



**Kamau v Kariuki (Environmental and Land Originating Summons
E012 of 2021) [2024] KEELC 3947 (KLR) (2 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3947 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2021**

MC OUNDO, J

MAY 2, 2024

**IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATIONS OF
ACTIONS ACT (CAP 22. LAWS OF KENYA)**

AND

IN THE MATTER OF SECTION 7(D) OF THE LAND ACT NO. 6 OF 2021

AND

**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE
RULES**

AND

**IN THE MATTER OF LAND PARCEL NO. KERICHO/LONDIANI JOUBERT/
KEDOWA BLOCK 5 (NDARUGU)/80**

BETWEEN

ELIAS KARIUKI KAMAU PLAINTIFF

AND

JOYCE WANJIRU KARIUKI DEFENDANT

JUDGMENT

1. Vide an undated Originating Summons filed on 3rd December, 2021 pursuant to the provisions of Section 7(d) of the *Land Act*, Order 37 Rule 7 of the Civil Procedure Rules and all other enabling provisions of the law the Plaintiff herein sought for the following orders:
 - i. That the court declare that the Plaintiff had acquired by way of adverse possession all that parcel of land known as Kericho/Londiani Joubert/Kedowa Block 5 (Ndarugu)/80 measuring 0.830



hectares or thereabout (the suit land) having been in uninterrupted occupation and possession of the same for over 12 years.

- ii. That an order issues requiring and directing the Land Registrar Kericho to register the Plaintiff herein, Elias Kariuki Kamau as the proprietor of the suit land in place of Joyce Wanjiru Kariuki, the Defendant herein.
 - iii. That the court issues a permanent injunction restraining the Defendant from interfering with the Plaintiff's occupation and enjoyment of the suit land.
 - iv. That the costs of the suit be borne by the Defendant.
2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting Affidavit of Elias Kariuki Kamau, the Plaintiff herein sworn on 1st December, 2021.
 3. Pursuant to the failure in the Plaintiff's effort of tracing the Defendant, the Plaintiff had vide a Notice of Motion Application dated 2nd February 2022 sought that the service of the Originating Summons upon the Defendant be effected by way of advertisement on the Daily Nation or any other appropriate service. The said Application was allowed on 15th June, 2023 wherein the court had ordered that substituted service upon the Defendant be through a newspaper of wide circulation and that copies of the notice to be pinned upon the court premises/notice board within the said 21 days. The court had also granted the Defendant leave to file her response within 21 days of receipt of the notice. Despite the substituted service, the Defendant did not enter appearance.
 4. Directions were taken on 24th April, 2023 to the effect that the Originating Summons be deemed as the Plaint while the Supporting Affidavit and Supplementary Affidavit as the witness statement. The Plaintiff was then directed to comply with the pre-trial directions after which the matter was to proceed by way of viva voce evidence.
 5. The matter proceeded for formal proof on the 29th November 2023 wherein the Plaintiff, Elias Kariuki Kamau testified to the effect that he lived in Kedowa and was a farmer. That he was in court in regard to land parcel No. Kericho/Londiani Joubert/Kedowa Block 5 (Ndarugo)/80 and that he knew the Defendant herein.
 6. His evidence was that between the year 1962 to 1963 he had visited his father who had been living with the Defendant and his (PW1's) mother wherein he had found that his father had instead been living with his mother and another woman making them two women. That at the time, the three of them had been arguing wherein he had sought to take his mother with him but his father had refused because she was his wife.
 7. That his father had then bought an additional one share of land at Ksh. 1000/= from his friend making it two shares of land and although he had wanted the women to be separated, his father had been against it hence they continued living on that land. That at the time, his mother had been sick and he had taken her to the hospital. That his father had remained with the Defendant and it had been then that his father had registered land parcel No. Kericho/Londiani Jourbert/ Kedowa Block 5 (Ndarugo)/80 to the Defendant and parcel No. Kericho/Londiani Jourbert/Kedowa Block 5 (Ndarugo)/68 to himself.
 8. That when his father became sick, the Defendant had packed her belongings and left him because she was still been young. That in that year 1989, his father had given his animals to his friend, one old man, to take care of them while he set out on foot to look for him in Kiambu where he had been employed as a teacher.



