



REPUBLIC OF KENYA



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**Maru v Mutai & another (Environment & Land Case E002 of 2021)
[2022] KEELC 15507 (KLR) (20 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15507 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E002 OF 2021**

MN MWANYALE, J

DECEMBER 20, 2022

BETWEEN

STANLEY TAPTOYEI MARU PLAINTIFF

AND

EMILY JEPTARUS MUTAI 1ST DEFENDANT

BENJAMIN KIPROTICH TANUI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff Stanley Taptoyoi Maru vide his Originating Summons dated August 2, 2021 sued the Defendant's Emily Jeptarus Mutai and Benjamin Kiprotich Tanui for orders that;
 - a. The Defendant/Respondent claim/interest to that portion measuring 2 acres or thereabouts comprised in that parcel of land known as Nandi/Kebulonik/334, stands extinguished by lapse of time.
 - b. That the Plaintiff/Applicant has obtained title and ownership of that portion of land measuring 2 acres or thereabouts comprised in that parcel of land known as Nandi/Kebulonik/344 by virtue of doctrine of adverse possession.
 - c. That pursuant to the forgoing, the Land Registrar, Nandi County or the Land Register in respect of land parcel No Nandi/Kebulonik/344 be ordered to rectify the register 2 amend the map to reflect the area so curved out in favour of the Plaintiff and issue him with fresh title to the portion measuring 2 acres comprised in the said land.
 - d. For an order that the Applicant is entitled to costs of this suit.
2. Vide a Notice of Motion application dated October 29, 2021 the Plaintiff sought injunctive orders against the Defendant to stop the Defendant from interfering with use, occupation, possession and ownership of Nandi/Kebulonik/344 measuring 2 acres.



3. Vide a ruling delivered on 14/2/2022 the application was allowed and injunctive orders issued against the Defendants pending hearing and determination of the suit.
4. On 6/7/2022, directions were issued for the matter to proceed by way of viva-voce evidence thereby converting the Originating Summons to a plaint and the Replying Affidavit to a defence. Parties were given time to file their witness statements, and upon compliance the matter was listed for hearing.

Plaintiff's Case and Evidence: -

5. It is the Plaintiff's case that he purchased 1 acre from Benjamin Kiprotich Tanui, the 2nd Defendant in 1992, the said Benjamin Kiprotich Tanui had equally purchased the said 1 acre from the late Samuel Kimagut Mutai husband of the 2nd Defendant.
6. That he purchased and settled on the other 1 acre which he purchased directly from Samuel Kimagut Mutai, the deceased husband of the 1st Defendant.
7. The 1st Defendant did not include the Plaintiff as a beneficiary of the Estate of the late Samuel Kimagut Mutai during the succession proceedings in Kapsabet SPMCC No 6 of 2013.
8. That after the purchase in 1992, the Plaintiff took possession and has lived thereon together with his family for more than 29 years hence he is entitled to a portion measuring 2 acres in Nandi/ Kebulonik/344.
9. On the basis of the above facts the plaintiff sought for the orders enumerated at paragraph 1 above.
10. The Plaintiff testified and called an additional 5 witnesses. It was his testimony that he had purchased 1 acre from the 2nd Defendant who had bought the same from Benjamin Tanui. He produced P Exhibit 1 showing an application for Land Control Board dated 18/9/1993 for subdivision and P Exhibit 2 was the letter of consent dated 22/9/1993 for subdivision as proof that he had bought from Benjamin Mutai, who had bought from the late Samuel Kimagut Mutai.
11. He further produced as P exhibit 3 an Agreement for Sale between himself and the late Samuel Kimutai Magut for the other acre. Agreement was dated 25/9/1993, and the consideration was Kshs 33,000 out of which kshs 31,000 was paid as first instalment and kshs 2,000/- was paid later. It was his testimony that he developed both 2 acres and built thereon and fenced in the year 1993. He produced photographs of mature trees as P Exhibit 4 (a) and 4 (b) was the fence he had erected; and P Exhibit 4 (c) were his cows which were grazing on the 2 acres.
12. No transfer of title was made in respect of the 2 acres he had purchased and upon request made to the 1st Defendant she declined to transfer hence the filing of the suit. He further produced a copy of the green card in respect of the property showing the 1st Defendant Emily Jeptarus Mutai as the registered proprietor.
13. On cross – examination, he stated that when he bought the property from the late Samuel Kimagut Mutai, and that Emily was present. He did sign the agreement for sale prepared by the village elders. He stated that his wife had earlier bought 5 acres from Mutai which was not in dispute.
14. He stated that he had bought 1 acre from Benjamin Tanui and the late Samuel Mutai gave him the P Exhibit 1 and 2 which he had intended to subdivide to Benjamin Tanui so as to subdivide but did not finalize the subdivision.
15. In re- examination, he stated that he got exhibits 1 and 2 from the late Samuel kimugut Mutai for purposes of subdivision.



