



Kiptoo v Kangogo (Sued as the Legal Representative of the Estate of the Late Noah Kiprop Kangogo) (Environmental and Land Originating Summons 65 of 2019) [2024] KEELC 6381 (KLR) (3 October 2024) (Judgment)

Neutral citation: [2024] KEELC 6381 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 65 OF 2019
MAO ODENY, J
OCTOBER 3, 2024

BETWEEN

SAMUEL K KIPTOO PLAINTIFF

AND

GLADYS JEPKORIR KEMBOI DEFENDANT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
NOAH KIPROP KANGOGO**

JUDGMENT

1. The Plaintiff filed Originating Summons dated 1st July, 2019 seeking the following orders:
 - a. That the applicant (Samuel K. Kiptoo) be declared and decreed the lawful owner and or beneficial owner of Land Title No. Nakuru/Ngongongeri/479 (2.02ha) situated in Nakuru County and registered in the names of the defendant and that the same be registered in his name by virtue of adverse possession as the defendant's right, interest and proprietor in the said suit property has been extinguished.
 - b. That the Land Registrar Nakuru County be ordered to rectify the Lands Register relating to Land Title No. Nakuru/Ngongongeri/479 in such a manner as will reflect the Plaintiff herein as the registered owner of Land title no. Nakuru/Ngongongeri/479 measuring approximately 2.02 hectares.
 - c. That the costs of these proceedings be borne by the defendant.
2. On 4th June 2015 Noah Kiptoo Kangogo instituted a suit Nakuru CMCC No. 570 of 2015 against Samuel Kiptoo (the Plaintiff herein) claiming ownership of the suit property LR No. Nakuru/Ngongongeri/479.



3. While the case was pending, Samuel Kiptoo instituted the instant case claiming adverse possession and to be declared an owner. Vide Nakuru High Court Misc Civil Application No. 22 of 2019 he sought for the transfer of CMCC No 570 of 2015 and the same became ELC No. 10 of 2020.
4. On 12th February 2020 the parties applied to have the two cases ELC 65 of 2019 and ELC No. 10 of 2020 to be consolidated which was allowed and ELC No. 10 of 2020 became the lead file.

Plaintiff's Case

5. PW1 Samuel Kipkoech Kiptoo stated that he has been residing on the suit land Nakuru/ Ngongongeri/479 with his family since 1997 which belongs to the defendant who is the registered owner. He produced a copy of the title deed for the suit land measuring 2.02 hectares.
6. It was PW1's evidence that he used to reside in Baringo but was relocated to the suit plot by the government and that the same was pointed out to him by a government Surveyor. It was further his evidence that the plot was vacant when he took occupation, planted trees, fruits, maize, beans, and vegetables, constructed a permanent house. PW1 produced photographs of the developments on the suit land and stated that he has resided on it for about 24 years, which period the defendant has never come to the land but met him for the first time in 2015.
7. PW1 stated that the Defendant has not developed the plot and that he filed a suit in 2015 against the Plaintiff claiming ownership of the plot. He also testified that it is not true that in 2018 he offered to vacate the property after being summoned by the Deputy County Commissioner Molo through a letter dated 28th November, 2018. It was his testimony that he was asked to vacate the suit property but he told the Deputy County Commissioner, the Chief, District Officer and the Defendant that the matter was in court.
8. It was PW1's evidence that he had written a letter dated 13th December, 2018 where he had agreed to vacate the suit land but did not vacate as he had promised to do so on before 31st January 2019.
9. Upon cross-examination by Mr. Mongeri, PW1 stated that he was shown the plot by Mr. Mwangi, a government surveyor and not the Defendant. PW1 further stated that the plot was a government forest and he only came to know that the Defendant was the owner in 2015 and is the current registered owner of the plot.
10. PW1 also admitted that he has not sued the Land Registrar and that the defendant filed a case against him before he filed this case. Further that in his statement of defence in CMCC 570/2015 at paragraph four of the defence, he stated that he has never been in occupation of the plot. It was also his testimony at paragraph six of his defence that he knows Evaline Jesang Ngeno who is his neighbor in Baringo and further that they have a family plot owned by his father.
11. PW1 further admitted that Evaline Jesang Ngeno's witness statement filed on 25th June, 2015 in ELC 570/250 stated that he was her tenant and that the photographs he has produced do not state that they were taken in the suit property.
12. On further cross-examination, he stated that he wrote the letter stating that he would vacate the suit land as he had been threatened with dismissal from the Kenya Defence Forces if he did not promise to vacate. He also stated that he does not have any document in court to indicate that he was shown the plot. It was his evidence that he was allocated the plot but that he had misplaced the allotment letter.
13. Upon re-examination by Ms. Omwenyo, PW1 testified that he is claiming plot No 479 whose registered proprietor is the Defendant and that he was never allowed to enter and occupy the plot but that the survey report indicates that he had built on plot 479.



