



REPUBLIC OF KENYA



**KENYA LAW**  
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**Too & another v Seroney & another (Environment & Land Case  
2 of 2022) [2022] KEELC 13761 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13761 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET  
ENVIRONMENT & LAND CASE 2 OF 2022**

**MN MWANYALE, J  
OCTOBER 24, 2022**

**BETWEEN**

**SOLOMON TOO ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPHINE CHEPKEMBOI (ACTING AS THE PERSONAL REPRESENTATIVE  
OF THE ESTATE OF THE LATE AGGREY KIBISU LUBISIA ALIAS EGGREY  
KIBISU LUVUSIA) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZIPPORAH JEBICHII SERONEY ..... 1<sup>ST</sup> DEFENDANT  
KENYA DEPOSIT INSURANCE CORPORATION AS THE LIQUIDATOR OF  
POST BANK CREDIT LTD ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs Solomon Too and Aggrey Kibisu Lubisia took out an Originating Summons dated March 21, 2016, seeking adverse possession of a portion of 9.2 Hectares in the property known as Nandi/chepkumia/502.
2. Simultaneous with the filing of the Originating Summons the Plaintiffs through the Notice of Motion of even date sought injunctive orders against the Defendants, jointly and severally seeking to restrain them, by themselves, their servant and/or evicting the Plaintiffs from the parcel of land known as NANDI/CHEPKUMIA/502.
3. The Originating Summons was supported by the Supporting Affidavit of Aggrey Kibisu Lubisa, formed the grounds and basis of the Originating Summons that;
  - i. They had been in occupation of the suit property since 1983.
  - ii. The registered proprietor was Zipporah Jebichi Seroney the 1<sup>st</sup> Defendant Who had charged the said parcel in 1993 to Post Bank Credit Limited For a sum of kshs 500,000/=.



- iii. That the proprietor of the land, found them in occupation in the land but has never taken only steps to remove them from occupation.
  - iv. That their occupation has been in the open, without any secrecy and without the consent of the registered proprietor of the land.
  - v. That the 2<sup>nd</sup> Defendant found the Plaintiff in occupation.
  - vi. That they thus seek to assert their rights by interests in the suit land which accrued for more than March 6, 1991 against the 1<sup>st</sup> Defendant and from February 18, 1993 against the 2<sup>nd</sup> Defendant.
  - vii. That they had learnt that the liquidator of the charge, intended to exercise the chargee's statutory power of sale.
4. The Notice of Motion application dated March 21, 2016 seeking injunctive orders was granted vide a ruling delivered on 26/1/2018 by the ELC Court at Eldoret.
  5. The suit was thereafter transferred to Kapsabet ELC for hearing and determination on 8/2/2022.

**Plaintiff's Case and Evidence: -**

6. The gist of the Plaintiff's case is summarized in paragraph 3 (i) to (viii) above. The Plaintiff called a total of 3 witnesses.  
  
PW1, Solomon Kipchirchir Too, the 1<sup>st</sup> Plaintiff testified in Court. It was his testimony that he had lived on the suit property from 1983 to date. He got to know the 1<sup>st</sup> Defendant, when he saw an advert for auctioning of the property. At the time, he was living in the suit property, the property was registered in the name of the 1<sup>st</sup> Defendant.
7. That initially the property belonged to their family but was registered in the name of the late John Marrie Seroney his uncle. It was his further testimony that the first Defendant had not being living on the suit property since 1983, and that his family as well the family of Aggrey Kibisu were on the property. He had planted trees, built thereon and the semi-permanent structures on the suit property were built by Kibisu.
8. There was no house belonging to the 1<sup>st</sup> Defendant that was burnt down, as the 1<sup>st</sup> Defendant did not produce any O.B. to show the property. He further stated that property was being sold and he is able to pay off the loan.
9. In cross – examination, by Mr. Rabut, he started that he was born in 1976 at Kaptumo but started living on suit property in 1983, together with his parents Thomas Kiptoo Kurgat and Ludia Cheptarus, who are now elderly.
10. He was not aware of any Succession Cause that had happened in relation to the property. He stated that he knew the 1<sup>st</sup> Defendant took a loan in 1993, and has not paid. The valuation report by the 2<sup>nd</sup> Defendant had not indicated who built the houses, but the title was still in the name of the 1<sup>st</sup> Defendant.
11. On cross – examination by Mr. Omboto, he stated that he was not related to the 1<sup>st</sup> Defendant, although the 1<sup>st</sup> Defendant claims to be the wife of John Jean Marrie Seroney. PW1 father and the late Seroney were brothers, so the late Serony was his uncle, they went to the property in 1983 after the death of Seroney in 1982, and they only found Kibisu there. He go to know the 1<sup>st</sup> Defendant in 2016.



