



REPUBLIC OF KENYA



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**Jadi v Mutiso (Environment & Land Case 150 of 2021)
[2022] KEELC 2945 (KLR) (26 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2945 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 150 OF 2021**

MN MWANYALE, J

MAY 26, 2022

BETWEEN

BEATRICE JADI PLAINTIFF

AND

JANE SYOMBUA MUTISO DEFENDANT

JUDGMENT

1. Beatrice Jadi, the Applicant took out an Originating Summons dated March 2, 2018 against Jane Syombua Mutiso the Respondent in the Originating Summons.
2. It was her claim that;
 - i She had acquired title of the parcel of known as Nandi/Kapkangani/438 by adverse possession and she sought orders that the title. In the name of the Respondent be extinguished and she be registered thereof.

Applicant's Case And Pleadings:

3. It was the Applicants further case that she together with her late husband had purchased the property jointly and settled thereon since 1974, continuously openly, peacefully and uninterrupted.
4. They had bought the same from the late Joseph Kipkasi for valuable consideration and that at the time of registration the property was registered in the name of the late Surtan Arap Kaigat on or about April 29, 1983, when the Applicant and her family were already in occupation. And that despite the said registration by the late Surtan Arap Kaigat, the said Sultan Arap Kaigat, the said Sultan Arap Kaigat never occupied or claimed ownership until his demise.
5. The Applicant further contends that in January 2018, she found out that the Respondent had not been registered as the owner of the property and a title had now been issued.



Respondents Case And Pleadings:

6. The Respondent in opposition to the Originating Summons filed a Replying Affidavit dated July 5, 2018 and claims inter alia that she was registered as the owner of the property less than 12 years.
7. She further states that she knows that the property was not purchased from the Estate of the late Surtan Arap Kaigat and any Agreement for sale in respect thereof is null and void.
8. In a nutshell the Respondent summarised her opposition to the suit as follow;
 - a That the Applicant is not the Administrator of the Estate of her late husband or the alleged vendor.
 - b That the Respondent husband died less than 10 years ago.
 - c That the period of limitation has not reached.
 - d That her registration has been for a period of less than 2 years.
 - e That the agreement is a nullity.
 - f That there has no fraud

On the basis of the above grounds she sought that the Originating Summons be dismissed with costs.

9. The matter initially was heard at the ELC Court at Eldoret, by the Hon Lady Justice M Odeny. On November 14, 2018, directions were taken before the learned Judge that the Originating Summons dated March 2, 2018 be deemed as a Plaintiff and the Replying Affidavit dated July 5, 2018 be deemed as a defence and the matter to proceed by way of *viva voce* evidence, the annexures filed alongside the affidavits be deemed as the parties lists of documents.
10. The Applicant further filed a Supplementary Affidavit dated June 20, 2019. The Plaintiff thereafter testified on December 3, 2019 before the Honourable Lady Justice M Odeny. Thereafter the Court was transferred and this matter was equally transferred to Kapsabet ELC Court for hearing and determination.
11. Upon transfer of the suit to this, I ordered for the typing of proceedings and parties took direction that the matter to proceed from where it had reached. Having converted the Originating Summons into a plaintiff or the Replying Affidavit in a defence, the Applicant shall now be referred to as the Plaintiff and the Respondent as the Defendant.

Plaintiff's Evidence

12. The Plaintiff testified as P W 1 and called another witness as P W 2. It was the Plaintiff's evidence that she wished to adopt her statement that she had filed on March 2, 2018. It was her testimony that she together with her husband the late Genshom Jadi Mukisa had purchased the property and settled thereon in 1970 and that her husband died on November 19, 2010. They had bought the suit property from a one Mr Joseph Kipkasi and the Agreement for sale thereof was produced as P Exhibit 2.
13. That her late husband Genshom Jadi Mukisa, passed on November 19, 2010 and a copy of the death certificate was produced as P Exhibit 1; and he was buried on the suit property without protest from anyone.



