



**Barngetuny (Suing as a Legal Representative of the Estate of Julius Kiplagat Barngetuny) v Sambu
(Judicial Review 119 of 2021) [2022] KEELC 4870 (KLR) (20 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4870 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
JUDICIAL REVIEW 119 OF 2021
MN MWANYALE, J
SEPTEMBER 20, 2022
(FORMERLY ELDORET ELC CASE NO 154 OF 2017)**

BETWEEN

**JEPKOECH BARNGETUNY PLAINTIFF
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF JULIUS
KIPLAGAT BARNGETUNY**

AND

JOEL KIPTOO SAMBU DEFENDANT

JUDGMENT

1. By a plaint dated April 4, 2017, the Original Plaintiff Julius Kiplagat Barngetuny sued the defendant Joel Kiptoo Sambu seeking injunctive and declaratory orders against the Defendant.
2. The plaintiff testified and thereafter passed on and he was substituted by his legal representative Emily Jepkoech Bargentuny *vide* the amended plant dated 24/3/2022 and filed on April 19, 2022.
3. The matter had initially proceeded at Eldoret ELC Court before establishment of Kapsabet ELC Court where it was transferred and parties took direction on 22/9/2021 that the matter proceed from where it had reached and proceedings were typed.

Plaintiff's Case And Evidence:-

4. The original plaintiff testified on 19/2/2021 based on the original plaint before his demise. It was his testimony that he had purchased land measuring 20 acres for Kes 20,000/= in 1974. He paid the last instalment and took possession. He produced the agreement for sale dated 26/9/1974 and a certificate of translation as P Exhibit 1 (a) and 1 (b). It was his further testimony that the defendant's father failed to transfer the property the property to him.



5. It was his further testimony that he was in occupation of the suit land from the said time and that in 1978, he filed a caution when he learnt of an imminent sale of the property. The caution was produced as P Exhibit 2.
6. The defendant is the son of Kirui Arap Sambu who had sold the property to him and was now the registered owner of the parcel of land after the demise of the original owner and succession proceedings. The plaintiff produced as exhibits, the grant of letters of administration and certificate of confirmation of grant, the transfer by transmission and a search.
7. In cross – examination, the plaintiff stated that he did not obtain the LCB consent. He stated that his children live and use the suit property.
8. PW2 – Lawrence Kiplating Arap Yego testified in Court. It was his testimony that he knew both the late Julius Kiplagat Barngetuny (PW1) and the late Kimaiyo Arap Sambu the father of the Defendant Joel arap Sambu.
9. It was his testimony that the PW1 has purchased the property from Kimaiyo arap Sambu and the defendant was aware of it.
10. That the property was in the possession of the Plaintiff's family who have been utilizing the same.
11. In cross – examination, he did not know when the property was sold as he was not a witness. He stated that the late Kimaiyo arap Sambu had told him that he was selling the 20 acres but when he went he found that it had already been sold.
12. PW3 Stephen Kipkorir Kosgey also testified. It was his testimony that he knew the deceased Plaintiff (PW1) Julius Barngetuny and his widow Emily Barngetuny (now the plaintiff).
13. It was his further testimony that he know the late Kimaiyo arap Sambu the father to the defendant and the property in question situated in Singilet Chepterwai and was about 20 acres; and had been purchased by Julius Barngetuny.
14. He was present at the said transaction. The property was sold for Kes 20,000/= and that the late Julius Barngetuny had Kes 19,000/= and PW3 topped up Kes 1,000/= to make it the 20,000/=. He was present at the time of the purchase but did not sign the agreement for sale.
15. It was his testimony that the children of the late Barngetuny are in possession of the suit property, from the time of the purchase. He testified that he did not know the defendant as the late Kimaiyo arap Sambu sold his property in 1974 and never returned.
16. In cross – examination, he stated that he was present during the signing of the agreement but did not sign the agreement only the witnesses signed.
17. He could not remember who drafted the agreement for sale. After selling the property Kimaiyo went to Kitale, he went to Kitale and passed on in 1993.
18. That when the late Kimaiyo sold the property, he left a house on the said property which house has since decayed; and the dispute started in 2017.
19. In re- examination; he stated that the dispute started in 2017; when the defendant wanted to occupy the area. That Kimaiyo arap Sambu did not return to the property. Once he sold the same in 1974.
20. PW4 Emily Jepkoech Barngetuny testified she is the widow of the late Julius Barngetuny as well as the Administrator of his Estate and the plaintiff in the amended plaint. It was her testimony that she together with her husband purchased the property in 1973 but settled thereon in 1974.



