



REPUBLIC OF KENYA



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**Rotich v Letting & another (Environment & Land Case E001 of 2021)
[2023] KEELC 21290 (KLR) (1 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21290 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E001 OF 2021
MN MWANYALE, J
NOVEMBER 1, 2023**

BETWEEN

MATHEW KIPRONO ROTICH PLAINTIFF

AND

ABIGAELE LETTING 1ST DEFENDANT

APPY J. METTO 2ND DEFENDANT

JUDGMENT

1. Mathew Kiprono Rotich took out an Originating Summons dated 3rd January 2023 against Abigael Letting and Appy J. Metto seeking prayers that; -
 - i) A declaration that the Defendant's right to recover the whole of land parcel number Nandi/Legemet/323 is barred under the Limitations of Actions Cap 22 of Laws of Kenya, and title over a portion in occupation on the grounds the Plaintiff herein has openly, peacefully and continuously been in occupation/use and possession of the aforesaid land parcel for a period exceeding 12 years.
 - ii) That there be an order that the Plaintiff be registered as the proprietors of land parcel number Nandi/Legemet/323 in place of the Defendant and/or the register thereof be rectified to reflect the Plaintiff is ownership of the aforesaid land parcel Nandi/Legemet/323.
 - iii) That the Defendants herein be ordered to execute all the requisite papers necessary to have the Plaintiff be registered as owner of the whole of Land Registration Nandi/Legemet/323 decreed by the Court in default, the Deputy Registrar and/or Court Administrative Officer be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of the Court.
 - iv) Costs of this originating summons to be borne by the Defendant.



- v) such further and/or other orders be made as the Court may deem fit and expedient in the circumstances of this case.
2. Pursuant to a case conference held on 4/7/2023, directions were issued for the conversion of the Originating Summons dated 03/01/2023 to a plaint and the Applicant is now the Plaintiff and the Replying Affidavit dated 28/02/2023 was converted to a defence and the Respondent is now the Defendant. The matter thus proceeded by way of viva voce evidence.

Plaintiff's Case And Evidence: -

3. In support of the prayers set out in paragraph 1 of this judgment, the Plaintiff averred that he had enjoyed peacefully and open occupation as well as cultivated the whole of Land Registration No. Nandi/Legement/323 for a period of duration exceeding 12 years w.e.f. 1978 and thus acquired ownership by way of prescription and/or adverse possession.
4. The Defendant is currently the registered proprietor of a parcel of land title number Nandi/Legement/323 wherein the Plaintiff have freely and continuously occupied and cultivated for over 44 years.
5. The Defendant holds the title in trust in favour of the Plaintiff by operation of the law; and her title had been extinguished by operation of law.
6. That the Plaintiff's late father had resided on the suit parcel since 1978 when the Plaintiff later joined him and resided on the same for over 12 years, planting trees thereon, tilled the land openly and adversely and without interruption to date.
7. The Plaintiff Mathew Rotich testified as PW1 and called 3 more witnesses.
8. It was his evidence while adopting his witness statement as part of his evidence in chief, and producing the documents listed in his list of documents dated 30/10/2023 as P - Exhibit 1 to 4, that; the suit property was registered in the name of Abigael Letting, yet he had been living thereon since 1998. He had planted coffee, maize, bananas and blue gum, cypress and had bee hives on the suit property. He had also constructed on the suit property. He discovered that the property had been registered to the Defendant when he went to collect titles belonging to his late father.
9. On cross – examination by Mr. Choge Learned Counsel for the Defendant, the witness stated that he worked as the CEC Nandi County in charge of Health, and his late father was an elected Councilor for Chemase. He stated that he had a house on the property and was a Co- Administrator of his father's estate. He had built in Nandi/Chemase/ 323 and in Nandi/Chemase/325. The suit property measured 8 acres.
10. He was aware that the Legemet area had been given to squatters and had been adjudicated sometimes 2011 and titles were issued in 2015. His father had been on the property but the witness built in 2017. His father had been sued in the lower Court case No. 95/2019 as a Defendant but his father had passed on in 2021 and he obtained letters of administration. The people living on the properties were the ones who were given the properties.
11. On re-examination, PW1 stated that the properties Nandi/Chemase/ 323 and Nandi/Chemase/325 were on the block but had different titles. He had not been served with the pleadings on the lower Court case No. 95/2019. In 2015, he was using portion of the property.
12. PW2, Mr. Alexander Kiplagat Sang, testified, and adopted his witness statement dated 3/01/2023 as part of his evidence in chief. It was his further testimony that the Plaintiff is his neighbor as he used



