



**Kisundi v Kisia & another (Sued as the Legal Administrators of Javan Kadari Kisia, Deceased)
(Environment & Land Case 4 of 2017) [2022] KEELC 14608 (KLR) (17 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 4 OF 2017
MN KULLOW, J
OCTOBER 17, 2022
IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT
BETWEEN
FRANCIS SARU KISUNDI PLAINTIFF
AND
BENJAMIN OGADA KISIA 1ST DEFENDANT
PIUS ANUMU AMARA 2ND DEFENDANT
SUED AS THE LEGAL ADMINISTRATORS OF JAVAN KADARI KISIA,
DECEASED**

JUDGMENT

1. Francis Saru Kisundu (“The Plaintiff”) commenced this suit by way of an Originating Summons dated January 12, 2017 against the Defendants for a determination of the following issues: -
 - i. A Declaration that the Defendants rights to recover the whole of L.R. No’s. SUNA EAST/ KAKRAO/ 4021 & 4022, respectively; are barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya, and their Titles thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcels of land for a period exceeding 36 years.
 - ii. There be an order that the Plaintiff be registered as the proprietor of the whole of L.R. No’s. SUNA EAST/ KAKRAO/ 4021 & 4022, respectively, in place of the Defendants.



- iii. There be an Order restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said parcels of land, that is, L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022, in any manner whatsoever and/or howsoever.
 - iv. The Deputy Registrar and/or Executive Officer of the Honourable High court be directed and/or ordered to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022, in favour of the Plaintiff, in the event of default by the Defendant to execute the necessary Transfer Instruments.
 - v. Costs of this Originating Summons be borne by the Defendants.
 - vi. Such further and/or other orders be made as the court may deem fit and expedient to grant in the circumstances of this case.
2. The Originating Summons is premised on the 25 grounds on its face and on the Plaintiff's Supporting Affidavit sworn on even date. It is the Plaintiff's case that on September 14, 1979; he entered into a sale agreement with one Javan Kadari Kisia, who is since deceased, over the sale of the entire suit land L.R. No. SUNA EAST/ KAKRAO/ 967. The sale was done upon conducting a search and ascertaining that the suit land was registered in the name of the deceased and the agreement was duly witnessed. That pursuant to the said Sale Agreement; he took immediate possession of the suit parcel and commenced cultivation and has remained in occupation and possession of the same to date.
 3. He averred that despite the deceased duly executing the sale agreement; he failed to apply and obtain the requisite Land Control Board Consent within the statutory period of 6 months or at all.
 4. He further stated that upon the death of the deceased, Javan Kisia; the Defendants applied and obtained Grant of Letters of Administration in respect of the estate of the deceased and which was later confirmed. Subsequently; the Defendants caused the original land parcel to be transferred and registered in their names and upon the said transfer and registration, they caused the said original parcel to be subdivided into 2 separate parcels L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022. The said processes were done without his knowledge or notice.
 5. However, despite the said transfer, registration and subdivision of the original land parcel; he has remained in occupation and possession of the original parcel of land for a period of over 36years since 1979 to date. It is his contention that neither the deceased nor the defendants took and/or has ever taken any steps to interfere with his physical possession and occupation of the original parcel of land.
 6. He therefore maintained that owing to his occupation and possession of the original suit land for a period of over 36years, he has acquired rights and interests over the suit property which are adverse to the Defendants' rights over the same property and urged the court to order that the suit parcels be transferred and registered in his name.
 7. The Defendant entered Appearance through the firm of M/S Sam Onyango & Co. Advocates dated February 7, 2017 and filed a replying affidavit sworn by the 1st Defendant on July 7, 2019 on his own behalf and on behalf of the 2nd Defendant and a witness statement dated October 31, 2019. He denied all the allegations contained in the Originating Summons. He confirmed that the late Javan Kadari Kisia was the registered proprietor of the original suit parcel and upon his death, they applied for Grant of Letters of Administration which was confirmed on May 11, 2010. Thus, by virtue of the powers bestowed upon them as administrators of the estate of the deceased, they caused the subdivision of the said original parcel and the creation of the 2 new parcel No's 4021 and 4022.



8. He denied there being a sale of land between the Plaintiff and their deceased father and maintained that his late father gave the plaintiff a portion of the suit land to put up his home upon the plaintiff's request. That there being no sale, the deceased was not under any obligation to procure Land Control Board Consent as he never entered into any land sale agreement.
9. It was his contention that the plaintiff's continued occupation of a portion of the suit parcels is because he has violently refused to vacate the suit land despite their demand and efforts to have him vacate the same. Hence, the claim of peaceful occupation is not true.
10. He thus maintained that there was no legal backing of the plaintiff's claim since his entry and occupation of the suit land was grounded on invitation of his deceased father and hence has not acquired any adverse rights and interests over the suit parcels. He urged the court to dismiss the Plaintiff's claim with costs.

