



**Kiptum v Njau & another (Environment & Land Case 292 of 2013)
[2022] KEELC 14823 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 292 OF 2013
SM KIBUNJA, J
NOVEMBER 15, 2022**

BETWEEN

CYNTHIA CHEPKEMBOI KIPTUM PLAINTIFF

AND

MICHAEL KAMAU NJAU 1ST DEFENDANT

SILA CHERUIYOT KEMBOI 2ND DEFENDANT

JUDGMENT

1. The plaintiff approached the court through the Originating Summons dated 20th May 2013, and subsequently the amended Originating summons dated and filed on 4th August 2014, against initially, the 1st Defendant, (deceased). The said summons was later amended and the 2nd defendant was enjoined as a party to the suit. The prayers sought are;
 - a. That Cynthia Chepkemboi Tumbe registered as owner of a portion of nine decimal Six One Nine (9.619HA) Hectares in Land reference Number 9930/15 having acquired ownership and proprietary rights through adverse possession and the title of the defendant to the portion measuring approximately Nine Decimal Six One Nine 9.619 hectares to be declared as having been distinguished.
 - b. That summons herein to be served upon Michael Kamau Njau
 - c. That during the pendency of this suit the said land L.R. No. 9930/15 be preserved.
 - d. That the registration made on the 3rd May 2013 by the 1st Defendant to the 2nd Defendant in respect of the suit land L.R. No. 9930/15 be cancelled by this Honourable court.
 - e. That the defendants be condemned to pay costs of this Originating summons.



2. The 2nd defendant opposed the summons through the reply to the amended originating summons sworn on the 11th December 2014 inter alia deposing that he had purchased the suit land from the 1st defendant in 2012 and after the transfer in August 2012, become the registered proprietor on 3rd May 2013; the plaintiff was utilizing the land prior to him buying it; that the plaintiff was aware of the transaction and was to give vacant possession at the expiry of the lease at the end of 2012; that the plaintiff claim to have purchased the suit land in 2000 and was to have made the last payment on before 31st October 2001, and cannot base her claim on adverse possession; that having bought the suit land only two years ago, the claim on adverse possession was premature.
3. The plaintiff testified as PW1. She told the court that she had sued the 1st defendant initially, and then added the 2nd defendant. It is her testimony that she had purchased 23 acres, equal to 9.619 hectares, from the 1st defendant on the 20th September 2000 for Kshs. 1,260,000.00. She produced the sale agreement made before an advocate as exhibit. That upon paying the deposit she took possession of the suit land in the year 2000. She went further by telling this court that despite finishing paying all the purchase price, the vendor Michael Kamau Njau, refused complete the transfer process to have the plaintiff registered as the absolute owner of the suit land. That she wrote a letter dated 11th August 2005 to the chairman of Soy/Turbo Land Control Board to stop any unlawful dealings in the suit land, as she continued enjoying exclusive possession thereof, living thereon and drawing her livelihood and that of her family therefrom. She told this court that the 2nd defendant, Sila Cheruiyot Kemboi, came to her land with bows and arrows and tried to evict her. The new development prompted the plaintiff to write a letter dated 15th May 2013 through her advocate, to the 1st defendant, Michael Kamau Njau to stop performing further dealings in the suit land. She then filed this suit and asked the court to grant her prayers.
4. The 2nd defendant, Sila Cheruiyot Kemboi, testified as DW1 that he bought the suit land from the 1st defendant, Michael Kamau Njau. He produced an agreement dated 3rd August 2012 as exhibit. He added that after he subsequently followed all the due processes, the suit land was registered in his name. He produced a certificate of lease, application for consent, letter of consent itself, transfer form and application for registration as exhibits. He went further by telling this court that he took possession of the suit land in the year 2013, and was not aware of any sale of land transaction of 2000 between the 1st defendant and the plaintiff.
5. The learned counsel for the plaintiff and 2nd defendant filed their submissions dated the 31st May 2022 and 27th May 2022 respectively, which the court has considered.
6. The following are the issues for the courts determinations;
 - a. Whether the agreement between the plaintiff and the 1st defendant stands a validity test.
 - b. Whether this suit is within the purview of *Limitation of Actions Act*, Chapter 22 of Laws of Kenya.
 - c. When does time starts to run in a claim based on a contract brought under the *Limitation of Actions Act*, Chapter 22 of Laws of Kenya.
 - d. What orders to grant.
 - e. Who pays the costs of the suit.
7. The court has after considering the parties' pleadings, evidence tendered by the two witnesses who testified before the court, submissions by the learned counsel, and the superior courts decisions cited come to the following determinations;



