



**Kangethu (Suing as the Personal Representative of the Late James Kangethu Njoroge) v Public Trustee as the Administrator Of the Estate of Giovanni Theodore Sovic (Deceased) & 3 others (Land Case 73 of 2017) [2022] KEELC 3985 (KLR) (29 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3985 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
LAND CASE 73 OF 2017  
FO NYAGAKA, J  
JULY 29, 2022**

**BETWEEN**

**JECINTA KAGURE KANGETHU ..... PLAINTIFF  
SUING AS THE PERSONAL REPRESENTATIVE OF THE LATE JAMES  
KANGETHU NJOROGE**

**AND**

**PUBLIC TRUSTEE AS THE ADMINISTRATOR OF THE ESTATE OF  
GIOVANNI THEODORE SOVIC (DECEASED) ..... 1<sup>ST</sup> DEFENDANT  
JOHN BERTRAM STEYN ..... 2<sup>ND</sup> DEFENDANT  
ADMINISTRATORS OF THE ESTATE OF JOHN BERTRAM  
STEYN ..... 3<sup>RD</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By a chamber summons dated April 13, 2017 the plaintiff asked for the discharge of the charge registered as No 13 against title LR No 6157 and that he be registered as proprietor by prescription, and the costs of the suit.
2. The suit proceeded by way of viva voce evidence. On November 11, 2019. PW1, one James Kangethu Njoroge, testified that he used to be a civil servant but had since retired and lived on the suit land. He produced as P Exhibit 1 a copy of the newspaper extract to show that he served the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. He testified that he had been in adverse possession of the suit land having taken possession of the same on 3/5/1973. He said he took occupation of the same after buying it from the registered



- owner, Giovanni Theodore Sovic. He stated that he went into possession by the permission of the owner.
3. His further testimony was that the registered owner sold the land to him at Kshs 30,000/= less Kshs 7,000/= which he was to use for repairs. He was to pay Kshs 23,000/= to the said Mr Sovic upon production of the title to the suit land so that it would be transferred to him. The transaction did not materialize because the land was charged to John Bertram Steyn who is the 2<sup>nd</sup> defendant. His evidence was that he did not know where the original title was but that the 2<sup>nd</sup> defendant is said to have moved to South Africa in 1958. He testified that the 2<sup>nd</sup> defendant must have died later but did not know when.
  4. He also testified that Mr Giovanni Sovic died in 1974. After that he tried to get the trustees of the estate of the late Givani Sovic but did not. Thus, in 1975 the Public Trustee, being the administrator of the estate of the late Giovanni Sovic asked him to vacate the land since they (The Public Trustee) was also searching for the title to the land. His testimony was that the law firm of Shaw & Carruthers had been appointed to handle the affairs of the estate of the late Giovanni. Thus, they wrote back to the Public Trustee informing him that he was lawfully occupying the parcel of land, with the knowledge of the owner and daughter, one Mary. Then the Public Trustee asked the Advocates to look for the title in vain. It was upon that that the Land Registrar and the Registrar of the High Court advised PW1 to file the instant suit. He then attempted to produce as P Exhibit 2 a copy of a letter dated May 3, 1973 written by Mr Giovanni. He stated that the original was lost. It was objected to and objection sustained. At that stage, PW1 was stood down.
  5. After PW1 was recalled, he stated that he entered the suit land on May 3, 1973. He produced as P Exhibit 2 the note titled “to whom it may concern” written by the late Givani Sovic on 3/05/1973 acknowledging that he has taken possession of the suit land. He stated that he was living on the land since 1973. His testimony was that Giovanni Sovic’s interest on the land, if any, had been extinguished or time barred. He produced as P exhibit 4 a copy of a letter dated May 4, 1973 written by Mr Giovanni T Sovic, which authorized his daughter Ms M C Ruthmann to handle the sale on his behalf. He then produced in evidence as P exhibit 5 a letter dated June 18, 1973 written by Ms Shaw & Carruthers Advocates to Mr Giovanni Sovic acknowledging the agreement between Mr Sovic and PW1 on the sale of the land. Again, he produced as P exhibit 6 another letter dated October 24, 1974 from the said Advocates, showing that the transaction was stopped because the land was charged and that Mr Sovic had died. PW1 then produced as P exhibit 7 a letter dated 16/04/1975 from the Public Trustee to the Advocates handling the transaction, which required PW1 to vacate the land because the transaction had fallen through.
  6. PW1’s further evidence was that the Public Trustee changed its view after a response from the law firm that the PW1 was legally on the land. He produced as P exhibit 8 a letter dated April 24, 1975. It showed that PW1 was legally on the land, with the consent of the registered proprietor and his daughter. On May 12, 1975 the Advocates, Shaw & Carruthers wrote to PW1 asking him to visit the office of the Public Trustee, Eldoret branch, to inform them how much he had spent on the land. He produced the letter as P exhibit 9. Then on September 29, 1975 the Advocates wrote to PW1 stating that they had paid the land rent on his behalf. He produced the copy of the letter as P exhibit 10. Then later, on January 25, 1978, the Advocates wrote a letter to PW1 showing that the Public Trustee was in the process of getting for him a provisional title since the original was misplaced. The letter was produced as P exhibit 11.
  7. PW2, the widow of PW1 who passed away in the course of the proceedings testified that she was the legal representative of the estate of PW1. She produced both a certificate of death and letters of administration issued in Kitale High Court Succession Cause No E042 of 2021 as P exhibit 12 and 13 respectively. She then produced as P exhibit 14 an extract of title. Lastly, she produced as P exhibit 15 a



