



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 32 OF 2016

JOHN KIMELI LELEI..... APPLICANT

-VERSUS-

CHRISTOPHER KISORIO CHUMA.....RESPONDENT

JUDGMENT

By an originating summons dated 15th February 2016 and amended on 21st March 2018 the applicant herein sued the respondent claiming that he had acquired two (2) acres or thereabout comprised in land parcel known as **UASIN GISHU/TAPSAGOI SCHEME/327** by way of adverse possession and sought the court's determination of the following questions:

1. Whether or not the Applicant, John Kimeli Lelei has acquired the ownership of two (2) acres or thereabout of land comprised in that parcel of land known as **UASIN GISHU/TAPSAGOI SCHEME/327** having been in exclusive, open peaceful continuous and uninterrupted possession and occupation and use of the same two (2) acres of land for a period of over 12 years.
2. Whether or not Christopher A. Kisorio Chuma's title of (2) acres of land or thereabout comprised in **LR No. UASIN GISHU/TAPSAGOI SCHEME/327** has been extinguished by the direct of adverse possession by the applicant John Kimeli Lelei since 1998.
3. Consequent upon the foregoing, Christopher A Kisorio Chuma's title over (2) acres of land or thereabout of land comprised in title No **UASIN GISHU/TAPSAGOI SCHEME/327** has been extinguished by operation of law and the said two (2) acres ought to be transferred into the name of the Applicant, John Kimeli Lelei.
4. A vesting order do accordingly issue, vesting (2) two acres or thereabouts of land comprised in land reference number **UASIN GISHU/TAPSAGOI SCHEME/327** to the Applicant John Kimeli Lelei.
5. Consequent upon prayers 1,2,3 and 4 being granted, the Respondent be ordered to execute the Application for Consent of Land Control Board for purposes of excising the said two (2) acres of land from land reference number **UASIN GISHU/TAPSAGOI SCHEME/327** and to appear at the relevant Land Control Board to obtain the consent of sub-division of the said land reference number **UASIN GISHU/TAPSAGOI SCHEME/327** and do execute the mutation form and the application for consent of Land Control Board and to appear before the relevant Land Control Board to seek consent to transfer to the Applicant the said (2) two acres of land contained in land reference number **UASIN GISHU/TAPSAGOI SCHEME/327** which he the Applicant has acquired through adverse possession and in default, the Deputy Registrar, the Environment and Land Court at Eldoret, do execute all the requisite conveyancing documents and obtain consents that the Land Registrar Uasin Gishu County do issue the Appellant John Kimeli Lelei with a title deed for 2 (two) acres or thereabouts of land (land so excised from the said land reference No. **UASIN GISHU/TAPSAGOI SCHEME/327**

APPLICANT'S CASE

The applicant swore an affidavit in support of the summons where he re-iterated the grounds in support and stated that the Respondent is the registered proprietor of Land reference number **UASIN GISHU/TAPSAGOI SCHEME/327** from 1st February 1984 measuring 5.9 Hectares and does not live on this parcel of land. He averred that in 1997, he bought an electric Posho Mill and approached the respondent for purposes of getting a place to install the said Posho Mill and the respondent allowed him to use a section of LR No. **UASIN GISHU/TAPSAGOI SCHEME/328** owned by the respondent on condition that he be paid a commission of 10% of the monthly profits.

It was the applicant's case that the Respondent embraced the idea of the posho mill and offered the applicant two acres of land in **UASIN GISHU/TAPSAGOI SCHEME/327** in exchange of the posho mill and the applicant immediately took possession of the posho mill in 1998. Later survey was done and confirmed the boundaries of the land occupied by the applicant and he constructed a house on the property. He stated that he has been in peaceful possession and occupation of the said two (2) acres of land comprised in the said Title No. **UASIN GISHU/TAPSAGOI SCHEME/327** from 1998 until mind 2012 when the Respondent started to lay a claim on a non-existent debt.

The applicant also stated that the Respondent trespassed onto the land and destroyed his fence but avers that he has been in exclusive, continuous, open, peaceful, and uninterrupted since 1998 to 2012 and by virtue of the fact that the Respondent's title has been extinguished since he has occupied the land for a period of over 17 years.

In response to the amended Originating Summons, the Respondent adopted the contents of the replying affidavit to the original summons where he deponed that he is the registered owner of all that parcel of land known as **UASIN GISHU/TAPSAGOI SCHEME/327** measuring 14.7 acres and **UASIN GISHU/TAPSAGOI SCHEME/328** measuring 5 acres. He stated that he knows the applicant having been friends with the applicant's father. He agreed that he offered the applicant space for the posho mill business and assisted him with the management of the same later.

