



**Kariuki v Chege (Sued as the Administrator of Silas Chege Ngarachu)
& another (Environmental and Land Originating Summons 321 of 2018)
[2024] KEELC 5892 (KLR) (17 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 321 OF 2018
MAO ODENY, J
SEPTEMBER 17, 2024**

BETWEEN

DAVID KAMAU KARIUKI PLAINTIFF

AND

**MARY MUMBI CHEGE (SUED AS THE ADMINISTRATOR OF SILAS CHEGE
NGARACHU) 1ST DEFENDANT**

**STANLEY MACHARIA NGARACHU (SUED AS THE ADMINISTRATOR OF
SILAS CHEGE NGARACHU) 2ND DEFENDANT**

JUDGMENT

1. By Originating Summons dated 14th December, 2018 the Plaintiff sued the Defendants seeking the following orders:
 - a. A declaration that the Plaintiff is entitled to be registered forthwith as owner of parcels L.R. No. 12167/10 and L.R. No. 12167/11 which are subdivisions of L.R. No. 12167/8 and which the Plaintiff has been in adverse possession for more than twelve (12) years immediately preceding the presentation of this suit and on which he has lived openly and continuously as of right and in adverse possession and without any interruption from the Defendant or their predecessors or agents or servants in the above title and that the Defendants' title to the said parcels of land has been extinguished in favour of the Plaintiff under section 37 and 38 of the *Limitation of Actions Act*.
 - b. In the alternative, a declaration that the Defendants hold L.R. No. 12167/10 and L.R. No. 12167/11 in trust for the Plaintiff herein and the Plaintiff is entitled to have the said parcels of land transferred to him by the Defendants forthwith.



- c. That the Defendant do transfer L.R. No. 12167/10 and L.R. No. 12167/11 to the Plaintiff and in default the Deputy Registrar be authorized to do and or sign all documents to effect transfer of L.R. No. 12167/10 and L.R. No. 12167/11 to the Plaintiff herein.
 - d. An order for costs of this summons.
2. The Defendant filed a replying affidavit sworn by Stanley Macharia Ngarachu on 15th May, 2019 in opposition to the Originating Summons.

Plaintiff's Case

3. PW1 Daniel Kamau Kariuki adopted his witness statement dated 19th August, 2019 together with his affidavit dated 14th December, 2019 and annexures as Pex Nos 1 to 4.
4. It was PW1's evidence that he purchased the suit land in 1993 and stated that he has resided on the same for 28 years and done some developments. PW1 further stated that he completed payment of the purchase price but the parcels were never transferred to him. He also testified that the vendor passed on and that the family of the vendor have never claimed any money from him and further that they have never evicted him. PW1 urged the court to compel the defendants to execute the transfer forms in his favour.
5. Upon cross-examination by Mr. Gichuki, PW1 confirmed that the title was in the name of Silas Chege (deceased) and that the purchase price was Kshs.1,250,000/= which he paid by instalments as follows: cheque for Kshs.459,996.05/=, second instalment vide a cheque for Kshs.200,521/= and the 3rd instalment in cash of Ksh.214,000/= but Silas died before he could do the transfer.
6. Upon re-examination, PW1 stated that he has been on the land since 1994 and that the Defendants never filed any suit against him for payment of any balance. PW1 was referred to DMFI-5 dated 8/9/1994 where he stated that the same was written to Silas Chege Ngarachu informing him that the transfer documents were ready for his signature at Masese Advocates office for registration. Further that the Administrators of the Vendor's estate were aware that he was on the land.
7. PW2 John Masese advocate testified that he was the advocate acting for both Plaintiff and Defendant and that the Plaintiff and Silas entered into a sale agreement for the sale of 2 acres for Kshs.1,250,000. He told the court that there was remaining balance of Kshs.430,000/ of which he wrote a demand letter and the Plaintiff made payment of Kshs.463,774/ with an over payment of Kshs.33,774. PW2 stated that his fees was Kshs.28,480/ leaving an overpayment of Kshs.5,294/
8. It was PW2's evidence that he prepared the transfer document and requested the seller to come and execute the transfer for registration but the seller died before then. He also stated that he assisted the deceased family to obtain Grant of Letters of Administration and that since the sale process was still incomplete, he requested the administrators to sign on the deceased's behalf. PW2 further testified that the plaintiff has always been in occupation of the suit parcels of land
9. Upon cross examination, PW2 stated that confirmation of the grant was done on 8th March, 2021 and rectified on 21st May, 2021 and that the suit land was inadvertently not included in the grant of letters of administration. It was his evidence that the purchase price was settled but did not have all the records as proof of payment of the purchase price.
10. On re-examination, he stated that upon his demand for Kshs.430,000/, the same was paid to the deceased and that the Administrators never instructed him to demand monies from the Plaintiff.



