

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT KILGORIS
ELCL (O.S) E016 OF 2024

CARREN CHEMUTAI KOECH (Being a Legal Representative of the Estate of the Late PAULINAH CHELANGAT

ROTUK.....PLAINTIFF

VS.

JOEL KIPRUTO KIRUI
DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 25th November 2024, taken out by Carren Chemutai Koech, who sued as a legal representative of the Estate of the late Pauline Chelangat Rotuk, (hereinafter referred to as **“the Plaintiff”**) The plaintiff sued Joel Kipruto Kirui, (the Defendant) seeking
 - (a)A declaration that the title of the Defendant Joel Kipruto Kirui to the freehold interest in tittle number Transmara/Ntulele ‘B’/212 has been extinguished by the Applicant adverse possession therefore for a period of more than 12 years in terms of Section 17 or 18 of the Limitation of Actions Act.
 - (b)THAT a declaration that the Plaintiff has acquired the freehold interests in land parcel No. Transmara/Ntulele ‘B’/212 by her adverse possession therefore for a period of more than 12 years that is from at least 1960 to date.
 - (c)THAT an order do issue requiring and directing the Transmara Subcounty Land Registrar to register the Applicant Carren Chemutai Koech as the absolute proprietor of land parcel number Transmara/Ntulele ‘B’/212 in place of Joel Kiprutoo Kirui

respectively and in any place of other person succeeding the Respondents.

(d) That This court be pleased to issue a permanent injunction restraining the Defendant by himself, agent, employees and/or servant acting at his behest from disposing and/or in any other way interfering with land parcel title number Transmara/ Ntulele 'B'/212.

(e) That costs of this suit be borne by the Defendant.

(f) That this court be pleased to make any other orders as it shall deem fit to meet the ends of Justice.

2. Directions were issued under Order 37, where at the Originating Summons was converted to a Plaint, and the supporting affidavit as a witness statement, Annexures to the supporting affidavit as Plaintiff's documents, and matter was to proceed viva vole evidence.
3. As the Defendant had filed a Defence and Counterclaim, as opposed to a Replying Affidavit, there was no need for the said conversion while the Response to the statement of defence and Response to Counterclaim were converted to defence and Counterclaim respectively.

Plaintiff's case and Evidence

4. It is the Plaintiff's case that even before adjudication of Ntulele B section her family has been in possession of Transmara/Ntulele 'B'/212.
5. The said possession having been in peaceful and continuous from 1960s to date developed the suit parcels extensively by constructing a home for the family.
6. That the Defendant's rights over the parcel have been extinguished by virtue of the doctrine of adverse possession.
7. P.W.1. The Plaintiff Ms. Carren Chemutai Koech testified. It was her testimony that she had sued on behalf of Pauline Chelangat Rotuk, she had *Ad Litem* and had conducted a search and found that the properly

had been registered to the Defendant. Her mother had lived on the property for over 40 years, and she had lived on suit property formed thereon since the demised of her mother who had been married thereon. The witness adopted her supporting affidavit as part of her evidence in chief.

8. She produced a copy of the *Ad litem* as P.exhibit 1, photographs of the trees as P.exhibit 2 (a-p), copy of certificate of search as P.exhibit 3, letter from the current chief Richard Chesinet as was marked as PMFI.1.
9. On cross- examination, the witness stated that she was born in 1981, and her late husband was the 8th born. Her brothers in-law had passed on, save for a young one. She had been married to the home in 1999, she was not aware when the title deed in respect of Trasmara/Ntulele 'B'/210. She was not aware of the acreage of the Defendants property, she was not aware that the Defendant had made a report about their occupation of the suit property. She confirmed that a title deed of the suit property had been issued in 2011. She indicated that she had not evicted the Defendant from the suit property.
10. She stated that during demarcation in 1988 her mother was living on the suit property, but Joel's (the Defendant's) father was in the demarcation committee and hence the property was demarcated to him. She stated that Kisii ELC had been withdrawn; the Defendant was not her neighbor.
11. On re-examination she stated that the property measured 12 acres, it had not been subdivided into 2 portions.
12. P.W2, Mr. Joel Kiptanui Kirui testified and adopted his witness statements as part of his evidence in chief.
13. It was his further testimony that Transmara/Ntulele 'B'/212 belonged to the Late Pauline Rotukand not Joel Kipruto Kirui, who had never lived on the parcel. The witness did not know how Joel was

