



REPUBLIC OF KENYA



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**Kemei v Sang (Environment & Land Case 85 of 2021)
[2022] KEELC 2807 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2807 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 85 OF 2021
MN MWANYALE, J
JUNE 30, 2022
FORMELY ELDORET ELC SUIT NO. 92 OF 2019**

BETWEEN

HILLARY KIPLAGAT KEMEI PLAINTIFF

AND

REMMY KIPKOECH SANG DEFENDANT

JUDGMENT

1. Hillary Kiplagat Kemei, the Plaintiff herein took out Originating Summons against the Defendant Remmy Kipkoech Sang, seeking to be declared as having obtained title over land parcel No. Nandi/Ndubeneti/476, by way of Adverse Possession for having occupied the said parcel inec, vic, nec, clam, nec precario for a period of 12 years since January 1990.
2. He further seeks that he be registered as the sole absolute and indefeasible proprietor of the said parcel of land Nandi/ndubeneti/476 and that the County Land Registrar, Nandi County to enter his name as the proprietor of Nandi/ndubeneti/476.
3. The Originating Summons is opposed by the Replying Affidavit of the Defendant, Remmy Kipkoech Sang.
4. The record does not reflect whether directions on the Originating Summons were issued. However, parties herein having consented the calling witnesses and the witnesses thereof giving viva voce evidence, the Court directs that the Originating Summons be deemed to be the Plaintiff and the Replying Affidavit be deemed to be the Defence, as was held in Eldoret Court of Appeal case No. 4 of 2018, Shadrack Bungei -vs- Selina Jerotich.



Plaintiff's Case

5. It is the Plaintiff's case that he has been in open, continuous and uninterrupted possession of Nandi/ndubeneti/476 measuring 10.0 Ha since 1990; the said occupation has also been without the consent of the Defendant Remmmy Kipkoech Sang, thus the Defendant's title ought to be extinguished having been kept out of possession since 1978.
6. The Defendant has been kept out of possession from the suit land for cumulatively more than 29 years as the Plaintiff has resided thereon for a period of 30 years. That from 1990 the title still stood extinguished independently in 2002.
7. It is the Plaintiff's further case that his entry on the property was as a son in 1990 and thus seeks the orders sought.
8. The Plaintiff has brought the case on his behalf and not on behalf of the Estate of his late father and his family.

Defendant's Case: -

9. The Defendant's case is as stated in his Replying Affidavit, dated 17th December 2021. It is the Defendant's case that;
 - i. The Plaintiff is not deserving of the orders sought, in the Originating Summons.
10. That the Defendant is the registered owner of this suit property and that pursuant to that right he had charged the property for a loan of kshs. 5,000,000 /= from Family Bank Limited on 30/01/2012.
11. At time of charging the property, Family Bank, conducted a valuation report on the suit property which and concluded that the property was currently unoccupied.
12. That the Defendant has always being in possession of the property, and that the Plaintiff has not satisfied the conditions of adverse possession on set out in Section 7 of the Limitation of Actions Act; which conditions are open exclusive, continuous and uninterrupted possession for over 12 years.
13. On 19th March 2001, the Land dispute Tribunal sitting at Kilibwoni, Nandi District heard the dispute in Kapsabet LDT No. 46 of 2001 and gave an award determining that the Defendant was the rightful owner of Nandi/ndubeneti/476 which award was adopted and a decree issued on 28th September 2001. The said decree was never appealed from.
14. In 2010, he reported the Plaintiff to Kapsabet Police Station and a Criminal Case Kapsabet PMCR No. 23 of 2011, Republic -vs- Barnabas Kipkemei Mitei and Hillary Kiplagat Chirchir. The initiation of the Criminal Case in 2011 was an interruption of the purported open, exclusive and quiet possession by the Plaintiff. Judgment in the case was rendering in 2015, which is when time can be deemed to have started running.
15. That the Plaintiff's father Barnabas Mitei, admitted that he had never been in possession of the suit property that his property was Nandi/ndubeneti 509 adjacent to the suit property, and the Plaintiff herein confirmed that at the time of the alleged offence in 2011, he was a school going student at St. Marks Boys High School, in 2011, he was thus a minor and could not lawfully claim a right to land independently.
16. There was thus evidence of the Plaintiff's occupation been interrupted and that time started running in 2011, thus at time of filing suit in 2019, 12 years of exclusive open, interrupted, notorious and continuous possessions has not lapsed.