Trial

11. On October 9, 2018; the matter was certified ready for hearing and a hearing date set for the February 6, 2019. However, on the said date, the matter did not take off and was adjourned to March 2, 2020.
12. On 02/03/2020; the matter proceeded for the Plaintiff's case, the Plaintiff testified as PW1, he adopted his Supporting Affidavit sworn on 12/1/2017 and his witness statement as of even date as his evidence and testimony in chief. He reiterated that
13. He produced his documents marked as F-SK 1(a)- FSK-7 save for FSK-5 and his bundle of documents dated 12/1/2017 save for Nos. 2,4,9 and 11 as exhibits in support of his case. PExhibit 1 to 10 admitted accordingly in terms of bundle of documents Nos.1,3,5 to 8,10,12 to 14 listed accordingly.
14. On cross-examination he stated that the suit parcel is 0.6Ha which he uses and denied the claims that the Defendants occupy the suit land and maintained that the 2nd defendant has not built thereon.
15. On re-examination he reiterated that the 2nd defendant stays far away from the land and does not use the same. The Plaintiff thereafter closed his case.
16. The matter proceeded for Defence Hearing on 15/3/2022; the Defendant testified as DW1, he adopted his witness statement dated 31/10/2019 as his evidence in chief.
17. On cross-examination, he stated that he has known the Plaintiff since he was born 70 years ago, though he could not recall the date when he entered the suit parcel. He maintained that the Plaintiff has never constructed a home on the suit land. It was his contention that they allowed the Plaintiff to cultivate the land and to live thereon, though he could not recall the date.
18. He further stated that they had agreed as a family to have the plaintiff evicted from the suit land but conceded that the minutes to the said family meeting were not produced or filed in court. Upon the death of his father, he filed succession cause and he was duly appointed as the Administrator of the estate of his father. He conceded that as an Administrator, he never filed any suit against the Plaintiff who was living on the suit land that had since been subdivided into 2 parcels. He confirmed that the suit land was currently being used by the Plaintiff and Chief Amar.
19. The Defence thereafter closed their case.
20. Upon close of the defence case, directions were issued on the filing of submissions. Both parties filed their rival submissions and authorities which I have taken into account and summarized as hereunder;



Plaintiff's Submissions

21. The Plaintiff submitted on 3 main issue to prove his claim on adverse possession. The first issue was whether he had entered into a lawful land sale agreement and whether his occupation became adverse upon the lapse of 6 months from the date of execution of the land sale agreement and it was his submission that having entered into a valid sale agreement with the deceased; his entry upon and usage of the suit property within the first 6 months following the execution of the sale agreement was contractual and hence consensual.
22. However, upon the expiry of the 6 months' period required for the obtaining of Land Control Board Consent; the plaintiff's continued occupation, possession and use of the suit property became adverse to the rights and/or interests of the registered owner. Consequently, that the plaintiff became a trespasser and thus it was within the rights of the deceased to commence the process towards the eviction of the plaintiff. None of such steps was taken by the deceased or the defendants. That his continued stay and use has therefore become adverse to the rights and interests of the deceased and his successors in title.
23. The second issue was whether the plaintiff's occupation and use of the suit property has been open, continuous and uninterrupted and the duration of the said occupation. It was his submission that upon execution of the sale agreement on September 14, 1979, he entered upon and took possession of the suit property, he cultivated the ground and even planted assorted trees. It was his contention that he adduced evidence of mature eucalyptus and assorted trees which have substantially grown evidenced by the photographs which were not challenged.
24. He therefore urged the court to find that the photographic evidence produced which showed the status of the land as proof of his open, continuous and uninterrupted occupation and use of the said property and the same was within the knowledge of the deceased and the defendants.
25. Issue number three was whether the plaintiff's occupation and possession meets the threshold for declaration of adverse possession. The plaintiff maintained that even though his initial entry was anchored on the basis of a land sale agreement, the agreement terminated when the vendor neither sought nor obtained the requisite land control board consent within the statutory period of 6 months hence the agreement became null and void. He however remained in occupation and use despite the termination of the said sale agreement to date. No steps were taken either by the deceased or the defendant to evict him from the property.
26. It was his submission that having tendered credible and consistent evidence in support of his claim, which was neither challenged nor controverted, he urged the court to find he had met the required threshold and grant the reliefs sought in the Originating Summons dated January 12, 2017.

