



**Chepkener v Chepkurui & another (Environment & Land Case
52 of 2018) [2022] KEELC 3552 (KLR) (18 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 52 OF 2018
SM KIBUNJA, J
MAY 18, 2022
IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF
KENYA
AND
IN THE MATTER OF L.R. NO. E/MARAKWET LOWER KABITO/ 195
AND
IN THE MATTER OF:

BETWEEN
NATHANIEL KIBET CHEPKENER PLAINTIFF

AND
FRANCIS KIPROP CHEPKURUI 1ST DEFENDANT
KIPROB BIRIR 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff approached the court by way of the originating summons dated the 8th March 2018, that is brought under section 38 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya, and Order 37 Rule 7 of the *Civil Procedure Rules*, seeking for judgement and the determination of the following questions, against the defendants jointly and severally;
 - i. “That the interest of Francis Kiprop Chepkurui in the 3.23 Ha in L.R. No. E/Marakwet/ Lower Kabito/19x have been extinguished by lapse of time and by notice of the *Limitation of Actions Act*.
 - ii. That the plaintiff has acquired title by way of adverse possession of the 3.23 Ha in L.R. No. E/Marakwet/ Lower Kabito/19x.



- iii. That the land register relating to the suit be rectified to reflect the plaintiff as the owner of the aforesaid suit land and any title documents issued be cancelled.
 - iv. That the 1st Defendant do effect transfer of the said parcel of land in favor of the plaintiff.
 - v. That a permanent injunction does issue restraining the defendants permanently from interfering with the plaintiff's use, possession ad occupation of L.R. No. E/Marakwet/ Lower Kabito/19x measuring 3.23 Ha.
 - vi. That costs of this suit be borne by the defendants.”
2. The summons is supported by the affidavit sworn by Nathaniel Kibet Chepkener, the plaintiff, on the 8th March 2018, in which he deposed inter alia that he purchased the suit property from Pius Birir, the late father to the 2nd defendant, in 1995; that he moved onto the land the same year, and had been in peaceful occupation of the same and cultivated it as a matter of right ever since, for over 21 years; that the 1st Defendant used fraudulent means and obtained title to the suit property, to defeat his interest; that the defendants had never lived on the suit property; that he has been in an open, free and uninterrupted possession of the suit land for over 21 years, and the court should make a finding that any interest, right or claim held by the defendants over the suit property has been extinguished; that he should be declared the owner of the said land through adverse possession.
 3. The plaintiff's claim is opposed by Francis Kiprop Chepkurui, the 1st defendant, through his replying affidavit sworn on the 6th April 2018, in which he inter alia deposed that the suit property had never been registered in the name of Pius Birir; that his registration with the said land on the 7th July, 2010 and issuance of the title deed on the 6th October, 2017 was pursuant to the adjudication process, and not therefore through fraud; that the plaintiff has not been in an open, free and uninterrupted possession of the suit property. The 1st defendant also raised a counterclaim that he is entitled to vacant possession of the suit property, and the plaintiff's possession thereof is unlawful and offends the sanctity of title to the land. That his prayer for an order of eviction against the plaintiff, and costs should be issued.
 4. Directions that the summons was to be heard through *viva voce* evidence were taken by consent on the 10th April, 2018.
 5. That during the hearing, the plaintiff testified as PW1, and called as witnesses Francis Chesire Kimuge, Barnabas Kiplagat Marori, and John Bosire, who testified as PW2 to PW4 respectively. PW2 told the court he was a retired chief, and neighbor to the plaintiff. He confirmed that the plaintiff had bought land from Pius Birir. That plaintiff had sent him on the 22nd July, 1996 to take Kshs. 20,000 to Aggarwal, an advocate to Pius Birir, and later on the 18th August, 1996 he witnessed the payment of Kshs. 24,500 to Pius Birir, as final payment for the land. PW4, a land adjudication officer, testified that according to the final official adjudication records, the suit land was first registered on the 21st January, 1985 with Pius Ruto Birir as the owner. That after the 60 days for inspection the name of Pius Ruto Birir was replaced with Nathaniel Kibet Chepkener as the owner. That after a recheck by the then officer in charge, that entry was found to have been erroneous, and ownership was reverted to Pius Ruto Birir on the 15th February, 2004.
 6. The 1st Defendant testified as DW2. He called Joseph Cheptumo Yator as a witness who testified as DW1. DW1 testified that he farmed on the ten (10) acre suit land from 1984, with the 1st defendant's permission, until 2010 when he left after being asked to stop using it by people who alleged the plaintiff had bought it. The 1st defendant testified next as DW2 that he was the first registered owner of the suit property. That he had asked Pius Birir to hold the land for him in 1983, and allowed DW1 to continue using it after he found him on it in 1987. He disclosed that he was the stepbrother to Pius Birir, the



then chief, who died in 2006. He also confirmed that the plaintiff was on the suit property, and that he wanted him out.