17. The Defendant thus seeks the Plaintiff's case be dismissed with costs.

Plaintiff's Evidence

18. The Plaintiff called a total of three witnesses in support of his case. P. W. 1. Was the Plaintiff Hillary Kiplagat Kemei, who adopted his supporting affidavit dated 31st July 2019 as his evidence in chief, as well as produced his list of documents dated 20/12/2021 as his exhibits, P Exhibit 1 Green Card, and Certificate of Official Search as P Exhibit 2.
19. It was the Plaintiff's testimony as contained in his supporting affidavit, that the Defendant acquired the tile to the property illegally in 1974, and has now charged the property to the Family Bank.
20. It was his testimony that he was born in 1990 but his identity card indicated that his Date of Birth as 1994. That he was charged with malicious damage and acquitted. And that since 1990 when he was born he has lived thereon and not been removed.
21. In Cross – examination, he stated that the property initially belonged to his grandfather, who also had another property 509. He testified in the criminal case. The two properties Nandi/Ndubeneti 508 and Nandi/Ndubeneti/476.
22. He indicated that he was not aware that his father had taken the Defendant to the tribunal, and was not aware whether his father had appealed against the tribunal decision. He indicated that there was no boundary between Nandi/Ndubeneti 476 and 509. When he was charged with malicious damage, he was at the time living in Kitale with his aunt.
23. In Re – Examination, he indicated that he went to school in Kitale and he was staying at his aunt's place. He did not call the Assistant Chief to testify as he had no good relationship with them.
24. PW2 Albina Jerotich Keino, also testified, adopting her witness statement dated 20th December 2021. It was her testimony that the Plaintiff was her nephew, born of her late brother that the property Nandi/Ndubeneti 476, initially belonged to her late father, and that is were they lived as a family.
25. In cross – examination, the witness indicated that the property belonged to her late father because she was born there. She was born on the property and knew of the dispute between the late brother and the Defendant.
26. PW3 Aftar Joseph Kipchumba Chemembet, a neighbor to the Plaintiff also testified. He adopted his witness statement and it was his testimony that he had been neighbors with the Plaintiff all his lifetime, and that the Plaintiffs live on the property.
27. In Cross – examination, he did not know the plot number of the suit property or any subdivision thereof. He was aware of a dispute between the Plaintiff's late father and the Defendant which went to a tribunal, but was not aware of the outcome. He was not aware whether the property had been sold, and was not aware of the title number.
28. In re-examination, he stated that he did not know the Defendant, but the children of the late Barnaba (Plaintiff's father), to wit, Sosten and Joseph live on the suit property. He was not aware of the outcome of the tribunal; the property did not have fence.
29. The Plaintiff thus closed his case and the matter went for Defence hearing.



Defendant's Evidence: -

30. The Defence called two witnesses. DW1, Michael Koech adopted his witness statement and produce a power of Attorney authorized him to testify on behalf of the Defendant as D- Exhibit 9 as well as the list of documents as D - exhibit 2 to D Exhibits 9.
31. In his statement the witness had stated that the Defendant and his family have been carrying out farming activities from on the suit property, which the Defendant had recently charged to Family Bank Limited on 30/1/2012.
32. He produced as D Exhibit 4, proceedings of Kapsabet PMCCR No. 23 of 2011 as well as the Judgement in Kapsabet PMCCR No. 23 of 2011.
33. He further produced proceedings in Land Dispute Tribunal No. 46 of 2001 as well as the decree of the Court adopting the award in Land Dispute Tribunal no. 46 of 2001 issued on 25.9.2001. The witness further produced a valuation report by Hall mark. The valuation report was prepared on 12th June 2015.
34. In cross – examination, the witness indicated that the Defendant had not constructed any structures thereon but they cultivated thereon.
35. He stated that the property is demarcated by a road an earth road and there is a river on the other side and trees where they bordered their neighbors. That they cultivated on the arable Section but the rocky side is not arable.
36. That the Plaintiff has not constructed on the suit property they have had a boundary dispute with one neighbor. He was aware of the outcome of Kapsabet Criminal case No. 23/2011 between Republic -vs- Barnabas Kipkemei Mitei & Hillary Kiplagat Chirchir, which was about trespass and malicious damage, and that the Plaintiffs father was buried in their own property and not in the suit property.
37. In re – examination, the witness, indicated that, by being in possession of the suit property, he meant that they are using the property for cultivation. That the survey was used for identity boundaries with one neighbor Thomas arap Bore, the grandfather of the Plaintiff whose property is Nandi/ Ndubeneti/509.
38. That the Plaintiff who was an accused in Kapsabet PMCCR No. 23 of 2011 had testified that he had not trespassed into their property and was acquitted. That the valuation report states that they are no developments on the property.
39. DW2 Hillary Biwott, the Assistant Chief, Kiplolok Sub Location testified in the matter, adopting his witness statement save for paragraph 6 of the said statement. It was is testimony that he knew the Defendant's parcel of land situated in Sinendo Village; within his area of jurisdiction. That he knew of a dispute between the Plaintiff's late father and the Defendant, that was heard and determined by the Land dispute Tribunal at Kilibwoni, where the Defendant was awarded the parcel of land.
40. He was also aware of the Criminal Case which was Kapsabet PMCR No. 23 of 2011, Republic -versus – Barnabas Kipkemei Mitei & Hillary Kiplagat Chirchir, where he testified in the case. He further testified that he was aware that the family of Thomas Bore have a land adjacent to the Defendants parcel of land that the family of Bore resides on the said parcel.
41. In cross – examination, the witness stated that he had been an Assistant Chief for the past 22 years, and that he had no problem with the Plaintiff's save that he had arrested the Plaintiff in 2010 when they cut trees.



