



**Siomo Farmers Co-operative Society v Kilel & 2 others (sued as the chairman,
secretary and treasurer of Rerendet Self Help Group) (Environment &
Land Case 3 of 2004) [2022] KEELC 3312 (KLR) (2 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3312 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 3 OF 2004**

MC OUNDO, J

JUNE 2, 2022

BETWEEN

SIOMO FARMERS CO-OPERATIVE SOCIETY APPLICANT

AND

CHERUIYOT KILEL 1ST DEFENDANT

PAUL KOECH MARITIM TUIYA 2ND DEFENDANT

SIMON KIPRONO ROTICH 3RD DEFENDANT

**SUED AS THE CHAIRMAN, SECRETARY AND TREASURER OF RERENDET
SELF HELP GROUP**

JUDGMENT

1. Before me for determination is an Originating Summons dated the 26th January 2004 bought under the provisions of Section 38(1) of the [Limitation of Actions Act](#) Order XXXVI Rule 3D of the [Civil Procedure Rules](#) where the Plaintiff/Applicant seeks for the following orders;
 - i. That the Applicant herein be declared to have acquired 0.3 hectares comprised in LR No. Kericho/Cheptalal/1803 resulting from subdivision of LR No. Kericho/Cheptalal/434, by way of Adverse Possession.
 - ii. That the vesting order do issue for transfer of the said 0.3 hectares comprised in LR No. Kericho/Cheptalal/1803 to the Applicant herein.
 - iii. That a permanent injunction do issue against the Defendants, its servants and/or agents restraining them from entering, occupying and/or alienating and/or in any other way interfering with the Applicant's quiet possession of LR No. Kericho/Cheptalal/1803.



- iv. That the cost of this suit be borne by the Defendants.
2. The Originating Summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn on the 27th January 2004 by the Applicants' chairman one Daniel Maritim Koitim.
 3. The Defendants' Replying Affidavit sworn on the 29th January 2005 was to the effect that the Applicant was a stranger who had trespassed on land parcel LR No. Kericho/Cheptalal/1803 as the 1st Defendant had not sold the said parcel of land to the Applicant but to the 2nd Defendant. That the Applicant had not been in open quiet and peaceful possession of the said parcel of land since there has been a dispute since 1984.
 4. Directions as to the disposal of the Originating Summons were taken on 10th February 2005 wherein the matter took off for hearing on the 1st October 2007 and Johnstone Kipkiorir arap Langat testified as PW1. Unfortunately this witness passed away during the pendency of the suit wherein via an application by his Counsel on the 24th November 2016, his evidence was expunged from the record and it was ordered that the matter starts de novo.
 5. The matter did not take off immediately due to numerous applications for an adjournment to the effect that on the 26 February 2020 the court was informed of the demise of the representative of 1st Defendant (sic) wherein Counsel sought to substitute him. Unfortunately this was not done and the matter proceeded for hearing ex parte on the 3rd of February 2022 in the absence of the Defendants who had been served but who failed to turn up the either by themselves or through their Counsel.
 6. Joel Chepkwony testified as PW1 to the effect that he lived in Siomo village, Siomo sub-location Embomos location in Bomet County. That he was a farmer and had been called as a witness on behalf of Siomo Farmers Society having been member No. 87 to the same. That he was currently the Secretary of the Society, the same having been registered as No 2202. He produced the certificate of registration of Siomo Farmers Co-op Society which was previously known as Embomos Co-op Society Reg. No. 2202, and incorporated on 12th July 1974 as Pf exh 1 and the certificate of change of name issued on 28 April 1978 as Pf exh 2.
 7. He went on to testify that he understood the nature of the Plaintiff's claim to wit that the society was claiming a piece of land which was previously LR No. Kericho/Cheptalal/434 but currently registered as LR No. Kericho/Cheptalal/1803. That Parcel No. 434 had previously been registered to Cheruiyot Kilel, the 1st Defendant herein as per the copy of the certified Green Card to LR No. Kericho Cheptalal/434 herein produced as Pf exh.3. That the property had been sub-divided with resulting parcel No. 1803 measuring 0.3 hectares transferred on the 29th March 2000 and registered to Rerendet Self Help Group. He produced a certified copy of the register in respect of No. 1803 as Pf exh. 4 stating that this was the parcel of land that the Plaintiff was laying claim to.
 8. He proceeded to testify that the Plaintiff had bought one acre of land from the 1st Defendant in the year 1975 at Kshs. 1800/= That after the 1st Defendant had given them land, he later on had requested for a token, something like a blanket which was normal in Kipsigis culture to be given a blanket, as a gift after the sale of land. That they had given him a token of 300/=.
 9. During that period in 1975, there had been no advocate and therefore parties had agreed mutually to pay for the land and the purchase price and terms thereto had been indicated on receipts. The payment had been made in three (3) instalments. He produced the copies of receipts in support of his evidence as 1st bundle not dated, 2nd bundle dated 12th April 1975, and the 3rd bundle dated 10th May 1975 as Pf exh 5 (a-c)