14. It was the Plaintiff's evidence that she lived together with her husband and their family thereon from 1974, when they bought the property, and have lived continuously, openly, peaceful and uninterrupted that they have extensively of the Respondent.
15. The Plaintiff further testified that the late Sultan Arap Kaigat, was registered on April 29, 1983, as the proprietor, at the time of the registration the Plaintiff and her family were already in occupation.
16. It was her evidence that despite the late sultan Arap Kaigat being registered thereon, he did not take possession of the property that at all till his demise.
17. On January 27, 2018, the Plaintiff conducted the search and found that the defendant had now been registered as the owner; the Plaintiff therefore registered a caution over the parcel of the land. It was her further testimony that the Defendant has never occupied nor utilized the suit properly.
18. In cross-examination, the Plaintiff stated that she had not taken out succession in respect of the Estate of her late husband. They had brought the property from Joseph Kipkasi and not Sultan Arap Kaigat.
19. In re-examination, the Plaintiff stated that she has commenced the suit on her own behalf and not on behalf of her late husband.
20. PW 2 David Wisitsa, also testified. It was his testimony, in accordance to his witness statement dated 2/03/2018, that he adopted in court, that he lives in Nandi/Kapakangani/437 which neighbours Nandi/Kapakangani/438 belonging to Beatrice Jadi the plaintiff. That he has lived there on since in 1974, and in all that time he has not seen the Defendant living on Nandi/kapakangani/438.
21. In cross-examination, he stated that he was 64 years old and was born in Nandi County, his late father Samuel Machunjiro Wisita having emigrated to Kapkangani in 1962. Nandi/Kapakangani/438 is registered in the name of Sultan Arap Kaigat. The Genshon was the husband of Beatrice Jadi, died in 2010, but had lived together with his dependants on Nandi/Kapakangani/438.
22. It was his testimony that Genshon has bought the property from the late Joseph Kipkasi who had bought it from the late Sultan. It was the witness evidence that his late father was registered in 1975 or thereabouts. He did not know whether succession in respect of late Genshon was undertaken, and that the Agreement had no number on it.
23. In Re-examination, the stated that their properties have been separated by the Kapsabet-Chavakali Highway. He stated that the Plaintiff utilizes the whole farm. He stated that he was not a witness to the Agreement of 1974 between Genshon and Joseph Kipkasi, but that Beatrice Jadi the Plaintiff has lived. On the Suit property and is still in Occupation since 1979. After the testimony of the two witnesses, the Plaintiff's case was closed.

Defendant's Case:-

24. The Defendant testified as D W 1 and called one witness, D W 2. It was the Defendant's testimony that and evidence that she was the Administrative of the Estate of the late Genshon Arap Kaigat having undergone succession in Kapsabet Succession No 33 of 2016, and Succession proceeding were produced as D exhibit 1.
25. She stated that she is the registered owner of Nandi/Kapakangani/438 and also 432. That there was no dispute in Nandi/Kapakangani/432. She indicated that she was her property back as she underwent succession but there was no objection from Beatrice Jadi the Plaintiff.



