



Byegon v Agricultural Finance Corporation (Environmental and Land Originating Summons E006 of 2023) [2024] KEELC 3505 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEELC 3505 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2023**

MC OUNDO, J

MAY 2, 2024

**IN THE MATTER OF ALL THAT PARCEL OF LAND KNOWN
AS KERICHO/KIPCHORIAN/LELU/BLOCK 5 (KEBENETI)/71**

BETWEEN

ROBERT KIPKEMOI BYEGON PLAINTIFF

AND

AGRICULTURAL FINANCE CORPORATION DEFENDANT

JUDGMENT

1. Vide an Originating Summons dated 18th May, 2023 brought pursuant to the provisions of Section 3A and 80 of the *Civil Procedure Act* and Order 37 Rule 3 of the *Civil Procedure Rules, 2010* the Plaintiff herein sought for the determination of the following questions:
 - i. Whether the Plaintiff has regained proprietary rights over all that parcel of land known as Kericho/Kipchorian/Lelu/Block 5(Kebeneti)/71 by virtue of continued uninterrupted possession for an initial period of ten (10) years and a further twenty (20) years adverse to the title acquired, albeit illegally, by the Defendant on 27th August, 2001?
 - ii. Whether having not been evicted from 27th August, 2001 to date vide any legal process, the Plaintiff should be declared a bona fide proprietor of all that parcel of land known as Kericho/ Kipchorian/Lelu/Block 5 (Kebeneti)/71 and be registered as such.
 - iii. Whether costs of the suit should be provided for.
2. The Originating Summons is premised on the grounds stated on the face of it as well as the Supporting Affidavit of equal date sworn by Robert Kipkemoi Byegon, the Plaintiff herein.
3. The Defendant did not enter appearance nor file any response. Subsequently, directions were taken on 18th October 2023 to the effect that the Originating Summons be deemed as the Plaintiff while the



Supporting Affidavit as the witness statement. The Plaintiff was directed to comply with the pre-trial directions after which the matter was to proceed by way of viva voce evidence.

4. The matter proceeded for formal proof on the 7th February, 2024 wherein the Plaintiff, Robert Kipkemoi Byegon testified to the effect that he was a farmer who lived at Kapsoit but had a farm in Kipkelion where he also lived. He adopted his Supporting Affidavit in support of the Originating Summons herein as his evidence in chief before proceeding to testify that the Defendant herein was his former employer for whom he had worked for from the year 1984 to 1993. That the Defendant had advanced him money in the year 1992 wherein he had started farming. That unfortunately, there arose tribal clashes in his Kipkelion area causing him to lose his dairy cows hence he was unable to pay back the money that had been advanced to him by the Defendant.
5. That in the year 2001, the Defendant had transferred his title to itself without any notice. He produced a copy of the Green Card as Pf exh 1 then testified that he had acquired the suit land title number Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 in the year 1992, about 32 years ago and had taken possession of the same immediately. That he had inherited the suit property from his father Elisha Cheres (now deceased) but the title now bore the Defendant's name. That even after the Defendant had acquired the title in the year 2001, he had still remained in possession of the said land for 31 years.
6. He explained that the Defendant did not take possession of the land but had just transferred the title to themselves without notice and it had made no effort to evict him from the suit land. That he kept livestock, sheep, goats and cows and also did maize farming on the suit land that measured 25 acres.
7. That he had been having uninterrupted occupation of the suit land for all those years thus he urged the court to assist him have the title deed to the suit land registered back to his name having acquired the same by adverse possession. He also sought for the costs of the suit.
8. The Plaintiff's case was marked as closed and the court directed that written submissions be filed wherein he complied and filed his written submissions dated 4th March, 2024 which I shall summarize as hereunder.
9. The Plaintiff gave a brief factual background of the matter before hinging his reliance on the legal attribution to the doctrine of Adverse Possession as provided for under the provisions of sections 7, 13 and 17 of the *Limitation of Actions Act* as well as a combination of decisions in the case of *Teresa Wachika Gachira v Joseph Mwangi* CA 325 of 2003 and *Benjamin Kamau Murwa & others v Gladys Njeri*, CA No. 213 of 1996. He therefore submitted that the critical period for determination as to whether possession was adverse is 12 years and the burden was on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner's permission, that the owner had been dispossessed or discontinued his possession of the land, that the adverse possessor had done acts on the land which were inconsistent with the owner's enjoyment of the soil for the purpose for which he had intended to use it.
10. That indeed, after the expiry of the 12 years period, the proprietor's title was extinguished by operation of the law and section 38 of the Limitation of Actions permitted the adverse possessor to apply to the court for an order that he be registered as the proprietor of the land.
11. His submission was that it had not been disputed that his occupation of the suit land had never been interrupted at all. That there had not been doubt from the evidence that had been adduced that he had enjoyed continued uninterrupted possession for an initial period of ten (10) years and a further twenty (20) years adverse to the title that had been acquired by the Defendant on 27th August, 2001 hence a cumulative period of 30 years. That there had been nothing suggesting that his occupation had been secretive or that it had not been known to the Defendant. He thus urged the court to find that the



Defendant had been dispossessed of the suit premises by those acts which had been *nec vi, nec clam, nec precarior* (that is, neither by force, nor secretly and without permission).