42. In 2000 the Defendant went to plough the property; the Plaintiff was still a minor then. The Plaintiff no longer resides in the sub-location but moved to Kabore Sublocation, and that during the survey Hillary was not present in during the survey.
43. The Plaintiffs parents were buried in Nandi/Ndubeneti /509, and not in Nandi/Ndubeneti/476. In re - examination, he confirmed that D Exhibit 4 related to a boundary and not a resurvey.
44. The Defence then closed its case and parties were directed to file their written submissions.

Plaintiff's Submission: -

45. In his submissions the Plaintiff, submit that the together with his family have occupied the suit property, to wit, Nandi/Ndubeneti/476, registered in the name of the Defendant for more than 12 years, since 1990 in the case of the Plaintiff but before him his father had been in occupation since 1980, and that his grandfather was buried on the suit land in 1982 and his father buried in 2017.
46. It is the Plaintiff's submission that the Defendant has not utilized the suit property since purchased the same in 1978.
47. The Plaintiff has framed two issued for determination.
 - a. Whether the Plaintiff has proved that his possession has been "nec vi nec clam nec precario."
 - b. Whether the Defendant's title has been extinguished by virtue of the Plaintiff's claim of adverse possession.
48. On issue No. 1 as captured in paragraph 47 (a) above, it is the Plaintiff's submission that he has occupied Nandi/Ndubeneti/476, nec, vi nec clam nec precario meaning that he had occupied without force, without secrecy, without permission. In this regard the Plaintiff has cited the decision in the case of *Mbira vs Gachubi* (2002)/ EALR 137, where the Court held "a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non – permissive, or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption."
49. On issue No. 2 as set out in paragraph 47 (b) above, the Plaintiff submits placing reliance on Section 7 of the *Limitation of Actions Act*, that the right of action to the Defendant accrued in 1978, when he got registered as the owner of Nandi/Ndubeneti/476 and that he had not in possession of the property.
50. That the Plaintiff's grandfather and his father took possession of the suit land in 1980 that the Plaintiff was born in 1990, grew up on, stayed on tilled, used and was in possession with his father until the demise of his father in the year 2017 on the suit land and the possession now vest on the Plaintiff since 1990 until when this case was instituted in Court in the year 2019 which is more than 12 years.
51. The Plaintiff submits that time started running in 1982 when his father settled thereon. The Plaintiff submits that the decree D Exhibit No. 8 did not stop time from running as the same was never executed against the Plaintiff's father herein. In this regard the Plaintiff places reliance on the reliance on the decision in *Mikiara M'rinkanya & another -vs- Gilbert Kabare M'mmbijiwe* Civil Appeal No. 124 of 2003 (007) eKLR). From the above analysis, it is clear that a judgement for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in Section 7 of the Act. "If the judgement is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 17 of the Act and the judgement debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings....."
52. On the strength of the above submissions and based on the decisions in;



1. [GAO vs Absalom Asunda](#) eKLR (2021)
2. [Wilson Njoroge Kamau vs Nganga Muceru](#) (2020) eKLR.
3. [James Maina Kinya vs Gerald Kwendaka](#) (2018)
4. [Celina Muthoni Kithinji vs Safiya Binti Swaleh and 8 others](#) (2018) eKLR

The Plaintiff submits that he has proved his case on a balance of probability and prays that the suit be allowed.

