



REPUBLIC OF KENYA



KENYA LAW
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**Waitage v Kayere (Environment & Land Case E002 of 2022)
[2022] KEELC 15151 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15151 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E002 OF 2022
MN MWANYALE, J
DECEMBER 5, 2022**

BETWEEN

MATHEW KIPNGETICH WAITAGE PLAINTIFF

AND

JANE KAJAIKA KAYERE DEFENDANT

JUDGMENT

1. The Applicant took out the Originating Summons dated 14th January 2022 against Jane Kajaika Kayere, claiming for orders.
 - a. That his Honourable Court declares that the proprietor's interest in the whole of parcel Nandi/Kipsigak/1552 be extinguished.
 - b. That on declaration of the proprietor's interest as extinguished, her name, successors in title, administrators or whomsoever claiming through her that may be or may have been registered as the proprietor during the pendency of this suit, be deleted and/or be removed from the register and the Applicant be registered as the proprietor of the whole of Nandi/Kipsigak/1522 in place of the present proprietor and/or Administrators and/or successors in title, he having acquired ownership thereof by way of Adverse Possession.
 - c. That the Honourable Court pleased to order and direct that the suit land Nandi/Kipsigak/1522 be vested on the Applicants.
 - d. That the Defendant/Respondent, his Successors in title, administrators to whomsoever claiming through him that may be or may have been registered as the proprietor be ordered to pay costs to the Plaintiff/Applicant in this case.
2. The orders above were sought on the strength that;



- i. The Plaintiff/Applicant is in possession and occupation of the whole of parcel Nandi/Kipsigak/1522, having occupied the said parcel for more than 12 years from the date when he purchased the suit land on the 26th day of August 2008 from the Respondent.
 - ii. That the occupation has been continuous, uninterrupted, open and notorious and adverse to the Defendant since the said purchase.
 - iii. That the Plaintiff/Applicant has developed the land and has used the same as his from that particular day.
3. The Plaintiff/Applicant filed thereafter file a Notice of Motion dated 22nd March 2022 seeking to serve through substituted service, and on 31/5/2022, the Court granted leave for substituted service.
 - a. Through registered post through P. O. Box 59946 Nairobi being the address given in the Agreement of Sale between the Applicant and Respondent dated 26/8/2008 and/or
 - b. Through an advert in a local daily with wide circulation.
 4. Vide an affidavit of service deponed on 3rd October 2022, service was said to have been effected on 19th August 2022 through an advert appearing on page 31 of the star newspaper of 19 – 21 2022 edition, and the Court being satisfied as to service, confirmed the matter for hearing undefended.
 5. Although no directions, as to the conversation of the Originating Summons to a plaint and vivavoce evidence to be adduced, the fact that the Plaintiff chose to give viva voce evidence, the Court deems the conversation of the Originating Summons to a plaint as was held by the Court of Appeal in the decision in the case of *Shadrack Bungei vs Selina Jerotich Eldoret* Civil Appeal no. 4/2018.
 6. Accordingly the Applicant shall now be the Plaintiff, the Originating Summons shall be deemed to be the Plaint, and the Supporting Affidavit be the witness statement.
 7. The Plaintiff testified as PW1 and called 1 more witness. The Plaintiff filed an Amended list of documents, the same was understood to be a supplementary list of documents dated 7th November 2022, hence the Plaintiff was recalled to produce the documents in the said Supplementary List of Documents, having earlier testified and PW2 also having testified.

Plaintiff's Evidence and Submissions: -

8. It was PW1 evidence that he purchased Nandi/Kipsigak/1522 on 26th August 2008 from the Defendant Jane Kajaika Kayere of ID No. xxxx for kshs One Million Two Hundred Thousand, which sale included a permanent residential house and toilet built thereon. The terms of the purchase included the purchaser taking vacant possession on the signing of the Agreement for Sale, as well as the vendor to execute the transfer and refer the sale to Kapsabet Municipal Land Control Board. The Agreement for sale was exhibited as P Exhibit number 1.
9. It was the Plaintiff's evidence that after the agreement was executed, the Defendant gave him possession but did not effect transfer to him and they lost contact upto date.
10. The Plaintiff produced application letter for a copy of the register as P Exhibit 2, a receipt thereof as P Exhibit 3, a certified copy of the register as P Exhibit 3 and a copy of the title deed for Nandi/Kipsigak/1552, Measuring 0.12 Ha as P Exhibit 5.
11. It was the Plaintiff's further testimony that after he purchased the property, the owner (the Defendant) relocated to Nairobi and he has had possession and occupation for 14 years and he sought for the orders in the Plaint.