In Cross-examination:-

26. She stated that the late Sultan Arap Kaigat was her father in law her husband was the late Jackson Kibet Serem who did not file succession in respect of his late father's estate. She was not aware when Sultani died as she did not meet Sultani in his lifetime. She was married in 1995, she confirmed that she had not utilised the property and her late husband equally did not utilise the property. They are shops on the property but she does not collect rent thereon. She was not sure whether they are crops on the property, and when Beatrice Jadi took possession on.
27. She stated in Cross – Examination that husband of the Plaintiff was buried thereon, and she has not sought any eviction. That there is a letter from the chief dated January 26, 2018 which confirms that Gerishon has lived there on since 1974.
28. In re-examination, she stated that when the chief's letter dated January 26, 2018 was written she was not present she confirmed that she was not aware why the property was registered in the name of a dead person as her father in law died in 1974, but that she got the title after succession proceedings.
29. DW2, Silas Kipyego Banoi, a retired Chief testified that he was Chief of Kaptuya Location for 24 years that he wrote a letter on March 10, 2016 in respect of Nandi/Kapkangani 438 and 432 which belonged to Sultani Arap Kaigat. The said letter was written in favour of Jane Syombua Mutiso, the Plaintiff who has a daughter in law to the late Sultani Arap Kaigat.
30. It was his testimony that he had never met Sultani Arap Kaigat in his lifetime. He indicated that there had been proceedings in the adjudication office because Gerishon did not buy from Sultan.
31. He further testified as having written a letter dated January 26, 2018 in which he stated that Beatrice Jadi the Plaintiff had been living on the property since 1974, and the letter was meant to facilitate the Defendant pick her title from the Land Register he produced the letter dated November 9, 2018 as D-exhibit 2, letter dated 26/1/2018 as D – Exhibit 3.
32. In Cross – Examination, he stated that he never met the late Sultan arap Kaigat in his lifetime. He stated as a chief it was his duty to write letters of succession, indicating the date of death in the death certificate but in this case, there was no death certificate. He further stated that he knew Beatrice Jadi, the Plaintiff; she had lived on the suit property before he became a chief. He also knew the late Gerishon Jadi.
33. In further cross – examination, he stated that the Plaintiff was still in possession of the suit property and had constructed ships there on that he only met the Defendant in 2015 or 2016 when her husband died. The Defendants' husband was not buried in Nandi/Kapkangani/438.
34. He stated that during adjudication he was not the area chief, and the proceedings for the adjudication were not before Court. Lastly it was his response in cross – examination that the Defendant has not lived on the property.
35. After the two witnesses were heard, the Defendant closed her case, parties were then directed to file their written submission.

Plaintiff's Submissions: -

36. In their submissions, the Plaintiff submits that the suit herein was filed by her in her own capacity asserting the right of ownership of the suit land, having occupied the same and is in actual occupation and utilisation of the said suit land continuously, peacefully and uninterrupted for a period in excess of 12 years.



37. The Plaintiff has identified the following issues for determination as follows;
- a) Whether the Applicant herein has acquired title to the said parcel of land measuring 1.5 Hactares or thereabouts from the parcels of land known as Nandi/Kap Kangani/438 by adverse possession.
 - b) Whether the Respondent Jane Syombua Mutiso holds title to the said parcel known as Nandi/Kap Kangani/438 in trust for the Applicant herein.
 - c) Whether the title of the Respondent in respect of the said parcel of land got extinguished on the expiry of 12 years after the Applicant took possession thereof.
38. The Plaintiff submits placing reliance on the decision in Kakamega HCC No 86/2005 – *Omukaisi Abulitsa v Albert Abulitsa Shitzeswa* where the general principles with regard to adverse possession under section 38 of the *Limitation of Actions Act* were stated. The Court observed as follows
- “Section 38 of the *Limitation of Actions Act* Chapter 22 laws of Kenya, entitles a person to be registered as a proprietor instead of the registered proprietor instead of the registered proprietor, where such person establishes by evidence that he or she has become entitled to be registered on his account of his or her occupation of the land, openly and continuously and without interruption... for a period of twelve years or more adversely to the title for the registered owners.... the trespasser is entitled to apply under Section 38 to the registered as the proprietor of the land. This is what the doctrine of adverse possession means.
39. The Plaintiff submits that the change of title by the Defendant does not amount to anything. In this regard and on the issue of change of ownership, the Plaintiff relies on the decision in Paul *Kamande Gicheba v Jacob Kinyua Kiragu* [2018] eKLR where the Court observed *inter alia*,”. It is Enite that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person’s adverse possession. (See *Githu v Ndepte*) 1984 KLR 776.
40. The Plaintiff further submits that even if the Agreement for sale was null and void the Claim on Adverse Possession would equally succeed. On the point on the void contract and agreement for sale, the Plaintiff has cited the Court of Appeal decision in Eldoret Civil Appeal No 51/2015, *Willy Kimutai Kitilit v Michael Kibet* [2018] eKLR.
41. The Plaintiff thus submits that she had proved her case and is entitled to the prayers sought.

