

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE (OS) NO. E011 OF 2023

SAMWEL GITIRO
CHACHA.....PLAINTIFF
VERSUS
JOHN MWITA KOROSO.....
DEFENDANT
JUDGEMENT

1. By way of Originating Summons dated 25th March 2023, the Plaintiff sought the following reliefs;

- 1. Whether the applicant Samwel Gitiro Chacha has been in open and continuous occupation of 6 ½ acres of land parcel No. Bukira/Bwisaboka/7138 now Bukira/Byvisaboka/7156 & 7757 having bought the same from the respondent on 31.10.1995, and settled thereon for over 12 years.**
- 2. Whether the applicant Samwel Gitiro Chacha has acquired title by Adverse Possession of all that parcel of land measuring approximately 6 ½ acres out of land parcel no. Bukira/Bwisaboka/7138 now Bukira/Bwisaboka//7156 & 7757 which are registered in the name of the respondents.**
- 3. Whether the respondent's title to 6 ½ acres out of land parcel no Bukira/Bwisaboka//7138 now Bukira/Bwisaboka/7156 & 7757 has been extinguished by effluxion of time.**

- 4. Whether the respondent should pay the costs of this originating summons.**
- 5. Whether land parcel no. Bukira/Bwisaboka/7138 now Bukira/Bwisaboka/7156 & 7757 should be sub-divided and a portion of 6 ½ acres whereof the applicant resides be given a new number and a title deed issued in his name.**
2. The Originating Summons was premised on the grounds on its body, and the averments of the Plaintiff in the Affidavit he swore in support of Summons.
3. The Plaintiff, in the Supporting Affidavit, deposed that on 31st October, 1995, he bought 6 ½ acres of land from the 1st Respondent where he paid the full purchase price of 20 heads of cattle. He annexed a copy of the sale agreement as SGC 1. Further, he took possession upon payment of the purchase price and has been in occupation of the 6 ½ acres parcel for over 12 years.
4. The Plaintiff deposed also that the 1st Respondent later subdivided land parcel **Bukira/Bwisaboka/7138 into Bukira/Bwisaboka/7156 & 7757** and transferred Bwisaboka/7757 to the 2nd Defendant.
5. He swore that the Respondent's title to the 6 ½ acres got extinguished by effluxion of time at the expiry of 12 years that was after October, 1995.
6. He urged the court to declare him as the owner of the 6 ½ acres out of Bukira/Bwisaboka/7138 now Bukira/Bwisaboka/7156 and 7757. He also urged the court to order that survey be done and a number and title deed to the 6 ½ acres be issued to him.

7. The Defendant did not enter Appearance or file any Response, despite having been served on several occasions. That did not dispense with the requirements of the law of evidence, particularly, Section 107 of the evidence Act which requires that he who alleges the existence or nonexistence of a fact should prove it unless the law shifts the burden from him. This is important because whoever desires that a court makes a finding in his favour on the existence or non existence of certain facts must prove that they either exist or do not exist as he alleges.

The Plaintiff's Evidence

- 8.** The Plaintiff testified as PW1. He adopted the depositions in his Supporting Affidavit as his evidence in chief. He marked and produced in evidence his documents as P-Exh1-4.
- 9.** He testified that he had lived on the suit land for 29 years. He had since developed it. He urged the court to order that he be issued with the title to the land.
- 10.** Joseph Marwa Muniko, a retired chief of Bukira Location, testified as PW2. He testified that he knew the Plaintiff and Defendant. Further, he knew that they entered into an agreement dated 31st October, 1995, at his then office.
- 11.** It was his testimony that he took possession of the land from 1995 to date. He had since built a house on it. Also, he cultivated the suit land.
- 12.** The Plaintiff thereafter closed his case.

Submissions

- 13.** Learned counsel for the Plaintiff filed his submissions dated 18th November, 2024. By them he gave the background of the case. He identified three issues for determination. The first

one was whether he had been in occupation been in peaceful, open, continuous and uninterrupted for over 12 years. He relied on **Section 38(1) and (2)** of the **Limitation of Actions Act** and the Court of Appeal case in **Titus Mutuku Kasuve V Mwaani Investments Limited & 4 Others 1KLR 1984.**

- 14.** It was his submission that the Plaintiff had provided sufficient evidence that he had been in open and exclusive possession of the suit land without any interruption for over 12 years. He submitted that there was evidence of crop damage assessment report dated 12th April, 2023 together with a valuation report from Kenya Forest Office-Kuria East/West.
- 15.** He relied on the **Civil Appeal case No. 10 of 1982 Sisto Wambugu V Kamau Njuguna [1983] eKLR.** He submitted that the Plaintiff has been in actual and constructive occupation of the suit land. He also submits that his evidence was not challenged.
- 16.** The second issue was whether he proved his case on a balance of probability. While submitting in the affirmative, his learned counsel submitted that the Plaintiff produced photographic evidence that confirmed his occupation on the suit parcel which evidence remained unchallenged. He further submits that the Defendant failed to provide any counter-evidence to dispute the Plaintiff's claim or the legitimacy of his occupation.
- 17.** It was his submission that the Plaintiff satisfactorily discharged his burden of proof and established his case on a balance of probabilities.