21. They bought property from Kimaiyo Sambu when he was the read chief and he left for Trans-nzoia and never returned until in 2017 when the defendant demanded the plaintiff's to vacate.
PW4 stated that she was present when the agreement for sale was made.
22. In cross – examination, she stated that she was present during the purchase, but she did not sign the agreement for sale. They constructed a mabati house after they purchased the suit property. She was not aware of the succession cause filed by Joel so she did not bother to file an objection in the succession cause. The house belonging to the late Kimaiyo was demolished.
23. In re- examination, she started that the late Kimaiyo did not come back after the sale in 1974.
24. After hearing the testimony of the 4 Plaintiff's witness. The Plaintiff case was closed.

Defence Case And Evidence:-

25. The defendant as well as another witness testified for the defence. DW1 Joel Kiptoo Sambu, testified. He adopted his witness statement dated 10/12/2018. It was his testimony that he is the registered owner of Nandi/Chepterwai/2017, having acquired it by transmission having undertaken succession vide Eldoret Succession Cause No. 159 of 2015, the Grant whereof he produced as D Exhibit 1.
26. The witness equally produced a copy of the title deed as D Exhibit 2. It was his testimony that the property belonged to his late father Kimaiyo arap Sambu and that there was no objection proceedings when the he was undertaking he succession cause.
27. It was the defendant further testimony, that the plaintiff's did not purchase the property in 1974, but they leased the same from his late father and that the deceased plaintiff placed a caution over the suit property claiming purchaser's interest yet he had kept on postponing the completion of the purchase.
28. The witness in cross-examination states that in 1974, he was 10 years old. He stated that there was no agreement for purposes of the lease. He stated that his father died in 1993 and succession was done in 2015. After his father's demise the Plaintiff moved into the suit property.
29. That from 1974, it is the plaintiffs who have been on the property and not themselves (defendants family).
30. DW2, Titto Kipruto Sambu, equally testified, and adopted his witness statement. It was his testimony that the defendant was his elder brother. He stated that Nandi/Chepterwai/217 was not sold to the plaintiff but was leased.
31. That as a family they consented to their older bother to proceed with the succession process in respect of their late father.
32. In cross – examination, he stated that he was in Sikhendu in Trans Nzoia in 1989, he visited the suit property and Kiplagat Barngetuny's cows were on the property. That his father died in 1993 and was buried in Sikhendu.
33. That his later father since he left the suit property in 1974, did not file any case to evict the plaintiff's. In 1989, Julius Kipngetich had his cows on the property, and the plaintiff built on the property in 2017.
34. After the testimony of the two defence witness, the Defence was closed and parties were directed to file their written submissions.



Issues For Determination:*-

35. The parties did not file any list of agreed issues.
The plaintiff has raised in her submissions,
- i) Whether the suit raised issues of adverse possession, and
 - ii) Whether the requirement of land control board was fulfilled;
 - iii) Whether the defendant's attempt to recover land is time barred.
 - iv) Whether the injunctive prayers can be granted.
36. In his submissions the defendant the following issues;
- i) Did the plaintiff purchase the suit land
 - ii) Did the plaintiff occupy or take possession of the suit property
 - iii) Can the plaintiff rely on an agreement made in 1974 to claim ownership in 2017?
 - iv) Has the plaintiff obtained the right of ownership by way of adverse possession?
 - v) Who pays costs of this suit?
37. There being no list of Agreed issued the Court frames as follows: -
- i) Whether the plaintiff purchased, and occupied the land based on the agreement for sale made in 1974.
 - ii) Whether the plaintiff has obtained right of ownership by way of adverse possession?
 - iii) Whether the agreement made in 1974 is enforceable and whether the Land Control Board consent was required?
 - iv) Has the plaintiff proved her case on the required standards of proof and is she entitled to the reliefs sought?
 - v) Who bears the costs of the suit?

