



Francis (Suing as the administrator of the Estate of Francis Juma Emot) v Saul (Environment & Land Case 170 of 2013) [2023] KEELC 21478 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21478 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 170 OF 2013
EC CHERONO, J
NOVEMBER 6, 2023**

BETWEEN

BARASA A FRANCIS (SUING AS THE ADMINISTRATOR OF THE ESTATE OF FRANCIS JUMA EMOT) APPLICANT

AND

SIMON KAYE SAUL RESPONDENT

JUDGMENT

1. The applicant instituted this suit vide originating summons dated 18th June, 2023 for determination of the following questions; -
 - a. Whether the respondent is the absolute registered owner of land parcel No Elgon/Kapkateny/647 which the applicant is in occupation of 3 ½ Acres on land parcel No Elgon/Kapkateny/647.
 - b. Whether the applicant has lived peacefully and continuously on the said parcel since 1980 and has established his home and constructed houses thereon.
 - c. Whether the respondent has refused and or neglected to give the applicant title to 3 ½ Acres from land parcel No Elgon/Kapkateny/647.
 - d. Whether the Respondents title to the 3 ½ Acres has now been extinguished by operation of the law.
 - e. Whether the applicant has acquired absolute title to the 3 ½ Acres of land by way of adverse possession.
 - f. Whether the respondent should be condemned to pay costs of the suit.



2. The Originating Summons are supported by the grounds on the face of the said Originating Summons and the Supporting Affidavit of the applicant sworn on the 18th June, 2013. The applicant deposed that he has been in continuous and peaceful occupation of 3 ½ Acres of land in parcel No Elgon/Kapkateny/647 (“the suit land”) for over 20 years and that his father now deceased bought the said portion of land in 1980 from one Wilfred Kungut Chai and took possession of it by constructing thereon. The applicant averred that at the time of the abovementioned purchase the property was registered in the name of the vendor’s father one Chai Chemaswet who died sometime before 1980 and a succession cause filed in 1996 by the vendor and his brother one Raymond Chai.
3. It was averred that at the time of the sale, the said Wilfred had sold the land to two people i.e. Johnstone Sindani and the applicant’s late father. It was the applicant’s contention that the said Wilfred acquired title after the succession cause of the piece sold to Johnstone while the piece belonging to the applicant’s father was registered in the name of the Respondent herein. It was deposed that the applicant became aware of the above when the respondent attempted to evict the applicant’s late father from the property in the year 1996. The applicant contends that he is entitled to the suit land having continuously lived therein without interruption since 1980 and has established his home thereon.
4. Upon service of Summons and other court processes, the respondent entered appearance through the firm of J.S.Khakula & Company Advocates and filed a replying affidavit sworn on 3rd October, 2016. The respondent deposed that he was the registered owner of the suit land. It was his contention that the suit land has never been the property of Wilfred Kungut Chai who allegedly sold it to the applicant’s late father. The respondent averred that although the suit land is a subdivision of land parcel No Elgon/Kapkateny/409, the latter parcel of land was owned by Chai Chemaswet and was subdivided into 3 portions i.e. No 645, 646 and 647 and given to his three sons i.e. Raimon Chongo Chai, Wilfred Kungut Chai and Simon Kaye Saul respectively. He averred that the subdivision process was done by Raimon Chongo Chai through Bungoma HC Succ Cause No 7 of 1995. It was his contention that the suit land did not exist in 1980 as alleged by the applicant as he obtained title in 1995 when the applicant’s father was still alive. The respondent deposed that if at all the applicant’s claim is based on his father’s alleged occupation of the late Naibei Chemaswet’s land, that occupation was terminated in 1995.
5. The applicant filed a supplementary affidavit sworn 10th October, 2016 and deposed that his late father purchased the suit land from Chai Chemaswet on 22nd June, 1980 while the land was still under Elgon/Kaokazteny/409 as a block and that the alleged succession process was done without their knowledge thus the sub-division. He further averred that the respondent was not a son of the late Chai Chemasweti but of Saul Chemasweti, a brother to the vendor who sold the land to the applicant’s father.
6. When the matter came up for hearing, counsel for the respondents sought for an adjournment which was declined and the court ordered that the matter to proceed for hearing noting that it had been listed for dismissal on several dates. During the hearing, the applicant adopted his supporting and supplementary affidavits sworn on 12th June, 2013 and 11th October 2016. The applicant also produced in evidence a list of documents dated 12th June, 2013 as Exhibit No 1-7. Neither the respondent nor his Counsel were present and their case was subsequently closed for non-attendance.

Analysis and Determination

7. I have considered the pleadings, attachments, submissions and authorities cited by the Applicant and find that the following are issues that commend for determination;
 - a. Whether the Applicant’s occupation of the Suit Land is adverse to that of the Respondent



