



**Keino v Kiprotich & another (Environment & Land Case
735 of 2012) [2022] KEELC 5 (KLR) (4 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 5 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 735 OF 2012
SM KIBUNJA, J
MAY 4, 2022
FORMERLY ELDORET HCCC NO. 120 OF 2011**

BETWEEN

EZEKIEL MUSA KEINO PLAINTIFF

AND

SAMWEL KIPTOLO KIPROTICH & ANOTHER DEFENDANT

JUDGMENT

1. The Plaintiff commenced this claim through the originating summons dated the 18th July, 2011, seeking for the following orders:
 - a. “Ezekiel Musa Keino be registered as the proprietor of land parcel Nandi/Chepkongony/405 having acquired ownership and or title through adverse possession and the titles of the registered owner be declared as having been extinguished.
 - b. That the summons herein be served upon Samuel Kiptolo Kiprotich as the Administrator of the Estate of Tabarimei Chepkwony.
 - c. Costs of this Originating Summons be provided for.”

The originating summons is based on the two grounds on its face that the plaintiff has been in uninterrupted possession of the said land since 1972, and has therefore acquired title thereof and the registered proprietor’s title has been extinguished by operation of the Limitation of Action Act; and that there is no other suit pending between the parties herein except Kapsabet PMCC No. 60 of 2011. The summons is supported by the affidavit of Ezekiel Musa Keino, the plaintiff, sworn on the July 18, 2011 in which he inter alia deposed that in the year 1972, he bought land parcel Nandi/Chepkongony/405, from the late Tabarimei Chepkwony for KShs. 500; that he took possession of the said parcel and fenced together with another parcel he had bought earlier in 1971 from the late Kimitei Borgok; that he has been in uninterrupted possession of the said land from 1972, but in 2000 the



defendant started claiming the said land, claiming he was the son of the late Tabarimei Chepkwony who had passed on in 1988; that the defendant's claim prompted him to file a caution against the title to protect his interests; that the defendant has obtained a grant in the estate of the late Tabarimei Chepkwony, and want to evict him from the land; that as he has been in exclusive possession of the suit land from 1972, it should be registered in his name.

2. The Defendant opposed the aforementioned plaintiff's originating summons through his replying affidavit sworn by Samwel Kiptolo Kiprotich on the October 17, 2011. It is his case that he is a son of Tabarimei Chepkwony who passed on the 1988; that the said deceased was the sole registered proprietor of Nandi/Chepkongony/405, measuring 0.8 hectares; that the defendant has been residing on the said land since 1969, and ploughed on it since 1988; that the Plaintiff has never been in occupation of the suit land as alleged, but resides on Samo Farm, Baraton for the last 20 years; that if the plaintiff had bought the land as alleged, he should have obtained the consent to transfer but did not; that the plaintiff has not lodged any objection in Kapsabet PMCC Succession Cause No. 20 of 2010, through which he obtained the grant to the estate of the deceased.
3. During the hearing Ezekiel Musa Keino, the plaintiff, testified on the November 16, 2017 as PW1. He testified that he had purchased the suit land from Kimitei Arap Songok while working as a police officer at Mandera. That he has been grazing cows on the land from 1972 but was not informed when the succession cause in respect of the lady who sold him the land was filed. During cross-examination, PW1 testified that he does not live on the suit land but at Baraton, since 2003. That he did not deal directly with the late Tabarimei Chepkwony during the land transaction, as it was his brother in law, the late Dr. Bett, who died in 2008, who did so on his behalf. That there was no written sale agreement over the land transaction. That he used to send the purchase price through the postal services. That he learnt in the year 1999, that the suit land herein had not been transferred to him after the purchase. That though he had lodged a caution over the title, the defendant was registered as proprietor through the succession cause that he did not know about. PW1 referred to a letter (Minutes of a Meeting) dated July 2, 2005 marked as PMFI 2, and a caution as PMFI. He produced a certified copy of an excerpt of the title of the suit land as P.exh 3(a) together with a copy of the official receipt as P.exh 3(b). He then testified that Tabarimei Chepkwony was registered the proprietor of the suit land on October 8, 1969. The record shows that the plaintiff was recalled to the witness box on the January 10, 2019, and testified that the Court issued an inhibition in ELC No. 738 of 2012 on the August 4, 2014. That the caution he had filed was withdrawn without his involvement or court order before the defendant got registered as proprietor in 2010. The plaintiff called John Kipleting Mitei as a witness and he testified as PW2. He testified that he was 80 years old having been born in 1939. That his father, Kimitei Borgok, had given land to the plaintiff, and another two-acre land to his sister, Tabarimei Chepkwony. That during his family's meeting of July 27, 2005, it was resolved that the suit land belongs to the plaintiff, who has used it since 1972. That the defendant has never used the suit land. During cross-examination, PW2 testified that neither the plaintiff nor the defendant have been using the suit land.
4. In his defence, Samuel Kiptolo Kiprotich, the defendant, testified as DW1, adopting the contents of his witness statement dated 11th February, 2013 as his evidence in chief. He testified that the suit land belonged to his mother who passed on in 1988. That he filed Kapsabet Succession Cause No. 20 of 2010 and got a grant without any objection being filed. He produced a copy of the certificate of official search as D.exh 1, copy of his mother's death certificate as D.exh 2 and copy of the grant issued in Kapsabet Succession Cause No. 20 of 2010 as D.exh 3. DW 1 further testified that his mother used to reside on the suit land measuring 2.2 acres until 1988, when she passed away. That PW1 owned a neighbouring parcel that was 8 acres, and used to graze his cattle on the suit land, until the time when he moved to Samo area, Baraton in 2003, after he sold his 8 acres of land to the factory. That he had filed Kapsabet Case No. 60 of 2011 to have the caution the plaintiff had lodged against the title of