10. He confirmed that the land they had bought had been excised from LR No. Kericho/Cheptalel/434 wherein they had taken possession immediately after the purchasing it in 1975 wherein they had used the field/ground as a paying point to their farmers for their produce of milk which was subsequently sold to Kenya Creameries Corporation (KCC)
11. He testified that they had also undertaken some developments on the suit land in that in 1976 they had fenced the land wherein in 1978 they had built semi-permanent structures made of timber and iron sheets and which structures were used as a store for storing salt, dairy meal, and pyrethrum. That they also had a shop on the land and one temporal structure which had been divided into two had been used for rental houses.
12. Subsequently in 1987 members of the society had proposed to have a dispensary and so they had accommodated it and toilet behind the two shops. That today they no longer had dispensary as the persons operating it had bought land elsewhere and moved away in the year 2008. That in its place there now stood a Chief's office Embomos Sub-location and also an educational office occupied by a zonal office under the Ministry of Education. That the two (2) semi-permanent structures which served as hotels had also been built on the suit land in 1979. That the zonal office and Chief's office were still housed on the land to date and that both structures were permanent having been constructed around the year 2005-2006.
13. His evidence was that they had attended the Bomet Land Control Board and made an application for transfer way after the purchase and that he had never had any dispute with Cheruiyot Kilel. That the dispute between them and Rerendet Self Help Group came about in a year he could not remember and that the Rerendet Self Help Group were their break away members. The official's therein were their members e.g. member No. 7 and No. 15, Simion Rotich and Maritim Tuiya respectively as they appeared on their register herein produced as Pf exh 6.
14. The witness testified that the dispute arose after the 2nd Defendants -Rerendet Self Help Group caused the title to suit land to be registered to themselves in the year 2000 wherein they had taken the same. That the split had arisen after some of their members, who did not receive cows that were being distributed had been angered wherein they had decided to go and pick the title deed from Cheruiyot Kilel. That the dispute had however been settled by the Disputes Tribunal in Konoin where an award had been issued in their favour. He produced the proceedings of Konoin L.D.T dated 24th August 2000 and a forwarding letter dated 21st August 2000 as Pf exh 7 (a-b) and continued to testify that the Tribunal's findings were not implemented.
15. That they had been advised to sue Cheruiyot Kilel thus the reason for the current proceedings. He confirmed that they were still in occupation of the land and that the 2nd Defendant had never occupied any part of the said land. That he had been an official of the society since 2000 as he had joined the same around 1995. The witness ended his testimony by seeking to be granted the prayers sought in the Plaint having been on the suit land from 1975 to date.
16. The 2nd Plaintiff's witness Simion Arap Ngetich also testified that he lived in Siomo within Bomet County and that he was a farmer and a member of Siomo Farmer Co-operative Society. That previously in 1982 or there about, he had been the Chairman of the said Society but had now retired. He confirmed that the society had started in 1975, wherein they had purchased $\frac{3}{4}$ acre of land in 1976 from one old man called Mr. Kilel of which they had paid him in installments in 1975. He confirmed that the land was purchased for Ksh 1,600/= wherein there had been an extra payment of Kshs. 300/= for the vendor's cloth and that he had been present when the money was paid. That subsequently they had started utilizing the land from the year 1977 by constructing premises thereon land which



the society was still utilizing to date. He also confirmed that the developments on the land included a shop, store, office, a chief's office and an education office and that they had no dispute with Cheruiyot Kilel. Further that neither the 2nd Defendant nor its members had ever utilized the land for which they were in exclusive use.

17. The Plaintiff closed its case wherein the defense case was also marked as closed and the Plaintiff filed their written submissions of an equal date on the 23rd March 2022.

Plaintiff's submissions.

18. Upon summarizing the evidence adduced in court as well as the Defendants the Replying Affidavit of 29 January 2005 the Plaintiff framed their issues for determination as follows.
- i. Whether the Plaintiff has been in occupation of all that property known as LR No. Kericho/Cheptalal/434 was subdivided into LR No. Kericho/Cheptalal/1802 and 1803 for at least 12 years.
 - ii. Whether the Plaintiff's occupation if any has been quiet, peaceful, uninterrupted, hostile and exclusive.
19. On the first issue for determination, the Plaintiff relied on the decided case in *Kasuve vs Mwaani Investment Limited & 4 Others* [2004] eKLR to submit that he had had un-interrupted, the exclusive possession of 0.3 hectares for a period of at least 20 years from 1984 to 2004 when the suit was filed. That it was also evident that the Plaintiff had also caused developments on the suit property including but not limited to construction a shop, a hotel, store, dispensary and a small office. That the developments thereto were hallmark indications of its long, exclusive, open, quiet and peaceful occupation of the subject property. That the period of limitation ran from the year 1975 when it completed the purchase price for the acquisition of the said parcel of land and therefore the 2nd Defendant's title ought to be extinguished by dint of its Adverse Possession. Reliance was placed on the combination of the provisions of Sections 7, 13, 38(1) and (2) of the *Limitation of Actions Act*.
20. The Plaintiff further relied on the holding in the case of *Safari Mwei Mangi & 4 others vs Estate of Hamisi Mwinikai Ramadhan (deceased) & 7 Others* [2020] eKLR to submit that the subject matter having been subdivided transferred and registered to the 2nd Defendant was immaterial as a claim for Adverse Possession could still be sustained by a purchaser in possession of the subject property.
21. The Plaintiffs sought from the courts to hold that it had proven on a balance of probability that it was entitled to 0.3 hectares comprised in LR No. Kericho/Cheptalal/1803 by virtue of its Adverse Possession from the year 1975.