18. The final issue was whether he was deserving of the orders sought. Counsel submits in the affirmative and relies on the case of **Wilson Kazungu Katana & 101 Others V Salim Abdalla Bakshwein & Another [2015] eKLR.**

19. In conclusion, he urged the court to order that the Plaintiff be registered as the owner of the suit land by adverse possession.

ISSUE, ANALYSIS AND DETERMINATION

20. This Court has carefully considered the submissions, the parties' pleadings, the law and the evidence. It is of the view that the main issue for determination is whether the originating summons is merited. Attendant to it is who to bear the costs of the Summons.

21. It is trite law that he who alleges must prove. I am guided by **Section 107** of the **Evidence Act** that provides;

(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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

22. Also, Section 109 of the Evidence Act provides as follows;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

23. It was the Plaintiff's case that he had been living in the suit parcel peacefully and uninterrupted for 29 years after having

purchased the same from the Defendant in 1995. The Plaintiff adduced a copy of the sale agreement dated 31st October, 1995 and marked it as PExh-1.

24. The doctrine of adverse possession is founded under **Sections 7, 13, 17 and 38** of the **Limitation of Actions Act**. Further, in order for one to succeed in the claim for adverse possession, a party must prove he had uninterruptedly possessed and occupied the suit land continuously and the Defendant was aware of such. **Section 7** of the 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 or, if it first accrued to some person through whom he claims, to that person. Section 13 “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 this 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. In addition, the case of **Public Trustee V Wanduru Ndegwa [1984] KECA 72 (KLR)** Kneller JA held as follows:

“The position of a vendor and a purchaser of registered land is this. The vendor as the registered

owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.

The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in *Bridges v Mees*, [1957] 1 Ch 475; and Simpson J (as he then was) in *Hosea v Njiru Ors*, [1974] EA 526 (K). The upshot is that although Kamau is the proprietor of this registered land Mrs Muthoni is in possession and actual occupation of it and has been in possession of it for over twelve years so she has rights acquired under the Limitation of Actions Act..."

26. In the instant case, it was the Plaintiff's case that he purchased the suit parcel from the Defendant vide the annexed sale agreement **PExh1**. It is this court's view that time started running from 31st October, 1995 and therefore the 12 years ended on 31st October, 2007. I thus find that the summons is rightfully before this court.

- 27.** It was the Plaintiff's case that he purchased 6 ½ acres of the suit parcel of land. In an endeavor to confirm that indeed it was true, this Court has taken a lot of time perusing and analyzing the form and content of the sale agreement relied on by the Plaintiff.
- 28.** Its contents are that John Mwita Koroso of Bukira East being the owner of parcel No. Bwisaboka/32 had for a total consideration of the sum of 17 cattle "...agreed without any alteration whatsoever to sell part /whole of my/our land of approximately ...acre/hectares of the aforesaid land to Mr. Samwel Gitiro Chacha forever." The land was sold for seven cattle. The 1st instalment of 20 cattle was paid on 31/10/1995. The 2nd instalment was "NIL".
- 29.** It is not in dispute that the said acreage of 6 ½ acres that the Plaintiff alleges to have bought was not captured in the sale agreement or any other material provided to the Court.
- 30.** In the circumstances, it is this court's view that in as much as the Plaintiff proved that he has peacefully occupied the suit parcel he failed to prove a key component of adverse possession: the size or specific area of the land he is in adverse occupation. Thus, this court is inclined not to grant the reliefs sought because it is not certain which acreage the sale agreement was for. It is not certain whether the agreement was for less than the whole or the whole of the parcel, and the Plaintiff cannot adduce evidence beyond that which was in the agreement, which is none. Again, it is not shown that indeed all the sum (number of cattle required for consideration) had been paid fully.

31. It was obligatory for the applicant to prove both the size of the suit land he bought and whether, indeed, he ever completed the purchase price. Otherwise, without the latter it is evident that he is not in adverse occupation of the land until the balance of the purchase price is fully paid and acknowledged: absent of it means he is residing on the land with the permission or licence of the owner.

32. The upshot is that the originating summons dated 28th March, 2023 is not merited. It is dismissed with no orders as to costs.

33. Orders accordingly.

JUDGMENT dated, SIGNED and DELIVERED virtually via the **Teams Platform** on this **30th** day of **October 2025**.

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistant: Ms. Lola

Mr. Achola Advocate for the Plaintiff.

N/A for the Defendant