DEFENDANTS' SUBMISSIONS

27. The Defendants had 2 issues for determination; on the first issue of whether the plaintiff's entry and occupation was without permission, consent or authority of the registered proprietor, it was their submission that the onus is on the plaintiff to demonstrate that his entry and occupation of the suit land was without concurrence, permission or agreement with the then registered proprietor. It was their contention that the evidence by the plaintiff was that he made an agreement with the then proprietor for the purchase of the said parcel and pursuant to that agreement he was allowed to gain entry into the suit property.



28. The thus maintained that the plaintiff's alleged entry and occupation of the suit property was with the consent, concurrence and authority of the registered proprietor and such entry cannot therefore amount to adverse possession.
29. The second issue was whether the plaintiff enjoyed open, peaceful, uninterrupted and continuous possession of the suit parcel for not less than 12 years. It was his submission that no evidence was led by way of a surveyor's report or any independent witness that the structures stand on the suit land nor have the said structures been in existence for the past 36 years as alleged.
30. It was their contention that the period of more than 12 years has not been proved and no evidence has been led to demonstrate when exactly entry and possession commenced. To the contrary, they maintained that they had adduced evidence of plaintiff's interruption of possession by the 2nd Defendant who transferred a portion of the suit land L.R. No. SUNA EAST/ KAKRAO/ 4022 to his name and took possession of the said portion prior to the commencement of the instant suit.

Analysis and Determination

31. I have carefully considered the various pleadings filed by the parties herein and the rival submissions, it is my considered view that the issues arising for determination are: -
 - a. Whether the claim of Adverse Possession has been proved by the Plaintiff.
 - b. Whether the Plaintiff is entitled to the reliefs sought.

A. Whether the Claim of Adverse Possession has been proved by the Plaintiff.

32. Adverse possession is a situation where a person takes possession of land and asserts his rights over it and the person having title and rights to the said land neglects to take action against such person in assertion of his title for a period of twelve (12) years.
33. Section 13 of the *Limitation of Actions Act* provides that: -
 - “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
34. Circumstances under which the title of a registered owner can be defeated by a claim of adverse possession was succinctly set out by the Court of Appeal in *Peter Kamau Njau vs. Emmanuel Charo Tinga* - Civil Appeal No. 29 of 2016 (unreported) as follows: -
 - “A registered owner of land, may not, by the provisions of section 7 of the *Limitation of Actions Act* bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner's title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner's permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are



inconsistent with the registered owner's enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner.”

35. It is the Plaintiff's contention that he has been in possession, occupation and use of the whole of the suit parcel No's. 4021 & 4022 since 1979 and has remained in occupation to date. He contends that his entry into the said property was vide a sale agreement dated September 14, 1979 between the deceased and himself and hence consensual. However, despite the said initial entry being by the permission and as a result of the sale agreement; the deceased failed to obtain the requisite Land Control Board Consent for the subsequent transfer within the statutory timelines of 6 months.
36. He thus maintained that upon the lapse of the 6 months without the obtaining the required LCB Consent; the said sale agreement became null and void and consequently the deceased was at liberty to commence the eviction process. It is his case that despite the sale agreement becoming void and unenforceable; he continued to occupy and use the said suit parcels and have been in possession and occupation to date. No efforts was or has been taken by the deceased or the Defendant herein to vacate him from the said land. therefore, having occupied the land for 36 years he has acquired rights and interests which are adverse to that of the Defendants.
37. The Defendant on the other hand; denied the existence of a sale agreement between the plaintiff and his late father or that he signed and witnessed the same and stated that the signature on the said sale agreement was a forgery.
38. It was also his contention that the Plaintiff was only given land by his late father after the plaintiff requested for the same and since then efforts to try efforts to have him vacate the said properties have been futile since the Plaintiff has always turned violent. He therefore maintained that there was no need to obtain the consent of the Land Control Board within the stipulated timelines or at all since there was no sale between the Plaintiff and the deceased.
39. He further averred that there was no evidence tendered of the 36-year period occupation and use other than the photographs which did not offer cogent proof of the existence of the houses and trees on the said land for over 36 years as alleged. He also opined that the plaintiff's possession and occupation was interrupted when the 2nd Defendant transferred a portion of the suit property to his name and took possession of the said portion.
40. From the foregoing, it is clear that the Plaintiff has been in occupation of the whole of suit parcel No's. 4021 & 4022. While the plaintiff contends that his initial entry onto the suit parcel was pursuant to a sale agreement dated 14/9/1979, the said agreement became null and void upon the lapse of 6 months without obtaining the relevant LCB Consent and his continued stay thereon thus became adverse in the year 1992 after the expiry of the 12 year statutory period without being evicted from the said parcels, where he continues to occupy to date. The Defendants on the other hand contends that the plaintiff's entry and occupation into the suit parcels arose when the plaintiff requested his deceased father to give him a portion of land since he had been chased away by his own father. His deceased father accepted the request and gave him a portion of the suit land to build a house. Consequently, what appears to be in dispute is whether such occupation and use by the plaintiff vested him with rights over the said suit parcels.
41. The plaintiff entry into the disputed portion of land as indicated earlier was vide a sale agreement between him and the defendants' deceased father. The Plaintiff further contends that even though the initial entry was by consent, the said agreement became null and void upon the expiry of 6 months without obtaining the requisite LCB Consent. That while both the deceased and the defendants were