9. That his father subsequently died, and because the Defendant had left with his Identity Card, they had tried to look for her to attend his father's funeral to no avail. That later in the year 1992, there had been post-election clashes which had caused the Kikuyus to pack their belongings and leave their parcels of land. That the Defendant had later sold land parcel No. Kericho/Londiani Jourbert/Kedowa Block 5 (Ndarugo)/68.
10. That in the year 1996, he had gone back to the suit land wherein he proceeded to cultivate it and even build his house thereupon. That he looked for the Defendant so he could inquire about the cows but he did not find her. That he then stayed on the suit land until the 22nd March, 2021 when he went to the chief who advised him to visit the lands office. That upon visiting the lands office, he had found out that land parcel No. Kericho/Londiani Jourbert/Kedowa Block 5 (Ndarugo)/68 had been sold to somebody he did not know while the suit land was still registered in the Defendant's name.
11. He produced the Green Card certified on 1st July, 2020 as Pf exh 1 before proceeding to testify that he was still in occupation of suit land to date. That he had even put up a Notice for sale so as to attract the Defendant, but she did not turn up. He produced the advice letter from the chief, dated 22nd March, 2021 as Pf exh 2, stating that that nobody had laid claim on the land as the same was known as "Mwalimu's" land.
12. He urged the court to issue him with a title to the suit land which measured 2 acres and wherein he had planted maize, put up a timber house and even fenced it.
13. The Plaintiff thus closed his case and since there was no evidence tendered by the Defendant, the Defence case was marked as closed wherein the Plaintiff filed his written submissions dated 13th December, 2023 to which I shall summarize as herein under.

Plaintiff's Submissions

14. The Plaintiff gave a brief background of the matter before raising one issue for determination to wit; whether he was entitled to the orders sought. He placed reliance on the provisions of Section 7(d) of the [Land Act](#) and the decided case of [Tabitha Waitherero Kimani v Joshua Ng'ng'a \[2017\] eKLR](#) where the conditions for consideration in proof of adverse possession had been laid out, to submit that adverse possession and/or prescription was one of the ways by which a person could acquire title to land.
15. He reiterated the evidence he had adduced in court and referred to the Green card which he had produced, as proof that the Defendant was the registered owner of the suit land. That he had also employed ways to get the Defendant's attention including putting up a notice for the sale of the suit property but the Defendant had never come to reclaim it. Further, that the chief's letter dated 22nd March, 2021 which he had produced in evidence had indicated that he had been in occupation of the suit land for over 12 years wherein no one had laid claim over it nor had there been any dispute over the same during the said period of time.
16. It was the Plaintiff's submission that he had been in continuous, open and uninterrupted occupation of the suit land for a period of more than 23 years and that over the said period, he had engaged in acts, in regard to the property, which were inconsistent with the rights of the Defendant who was the registered proprietor. That further, he had demonstrated that he had openly used the land as of right, having had been continuous possession and possession had not been broken or interrupted. That the Defendant had not taken any legal action to remove or evict him from the land and consequently, after the expiry of 12 years, the Defendant had automatically lost the right to recover the land whereas he had acquired title to the land by operation of the law.



17. He placed reliance on the decided case of James Obande Wasui v Jeremiah Ochwada Musumba [2002] eKLR where the court had held that an occupier's right to adverse possession runs with the land irrespective of the change in proprietorship. He placed further reliance on the provisions of Section 28(h) of the [Land Registration Act](#) to submit that a claim for adverse possession was considered to be an overriding interest.
18. He thus submitted that he had established notorious, open and exclusive possession of the suit property hence he was entitled to be registered as the owner of the suit land by virtue of adverse possession thus the court should grant the orders as sought in his Originating Summons.

Analyses and Determination.

19. 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/Londiani Joubert/Kedowa Block 5 (Ndarugu)/80 measuring 0.830 hectares or thereabout, 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:
20. 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...”
21. 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.”
22. 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 shall have obtained and registered a High Court (read Environment and Land Court) Order vesting the land in him.
23. 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.”
24. 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 (read Environment and Land 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 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.
25. On analyzing the above evidence, it is the Plaintiff's case that although the Defendant herein had been registered as proprietor of the suit land at the time she was cohabiting with his father, when his father got sick, she fled from him and upon his death, they had tried to look for her to attend his funeral to no avail. That later in the year 1992, there had been post-election clashes which had caused the Kikuyus to pack their belongings and leave their parcels of land. That later in the year 1996, he had gone back to the suit land where he had proceeded to cultivate it and even build his house thereupon. That he had searched for the Defendant in vain wherein he had taken possession and occupation of the suit land. He produced a letter dated 22nd March, 2021 as Pf exh 2, confirming that he had been in occupation of the suit land for the last 12 years.
 26. He acknowledged that the Defendant had been the registered proprietor of the suit land but since he had been in uninterrupted, open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendant for more than 12 years, he had acquired title to it as against the Defendant by way of adverse possession.
 27. 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.
 28. 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 3rd August 1992 wherein she had been issued with title.
 29. 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.”
 30. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR*, the Court of Appeal had observed as follows;

“Likewise, it is settled that a person seeking to acquire title to land by way of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”
 31. 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.
32. 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.
33. 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. An example of the Plaintiff's notorious use of the suit land was exhibited at the hearing when he testified that he had planted maize, put up a timber house and even fenced the land.
34. I am satisfied from the Plaintiff's testimony and the documents 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 1996 and had continued to be in possession even as he testified in the year 2023.
35. 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 L.R No. Kericho/Londiani Joubert/Kedowa Block 5 (Ndarugu)/80.
 - ii. The land LR No. Kericho/Londiani Joubert/Kedowa Block 5 (Ndarugu)/80 should forthwith 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.
36. It is so ordered.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