- to work for the Plaintiff's late father. That the Plaintiff Mathew Kiprono was utilizing the property herein having planted maize. He stated that no one had claimed the property until recently.
13. On cross – examination, the witness stated that his property is Nandi/Chemase/859, measuring 5 acres. He confirmed that the Plaintiff was his neighbor and that he had been previously employed by the Plaintiff's father who is now deceased.
 14. He stated that Chemase is a flat area while Legemet was hilly, and that a person was allocated downhill would also be allocated the adjoining steep. Legemet people were issued with titles in 2015 by the Late President Kibaki. It was his testimony that the Plaintiff's father did not live in Legemet.
 15. The witness did not have a portion uphill since he did not have a steep area bordering his property. It was his further answer that the Plaintiff's father had 32 acres in Nandi/Chemase, and that the Plaintiff's sibling had all built in Chemase.
 16. The Plaintiff lived in Legemet since 1999 and had been utilizing the same. The witness did not know how old the Plaintiff was in 1999 but he knew that the Plaintiff was well educated. The witness did not know the Defendant as she was not a resident of Chemase nor Koyo registration area.
 17. In re-examination, the witness stated that his property has no dispute and he had no property in Legemet. The Plaintiff's father had property in Chemase which was downhill. The Plaintiff lives in Legemet and he did not know everyone who lived in Legemet.
 18. PW3, Abraham Kiplimo Rotich also testified and adopted his witness statement; as part of his evidence in chief. It was his testimony that he was part of the late Charles Tanui's family.
 19. On cross – examination, he stated that the Plaintiff was his brother and they were both born in Chemase. He was aware that Legemet titles were issued in 2012. His late father had multiple properties, and the Nandi/Legemet/323 was the property in dispute. When shown the adjudication register, he confirmed that the Nandi/Legemet had been registered in the name of the Defendant on map sheet No. 9 and its acreage was 5.5 acres, the adjudication register had not been deleted. It was his testimony that Nandi/Legemet/322 and 325 belonged to his late father. On the register of Nandi/Legemet/322 the same initially had the name of John Kiptanui Tanui which was cancelled and replaced with Charles Tanui.
 20. On Nandi/Legemet/325, the same was registered in his father's name while Nandi/Legemet/324 had the name of John Kipkembok Songok as land owner and the name of Jackson Tum had been deleted. The witness stated that there was no objection in respect of parcel Nandi/Chemase/323 but they were objections in respect of Nandi/Chemase/322 and 324.
 21. The witness further confirmed that the title deed had been issued on 18/3/2015 to the Defendant. He stated that he was one of the administrators of his late father's Estate and had filed adverse possession on the property. He confirmed that the registration of the title entry number 1 on the search was entered on 19/01/2015 so 12 years had not reached.
 22. The witness did not know whether the surveyors had been on the property, he stated that the Plaintiff had 2 farm hands, and had planted coffee planted cypress and Eucalyptus trees and that a Mr. Philip Kiprotich was the father of the Plaintiff's farm hand. He stated that titles in Nandi/Legemet area had been issued in 2012.
 23. In re-examination the witness stated that the property was government land before it was registered. He indicated that he had been born on the suit land, but had not seen the adjudication register hitherto. He indicated that titles had been issued from 2012 onwards and that Abigael came to the property in 2019. He had been on the property in 1990's and his father had been on the property before the



