



**Muyei & 15 others v Kwemoi Simatwa (Being sued as the Legal Representative
of the Estate of Simatwa Malinga – Deceased (Environment & Land
Case 14 of 2020) [2022] KEELC 2314 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 14 OF 2020**

**BN OLAO, J
JUNE 29, 2022**

BETWEEN

DAVID CHERENJE MUYEI 1ST PLAINTIFF
ANDREW MULANGO NDIEMA 2ND PLAINTIFF
REUBEN KONES NDIWA 3RD PLAINTIFF
ALEX MATEB KONES 4TH PLAINTIFF
STEPHEN KAPTANG NAIBEI 5TH PLAINTIFF
JOEL KWARAT JAFRED KIRONG 6TH PLAINTIFF
MARTIN NDIWA 7TH PLAINTIFF
ELISHA NGEYWO JOTHAM 8TH PLAINTIFF
ROBERT KIBOCHA CHEPKASIS 9TH PLAINTIFF
RODGERS MUKORI NGEYWO 10TH PLAINTIFF
SOET SAKONG' KAPCHANGA 11TH PLAINTIFF
STEPHEN MITIOS KWALIA 12TH PLAINTIFF
SALLAH SALIM NDIEMA 13TH PLAINTIFF
JAMES TOWEET NAIBEI 14TH PLAINTIFF
WILFRED CHEMOSIN ELIJAH 15TH PLAINTIFF
ELIJAH MACHAS MASAI 16TH PLAINTIFF

AND



RODGERS KWEMOI SIMATWA (BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SIMATWA MALINGA – DECEASED DEFENDANT

JUDGMENT

1. Simatwa Malinga (the deceased herein) is still the registered proprietor of the land parcel No Elgon/chemoge/218 (the suit land) which measures 24 Hectares that is approximately 59.2 acres. His son Rodgers Kwemoi Simatwa (the Defendant herein) is the Administrator to his Estate and holds a confirmed Grant issued to him in Nairobi High Court Succession Cause No 67 of 2000 which shows his share of the suit land as 48 acres. The name of the proprietor of the balance of 12 acres is not very clear because the Grant is rather faint. It is also not clear exactly when the deceased died as the Death Certificate is not among the documents filed herein.
2. What is clear however is that long before the Certificate of Confirmation of the Grant in respect to the Estate of the deceased was issued on 13th July 2009, the Defendant had embarked on a selling spree between 1993 and 2008 and disposed various portions of the suit land to the following persons: -
 1. David Cherenje Muye(1st plaintiff) – 1¼ acres
 2. Andrew Mulango Ndiema(2nd plaintiff) - 2 acres
 3. Reuben Kones Ndiwa (3rd plaintiff) - 2½ acres
 4. Alex Mateb Kones(4th plaintiff) – 1¼ acres
 5. Stephen Kaptang Naibei(5th plaintiff) - 1½ acres
 6. Joel Kwarat Jafred Kirong(6th plaintiff) – 1 acre
 7. Martin Ndiwa(7th plaintiff) – 1½ acres
 8. Elisha Ngeywo Jotham(8th plaintiff) – 1½ acres
 9. Robert Kibocha Chepkasis(9th plaintiff) – 2¼ acres
 10. Rodgers Mukori Ngeywo(10th plaintiff) – 2 acres
 11. Soet Sakong Kapchanga(11th plaintiff) – 2 acres
 12. Stephen Mitios Kwalia(12th plaintiff) – 1 acre
 13. Sallah Salim Ndiema(13th plaintiff) – 1 acre
 14. James Towet Naibei(14th plaintiff) – 1 acre
 15. Wilfred Chemosin Elijah(15th plaintiff) – 1¹/8acres
 16. Elijah Machas MasaI (16th plaintiff) – 2 ¼ acres
3. The above named sixteen (16) purchasers who are the 1st to 16th plaintiffs herein bought their respective portions of the suit land from the Defendant the earliest being David Cherenje Muye(1st plaintiff) in 1993 and the latest being Joel Kwarat Jafred Kirong (6th plaintiff) in 2008. From their respective supporting affidavits filed herein, they all took possession of their various portions of the suit land



which they have fenced, developed by putting up houses and planted crops. That they have done so peacefully, openly, continuously and un – interrupted for well over 12 years.

4. By an Originating Summons dated 9th July 2020 and filed herein on 13th July 2020, the 1st to 16th plaintiffs sought orders that they be declared as owners of their respective portions of the suit land by way of adverse possession having been in occupation and possession thereof for over 12 years. Alternatively, they sought a declaration that the defendant holds the title to the suit land in trust for them with respect to the various portions which they occupy and the said portions be carved out of the suit land and be registered in their respective names.
5. In support of their claims, they each filed supporting affidavits to which were annexed the following documents: -
 - 1: Sale agreements executed between them and the defendant.
 - 2: Certificate of Confirmation of Grant in respect to the Estate of the deceased confirming that the defendant is the Administrator to the Estate and his share is 48 acres.
 - 3: Green Card showing the deceased as the registered proprietor of the suit land since 18th January 1967.
6. The record shows that on 8th August 2020, the Defendant was served with the Originating Summons, supporting affidavits and annexures as well as summons to enter appearance at his home in Kitalale Village Within Trans – Nzoia County by a process server named Pius Wamalwa Kundu having been identified by Rodgers Mukori Ngeyo (the 10th plaintiff). However, the defendant did not enter any appearance or file any response to the Originating Summons.
7. When the Originating Summons was placed before me for directions on 2nd November 2020, I directed that it be listed for formal proof and the defendant be served. It was subsequently listed for formal proof on 27th July 2021 when Mr Were Counsel for the plaintiffs confirmed that the defendant who by then was remanded at the G. K. Prison Kitale had been served as directed. I confirmed from the affidavit of service filed by Pius Wamalwa Kundu and dated 23rd July 2021 that indeed the defendant had been duly served with the hearing notice. I accordingly allowed MR WERE to prosecute the plaintiffs’ case.
8. All the plaintiffs testified in support of their respective cases. The 11th plaintiff (Soet Sakong Kapchanga) was deceased by then but his widow Folrence Cheboi Soet (PW 16) testified on his behalf having already substituted the deceased after obtaining a Limited Grant *Ad Litem* vide Bungoma Chief Magistrate’s Succession Cause No 138 Of 2021.
9. The plaintiffs adopted as their testimonies their respective supporting affidavits and produced as their documentary evidence the various sale agreements executed between them and the defendant by which they purchased and took possession of various portions of the suit land. Also produced were the Certificate of Confirmed Grant showing that the defendant is the Administrator of the Estate of the deceased and his share of the suit land is 48 acres.
10. At the end of the plenary hearing, Mr Were stated that he would not be making any submissions.
11. I have considered the evidence by the plaintiffs including the documents filed in support of their Originating Summons. As the defendant did not file any replying affidavit in opposition to the Originating Summons, the averments of the plaintiffs as contained in their respective supporting affidavits are not rebutted. This Court can therefore conclude, which I hereby do, that those averments are not only true but that they are also admitted.