the suit land removed. DW 1 produced a copy of the transfer forms in his favour as D.exh 5 and a copy of the title deed issued to him as D.exh 6. During cross examination, DW1 testified that his late mother, Tabarimei, was buried on his uncle's, Kimitei's land. That Kimitei had accommodated the late Tabarimei on his land after the collapse of the house she used to live in on the suit land. That the land belonged to him but was registered in his mother's name in 1969, as he had been jailed in 1964. After DW 1 was released from jail in 1973, he started cultivating crops on the suit land, and has been using it since then. The defendant called Ernest Choge as a witness who testified as DW2. He adopted the contents of his witness statement dated 22nd January, 2019 as his evidence in chief. He testified that he was the village elder at Mobon, and that the suit land belonged to Kimitei Arap Borgok, a brother to the mother of the defendant. That the defendant's mother resided in a house on the suit land until when it collapsed, and she went to stay with her brother, Kimitei, as the defendant was then in jail. That the plaintiff had bought a separate 8 acres parcel of land from Kimitei that he later sold to the factory about 12 years ago. That PW1 has never resided on the suit land and that it belongs to DW1, who had at one time leased it to the factory, but when the lease term ended, the suit land reverted back to him. During cross-examination DW2 testified that both PW1 and DW1 used to farm on the suit land but the other would uproot the crops planted by the other person. That the defendant resided at Kapsabet and would visit the suit land over the weekend. That the plaintiff never used the suit land during the lifetimes of Kimitei and his sister. That the plaintiff had fenced only his eight (8) acres land, and not the suit land. That the problems over the suit land, between the plaintiff and the defendant started in 2010/2011. That the land was being used by the defendant. The defendant also called Elizabeth Mitei, who testified as DW3. She adopted her witness statement dated the 22nd January, 2019 as her evidence in chief. DW 3 stated that she is the wife to the late Arap Mitei, the first born of Kimitei Arap Borgok, DW1's uncle. DW3 testified that PW1 used to own an 8 acres parcel of land next to the suit land. The late Tabarimei planted maize on the suit land until her demise. During cross-examination, DW3 stated that the suit land has no fence since the fence that used to exist had been damaged by people over the years. She also testified that DW1 lives on another land, but he cultivates the suit land. The house that was on the suit land collapsed about 30 years ago and the other house that was erected was destroyed.

5. That upon closing the parties' oral testimonies, the learned counsel for the plaintiff and defendant filed their written submissions dated the January 19, 2022 and February 7, 2022 respectively.
6. The Plaintiff submitted that he has acquired adverse possession rights over Nandi/Chepkongony/405, and relied on the Court of Appeal decision in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR where it was stated as follows:

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the Applicant, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess in twelve years having dispossessed the owner or there having discontinuance of possession by the owner.”

The Plaintiff submitted that he has had exclusive possession of the suit land to the exclusion of the true owner for a period of 12 years. The plaintiff also referred to the Court of Appeal case of *Wambugu v Njuguna* [1983] KLR 172 which held that:

“Adverse possession contemplates two concepts possession and discontinuance of possession. The proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has continued his possession for the statutory



period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

The Plaintiff submitted that the filing of a suit does not amount to an interruption in the possession of the suit land, as it does not cause the time for adverse possession to stop running. In *Kipketer Togom v Isaac Cipriano Shigore* [2012] eKLR the Court held thus:

“The Respondent must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property. Then only is there interruption to occupation and possession and only does the time stop running the proceedings initiated or instituted by the Defendant do not amount to interruption.”