Defendant's Submission: -

53. On his part the Defendant submits on the elements that ought to be proved for a claim of adverse possession to succeed.
54. It is the Defendants submission that the elements to be proved are exclusive use and possession of the property, non-permissive, hostile or adverse use of the property and continuous/uninterrupted use of the property for a period of at least 12 years.
55. The Defendant has thus opted to submit on each of the element of adverse possession.
56. The Defendant submits that the Plaintiff has failed the evidential burden bestowed on him under Section 107, 109 and 112 of the [Evidence Act](#). Whereas the Plaintiff stated in his statement that he was born in 1990, his identity card indicated that 1994, it the Defendant's submission thus the plaintiff did 1990 as claimed in the Originating Summons.
57. The Defendant further submits that the valuation report (D Exhibit 9) showed that the suit property had no improvements, hence occupation by the Plaintiff was thus not proved and urged the Court to find and hold so.
58. On peaceful and continuous occupation without interruption, the Defendant submits relying on the decision in [Elija Ikaba Ikanjo vs Joseph Ngairo Asustsa](#) (2006) eKLR, where the Court held that;

“For there to be interruption the proprietor must evict or eject the trespasser, but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time.”
59. The Defendant submits that the institution of the Criminal proceedings via Kapsabet PMCR No. 23 of 2011, as well as the Kapsabet LDT No. 246 of 2001 between the Plaintiff's father and the Defendant stopped time and time must start to run all over again.
60. On non – permissive occupation, the Defendant submits that the Plaintiff has not been in occupation of time a suit property; and that the Plaintiff's suit does not fall within the ambit of Section 7 of the [Limitations of Actions Act](#). In this regard the Defendant urges the Court to be persuaded by the decision in [Ruth Wangari Kanyagia vs Joseph Muthoni Kinyanjui](#) 2017 (eKLR).
61. The Defendant has further submitted that the omission of Family Bank as a Defendant in the suit, contravened the fundamental rights of the Bank as a charger in contravention of Article 25 (e) of [the Constitution](#).
62. On account of the above submission, the Defendant prays that the Plaintiffs suit be dismissed with costs.



Issues For Determination: -

63. The parties herein did not file any of agreed issues. Whereas the Plaintiff identified and submitted on two issues as captured in paragraph 47 above, to wit, whether the Plaintiff has proved that his possession has been nec vi, nec clam nec precarior and whether the Defendants title has been extinguished by virtue of Plaintiff's claim of adverse possession; the Defendant has opted to submit on the elements of adverse possession.
64. There being no list of agreed issued for determination, the Court thus frames the issues for determination as follows;
1.
 - (a) whether the Plaintiff has proved the essential elements of Adverse Possessions.
 2.
 - (b) if answer to (a) above is in the affirmative is he Plaintiff entitled to the relief's sought?
 3.
 - (c) If answer to (a) above is in the negative, is the Plaintiffs entitled to the relief's sought.
 4. Who bears the costs of the suit?

Analysis And Determination: -

65. The Plaintiff has brought this suit in his own right claiming adverse possession from the time of entry in 1990 when he entered the suit land Nandi/Ndabuneti/476 upto the time he filed suit. It was the Plaintiffs case as set out in his Originating Summons now converted to plaint, that his entry in the suit property Nandi/Ndabuneti.476 was in 1990 when he was born thus his entry was that of a son.
66. In the course of his testimony, the Plaintiff stated that he was claiming entry from 1982, when his late father took possession. Whereas on the one hand, the Plaintiff claims the adverse possession started running from 1990 when he entered as a son, he seems to have abandoned 1990 as the entry and claims entry of 1982, when his father took possession.
67. As noted above, the Plaintiff's claim is in his own right and not as an administrator of the Estate of his late father, and on behalf of his family, the entry date of 1982, was when his father is alleged to have occupied and not when the Plaintiff occupied, so the entry then must have been either in 1990 when the Plaintiff states he was born or in 1994 where his identity card indicates he was born.
68. Section 3 and 9 of the *Registration of Person Act* Cap 107, provides that a National Identity Card is valid and presumes the particulars thereof to be true as per Section 5 and 17 thereof.
- Accordingly, in view of the conflicting dates of birth, the law recognizes the particulars of his identity card to be valid, hence the Plaintiff was thus born in 1994.
69. Hence the entry by the Plaintiff in 1994 was a son and under the disability of a minor, hence his right to acquire property accrued after he attained the age of majority in, and that would been in 2012.
70. It follows therefrom that time for purposes of Adverse Possession in terms of the Plaintiff's claim herein started running in 2012 and 12 years later, his right to adverse possession would have crystalized.