12. It is not in dispute that the deceased is the registered proprietor of the suit land and that the defendant is the Administrator to his Estate. A claim for adverse possession can be made against the Estate of a deceased person. In the case of *Karuntimi Raiji .v. M'makinya M'itunga* 2013 eKLR the Court of Appeal citing the provisions of Section 30(f) of the repealed *Registered Land Act* and Section 2 of the *Law Reform Act* confirmed that a claim to land by way of adverse possession can be made against the Estate of a deceased.
13. Section 38(1) of the *Limitation of Actions Act* allows a person who is in occupation of land registered in the names of another for the statutory period of twelve (12) years to apply to the Court for orders that he be registered as the proprietor of the suit land. It reads: -

38(1): "Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 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 the proprietor of the land."

In *Kasuve .v. Mwaani Investments Ltd & Others* 2004 1 KLR 184, the Court of Appeal stated thus: -

"And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje .v. Saikwa*No 2 1984 KLR 284."

A title by adverse possession can also be acquired for only a part of the land – *Githu .v. Ndeete* 1984 KLR 776.

14. It is also clear from the sale agreements produced by the plaintiffs herein that they went into occupation of their respective parcels of land as purchasers having fully paid the defendant the purchase price. In *Public Trustee .v. Wanduru* 1984 KLR 314 MadanJ.A, (as he then was), stated that a purchaser in possession of the land having paid the purchase price is a person in whose favour the period of limitation can run. In this case, the earliest purchaser was the 1st plaintiff David Cherenje Murei who went into occupation of his 1¼ acre in 1993 while the latest was the 6th plaintiff Joel Kwarat Jafred Kirong who went into occupation of his 1 acre in 2008. This suit was filed on 13th July 2020 by which time, all the plaintiffs had been in occupation and possession of their respective portions of the suit land, which they claim, for the statutory period of twelve (12) years. There is nothing to suggest that their occupation and possession of those portions of the suit land was not open, exclusive, peaceful, un – interrupted and with the knowledge of the defendant. In any event, the plaintiffs' claims have not been rebutted and this Court has no option other than to find that they have formally proved their respective cases.
15. Ultimately therefore, I am satisfied that each of the plaintiffs has proved that they are entitled to the portions of the suit land which they occupy by way of adverse possession and should be registered as the proprietor in place of the deceased.

Judgment is entered for the plaintiffs against the defendant as follows: -

1. The 1st to 16th plaintiffs have acquired by way of adverse possession the portions of land which they occupy out of the land parcel No Elgon/ Chemoge/218.
2. The Land Registrar and Land Surveyor Bungomashall demarcate and register in the plaintiffs' names the following portions out of the land parcel No Elgon/chemoge/218: -



- (a) David Cherenje Muyeji- 1¼ acres
 - (b) Andrew Mulango Ndiema- 2 acres
 - (c) Reuben Kones Ndiwa- 2½ acres
 - (d) Alex Mateb Kones- 1¼ acres
 - (e) Stephen Kaptang Naibei- 1½ acres
 - (f) Joel Kwarat Jafred Kirong- 1½ acre
 - (g) Martin Ndiwa- 1½ acres
 - (h) Elisha Ngeywo Jotham- 1½ acres
 - (i) Robert Kibocha Chepkasis- 2¼ acres
 - (j) Rodgers Mukori Ngeywo- 2 acres
 - (k) FLorence Cheboi Soet
(wife to Soet Sakong
Kapchanga- deceased – 2 acres
 - (l) Stephen Mitios Kwalia- 1 acre
 - (m) Sallah Salim Ndiema – 1 acre
 - (n) James Toweet Naibei- 1 acre
 - (o) Wilfred Chemosin Elijah – 1¹/₈ acres
 - (p) Elijah Machas Masai – 2 ¼ acres
3. The plaintiffs shall meet the costs of the demarcation and registration.
 4. Title No Elgon/chemoge/218 is hereby cancelled.
 5. The defendant shall within 30 days of this Judgment execute all the necessary documents to facilitate the registration of the above portions in the plaintiffs' names.
 6. In default of the above, the Deputy Registrar shall be at liberty to do so on behalf of the defendant.
 7. As the suit was not defended, I make no orders as to costs.

BOAZ N. OLAO.

J U D G E

29TH JUNE 2022.

JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 29TH DAY OF JUNE 2022 BY WAY OF ELECTRONIC MAIL.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E



29TH JUNE 2022.