16. PW2, Mr Josphat Morogo testified on behalf of the Plaintiff it was his testimony that initially the Plaintiff had purchased 5 acres from the Samuel Mutai and a subdivision and transfer in respect of this was made and it was not in dispute.
17. In 1992, he bought an additional one acre from 2nd Defendant Benjamin Tanui who had equally brought from Samuel Tanui.
18. That the late Samuel Kimagut Mutai intended to transfer to the Benjamin Tanui and went to the Land Control Board, for consent to subdivide but he purchased from Benjamin Tanui and was handed the documents (P Exhibit 1 and 2) .
19. In 1993, the Plaintiff bought an extra two acres from the late Samuel Kimagut Mutai, and in 2001, he bought from Kimagut Mutai an extra 1.2 acres and in 2002 he purchase 0.6 acres. The extra 1.8 acres purchased by Plaintiff were sold to third parties and there is no dispute on these properties and their acreage as well as the initial 5 acres.
20. The dispute relates to the 2 acres the Plaintiff purchased from Benjamin Tanui 2nd Defendant and Kimagut Mutai in 1992 and 1993 which acreage were fenced by the Plaintiff and he had planted trees thereon.
21. In cross examination, the witness stated that he was not a witness to the agreement between Benjamin Tanui and Samuel Mutai. The Plaintiff resides in Nandi/Kebulonik/345 which borders the two acres in dispute. There was no dispute until 2020 when the 1st Defendant was registered after succession.
22. In re-examination, the witnesses stated that the boundary dispute arose in 2020 after the death of late Samuel Mutai.
23. PW3, Mr Jacob Kipsang Chumba testified on behalf of the Plaintiff. He adopted his witness statement dated 16/2/2022, it was his testimony that Benjamin Tanui, the 2nd Defendant brought from the Samuel Kimagut Mutai, since he bought grass from Benjamin Tanui for thatching his house and was aware that Benjamin Tanui sold the property to the Plaintiff in 1992.
24. In cross examination, he stated that Nandi/Kebulonik/344 belonged to Samuel Mutai. He was sure that the late Benjamin Kimagut Tanui had bought from Samuel, since Benjamin had fenced off the property which was not possible in a lease, he was not a witness to the sale between Benjamin Tanui and the late Samuel Kimagut Mutai.
25. PW4, a neighbour to the Plaintiff Joseph Kibet Rono equally testified. It was his testimony that the Plaintiff had purchased 5 acres from the Benjamin Tanui, initially then the 2nd Defendant in 1992 sold 1 acre to the Plaintiff and in 1993 the late Samuel Mutai sold to Plaintiff 1 acre to make it 2 acres.
26. After the demise of the late Samuel Mutai, the Widow and administrator of his estate Emily Mutai the 2nd Defendant started demanding for the 1 acre in 2020, although the Plaintiff uses both acres.
27. In cross – examination, he stated that he was not present during the sale between Benjamin Tanui and the Plaintiff; but as a neighbour he became aware of the sale.
28. John Morogo Busienei, a village elder now retired; and he produced P Exhibit 3, and Agreement for Sale between the late Samuel Mutai and Stanley Maru for the purchase of 1 acre, which he had authored.
29. In cross – examination, he stated that at time of writing the agreement, the late Samuel Mutai and his wife were present together with their son Gideon but were not recorded as present. The 1st Defendant and his son Gideon did not sign the agreement but were present. The consideration was Kshs 33,000, where Kshs 31,000 was paid and Kshs 2,000 paid on 2nd instalment.