71. PW3 and PW3 both testified as to the Plaintiff's and his family occupation indicating that the property belonged to the late Thomas Bore and that they were not aware of any subdivision or transfer by the late Thomas Bore to the Defendant.
72. However, the green card produced by the Plaintiff as P Exhibit 2, shows on entry No. 1 that the property belonged to Thomas arap Bore as the original owner but the 2nd entry shows the Defendant acquired interest in pursuant to a sale consideration of kshs. 30,000/=.
73. The green card further reveals that parcel number Nandi/Ndubenet/476 was a subdivision of Nandi/Ndubenet/10. Hence testimony of PW2 and PW3 cannot stand in light of P Exhibit 2.
74. Both Plaintiff and Defendants agree on the elements of adverse possession having cited the decision in the case of Mbira vs Gachuhi 2002 (EALR 137), which laid out the elements to prove in a claim of adverse possession the Court held “ a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove, non – permissive or non-consensual actual, open notorious exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”
75. On issue number 1 (a) whether the elements of adverse possession having been proved?
76. The statutory period prescribed by law in Kenya is 12 years, has the Plaintiff occupied the parcel for the 12 years uninterrupted.
77. The Court has found that the Plaintiff has filed this claim on his own right and not on behalf of the Estate of his late father, the Court has found that the Plaintiff was born in 1994 and that he attained the age of majority in 2012 so as to be able to acquire any proprietary interests. The suit having been filed in 2019, it follows that from 2012 to 2019 it only 7 years and the statutory period of 12 years has not accrued.
78. Should I be found wrong, on the issue of the Plaintiff having to attain the age of majority to be able to acquire proprietary interest, and without prejudice to the foregoing paragraph, if as submitted by the Plaintiff, his claim started upon his entry on his birth in 1994, then 12 years would be mean time started running in 2006, and the suit filed in 2019, then adverse possession would have accrued, if the said time was uninterrupted .
79. However, in 2001, a decree was passed affirming ownership to the Defendant in Kapsabet LDT No. 46 of 2001 as exhibited by D-Exhibit Number 5 when time stopped running in 2001, and started running again.
80. In view of the fact that the judgment was not executed after or before the 12 year the said judgment is unenforceable, but it stopped time from running. In arriving at this the Court is guided by the decision in *Mwangi Githu vs Livingstone Nderitu* (1980) Eklr where the Court of Appeal stated that “time ceased to run under the *Limitation of Action Act*, either when the owner asserts his right or when his right is admitted by the adverse possession, assertion of rights is when the owner takes legal proceedings of making an effective entry into the land.” As well as the decision in *Elija Ikaba Ikanjo vs Joseph Ngairo Asutsa* where the Court observed that “For there to be interruption, the proprietor must evict the trespasser, but because eviction is not always possible without breach of peace, institution of suit against the trespasser does interrupt and stop the time.”
81. Accordingly, then, time started running again in 2001 after the decree and 12 years would have crystallized in 2013, if the same was uninterrupted, however an action was taken by the Defendant to assert his right by the Criminal Proceedings in Kapsabet PMCR No. 23 of 2011.



82. It follows therefrom by virtue of the actions taken by the Defendant to assert his rights, the time started running after 22/04/2015 when the Criminal proceedings in Kapsabet Criminal Case No. 23 of 2011 ended hence by the time the suit was filed in 2019, the right for adverse possession had not arisen.
83. Having analyzed both possible scenario where time for adverse possession started running and having found that time started running on attainment by the Plaintiff of the age of majority in 2012, then the right for adverse possession has not accrued yet. Thus, in answer to issue number 1 (a), the Court finds that the Plaintiff has not proved the elements of adverse possession.
84. Having answered issue number 1 (a) in the negative, the Court now answers issue number 1 (c) whether the Plaintiff is entitled to the relief's sought. The Court has found that the elements of adverse possession have not been proven, it follows therefrom that the Plaintiff is equally not entitled to the relief's sought.

Disposition: -

85. The upshot is that the Plaintiff has not proved its case on the required standard of proof, and the Plaintiff's case for adverse possession in relation to Nandi/Ndubunet/476 is hereby dismissed and the Defendants title over Nandi/Ndubuneti/476 is found to be indefeasible under Section 25 and 26 of the [Land Registration Act](#) save for the existing charge, in favour of Family Bank.
86. Plaintiff case is hereby dismissed with costs to the Defendant.

Dated and Delivered in Kapsabet this 30th day of June, 2022.

Hon. M. N. Mwanyale,

JUDGE

In the presence of:

Mr. Tallam for the Plaintiff.

Mr. Kipkoech for the Defendant

