



Soo v Soo & another (Legal administrators of the estate of the late Kimisik Soo) (Environment & Land Case 55 of 2018) [2022] KEELC 12731 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEELC 12731 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 55 OF 2018
MC OUNDO, J
MAY 26, 2022
IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

BETWEEN

DAVID KIPLANGAT SOO APPLICANT

AND

RAEL CHEPTANUI SOO 1ST RESPONDENT

JOHN KIMUTAI MUSIK 2ND RESPONDENT

LEGAL ADMINISTRATORS OF THE ESTATE OF THE LATE KIMISIK SOO

JUDGMENT

1. By an originating summons dated July 6, 2018 filed under the provisions of section 38 of the *Limitation Act*, order 37 rule 7 and order 40 rule 2 of the *Civil Procedure Rules* the applicant herein who is in possession of a portion of land measuring 0.57 hectares comprised in Kericho/Loret/521 by adverse possession seeks the following:
 - i. That the defendant's/ respondent's claim /interest to that portion measuring 0.57 hectares or thereabouts and comprised in that parcel of land known as Kericho/Loret/521 stands extinguished by the lapse of time.
 - ii. That the plaintiff/ applicant has obtained title and ownership of that portion of land measuring 0.57 hectares or thereabouts comprised in that parcel of land known as Kericho/Loret/521 by virtue of the doctrine of adverse possession.
 - iii. That pursuant to the forgoing, the land registrar Kericho county or the land registrar currently in lawful custody of the land registrar in respect of the land parcel No Kericho/Loret/521 be ordered to delete the name of Kimisik Soo from the register and/amend the map to reflect the



area so curved in favour of the plaintiff and issue him with fresh title to the portion measuring 0.57 hectares or thereabouts comprised in the said parcel.

- iv. For an order that the applicant is entitled to costs of the suit
 - v. Any order that the honorable court shall deem fit to grant.
2. The originating summons is premised on the grounds stated on the face of it as well as the supporting affidavit of David Kiplangat Soo the plaintiff herein.
 3. Simultaneously with the originating summons, the plaintiff had filed a notice of motion dated the July 6, 2018 where he had sought for injunctive reliefs restraining the defendants, their servants or anyone else claiming under them from trespassing, entering ploughing, damaging, wasting, alienating, transferring, or in any way interfering with his use, possession and ownership of part of that parcel known as No Kericho/Loret/521 measuring 0.57 hectares. Interim orders were granted on the July 17, 2018.
 4. Subsequently, the 1st defendant filed her replying affidavit on the October 1, 2019 wherein she refuted the allegations made by the plaintiff and proceeded to state that the land sale agreement dated June 29, 1999, was falsified as at that time, the proprietor of those suit land was deceased and a succession cause No 273 of 1999 was still on going. That the agreements dated November 12, 1999, September 22, 2000, and June 29, 1999 were all forgeries and parties had no capacity to sell the land. The 1st defendant however confirmed that the plaintiff had entered onto the suit land in the year 2010 wherein he had been advised by the clan elders not to develop the land until after the succession process had been completed. That his entry therefore was based on forged sale agreements and forceful entry and thus he did not deserve the orders sought from the court.
 5. Directions were taken on the September 29, 2021 to the effect that the originating summons be deemed as the plaint. The 1st defendant's replying affidavit was to be deemed as her defence. Leave was granted to the 2nd defendant to file his replying affidavit within 21 days. Parties were further granted leave to file their respective witness statements and all documents and that the matter would proceed by way of *viva voce* evidence.
 6. Subsequently, whereas the plaintiff complied with the court's direction, there was no compliance by the defendants despite service.
 7. On the October 21, 2021 when the matter was called out for hearing, only the plaintiff responded and there having been no response from the respondents, the court directed for the plaintiff to proceed with his evidence pursuant to the provisions of order 17 rule 3 of the *Civil Procedure Rules*.
 8. The plaintiff testified to the effect that he was now farmer having retired as cultural officer. That he had sued the defendants in their capacities as the administrators to the estate of late Kimisik Soo who was the registered proprietor of land parcel No Kericho/Loret/521 and husband to the 1st defendant.
 9. He produced the certificates of confirmation of grant dated April 2, 2019 issued in succession cause No 273 of 1999 as Pf exh 1 and a copy of the green card to No Kericho/Loret/521 dated May 30, 2018, as Pf exh 2.
 10. The plaintiff went on to testify and that in the year 1999 the 1st defendant sold to him 1.3 acres of land at a cost of Ksh 234,000/= which land comprised in land No. Kericho/Loret/521. That the parties had executed a sale agreement on June 29, 1999, which agreement he produced as Pf exh 3.
 11. That after he had paid for the 1.3 acres, the 1st defendant had sold to him another 0.1 acres at a cost of 20,000/= which transaction was also reduced into an agreement dated November 12, 1999 herein



