



**Katam v Sigira (Environmental and Land Originating Summons  
56 of 2018) [2022] KEELC 15064 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15064 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 56 OF 2018**

**CG MBOGO, J**

**NOVEMBER 25, 2022**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF  
ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION  
IN RESPECT OF PARCEL NUMBER**

**CIS-MARA/OLULUNGA/15035**

**BETWEEN**

**MOSONIK ARAP KATAM ..... PLAINTIFF**

**AND**

**KIPLAGAT ARAP SIGIRA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed originating summons dated August 15, 2018 seeking determination of the following questions: -
  - a. Whether the plaintiff has been in adverse possession of the defendant's parcel of land number Cis-Mara/Ololulunga/ 15035 measuring 3 acres.
  - b. Whether the plaintiff should be registered as the proprietor of parcel of land number Cis-Mara/Ololulunga/15035 measuring 3 acres.
  - c. Whether the District Land Registrar Narok should be directed to register the plaintiff on the possession of parcel known as Cis-Mara/Ololulunga/15035 measuring three acres in place of the defendant.



- d. Whether the republic (*sic*) registrar of this honourable court should execute transfer documents to effect transfer to the plaintiff herein of the 3 acres of land in the event the defendant refuses.
  - e. Whether the defendant should be restrained by an order of injunction from selling, transferring or in any other manner whatsoever interfering with the plaintiff's peaceful use, occupation and or enjoyment of 3 acres comprised of parcel of land known as Cis-Mara/ Ololulunga/15035 both parties pending the hearing of the suit and after the determination hereof (*sic*).
  - f. Who should pay the cost of the suit.
2. The originating summons is supported by the affidavit of the plaintiff sworn on even date. In his supporting affidavit, the plaintiff deposed that he has been in occupation of the suit land since September, 1985 after entering into an agreement for sale and he is surprised that the defendant intends to evict him from the suit land without any reasonable cause. The plaintiff further deposed that he has been in occupation peacefully and without interruption of the three acres and built structures on the same and has acquired rights that are adverse to those of the defendant and prays that this court orders a transfer of the disputed parcel of land.
  3. The defendant filed a replying affidavit sworn on March 18, 2022 in opposition to the originating summons. The defendant deposed that suit land arises from a subdivision of land known as Narok/ Cis-Mara/ 96 measuring approximately 99.81 hectares which was subjected to the process of demarcation, allocation and registration amongst four registered proprietors. He further deposed that thereafter he purchased 21.81 hectares being the whole of the suit property and assumed vacant possession and occupation of the same. Further, that in the year 2013, the plaintiff approached him and offered to purchase 3 acres and which he paid Kshs 10,000/- and which was towards survey work. He allowed the plaintiff to utilize 2 acres as he looked for money to purchase the same on the understanding that if he was unable to raise the consideration price, the consideration of Kshs 10,000/- would be utilized as lease charges and that when the plaintiff failed to raise the purchase price, he requested him to move out but he refused and instead and with the help of about 15 people, he erected a fence cutting across 3 acres which he claims he purchased from him.
  4. The defendant further deposed that the plaintiff has continued to trespass upon and forcefully remain on the suit property and which he has no justification to lay claim. The defendant pleaded particulars of fraud as follows:-
    - a. Fraudulently and knowingly laying claim to 3 acres portion out of his portion parcel of land when he had no legitimate claim and or interest at all thereon.
    - b. Trespassing upon his parcel of land and unlawfully laying forceful claim thereto under the pretext that he has a bonafide claim to the same as having bought it from him.
    - c. He has unlawfully denied him the right to freely access and or carry out development on his piece of land.
    - d. He has unlawfully wasted, damages and or alienated his piece of land including the construction of a fence, cultivation and or livestock keeping.
  5. The defendant deposed that he filed a suit at the Magistrates' Court in ELC Case No 116 of 2018 which is part heard and that since the matter at the Magistrates' Court was filed earlier than this particular matter, then the proceedings herein are improperly before this court. Further, that the plaintiff herein has been utilizing the portion of land for two years or less merely as a licensee which he has since



terminated and that it was irregular and unlawful for the plaintiff to proceed and file originating summons when there are related proceedings in the lower court. Further, that the grounds set out in the application does not meet the threshold for the grant of orders of adverse possession and the suit before this court is incompetent, fatally and incurably defective and amounts to an abuse of the process of the court.