30. John Kimeli Tanui, was the last witness, testified as PW6.
It was his testimony that as a family of 3 brothers, they all bought 1 acre in 1990 from the late Samuel Kimagut Mutai, but the same was registered in the name of Benjamin Tanui the 2nd Defendant.
31. That in 1992, the 2nd Defendant as their brother sought their consent and sold the property to Stanley Maru, the Plaintiff.
32. In cross – examination, the witness stated that they did not have the agreement to show purchase of the 1 acre. He stated that he had bought the property at kshs 12,000/= . He stated that he lived in Kamoiywo together with the 2nd Defendant in their mother’s property and have not differed with Benjamin the 2nd Defendant.
33. After the testimony of the 6 witnesses the Plaintiff’s case closed.

Defendants Case And Evidence:

34. The Defendant Emily Mutai testified as DW1, she adopted her witness statement dated 16/3/2022 together with the Replying Affidavit which had been converted as a defence.
35. It was her testimony while producing the documents/annextures in her Replying Affidavit as D Exhibit 1 to 4, that she was the administrator of the Estate of her late husband Kimagut Samuel. It was her testimony that there was a boundary dispute between her late husband and the Plaintiff in 2020. The elders tried to arbitrate and a resolution was made that she be given the property. She further stated that the Plaintiff had sold the property to other people and hence she was not able to transfer the property.
36. In cross – examination she admitted that Stanley Maru the Plaintiff had initially bought 5 acres. When shown photographs she admitted that trees in photograph 1 (P Exhibit 4a) were on the 5 acres bought by Stanley. She had not seen the trees on photograph 2 (P Exhibit 4b) she stated further that the Plaintiff had sold the property to 3 other people hence she was not able to transfer the property; to the Plaintiff as the other people are in occupation of the property and not the Plaintiff.
37. In further cross – examination she stated that the original property was number Nandi/Kebulonik/140 which was subdivided into Nandi/Kebulonik/344 belonging to her and Nandi/Kebulonik/345 belonging to the Plaintiff and his wife. There was no dispute in relation to 345 belonged to the Plaintiff. She stated that the Plaintiff encroached on her property after the demise of her husband.
38. In re-examination, she stated that she did not recall the surveyor reading the report.
39. DW2, the 2nd Defendant Benjamin Kiprotich Tanui. He adopted his witness statement as part of his evidence in chief. In the said statement, he stated that he had entered into an oral agreement with the deceased husband of the 1st Defendant over Nandi/Kebulonik/344 allowing him to use the said parcel for grazing of his cows. That he used the parcel for 2 years and paid him to the use.
40. It was his evidence that he never sold the parcel of land to the Plaintiff as it never belonged to him in the first place.
41. In cross – examination, he stated that he had not bought an acre together with his brothers as a family; and that he used the whole property of Mr Mutai as it was not fenced but he did not know of the dispute since he left in 1992.
42. In re-examination the witnesses stated that he did not know what the decision of the elders was in relation to the dispute. He stated that he his brother’s did not show any proof that they had bought the property and later on sold it.



43. At the interlocutory stage while the suit was pending and after delivery of the ruling dated 14/2/2022 the Court allowed the Defendant to access the disputed property and a joint survey be done and the survey report to be filed in the matter.
44. The survey was conducted and a surveyor report dated June 21, 2022, and the close of the respective cases parties were directed to file submissions on the survey report.
45. After close of the respective cases, parties were directed to file written submissions on the case.
46. Whereas the Plaintiff filed his submissions on the case as well as the survey report, the Defendant did not file its written submissions despite the record showing that they were requested for a week on October 26, 2022 when the matter was mentioned having not filed by the given timeline and allowed to file submissions by close of business on 3/11/2022.
47. The Plaintiff's submission have not identified any issue for determination and as the Defendant has not filed her submissions, it now behoves the Court to frame the issues for determination.

Upon analysis of the pleadings, the evidence and the submissions on record, the court frames the following as issues for determination.