- Plaintiff. He stated that every one living on parcel was allocated from the lower side upwards to the hill. So, 323, 322 and 325 are adjacent to properties that belonged to their late father. He only realized that Abigael had a title in Court during the testimony though he knew about her in 2020. He stated that people were in possession before issuance of titles.
24. PW4, William Kiprono Rengwees testified and adopted his witness statement as part of his evidence in chief.
 25. On cross – examination, the witness stated that they are farm workers within the property and houses belonging to the farm workers. He stated that his home was about 1 kilometer from the late Charles Tanui's home and 2 kilometers from the suit property. That the late Charles Tanui's children all have different homes. The witness stated that he did not have property in Legemet.
 26. The witness confirmed that Nandi/Legemet 322 belonged to Charles Tanui, Nandi/Legemet 323 belonged to Abigael Letting Nandi/Legemet/324 belonged to Jonah Songok Nandi/Legemet/325 belonged to Charles Tanui. He stated that on the search the property belonged to Abigael Letting, who was registered on 18/01/2015 and title issued on 18/03/2015. That there was a structure a house on the property, the other children of Charles Tanui had houses on the other property.
 27. On re- examination, the witness stated that he had to pass through the late Charles Tanui property before going to the suit property, and that the Plaintiff had planted trees thereon, and that the Plaintiff had stayed for more 30 years and allocation was premised on the lower side going uphill.
 28. After the testimony of the 4 Plaintiff's witness, the Plaintiff case closed.

Defence Case And Evidence: -

29. Abigael Letting and Appy J. Metto sued as first and second Defendant filed a replying affidavit deponed by Abigael Letting aka Appy J. Metto stating that she was one and the same person.
30. In her Replying Affidavit converted defence it was her case that she is the registered owner of Nandi/Legemet/323 having been registered and issued a title on 18th March 2015.
That the title has not been issued to her more than 12 years and that there was no objection during the adjudication and registration exercise by the Plaintiff/Applicant.
31. During the adjudication and registration process there was a committee to ascertain each and every person's claim over their occupied portion. The titles were transferred by the Government based on claims of occupation and possession by the squatters.
32. The Respondent does not merit the orders sought as it is less than the statutory period of 12. The entry by the Plaintiff from 1978, was when the property was government land.
That there is a pending case before the Chief's Magistrate's Court, to wit, Kapsabet CMLC No. 95/2019 which she as the Plaintiff had sought boundaries to be fixed and the case was as a result of forceful invasion by the Plaintiff in this case who demolished her house, uprooted her crops and put up structures and hence the entry was through forceful occupation possession and the user has been with force, threats of physical harm and damage.
33. The Defendant testified as DW1 and called 1 more witness, Kipruto Kibet, who is a Court Staff at Kapsabet Law Courts in charge of Civil Registry at the Chief Magistrate's Court.
34. It was her testimony as DW1, while adopting her witness statement as part of her evidence in chief, she owned Nandi/Legemet/323 measuring 2.25 hectares and she had been issued with tittle deed on 18/3/2015 and the green card has been opened on 19/01/2015. She produced the copy of green card as



- D Exhibit 1 and copy of her title deed as D Exhibit 2, she produced a certified copy at the adjudication register as D exhibit 3a and a sketch map for Nandi/Legemet/323 as D exhibit 3 (b).
35. She stated that the photograph of a house that appeared as P Exhibit 3 was built by her workers and it was her house. She had planted coffee on the property. She had planted coffee on the suit property. She had a boundary dispute with her neighbor the late Charles Kiprotich Tanui, but nothing was done by the Registrar. She stated that the Plaintiff herein took possession in 2019 and demolished her house in 2021 and that he Plaintiff was in her property.
 36. On cross – examination by the Plaintiff’s Counsel the Defendant stated that her name was Abby Jeruto Metto but her title deed had been issued in the name of Abigael Letting, Letting being her husbands name. she had bought the property from a Mr. John Tanui who used to live there before she was registered as owner. She stated that she had sued Philip Rotich and Aaron Chumba and the Plaintiffs was not a party in the Chief Magistrate’s case. She had sued since the Defendants had encroached her property. He caretaker had been living on the property, the Land Registrar had visited the property once but was stopped by a Court order on the second visit. She did not know how the plaintiff’s father had bought the property. The plaintiff had evicted her in 2019 while the Plaintiffs property was neighboring hers.
 37. In re- examination, the Defendant stated that her name was Abigael Jerutto Metto also known as Abigael Letting. Jeruto Metto was her maiden name while letting was her husband’s name. she took possession of the property that she had bought. She had sued Rotich and Aaron since they had invaded her property in the HIEF Magistrates Court.