6. This matter proceeded for hearing on July 4, 2022. While adopting his supporting affidavit sworn on August 15, 2018 as his witness statement, the plaintiff testified that he purchased three acres from the defendant and paid the same in two instalments ie Kshs 15,000/- and Kshs 25,000/- respectively which was in cash at the suit property in the year 1985. Further that they did not record the transaction and there were two witnesses; the surveyor by the name of Ronoh and one Arap Kerpet. He further testified that he does not know when the defendant acquired the title. Also, that the ten thousand shillings he paid was in cash and not in form of livestock and also it was not surveyor's fees. He further testified that his son is in occupation of the portion of the suit property and has lived and made developments on the same. He informed the court that he does not know if a title deed was issued in the year 2017 but that he is in court to enforce a contract.
7. On re-examination, the plaintiff testified that he has never had any disagreement with the defendant and he has never asked him to vacate the suit property which he has resided since the year 1986 which he purchased in two instalments.
8. The defendant while relying on his replying affidavit sworn on March 18, 2022 testified that the plaintiff did not pay him Kshs 40,000/- but paid him Kshs 10,000/- in the form of a cow which was for survey works and there was no agreement to sell the land to the plaintiff. He testified that he only promised to sell land to him at a later date but did not indicate when. He further testified that he does not remember when the plaintiff gave him the heifer upon which he entered the land and he only made a promise incase he decided to sell and that he allowed the plaintiff to live on the land even though he had not sold it to him. Further, that the plaintiff does not have consent to reside on the suit property and neither are they in good terms. He testified that the plaintiff has only recently built on the suit property.
9. The defence hearing proceeded on July 20, 2022 where Daniel Kipkorir Towett (DW1) while adopting his witness statement dated 18<sup>th</sup> March, 2022 testified that both parties are his relatives and that parcel number Cis-Mara/Ololulunga/1503 belonged to his father. He further testified that he does not know when the plaintiff entered the defendant's land but that he is in occupation of about 3 acres and that he recently constructed a house and a kiosk on the suit property and erected a fence. On cross examination, DW1 testified that he bought 4 acres from the defendant in the year 1994 but has never been summoned to attend a meeting to resolve any dispute between the parties. Further, that it is the defendant who told him that the plaintiff gave him Kshs 10,000/- and that the defendant did not have a title in the year 1994. He further testified that the plaintiff has never resided on the suit land but only cultivates on it. On re-examination, he reiterated that there were no title deeds to the suit land when he bought the land and that further he has no grudge against the plaintiff.
10. On October 13, 2022, Kennedy Too-District Land Registrar (DW2) testified that on July 26, 2022 he received summons with respect to parcel of land numbers Cis-Mara/Ololulunga/96,1148 and 1503. That parcel number 96 was closed for partition on 29<sup>th</sup> June, 1993 and it was in the names of Tobiko Ole Molo (deceased), Oloibor Ole Molo, Seki Ole Kisoto and Kungurupet Arap Kenduiywa. He further testified that on September 15, 1983 a caution was placed on parcel number 96 by Kipsoi Arap Misoi who was claiming beneficial interest and that on June 29, 1993 the said caution was removed and the title was closed and partitioned into ten portions ie from 1147 to 1156. That the title deed for parcel number 1148 was issued on June 29, 1993 in the names of Ntululu Ole Molo, Seki



Ole Kisoto, Oloibor Ole Molo and Kungurupet Arap Kenduiywo and on the July 21, 1993 the land was transferred to the defendant. On July 22, 1993 he was issued with a title deed. On September 18, 2013 the title was closed for subdivision and new titles were issued being parcel number 15035, 15036 and 15037. The said titles had no encumbrances, inhibitions or restrictions. That parcel number 1503 is registered in the name of Katem Techonet and the title has no encumbrance. DW2 testified that the name of the plaintiff is not in any of the titles and a purchaser who claims beneficial interest ought to produce documents to prove their beneficial interest in order to protect one's interest, they are required to register their names in the green card.