Defendants Submission: -

42. The Defendant through the firm of Kipkosgei Choge Advocates filed her submission. On the ingredients to be satisfied on the doctrine of Adverse Possession, the Defendant submits placing reliance on the decision in *Tabitha Waittherero Kimani vs Joshua Nganga* that five elements ought to be proved. The elements are
- a) Open and notorious use of the property
 - b) Continuous use of the property
 - c) Excessive use of the property
 - d) Actual possession of the property



43. The Defendant submits that if a time for adverse possession was running, then it was interrupted in March 2018 when this suit was filed.
44. With regard to fraud, the Defendant submits that the same was not proven as it was not specifically pleaded and proven as required *Vijay Moriaria vs Wasigh Madhusing Darbuns*.
45. The Defendant submits that for a claim of adverse possession to succeed, the Respondent ought to have actual constructive knowledge of adverse possession must be proved; and places reliance in the case of *Titus Kigoro Munyi vs Peter Mburu Kimani* (2015 Eklr).
46. The Defendant submits that there was a re- entry by the Plaintiff after the death of her husband. The Defendant further submits that the she become aware when she was sued after some had completed succession.

For the above submission the Defendant prays that the suit be dismissed.

Issues For Determination:

47. The Plaintiff penned 6 issues for determination in their submissions as enumerated in paragraph 33 above. The Defendant did not file any issues for determination in her submissions.
48. There being no list of Agreed Issues the Court frames the issues for determination as following;
 1. Whether the Plaintiff has proved open peaceful continuous occupation of Nandi/ Kapkangani/438.
 - b) If the answer to (a) above is in the positive was the Defendant aware of the said occupation?
 - c) If the answer to (a) is in the negative, has the Plaintiff proved the essential ingredients of the doctrine of Adverse Possession?
 - 2) Is the Plaintiff entitled to the Relief's sought noting that the Defendant was registered as proprietor less than 2 years before suit was filed?
 3. Who bears the costs of the suit?
49. The Court now proceeds to analyse the evidence and the law as against the issues framed above.

Analysis And Determination: -

50. The law on Adverse Possession as stated in Section 38 of *Limitation of Action Act* is very clear. That for a claim of Adverse Possession to succeed the Plaintiff in whose favour the title ought to be registered ought to prove the following, outline in the decision of *Tabitha Waittherero Kimani v Joshua Ngana (supra)*, cited by the Defendant, the Plaintiff ought to prove;
 - i) Open and notorious use of the property,
 - ii) Continuous use of the property
 - iii) Actual possession of the property
 - iv) Excessive use of the property
51. On issue No 1 whether the Plaintiff has proved open, peaceful, and continuous occupation of Nandi/ Kapkangani 438. It is on record as through the testimony of PW1 that she had occupied the property since 1974, when she bought the same together with her late husband, and an agreement for sale between her late husband and Joseph Kiptas was produced. Although the Agreement does not show



the registration number of the parcel, the same is understandable since copy of the green card shows that his parcel was actually registered in 1983 while the Agreement predates the registration.

52. This fact of occupation and possession was corroborated by the evidence of PW2 a neighbour, who indicates that the Plaintiff's and her family have lived there since about 1974 and her last born son is about 45 years old still lives within the said property.
53. DW1 the retired area chief stated that the Plaintiff had lived in the property even before he became a chief, yet he had been a chief for more than 24 years and had even retired.
54. The Defendant herself indicates that the Plaintiff is in occupation of the suit property and that she is using the suit properties as she collects rent from the shops on the suit property. Against all these testimonies, the Court readily accepts that the Plaintiff and her family have resided on the suit property from 1974 and that time started running for purposes of Adverse Possession when the suit property was first registered in the name of Sultan Arap Kaigat on April 29, 1983.
55. So from 1983, when the 1st owner was registered, time for purposes of adverse possession started running and at the time of filing suit in 2018, the Plaintiff have lived there on for 35 years, which is more than 12 years threshold required for the doctrine of Adverse Possession to set in

The Court therefore answer issue number one in the affirmative.