Judgment in Kitale ELC No 14 of 2013 to show that her father had sued the daughter and the said Mr John Bertram on a claim of adverse possession against them and the case was dismissed on May 4, 2016.

8. In cross-examination the PW2 maintained that PW1 moved onto the suit land in 1973. She joined him on the land in 1977. She however, did not get to meet Mr Giovanni Sovic. She admitted to having not read the judgment she produced as P Exhibit 15. The defendant did not wish to and did not call any evidence. All parties closed their cases at that stage.

### Submissions

9. The plaintiff filed her submissions on July 8, 2022. The defendants opted not to file any written submissions.
10. The plaintiffs submitted that The plaintiff summed up that her claim was for discharge of the charge registered as No 13 against the title to LR No 6157 and registration of the parcel of land in her name as proprietor. Her claim was based on registration prescription. She stated that she was the administrator of the estate of the original plaintiff the late James Kangethu Njoroge (Mr. Kangethu) who, regrettably, passed away on March 22, 2021 during the pendency of this suit. She produced a grant of letters of administration ad litem and a certificate of death as evidence of the above.
11. She stated that from her evidence she had used the land openly, peacefully, exclusively and continuously without the consent of the registered proprietor of the land for at least 12 years immediately preceding the filing of the claim. She then claimed the same by way of adverse possession. She relied on sections 7, 13, 17 and 38 of the *Limitation of Actions Act*, and the Court of Appeal decisions of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* [2017] eKLR and *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR.

### Analysis and Determination

12. I have considered the evidence and the law. The issue before me is whether the plaintiff has proven on a balance of probabilities that she has acquired title to the parcel of land LR No LR No 6157 by way of adverse possession and is therefore entitled to be registered as the owner, and in so doing that the Land Registrar should remove the caution that was placed on the said parcel as entry No 13.
13. A claim of adverse possession is based on the facts that an owner of a parcel of land is dispossessed thereof without his permission by the adverse possessor who openly and peacefully does so for a continuous period of over 12 years. In *Mtana Lewa vs Kabindi Ngala Mwagandi* (2005) eKLR the Court of Appeal stated that:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years.”