11. On cross examination, DW2 testified that parcel number 1148 was closed for subdivision on September 18, 2013 but cannot tell the names of the persons registered as he does not have the green card in court and cannot also tell who is in occupation of the three parcels of land.
12. The plaintiff filed written submissions dated November 15, 2022. The plaintiff submitted that he has been in occupation of the portion of the suit property for 12 years uninterrupted and as per the law, he is qualified to have adverse possession and the evidence was corroborated by the defendants who indicated that they actually purchased the same. The plaintiff relied on the cases of *Wilson Njoroge Kamau versus Nganga Muceru Kamau* [2020] eKLR and *Stephen Mwangi Gatunge versus Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (deceased) and of Mwangi Kimingi (deceased))* ELC No 7 of 2021 (OS).
13. The defendant filed written submissions dated November 23, 2022. The defendant raised two issues for determination as below: -
  1. Whether the plaintiff is entitled to ownership of the suit land by adverse possession.
  2. Costs of the suit.
14. On the first issue, the defendant submitted that since the plaintiff's mode of occupation was a result of an offer for sale, that implies that his initial entry thereon and use of a portion was a permissive one and it is a prerequisite that for one to claim adverse possession, he must demonstrate that the same was non-permissive, non-consensual and without licence. The defendant relied on the cases of *Gabriel Mbui versus Mukindia Maranya* [1993] eKLR, *Samuel Miki Waweru versus Jane Njeru Richu*, Civil Appeal No 122 of 2001 and *Mbira versus Gachubi* (2002)1 EALR 137.
15. The defendant further submitted that the plaintiff's sole intention in instituting this matter was to deprive the defendant of his property by a mere assertion of claim of adverse possession which he was not able to prove.
16. I have analysed and considered the pleadings, the evidence tendered and the written submissions filed by the parties herein and the issue for determination is whether the plaintiff is entitled to the orders of adverse possession.
17. To arrive at the just determination of this matter, it is important for this court to relay the sequence of events leading up to the determination of this case. The defendant filed a suit against the plaintiff at the Chief Magistrates' Court in ELC No 116 of 2018 dated June 10, 2018. In the plaint the defendant sought the following orders: -
  - a. An order of declaration that all that piece of land known as Cis Mara/Ololulunga/15035 measuring approximately 17.35 hectares or thereabouts belongs to the plaintiff herein and that the defendant by himself, his servants and or agents jointly and severally are trespassers upon the aforesaid piece of land or any portion thereof.



- b. An order of eviction removing the defendant by himself, his servants and or agents from all that piece of land known as Cis Mara/Ololulunga/15035 measuring approximately 17.35 hectares or thereabouts belonging to the plaintiff herein.
  - c. Mesne profits.
  - d. Costs of this suit plus interest at court rates.
  - e. Further or any other relief that this honourable court may deem fit to grant.
18. In that suit, the plaintiff filed a statement of defence and counter-claim and sought for judgment against the defendant for: -
- a. A declaration that the defendant paid the money in value in accordance with sale agreement and that he is the absolute owner of the 3 acres of land composed of parcel known as Cis-Mara/Ololulunga/15035.
  - b. An order of specific performance compelling the defendant to sign a transfer instruments and transfer the suit property measuring 3 acres of land composed of parcel known as Cis-Mara/Ololulunga/15035 of the defendant.
  - c. In case of non-compliance or in (b) above the court do issue an order directing the registrar to effect the orders of the court.
19. The plaintiff also sought for compensation on specific damages in terms of alternative refund of the purchase price at the current market value and also for development done as per the valuation to be produced in court.
20. On May 31, 2022 and by consent of both parties, ELC Case No 116 of 2018 was consolidated with the instant case. A thorough analysis of the evidence shows that the plaintiff purchased a portion of the suit land being 3 acres from the defendant in the year 1985 and paid the sum of Kshs 40,000/- in instalments and since then, he has been in peaceful and quiet possession of the portion of the suit land and now wants to acquire ownership of the same by virtue of adverse possession. It is also not in dispute that the defendant is the registered proprietor of property known as Cis-Mara/Ololulunga/15035. Based on the testimony of the witnesses, the plaintiff appears to be in actual occupation by cultivating on it. It was also the evidence of the defendant, that the plaintiff approached him in the year 2013 with the intent to purchase the portion but only paid Kshs 10,000/ which according to him was towards survey works.
21. I have analysed the documents produced by the plaintiff and I do note that according to the photographs relied on by the plaintiff, there is a structure made of iron sheets and it appears that there is cultivation/ploughing which takes place. It also appears that the parties have tried to resolve the dispute through the office of the Assistant County Commissioner with the signatures dated September 18, 2013. I do note that in the said meeting, the elders and the witnesses found that both parties mutually agreed by consent to sell and purchase 3 acres of land at Kshs 40,000/- which was fully paid. Interestingly, none of the parties disputed this evidence. I am satisfied that the defendant entered into an agreement with the plaintiff for the sale of 3 acres of land.
22. It was also the evidence of the plaintiff that he has been in occupation of the suit portion since the year 1985 and has now acquired adverse possession. On the other hand, the defendant testified that the plaintiff approached him in the year 2013 for sale and he paid him Kshs 10,000/- which was survey works with a promise to sell him the portion if he decided to do so.