Defendant's Case

14. DW1 Gladys Jepkorir Kemboi adopted her witness statement dated 22nd May, 2023 as her evidence in chief and a list of documents dated 11th May, 2023 which she produced as Dex No 1 to 11. It was her evidence that the Plaintiff is on the suit land illegally as they have never sold the land to him. DW1 also stated that the land is registered in the late husband's name hence the owners of the suit land. She urged the court to dismiss the plaintiff's suit with costs.
15. Upon cross-examination by Ms. Omwenyo, DW1 stated that she is claiming plot No 479 as the land belonged to her late husband. She stated that she is the administrator of the estate of her late husband and that the search is for plot No Nakuru/Ngongongeri/1471 in the name of her late husband (Noah Kiprok Kangogo) measuring 2.02 Hectares.
16. It was DW1's testimony that she went to the suit land in 1997, 1998 and 2000 and that the late husband had cleared the forest and started farming. She further stated that she is unable to access the suit land and that it is not true that the Plaintiff has been on the suit land for more than 12 years. DW1 testified that they had moved to court to stop the Plaintiff from burying the child on their suit land.
17. Upon re-examination by Ms. Chesang, DW1 stated that she is the administrator of the estate of her late husband who is the registered owner of the suit plot No. 479. It was her evidence that the plaintiff entered the suit land in 2013, they reported the matter to the Chief and filed the case in 2015.
18. DW2 Robert Korir, a Pastor adopted his witness statement dated 28th January, 2021 and stated that the land belongs to the late Noah Kangogo.
19. Upon cross-examination by Ms. Omwenyo, DW2 confirmed knowing the defendant and stated that he was allocated together with the late Noah Kangogo land in 1997 which was a forest by then. It was his evidence that his plot is 200 meters from Plot No. 479 and that the Late Noah Kangogo reported the dispute the sub-county Commissioner against the Plaintiff.
20. Upon re-examination by Ms. Chesang, DW2 testified that the Plaintiff got into the land between 2010 and 2013 and that Noah Kangogo cleared the forest and built a semi-permanent house and started farming.
21. DW3, Haron Koima, an Assistant Chief Lawina sub-location adopted his witness statement dated 28th January, 2021 and stated that the land belongs to the widow of Noah Kangogo.
22. Upon cross-examination by Ms. Omwenyo, DW3 stated that he has been an Assistant Chief from 2012 and his plot is No. 610 which was allocated to him in 1997 and he bought it from Mary Kosei. He stated that he was staying at Ngongongeri but he was born in Baringo. He further testified that the Plaintiff was never relocated from Tenjes to Ngongongeri.
23. DW3 testified that there is a semi-permanent house and in 2021, there was a child who was buried in the suit land. He stated that there have been many cases between the Plaintiff and Noah Kangogo at the Chief's office and at the sub-county Commissioner's office. It was his evidence that nobody forced the Plaintiff to write a statement that he would move out of the suit land.
24. Upon re-examination, DW3 testified that he got a complaint in 2013 as an Assistant Chief and that there was an order stopping the burial of the Plaintiff's child in 2021.



