



Jepkorir ((suing in her capacity as the Legal Representative and Administratrix of the Estate of Geoffrey Kiplagat Maswai)) v Kogo (Environment & Land Case 141 of 2021) [2022] KEELC 12690 (KLR) (20 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12690 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 141 OF 2021
MN MWANYALE, J
SEPTEMBER 20, 2022**

BETWEEN

**PAULINE JEPKORIR PLAINTIFF
(SUING IN HER CAPACITY AS THE LEGAL REPRESENTATIVE AND
ADMINISTRATRIX OF THE ESTATE OF GEOFFREY KIPLAGAT MASWAI)**

AND

ERNEST KIPROP ARAP KOGO DEFENDANT

JUDGMENT

1. Pauline Jepkorir was substituted in the suit in place of her late husband Geoffrey Kiplagat Maswai, in her capacity as the legal representatives and administratrix of his Estate.
2. The late Geoffrey Kiplagat Maswai, had taken out an originating summons dated March 16, 2016 seeking various orders but particularly that he had acquired title and ownership of whole of land reference number Nandi/kamobo/234 containing by measurement 4.4 hectares by dint of adverse possession.
3. Upon substitution of the plaintiff an amended originating summons was filed; which reiterated the prayers sought in the original originating summons.
4. The court issued directions that the originating summons be converted to a plaint and the replying affidavit to be defence; and a hearing was slated.

The matter partly proceeded with PW1 and PW2 testifying before Hon Ombayo J.

5. The original plaintiff Geoffrey Kiplagat Maswai thereafter passed on necessitating the substitution, thereafter after establishment of this court at Kapsabet the file was transferred to this court.



6. Parties took direction that the matter to proceed from where it had reached and the proceedings before Eldoret ELC were typed.

Plaintiffs Case

7. It was the plaintiff's case from the originating summons and the amendment made thereto that;
 - i. The defendant is the registered owner of Nandi/kamobo/234
 - ii. That the plaintiff has lived in Nandi/kamobo/234 for 38 years.
 - iii. That he has generally developed the parcel of land.
 - iv. That the plaintiff as a widow has also lived and developed the property
 - v. That the respondent has never lived and does not live on the said parcel number Nandi/kamobo/234
 - vi. That the possession, occupation and use of the land reference number Nandi/kamobo/234 has been exclusive, continuous, open and peaceful and uninterrupted and it has been so since 1976 to date.
 - vii. That he has thus acquired title/ownership of the said land reference number Nandi/kamobo/234 by operation of law.
8. The plaintiff thus prayed for the orders sought in the originating summons.

Defendants Case:-

9. It is the defendant's case, that he owns Nandi/kamobo/234 and that the plaintiff's has initially moved in the property as he was staying with his mother the late Sofia Chepngetich.
10. The Plaintiff's stay on the suit property was by virtue of his mother having been allowed to live on the suit property.
11. That at the plaintiff's request upon his mother death in 2003, the defendant had allowed him to leave thereon. That the defendant had been utilizing the property planting maize every planting season; and that he had allowed the plaintiff to utilize 0.2 Acres of the property.
12. Thus the applicant has not been in continuous, peaceful and uninterrupted, open and exclusive occupation of the land. It is the defendant's case thus the plaintiff has not proved his case on adverse possession. As his sons have been utilizing the property.

Plaintiff's Evidence: -

13. The plaintiff's called 4 witnesses. It was PW1's testimony that he had lived on the parcel of land since his birth in the late 1960's and at time of the testimony he was still living on the parcel. It was his testimony that his mother lived with them on the suit property; but that he was never employed by the plaintiff not a Mr Fredrick Tiony.
14. He produced photographs showing the house that were on the suit property and that his mother had constructed one of the house while he had constructed the other. There were also cows on the suit property.
15. PW2 was the plaintiff in the amended originating summons Pauline Jepkorir. She reiterated most of the evidence that PW1 had given save to add that she had been living on the property from the time