12. It was his testimony that he had planted the trees and his parents were not witnesses in the case; he had not paid any loan amount. Aggrey Libisu was son of an employee of his father. Mr. Kibisu's father died his parents did not sue because he sued on his own right. He was not aware of any case between Post Bank and 1<sup>st</sup> Defendant. There was no house burnt nor rape on the daughter of the 1<sup>st</sup> Defendant as alleged by the Defendant. He had lived on the property peaceful.
13. In re- examination, he stated that he had lived on the property from 1983 to date, the Kibisu's were also living on the property, he had sued for adverse possession since his parents were aged.
14. PW2, Anna Lagat equally testified. It was her testimony that she knew Solomon Too as owner of the Seroney property. He had known him since 1983. Solomon farms on the property, he had tea bushes and planted maize. It was her testimony that she did not know Zipporah Seroney.
15. In cross examination by Mr. Rabut, she stated that she lived on property number 1473 which neighbors the disputed property. She stated that the house on the disputed property belonged to Solomon Too since it was built by his father (Solomon's father).
16. In further cross – examination by Mr. Omboto, she stated that Solomon was a young man when he got to know him. He was living with his parents there, but afterwards he built his own house. He stated that he knew Aggrey Kibisu's father who was an employee of Solomon's father. Prior to 1983 he had not visited the property.
17. PW3 Nelikinzi Agala also testified. He stated that he knew Solomon Too, who neighbors him, and that he knew Aggrey Kibisu who had died in 2019, he stated that he did not know Zipporah Seroney the 1<sup>st</sup> Defendant.
18. It was his testimony that he had a property nearby and that Solom Too's property was 502; he stated that he had known Solomon since 1983; that there is maize and tea bushes planted thereon. He was not related to anyone in the property.
19. In cross – examination by Mr. Rabut. He stated that the Aggrey Kibisu now deceased was his brother. Kibisu and his family lived on 502. The late Kibisu was born on the suit property, his father had settled there on as an employee.
20. In further cross – examination by Mr. Omboto, he stated that the late Aggrey Kibisu was his cousin brother. That the property 502 belonged to Solomon Too and not Aggrey Kibisu. He stated that the father to the late Aggrey Kibisu was an employee of the father of Solomon Too. He stated that he did not know Zipporah Seroney.
21. In re-examination, he stated that he had been told that the property belonged to late Jean Seroney and Solomon Too is related to the late John Jean Marrie Seroney. The father of Solomon Too and the late Jean Marrie were brothers while Kibisu's father was an employee of the father of Solomon.
22. After the testimony of the 3 Plaintiff's witnesses, the Plaintiff's case closed.

**1<sup>ST</sup> Defendant's Case: -**

23. The 1<sup>st</sup> Defendant, Zipporah Jebichii Seroney testified as DW1. It was her testimony that she had been sued by her nephew, the son of her step brother in law wanted to dispose her of her property NANDI/CHEPKUMIA/502, which she had acquired by transmission, since the property had belonged to her late husband who had died in 1982. She produced the death certificate as D Exhibit 1 and a certificate of confirmation of Grant as D Exhibit 2.