- a. The plaintiff testified before this court and produced a sale agreement dated 20th September 2000 between herself and the 1st defendant drawn by the firm of Birech & company. The agreement at clause 2 set out the mode of payment of the purchase price. To start with Kshs.100,000.00 was to be paid upon signing the agreement, followed by Kshs.,500,000.00 to be paid on or before 15th November 2000, and balance of Kshs.660,000.00 on or before 30th October 2001. It was the plaintiff's evidence that she paid the initial amount of Kshs.100,000.00 in cash to the 1st defendant. That she also paid another Kshs.100,000.00 on the 28th February of an year that was not clearly indicated on the deposit slip that was paid through Standard Chartered Bank, and a similar amount in cash to 1st defendant. That was followed by Kshs.300,000.00 paid in cash in year 2000, on a date she could not recall. The rest of the payment was in form of maize equivalent to Kshs.660,000.00 she supplied to the 1st defendant's house. PW1 stated during cross examinations that she had no documentary evidence to confirm that she had paid the 1st defendant the Kshs.100,000.00 on execution of the sale agreement or 500,000.00 by 15th October 2000 or the 660,000.00 by 30th October 2001. She agreed that the 1st defendant and herself never obtained the land control board consent over the sale transaction of the suit land. That the 1st defendant did not transfer the land to her despite her various complaints including to the Land Control Board, by the time he died in 2018. That she had completed the purchase price payments in 2001 and had taken possession of the land. That on the face of the agreement between the plaintiff and 1st defendant who however has not participated in the proceedings, it appear to have been a valid contract that became binding upon signing. There is however no explanation tendered to the court why the plaintiff never pursued the 1st defendant before his demise in 2018, or the administrator(s) of his estate after his death for specific performance orders.
- b. That from the plaintiff's own evidence, she had taken possession of the suit land as a purchaser and with permission of the 1st defendant. Therefore, the plaintiff cannot claim to have been in adverse possession of the suit land during the period she occupied the land with the permission or pursuant to the license given by the 1st defendant. It is not crystal clear when that permission was terminated or withdrawn. This suit was filed on the 21st May 2013, and from the evidence of the plaintiff, it was in 2013 that the 2nd defendant came to the land and claimed that he had bought it. It is also not clear due to lack of documentary evidence, when the plaintiff paid the last purchase price to the 1st defendant. The court will therefore take it as a fact that by the time the plaintiff filed this suit, she had come to the conclusion that the permission she previously had to quietly possesses the land was no more. That is the time that adverse possession could have started to run in her favour.
- c. It is a fact that the 2nd defendant was not a party to the sale agreement of 20th September 2000 between the plaintiff and the 1st defendant, and had no obligations under it towards the plaintiff. That of course the plaintiff has not sought for any orders against the defendants based on the said sale agreement. Her claim is fully based on adverse possession. That adverse possession is a situation where a person takes possession of land, and asserts rights over it, and the person having title to it omits or neglects to take action against such person in assertion of



his title for a period of twelve (12) years. Section 7 of the *Limitation of Actions Act*, chapter 22 of Laws of Kenya, provides that:

“ 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.”

Section 13 of the Act further 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.
 - (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 afresh 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), the land in reversion is taken to be adverse possession of the land.”
- d. The plaintiff claims that she has been in occupation of the suit land from the year 2000 when she took possession immediately after paying the purchase price. To be precise the agreement dated 20th September 2000 between the plaintiff and the 1st defendant is crystal clear under clause 4, on taking possession. It states:

“ The purchaser shall take possession of the suit land on signing hereon.”

The plaintiff's taking of possession of the suit land was indeed with permission of the 1st defendant, as opposed to adverse possession. In the case of *Public Trustee v Wanduru Ndegwa* [1984] eKLR the court found that adverse possession rights can emanate from a contractual relationship between parties. The court went on stating that the time for purpose of Limitation of Actions begins to run from the date of final payment. Similarly, in the case of *Hosea v Njiru & Others* [1974] EA 526, the Court, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last installment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it. Additionally, in the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR the Court of Appeal while allowing the claim for adverse possession emanating from a contractual relationship, held at paragraph 32 as follows:

“ Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee — v- Wanduru* , (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if



the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favor the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any, permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August, 1978 from Karuga Wandai & Co. Advocates. From 18th August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18th August, 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7th February, 1991."

In this case, before me, it is not clear when, if at all, the plaintiff finished paying the purchase price, so as to make a finding as to the time her possession of the suit land became adverse to the title of the registered proprietor. The plaintiff failed to discharge her duty to prove on what date if at all, she had fully paid the purchase price to 1st defendant as required under sections 107 and 109 of the *Evidence Act* chapter 80 of Laws of Kenya. The two sections provide as follows;

107. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
109. "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".

I find that the plaintiff's claim of relying on the sale agreement provisions that payment of purchase price was by October 2001, as a ground to make her possession of the suit land adverse, without adducing evidence to confirm the actual payment, is not in agreement with the principle set out in the various superior courts decisions on when adverse possession arises out of possession that started on contractual basis.

