



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
KABARNET

ELCOS NO. E002 OF 2024

**SAPHINA
CHELAGAT.....PLAINTIFF**

JEPKORIR

VERSUS

DAVID CHERUIYOT CHIRCHIR.....DEFENDANT

JUDGMENT

Introduction

1. The applicant instituted the instant suit vide an originating summons dated 5th September 2024 for judgment against the respondent for: -

- i) A declaration that the title of the respondent, David Cheruiyot Chirchir, in the parcel of land known as Baringo/Kewamoi "A"/1191 (suit property) has been extinguished by his (applicant's) adverse possession thereof for a period of over 12 years;

- ii) A declaration that he (the applicant) has acquired the freehold interest in the suit property for a period of more than 12 years, that is, from at least 2008 to date;
- iii) The last original indentures in respect of the suit property measuring 0.14 hectares which are with the defendant be dispensed with;
- iv) An order requiring and directing the Land Registrar Baringo to register him (applicant) as the absolute owner of the suit property in place of the respondent;
- v) Costs of the suit be borne by the respondent.

2. The suit is premised on the grounds that the plaintiff has been in continuous, uninterrupted and exclusive possession of the suit property to the detriment of the respondent since 2008; that the applicant has had open, continuous and uninterrupted use and occupation of the suit property since September 2008 and that recently the respondent verbally

threatened to evict the applicant from the suit property.

3. The defendant filed a response to the plaintiff's suit vide a replying affidavit sworn on 10th February 2025, in which he *inter alia* depones as follows: -

i) "

ii)

iii) THAT the applicant reaffirms my registered ownership of the suit property; a fact that I do not contest at the outset. What I staunchly contest, however, is the applicant's claim that she has extinguished my proprietary rights by way of adverse possession.

iv) THAT since I purchased the suit land I have had unfettered possession to date and at no point was such possession transferred, donated or otherwise. I have no knowledge

of the applicant's possession or occupation at any given time.

v) THAT all that I am aware of is that the applicant's deceased father had at one point occupied the suit land but proceeded to erect structures without my authority; these are the same unlawful structures which the applicant relies on to buttress her claim of possession;

vi) THAT I am advised by my advocate on record, whose advice I believe to be true, that the applicant cannot institute the present originating summons on her own account since she bears insufficient nexus to the subject matter. As stated, the structures/developments were erected by her deceased father. She is not before this court on the basis of any grant on her father's estate's behalf. Thus, it is unclear what her locus or link is given that she was not in occupation of the property for the purported period;

vii) THAT I am further such advised that an applicant cannot beseech a court of law to recognize rights accruing from unlawful act (illegal erecting of structures/developments on my land);

viii) THAT the documents annexed to her summons do not prove the applicant's possession or occupation either. The random receipts provided could relate to any property; receipts which are notably not certified. There is insufficient evidence of continuous, open and hostile possession for at least 12 years. The elements of adverse possession are not to be taken lightly; the applicant's high burden to prove all such elements must be discharged which she had not achieved;

ix) THAT from the foregoing it follows that the applicant's originating summons should be dismissed as frivolous for absence of evidence supporting adverse possession..."

4. Pursuant to directions given on 20th February, 2025 the originating summons was converted to plaint, the supporting affidavit sworn in support thereof into the applicant's witness statement, the documents annexed to the supporting affidavit into applicant's documents and the replying affidavit into the respondent's defence.
5. Parties were granted leave to file further witness statements, if need be, and the suit set down for hearing orally.

EVIDENCE

Plaintiff's case

6. When the case came up for hearing, the plaintiff, who testified as P.W.1 relied on her witness statement dated 5th September 2024 after it was adopted as her evidence in chief.
7. The plaintiff informed the court that she had lived in the suit property since 2008; that her husband and she had erected structures in the suit property after obtaining approvals from the County Government Baringo in April 2008. She produced the approved

plan as Pexbt 1. The plaintiff informed the court that no one raised any objection when they were building the house.

8. The plaintiff further informed the court that in 2009, the respondent complained to them that they were erecting a house in his land. The court heard that the defendant asked the plaintiff and her husband to demolish the house but did not serve them with an eviction notice. He (defendant) went silent until 2024 when the plaintiff learnt that he (the defendant) was planning to demolish the house they had erected from the suit property and evict them from the suit property.

9. The plaintiff further informed the court that in 2010, her husband conducted a search and established that the suit property was registered in the name of the defendant. To show how they acquired the suit property, the plaintiff produced a ledger report for water connected in the suit property as Pexbt 2; photographs showing structures and trees they erected and planted in the suit property as Pexbt 3 (a), (b) and (c); receipts for purchase of the materials

they used to erect the structure in the suit property as Pexbt 4(a) to (d) and official search in respect of the suit property as Pexbt 5.

10. Concerning the defendant's contention that the structures in the suit property were erected by her father (now deceased), plaintiff informed the court that the contention is false and stated that her father had no capacity to build the house as he was a retiree getting a pension of Kshs. 6,000/- per month.
11. The plaintiff further informed the court that they entered the suit property when it was vacant and know of no other home.

Defendant's case

12. The defendant who testified as DW1, relied on his statement dated 10th February 2025 after it was adopted as his evidence in chief. He informed the court that he knows the plaintiff; that the plaintiff is a daughter of Chelagat who sold/exchanged the suit property to him in exchange of another parcel of land and that it is not true that the plaintiff had lived in the suit property for over 12 years.

13. In cross examination, the defendant asserted that the plaintiff had not lived in the suit property for over 12 years. He stated that he learnt that the house he had built in the suit property had been demolished in 2019 and complained to the plaintiff's father, Chelagat.