24. It was her further testimony that she had planted the tea bushes in 1974 when she lived on the property.
25. She stated that in 1991, the farm was invaded by thugs, and she took her loan from Post Bank and charged the property as security. She had employed a farm labourer and housed him, the father to Aggrey Kibisu was her farm hand. Her farm manager was a Mr. Kiriongi Ambrose.
26. It was her further testimony that Solomon Too the 1<sup>st</sup> Plaintiff was her nephew being a son to his step brother in law. At the time that she charged the property, the farm did not have anyone living thereon. She confirmed taking a loan in 1991 from Post Bank but had not paid any installment. The loan was for kshs 500,000/=. She has been paid the bonuses in respect of the tea therein.
27. It was her father testimony that Aggrey Kibisu had passed on December 13, 2017; and both Solomon Too and the family of Aggrey Kibisu do not live on the property.
28. On cross – examination by Mr. Rabut for the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant confirmed that she took a loan of kshs 500,000 from Post Bank, and has not repaid any installment from 1993, and that the title was in the custody of the bank.
29. The witness was cross – examined by Mr. Mogambi for the Plaintiffs, she stated that she was indebted to the 2<sup>nd</sup> Defendant, she was willing to pay but did not have funds, she was aware that the property had not been sold. She was not aware whether the Plaintiff had obtained injunctive orders which stopped any sale.
30. She further stated that she built a farm house on the property in 1974, though she did not have photographs of the house. She stated that she was evicted by thugs who had been hired by the Plaintiffs, though she did not have a report from the police station, they were arrests and charges but id not know the outcome of the case.
31. The witness in further cross – examination stated that she had an account with KTDA who pay her a bonus, she got a bonus of kshs 80,000/= the last time but she had not repaid the loan. She knew Aggrey Kibisu as her tea picker, who he paid a salary. She stated the Plaintiffs did not live on the property, that they were only structures thereon, and that she wanted her property back. She asked the Court to waive the interest charged by the 2<sup>nd</sup> Defendant.
32. She further stated that the Plaintiff<sup>2</sup> gained entry after evicting her in December 1991. She refused to look at the photographs because of her house had been demolished and was not in the photographs.
33. In Re- examination; she stated that the people referred to the valuation report were possibly her tea pickers; who were casual laborers. She stated that there was an invasion by thugs on her property and had reported to the police station. She had borrowed money from the Post Bank to treat her daughter who had suffered mishap during the invasion on her property by the thugs sponsored by the Plaintiff.
34. She stated that the 2<sup>nd</sup> Defendant had sued her in 1996 for the debt and the Plaintiff has not proved that they paid off the debt owing to 2<sup>nd</sup> Defendant.
35. She further stated that Aggrey Libisu was a manual labourer while the first Plaintiff was her nephew. Aggrey Libisu was an adult when he come to the property, while Solomon did not come to the property while she was there. He confirmed that according the paragraph 5 of her Replying Affidavit, she had said she did not know Aggrey Libisu, in relation to whether he was her relative.
36. DW2, Winsome Jebet Kossom, an Assistant Liquidation Agent in charge of Post Bank Credit Limited (in liquidation) testified on behalf of the 2<sup>nd</sup> Defendant. She produced a charge document dated 25.01.1993 between the 1<sup>st</sup> Defendant as borrower and Post Bank Credit Limited as Lender.