- e. The courts have held that time for adverse possession starts running when the final installment of purchase price is made. This was held by the court in Eldoret ELC NO. 215 of 2017 *Felix Kipchoge Limo Langat v Robinson Kiplagat Tuwei* [2018] eKLR. In the same vein, in the case of *Simon Ng'ang'a Njoroge -vs- Daniel Kinyua Mwangi* (2015) eKLR the Court in applying the principle espoused in the case of Wambugu -vs- Kamau and held as follows:

"Having found the plaintiff's testimony concerning the said sale agreements more believable, and taking note of the principle espoused in Wambugu -vs- Njuguna to the effect that where a claimant pleads the right to land under an agreement and in the alternative, seeks an order based on subsequent adverse possession, (Like the plaintiff herein has done) the rule is : the claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price and that the claimant will succeed under adverse possession upon occupation for at least 12 years after such payment . I find and hold that, in the



circumstances of this case, the plaintiff's possession of the suit property became adverse from 6th June, 1994".

- f. The court espoused the above principle in the case of *Wambugu -vs- Kamau in the case of Public Trustee -vs- Wanduru* (1984) KLR 314 where the court held that adverse possession commences in favor of the purchaser on the date he completes payment of the purchase price and stated:

“—that the full purchase price for the land having been paid on the same day, viz March 16, 1967 the learned judge ought to have held that the second appellant had completed adverse possession of the suit land for over twelve years before the institution of the suit on April 2, 1979”.

The court went on to observe as follows:

“Of course, calculated from the date of payment of the purchase price on March 16, 1967 and on the basis of it, the full span of twelve years' adverse possession and more had already run when the suit was filed on April 2, 1979. The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day”

The court further held thus:

“A purchaser in possession of the land purchased after having paid the purchase price, is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor. *Bridges -vs- Mees* (1957) ICh 75 at 484; referred to with approval in *Wamwangi Githui -vs- Livingstone Ndete and others*, CA No.24 of 1979 (unreported).”

In the present case, I find that the plaintiff was required to pay her final installment on or before the 30th of October 2001. She testified and told this court that she complied with the terms of the sale agreement. The court has as shown above, however observed that the plaintiff has not presented evidence upon which the court can clearly make a finding that the last purchase price was paid, and if so, on a specific date, month or year. That without that confirmation, then the plaintiff's claim that she had been in adverse possession of the suit land for more than 12 years by the time she filed this suit is without evidence in support.

- g. The 2nd defendant has taken the position that the plaintiff did not complete paying the purchase price to the 1st defendant by the time he bought the land. He testified how the 1st defendant had put a sign board on the land that he was selling it. He contacted the 1st defendant and they made a sale agreement on the 3rd August 2012. The land was vacant and after paying the purchase price wholly, he took possession and has been residing, farming and grazing on it since then. They obtained the Land Control Board consent to transfer, and procedurally had the land registered in his name in 2013. That he only got to know of this case after he was served with the order issued on the 5th February 2014, and he applied to be joined in the suit as it affected his land. The 2nd defendant's title to the suit land has not been challenged by the 1st defendant, from whom he obtained it. The plaintiff has failed to establish her claim over the suit land based on adverse possession. She had asked the court in her testimony to either have the 2nd defendant registration with the land revoked and the reverted to 1st defendant or transferred to her name. She has however not tendered any evidence upon which the process



through which the 2nd defendant obtained title to the suit land can be impugned or challenged in accordance with section 26 of the Land Registration Act No. 3 of 2012 which provides that;

- (1) the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar, shall be received in evidence in the same manner as the original.”

That as there is no evidence of fraud or misrepresentation, illegality or corrupt scheme in the way or process that the 2nd defendant acquired title to the suit land from the 1st defendant has been proffered by the plaintiff, the court takes him to be the absolute and indefeasible owner of that said land.

- h. The plaintiff recourse can only be against the 1st defendant, probably for refund of the monies, if any, paid under the sale agreement of 20th September 2000, which became void for failure to obtain a consent to transfer from the Land Control Board within the six (6) months from the date of the agreement or full payment of purchase price thereof. The plaintiff disclosed to the court that the 1st defendant died in 2018 and that she attended his burial. That under Order 24 Rule 4(3) of the Civil Procedure Rules, the plaintiff's suit or claim against the 1st defendant abated after the lapsing of one year from the date of his death in 2018, without being substituted by a legal representative. The court cannot therefore make any pronouncement or orders against the 1st defendant, deceased. In this suit as the case against him has abated.
- i. That on the issue of costs, the 2nd defendant having emerged victorious in defending the suit is under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya entitled to costs.
 1. Flowing from above the court finds and orders as follows;
 - a. That the plaintiff's case against the 1st defendant abated in 2019 following his death in 2018.
 - b. That the plaintiff has failed to prove her case against the 2nd defendant to the standard required of a balance of probabilities and her suit is hereby dismissed with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF NOVEMBER 2022.

S,M, KIBUNJA, J.

ELC MOMBASA.



IN THE PRESENCE OF;

PLAINTIFF

DEFENDANTS

COUNSEL

WILSON .. COURT ASSISTANT.

S.M. KIBUNJA, J.

ELC MOMBASA.