The Plaintiff further submitted that a claim in adverse possession survives the death of the registered proprietor, as was observed in the Court of Appeal case of *Karuntimi Raiji M' Makinya M'Itunga* [2013] eKLR that:

“Another issue raised by the Appellant is that a claim for adverse possession does not survive a deceased person. Section 30(f) of the *Registered Lands Act* and Section 2 of the *Law Reform Act* provide an answer to the issue. Section 30 provides;

“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 them being noted on the registers;

- a.
- b.
- c.
- d.
- e.
- f. Rights acquired or in process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription;

Under the doctrine of adverse possession, a Claimant's claim to the land runs against the title and not necessarily the current holder of the title in that period of limitation begins to run from the date of granting of the Certificate of title for that is when the title holder is prima facie entitled to possession and therefore, entitled to take action against any intruder to the land.”

The learned counsel also referred to the Court of Appeal case in *Peter Thuo Kairu v Kuria Gacheru* [1988] KAR 111 where the court held as follows:

“A claim of adverse possession subsists not only against the present holders but also their predecessors in title.”

And submitted that the Plaintiff has had uninterrupted occupation of the suit land for a period of 49 years, since time began to run when the Plaintiff paid the purchase price for the suit land in the year 1972.



7. The Defendant submitted that the principles for the establishment of adverse possession have been settled by courts. That the Court of Appeal in *Wambugu v Njuguna* [1983] eKLR held as follows:

“Where the Claimant is in exclusive possession of the land with leave and license of the Appellant in pursuance to a valid agreement, the possession becomes adverse and the time begins to run at the time the license is determined... Adverse possession contemplates two concepts: possession and discontinuance of possession...the proper way of assessing proof of adverse possession would 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 or she has been in possession for the requisite number of years.”

That in the case of *Maweu v Liu Ranching and Farming Cooperative Society* [1985] KLR 430 the court determined:

“...thus to prove title by adverse possession, it was not sufficient to show that some acts of possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances.”

And in *Mbira v Gachubi* [2002] I EALR 137, the court held:

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

The Defendant submitted that the Plaintiff sold the parcel of his land measuring 8 acres to Kaptumo Tea Factory and moved to Samo Village in Baraton. The aforementioned portion was adjacent to the suit land. The Plaintiff has never resided on or been in possession of the suit land. That had the Plaintiff been in possession of the suit land, he would have sold 10 acres of land to Kaptumo Tea Factory. The Defendant further submitted that he has been in continuous occupation of the suit land since 1954, and that the Plaintiff has failed to prove that he has been in peaceful, open, continuous and uninterrupted possession of the suit land. That the Plaintiff's claim must fail because he has not proved that he purchased or conveyed the purchase price for the suit land to Tabarwei. That the plaintiff has also not proved that he has been living on the suit land from 1972 to date, and he also failed to give a justifiable reason for only selling 8 acres of land, if he owned 10 acres, before he moved to Samo Village in Baraton. The Defendant submitted that the Plaintiff's claim for adverse possession must fail since he has been residing on the suit land since 1954 and the aforesaid land belongs to his late mother. The Defendant urged the Court to dismiss the Plaintiff's claim with costs and to make a declaration that he is the lawful proprietor of land parcel, Nandi/Chepkongany/405.

8. The following are the issues for the court's determinations;
- a. Whether the plaintiff has been exclusive possession of the suit land and if so, from when.
 - b. Whether the plaintiff has been in adverse possession of the suit land for more than twelve (12) years, and if so whether the registered proprietor's title has been extinguished.
 - c. Whether the plaintiff should be registered as proprietor of the suit land.



d. Who pays the costs of the suit.

9. I have considered the pleadings in the originating summons, both parties' evidence tendered, submissions filed, superior courts decisions thereon, and come to the following findings;

a. The law on adverse possession is now well settled in Kenya. The essential requirements to be met in order to succeed in a claim for adverse possession have been discussed at length by numerous superior courts. The doctrine of adverse possession is set out in section 7, 16, 17 and 38(1) and (2) of the Limitations of Actions Act, Chapter 22 of the Laws of Kenya, that provide as follows:

7. "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"

13. "(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession)..."

38. "(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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."

In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the Court enumerated the ingredients for a successful claim of adverse possession as follows:

- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression "colour of title" in law means, that which is title in appearance but not in reality.
- c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
- d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the dispossessed owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.
- e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land
- f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.



- g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
- b. The Plaintiff has claimed that he purchased the suit land from Tabarimei Chepkony, DW 1's late mother, in the year 1972, for a consideration of Kshs. 500/=. The Plaintiff has not adduced any proof to establish the existence of the aforementioned transaction. The Plaintiff has also not produced any evidence to show that he actually advanced the consideration amount of Kshs. 500/= to DW 1's late mother. The Plaintiff sought to rely on the minutes of a meeting that was held on July 2, 2005 produced as P.exh 2, to prove that he is the rightful owner of the suit land. I am not persuaded that a sale of land transaction entered into in 1972 can be ratified by the minutes of a meeting held in 2005. In any event, the Plaintiff stated during cross examination that he paid Kshs. 800/= as consideration for the purchase of the suit land. Noting that the Plaintiff has not brought any witnesses to testify to the existence of an agreement for the purchase of the suit land herein, I find that a discrepancy in the purchase price is a material contradiction that goes to the root of the matter. In *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR the court held as follows:

“This is a clear testimony of material contradiction on the evidence of the appellant as to the exact amount he paid to the respondent. If the appellant cannot remember the actual sale purchase and amount he paid for the property he is claiming, he cannot be trusted to be telling the truth.”