12. The Plaintiff urged the court to declare that he had regained proprietary rights over all that parcel of land known as Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 by virtue of continued uninterrupted possession for a cumulative period of 30 years. He also urged the court to make a declaration that having not been evicted from 27th August, 2001 to date vide any legal process, he should be declared a bona fide proprietor of all that parcel of land known as Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 and be registered as such. That further, the suit property be transferred back to him and there be an order that the Deputy Registrar of the court execute all the documents necessary to affect the transfer. He also sought for costs of the suit.

Analyses and Determination

13. This being a matter that was determined on formal proof where the Plaintiff sought for orders that he be registered as proprietor of parcel Kericho/Kipchorian/Lelu/Block 5(Kebeneti)/71, having acquired the title by virtue of the doctrine of adverse possession, the court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the [Limitation of Actions Act](#), (Cap 22) in these terms:
 14. Section 7 of the [Limitation of Actions Act](#) provides as follows:

“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...”
 15. Section 13 of the [Limitation of Actions Act](#) aforesaid further provides that:

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.”
 16. Sections 37 and 38 of the [Limitation of Actions Act](#) stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he/she shall have obtained and registered a High Court (read Environment and Land Court) Order vesting the land in him/her.
 17. Section 37 of the [Limitation of Actions Act](#) provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
 18. In terms of Section 38 of the [Limitation of Actions Act](#), where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court (read Environment and Land Court) is provided for in Order 37 Rule 7 of the [Civil Procedure Rules](#) as follows:



- i. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
 - ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
19. On analyzing the above evidence, it is the Plaintiff's case that he had inherited the suit property from his father Elisha Cheres (now deceased) wherein he had acquired title to it being LR No. Kericho/Kipchorian/Lelu/Block 5 (Kebeneti)/71 in the year 1992 wherein he had taken immediate possession. That while working as an employee of the Defendant herein from the year 1984 to 1993, the Defendant had advanced him money (loan) in the year 1992 wherein he had started farming. That unfortunately, there arose tribal clashes within Kipkelion area wherein he lost his dairy cows and was thus unable to pay back the loan that had been advanced to him by the Defendant.
20. That in the year 2001, the Defendant without Notice then transferred title of the suit land to itself as per the Green Card herein produced Pf exh 1. That even after the Defendant had registered the suit land to itself and acquired the title in the year 2001, he had still been in possession and/or occupation of the same up to the time the suit was filed. That there had been no attempt by the Defendant to evict him from the suit land where he kept his cows, sheep, and goats and also did maize farming. That he had since been in uninterrupted occupation of the suit property and had thus become entitled to be registered as the legal owner thereof in place of the Defendant, whom he admitted was the title holder of the suit land.
21. That he had been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendant for more than 31 years which was more than the 12 years required under the law for him to acquire title against the Defendant by way of adverse possession.
22. It is against this background, that the issue that arises for my determination is whether or not the Plaintiff has acquired the suit property by way of adverse possession.
23. I have looked at the official search certificate produced as Pf exh 1, and the same confirms that indeed the Defendant herein had been registered as proprietor of the suit land on the 9th September 2004.
24. In the decided case of *Wambugu vs Njuguna* (1983) KLR 173, the Court of Appeal held as follows:

“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights 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 intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”
25. In *Samuel Kibamba v Mary Mbaisi* [2015] eKLR the Court of Appeal had held as follows;

“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”

26. The main the elements of adverse possession that a claimant has to prove include :
- i. actual,
 - ii. open,
 - iii. exclusive
 - iv. and hostile possession of the land claimed.
27. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.
28. The Defendant in this matter had never taken any steps to enter onto the suit land or assert his right as the owner. It was the Plaintiff’s evidence that he had been in open and notorious possession of the suit land. An example of the Plaintiff’s notorious use of the suit land was exhibited at the hearing when he testified that he had kept livestock, sheep, goats and cows and also done maize farming.
29. I am satisfied from the Plaintiff’s testimony and the document he produced in evidence that he had discharged this burden of proof. The Plaintiff further proved that he has been in open, continuous and uninterrupted occupation of the suit property since 1992 before the land was registered to the Defendant and had continued to be in possession even after the Defendant’s registration in 2004.
30. The Defendant did not defend the suit and as such placed no material before the court to contradict the Plaintiff’s evidence. It is therefore my finding that the Plaintiff has proved his case on a balance of probability. I enter judgment for the Plaintiff against the Defendant as follows;
- i. The Plaintiff has acquired title deed by adverse possession over LR No. Kericho/Kipchorian/Lelu/Block 5(Kebeneti)/71.
 - ii. The land LR No. Kericho/Kipchorian/Lelu/Block 5(Kebeneti)/71, be registered in the names of the Plaintiff and the Defendant be ordered to sign all the necessary transfer instruments in his favour and in default the Deputy Registrar of the court be authorized to sign the same, within 30 days of the delivery of this judgment.
 - iii. The Plaintiff shall have the cost of this suit at a lower scale since the same was undefended.
31. It is so ordered.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT NAIVASHA THIS 2ND DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