- that she was married in 1985. That the land belonged to her mother in law Sofia and upon her husband demise. She further confirmed that there was a boundary in the property and that there was no dispute before 2016.
16. PW3 equally testified, that the property belonged to the plaintiffs late mother Sophia Chepngetich. He indicated that the late Sophia Chepngetich was not an employee of the defendant.
 17. He denied knowledge of whether the defendants relatives had been buried on the suit property and further stated the whole property had been fenced.
 18. In cross – examination, he indicated that he knew Geoffrey from 1970's as they were neighbors. He indicated that he did not know how the late Sophia, who was the late Geoffrey's mother ended up in the property. He confirmed that the property had been fenced but did not know who had fenced the same.
 19. PW4 a neighbor Mr Francis Shangalla equally testified. It was his testimony that the suit property belonged to the late Geoffrey and his mother. He stated that there was no burial at the suit property other than of the Geoffrey. He confirmed that the property had been fenced and the general area was called Geoffrey Maswai.
 20. In cross – examination, he stated that the late Geoffrey and his family had lived thereon since they were children. He stated that the late Geoffrey's brother were drunkards and not reliable people. He confirmed that the property was fenced but did not know who had fenced the same.

Defendant's Evidence: -

21. DW1 the defendant testified and he adopted his witness statement. It was his testimony that he lived in the suit property together with his late mother Clara Chelemek who died in 1984, when he moved to Sarora. That he had employed the plaintiff's mother Sofia Chepngetich to be a care giver to his late mother.
22. That the late Geoffrey Maswai was a son to Sophia Chepngetich who was a house help to his late mother. At time of employing the late Sophia Chepngetich came with her 3 sons.
That he allowed the late Sophia Chepngetich to live on the property even with his mother's demise upto her demise in 2004.
23. That after the plaintiff's mother died, the late Geoffrey Maswai requested for permission to stay on the suit property as he continued to look for a place to stay, the permission was granted for 3 months in the presence of the area chief (DW2).
24. That the plaintiff use of the property was with his permission/licence granted to his mother who was a house help. In his replying affidavit he however admitted at paragraph 14, that the applicant had been tilling 0.2 acres of the property.
25. The defendant called 2 other witnesses including the area chief of Kapsabet Location. It was his testimony (DW2) that he knew of the dispute between the plaintiff and the defendant. That he had initially written a letter to the late Geoffrey Maswai to vacate the suit land, and that the late Geoffrey Maswai requested and was granted 3 months to vacate after the demise of his mother the late Sophia Chepngetich in 2003.
26. DW3, John Kibet also testified. It was his testimony that he was a brother to the late Geoffrey Maswai and that the Pauline Jepkorir is his sister in law by virtue of being the wife of his late brother Geoffrey Maswai. He knew the Ernest Kiprop since he lived on his property from his childhood together with his mother who was an employee of the defendant.



27. It was his testimony that his two brother died and were buried at a Muslim cemetery. He also testified that an infant relative of the defendant was buried on the property, as well as the amputated legs of the defendant's wife.

Plaintiff's Submission: -

28. At the close of both the plaintiff and the defendant's case, parties were directed to file their respective submissions.
29. It is the plaintiff submission placing reliance in Eldoret ELC Miscellaneous Civil Application No 5 of 2019 where the defendant herein had sought an injunction to stop the burial of the deceased Plaintiff Geoffrey Kiplagat Maswai, where the court (Hon Ombwayo J) made a finding that the late Geoffrey Kiplagat Maswai, had been in possession of the suit land for more than 12 years. Based on the findings of the honorable judge, the plaintiff submits that he had proven her case.
30. The plaintiff has proposed the following as the issues for determination.
- a. Whether or not the plaintiff has acquired title over the suit land by way of adverse possession.
 - b. Whether or not the plaintiff is entitled to the prayers sought in the originating summons.
 - c. Who should pay the costs of suit?
31. The plaintiff has relied on the decision in the case of *Phyllis Wanjiru Kamdu v Wilson Gichubi Gachangwe and 2 others* which describes that a claim of adverse possession of the land must be actual open, continuous and exclusive for a prescribed period of 12 years.
32. With regard to the letter authored by the chief to the plaintiff, the plaintiff submits that the same does not amount to assertion of title and in this regard places reliance in the case of *Amos Weru Murigu v Marata Wangari and Kambi and another*, cited in the of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau Muranga* ELC No 7 of 2021.