allocated the parcel, as Joel lived in Olesakwana adjudication section, and that Joel's father was part of the adjudication committee.

14. On cross-examination, the witness stated that he lived in Ntulele and was not related to Pauline Rotuk but were neighbours with one farm separating them. He was aware of the previous suit that had been filed by Pauline Rotuk at Kisii ELC Case No. 1044/2016 which had been discontinued.
15. The witness indicated that he was not aware why Pauline Rotuk had withdrawn the sued; he was not aware that Pauline Rotuk had another property registered in her name.
16. On re-examination, the witness indicated that the Defendant lived in Olesakwana but he did not his the Defendant's title number on his property. He confirmed that people get varying acreages, He stated that the Defendant has not lived on the suit property and he did not know the Defendant was allocated the suit property, but the Defendant's father had been a member of the adjudication committee.
17. PW3, Richard Cheruiyot equally testified, he adopted his witness statement as part of his evidence in chief and stated that the suit property belonged to the family of Arap Rotuk and was in Ntulele Adjudication Section which borders Olesakwana adjudication section.
18. The witness indicated when the Adjudication was finalized, he was in primary school together with the Defendant and the Defendant could thus not be allocated the suit property as he was in school; and that the Defendant had never lived on the suit property. The developments on the suit property were made by the family of Arap Rotuk family, Arap Rotuk his wife and two daughters in-law and a son were buried on the suit property. He stated that the Defendant had not lived on the suit property and when he claimed the same with the DC no one knew him other than him.
19. On cross-examination by Mr. Bigogo the witness stated that the plaintiff was his neighbour in Ntulele. That he was in school during

demarcation together with the Defendant. On the Defendant's ID the witness stated that the Defendant had not been issued with an ID during demarcation. Demarcation and allocation are based on occupation and school children were not allocated. The Defendant's father lived in Olesakwana but the Defendant's uncle lived in Ntulele and was in the committee.

20. The witness stated in further cross-examination that he did not have the minutes of the DC's meeting and he was not listed as a witness in Kisii Case.

21. On re-examination, the witness stated that he knew the Defendant very well as they schooled and were circumcised together. Birth certificates were not used to allocate. The witness stated that he got his ID in 1991 and the Defendant in 1996 and as adjudication had been completed in 1987, both of them had no ID Cards then.

Defendant's Case and Evidence

22. The Defendant a statement of Defence and Counter-claim in which he pleaded that

(i) the suit was *Resjudicata* in view of a previous suit being Kisii ELC No. 1044/2016 which suit had been withdrawn on 22nd May 2017.

(ii) The suit offended provisions of Section 13 and 38 of the Limitations of Actions Act.

(iii) That the Plaintiff's mother was issued with a title over Transmara/Ntulele 'B'/210 while the Defendant was issued with a title over Transmara/Ntulele 'B'/212, after he was found to be in occupation on Ntulele 'B'/212 during adjudication.

(iv) That the Plaintiff invaded the suit property on 9th November 2018.

(v) In respect of the counter-claim the counter-claim, pleaded that she owned the suit property as a result of first registration, and that the Defendants forcibly evicted the counter-claimer and erected structures thereon.