23. The question which then arises is, was possession adverse to the defendant? The law on adverse possession is provided for under the [Limitation of Actions Act](#). Section 7 of the Act provides:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

24. Section 13 of the Act further provides as follows:- “(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 of this Act 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

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

25. The Court of Appeal in Kisumu Civ App No 110 of 2016 [Richard Wefwafwa Songoi v Ben Munyifwa Songoi](#) [2020] eKLR opined that a person claiming adverse possession must establish the following: -

(a) On what date he come into possession.

(b) What was the nature of his possession?

(c) Whether the fact of his possession was known to the other party.

(d) For how long his possession has continued and

(e) That the possession was open and undisturbed for the requisite 12 years.

26. In this case, the plaintiff ought to have satisfied this court that it has met all the above elements. The plaintiff's entry into the portion of the suit land in the year 1985 is not opposed. However, the evidence of the defendant and DW1 was contradictory to the extent that DW1 did not know when the plaintiff took possession and the defendant on the other hand claimed to have given the plaintiff the said portion as lease. In addition, the possession was very much known by the defendant and was open, continuous and uninterrupted for more than 12 years. The plaintiff was in occupation as it was established that he cultivates on the same. In this case, the period of adverse possessions began to run 12 years after i.e. the year 1998. However, the same does not qualify for consideration as adverse because the entry to the said portion was lawful. The defendant permitted the plaintiff entry based on an agreement for sale. To determine the nature of possession, this court is guided by the decision in Kisumu Civil Appeal No 27 of 2013 [Samuel Kibamba v Mary Mbaisi](#) [2015] eKLR, where the court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained



in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

27. Most notable is the fact that the defendant did not rebut the evidence of the documents produced by the plaintiff which confirmed that both parties entered into agreement for sale of land. I am satisfied and having evaluated the evidence on record, the plaintiff is entitled to the 3 acres out of the portion of the suit land.
28. Arising from, this court finds merit in the originating summons dated August 15, 2018 and judgment is hereby entered against for the plaintiff (defendant in ELC No 116 of 2018) in the following terms: -
- i. A declaration that the plaintiff paid money in value in accordance with the agreement and that he is the absolute owner of 3 acres of land comprised in the parcel of land known as Cis-Mara/Ololulunga/15035.
  - ii. An order of specific performance is hereby issued compelling the defendant to hive off 3 acres from the parcel of land known as Cis- Mara/ Ololulunga/15035 and execute transfer documents in favour of the plaintiff.
  - iii. In the event that the defendant fails to do so, the Deputy Registrar of this court to execute transfer documents in compliance with order ii above.
  - iv. The originating summons dated August 15, 2018 is dismissed.
  - v. The plaint dated June 10, 2018 is dismissed.
  - vi. Each party to bear its own costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 25<sup>TH</sup> DAY NOVEMBER, 2022.**

**MBOGO C.G**

**JUDGE**

**25/11/2022**

In the presence of: -

CA: T.Chuma