- The borrower had borrowed kshs 500,000/= and offered LR. NANDI/CHEPKUMIA/502 (suit property) measuring approximately 9.2 Hectares as security. The charge was registered on the encumbrance section of the title.
37. The 1<sup>st</sup> Defendant did not make any single repayment, and demand letters sent to her were not honoured. A civil suit No. 2685 of 1996 was thus filed so as to recovery kshs 2,700,000/= together with Interest at 18% compounded monthly until payment in full.
  38. The claim was awarded and a decree was issued which DW2 produced as D Exhibit 7. On the strength of the decree the 2<sup>nd</sup> Defendant instructed valuers to value the property which valuation was conducted by Highland Valuers, which on 4<sup>th</sup> June 2015 D Exhibit 9. The value for the property was kshs 12,000,000/= and the forced value is kshs 9,000,000/=. The sale did not proceed because of any injunction issued in this matter.
  39. On cross – examination by Mr. Mogambi DW3 stated that the loan was advanced to 1<sup>st</sup> Defendant on January 25, 1993. The initial valuation report is not before Court. On page 5 of the valuation reports, remarks of people who were on the properties. Whose identities could not be identified. She stated that there was a tea plantation and structures for the people who were on the property. She stated that there were several demand letters and notices but the prices were below the reserved prices.
  40. On further cross – examination by Mr. Omboto D.W. 3 stated that the loan was advanced to 1<sup>st</sup> Defendant in 1993 for kshs 500,000, whilst the 2<sup>nd</sup> Defendant was in operation and the 1<sup>st</sup> Defendant was in occupation. There were farm workers and tea plantations.
  41. In the Originating Summons the Applicant now Plaintiff had framed the following as issues for determination.
    - i. Whether the Plaintiff has been in open, continuous and uninterrupted occupation of 9.2 Hectares of land parcel known as NANDI/CHEPKUMIA/502?
    - ii. Whether the occupation has been without the consent of the Defendants?
    - iii. Whether the 1<sup>st</sup> Defendant’s tittle to the land has been extinguished by adverse possession and her right to recovery of land by action has also been extinguished?
    - iv. Whether the Plaintiffs are entitled to be registered as the proprietors of 9.2 Hectares comprised in the land parcel known as NANDI/CHEPKUMIA/502 in place of the 1<sup>st</sup> Defendant.
    - v. Whether the 2<sup>nd</sup> Defendant holds any valid chargees interest in the suit land capable of enforcement by way of a statutory power of sale in review of the overriding interests?
    - vi. Whether the 2<sup>nd</sup> Defendant should execute a discharge of charge in respect of the 9.2 Hectares of land to be registered in the Plaintiff’s names.
    - vii. Whether in default of the Defendant’s complying the Deputy Registrar of the Honourable Court may execute the requisite instruments.
    - viii. Who should meet the costs of this suit?
  42. Parties were directed to file written submissions. Upon perusal of the Court record, the Court found that they had been an amendment of the Originating Summons through an Amended Originating Summons filed on October 2, 2018. The Amendment was to substitute Aggrey Kibisu Lubusia with his personal representative Josephine Chepkemboi.
  43. In her written submissions the 1<sup>st</sup> Defendant framed the following as issues for determination;



- a. Whether the Plaintiffs have met out the required threshold on adverse possession on the suit parcel of land known as NANDI/CHEPKUMIA/502.
  - b. Whether the 1<sup>st</sup> Defendant's title to the suit land has been extinguished by adverse possession.
  - c. Whether the charge registration against the suit land in favour of the 2<sup>nd</sup> Defendant need to be discharged to validate a claim under adverse possession.
  - d. Whose rights comes first between the chargee or mortgagee and the claim by adverse possessor.
  - e. Whether there is a relationship between the Plaintiff and the 1<sup>st</sup> Defendant.
  - f. Who should bear the costs of the suit?
44. On their part the second Defendant has framed only one issue.
- i. Whether the prescriptive rights in adverse possession supersedes the rights of a chargee under a charge.
45. Upon perusal of the pleadings, hearing of the testimony of the witnesses and evidence adduced during trial as well as having considered the rival written submission of the parties, the Court considers the following as issues for determinations and frames the same.
- i. Whether the Plaintiffs has been in open continuous, uninterrupted occupation of Nandi/ Chepkumia/502, without the consent of the Defendants for a period of 12 years?
  - ii. Whether there is a relationship between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant?
  - iii. Whether the Plaintiffs have proved their case on adverse possession on a balance of probability?
  - iv. If answer to iv) above is in the affirmative, whether the 2<sup>nd</sup> Defendants holds any valid chargees interest by way of statutory power of sale in view of the overriding interests? Which interests take precedence, prescriptive rights under adverse possession or the chargees statutory rights? Whether the 2<sup>nd</sup> Defendant should execute discharge of charge to be registered in the Plaintiff's name?
  - v. If answer to iv) above is in the negative, is the 2<sup>nd</sup> Defendant entitled to exercise the statutory power of sale pursuant to the decree?
  - vi. Who bears the cost of the suit?