at liberty to evict him from the suit property, no steps were taken and he continued to stay of the suit parcels without consent and with the full knowledge of the defendants since 1979 to date.

42. The original suit parcel was registered in the name of the deceased, however, upon succession and the confirmation of the Grant of the Letters of Administration, the Defendants who were the lawful Administrators of the estate of the deceased; subdivided the original parcel L.R. No. SUNA EAST/ KAKRAO/967 into 2 portions of land namely L.R. No. SUNA EAST/ KAKRAO/4021 and 4022, all registered in the Defendants' names.
43. Possession and occupation are some of the important pillars that must be demonstrated in a claim for adverse possession. Possession and occupation must be open, continuous, uninterrupted for a period of 12 years. An Applicant must also establish and demonstrate whether he has acquired rights and overriding interests over the suit property which are adverse to the rights of the Defendant as the registered proprietor of the suit land.
44. The plaintiff contends that he has been in continuous uninterrupted possession and occupation of the portion of the suit property since 1979; he adduced photographic evidence of the various developments on the suit property, houses, mature eucalyptus and assorted trees in support of his claim of occupation and use.
45. The Defendant on the other hand dismissed the claims by the plaintiff and maintained that no sufficient evidence had been tendered to support the occupation and use of over 36 years as alleged. That there was no surveyor's report or a witness to testify as to the said long stay and therefore there is no way of ascertaining the longevity of the Plaintiff's stay.
46. In the case of *Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch* [2021] eKLR it was held that; -

“..... for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land.....”

47. Although the Plaintiff's entry into the land was by virtue of a sale and hence permissive, the said sale agreement became void and unenforceable upon the expiry of the 6 months' period without the deceased having obtained the requisite LCB Consent. Guided by the decision above and having held that the said sale of land agreement became void and unenforceable; I find that the plaintiff's continued occupation and use thus became non-consensual; no steps were taken by the deceased of the defendants to evict him from the said land or interfere with his occupation and use whatsoever or howsoever. It



is therefore my considered view that the Plaintiff's continued possession and occupation thus became adverse; thus at the time of filing the suit.

48. I therefore find and hold that the Plaintiff has satisfactorily proved on a balance of probabilities that his occupation and use of the whole of the suit property now parcel No's. 4021 & 4022 to warrant the reliefs sought.

B. Whether the Plaintiff is entitled to the reliefs sought

49. In view of the foregoing, having held that the plaintiff has proved his claim on adverse possession against the Defendant's title to the required standard, I find that he is entitled to the reliefs sought.

Conclusion

50. The upshot of the above is that the Plaintiff has proved his claim on adverse possession on a balance of probabilities and I accordingly allow the Originating Summons dated January 12, 2017 as follows;
- a. A Declaration be and is hereby made that the Defendants rights to recover the whole of L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022, respectively; are barred under the Limitation of Actions Act, Cap 22 Laws of Kenya, and their Titles thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcels of land for a period exceeding 36 years.
 - b. An Order be and is hereby issued that the Plaintiff be registered as the proprietor of the whole of L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022, respectively, in place of the Defendants.
 - c. An Order of Permanent Injunction be and is hereby issued restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said parcels of land, that is, L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022, in any manner whatsoever and/or howsoever.
 - d. The Defendants are hereby ordered to execute all the necessary and/or requisite forms/ instruments to facilitate the transfer of the suit parcels in the name of the Plaintiff within 60days from the date of this Judgment.
 - e. The Deputy Registrar be and is hereby directed to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of L.R. No's. SUNA EAST/ KAKRAO/ 4021 & 4022, in favour of the Plaintiff, in the event of default by the Defendants to execute the necessary Transfer Instruments within the stipulated period.
 - f. Costs of this Originating Summons be borne by the Defendants.
 - g. Any eviction to comply with the statutory provisions.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 17TH DAY OF OCTOBER, 2022.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

Nonappearance for the Plaintiff

Nonappearance for the Defendant