When she bought the property, there was no title deed as the property belonged to the Government. Philip Rotich had no property nearby. Her house had been demolished in January 2021.
 38. DW2, Mr. Kipruto Kibet testified. He stated that he was in charge of the Civil Registry at the Chief Magistrate’s Court Kapsabet. He produced Kapsabet CM E&L No. 95/2019, where the Plaintiff was Abigael Metto aka Abigael Letting vs Philip Rotich and Aaron Chumba.
 39. The claim before the Chief Magistrates Court related to ownership of Nandi/Legemet 323, allegations of encroachment by the Defendants.
 40. He stated that there was an Amended Plaint dated 9/9/2022 which joined Martin Kiprono Rotich the Plaintiff herein as a third Defendant in place of the late Charles Tanui. The Court had ordered a site visited on 24/10/2022 and another order dated 30/9/2022 for Registrar Nandi to determine positions of Nandi/Legemet/322/323 and 325; and a report filed on 26/01/2023. This matter was active hence certified copies of pleadings were produced in a bundle as D Exhibit 4.
 41. in cross – examination, the witness stated that initially Mathew K. Rotich the Plaintiff was not a party to the suit. The order dated 30/9/2022 was to determine the position of Nandi/Legemet/323. The report was filed by the Land Registrar was dated 26/01/2023.
 42. in re- examination, the witness stated that Mathew Rotich was brought into the suit through an amendment as an Administrator of Estate of the Late Charles Tanui.
 43. After the testimony of the two defence witnesses, the defence case closed and matter was slated for oral submissions.

Plaintiff’s Submission: -

44. It was the Plaintiff’s submission through, Mr. Korir, Learned Counsel that he was in occupation of Nandi/Legemet/323 and before that his late father Charles Tanui had been in occupation. The



Plaintiff's late father having been in occupation since 1978 and the Plaintiff later joined him in 1990 and had extensively developed by farming coffee and planting crops including bananas.

45. The Plaintiff had taken possession and continued to live thereon for more than 12 years so about 44 years.
46. It was the Plaintiff's further submissions that Alexander Sang PW2 was his father's manager and managed this particular farm. That the parcel belonged to the Government and it was adjudicated in the late 2000's; that for one to have been allocated in the Legemet area, which is hilly, one had to have an adjacent; land to the hill and his father had the same.

It was the Plaintiff's Advocate further submission that PW3 had echoed the testimony of PW2 with regard to occupation.

47. The Plaintiffs' Advocate submitted that the Defendant did not know the boundaries of the suit property yet she had claimed to be in possession of the same.
48. With regard to ELC No. 95/2019 pending before the Chief Magistrate's Court Kapsabet, the Plaintiffs Advocate submitted that the Plaintiff was introduced in the suit through an Amendment in 2022.
49. The Plaintiff's Advocate submitted that the law on adverse possession is provided under Section 7, 13, and 38 of the Limitations of Action Act.

Plaintiff relied on the decision in the case of *Kasure vs Mwhami Investment Limited and 4 others*. Where the Court stated that

“ a claimant must prove possession for a continuous period of 12 years.”

50. The Plaintiff Further submitted that the Defendant has never lived in Nandi Hills and certainly not on the suit property, the Plaintiff did not avail the Agreement for sale, and did not call John Tanui as a witness.
51. The Plaintiff additional placed reliance on the decision in ELC No. 259/2017 Muranga, *Wilson Njoroge Kamau vs Nganga Mucheru Kamau* as well as *Mbuthia Macharia vs Anna Mutua* placing reliance on Section 112 of the *Evidence Act*, the Plaintiff submitted wondering the identity of the Defendant who was called Abigael Jeruto Metto yet to title was in in the name of Abigail Letting while at the issuance of title, she was called Abigael Jeruto Metto.
52. On the strength of the above the Plaintiff urged the Court to allow his case.

Defendants Submission: -

53. The Defendant Advocate submitted on the principles of *nec vi necclaim nec precario* and added that the knowledge of occupation by the registered owner must be proven.
54. It was the Defendants Advocate that registration was done in 2015 and title issued in 2018; hence the duration of 12 years had not crystallized.
55. Before registration the property was Government land and could not be acquired by way of adverse possession.