Defendants Submission:-

33. The defendant has identified one issue for determination, being whether the defendant's claim has met the threshold for a claim of adverse possession?

In submission on this point, the defendant submits that the plaintiffs claim has not reached the threshold and places reliance on the case of *Wairimu Mburu v Chege Thaiya* (2019) eKLR LC No 87 of 2018 (originating summons) where the court observed that;

Similarly a person who occupies as license cannot claim land by dint of the doctrine of adverse possession. This was settled in the case of *Hughes v Griffin* (1969) All ER 460, where it was held that a license or tenant at will, does not have time running in his favour, for purposes of a claim for adverse possession.....

Following the above principles of law, it means the period between 1972 – 2007 the plaintiff and her husband occupied the land as a worker and a spouse of the worker respectively. Therefore, they occupied with the permission and under licence of the owner the defendant herein. I do not agree with submissions by counsel of the plaintiff that the plaintiff has locus to seek adverse possession of her husband as an employee. Her licence then expired with the demise of her husband in July 2007. Time started running in favour of adversely from the year 2007 when her husband died. Barring no contract of employment/licence from the defendant and taking July 2007 to date gives 11 years 8 months which



is less than the statutory period of 12 years provided in law. Her claim therefore has been brought to court prematurely.”

34. The defendant thus submits that the occupation of the late Geoffrey Maswai on the property was by permission by virtue of the fact that his late mother Sophia Chepngetich was an employee of the defendant.

Issues for Determination: -

35. As observed above, no joint issues for determination were filed, upon review of the pleadings, the evidence and submission filed, the court frames the following as issues for determination;
- i. Whether the circumstances of the plaintiff’s occupation of the suit property can give rise to adverse possession.
 - ii. Whether the defendant utilized portions of the suit land, and/or whether the plaintiff had exclusive use of the suit property.
 - iii. Whether plaintiff has established the doctrine of adverse possession; and what orders is he entitled to?
 - iv. Who bears the cost of the suit?

Analysis and Determination: -

36. In the amended originating summons, in her capacity as the legal representative and administratrix of the estate of her late husband Geoffrey Kiplagat Maswai.
- Issue No 1, whether the circumstances of the plaintiffs occupation can give rise to adverse possession.
37. Pauline Jepkorir’s claim of the suit property through the amended originating summons, is that her late husband has been in occupation of the suit property for more than 12 years by the time of his demise.
38. As noted earlier, this Court (Hon Ombawo J) in Miscellaneous Application No 5 of 2019, which related to a burial dispute between Pauline Jepkorir the plaintiff herein as a respondent and the defendant Ernest Kiprop Arap Kogo as an Applicant found that the deceased (Geoffrey Maswai) was in possession of the suit property for more than 12 years before he died.
39. The court found an issue for determination as to whether the deceased was allowed to stay on the suit property with his mother and to vacate at the time of her demise.
40. That issue has been incorporated in issue number 1 in this suit. The plaintiff’s states that her entry on the suit property was through marriage to the late Geoffrey Maswai in 1985. That the Late Geoffrey Maswai and his late mother Sophia Chepngetich lived on the suit property. The plaintiff therefore has not knowledge of the circumstances leading to entry of her deceased husband and her late mother in law to the suit property. None of the plaintiff’s witnesses were able to testify as to entry of the late Sophia Chepngetich on the suit property.
41. The defendant (DW1) stated that he had employed the late Sophia Chepngetich as a house help to look after his late mother Clara Chemelech. This was corroborated by DW3, John Kibet Kibos, a son to the late Sophia Chepngetich and brother in law to the plaintiff, and an elder brother to the deceased Geoffrey Maswai who confirmed that his late mother was an employee of the defendant.
42. The entry by the plaintiff’s late husband and her entry was thus through the permission granted to the late Sophia Chepngetich. The said permission, thus lapsed at the demise of the plaintiff’s mother in