14. In re-examination, the defendant stated that he did not report the incident of demolishing of his house to the police because when he visited the land in 2019, he did not find the plaintiff's father (Chelagat) and did not know whom he could report as having entered the land.

SUBMISSIONS

15. At close of hearing, parties filed written submissions and framed the issues for the court's determination as follows: -

- i) Whether the plaintiff has met the threshold for a claim for adverse possession;
- ii) Whether the plaintiff is entitled to the reliefs sought.

16. On whether the plaintiff has met the threshold for a claim for adverse possession, the plaintiff in her submissions dated 15th July 2025 and filed on 16th July 2025 gave a brief overview of the evidence she relied on in support of her case and submitted that the evidence was not controverted by the defendant hence her claim meets all the legal thresholds for adverse possession as set by statute and case law. She cited the cases of **Kasuku v Muli (2005) eKLR; Kweyu v. Omuto (1990-1994) EA 284** and **Mbira v Gachuhi (2002) 1 EALRr 137** in further support of her case.
17. The defendant filed submissions dated 16th July 2025, in which he acknowledged that the law on adverse possession is as stated/espoused in the cases cited by the plaintiff and made further reference to the case of **Mtana Lewa v Kahindi Ngala Mwagandi (2015) eKLR**. He submitted that the plaintiff's claim for adverse possession should fail because of inadequate proof of the tenets of adverse possession espoused in the case of *Mtana Lewa supra*.

18. The defendant submitted that time for purposes of adverse possession could not have begun running in favour of the plaintiff in 2008 because the actual occupant of the suit property was the plaintiff's father; that the plaintiff's allegation that she took possession of the suit property in 2008 is unproven and that the plaintiff's father took possession of the suit property after the defendant had permitted him temporary possession on account of their friendly relations. The defendant further submitted that it was understood between the plaintiff's father and him that the permission would not dislodge his ownership of the suit property.
19. The defendant lamented that the plaintiff's father acted contrary to the arrangement they had by erecting structures on the suit property.
20. The defendant asserted that it was the plaintiff's father who was in actual possession at the time and not the plaintiff.
21. The defendant maintained that the possession was with his permission, hence incapable of forming

the basis of the plaintiff's claim for adverse possession of the suit property.

22. Based on gazette notice number 5374 published in respect of Kabarnet High Court Succession Cause E1 of 2024 regarding the estate of the plaintiff's father, the defendant stated that the plaintiff's father died in 2021.

23. Maintaining that it is the plaintiff's father who was in use and occupation of the suit property, the defendant submitted that the plaintiff cannot rely on her father's occupation of the suit property to buttress her case. The defendant further submitted that the plaintiff did not institute the suit as an estate administrator but filed the suit in her own name; that the plaintiff is unknown to the defendant as any dealings he had were with the plaintiff's father.

24. On whether the plaintiff is entitled to the orders sought, the defendant maintained that the plaintiff's claim is insufficiently proven and urged the court to dismiss her suit with costs to him.

Analysis and determination

25. I have carefully read and considered the cases urged by the parties. The plaintiff's case is that she has enjoyed exclusive possession for over 12 years hence she has acquired title to the suit property on account of having been in adverse possession thereof.
26. The defendant denies the plaintiff contention that she has acquired title to the suit property on account of having been in adverse possession thereof. The defendant contends that it is not the plaintiff who has been in use of the suit property but her father, now deceased, whom he gave temporary permission to occupy and use the suit property.
27. Having read and considered the evidence adduced in this suit, regarding the plaintiff use and occupation of the suit property and the defendant's contention that it is the plaintiff's father who was in use of the suit property and not the plaintiff, I do find that the defendant has not proved that it is the plaintiff's father as opposed to the plaintiff who was in use and possession of the suit property. The

defendant also failed to prove that the possession and use of the suit property by the plaintiff was on account of the permission allegedly granted to the plaintiff's father.

28. The circumstances of this case point to a case of discontinuance of use of the suit property by the registered owner leading to possession and use of it by the plaintiff in a manner adverse to the defendants interests therein. In **Titus Mutuku Kasuve v Mwaani Investments Ltd & 4 others (2004) e KLR**, the Court of Appeal quoted with approval the decision in the case of **Wanje v. Saikwa (No.2) (1984) KLR** 284 thus: -

“...Section 38(1) of the Limitation of Actions Act chapter 22 laws of Kenya authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of registered proprietor.”

The court further held: -

“In order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition”.

29. There being no evidence adduced by the defendant capable of controverting the evidence adduced by the plaintiff concerning the time she entered in the suit property, her peaceful use and occupation of it, I am satisfied that the plaintiff has made up a case of being declared the owner of the suit property on account of having been adverse possession thereof.

30. Arising from the foregoing, I find and hold that the plaintiff has proved her case on a balance of probabilities and I allow her suit in terms of prayer 1, 2, 3 and 4 of the originating summons/plaint.

31. Regarding costs of the suit, I order each party to bear their own costs of the suit as condemning the defendant to pay costs of the suit, in the circumstances of this case, would be tantamount to compounding the prejudice the defendant has suffered on account of his lack of diligence in use and protection of the suit property leading to it being acquired by the plaintiff on account of being in adverse possession thereof.

32. Orders accordingly.

Dated, signed and delivered virtually at Iten this 13th day of October, 2025.

**L. N. WAITHAKA
JUDGE**

Judgment read virtually in the presence of;-

Mr Kiptoo for the applicant/plaintiff.

Ms Mvati h/b for Biko for the respondent/defendant.

Court Assistant; Ian.