- b. Who should bear costs
8. I note that neither the respondent nor his counsel appeared during the hearing of the case and therefore his case was closed for non-attendance. In instances such as this, the Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the applicant is entitled to the prayers sought. While considering a similar case concerning uncontroverted evidence in the case of Murang'a ELCA No 16 of 2017 *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court pronounced itself to the strength of such evidence as follow;-
- It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.
9. Section 108 & 109 of the *Evidence Act* is clear that the burden of proof is usually placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property is alleged, the burden is higher than the standard required in ordinary civil claims. The burden of proof squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. The Applicant is the one who has alleged and must proof. (See Nairobi CoA App No 95 of 2014 *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR)
10. It is not in dispute that the Applicants claim in the Originating Summons is based on adverse possession. What is adverse possession? The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, which provides that: -
- “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 or, if it first accrued to some person through whom he claims, to that person.”
11. It commences in wrong and is aimed against a right of the true owner. The person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was hostile and not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property
12. Section 17 of the *Act* extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 of the same *Act* also provides;
- “(1) 1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.”
13. The Court of Appeal in Kisumu Civ App. No 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR opined that a person claiming adverse possession must establish the following:
- a. On what date he came into possession.
 - b. What was the nature of his possession?
 - c. Whether the fact of his possession was known to the other party.
 - d. For how long his possession has continued and



- e. That the possession was open and undisturbed for the requisite 12 years.
14. It is on the foregoing principles that the Applicant's claim falls for consideration. The burden of proof lies with the Applicant to establish the elements of adverse possession as set out in the above cases. From the Applicant's originating summons, supporting affidavit and testimony and the Respondents replying affidavit which forms part of the record, it is not in contention that the Applicant is in actual possession and occupation of the suit land.
15. The Applicant's case is that his deceased father purchased 3 ½ Acres from one Wilfred Kungut Chai, son to Chai Chemaswet who was the original registered owner of parcel No Elgon/Kapkateny/409 which was later sub-divided and resulted to parcels No 645,646 & 647. From the sale agreement produced by the Applicant in evidence, it is clear that his late father purchased the parcel on 22nd June, 1980 for a consideration of Kshs 3,500/= and immediately took occupation. The Respondent in his replying affidavit contends that the suit property came into existence in 1995 when parcel No Elgon/Kapkateny/409 was subdivided and thus the Applicants' claim was terminated in 1995. As mentioned earlier, the burden is on the Applicant to prove that he was in possession of the said portion of the whole parcel.
16. The Applicant in support of his claim produced an agreement of sale that identified the actual area occupied and which he claims as 3.04 Acres out of parcel No Elgon/Kapkateny/409 which now lies in resultant parcel No Elgon/Kapkateny/647 after the sub-division. This evidence has not been controverted by the Respondent in his replying affidavit. I therefore agree with the Applicant's evidence which corresponds with the extend of the portion he claims and occupies.
17. In response to the Applicant's claim, the Respondent deposed that the property which the Applicant alleged to have bought was sub-divided in the year 1995 and therefore his claim has been extinguished. In my view, this argument is untenable since change of ownership as a result of sub-division or even sale does not affect a claim for Adverse possession which is based on the owner having lost his right 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. Simply put, adverse possession is a fact to be observed upon the land and not to be seen in a title.
18. Gitumbi J in the case of *Mary Wanjiku Njuguna v Beatrice Wanjiku Ngugi* [2015] eKLR held that where a person buys land without establishing who is in possession of that land risks his/her investment the same way he would lose it if he fails to inspect it for 12 years after acquiring it. Section 28 (h) of the [Land Registration Act](#) provides for the rights of the adverse possessor when a party is acquiring title to land by way of adverse possession. This section states thus;
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”
19. In the Court of Appeal case of [Kairu-v-Gacheru](#) 91986-1989)EA 215, Nyarangi J (as he then was) held;
- “.....On the evidence, the respondent continued to be in adverse possession until 12 years were over. The appellant did not dispossess the respondent and so as purchaser he took subject to overriding interests then subsisting”



20. From the foregoing principles and on the question of how long possession has continued, it is my observation that by the time the Respondent acquired title over the suit property, the Applicant had already been in occupation of the suit property for over 12 years. It is therefore my considered view that time started running in 1980 until 1998 when the deceased died as shown in his certificate of death which means that the Applicant had been in possession for 18 years and his beneficiaries continue to be in possession. From the material before this court, it is clear beyond peradventure that the Applicant had been in possession and occupation of the suit property firstly through purchase and later without permission after the sale agreement fell through. It is therefore safe to state that the Applicant's occupation to the suit property was without force, without secrecy and without permission (*nec vi nec clam nec precario*)
21. In view of the foregoing, I am persuaded that the Applicant's occupation of the said portion of the whole parcel measuring 3.4 acres was peaceful, continuous, and uninterrupted for over 12 years. It is therefore my finding that the Applicant has proved that he has acquired a portion of the whole parcel measuring 3.4 acres by adverse possession.

Conclusion

22. From the foregoing reasons, I hereby enter judgment for the plaintiff/Applicant in the following terms;
- a. A declaration that the Applicant has acquired a portion measuring 3.4 acres forming part of parcel No Elgon/Kapkateny/647 by adverse possession.
 - b. A declaration that all that area measuring 3.4 Acres forming part of parcel No Elgon/Kapkateny/647 has been extinguished by the Applicant's adverse possession and occupancy thereof for a period of more than 12 years pursuant to the provisions of Section 17 and 38 of the *Limitation of Actions act cap 22*.
 - c. An order that the Applicant be registered as the proprietor of all that area measuring 3.4 Acres forming part of parcel No Elgon/Kapkateny/647 in place of the Defendants/Respondents
 - d. Costs of this Originating Summons are awarded to the applicant.
23. Orders accordingly.

DATED AND SIGNED AT BUNGOMA THIS 6TH NOVEMBER, 2023.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Juma Waswa for Plaintiff/Applicant
2. Defendant/Advocate-absent
3. Okwaro C/A present.