The respondent deponed that the applicant later requested that in exchange of the posho mill, he be given a portion of the land equivalent to the value of the posho mill and the breakdown was as follows;

a) The mortar	= Kshs.70,000/=
b) The mill	= Kshs.40,000/=
c) The posho-mill structure	= Kshs.20,000/=
d) Electricity supply	= <u>Kshs.10,000/=</u>
<u>TOTAL</u>	= <u>Kshs.140,000/=</u>

It was the respondent's evidence that he accepted the offer and therefore gave the applicant one acre of land in exchange of the posho mill. He stated that the applicant harvested 25 mature cypress trees leading him to carve out only one acre for the applicant since he was apprehensive the applicant may be unable to pay sufficient consideration for the additional one acre of land which he had orally agreed to buy.

According to the Respondent, after the trees were cut by the applicant the chief summoned the applicant and him and it is at that point that the applicant made a claim for 2 acres insisting that the exchange of the posho mill was for 2 acres of land and not one acre and as a result of that he chose to cancel the exchange agreement and made it very clear to the applicant to take back the posho mill and he takes back his piece of land.

PW1 testified and produced a green card to support his case and stated that elders intervened in 2012 resolved the respondent remains with the posho mill and the applicant retains the 2-acre parcel of land as agreed between the parties. The applicant also stated that the respondent was dissatisfied but did not challenge the elders' findings.

PW 2, Wilfred Kirwa Yego testified that the applicant is the owner of the two acres of land since he used to work on the land as a farm hand and the same was well demarcated and fenced off.

PW 3 William Maiyo testified that he is the Assistant Chief of Kaptebee sub location and when the applicant complained of the suit land, he invited them to a meeting on 13th April, 2012 alongside other 14 elders who deliberated on the issue. Upon their deliberations, they concluded that the two acres of land comprised in LR. No **UASIN GISHU/TAPSAGOI SCHEME/327** belongs to the applicant and that the applicant had been in continuous open occupation of the suit property prior to the respondent raising the issues.

PW 4 testified in support of the applicant's case and indicated that the applicant is entitled to the 2 acres of the property.

The applicant produced the green card, minutes of the meeting and a letter with background facts of the matter on exchange of the 2 acres' piece of land with the posho mill.

RESPONDENT'S CASE

DW 1 testified and re-iterated the contents of the statement and affidavit in opposition to the applicant's claim for adverse possession.

DW 2 indicated that he knew the respondent well and testified on the elders' meeting and stated that there was no resolution arrived at after the respondent walked away from the meeting.

APPLICANT'S SUBMISSIONS

Counsel reiterated evidence of the parties and submitted that the issue for determination is whether or not by dint of law the applicant has acquired title and ownership of two (2) acres or thereabout of land comprised in that parcel of land known as **LR NO. UASIN GISHU/TAPSAGOI SCHEME/327** and/or whether or not the applicant is entitled to the prayers sought for in the originating summons.

Counsel relied on the Court of Appeal case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015]eKLR** where the court held that:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person

having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licensed of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms:-

"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."

Mr. R. M, Wafula counsel for the applicant also cited the case of **Grace Jesoimo Tarus & another v Sarah Rop & 2 others [2018] eKLR** where this Honourable court re-emphasized what the Court of Appeal had stated in the case of **Teresa Wachuka Gachira v Joseph Mwangi Gachira [2009] eKLR** when it affirmed as follows:

"In the case of Teresa the Court of Appeal emphasized the importance of following the prescribed procedure in adverse possession claims. The need for production of a form of a copy of title document must be exhibited to indicate that the person sued is the registered owner of the suit land. This can be a copy of an extract of the register or an official search showing the details of the registration. Failure of such evidence is fatal to the claimant's suit as orders cannot be granted in respect of a parcel of land that does not belong to the respondent."

Counsel therefore urged the court to allow the the prayers as sought in the originating summons with costs.

RESPONDENT'S SUBMISSIONS

Counsel for the respondent submitted that it is not in dispute that the respondent is the registered owner of the suit land, what is in dispute is that the applicant has not acquired the suit land by way of adverse possession as he has not been in continuous, peaceful occupation for a period of 12 years.

Counsel relied on the case of **George Mudia V. Peter Njagi Njue [2017] eKLR** where the court held that:

"Exclusive use and possession of the property, open and notorious use of property, non-permissive hostile or adverse use of property, continuous /uninterrupted use of property for a period of time at least 12 years. "

Mr. Tarigo also cited the case of **Magaret Wangui Niugi & 2 others V. George Kimani & another (2019) eKLR** where the court held that:

"The common Law doctrine of adverse possession which is incompetent with and in denial of the title of the true owner of land. To establish adverse possession a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land.{animus possidendi} Secondly the claimant must prove that he has used the suit land without force, without secrecy and without persuasion {nec vi nec clam nec precario} for the prescribed limitation period of twelve years, Thirdly he must demonstrate that the registered owner had knowledge (or the actual or constructive means of knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous. It must not be broken or interrupted. "

It was counsel's further submission that the applicant was given permission to use the respondent's land in the year 1998 or thereabout which the same amounted to informal lease and the year 2003 the applicant entered into an informal exchange which was not written down and later in the year 2011, a dispute arose between the two parties and it led to the applicant being denied the use of the land in question. That the respondent rescinded the agreement for exchange and took possession of the suit land at the exclusion of the applicant.