- i. Whether the Plaintiff purchased 1 acre from the 2nd Defendant and an additional second acre from Samuel Kimagut Mutai.
- ii. Whether the Plaintiff has trespassed on the 2 acres as claimed by the Defendant
- iii. If answer to (i) above is in the affirmative has the Plaintiff proved the elements of adverse possession.
- iv. If answer to (ii) above is in the affirmative, have the Defendants proved their defence.
- v. Who bears the costs of the suit?

Analysis And Determiantion:

48. In answer to issue number 1 as to whether the Plaintiff purchased 1 acre from the 2nd Defendant and another from the late Samuel Kimagut Mutai, the Plaintiff produced as P Exhibit 3, an agreement for sale dated 25/9/1993, the contents of the agreement, were corroborated by PW5, a retired villager elder who authored the agreement dated 25/9/1993, which was between the late Samuel Kimagut Mutai, and it related to one acre sold at a consideration of kshs 33,000/=, in Nandi/Kebulonik/344.
49. There is thus evidence on record to support the Plaintiffs claim of purchase of one acre in Nandi/Kebulonik/344 from the late Samuel Kimagut Mutai, the husband of the 1st Defendant in 1993.
50. It was the Plaintiff's further evidence that he purchased one acre from the 2nd Defendant who had purchased the same from the late Samuel Kimagut Mutai, in support of this, the Plaintiff produced as P Exhibit 1 and P Exhibit 2, an application for LCB consent and a consent letter for subdivision. It was his testimony that 2nd Defendant had bought from the late Samuel Kimagut Mutai, and it is the late Samuel Mutai, who gave him P Exhibit 1 and 2 so as to lodge for the subdivision.
51. The evidence for the purchase from Benjamin Tanui was corroborated by PW3, who indicated that he initially bought grass for thatching of his house from Benjamin Tanui from the said parcel, but later on bought from the Plaintiff after Tanui sold the same to the Plaintiff.
52. Was PW3's evidence in cross examination that the 1 acre had been fenced at the time he bought the grass and that in a lease it was possible to fence a eased property.



53. This evidence was corroborated by PW6 John Kimeli Tanui, the 2nd Defendant's brother; who narrated on how in 1990 as a family they had bought 1 acre from the late Samuel Kimagut Mutai and left the property, to their brother the 2nd Defendant, who later sold it in 1992 with their blessings to the Plaintiff.
54. From the evidence as summarised above, the court finds that the Plaintiff bought one acre of land from the 2nd Defendant in 1992 and an additional acre of land from the late Samuel Kimagut Mutai in 1993.
55. Thus in answer to issue number 1 the Plaintiff has proven purchase of the two acres, in Nandi/Kebulonik/344 one acre each from the late Samuel Kimagut Mutai and the 2nd Defendant and issue number 1 above is answered in the affirmative.
56. On issue number 2, whether the Plaintiff has trespassed on the two acres belonging to the Defendant. The first Defendant through her Advocate sought for a survey to be done, and a survey report was filed in Court. Parties were directed to file their submissions on the suit and the survey report. Whilst the Plaintiff submitted on the same, the Defendant did not file their submissions.
57. In the survey report, the surveyor Mr. Evans Osiocha from the County Surveyors Officer, observed that the Plaintiff was in occupation of the 2 acres in dispute having fenced off the said portion using posts and barbed wire, the fence he had planted blue gums in single line surrounding the parcel of land. The photographs exhibited by the Plaintiff equally show mature trees in a single line, consistent with the findings in the survey report and the evidence of PW2, equally lends weight to the findings of the survey report, that the Plaintiff has been in occupation of the disputed property since 1992, when he bought. On the sketch map annexed to the survey report an access road is equally shown from the boundary of the property.
58. From the evidence above, there is no evidence to support the claim of trespass by the Defendant as in cross – examination the 1st Defendant on being shown the photographs conceded that the blue gum trees were on the property of the Plaintiff which formed part of the 5 acres he had initially purchased, and form part of Nandi/Kebulonik/345, however the survey report indicated that the 2 acres form part of Nandi/Kebulonik/344.
59. The Defendant did request the survey to be done but later abandoned the same. Having been filed through an order of the court, the survey report is thus admitted as evidence under the provisions of order 18 rule 10 of the *Civil Procedure Rules* as read together with section 146 (4) of the *Evidence Act*. The parties were called upon to submit on the report and only the Plaintiff filed his submissions on the report.
60. The Plaintiff submits that the survey report has actually indicated him as it shows that he is in occupation of the disputed 2 acres.
61. The court thus finds the claim by the defendant that the plaintiff has trespassed on her parcel of land is not supported by evidence and has not proven and it fails.
62. The Court shall now examine and determine issue number 3, whether the Plaintiff has proven the ingredients of adverse possession; of the 2 acres in Nandi/Kebulonik/344.
63. The Plaintiff in his submissions has cited the decision in the case of *Nathaniel Kibet Chepkerer v Francis Kiprop Chepkurui and another* [2022] eKLR wherein the ingredients to be proven. On a claim of adverse possession were restated, which are that the claimant must have been in exclusive possession of the land, openly and as of right and without interruption for 12 years after dispossessing the owner or by discontinuation of possession by the owner of his own violation.