11. PW3 Samuel Kirathe Kamau adopted his witness statement dated 29th August, 2019 and upon cross examination by Mr. Gichuki, he confirmed that he was not a registered property agent but stated that he sold properties as an individual and that he is the one who took the Plaintiff to the suit land.
12. It was PW3's evidence that Silas gave him the land in 1992 to sell and that the Plaintiff bought the land in 1993 and took possession. PW3 confirmed that the Plaintiff paid the purchase price in full.

Defendants' case

13. DW1 Stanley Macharia Ngarachu adopted his replying affidavit dated 15th May, 2019 and witness statement filed on 18th January, 2021 as his evidence and produced 6 annexures to the replying affidavit as Dex. No. 1 to 6. DW1 also adopted his further list of documents dated 23rd March, 2022 and produced as Dex. No. 7 to 20.
14. It was DW1's testimony that the Plaintiff bought his father's plot and wanted them to transfer the plot but that the Plaintiff was yet to pay a balance of the purchase price of Kshs. 430,000/ DW1 further stated that they were ready to transfer the suit land upon payment of the balance of the purchase price.
15. Upon cross examination by Mr. Waiganjo, he confirmed that from PW2's letter dated 8th September, 1994 the entire purchase price was paid. He also confirmed that he had not written any letter to the Plaintiff demanding the balance. DW1 also stated that he would transfer the land to the Plaintiff if he received the balance. DW1 confirmed that the Plaintiff has been on the suit land since 1993 and has since developed the land.
16. Upon reexamination, DW1 stated that the Land Control Board consent was issued to the Plaintiff on 10th February, 1993 and that there was no sale agreement between his father and the Plaintiff and that PW2 did not produce all the documents showing that his father had been paid all the money. He did not demand Kshs.430,000 from the Plaintiff.
17. DW2 Mary Mumbi Chege adopted her witness statement filed on 18th January, 2021 and the wife of the deceased Silas Chege Ngarachu(deceased) and confirmed that her husband had sold the suit land to the Plaintiff.
18. Upon cross examination by Mr. Waiganjo, DW2 stated that she was aware of her husband's sale of the suit land to the Plaintiff but she was not involved in the transaction. She further confirmed that PW2 did not include the suit property of land in the succession cause. It was her evidence that the Plaintiff has been on the suit land since 1993 and her only claim is for the balance of the She added that her claim was for the balance of the purchase price.
19. On reexamination, she stated that her late husband would have told him if the Plaintiff had paid the balance of the purchase price and that he never signed the transfer forms.

Plaintiff's Submissions

20. Counsel for the Plaintiff identified two issues for determination, as to whether the Plaintiff proved his case on a balance of probabilities and who should bear the costs
21. On the first issue, counsel relied on Sections 7, 13(1), 38(1) (2) of the [Limitation of Actions Act](#) and the Court of Appeal case in [Kasuve V Mwaani Investments Limited & 4 Others 1 KLR 184](#) and submitted that from the evidence, the defence witness confirmed that the Plaintiff took possession of the suit land in 1993 and that no action was ever taken to evict him from the suit land. Counsel submitted that the Defendants held the suit land in trust for the Plaintiff and they ought to be compelled to transfer the same to him.



22. Counsel further relied on the cases of Wambugu V Njuguna (1983) KLR 173 as cited in the case of Simon Nganga Njoroge V Daniel Kinyua Mwangi [2015] eKLR that explained the principles of adverse possession and also relied on Section 4(1) of the Limitation of Actions Act. Counsel submitted that from 7th January, 1994 to 10th December, 2018, no legal action had been taken by the Defendant to recover the suit land from the Plaintiff.
23. On the second issue of costs, counsel relied on Section 27 of the Civil Procedure Act and urged the court to grant costs of the suit to the plaintiff as he had discharged the burden in proving his case on a balance of probabilities.

Defendants' submissions

24. Counsel for the Defendants submitted that the Plaintiff admitted that he had not completed the payment of the purchase price and that there were no records to show that the balance of Kshs 430,000/ had been paid the Defendants or Silas Chege.
25. Counsel further submitted that the suit land was never included in the succession cause of the deceased since the Plaintiff had not completed the purchase price and that the fact that the Defendant did not raise the issue of unpaid purchase price as counter claim, does not extinguish their right to claim any rights arising from the sale agreement.
26. It was counsel's submission that the Plaintiff's entry to the suit land was with the deceased's authority by virtue of sale and therefore the issue of adverse possession could not apply. He further submitted that from the time confirmation was granted the period of adverse possession was not complete.
27. Counsel relied on the case of Wilfred Kegonge Babu V Henry Mose Onuko and submitted that the Defendants were awaiting completion of the purchase price thus the sale agreement had not been repudiated.
28. Counsel also cited the cases of Gabriel Mbui V Mukindia Muranya HCCC 283 of 1990, Francis Gitonga Macharia V Muiruri Waithaka [1998] eKLR which cited with approval the case of Titus Kigoro Munyi V Peter Mburu Kimani [2015] eKLR and submitted that the Plaintiff took possession in 1994 until the owner's demise on 16th April, 2004 hence 12 years had not lapsed as time ceased to run at the time the actual owner died.
29. Counsel further relied on the case of Public Trustee V Wanduru [1984] KLR 314 which cited with approval in Regina Wanjiru and Joyce Wanjiku Kiago V Lucy Wairimu and urged the court to dismiss the case as the full purchase price had not been paid.