- produced as Pf exh 4. That he had paid for the second parcel of land six months after purchasing the first parcel of land and the payments for both parcels of land had been completed in the year 2000 and acknowledged on the September 22, 2000 as per the acknowledgement letter herein produced as Pf exh 5. That it had been after the acquisition of the land that he had taken possession and occupation, fenced the same using barbed wire and Ki-apple trees. He had then proceeded to plant trees along the fence and had put up temporal structures made of wood and iron sheets and dug a pit latrine as well as cultivating and planting various crops like maize, potatoes, beans, avocado and also a tree nursery of about 50,000 seedlings, and about 5,000 seedlings of cypress trees.
12. That in the beginning of the year 2010, he had started the preparation of construction of a permanent residential house which was completed in the year 2014 and contained four bedrooms, dining room, kitchen, store and a lounge. He produced pictures depicting the developments made on the suit land as Pf exh 6(a-d)
 13. He went on to testify that the 1st defendant had even applied for consent from the land control board for the subdivision of the land to be excised and the portion given to him. The consent had been issued by the Bureti land control board on June 14, 2000, herein produced as Pf exh 7, wherein she went ahead and signed the transfer form, which he produced as Pf exh 8. That the transfer was however not completed because the 1st defendant's family had not completed the succession process for No Kericho/Loret/521.
 14. It was his evidence that it took possession of the property after he had purchased it in 1999 and has been in occupation for about 22 years. That no dispute had ever arisen over the issue of the land on which he continues to live peacefully. That the certificate of confirmation showed that the land was to be subdivided and distributed to the beneficiaries of Kimisik Soo however the same has not been subdivided nor distributed because he had lodged a caution on the land on May 21, 2018 having noticed that he had not been included in its subdivision. The plaintiff sought that the court extinguishes the title to No Kericho/Loret/521 as far as his portion of 1.41 acres was concerned and that the defendants meets the costs of the suit.
 15. The second witness Richard Kipkurgat Kirui testified as PW2 to the effect that both the plaintiff and the 1st defendant were his neighbors. He adopted his statements as his evidence and proceeded to confirm that indeed the plaintiff had settled on the land in the year 1999 and that the owner of the land was one Kimisik Soo. That the plaintiff had peaceful occupation of the suit land and had developed it by putting up a fence, planting trees and constructing two houses, one which was permanent, on the same.
 16. Richard Kibii testified as PW3 wherein he confirmed that the parties to the suit were his neighbors/ he confirmed that he had stayed in the village for about sixty (60) years and that the plaintiff herein had lived on the suit land since 1999. That pursuant to the 1st defendant intimating that she had wanted to sell the land, he had looked for a buyer, the plaintiff herein, whom he had taken to the 1st defendant's house and left him there. That in the year 2000 he found the plaintiff had already settled on the land upon which he had ploughed and erected a fence. He also confirmed that there had been no dispute since then and that they lived as neighbors. The plaintiff closed its case and filed submissions.

Plaintiff's Submissions.

17. The plaintiff filed his issues for determination as follows;
 - i. Whether the plaintiff has been in occupation of a portion measuring 1.4 acres (0.5 hectares) comprised in all that property known as No Kericho/Loret/521 for a period of at least 12 years.