64. In the instant case, the entry on the two acres by the Plaintiff, was found to have been by way of purchase of 1 acre from the 2nd Defendant in or about 1992, and the purchase of the 2nd acre from the late Samuel Kimagut Tanui on or about 1993. In both cases, the property was subject to the [Land Control Act](#), as was evidenced by P Exhibit number 1 and 2 being an application for LCB consent and LCB consent to subdivide.
65. The Plaintiff entry was thus initially as a purchaser whose permission was terminated by virtue of section 6 (1) of [Land Control Act](#) by virtue of the Agreement becoming void for lack of the LCB consent; after 6 months of the entry; as was held in the decision in the case of [Miki Waweru v Jane Njeri Ruchu](#) [2007] eKLR where the Court of Appeal held “in our view where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction thereafter becomes void under section 6 (1) of the [Land Control Act](#), for lack of a Land Control Board such permissions is terminated by operation of law and the continued possession if not illegal becomes adverse from the time the transaction become void.”
66. It follows therefrom that for purposes of time, that time started running on or about 1993 for the 1st acre and in 1994, for the other second acre, and time for adverse possession taking that time started running in 1994, crystallized in 2006; for both properties.
67. PW2, PW3, PW4, PW5 and PW6 all indicated that the Plaintiff has been in occupation of both acres which fact was further confirmed by the survey report as well as the photographs of mature tree and the 1st Defendant herself stated that they had been no dispute during the lifetime of her husband. The court finds the occupation since 1994 to date to have been more than 12 years in an open and continuous manner and is satisfied that the Plaintiff has proven adverse possession.
68. There is a requirement that a claimant for adverse possession must exhibit the abstract of title or copy of the register; as was stated in the decision in the case of [Githi Mwangi & 4 others v Joseph Mwai Kabiru & 4 others](#).
69. In his evidence the plaintiff produced a copy of the green card (copy of register) in respect of Nandi/ Kebulonik/344, and therefore satisfied the said requirement.
70. On a balance of probabilities, the court is satisfied that the plaintiff has proven his case to warrant an entry of judgment in his favour.

DISPOSITION:

71. Accordingly, judgment is hereby entered in favour of the plaintiff as against the defendant in terms: -
- i. That the defendants interest and title in respect of 2 acres in Nandi/Kebulonik/344 occupied by the plaintiff be and is hereby extinguished by virtue of section 17 of the [Limitation of Actions Act](#).
 - ii. The County Surveyor Nandi County to subdivide the 2 acres occupied by the plaintiff as captured in the survey report dated 21/6/2022.
 - iii. A vesting order issues in favour of the plaintiff, vesting the 2 acres to be subdivided in (2) above and for the County Land Registrar to rectify the register by registering the Plaintiff as proprietor of the resultant two acres after subdivision is caused on Nandi/Kebulonik/344.
 - iv. Each party shall bear its costs.
72. Judgment accordingly.



DATED AT KAPSABET THIS 20TH DAY OF DECEMBER, 2022.

Hon MN Mwanyale

JUDGE.

In the presence of;

Dr. Chebii for the Plaintiff

No appearance for Mr. Rotich for the Defendant.