Analysis And Determination

30. The issues for determination are whether the Plaintiff has proved adverse possession to the suit land, whether the plaintiff paid the full purchase price and whether the defendant are entitled to their claim for a balance of the purchase price of Kshs. 430,000/
31. For a party to succeed in a claim of adverse possession, he or she must demonstrate that he/she has been in peaceful, continuous and uninterrupted occupation of the suit land period of twelve (12) years as per Section 7 of the Limitation of Actions Act, CAP 22 Laws of Kenya which provides that:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person...”



32. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* (2005) eKLR adverse possession was described as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title neglects to take action against such person in assertion of his title for a certain period. In Kenya, the period 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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the owner.”

33. It is not in dispute that the Plaintiff purchased the suit property from Silas Chege (deceased) as per the sale agreement dated 17th May, 1993. It is also not in dispute that the Plaintiff took possession and has been in such possession since 1993. It is on record that all plaintiff's witnesses and the defendants themselves confirmed this. The defendants also admitted that the plaintiff's occupation was continuous and uninterrupted both during the Vendor's lifetime and after his demise. They did not interfere with his occupation at all times.

34. The plaintiff and PW2 Advocate Masese who was the lawyer of both the purchaser and the Vendor confirmed that the plaintiff paid the full purchase price. He even informed the court that the Plaintiff had overpaid by Kshs 33,774 of which Kshs.28,480/ was his fees and an overpayment balance of Kshs.5294/

35. PW2 also stated that he had written a demand notice for the sum of Kshs.430,000/ which was paid hence, there was no further claim and that is why he prepared the transfer documents for the signature of the Vendor. It should also be noted that neither the vendor nor the defendants demanded any balance from the plaintiff until 2018 when the plaintiff filed this suit only to claim that there was a balance. The defendants claimed the balance from the bar and not vide a counterclaim.

36. If the defendants really had a claim for the balance of the purchase price, then they should have filed a counterclaim for the same. The defendants had an opportunity to amend their defence and include a counterclaim but squandered this chance.

37. It was the Defendant's case that they were ready and willing to transfer the suit property to the Plaintiff as long as he cleared the balance of the purchase price. In the case of *Tilak Company Ltd V Mageta Enterprises Ltd (Civil Appeal E080 of 2021)* [2024] KECA 342 (KLR) the court held as follows:

“Clearly understood, the position is that time starts to run upon payment of the last instalment, or if it has not been paid, upon repudiation of the contract. The position is that time starts to run after payment of the last instalment of the purchase price...”

38. It was the plaintiff's case that he paid the last instalment to the deceased vendor while he was still alive and that he was supposed to sign the transfer documents which PW2 confirmed that he had prepared. The deceased died in 2004 and this matter was filed in 2018. Even if we assume and compute that time started running in 2004, it still falls within the limitation period of 12 years.

39. In the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal held that:

“Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with



permission of the appellant qua vendor. In the case of Public Trustee – v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

40. The Plaintiff entered into the suit property in 1993 pursuant to a sale agreement, which is not disputed by the defendants. The plaintiff’s occupation for a period over 28 years is also acknowledged.

41. The defendants’ evidence that there is an unpaid balance is time barred by section 4(1)(a) of the Limitations of Actions Act which provides that:

‘The following actions may not be brought after the end of six years from the date on which the cause of action accrued:

(c) actions founded on contract;’

42. The Defendants cannot therefore claim any balance from the Plaintiff if any as the limitation period had already set in and the deceased’s title with regards to the parcels bought by the plaintiff had automatically lapsed. The title was extinguished by dint of section 17 of the *Limitation of Actions Act* which provides thus:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

43. Neither the deceased nor the Defendant’s father/husband took any action to evict the plaintiff from the suit land or lodge a claim for the balance of the purchase price.

44. I have considered the pleadings, the evidence on record and the submissions by counsel and find that the plaintiff has proved that he has acquired the suit parcels of land vide adverse possession. I therefore make the following specific orders:

a. A declaration is hereby made that the Plaintiff is entitled to be registered as owner of parcels L.R. No. 12167/10 and L.R. No. 12167/11 which are subdivisions of L.R. No. 12167/8 by way of adverse possession.

b. That an order is hereby issued to the Defendant to transfer L.R. No. 12167/10 and L.R. No. 12167/11 to the Plaintiff and in default the Deputy Registrar is hereby authorized to sign all documents to effect transfer of L.R. No. 12167/10 and L.R. No. 12167/11 to the Plaintiff herein.

c. Costs of the suit to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF SEPTEMBER 2024.

M. A. ODENY

JUDGE