**Analysis and Determination: -**

46. It is common ground that Nandi/Chepkumia/502, belongs to the 1<sup>st</sup> Defendant who acquired the same through transmission after the demise of her late husband John Jean Marrie Seroney. This was confirmed by D Exhibit 2, a copy letters of Administration Interstate issued to 1<sup>st</sup> Defendant, D Exhibit 1 a copy of the Certificate of Death of the Original Owner Marrie John Seroney as well as a Ruling in HCC Kisumu Succession Cause No. 50 of 1992 and No. 206 of 1992, which confirmed that Nandi/ Chepkumia/502 formed part of the Estate of the late Jean John Marrie Seroney. The 1<sup>st</sup> Defendant further produced a copy of the title for the property as D Exhibit 4 in her name.
47. Having proved ownership of Nandi/Chepkumia/502; the 1<sup>st</sup> Defendant, took out a loan of kshs 500,000 and charged the property to Post Bank Credit Limited which is now under liquidation and the Liquidator has been sued as the 2<sup>nd</sup> Defendant. The charge in respect of the property was produced by the 2<sup>nd</sup> Defendant as 2<sup>nd</sup> Defendants D Exhibit 2.



48. The original second Plaintiff Aggrey Libisu passed on before the matter was heard and he was substituted in the Amended Originating Summons by his Personal Representative Joshephine Chepkemboi. The substituted second Plaintiff Josephine Chepkemboi, however did not testify.
49. There was no authority to Co-Plaintiff filed in respect of the substituted Plaintiff, Josephine Chepkemboi who did not testify hence the 2<sup>nd</sup> Plaintiff's suit was a non-starter and the Court shall consider the 1<sup>st</sup> Plaintiff suit.
50. In arriving at the above conclusion, the Court is persuaded by the decision in the case of *Hezekia Kipkorir Maritim & 10 others vs Philip Kipkeoch Tenai & 2 Others* (2016) eKLR where the Court held that.

“in view of the foregoing, and with regard to the competence of this suit and to the instant application it is my view that even if the 2<sup>nd</sup> and 10<sup>th</sup> Plaintiffs suit was declared a nonstarter for failure to authorize the 1<sup>st</sup> Plaintiff to swear respective affidavits on their behalf, the 1<sup>st</sup> Plaintiff's claim against the Defendants still stands.”