Plaintiff's Submissions

25. Counsel for the Plaintiff filed submissions dated 1st August, 2024 and identified the following issues for determination:
 - a. Whether the Plaintiff has met the pre-requisite elements of adverse possession?
 - b. Whether the rights and interests of the Defendant in Land Title No Nakuru/Ngongongeri/479 measuring approximately 2.02 hectares have been extinguished under the doctrine of adverse possession?
 - c. Whether the Plaintiff is entitled to be registered as the proprietor of the suit property by the operation of the doctrine of adverse possession?
26. On the first issue, counsel relied on the cases of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR and *Peter Gichuki Wanjobi vs Julia Mumbi Muturi Civil Appeal No 65 of 2016* and submitted that the Plaintiff entered the suit land and exerted actual possession on it in 1997 without the prior permission or the consent of the owner of the land and had remained thereon for 18 years before the Defendant took action in 2015. Counsel submitted that the Defendant has given contradictory evidence on the date of entry and that computation of time ought to start in 1997 when the plaintiff entered the land.
27. Counsel further submitted that the mode of entry was non-permissive as the Defendant involved the local administration through the Chief and Deputy County Commissioner. Counsel relied on the cases of *Benjamin Kamau Murima & 3 others vs Gladys Njeri Civil Appeal No 213 of 1996* and *Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau* (Suing in her capacity as the administrator of the estates of *Kimingi Wariera (Deceased)* and of *Mwangi Kimingi (Deceased)* [2022] eKLR. Counsel submitted that the Plaintiff had been in hostile and adverse possession of the land and has developed the suit land as shown in the photographs produced.
28. On the second issue, counsel relied on Section 28 (h) of the *Land Registration Act* and submitted that the Defendant's land is subject to overriding interests. Counsel further relied on Section 7, 17 and 18 of the *Limitation of Actions Act* and submitted that the continued occupation and possession of the land by the plaintiff from 1997 means that the right of the Defendant to bring an action to enforce his rights were alive before the expiry of the twelve-year period.
29. Counsel submitted that as from the year 2009, the right and interests of the Defendant on the land were extinguished by the operation of the doctrine of adverse possession and hence barred from bringing an action for the recovery of the land, Counsel submitted that the Defendant thus holds the title in trust for the adverse possessor who has dispossessed him of the land.
30. Ms. Omwenyo further submitted that the mode of use of the suit land and acts of the plaintiff have been adverse to the rights and interests of the defendant and thus meet the threshold for dispossessing of land from the Defendant. Counsel relied on the cases of *Sisto Wambugu v Kamau Njuguna* and *Samwel Nyakenogo vs Samwel Orucho Onyaru Civil Appeal No 24 of 2004*.
31. On the third issue, counsel relied on Article 40 (1), 65 of *the Constitution* of Kenya and Section 38 (1) of the *Limitation of Actions Act* and submitted that the Plaintiff has proved his case on a balance of probability thus has met the elements of adverse possession. Counsel urged the court to grant the orders as prayed in the originating summons to the effect that the Plaintiff be registered as proprietor of the suit property title number Nakuru/Ngongongeri/479.



Defendant's Submissions

32. Counsel for the Defendant filed submissions dated 4th September, 2024 and identified the following issues for determination:
 - a. Whether the Defendant is the registered owner of the suit parcel?
 - b. Whether the Plaintiff has acquired the suit property by adverse possession and whether the Plaintiff has met pre-requisite elements of adverse possession.
 - c. Whether the orders sought by the plaintiff are merited and whether the orders sought by the Defendant should be granted as prayed.
33. On the first issue, counsel submitted that the Defendant is the registered owner of the parcel of land known as Nakuru/Ngongogeri/479 measuring 2.02 Hectares whose copy of title was produced by DW1 as an exhibit. Counsel relied on the case of *Ali Wanje Ziro vs Abdulbasit Abeid Said & Another ELC No 97 of 2020* and submitted that a title deed being prima facie evidence of ownership of land and the failure by the Plaintiff to challenge and/or prove on a balance of probability that the Defendant acquired the title deed fraudulently leaves the Defendant as the legal registered owner of the suit property.
34. On the second issue, Mr. Mongeri submitted that the Plaintiff forcefully took possession and occupation of the subject parcel of land claimed adverse possession yet he has been in occupation of the suit property for less than twelve years. Counsel submitted that the Defendant has also interrupted the period since the Defendant lodged a complaint with the local authorities. Counsel submitted that in 2015, the Defendant filed a suit against the Plaintiff vide CMC No 570 of 2015; *Noah Kiprok Kangogo vs Samuel Kiptoo* as a consequence of non-compliance by the Plaintiff to vacate the suit land. Counsel submitted that using force to gain possession negates adverse possession.
35. On the third issue, counsel relied on Section 109 of the *Evidence Act* and submitted that the Plaintiff has failed to prove ownership by adverse possession and the case should be dismissed.

