



**Bett v Jesicheli & another (Environment & Land Case E093 of 2021)
[2024] KEELC 5188 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E093 OF 2021**

MN MWANYALE, J

JULY 11, 2024

BETWEEN

PAUL KIBIEGO BETT PLAINTIFF

AND

ISICHI JESICHELI 1ST DEFENDANT

IMBIRO IMEMWA 2ND DEFENDANT

JUDGMENT

1. In his Originating Summons dated 11th October 2019, the Applicant now Plaintiff seeks judgment against the Defendants Isichi Jesicheli and Imbiro Imemwa for; -
 - a. Declaration that the titles of the Isichi Jesicheli and Imbiro Imemwa free hold interests in land registration No. Nandi/serem/293 And Nandi/serem/294 having been extinguished by the Plaintiff's adverse possession thereof for a period for more than 12 years in terms of Section 17 and 18 of the Limitations of Actions Act.
 - b. A declaration that the Plaintiff has acquired freehold interests in land parcels Nandi/serem/293 And Nandi/serem/294 by his adverse possession thereof for a period of more than 12 years from 1979 to date
 - c. An order do issue requiring and directing the Land Registrar Nandi County to register the Plaintiff as the owner of land registration No. Nandi/serem/293 And Nandi/serem/294 in place of Isichi Jesicheli and Imbiro Imemwa respectively.
2. It is the Plaintiff's case whilst testifying as PW1 that he purchased the said entire portions from the Defendants in 1979 and he took possession thereof and the Defendants moved out of the property. In relation to Nandi/serem/294, he produced an Agreement for Sale, showing the purchase price to



have been at a consideration kshs 6,300/=. It was his evidence that he paid in full and took possession and developed the property.

3. In relation to Nandi/serem/292, the Agreement for Sale thereof was lost but he remembers paying kshs 3600/= and took possession of the same in 1979. No transfers were executed by the Defendants who moved away and their whereabouts remain. Unknown as well as to whether they were alive or not remained unknown.
4. In support of his case the Plaintiff produced copies of the official search in relation to the properties, showing the Defendants as the respective registered owners thereof as P Exhibit 1 and 2 and the Agreement for Sale as P Exhibit 3.
5. It was his further evidence that he had had peaceful occupation of the suit properties, developed the properties by building houses, planted tea and trees thereon, and he was generally regarded as the owner of the suit properties.
6. The Plaintiff in support of his case called PW2, Musa Chebochei, the Area Chief of Mugen Location, who testified having seen the Plaintiff occupy the suit properties, and in his capacity as the area chief he had authored a letter he produced as P Exhibit 5 to the Land Registrar seeking registration of the Plaintiff. He further testified that he had not received any complaint on the ownership of the property.
7. The Originating Summons taken out by the Applicant were served through substituted service and the Deputy Registrar endorsed the request for Judgement and this Court deemed the matter as undefended. The substituted service was through advertisement pursuant to a Court order dated 8/11/2021, and the same was carried in the Daily Nation Newspaper of 26/01/2022.
8. No directions were taken on the Originating Summons, but the Applicant having chosen to proceed viva voce evidence, the Originating Summons was deemed to be the Plaint, as was held in the decision in the case of Shadrack Bungei vs Selina Jeroith Eldoret Civil Appeal No. 4/2018.
9. Although the matter was undefended, the Plaintiff nonetheless had to discharge the evidential burden so as to have judgment entered in his favour as was held in the decision in the case of Karugi & Others Vs Kabiya & 3 Others (1983) eKLR.
10. After the testimony of the Plaintiff and the matter being undefended the Plaintiff filed his submissions which the Court now considers and summarizes as follows; -

Plaintiff's Submissions: -

11. It is the Plaintiff submissions that on a balance of probabilities he had proved his claim and places reliance on the interpretation of Section 38 as was stated in the decision in the case of Chevron (K) Ltd vs Harrison Charo Shutu 2016 (eKLR) and that he had also proved the ingredients of adverse possession as stated in the decision of Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, the same being; -
 - i. Neci vi nec clam, nec precario (no force no secrecy, no persuasion)
 - ii. The owner had knowledge or means of knowing actual or constructive possession or occupation
 - iii. The possession must be continuous.
 - iv. Must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration.