Determination.

22. This being a matter where the Plaintiff has sought for orders that it be registered as proprietor of parcel LR No. Kericho/Cheptalal/1803 having acquired the title by virtue of the doctrine of Adverse Possession, the court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:
23. Section 7 of the *Limitation of Actions Act* provides as follows:

“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...”



24. Section 13 of the *Limitation of Actions Act* further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this *Act* referred to as Adverse Possession) and, where under sections 9, 10, 11 and 12 (of the *Act*) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

25. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court (read Environment and Land Court) Order vesting the land in him.

26. Section 37 of the *Limitation of Actions Act* provides that:

Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement 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.”

27. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by Adverse Possession to land, (s)he must apply to the Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 of the *Civil Procedure Rules* as follows:

- i. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
- ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

28. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by Adverse Possession to prove, not only the period but also that possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale vs Liverpool College* (1900)1 Ch.19, 21.

29. It is against the background of the affidavits and the submissions herein submitted, that the issue that arises for my determination is:

- i. Whether or not the Plaintiff has acquired the suit property by way of Adverse Possession.

30. On analyzing the Plaintiffs’ uncontroverted evidence since the Defendants decided to stay away from the proceedings, it is the Plaintiff’s case that it had been incorporated on 12th July 1974 and previously known as Embomos Co-op Society Reg. No. 2202 as per Pf exh 1, wherein on 28th April 1978 it had changed its name to Siomo Farmers Co-op Society as per the certificate of change of name herein produced as Pf exh 2.

31. That it entered into the suit property in the year 1975-1976 by virtue of a sale agreement with one Arap Kilel the 1st Defendant herein wherein they had purchased 0.3 hectares for Kshs. 1800/= to be excised



from the 1st Defendants parcel of land LR No. Kericho/Cheptalal/434. That after the 1st Defendant had given them the land, he had requested for a token, which was normal in Kipsigis culture, as a gift after the sale of land, wherein they had given him a token of Ksh. 300/= . That the payment of the suit land had been made in three (3) instalments wherein the last installation had been made on 10th May 1975 as per Pf exh 5 (a-c) The 1st Defendant had however refused to transfer the parcel of land.

32. The Plaintiff's evidence is that upon purchase, they had immediately taken possession of the 0.3 hectares in 1975 wherein they had used the field as a paying point to its farmers. That subsequently they had proceeded to develop the land by putting up a fence, constructing a shop, store, office, a chief's office and an education office.
33. In essence therefore the Plaintiff entered on the 0.3 hectares as a purchaser wherein that entry became void by operation of the law after the expiry of the respective six months, for lack of consent of Land Control Board under the *Land Control Act* and subsequent transfer. It was the plaintiffs' evidence that from the year 1975 to the time of filing suit in 2004, they had been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendants, wherein it had continued to commit acts that were adverse to its owner. The period of more than 29 years before filing of the suit was a period more than the 12 years required under the law for them to acquire title against the Defendants by way of Adverse Possession.
34. Indeed the Court of Appeal in *Samuel Miki Waweru v Jane Njeri Richu* [2007] eKLR held as follows:

“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 (1) of the *Land Control Act* for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”
35. A look as the Pf exh No 3 the same is clear that after the suit land had been sold to the Plaintiff, there had been a subdivision of the parent land No LR No. Kericho/Cheptalal/434 on the 29th March 2000 which had resulted into parcels number LR No. Kericho/Cheptalal/1802 and 1803, the latter parcel of land to which the Plaintiff claims. On the 29th March 2000, LR No. Kericho/Cheptalal/1803 was transferred to the 2nd Defendant herein.
36. As rightly submitted by the Plaintiff in their submissions, their possession and occupation of the suit land herein was not affected by the subsequent subdivision and transfer of the same, them having been in occupation and possession for more than 12 years after having paid the full purchase price. For the purposes of Adverse Possession, time started to run from the date when the Plaintiff was granted possession of the suit land after the completion of the payment of the purchase as was held by this court in the case of *Stephen Mwangi Waweru v Omari Abdullah Muchiri* [2019] eKLR.
37. Further, the Court of Appeal in the case of *Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996* held that:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”



The onus is on the person or persons claiming Adverse Possession:

“.. to prove that they have used this land which they claim as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

38. The main the elements of Adverse Possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

39. I find that the Plaintiff has sufficiently demonstrated the elements herein above stated thereby sufficiently establishing a claim to the land by Adverse Possession. The Plaintiffs’ Originating Summons dated the 26th January 2004 is herein allowed in its entirety as prayed.

40. Each party to bear their own cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 2ND DAY OF JUNE 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