14. In *Public Trustees vs Wandura* 1984 KLR 314 at 319 Madan J stated that:-

“...adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”



15. In *Abdulkhalil Mohamed Abdulkhalik Mazurui & 2 Others v Josiah Kafuta J. Mtila & Another* [2021] eKLR, the Court of Appeal held that,
- “The burden of proving adverse possession lay with the 1<sup>st</sup> respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in *R vs Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1AC 335 at 350, 'not by force, nor stealth, nor the licence of the owner'. See also *Kimani Ruchine vs Swift Rutherford & Co Ltd* [1980] KLR on this point.
- A claim of adverse possession can only be maintained against a registered owner, as set out in *Chevron (K) Ltd vs Harrison Charo Wa Shutu* [2016] eKLR, and time as envisioned under section 7 of the *Limitation of Actions Act*, can only run against a registered owner.”
16. Section 38(1) of the *Limitations of Actions Act* was in his favour since it provided for a case where a “person claiming to have become entitled by adverse possession to land registered under any of the Acts may apply to the High Court for an order that he be registered as the proprietor, in place of the person then registered as proprietor of the land.”
17. Section 7 of the *Limitation of Actions Act* provides that:
- “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.”
18. Section 17 of the *Act* provides that:
- “Subject to section 18 of this *Act*, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
19. The totality of the import of the provisions is that a person claiming to have ownership of the land will lose it if another has adverse possession thereof, and that period prescribed is a minimum of 12 continuous years. And the owner loses the right to claim it if the period lapses because his interest is extinguished by facts firming the law.
20. In this case, two witnesses testified in this matter on behalf of the plaintiff. PW1 was the person who is said to have bought the parcel of land from one Giovanni Theodore Sovic and moved onto it with his family. That was from his oral testimony before he passed away. He testified that he had been in adverse possession of the suit land since on 3/5/1973. He produced evidence of payment for the purchase of the land and that he moved onto it with the owner’s permission.
21. His further evidence was that Mr Giovanni Sovic died in 1974 and he tried to get the trustees of the Estate of the late Giovanni Sovic but did not. Then in 1975 the Public Trustee, being the Administrator of the Estate of the late Giovanni Sovic asked him to vacate the land but he did not since it was pointed to the said office by his lawyers that he was rightly in possession of the said parcel. He produced in evidence as P exhibit 2 a note titled “to whom it may concern” written by the late Givani Sovic on 3/05/1973 acknowledging that he has taken possession of the suit land.



22. His evidence was that the interest of the said Giovanni Sovic to the suit land had been extinguished or time barred since he had been on the parcel since 1973. He produced as P Exhibit 4 a copy of a letter dated 04/05/1973 written by Mr Giovanni T Sovic authorizing his daughter Ms M C Ruthmann to handle the sale on his behalf and she engaged with the lawyers who were handling the case with the Public Trustee.
23. PW2, stated that her later father moved onto the land in 1973 but she joined him on it in 1977. She produced as P exhibit 14 an Extract of Title to show that the defendant was the registered owner. Lastly, she produced as P exhibit 15 a Judgment in Kitale ELC No 14 of 2013 to show that her father had sued one C Ruthman (Mrs), the daughter of the late Giovanni Sovic and John Bertram, in a claim of adverse possession over the suit land and judgment entered on May 4, 2016 by which the suit was dismissed.

### **Finding and Final Disposition**

24. I find that the plaintiff has proved her case on a balance of probabilities and is entitled to judgment in terms of the reliefs sought in the amended originating summons. I therefore enter judgment for the plaintiff against the defendants jointly and severally as follows:
  - a. A declaration be and is hereby issued that Jecinta Kagure Kangethu has acquired land parcel No LR No 6157 by way of adverse possession and is entitled to be registered as proprietor by prescription thereto.
  - b. A charge registered as No 13 against the title to LR No 6157 be and is hereby be discharged forthwith.
  - c. The costs of this suit be borne by each party.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 29<sup>TH</sup> DAY OF JULY, 2022.**

**DR. IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