56. Having answered issue No. a) In the affirmative, the Court now checks at issue No 1 (b). The Defendant submits placing reliance on the decision in *Titus Kigoro Manyi v Mburu Kariuki* 2015 eKLR, for the proposition that the Defendant did not have knowledge of the unlawful occupation of the suit land by the Plaintiff.
57. Evidence on record suggests that prior to the filing of the suit, the Defendant knew that the Plaintiff had occupation of the suit land.

In her evidence in chief, the Defendant started that she knew the Plaintiff in 2015. DW2, the retired chief in his testimony produced two letters that he had written, one dated January 26, 2018 and the other one written earlier March 10, 2016, both letters were produced as D exhibits, 2 and 3. While being cross-examined on D Exhibit 3, letter dated January 26, 2018, the witness stated.

58. In Re-examination trial the said letter was written in favour of the Defendant but in the presence of both the plaintiff and the Defendant. From this evidence, it follows that the Defendant was well aware of the plaintiff's occupation of the suit property before the suit was filed.

The inevitable conclusion, as the court finds is trial to Defendant was aware of the plaintiff's occupation of the suit property and the answer to issue number 15 in the affirmative.

Whether the plaintiff is entitled to the Reliefs sought noting that the Defendant was registered as proprietor 2 years prior to filing of the suit?

59. It is the Defendants submissions that the Limitation of Action has not crystallised to entitle the Plaintiff to lodge the claim as the Defendant was registered as the proprietors Nandi/Kap Kangani 438 only 2 years prior to filing of the suit.
60. Indeed a copy of the search produced by the Plaintiff as P Exhibit 5 shows that the Defendant had been registered as the proprietorship on April 27, 2017 and a title issued on April 28, 2017. This suit was filed on March 2, 2018. At time of filing suit the Plaintiff had only been registered as less than 2 years. On the strength of that, the Defendant submits that the 12 year period had not crystallised.



61. That submission however is merely a red herring as the Court has observed and found in paragraph 51 above, time for purposes of Adverse Possession started at the time the original owner Sultan arap Kaigat was registered on April 29, 1983.
62. A mere change of ownerships does not affect the time, as was stated in the case of *Gitbu v Ndeete [1981] KLR*, as well as the decision in *Titus Kigor Munyi v Peter Mburu Kimarii* 2015 eKLR. In *Gitbu v Ndeete*, the Court observed, “the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”
63. It follows there from, that time started running from April 29, 1983 and at time of acquisition of title by the Defendant in 2017, the 12 years period had already crystallised.
64. The Court answers this issue in the negative. Having analysed all the issues for determination, the Courts returns a finding of fact that that the Plaintiff is entitled to be registered as the proprietor of Nandi/Kapgangani/438, the title of the Defendant the registered owner having been extinguished by operation of law.

Disposition: -

65. On a balance of probability, the Court finds that the Plaintiff has proved her case and is deserving of the orders hereby allows the plaint in terms that;
- 1 That the Defendants title in respect of Nandi/Kapgangani 438, be and is hereby extinguished under Section 17 of the *Limitations of Actions Act* and the title in the name of Jane Syombua Mutiso is hereby cancelled.
 - 2 The Land Registrar Nandi County to rectify he register accordingly and Register Beatrice Jadi as the new proprietor of Nandi/Kapgangani/438.
 - 3 Each party to bear its own costs.
66. It is so ordered.

Dated and Delivered in Kapsabet this 26th day of May, 2022.

Hon M N Mwanyale,

JUDGE

In the presence of:

Mr Osango for the Plaintiff

Mr Melly holding brief for Choge for the Defendant