12. The Plaintiff further placed reliance on the decision in *Public Trustee vs Wanduru & Mwangi & Another versus Mwangi* (1986) eKLR.

Issues For Determination: -

13. Having analyzed the pleadings evidence and submissions, the Court frames the issues for determination as follows;
 - i. Whether the Plaintiff has proven entitlement to the parcels Nandi/serem/293 And Nandi/serem/294 by adverse possession
 - ii. Whether the Plaintiff claim is merited
 - iii. Do the reliefs sought issue?
 - iv. Who bears the costs of the suit?

Analysis And Determination: -

14. Adverse possession in Kenya, has its foundation on Section 7, 13 and 38 of the Limitation of Action Act, and has equally been recognized as an overriding interest under Section 28 (h) of the [Land Registration Act](#).
15. Various dictas of the Courts, have equally agreed on the scope of the 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 by the method of adverse possession for the applicable stator period must prove non permissive or non – consensual, actual, open, notorious exclusive and/adverse use by him or those prescribed period without interruption.”

16. Applying the above principles of the instant case, the Plaintiff took possession of Nandi/serem/ 293 and Nandi/serem 294 pursuant to sale in 1979, 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 purchased the same, the statutory period for adverse possession in Kenya is 12 years and indeed from 1979, 12 years have since lapsed.
17. The entry by the Plaintiff to the suit properties was pursuant to agreements for sale, and being agricultural land the same required the consent of the Land Control Board. The transaction was therefore subject to the [Land control Act](#) and the agreement became void by virtue of Section 6 (i) of the [Land Control Act](#), 6 months after the purchase. Consequently, any consent given after the 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 by the Land Control Board such permissions is terminated by operation of the law and the continued possession if not illegal becomes adverse from the time the transaction because void.”

18. Accordingly, 6 months after the execution of the agreements, the transaction become void and time started running from the said date and since the second, agreement was not executed, till started



running in 1980 and crystallized in 1992. The Originally Summons having been taken out in 2019 the same had crystallized.

19. The ownership of the suit properties in the suit was proved by the official searches P Exhibit 1 and 2, and the purpose for production of the copy of title/abstract to be annexed to the Originating Summons as was stated in Githu Mwangi and 4 others vs Joseph Mwai Kiburu & 4 others (2005) eKLR was thus achieved.
20. The Court is thus convinced that the Plaintiff has proven the ingredients of adverse possession, by proving possession of property from 1979, living thereon continuously, openly and in an exclusive manner, thus in answer to issue number 1, the ingredients of adverse possession have been proven.
21. As noted earlier, the suit was undefended and the evidence uncontroverted, the Plaintiff was still under an obligation to discharge the burden of proof as was held in the case of Karugi & 3 others vs Kabiya and 3 others (1983) eKLR, where the Court of Appeal held interalia

“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 validly defended, the burden of proof is not way lessened because this is heard by way of formal proof.”
22. On the evidence placed before Court, the Court is satisfied that having met the evidential burden, the Plaintiffs case is thus merited as it had been proven.

Disposition: -

23. The Plaintiff has proved that he has acquired title to Nandi/serem/293 And Nandi/serem/294 through open occupation of the same pursuant to a purchase in 1979 and accordingly judgment is entered in favour of the Plaintiff as against the Defendants jointly and severally in terms as follows.
 - i. The Defendants title and interest in Nandi/serem/293 And Nandi/serem 294 respectively 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/serem/ 293 And Nandi/serem/294.
 - iii. There shall be no orders as to costs.

JUDGMENT DELIVERED AND DATED AT KAPSABET THIS 11TH DAY OF JULY 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Mr. Rotich for the Plaintiff