Plaintiff's Submissions:-

38. In her submissions, the plaintiff submits that she together with her late husband bought the land in 1974 and an agreement for sale was written. That upon the same, the vendor who was the father of the defendant moved out and relocated to Trans Nzoia where he stayed till his demise in 1994, he never reclaimed the parcel.
39. It is the Plaintiff's submissions based on the *Gulam Mariam Noordu v Julius Charo Karisa* Civil Appeal No 26 of 2015 which decision quotes the decision in *Bayete Company Limited v Kosgey*, where the plaintiff made no specific plea of adverse possession, but the plea was nonetheless granted. The Plaintiff further submits placing reliance on the case of *Chevron (K) Ltd v Harrison Charo wa Shetu* (2016) eKLR that a claim by adverse possession could be brought by way of plaint.
40. It is the plaintiff's submission thus although the suit was commenced by way of a plaint as opposed to an Originating Summons, then the suit is not fatally defective.



41. The Plaintiff has submitted on the ingredients of adverse possession and has cited the case of *Mweu v Kiu Ranching and Farming Co-operative Society Ltd* (1985) KLR 430.
42. The plaintiff submits based on the case of *Jeremiab Kiilu Maittha v Agnes Ngeki Mutie* (2018 eKLR), that once a person takes possession of the suit property, in a situation where a sale agreement is null and void for want the Land Control Board consent, a purchaser can still succeed to have such land registered in his name.
43. The plaintiff submits that the defendant attempts to recover land is statute barred by virtue of section 7 of the *Limitation of Acts Act*.
44. On the relief's sought, the plaintiff seeks injunction and has placed reliance on the case of *Giella v Cassman Brown* and the case of *Nguruman Limited v Jan Bonde Nielsen and 2 others*, as well as the decision in *Maia Limited v First American Bank of Kenya Ltd*.

Defendants Submission:-

45. The Defendant submits that the Agreement for sale produced as P Exhibit No. 1 offends the provisions of section 3 (3) of the *law of contract Act* in so far as the same was not signed by the parties thereto.
46. The defendant in reliance to section 4 (1) (a) of the *Limitation of Actions Act* submits that the suit is time barred as it was founded on contract.
47. The defendant submits that the plaintiff has not proven its case on a balance of probability and is not entitled to the reliefs sought and he suit should be dismissed with costs. The defendant further submits that no submissions by the plaintiff had been served upon then as ordered by the court.

Analysis And Determination:-

48. The Court shall now analyze the issues framed for determination.
On issue number 1, on whether the plaintiff, purchased, and occupied the property based on the agreement made in 1974, the Court finds that the agreement made in 1974 and produced as P exhibit No. 1 offends the provisions of section 3 (3) of the *Law of contract Act*, in so far as it was not signed by the parties to it. The plaintiff cannot therefore place reliance on the agreement for sale as produced.
49. Plaintiffs witnessed including the deceased plaintiff and the plaintiff in the amended plaint, however testify to the fact that occupation by the Plaintiff on the suit property was made pursuant to the agreement for sale in 1974. The DW2 equally testified that the Plaintiff family have been in occupation and in 1989 when they visited the suit property they found the Plaintiff grazing his cows on the property. DW1 the Defendant equally testified visiting the suit property in 1978 with his dad, and found that Defendant in occupation. P Exhibit 4 reveals that the deceased Plaintiff has indeed registered a caution claiming purchaser's interest in 1978.
50. The court is thus convinced that on the basis of the evidence on record, that the plaintiffs occupied the suit property and have been utilizing the same from 1974 or thereabouts, and certainly as confirmed by the defendant that the plaintiffs have been in occupation in 1979, when they visited, the Court finds that the Plaintiffs have been in occupation and usage of the suit property at least from 1979 as confirmed by DW1.
51. Although the agreement for sale dated in 1974 is enforceable by dint that it offends section 3 (3) of the *Law of contract Act*, the Court has found that the occupation by the Plaintiff's on the suit land as confirmed by the defendant to be from 1979.