That further, the evidence that the Plaintiff's occupation and possession of the suit land from 1972 was as a purchaser negates his claim of adverse possession as it was with the vendor's permission or license until her death in 1988.

- c. For a party to successfully advance a claim for adverse possession, they must prove that they had continuous and uninterrupted possession of the suit land for a period of at least Twelve (12) years. It is trite that possession is a factual issue that can be ascertained by adducing evidence. It is not sufficient for the Plaintiff in this claim to state in his pleadings, and in his witness statement that he has been in possession of the suit land from the year 1972 to date. The Plaintiff has not adduced any evidence to prove that he took possession of the suit land herein in the year 1972 and that by so doing, he dispossessed the registered owner of the suit land. He could not have dispossessed the registered owner when his possession was as a purchaser.
- d. The Defendant, on the other hand, claims that his late mother has been in possession of the suit land from the year 1969 until her death in the year 1988. I note that DW 2 and DW 3 testified that the Defendant is currently in possession of the suit land. In the case of *Samwel Nyakenogo v Samwel Orucho Onyaru*, [2010] eKLR the Court made the following observation:

“The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will 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 for the requisite period. See *Wambugu v Njuguna*, CA No. 10 of 1982.”

- e. The Defendant has admitted that the Plaintiff used to graze his cattle on the suit land, while the Defendant's late mother was still alive and residing on the suit land. DW 2 testified that the Plaintiff has never resided on the suit land, and further that whenever the Plaintiff would plant



crops on the suit land, the Defendant would uproot them. It is unfortunate that the counsel on record for the parties in this matter, did not interrogate this statement further to establish the timelines when the aforementioned actions of planting and uprooting of crops took place. I also note that the Defendant did not also furnish the court with evidence to corroborate the veracity of the statement that his late mother had been in occupation of the suit land, or when exactly the planting and uprooting of crops on the suit land was taking place. Be that as it may, the Defendant was not required to bear the onus of any proof in this claim. In the case of *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR the Court made the following observation:

“This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.”

In the circumstances, I find that the Plaintiff has not met the threshold required to prove his claim as is set out in section 107 of the *Evidence Act*, chapter 80 of Laws of Kenya, which provides as follows:

Burden of proof

1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- f. Noting that continuous possession for a period of at least twelve (12) years constitutes the primary element that must be satisfied in proving adverse possession, the Plaintiff's claim herein must fail for failure to prove and or demonstrate that he has been in actual and or constructive possession of the suit land. The Court of Appeal in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR cited with approval the decision of the Supreme Court of India in *Karnataka Board of Wakf v Government of India & others* [2004] 10 SCC 779 wherein the essentials of adverse possession were discussed as follows:

“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 of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile 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 continuous. 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.”

In view of the foregoing, I am inclined to believe that the Defendant is indeed in possession of the suit land.

- g. That though the defendant sought through the written submissions to be declared the lawful proprietor of the suit land, I have noted there is no such prayer or averment or counterclaim in his replying affidavit sworn on the October 17, 2011. That as parties are bound by their



pleadings, the court is unable to grant a prayer that was not raised in the pleadings as the other party would be prejudiced for not being afforded an opportunity to respond.

- h. That as the plaintiff has failed to prove his claim to the standard required, and in view of the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, that costs follow the event, the defendant is granted the costs.
10. That flowing from the above findings, the court orders as follows:
- a. THAT the Plaintiff's claim for adverse possession over Nandi/ Chepkongony/ 405 is hereby dismissed with costs to the Defendant.
 - b. THAT the order of inhibition against Nandi/Chepkongony/405, of the July 25, 2014, is hereby lifted and or vacated upon a copy of this order being filed with the Land Registrar, Nandi County.
 - c. THAT for avoidance of doubt, the consent order of the October 7, 2014 is also hereby declared spent as the suit has been determined.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 4TH DAY OF MAY, 2022

S.M.KIBUNJA

JUDGE

ELC ELDORET.

In the virtual presence of;

Plaintiff ... Absent

Defendant: ... Absent

Counsel:Ms. Tum for Plaintiff

Mr. Yego for Defendant

Court Assistant: Oniala

S.M.KIBUNJA

JUDGE

ELC ELDORET

