



**Cheboi v Kimani (Environmental and Land Originating Summons
108 of 2020) [2022] KEELC 13430 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13430 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 108 OF 2020**

EO OBAGA, J

OCTOBER 13, 2022

**IN THE MATTER OF LAND PARCEL TITLE NO.
ELDORET MUNICIPALITY BLOCK 27/1664**

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

BENARD CHEBOI PLAINTIFF

AND

JOHN MUNGAI KIMANI DEFENDANT

JUDGMENT

Introduction

1. The plaintiff filed an originating summons dated December 1, 2020 in which he sought to have the following questions answered: -
 - a) Whether the title of the said John Mungai Kimani to the freehold interest in land parcel title number Eldoret Municipality Block27/1664 has been extinguished by the plaintiff's adverse possession thereof for a period of more than 12 years in terms of sections 17 and 38 of the *Limitation of Actions Act*.
 - b) Whether the plaintiff has acquired the interest in land parcel Eldoret Municipality Block27/1664 by his adverse possession thereof for a period of more than 12 years.
 - c) Whether the Land Registrar should be ordered to register the plaintiff as the absolute proprietor of land parcel title number Eldoret Municipality Block27/1664 in place of John Mungai Kimani the defendant herein.



- d) Whether the Deputy Registrar should be empowered to sign the transfer form instead of the defendant hereto should the defendant fail to comply with the order of this honourable court.
- e) That costs of this application be award to the plaintiff.

Background:

- 2. The defendant who was served through substituted service by advertisement in the press neither entered appearance nor filed a replying affidavit. The hearing therefore proceeded by way of formal proof.
- 3. In his pleadings, the plaintiff stated that he purchased LR No Eldoret Municipality/Block 27/1664 (suit property) from Regina Njeri Irungu who had purchased the same for her son Peter Mungai Mangu now deceased from the defendant. The defendant had been fully paid by Regina Njeri Irungu.
- 4. In his testimony in court, the plaintiff stated that he had not entered into a sale agreement with Regina Njeri Irungu and that following the post-election violence of 2007/2008, he has not seen Regina Njeri Irungu. His efforts to trace the defendant were in vain. He stated that he was given the original title by Regina Njeri Irungu.
- 5. The plaintiff stated that he has been in occupation of the suit property which he has been cultivating since he took possession in 2007. He stated that there is no one who has come to claim the suit property and that there are no encumbrances registered against the title. He therefore prays that he be registered as owner having dispossessed the true owner.
- 6. I have considered the plaintiff's claim as well as the submissions filed on his behalf. Though this suit proceeded by way of formal proof, the plaintiff was bound to prove it to the required standard.
- 7. In his submissions, the plaintiff relied on the case of *Mtana Lewa v Kabindi Ngala Mwangadi* (2005) eKLR where Makhandia J A stated as follows:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts right over it and the person having title neglects to take action against such a person in assertion of his title for a certain period. In Kenya, the period is twelve (12) years. The process springs into essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor stealth nor under licence of the owner. It must be adequate in continuity in publicity and extent to show that possession is adverse to the owner.”
- 8. The plaintiff also relied on the case of *Sisto Wambugu v Kamau Njuguna* (1982) KLR 172 where it was held as follows:-

“First in order to acquire by statute of limitation title to land to which has a known owner, that owner must have lost his right to the land either of it.... The *Limitation of Actions Act* (cap 22) on adverse possession contemplated two concepts; dispossession and discontinuance of dispossession of possession.”
- 9. I have now to decide on whether the plaintiff has met the threshold for grant of orders for adverse possession. The plaintiff states that he has been in continuous occupation of the suit property where



he has been cultivating for over twelve years. The burden of proving this lay with the plaintiff. In the case of *Gabriel Mbui v Mukindia Maranja* (1993) eKLR, justice Kuloba stated as follows:-

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from the mere exercise of exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto* use and defacto occupation must be shown”.

10. In the instance case, the plaintiff without more stated that he has been in continuous possession for over twelve years. In the case of *Wambugu v Njuguna* (1983) KLR 172, the court held as follows:-

“In order to acquire by statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intends to use it”.

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been disposed or has discontinued his possession for the statutory period not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

11. In *Mbira v Gachubi* (2002) 1 EALR 137 it was stated as follows: -

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open notorious, exclusive ad adverse use by him or those under whom he claims for the statutorily prescribed period without interruption.”

12. It is important to note that though the claim by the plaintiff is directed at the defendant, the main actor is Regina Njeri Irungu who purchased the suit property for her son. The purchase was from the defendant. The plaintiff's evidence is that he entered the suit property pursuant to a sale. In his own evidence, he was yet to sign an agreement with Regina Njeri Irungu. This being the case, he is on the suit property with permission pending conclusion of the sale procedures. He cannot therefore claim adverse possession.
13. Without a sale agreement and without evidence of any payment, there is no way the plaintiff can seek adverse possession of the suit property. The mere fact that he has the original title does not prove that he had paid for the suit property. A person cannot claim to have paid for land without a sale agreement.
14. Until the sale is concluded, the plaintiff continues to be in possession of the suit property with permission of the owner. I therefore find that the defendant is not entitled to an order of adverse possession. The plaintiff's claim is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 13TH DAY OF OCTOBER, 2022.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Maritim for Plaintiff.



Court Assistant -Albert

E. O. OBAGA

JUDGE

13TH OCTOBER, 2022.