7. The learned counsel for the plaintiff and 1st defendant filed written submissions dated the 22nd February, 2022 and 7th March, 2022 respectively.
8. The issues for the court's determinations are as follows;
 - a. "Whether the Plaintiff has established having been in adverse occupation of the suit land, and if so from when.
 - b. Whether the plaintiff's occupation of the suit property was open, notorious and without permission of the owner.
 - c. Whether the plaintiff's occupation of the suit land has been for a continuous and uninterrupted period of over 12 years.
 - d. Whether the 1st defendant has made a case for the eviction of the plaintiff from the suit land.
 - e. Who pays the costs in the suit and counter claim.
9. The court has carefully considered the parties' pleadings, evidence tendered by both sides, submissions filed by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions;
 - a. That from the filed submissions, the parties to the suit are in agreement as to the governing law and principles for a claim of title by way of adverse possession to succeed. They both agree that this claim arises under section 7 of the Limitation of Actions Act, chapter 22 of Laws of Kenya, which provides that:

" 7. Actions to recover land

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 or, if it first accrued to some person through whom he claims, to that person."

The court is indeed, in agreement with the Counsel's summation of what needs to be established for such a claim to succeed as laid out in the decisions cited by the parties in *Mbira vs Gachubi* (2000) EA 1 and *Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburur Muga & 3 others* [2017] eKLR. A claimant has to prove that he has been in exclusive possession of the land, openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.

- b. That in this case, the date of registration of the suit land is not contested. The suit property was first registered in 2010. The 1st Defendant contends that it is an established position of law that property has to first be registered before a claim of adverse possession can commence. To this end, he urged the court to find that the computation of the 12-year period under section 7 of the Limitation of Actions Act should start from 2010. He cited several superior courts decisions being, *John Mungai Karua vs Muguga Farmers Co-Op Society & 4 others* [2015] eKLR, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1 KLR 184, *Haro Yonda Janje v Sadaka Dzengo Mbauro & another* [2014] eKLR and *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR. Indeed, it is true that in the above decisions among others, the courts



have held that adverse possession proceeds against registered land. The Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR stated that:

“In *Teresa Wachuka Gachira v Joseph Mwangi* Gachira, Civil Appeal No.325 of 2003, the Court emphasized the importance of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court. See *Kyeyu v Omutu*, Civil Appeal No. 8 of 1990. See also the present position in *Johnson Kinyua v Simon Gitura* Civil Appeal No.265 of 2005, where this Court found that the existence and proprietorship of land can be proved either by an extract copy of title or certificate of official search. The registered owner of any person who may have an interest in the property the subject of the summons must be served with it.” [emphasize added]

That I am persuaded that this requirement arises from the fact that a certificate of title is in law, conclusive proof of ownership of a disputed property. Therefore, as noted above, the existence and ownership of property can be deduced and by extension, the adverse claim against a specific person over a specific property, can be adjudicated through such a certificate.

- c. That further to the foregoing, it is my considered opinion that in adverse claims, the key question is simply whether it can be established who owns suit property. This position is apparent in the concurring opinion of Ouko JA, in *Mtana Lewa* (*supra*) where he stated: -

“I hold the view that the previous justification that a squatter has a right of invading private land (as opposed to public land) if the paper owner “abandons” it and the squatter occupies it for a period of 12 years is no longer plausible. To begin with, it is a criminal offence under Section 155 for a person to unlawfully occupy a public land. Secondly in terms of Section 107, the Government can compulsorily acquire private land and compensate the paper owner. Why should a stranger be permitted to invade private land regardless of the law of trespass specifically Section 3 of the *Trespass Act*, and even after that be rewarded with it for free after 12 years.”

The said honourable judge further noted that adverse possession is a claim preserved against private land, but cannot proceed against public land. It is meant to address private landowners and caution against laxity in defending one’s private property rights. That is the same position seen in all the superior court cases cited by the 1st Defendant as set out above. That in the case of *John Mungai Karua* (*supra*) the suit failed because the Plaintiff failed to sue the proprietors of the property. The court stated that;

“There is the alternative prayer for adverse possession. It is not necessary for me to go to the merits or otherwise of this claim. It must fail for the simple reason that the plaintiff never sued the proprietors of the land that he seeks to claim by way of adverse possession. I mentioned earlier that the title holders of the land parcels Nakuru Municipality Block 22/ 511, 512, 514, 516, 517 and 518 are not parties to



this suit. There is no way I can entertain the claim for adverse possession, for such claim, must be directed at the registered proprietors of the land parcels in issue.”