52. On the issue number 2 as to whether the plaintiff has obtained ownership by dint of adverse possession. The defendant submits that the claim of adverse possession ought to be commenced by way of originating summons and hence the suit having been commenced by a plaint is totally defective.
53. The law on adverse possession has steadily progressed and as submitted by the plaintiff, the Courts have allowed suits commenced by way of plaint on adverse possession to succeed as was observed in the *Gulam Mariam Noordan v Julius Charo Karisa* as well as *Bayete Company Limited v Kosgey* and in *Chevron (K) Ltd v Harrison Charo was Shutu* (2016).
54. This court finds no fault in the procedure adopted by the plaintiff and understands the plaintiff case to be founded on adverse possession.
- Accordingly the court shall thus examine whether the ingredients of adverse possession have been satisfied by the plaintiffs.
55. The ingredients of an adverse possess claim were discussed in the case of *Wilson Kazungu Katana and 101 others v Salim Abdalla Bashwein and another* (2016) eKLR as well as the decision in *Kasure v Mwaano Investments Limited and 4 others*; where the Court observed that a claimant in adverse possession must prove that;
- i. He has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner of by discontinuance of possession by the owner of his own violation.
56. Applying the above ingredients to the above case, the testimony of the 4 plaintiff's witnesses, as well as the DW1.
57. Witnesses confirm that there was occupation and use of the suit property by the plaintiffs from around 1979. Hence the 12 years period crystallized in 1991.
58. The plaintiffs witnesses equally testified that it is the plaintiff who were in occupation and open use of the suit property and that the defendant intended to assert his right in 2017.
59. Indeed at the demise of the original owner in 1993, the plaintiff's right to adverse possession had crystallized.
60. By the time the defendant was registered as the owner, the plaintiffs right had crystalized.
61. On the issue of whether the lack of the land control board consent renders the agreement enforceable. The court has already found that the agreement for sale was unenforceable for offending section 3 (3) of the *Law of Contract Act*. The lack of land control board consent further makes the transaction illegal for offending section 6 (1) of the *Land Control Act*.
62. The net effect of the above finding is that the occupation by the Plaintiff became adverse due to the illegalities as was held by Court of Appeal in the case of *Miki Waweru v Jane Njeri Richu* 2007 (eKLR) "in our view where a purchaser or lessee of land in a controlled transaction is permitted to be in possession to land by the vendor or lessor pending completion and the transaction thereafter becomes void under section 6 (1) of the *Land Control Board* such permission is terminated by operation of law and the continued possession if not illegal, becomes adverse from the time the transaction become void."
63. Further the Court of Appeal in *Jeremiah Kilu Maitha v Agnes Ngeki Mulie* (2018) eKLR - the Court stated, in a situation where a sale agreement is null and void for want of the consent of the Board, a purchaser can still succeed to have such land registered in his favour, if he proves that he took



possession of the land and has been in such possession continuously, exclusively, peacefully and with the knowledge of the registered owner for a period of twelve (12) years.

64. Guided by the above decisions of the Court of Appeal and having found that the plaintiff has proved the ingredients of adverse possession the court finds that the plaintiff is entitled to the reliefs sought.

Disposition:-

65. The court finds that the plaintiff have on a balance of probabilities proven her case and accordingly enter judgement in her favour in terms that;
- i) The defendants title and interest in Nandi/Chepterwai/217 measuring 20 acres currently occupied by the Plaintiff is hereby extinguished by virtue of section 17 of the [Limitation of Actions Act](#).
 - ii) The land registrar Nandi County, to rectify the register accordingly and register the plaintiff as the proprietor of Nandi/Chepterwai/217.
 - iii) A permanent injunction hereby issue against the defendant, his servant, agents from interfering with plaintiffs quiet possession and occupation of the parcel of land known as Nandi/Chepterwai/217.
66. On costs, the plaintiff is denied costs because he did not serve his submissions on the defendant on time as was ordered by the court.
67. Judgment accordingly.

DATED AT KAPSABET THIS 20TH SEPTEMBER 2022.

HON. M. N. Mwanyale,

JUDGE

Delivered in the presence of;

Mr. Nyamweya for the Defendant

Mr. Choge for the Plaintiff.