- ii. Whether the plaintiff's occupation if any has been quiet, peaceful, uninterrupted, was time and or exclusive.
 - iii. What remedies are available to the parties herein?
18. On the first issue for determination, the plaintiff submitted that he had purchased a piece of land measuring 134 acres comprised in all that property known as No Kericho/Loret/521 via and the agreement dated June 19, 1999 at a consideration of Ksh 234,000/= to which she had paid Ksh 203,000/= upon execution of the agreement. That he had later purchased a portion measuring 0.11 acres, from the 1st defendant which was adjacent to the earlier portion *vide* an agreement December 12, 1999 and that he had cleared the total purchase price of both parcels of land being Ksh 254,000/= in the year 2000.
 19. That he took possession of the suit land in 1999, fenced the same off using barbed wire and kie-apple trees, planted trees along the boundaries, put up both temporal and permanent structures, cultivated and planted various crops like maize, potatoes, beans and avocados and even planted a tree nursery of about 50,000 seedlings.
 20. That despite the 1st defendant being amenable to transfer the suit land to the plaintiff, the transfer was effected as succession proceedings in respect of the estate of the late Kimisik Soo had not been concluded.
 21. It was the plaintiffs submission that he had been in occupation of a portion measuring 1.4 acres comprised in all that property known as No Kericho/Loret/521 from the year 1999 when he purchased it from the 1st defendant to date. That his occupation has been an interrupted and exclusive for a period of at least 18 years from 1999 to 2018 when the suit was filed. That he had also undertaken various developments which were hallmarks and/or indications of his long exclusive, open, quiet and peaceful occupation of the suit property.
 22. That the period of limitation as a purchaser of land in his favour ran from the year 2000 when he completed payment of the purchase price for acquisition of the subject parcel of land. That the 1st defendant's title as legal representatives of the estate of Kimisik Soo ought to be extinguished by dint of his adverse possession for a period of more than 18 years. The plaintiff relied on the Court of Appeal decision in the case of *Peter Mbiru Michuki v Samwel Mugo Michuki* [2014] eKLR to submit that a claim for adverse possession could be sustained by the purchaser in possession of the subject property.
 23. That in view of the fact that the instant claim was raised against the estate of Kimisik Soo (deceased) and further while relying on the findings of the Court of Appeal in the case of *Mate Gitabi v Jane Kaburu Muga & 3 others* Nyeri Court of Appeal civil case No 43 of 2015 cited in *Phyllis Wajiru Kamau v Wilson Gichuhi Gachagwe & 2 others* [2019] eKLR, his claim was justiciable and sustainable. The plaintiff sought that his originating summons dated July 6, 2018 be allowed as prayed.

Determination

24. This being a matter where the plaintiff sought for orders that he be registered as proprietor of 0.57 hectares or thereabouts comprised in that parcel of land known as Kericho/Loret/521 having acquired the title by virtue of the doctrine of adverse possession, the court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in section 7 of the *Limitation of Actions Act*, (cap 22) in these terms:



25. Section 7 of the *Limitation of Actions Act* provides as follows:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”
26. Section 13 of the *Limitation of Actions Act* aforesaid further provides that:
- A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
27. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court order vesting the land in him.
28. Section 37 of the *Limitation of Actions Act* provides that:
- Where a person claims to have become entitled by adverse possession to land registered under any of the acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
29. In terms of section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in order 37 rule 7 of the *Civil Procedure Rules* as follows:
- i. An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
 - ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
30. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.
31. On analyzing the above evidence, it is the plaintiff's case is that he had sued the defendants in their capacities as the administrators of the estate of late Kimisik Soo who was the registered proprietor of land parcel No Kericho/Loret/521 and husband to the 1st defendant. That he had entered into the suit property in the year 1999 through a sale agreement in the year 1999 with the 1st defendant who sold to him 1.3 acres of land at a cost of Ksh 234,000/= which land comprised in land No Kericho/Loret/521 as per an executed agreement of June 29, 1999 herein produced as Pf exh 3. That after he had paid for the 1.3 acres the 1st defendant had sold to him another 0.1 acres at a cost of Ksh 20,000/= which transaction was also reduced into an agreement dated November 12, 1999 herein produced as Pf exh 4. That he had paid for the second parcel of land six months after purchasing the first parcel of



land and that the payment for both parcels of land had been completed in the year 2000, which now comprised a total acreage of 0.57 hectares or thereabouts.