That in *Kasuve (supra)* the requirement of registration was pursued by the court for two distinct reasons. One, the property in question was un-demarcated, and therefore difficult to ascertain to what extent it was claimed under adverse possession. Two, and most importantly, the parties sued were not the ones whose direct interest in the suit property was in question. The court stated:

“The appellant did not produce any documents to show that the first and 2nd respondents are registered in respect of any of the four sub-divisions and the averments above remain unsubstantiated. Hence the appellant did not establish any cause of action against the first and second respondents. The 3rd, 4th and 5th respondents are beneficiaries of the estate of Ndolo who got the land through a judgment of the Court. They are not the administrators of the estate. Elizabeth Kamene Ndolo who got the bigger share of the ranch and who was the executrix of the estate of Ndolo was not made a defendant.

In our view, the proper defendant to the plaintiff’s claim should have been the estate of Ndolo through the executrix of the will and not the beneficiaries.”

And in *Haro Yonda Janje (supra)* the court stated:

“The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession.”

That the decisions above were concerned with the fact that the suits were not commenced against the true owners of the suit properties. For this reason, reliance was placed on the land register, and the failure to produce them which would have enabled the true owner respond to the claim of adverse possession.

- d. That in the instant case however, the true owner is known. The 1st Defendant has asserted title since 1984, and it is against him and the 2nd Defendant that the claim of adverse possession is raised. As per his claim, he has owned the property since 1984 and handed it over to DW1 in 1987 to cultivate and rear livestock, and was issued with the title in 2017. He has asserted and demonstrated that during the adjudication process, as early as 1984 and later in 2003, he was filing objections claiming title to the suit property. The plaintiff has in turn argued that he entered the suit property in 1995. Further, the size of the suit property and its exact dimensions were known all along. The plaintiff’s witness, Barnaba Marori explained that he was a retired surveyor, and that he had undertaken survey and demarcation of the suit property. With this sequence of facts, I am persuaded that there is merit in analyzing the plaintiff’s claim regardless of the suit land’s first registration being in 2010, as the 1st Defendant’s claim of ownership of the suit property dates back to several years before the date of the start of the Plaintiff interests.
- e. That on the issue of whether the plaintiff was ever in open, continuous, and uninterrupted possession of the suit property for over 12 years, it was his testimony that he came into possession of the property in 1995 following a purchase from Pius Birir. Whereas this transaction has been questioned by the 1st defendant, and no sale agreement has been tendered, the payment receipts availed by the plaintiff are corroborative of his assertion that there was a sale transaction on or around 1995, when he claims to have entered the suit property. Further,



his witness Francis Kimunge, PW2, confirmed the existence of the sale of land transaction between Pius Birir and the plaintiff in 1996. It was his evidence that at one time he was sent by the plaintiff to take money to the advocate of Pius Birir. He also testified to have witnessed the final installment being paid to Pius Birir, a fellow Chief of another Location. That the two payments are evidenced by receipts of 22nd July, 1996 and 18th August, 1996 which bears his name. Further, in the adjudication record of the suit property, it shows that in 1990s, the name Pius Birir was crossed out as owner and replaced with that of the plaintiff, before being reinstated again in 2003. The name was on a date that was not indicated crossed out again, and replaced with the 1st defendant's name, that according to PW4 was irregularly done. Those entries and cancellations were corroborated by evidence of George Bosire, PW4, who is a land adjudication officer in Elgeyo Marakwet. That according to PW4, the first registration of the suit land should have been in the name of Pius Ruto Birir. The plaintiff sued Kiproop Birir, the 2nd defendant, as the administrator of the estate of Pius Birir, but he has neither filed any replying papers nor in any other way defended this claim. That in case the court was to find that late Pius Birir was the owner of the suit land, the plaintiff's claim of entitlement under adverse possession remains undisputed, as the 2nd defendant has not defended the suit on behalf of the estate.

- f. That on his part, the 1st defendant claimed he obtained the suit land in 1984, and that he granted possession to DW1, Joseph Yator, who claimed to have stayed in the suit property till 2010, when he was unceremoniously evicted under threat of arrest by police officers, allegedly at the behest of the plaintiff. It was his testimony that his structures on the property were demolished. That after considering the two rival positions, it is clear that on a balance of probabilities, the plaintiff's narrative carries weight. At the first instance, if the 1st defendant's witness, Joseph Yator, DW1, was unceremoniously evicted, why did he simply not report to, and ask, the 1st defendant to protest the invasion? No reason has been tendered as to why the 1st defendant, instead of contesting his claim, simply waited and after about seven (7) years later, emerged with a title deed in his name, after having the plaintiff's name cancelled from the adjudication register in 2010. Further, given the plaintiff name was in the adjudication register from 2003 to 2010, then at the very least, the 1st defendant, Adjudication and Land Registrar's offices needed to have involved the plaintiff in the processes they undertook leading to the 1st defendant's registration with the suit land in 2010, and issuance of the title deed in 2017.
- g. That I am inclined to find that the plaintiff was on a balance of probabilities living on the property as early as 1996, when the final payment of the purchase price was made to Pius Birir. That as there was no consent of the Land Control Board was obtained within six months after the sale agreement or the last payment of purchase price, and no transfer of the suit land was effected to his name, then even though the plaintiff had commenced possession of the suit property with permission as a purchaser, that license is taken to have lapsed after six months, that is, on or about 18th February 1997. That from that date, the plaintiff's possession of the suit land became adverse the title of the owner, be it the 1st defendant or Pius Birir. This would mean the plaintiff has been on the property without protest from the 1st defendant and Pius Birir, represented in these proceeding by the 2nd defendant, for over the 21 years, as he has claimed, which is well over the 12-year period prescribed by the *Limitation of Actions Act*.
- h. That on the question of whether the plaintiff's occupation was open, notorious and adverse to the interests of the 1st defendant, the plaintiff has provided photographs in evidence of his occupation that show extensive farming activities on the suit property. Whereas the 1st defendant had questioned the age of the said trees so as to determine whether the plaintiff