Counsel also relied on the case of **Wambugu v. Njuguna [1983]eKLR 174** where the court held that:

"In order for a person to acquire title by operation of statute of limitation to land which has a known owner, the owner must have lost his rights 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 are acts inconsistent with his enjoyment of the suit for purposes of which he intends to use it. The applicant has to prove that he has dispossessed the respondent of the suit land by adverse possession."

Secondly on the second limb of the open and notorious use of the property counsel submitted that the applicant used the suit land with permission from the respondent prior to 2011 and after the Respondent complained about the applicant's non-payment of trees in 2011, the applicant's permission was interrupted and his use of the property was stopped.

Counsel also relied on the case of **David Kipkosgei Kimeli v. Titus Barmasai [2019]eKLR** and urged the court to find that the applicant has not proved adverse possession

ANALYSIS AND DETERMINATION

The issues for determination in a claim for adverse possession are well settled. The ingredients of adverse possession are as was enumerated in the case of **Tabitha Waitherero Kimani v Joshua Ng'ang'a [2017] eKLR**, by **Ombwayo J** 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.”

The issue for determination is whether the applicant has met the above ingredients of adverse possession. From the evidence tendered before this Court, the applicant bought an electric Posho Mill in 1997 and requested the Respondent to allow him use a portion of his property to install the mill. The respondent allowed him to use a portion of the on LR No. UASIN GISHU/TAPSAGOI SCHEME/328 on condition that he be paid a commission of 10% of the monthly profits.

In 1998, the Respondent became interested in the business and offered the applicant two acres of land in exchange of the posho mill which was agreed upon by the two parties. The applicant subsequently occupied the property and constructed a house on it and the same was demarcated and fenced off. The dispute arose in 2012 when the respondent laid claim on the suit land.

According to the respondent, the 12-year period was not complete as the initial occupation by the applicant of the suit property was with permission and the said stay was cut short after the issues arose.

Section 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, CA 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 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 Applicant must show that the respondent 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”

The facts and evidence relied upon by the applicant are to the effect that he has been in exclusive possession of the suit premises and has cultivated and done improvements on the suit property. The applicant demonstrated that indeed there was an exchange agreement between the parties herein for the 2 acres of land in exchange for the posho mill which is not disputed by the respondent.

The witnesses also confirmed that the applicant has been in occupation of the suit land having entered into an exchange agreement with the respondent. The applicant's occupation of the suit property from the time of the exchange agreement was made in 1998 to 2012 is therefore more than 12 years.

In the case of Kweyu v Omuto, C.A Civ Appeal 8 of 1990 cited with approval in **Gichinga Kibutha v Caroline Nduku [2019] eKLR** held that;

“In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts.”

It is on record that the Respondent only challenged possession in 2011 and after the applicant had been resident on the suit property for over 12 years and upon the finding by the elders as to the owner of the property he has not challenged the possession leaving the Applicant to openly publicly occupy the suit property uninterrupted. The fact that the Applicant has extensively developed the suit property is a

demonstration of *animus possidendi*, (intention to possess) to the exclusion of the respondent. The open, continuous and hostile occupation has not been broken from 1998, a period in excess of 12 years.

In the case of **Simon Ng'ang'a Njoroge -vs- Daniel Kinyua Mwangi (2015) eKLR** where the Court in applying the principle espoused in the case of **Wambugu –vs- Kamau** (supra) held as follows: -

*“Having found the plaintiff’s testimony concerning the said sale agreements more believable, and taking note of the principle espoused in **Wambugu -vs- Njuguna** (supra) to the effect that where a claimant pleads the right to land under an agreement and in the alternative, seeks an order based on subsequent adverse possession, (Like the plaintiff herein has done) the rule is : **the claimants possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price and that the claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.** I find and hold that, in the circumstances of this case, the plaintiff possession of the suit property became adverse from 6th June, 1994”.*

This case is based on an exchange of land with a posho mill in 1998 which is not disputed. I find that the applicant has become adverse to the respondent’s suit property on a portion of two (2) acres from 1998. The net effect is that the applicant’s claim for adverse possession succeeds with costs.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF JULY, 2021

M. A. ODENY

JUDGE