12. PW2, Mr. Cleophas Bunei, the Area Chief of Kapturet Location, equally testified. It was his testimony that he had been area chief for about 6 years, although he knew the Plaintiff who was living in Nandi/ Kipsigak/1552 for more than 15 years. The Plaintiff had been living on the property since he knew him.
13. On the strength of the two witnesses the Plaintiff closed his case and filed submissions.
14. It was the Plaintiff's submissions that he deserved the orders sought in the Plaint as he had lived on the property, pursuant to an Agreement for sale dated 26/8/2008 for more than 12 years by the time he filed the suit. In this regard the Plaintiff placed reliance on the decision in the case of *Mweu vs Kim. Ranching and Farming Co-operative Society Ltd.* (1985) KLR 430.
15. The Plaintiff further submitted that he had produced a copy of the register as was required, in the decision in the case of Githi Mwangi and 4 others vs Joseph Mwai Kabiru and 4 Others(2005).
16. The Plaintiff submits that the entry constitutes dispossession of the vendor/ the Defendant and submits that he has proved his claim and the suit be allowed in its entirety.

Issues for Determination: -

17. The Plaintiff did not frame any issues for determination. Noting that the matter is undefended the Court nonetheless, frames the following as issues for determination.
 - i. Whether the Plaintiff has proved the ingredients of adverse possession.
 - ii. If answer to (i) is in the affirmative has the Plaintiff proved his case on the required standard.
 - iii. If answer to (i) is in the negative, is the Plaintiff entitled to the relief's sought?
 - iv. Who bears the costs of the sit?

Analysis and Determination: -

18. Adverse possession in Kenya, has its foundation on Section 7, 13, 38 of the Limitation of Action Act, and has equally been recognised as an overriding interest under Section 28 (h) of the [Land Registration Act](#).
19. Many judicial decisions, have equally agreed on the scope of adverse possession and the ingredients to be proved as stated in the decision in the case of *Mbira vs Gachuhi* (2002) EALR – Where the Court observed... “ 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 and/adverse use by him or those under whom he claims for the statutory prescribed period without interruption?
20. Applying the above principles to the instant case, the Plaintiff took possession of Nandi/ Kipsigak/1522 pursuant to an agreement for sale dated 26th August 2008 and has been in occupation since then. PW2 the area chief, did confirm the open, exclusive, actual and notorious use of the suit property by the Plaintiff since the time he bought the same. The statutory period for adverse possession in Kenya is 12 years and indeed from 26th August 2008, 12 years have since lapsed.
21. The entry by the Plaintiff to the suit property and dispossession of the Defendant was pursuant to an agreement for sale. The terms of sale included a reference to Kapsabet Municipality Land control Board for issuance of the Land Control Board Consent. The transaction was therefore subject to the [Land Control Act](#), and Agreement became void by virtue of Section 6 (1) of the [Land Control Act](#), 6 months after the purchase. Consequently any consent given for entry was thus withdrawn, as was



held by the Court of Appeal in the decision in the case of *Miki Waweru vs Jane Njeri Richu* 2007 (eKLR).....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 (i) of the *Land Control Act* for lack of consent of the 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.”

22. Accordingly 6 months after Agreement for sale was executed the transaction become void, on or about the 26th February 2009 and time started running from the said date and crystallised on 25th February 2021, 12 years later. The originating summons having been taken out in January 2022 the time had crystallised.
23. There is a requirement equally that a copy of the title/abstract be annexed to the originating summons for prove of ownership as was held in *Githu Mwangi and 4 Others vs Joseph Mwai Kibiru and 4 Others* (2005) eKLR, which the Plaintiff produced as P Exhibit 2, and P Exhibit 5..
24. Having analysed the evidence, adduced in this matter, the Court is convinced that the Plaintiff indeed purchased Nandi/Kipsigak/1522 from the Defendant as evidenced by the Agreement for Sale and having taken possession of the property from 26th August 2008, living thereon continuously, open and in an exclusive manner, the Plaintiff has proven the ingredients of adverse possession, and thus in answer to issue number/ the same is answered in the affirmative.
25. Although the suit was undefended and the evidence uncontroverted, the Plaintiff still had to discharge the burden of proof, as was held by the Court of appeal in the case of *Karugi and Others vs Kabiya and 3 Others* (1983) eKLR. Where the court held “the burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validity defended. The burden of proof is not way lessened because this is heard by way of formal proof.”
26. The Court is satisfied from the evidence placed before it, that the Plaintiff has proved this case on a balance of probability as required, hence the answer to issue number 2, the Plaintiff has proved his case as required.

Disposition: -

27. The Plaintiff has proved that he had acquired title to Nandi/Kipsigak/1522 by way of adverse possession through open occupation of the same pursuant to a purchase in 2008 and accordingly judgment is entered in favour of the Plaintiff as against the Defendant in terms as follows;
 - i. The Defendants title and interest in Nandi/Kipsigak/1522 currently occupied by the Plaintiff is hereby extinguished by virtue of Section 17 of the *Limitation of Actions Act*.
 - ii. The Land Registrar Nandi County, to rectify the Register so as to register the Plaintiff as the proprietor of Nandi/Kipsigak/1522.
 - iii. There shall be no orders as to costs.

DATE AT KAPSABET THIS 5TH DAY OF DECEMBER 2022.

HON. M. N. MWANYALE,

JUDGE.

In the presence of



Mr. Choge for the Plaintiff