23. The counter-claimer sought for eviction of the Plaintiff from Transmara/Ntulele 'B'/212
- (I) Permanent injunction to restrain the Defendant in the counter-claimer.
 - (II) Costs of the counter-claim and interests thereon.
24. The Defence called 3 witnesses. DW1, Mr. Benjamin Kipkanii Chepkwony a retired chief of Emurua Dikirr location gave evidence. He confirmed authoring a letter dated 28.08.2012 (D.Exhibit No. 1) to Mr. Boniface Koech, son of Pauline Rotuk to stop trespassing on the suit land; Transmara/Ntulele 'B'/212.
25. On cross-examination, the witness stated that he had been an Assistant Chief and Chief of Emurua Dikirr from 1995. He confirmed that as at the time of demarcation the Rotuk family lived on the suit property, he indicated that Boniface Koech had demolished a house on the suit property; that the Defendant's father had resided on suit property together with the Defendant.
26. After authoring D.Exhibit 1, he forwarded the letter to the D.O but did not follow up. He confirmed that no criminal charges nor civil suit was filed against family of Rotuk. The witness stated that he was interdicted in 2007 but retired in 2018.
27. In re-examination, the witness stated during demarcation all people on the ground were allocated including Pauline Rotuk and Joel Kirui whose house was demolished by Boniface Koech.
28. D.W2, the Defendant stated that the Plaintiff lived on his property and is the daughter in-law of Pauline Rotuk who is deceased.
29. The witness stated that the late Pauline Rotuk had a property adjacent to his property and another property known as Transmara/Ntulele 'B'/466. That her property Transmara/Ntulele 'B'/210 was bigger than his property.

30. On cross-examination, the witness stated that adjudication of Ntulele B was done in 1988 when he was 18 years. He had an ID Card which was issued in 1996.
31. He stated that he was born in Kapsasian ward while the suit property was in Ilkerin ward but he had clan members who lived in the said village. Adjudication was done randomly. He stated that he dropped out at class 8. He knew Mr. Kibilo Barketet who was in the adjudication committee and was his uncle. The witness did not have photographs. On the Kisii case, Pauline did not file a consent and he was not aware that the Kisii case was withdrawn. The witness stated that he lived in Chepbuluk where he was born.
32. On re-examination, the witness stated that he had tried arresting Boniface Koech, that Mr. Kibolok Barteklet was a brother to his father but did not favour him during adjudication. Adjudication was done in 1988 but he was given title in 2011, he said the Plaintiff were trespassers, he stated that he lived in Chepbuluk while the property was in Ntulele because he could live and work anywhere.
33. D.W.3 Inspector Stephen Mulumba testified, he stated that he was the Deputy O.C.S in Emurua Dikirr police station and that he was aware of O.B No. 9/11/10/2018 which was received from Joel Kipruto Kirui which related to forcible detainer against Boniface Korir who had erected a grass thatched house on Transmara/Ntulele 'B'/212. The O.C.S had referred the complaint for a civil redress.
34. On cross-examination, the witness stated that Joel resided in Chepbul in Kapsasina ward, the witness was not aware where the property was, he did not visit the suit property as the matter was referred to a civil remedy. The report did not indicate that Mr. Kipruto was in occupation of the suit property.
35. On re-examination, the witness indicated that Mr. Kipruto reported forcible detainer, thus he took steps to have the plaintiff prosecuted. If he was the O.C.S, he would have recommended

prosecution with the testimony of her 3 Defence witnesses. The Defence case closed.

36. Parties were directed to file submissions.

Plaintiff's Submission

37. The Plaintiff framed and submitted on two issues for determination

(i) Whether the Plaintiff's possession and occupation of the suit property was adverse to the Respondent's title and proprietary interests.

(ii) Whether the relief sought be granted.

38. The Plaintiff placed reliance on Richard Wefwafwa Songoi Vs. Ben Munifywa Songoi and the decision in Mtana Lewa Vs. Kahindi Ngala Mwangandi and submitted that the Plaintiff had proven the principles as set out in the said cases, the plaintiff having lived on suit land even before adjudication.