51. It is the 1<sup>st</sup> Plaintiffs claim that he entered the suit land in 1991 and has been living there on together with his parents since then. PW2 and PW3 equally testified that the 1<sup>st</sup> Plaintiff has been their neighbors from around 1991 today. The 1<sup>st</sup> Defendant states that she vacated the house in 1991 when thugs attacked her, in the house. It was her testimony and belief that the thugs were sponsored by the Plaintiffs. The entry by the Plaintiff though disputed by the 1<sup>st</sup> Defendant was thus somewhere in 1991.
52. This is confirmed by the fact that the Defendant stated that she vacated the property in the 1991 and took a loan to treat her daughter who had suffered mishap during the attacks, by the thugs she attributed to have been sponsored by the Plaintiffs. The entry then was in 1991, and at the time of filing suit, in 2016, it had been 25 years.
53. In answer to issue number 1, the Court finds that the 1<sup>st</sup> Plaintiff had been occupying Nandi/Chepkumia/502 for more than 25 years, in an open and exclusive manner, open in that his neighbors testified to this effect and exclusive manner, since the Defendant confirmed that she had never been on the property since 1991, but visited in 2017, after commencement of the suit.
54. In answer to issue number 2, whether there is a relationship between the 1<sup>st</sup> Plaintiff and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Plaintiff indicated in cross examination that the late John Jean Marrie Seroney was his uncle brother to his dad, and the 1<sup>st</sup> Defendants was his wife.
55. The 1<sup>st</sup> Defendant equally stated that the Plaintiff was his nephew by virtue of being a son to his step brother in law. PW3 in cross examination by Mr. Ombwoto stated that he had been informed that the suit property belonged to the late John Jean Marie Seroney and that the 1<sup>st</sup> Plaintiffs father was a brother to the late John Jean Marrie Seroney.
56. It follows therefore that the 1<sup>st</sup> Plaintiff is a nephew of the 1<sup>st</sup> Defendant. The relationship once established has a bearing in adverse possession matters. The Court of Appeal in the case of *Samuel Kihamba vs Mary Mbaisi*, held that “could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and stepson. We think not, we are persuaded by various decta which we have quoted and relied upon in this judgment and must state. It would create havoc or families and society of Kenya generally if the principle of adverse possession applied within families against close relatives.”



57. Similarly the High Court in the case of *Mbui vs Maranya* 1993, had declined to grant adverse possession between relatives, as well as the High Court in *Rodgers Mwabonje vs Douglas Mwabonje* 2014 (eKLR).
58. Having found that adverse possession is not permissible between relatives, as in this case, the Court answers issue number iii) and iv) in the negative, and consequently skips issue no. 5 that would have been answered if issue number (iv) was in the affirmative.
59. On issue number 5, the Court has found that the doctrine of adverse possession has not been established hence is the 2<sup>nd</sup> Defendant entitled to exercise the statutory power of sale pursuant to the decree herein.
60. The 2<sup>nd</sup> Defendant submits that it commenced the recovery pursuant to the decree issued in 1997. The Court framed this as an issue as it formed the basis of the ruling for the injunction issued on January 26, 2018.
61. The Plaintiff in their submission submit that the decree is unenforceable as it is time barred by virtue of Section 4 (4) of the *Limitation of Actions Act* and have placed reliance. *Willis Onditi Odhiambo vs Gateway Insurance Company Ltd.*
62. I agree with the submissions of the Plaintiff that the decree issued in 1997 is not enforceable at the moment. The 1<sup>st</sup> Defendant has however admitted that she was advanced a loan of kshs. 500,000/= and that she did not repaid any installment of the loan, the recovery of and exercise of the statutory power of sale should thus be based on the default on the repayment as opposed to the decree.

**Disposition: -**

63. The Plaintiffs claim on adverse possession in relation to Nandi/Chepkumia/502, has not been proven and it is hereby dismissed with costs.
64. The 2<sup>nd</sup> Defendant is at liberty to exercise its statutory power of sale in relation to Nandi/Chepkumia/502, based on the default of the repayment by the 1<sup>st</sup> Defendant and not on the decree as it had previously attempted.  
The injunction herein, issued vide the ruling dated January 26, 2018 is hereby lifted.
65. Judgment accordingly.

**DATED AT KAPSABET THIS 24<sup>TH</sup> DAY OF OCTOBER, 2022.**

**HON. JUSTICE M. N. MWANYALE**

**JUDGE.**

**Delivered in the presence of;**

Mr. Omboto for 1<sup>st</sup> Defendant

Mr. Rabut for 2<sup>nd</sup> Defendant

Mr. Mogambi for Plaintiff