law in 2003. DW1 and DW2 testified that the late Geoffrey Maswai thereafter sought for 3 months permission. In the letter produced by the defendant (D Exhibit 1) this fact was equally recorded. It follows therefrom from 2004 presumably the plaintiff's late husband was living on the suit property without the consent of the defendant.

43. Thus for purposes of adverse possession the time started running from 2004 and by the time the suit was filed in 2016, the 12 years had crystallized.
44. Thus in answer to issue number 1, the court finds that whereas the initial occupation of the plaintiff's husband on the suit property was through permission granted to this late mother, that entry was a licensee, but the said permission terminated upon the demise of the plaintiff's husband mother in 2003, and upon the expiry of the plaintiff's three month extension, so effectively from 2004, the plaintiff's husband occupation was adverse to the defendants.
45. On the issue number 2, whether the defendant utilized portions of the land and/or whether the plaintiff has exclusive use of the suit property.
46. The plaintiff produced photographs of old house constructed on the suit property. There were also photographs of freshly cultivated farm taken in 2017 while the suit had been filed as well as photographs of cows on the suit property.
47. The defence all through the cross- examinations, of PW3 and PW4, as well as the testimony of defendant and DW3 indicated that the defendant's wife legs were buried on the suit property after amputation as well as an infant relative of the defendant and defendant's niece, was also buried on the suit property.
48. This testimony was corroborated by the DW3 who is a relative of the plaintiff and who had been described as a drunk, but the court found him coherent.
49. All the plaintiff witnesses also testified that the suit land had been fenced, but were not aware of the one who fenced the same. DW1 stated that he is the one who fenced the suit property.
50. The court finds that the actions of the defendant to bury his relatives on the suit property was usage by the defendant, hence the plaintiff did not have exclusive use of the suit property and time since the defendant fenced the property, the court readily agrees that the plaintiff must have had the use of about 0.2 acres of the suit property and not the entire suit property, this is because in fencing the suit property, the defendant must have known the acreage in use by the plaintiff's.
51. In answer to issue number 2, the court finds that the plaintiffs did not have exclusive use of the whole 10.6 acres but must have used 0.2 acres that the defendant states in paragraph 14 of the replying affidavit; for tilling.
52. Since the plaintiff produced evidence of cows, the cows must have also utilized a portion of the suit property in addition to the 0.2 acres and the court finds an additional 0.4 acres as probable usage by the plaintiff's cows, while the rest of the property was fenced off by the defendant for his use to plant maize as stated in his testimony.
53. In answer to use number 3, the court finds thus that the plaintiff has proved that he is entitled to a portion of suit property by virtue of adverse possession and therefore proceeds to award a portion thereof in terms as follows:-
 - i. The plaintiff is entitled to be registered as proprietor of the suit land measuring 0.6 acres by virtue of the adverse possession.



- ii. The defendant to subdivide and transfer the 0.6 acres to the plaintiff. In subdividing the 0.6 acres, regard is to be given to where the two houses belonging to the plaintiff and the late Geoffrey Maswai's grave to constitute part of the 0.6 acres to be given to the plaintiff.
 - iii. The remaining 10.0 acres to remain as the property of the defendant.
54. As the plaintiff has partly succeeded in the suit, the plaintiff is awarded costs of the suit.
55. Judgment accordingly.

DATED AT KAPSABET THIS 20TH SEPTEMBER 2022.

HON. M. N. MWANYALE,

JUDGE

Delivered in the presence of;

Mrs. Rop holding brief for Mr. Wafula for the Defendant.

No appearance of Mr. Nabasenge for Plaintiff.