The Plaintiffs late father did not claim the property. At time the register was opened, the Plaintiff was a minor and there was no evidence that the Plaintiff was on the suit property. No parcel number in Chemase was shown to show that the property was adjacent to the Chemase area.



No map was availed either to show that the same shared survey map in 622 and 625, there was no encroachment by other property.

56. The Defendant's Advocate placed reliance on the decision in the case of Waitherero Kimani vs Joshua Nganga 2017 eKLR on the issue of continuous use of property and actual possession open and notorious use of the land. Physical use of land in accordance with type of property must be proved.

No delivery book of coffee was adduced, no employment record and that there was no continuous occupation.

57. The Plaintiff submitted that the limitation was 12 years, while the land had been registered 8 years ago and he urged Court to dismiss the suit.
58. in a brief rejoinder, the Plaintiff's Advocate submitted that adverse possession is about occupation and not registration and cited the decision in the Muranga ELC (supra).
59. After hearing the respective submissions, the Court has now analyzed the pleadings and evidence on record and shall frame the issues for determination.

Issues For Determination: -

60. Before framing into the issues for determination, the Court notes a few facts that have been settled in the hearing.
61. It is common ground between the Plaintiff and the Defendant that the Defendant is the registered owner of Nandi/Legemet/323 having been registered on 19/01/2015 and title issued on 18/3/2015.
62. It is also not contested that the Plaintiff was born on 27/7/1979 and can only claim adverse possession from the time he attained the age of majority, that would be in 1997.
63. The Plaintiff's occupation must thus be viewed from 1997, since he did not file the suit on behalf of his father's estate the estate of late Charles Tanui but the suit was brought in the Plaintiff's personal capacity.
64. It is also common ground that the property was registered on 19/01/2015.
65. The first issue for determination shall be treated as a preliminary issue since it has potential of determining the suit. The Court now frames the issues for determination as follows;
- i) whether or not in light of registration of the suit property on 19/01/2015, the Plaintiffs cause of action has crystallized.
 - ii) whether the Plaintiff has proven adverse possession
 - iii) whether the Plaintiff has proven his case, or whether the Defence should be upheld
 - iv) What reliefs ought to issue?
 - v) who bears the costs of the cause?

Analysis And Determination: -

66. It must be noted, that neither the Plaintiff's Advocates nor Defendants Advocate has supplied to the Court the authorities they relied on in their oral submissions despite expressly been directed to do so.



67. On issue number (i), the Plaintiffs occupation of the suit property must be deemed to have started when he attained the age of majority, hence from 1997, as he was otherwise a minor and under a disability, the suit property was hitherto unregistered and registration was done on 19/01/2015.
68. The occupation of the Plaintiff on the suit property from 1997 to 19/01/2015 was thus occupation of public land as the suit land had not been registered. In terms of Article 62 (i) (d), of the Kenya Constitution the property was land in respect of which no individual or community ownership could be established by any legal process before the registration and hence fell under the category of public land. Could this period from 1997 to 19/01/2015 when the suit land was still public land be taken into consideration for purposes of computing adverse possession?
69. The suit property for period occupied by the Plaintiff from 1997 to 19/01/2015 was excluded from the provisions of Limitation of Action Act by Section 41 (i) (a) of the said Act, since the same was public land, as government land.
70. It was only after the same ceased to be public land after adjudication and registration of the Defendant did time, start to run for purposes of adverse possession hence from 19/01/2015. Since the suit was filed in January 2003. The 12 years period for purposes of Section 7 and 13 of the Limitation of Actions Act had not reached.
71. At time of filing suit only 8 years had lapsed and accordingly, the 12 years period for purposes of adverse possession have not crystallized.
72. In answer to issue number 1, the Plaintiff's right to a claim of adverse possession in respect of Nandi/ Legemet/ 323 has not crystallized.
73. Having answered the first issue in the negative, the Court shall not consider the other issues for determination, as the Plaintiff has failed to prove entitlement to adverse possession, suit having been filed before 12 years period and the Plaintiffs suit is hereby dismissed with costs.

JUDGMENT, DELIVERED AND DATED AT KAPSABET THIS 1ST DAY OF NOVEMBER, 2023.

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

Mr. Korir for the Plaintiff

Mr. Choge for the Defendant