planted them, no expert evidence was presented to disapprove the age assessment as per the plaintiff. That nevertheless, even if the court was to disregard the trees, the photographs presents evidence of open occupation of the suit property by the plaintiff.

- i. That the 1st defendant has not claimed at any point since he allegedly acquired the property in 1984 that he permitted the plaintiff to reside therein. He further has not proven any protest against the plaintiff's occupation of the suit land, other than in the chief's report of 8th January 2018 asking the plaintiff to vacate the suit property. It is apparent by 2018, the plaintiff, whose possession of the suit land became adverse in 1997, had been in occupation thereof for over 12 years. Therefore, for a significant period of the plaintiff's occupation, the 1st defendant never asserted his claim to the land. I am therefore convinced, and find that the plaintiff's occupation of the suit property was open, notorious and adverse against the interests of the 1st defendant.
 - j. That having found that the plaintiff was in open and notorious occupation of the suit property for a continuous period of over 21 years from 1997, until the protest made in 2018, and which he did not obey, and as it was admitted he was still in possession as of the time of the defence hearing, this court finds that the 1st defendant interest over the suit land has long been extinguished, and is precluded from claiming ownership of the suit property. This court finds that the plaintiff has obtained title to the suit property by way of adverse possession.
 - k. That the findings above confirm that throughout the time the 1st defendant was having his name entered in the adjudication record in place of that of Pius Ruto Birir, and later being registered as proprietor of the suit land in 2010, and by the time he was issued with the title deed in 2017, he was aware that the plaintiff had had possession of the land for over twelve (12) years. He did not take any legal steps to have the plaintiff's interest over the suit land terminated first or have him vacate from the land. That having found that the 1st defendant's interest over the suit land has been extinguished by the plaintiff's adverse possession for a period of over twelve (12) years, then his counterclaim has no merit and must fail.
 - l. That though the successful party would under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya ordinarily be entitled to costs, the court is of the view that justice in this matter would better be served with each party should bear his own costs, in both the main suit and counterclaim.
10. That flowing from the foregoing findings, the court finds the plaintiff has proved his claim against both defendants, while the 1st defendant has failed to establish his counterclaim against the plaintiff. The court therefore enters judgement for the plaintiff and against the defendants in the following terms;
- a. That the interests of Francis Kiprop Chepkurui, the 1st defendant, and Pius Ruto Birir, whose estate is represented by Kiprop Birir, the 2nd defendant, in the 3.23 hectares in Elgeyo/Marakwet/Lower Kabito/19x, have been extinguished by the lapse of over twelve (12) years that the plaintiff has been in adverse possession of the said land from 1997.
 - b. That Nathaniel Kibet Chepkener, the plaintiff, has acquired title by adverse possession to the 3.23 hectares of Elgeyo/Marakwet/Lower Kabito/19x.
 - c. That the 1st defendant should transfer 3.23 hectares of Elgeyo/Marakwet/Lower Kabito/19x to the plaintiff within ninety (90) days from today, and in default the Land Registrar, Elgeyo Marakwet is hereby ordered to upon receipt of a copy of this order, to rectify the suit property's register, cancel the title deed issued in the name of the 1st defendant, and register the plaintiff named herein as the legal owner/proprietor.



- d. That a permanent injunction is hereby issued restraining the defendants from interfering with the plaintiff's use, possession and occupation of Elgeyo/Marakwet/Lower Kabito/19x, measuring 3.23 hectares.
- e. That the 1st Defendant's counterclaim be and is hereby dismissed.
- f. That each party to bear his own costs in both the main suit and counterclaim.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 18TH DAY OF MAY, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PLAINTIFF : Absent

DEFENDANTS: Absent

COUNSEL: Dr. Chebii for the Plaintiff

Mr. Tororei for the Defendants

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET

