- i) Establish actual boundaries of parcels number Nandi/Baraton/858 and Nandi/Baraton 859.
 - ii) Establish the extent of physical and existing portions occupied by the Plaintiff and the Defendant respectively.
50. A surveyor from his office, Joel Limo visited the scene and carried out the survey, he produced the surveyor report as (D Exhibit 7).
51. The survey report has 2 sets of drawings.
- Drawing (1) extract of the mutation that created the boundaries of Nandi/Baraton/858 which measures 10.7 acres, and Nandi/Baraton/859 measuring 6 acres.
52. The physical findings on the ground were that there existed a clear boundary, which is not captured by the mutation, but shown by the respective parties.
- On the ground Nandi/Baraton 858 measures 6.177 acres while Nandi/Baraton 859 measures 10.602 acres.
53. The survey report noted a variation of acreage between the physical findings on the ground and the mutation and an interchange of acreage where the acreage of 858 reduced from 10.7 to 6.177 on the ground and the acreage of 859, increased from 6.0 acres to 10.603 acres.
54. The report further makes a finding, that boundary on the physical aspect.
55. In cross examination, he stated that there was a variance between the acreage on the mutation and on the ground but there was no hiving out, the ground findings do not tally with the mutation, he could not tell who occupies parcel 858 and 859, and whether the excess acreage on 859 was developed or not.
56. In re – examination, he stated that both parties were present during verification. He was not able to tell when the live fence was placed. But the boundary on the map is not same as the one on the ground.



57. The Defence case equally closed parties were directed to file their respective submissions.

Plaintiff's submissions:-

58. In her submissions through her Counsels Merris Tororei and Company Advocates, the Plaintiff has summarised the evidence adduced by the parties and submits placing reliance on the case of *Wilson Kazungu Katana and 101 others vs Salim Abdalla Bashwein and another* (2016) eKLR as well as the decision in *Kasure vs Mwaano Investments Limited and 4 others*, for the proposition that a claimant in adverse possession must prove, that (i) 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 violation.
59. The Plaintiff thus submits, that the parcel of land in the suit property is in the name of the Defendant.
60. The Plaintiff further submits that the Plaintiff has occupied the same since 1998. The Plaintiff submits that the entry was without permission as the registered owner and in this regard to the Plaintiff has cited the case of *Iwanje vs Siakwa* and *Kasuve vs Mwaani Investments Limited and 4 others*.
61. The Plaintiff submits that having fenced 3.7 acres in Nandi/Baraton/858, as was confirmed by the survey report from 1998, she has indeed utilised the suit property and is deserving of the orders sought.

Defendant's submission:-

62. The Defendant filed her written submissions dated March 21, 2022 and list of Authorities dated March 25, 2022.

The Defendant has raised two issues, for determination, as here follows;

- i) whether the applicant has brought herself within the limits of the doctrine of Adverse possession for the position for the position that

“what these authorities are emphasising 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 trespassers 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 effectuate the termination of the consent for a period of 12 years, after then, such Applicant would be perfectly entitled to sue on account of adverse possession.”

- iii) Whether the Respondents claim over the suit land stands extinguished.

63. On the first issue, the Defendant places – reliance on the decision of *Wilson Kazungu Katana and 101 others vs Salim Abdalla Bakswein and another* 2015 eKLR.
64. The Defendant submits that to prove adverse possession, the element of possession and discontinuance of the same must be proved.
65. The Defendant thus submits that for adverse possession to be proved, there must be dispossession of the title holder and its discontinuance for the statutory period of 12 years.
66. The Defendant submits further relying on the Court of Appeal decision in case of *Mombasa Teachers Co-operative Savings and Credit Society Limited vs Robert Muhambi Katana*, where the Court



observed as follows “likewise it is settled that a person seeking to acquire title to land by way of adverse possession must prove non permissive or non consensual, actual open, notorious excessive and adverse use/occupation of the land in question for an interrupted period of 12 years...’

It is the Defendants submissions that the Plaintiff did not discharged the burden. The Defendants submits that there is nothing on record to show that the Plaintiff is in occupation of the alleged 3.7 acres since Plaintiff’s husband was not even buried in the suit property.

67. It is the Defendants further submission, that as the Plaintiff as they are other people in occupation of the suit property, the Plaintiff did not prove the requirement of “identification of land in possession of an adverse possession” Set out in the case of *Wilson Kazungu Katam and 101 others vs Salim Abdalla Bakswein*.

The Defendant submits that it was the evidence of the DW3 that the Plaintiff moved the boundaries in 2013 after the demise of the Defendant’s father and that time for adverse possession has not crystallised.

68. The Defendant submits that her father was buried in the suit property in 2013, so he must have enjoyed proprietary rights.

69. The Defendant submits placing reliance on the decision in *Wambugu -vs- Njuguna*, that “times to begin to run when the true owner ceases to be in possession of his land,” and that since the Defendants father was buried on suit property in 2013, the Defendant invites the Court to take 2013, as when time started running.

70. The Defendant submits that her title is indefeasible and that as the Plaintiff has not proven fraud, title ought to be upheld, and Plaintiff to be declared a trespasser.

71. On issue No 2 the Defendant submits that the Plaintiff has not been in possession of the suit property.

Issue for determination:-

72. The Plaintiff did not frame any issue for determination while the Defendant framed two substantive issues together with the issue of costs, there being no list of agreed issues, the Court frames the following as the issued for determination.

1. When did time start running for purposes of Adverse Possession.
- 2a) Has the Plaintiff proved the ingredients of adverse possession.
- 2b). If the answer to the 2(a) above if in the affirmative, is the Plaintiff entitled to the 3.7 acres by a dint of adverse possession, or the reliefs sought.
- 2c). If the answer to the 2(b) above if in the negative is the Defendants title indefeasible.
3. Who bears the costs of the suit.

Analysis and determination:-

73. As pleaded by the Plaintiff, her claim in adverse possession, relates to a portion measuring 3.7 acres within Nandi/Baraton/858. The Plaintiff claims on behalf of the Estate of her late husband, who is alleged to have purchased the said portion in 1998.

74. Although the Plaintiff had listed a payment schedule in relation to the agreement for sale between the late Kimeli arap Keter, the original owner and father of the Defendant, and her late husband, the said schedule of payment was not produced in evidence.



75. PW2 testified that, he had an oral lease with the late Kimeli arap Keter in 1997 to cultivate the area now occupied by the Plaintiff, and that when he went to seek an extension in 1998, he was told by Kimeli arap Keter that the said portion had been sold to the late Peter Togom and that Peter Togom started erecting a fence of the said portion. This testimony corroborates the testimony of PW1 as to the entry of the Peter Togom on the parcel of land Nandi/Baraton/858. The Court believes the evidence of PW1 and PW2 as to the entry of Peter Togom and finds that the same as credible, compared to the testimony of DW1 and DW2 and DW3.
76. For starters, DW1 was not present in 1998 when the said agreement for sale was made, DW2 equally had left Baraton to Mosoriot in 1998 and was not present, while DW3 purchased his property in 2007. All the 3 Defence witnesses were not on the suit property in 1998 and could not testify as to the events of 1998.
77. The Court thus makes a finding that the entry of Peter Togom on whose estate the suit was filed on the portion of Nandi/Baraton/858 was in 1998. Further that entry must have been made pursuant to an Agreement of sale hence was thus by the consent of the owner.
78. No transfer of the additional 3.7. acres was however done necessitating this suit upon a threat eviction. An agreement for sale is basically a contract, hence the entry by Peter Togom was pursuant to contract was thus by consent.
79. As was observed in *Wanje vs Sakwa* and *Kasure vs Mwaani Investments Limited* both cited in Wilson Kazungu Katana cited by the Plaintiff..... “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 step for a period of 12 years after then such application would be perfectly entitled to sue on account of adverse possession.”
80. For purposes of whether the owner withdrew the consent, the provisions of section 6 (1) of the Land Control came into play, the agreement became void after that the expiry of 6 months from the date of contract.
81. It follows there from that any Agreement for sale that the late Peter Togom and the Kimeli arap Keter had become void after 6 months of the purchase. Effectively consent was withdrawn. The Court of Appeal in *Miki Waweru vs Jane Njeri Richu* 2007 eKLR, observed as follows; “ 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 lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the *Land Control Act* for lack of consent of the Land Control Board such permissions is terminated by operation of Law and the continued possession if not illegal, becomes adverse from the time the transaction become void.”
82. Turning to issue No. 1 as to when time started running, the Court finds the initial entry in 1998 was by permission but the permission was terminated by operation of law 6 months thereafter, either within 1998 but certainly not past July 1999.
83. Thus time started running for purposes of adverse possession latest in 1999 and 12 years later, a right for adverse possession accrued to the Plaintiff.
84. In answer to issue No 1 the Court finds 1999 as the time when time started running for purposes of adverse possession.
85. With regard to issue No 2, whether the Plaintiff has proved the ingredients of adverse possession?



Both the Plaintiff and Defendants Advocates have cited the decision in Wilson Kazungu Katana they thus agree on the ingredients of adverse possession as stipulated in the said case.

86. The Court now examined the ingredients of adverse possession as cited in the case of Mombasa Teachers Co-operative Savings and Credit vs Robert Muhambi Katana and 15 others (2018) eKLR.
87. It is to be noted that the ingredients in both cases are actual the same and the Court places the test in the Mombasa Teachers case, as it was the one cited by the Defendant.
88. The test is set out in paragraph 63 of the said decision above is that the Plaintiff ought to prove. Non permissive or non consensual, actual, open, notorious exclusive and adverse use/occupation of the land in question for a period of 12 years.
89. The Court has found that the entry was initially by consent of the Defendant's late father but that by operation of law, that permission was terminated in 1999, so the subsequent stay from 1999 was non consensual and non permissive, and the Plaintiff has proven this. On actual occupation, and open, notorious and exclusive the joint survey report produced as D Exhibit 7, indicates that the acreage in Nandi/Baraton 858, was originally 10.7 but has now reduced to 6.177 acres while Nandi Baraton, 859, was originally 6.0 acre but is now 10.602 acres.
90. This findings corroborates the evidence of PW1 and PW2, who indicated that upon purchase, the late Peter Togom fenced off the additional 3.7 acres, which he added to the original 6 acres purchased in Nandi/Baraton/859.
91. The Court has earlier found that right to claim for adverse possessions accrue to the Plaintiff firstly 12 years from 199, which is 2011. The Defendants late father Kimeli arap Keter died in 2013, in 2011 he was still alive and did not exercise any right or evict the Plaintiffs. In fact the first dispute according to the Defendant and DW3 came after the demise of Kimeli arap Keter in 2013, by that time the right for adverse possession had already accrued to the Plaintiff.
91. On this issued and for the reason advanced above, the Court finds the Plaintiff has proven that her right to adverse possession has accrued.
92. Having answered issue 2 (a) in the affirmative, the other issues then would be is the Plaintiff entitled to the reliefs sought?
93. On a balance of probability the Plaintiff has proven her case and is thus entitled to the reliefs sought noting that she had sought for 3.7 acres and she is bound by her pleadings.

Disposition

94. Accordingly judgment is entered in favour of the Plaintiff in terms that:-
 - i) The Defendant's title and interest in Nandi /Baraton 858, in relation to 3.7 acres currently occupied by the Plaintiff is hereby extinguished by virtue of Section 17 of the Limitation of Actions Act.
 - ii) The County Land Surveyor Nandi County to hire out only the 3.7 acres from Nandi/Baraton/858, and the resultant titles to be given to the Plaintiff for 3.7 acres and the Defendant the rest.
 - iii) Since the Plaintiff is occupying 4.62 acres in Nandi/Baraton/858 in hiving out the 3.7 acres sought and decreed herein, the County Surveyor to have regard to the current Developments by the Plaintiff.



- iv) The Land Register Nandi County, to rectify the Register accordingly and upon the subdivision and register the Plaintiff on the 3.7 acres to be hived out in Nandi/Baraton/858.

Costs

95. Ordinary the Court makes no order as to costs, in adverse possession case but in this case in view of the conduct of the Defendant that triggered filing of this suit, the plaintiff shall have the costs of the suit.

Judgment accordingly.

DATED AND DELIVERED AT KAPSABET THIS 31ST DAY OF MAY 2022.

HON JUSTICE M N MWANYALE

JUDGE.

In the presence of Ms Kimeli for Plaintiff

Mr Kogo holding brief for Mr Melly for the Defendant