39. On dispossession the Plaintiff relied on the decision in the case of Sisto Wambugu Vs. Kamau Njuguna and Samwel Kihamba Vs. Mary Mbaisi.

40. The Plaintiff urged the court to allow her claim.

Defendant's Submission

41. The Defendant submits that the Plaintiff's admission of the existence of the previous suit to wit, Kisii ELC Originating Summons No.1044 of 2016, withdrawn on 22nd of May 2017 made their stay on suit property for about 7 years to the time of filing of this suit on 4th of December 2024, hence, the 12 years period for adverse possession claim to be made had not crystallized.

42. The Defendant allege that the Plaintiff did not provide evidence of fraud hence fraud was not proved and the plaintiffs were thus trespassers.

43. The Defendant placed reliance on section 24-26 of the Land Registration Act of the indefeasibility of the title once it is registered.
44. The Defendant placed reliance on the testimony of D.W.1 Mr. Benjamin Chepkwony on the fact that the Defendant was a resident of his jurisdiction and an occupant of the suit property.
45. The Defendant further submits that the Plaintiff failed to prove the ingredients of adverse possession as set out in Daniel Kimani Ruchure Vs. Swift Rutherford & Co. Ltd.
46. The Defendant relying on the issue of invasion of the suit property by the Plaintiff's relative and the report made to the chief and police station interrupted the peaceful and quiet possession and that time started running after the withdrawal of Kisii ELC No. 1044/2016 on 29th October 2017 hence, the period for adverse possession had not crystallized. The Defendant sought for the dismissal of the case.

Issues for Determination

47. Having analyzed the pleadings, gone through the evidence and testimonies of the witness as well as the submissions by the counsels for the parties, and considered the law the court frames the following as issues for determination.
48. A jurisdictional issue arising from the statement of Defence and counterclaim raises three issues
 - (i) whether or not the suit is competent in view of the plea that
 - (a) Suits offends Section 7 of the Civil Procedure Act,
 - (b) Offends the provisions of Section 13 and 38 of Limitation of Actions Act.
 - (c) Offends Section 7 (d) of Land Act.
 - (i) Whether the Plaintiffs claim has been proven or whether the Defence and Counterclaim is merited and should be upheld?
 - (ii) What reliefs ought to issue
 - (iii) Who bears the costs of the suit.

Analysis and Determination?

49. On issue 1 (a) the Defendant by pleading that the suit offends Section 7 of the Civil Procedure Act is essentially stating that the suit is *Resjudicata*. In view of the previous suit, to wit, Kisii ELC case No. 1044/2016 between the same parties Pauline **Rotuk vs Joel Kipruto Kirui.**
50. The Defendant produced the pleadings in relation to the previous suit; indeed, there was a previous suit filed by Pauline Chelangat Rotuk vide an O.S in which she claimed adverse possession of this suit parcel. The said suit initially been filed before the High Court at Kisii being Kisii ELC No.497 of 2012, before the establishment of the ELC where it was numbered Kisii ELC No.1044/2016.
51. The Defendant produced a copy of an order dated 25th July 2017, which lady Justice J.M Onyango recorded the withdrawal of the Kisii ELC suit. It follows therefrom that the Kisii ELC suit was not heard on its merit and hence the requirement that there is a judgment on merit for *Resjudicata* to operate was not fulfilled.
- It follows therefrom this suit is not *Resjudicata* to operate the court in John Maritime Florence Services Limited and Another Vs. Cabinet Secretary and Transport and Infrastructure 2021 (KESC) 39 where the court held *inter alia*
- “for the doctrine to apply the following must be demonstrated**
- (a) There is a former judgment or order which is final.**
- (b) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties.**
- (c) There must be between the first and second suits, identical parties, subject matter and cause of action”** stated the following element must be proven.
52. Issue number 1 (a) is therefore answered in the negative, this suit does not offend Section 7 of the Civil Procedure Act.