Analysis and Determination

36. The issue for determination by the court is whether the Plaintiff is entitled to be registered as the owner of Land Title No. Nakuru/Ngongogeri/479 (2.02ha) situated in Nakuru County by virtue of adverse possession.
37. The plaintiff has to prove that he has met the ingredients of adverse possession as was stated in the case of *Tabitha Waitherero Kimani v Joshua Ng'ang'a* [2017] where eKLR, Ombwayo J enumerated the ingredients to be satisfied in a claim of adverse possession as follows:
 - (A) Open and notorious use of the property. For this condition to be met the adverse party's use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
 - (B) Continuous use of the property – The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire



limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

- (C) Exclusive use of the property – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
- (D) Actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

38. It is incumbent upon the Applicant to meet the five ingredients for the court to declare that he/she has acquired the land by way of adverse possession.

39. Adverse possession is a common law doctrine that allows the dispossession of an owner if the ingredients are met. It should be noted that courts do not just give a blanket cheques to claimants who squat on peoples' land and claim to have acquired the land by way of adverse possession. The claimants must prove that they have been in exclusive possession, openly, uninterrupted for a period of 12 years and that there has been discontinuation of possession by the owner on his own volition.

40. In India Supreme Court decision in the case of Kamataka Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779 the court stated thus:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

41. It is the Plaintiff's case that he entered the suit land in 1997 without the prior permission or the consent of the owner and has remained thereon to date which is a period of more than 12 years.

42. From the evidence on record, the plaintiff stated that he was allocated the suit land in 1997 by the government and was shown the plot by a government surveyor. The plaintiff also admitted that they have had disputes with the defendant who is the registered owner at the Chief's, District Officer and the Sub County Commissioners Office. The defendant also produced a letter dated 13th December 2018



where he had agreed to vacate the suit land by 31st January 2019 but he never complied. He claimed that he had been threatened but there was no evidence that he had taken any action to report the threat or that he signed it under duress. This must have been an afterthought.

43. The evidence that the plaintiff was allocated the suit land by the government and shown the suit land by the government surveyor makes this case unsuitable for a claim for adverse possession. If indeed it is true that he was allocated the land as claimed, then he should have followed up with the allocating authority to give him a title in his name. There was no such allotment letter which he claimed to have had but did not produce. The issue of allotment letter is neither here nor there as it does not form part of the ingredients of adverse possession.
44. The plaintiff should have filed a claim to be issued with a title for the land he claims to have been allocated or cancellation of the plaintiff's title but not as a result of an order of adverse possession. This is a case where the plaintiff wants to reap where he has not sown.
45. Even if the court were to consider whether the plaintiff had dispossessed the defendant by way of adverse possession, the evidence on record indicates that this possession was not peaceful as there were interruptions with disputes at the local administration, the court in 2015 and a letter agreeing to vacate the suit land by January 2019. The possession must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.
46. In this case the entry was by allocation as alleged by the plaintiff which if it was the case, then the plaintiff should know that adverse possession does not run against the government as provided for under section 41 of the *Limitation of Actions Act*.
47. Section 41 of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that the doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government.
48. Similarly, in the case of *Ravji Karsan Shanghani v Peter Gakumu* [2019] eKLR the court considered whether adverse possession could apply to land owned by the Government and stated as follows:

“The Defendant was allocated the suit land on 23rd April 1986 following his application for allocation. At the time of allocation, the land was unsurveyed and it constituted part of Government land and that is how the Government could alienate it. It is trite law that adverse possession cannot accrue against land that is owned by the Government. The Plaintiff contended he occupied the suit land in 1979 and had since that time effected various developments thereon which demonstrated his occupation and possession was adverse to the rights and interests of the registered owner. Thus, even assuming the Plaintiff had during the period 1979 to 1986 occupied and possessed the land under circumstances that could amount to adverse possession, my view is the Plaintiff could not adversely possess the land against the Government such that the Government's rights and interest over the land could be extinguished.”
49. It is not disputed that the suit land belongs to the defendant and that is why the plaintiff brought a claim of adverse possession against the defendant. I find that the Plaintiff has failed to meet the threshold for an order of adverse possession and therefore the originating summons is dismissed with costs to the defendant.
50. The defendant's claim against the plaintiff for a permanent injunction restraining Samuel Kiptoo, his servants, agents, legal representatives, employees, from entering, trespassing, cultivating, leasing, remaining in and in any way whatsoever interfering with parcel No. Nakuru/Ngongongeri/479 measuring 2.02 hectares is hereby allowed as prayed with costs.



DATED, SIGNED AND DELIVERED AT NAKURU THIS 3RD DAY OF OCTOBER 2024.

M. A. ODENY

JUDGE