32. That from the year 1999, he has been in uninterrupted occupation of the suit property which he had extensively developed and has now become entitled to be registered as the legal owner thereof in place of it registered proprietor the deceased Kimisik Soo, whom he admits is the title holder of the suit property.
33. It is further the plaintiff's case that he has been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the defendants for more than 18 years since he bought it. According to the plaintiff, the said period is more than the 12 years required under the law for him to acquire title against the estate of the late Kimisik Soo, which was represented by the defendants, by way of adverse possession.
34. It is against this background, that the issue that arises for my determination is whether or not the plaintiff has acquired land measuring 0.57 hectares or thereabouts comprised in that parcel of land known as Kericho/Loret/521 by virtue of adverse possession.
35. I have looked at agreements dated the June 29, 1999, produced as Pf exh 3 and the second sale agreement of November 12, 1999 herein produced as Pf exh 4 and it is not in contention that the plaintiff herein took possession and occupation of the suit properties as a purchaser as per the acknowledgment letter of the September 22, 2000 herein produced as Pf exh 5. I have also considered the fact that at the time of the sale agreement the suit parcel of land was still registered to the deceased one Kimisik Soo as per the copy of the green card dated May 30, 2018 herein produced as Pf exh 2. That there had been no succession cause filed in court at the time the sale transaction occurred and therefore the 1st defendant from whom the plaintiff bought the suit land had no title to pass. indeed the certificate of confirmation of grant to the deceased's estate (Pf exh 1) was issued on the April 2, 2019 which was 20 years after the plaintiff had taken possession of the suit land.
36. The entry onto the 0.57 hectares of land by the plaintiff therefore in 1999 became void by operation of the law thereby becoming adverse from the time the parties entered into the agreement for sale. The sale agreement further became null and void after the expiry of the respective six months, for lack of consent of land control board under the [Land Control Act](#).
37. Indeed the Court of Appeal in [Samuel Miki Waweru v Jane Njeri Richu](#) [2007] eKLR held 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 permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.
38. Pursuant to above finding and the fact that the plaintiff's possession of the suit land was open, notorious and uninterrupted for a period of more than 18 years and further that there had been continuous development and cultivation which involved planting of trees, erecting thereon both permanent and semi-permanent residential houses, and putting up a fence, I find the said developments were hallmarks and/or indications of his long exclusive, open, quiet and peaceful occupation of the suit property and went beyond a mere license thus giving the plaintiff the position of an adverse possessor.



39. Since the alleged sale agreement became null and void by virtue of the vendor not having any title to pass, and secondly after the expiry of the respective six months there having not been consent of the land control board, I find that the decision to be rendered herein is solely on the basis of the claim of adverse possession.

40. In the case of *Mate Gitabi v Jane Kaburu Muga and 3 others* Nyeri Court of Appeal civil case No 43 of 2015, the court was dealing with a situation where an adverse possessor claimant was in occupation of the land of a deceased person. The court stated thus;

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than thirty years since the appellant took adverse possession of the land or dispossessed the 1st respondent...”

41. The Court of Appeal in its decision in *Karuntimi Raiji v M'makinya M'itunga* [2013] eKLR held that:-

another issue raised by the appellant is that a claim for adverse possession does not survive a deceased person. section 30 (f) of the Registered Lands Act and section 2 of the *Law Reform Act* provide an answer to the issue. Section 30 provides that:

Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:

- a.;
- b.;
- c.;
- d.;
- e.:
- f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

section 30 (f) preserves rights being acquired by virtue of limitation of actions. A claim of adverse possession is a claim founded on limitations of action. We find that as of the date of registration of the appellant as proprietor of the suit property on March 22, 1973, the respondents claim to adverse possession existed and time started to run. This claim continued uninterrupted for over 21 years.

42. The said holding answered the question as to whether a claim for adverse possession could be made against the estate of a deceased person. From the foregoing analysis, it is clear that the answer is in the affirmative.



43. Indeed the Court of Appeal in the case of *Benjamin Kamau Murma & others v Gladys Njeri*, C A No 213 of 1996 held that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

The onus is on the person or persons claiming adverse possession:

“.. to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

44. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

45. I find that the plaintiff has sufficiently demonstrated the elements herein above stated thereby sufficiently establishing a claim to the land by adverse possession. The plaintiff’s originating summons dated the July 6, 2018 is herein allowed in its entirety as prayed.

46. Each party to bear their own cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 26TH DAY OF MAY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