53. The court proposes to deal with issue No. 1 (b) together with issue No .2, while with regard to issue no.1 (c) as to whether the suit offends Section 7(d) of the Land Act.

54. Section 7(d) of the Land Act provides “Title to land may be acquired through

(a) Allocation

(b) Land adjudication process.

(c) Compulsory acquisition.

(d) Prescription.

(e) Settlement programs.

(f) Transmissions

(g) Transfers.

(h) Long-term leases exceeding 21 years created out of private land.

(i) Any other manner prescribed in Act of Parliament

55. The Defendant pleaded that the suit offends section 7(d) of the Land Act. Acquisition of Land through prescription.

56. Acquisition of land through prescription was recognized by the Court of Appeal in Lewa Vs. Mwagandi (Civil Appeal No. 56/2014) 2015 (KECA 532 KCR, whereat paragraph 48 the court held as *interalia* as follows

“48....The essence of adverse possession under the Limitation Actions Act, is that the registered proprietor of land is prohibited from bringing an action to recover land after 12 years from the date when the cause of action accrued. Upon the expiry of that period the proprietor’s title to the land is extinguished by operation of the law and any person who has been in occupation of the land peacefully, openly and as of right for the prescribed period is entitled to bring an action in the High Court to be declared the owner of the land”. Since the Plaintiff as the Adverse possessor seeks to claim ownership by prescriptive rights, which is recognized under Section 7(d) of the Land

Act as way of Land Acquisition, the averment that the suit herein offends Section 7(d) does not hold water, and the same fails. In answer to issue No. 1(c) the same in the negative.

57. The court shall embark to answer issue No. 1(b) together with issue number (ii). Does the suit herein offend Section 7 and 38 of the Limitation of Action Ac. The Defendant position is that time for adverse possession starting running in 2017 after the withdrawal of the Kisii ELC Case No. 1044/2016.

58. The Plaintiff's Submissions are silent on this. Although the Plaintiffs started their occupation of suit by Pauline Rotuk and her family started before the adjudication. Time could only run in favour of an adverse possessor from 5th of April 2011, when the suit property was firstly registered; after the adjudication.

59. It follows therefrom that from April 2011 to the time the suit was filed in December 2022, the 12 years period had crystalized and the averment that the suit offended Section 7 and 38 of the Limitations of Actions Act, having filed before the said lapse of 12 years equally fails, and the court answers issue number 1(c) in the negative.

On issue number 2, the court shall analyze whether the Plaintiff proved the elements of adverse possession as were summarized in the recent decision by the Court of Appeal from various *dictas* as was held in the decision in the case of Andafu Vs. Akhuoya where the court held; **“33. Courts on the other hand have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession, the leading cases from this court in this regard include Titus Mutuku Kasuve Vs. Mwaani Investments Limited and 4 Others 2024 eKLR, Titus Kigori Munyi Vs. Peteru Mburu Kimani Civil Appeal No. 28/14, and Karuntuli Ranj Mumkinya 2013 eKLR, 34. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be;**

(a) Adverse to the interests of the owner meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognised superior claim of another.

(b) Actual as opposed to constructive possession where the test is in the degree of actual use and enjoyment of the parcel involved by the claimant or his agent, tenant or licence.

(c) Open and notorious, meaning the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owners right are being invaded. Differently put the possession must be manifest to the community.

(d) Without force - meaning that the possession and occupation must have been aliened peacefully not through actual or threatened violence.

(e) Exclusive, meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put the claimant must demonstrate that she wholly excludes the owner from possession for the required period.

(f) Continuous and uninterrupted for the period of 12 years - meaning that the owner did not enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years....”

60. The court shall now examine whether the elements have been proven.

61. On the statutory time, the court has found that time started running on 5th of April 2011, when the Defendant was registered the proprietor of Transmara/Ntulele B/212.

62. Did time stop running for adverse possession, either because of the Kisii ELC Case No.1044/2016 up to the time of its withdrawal or by any action of the Defendant to assert his rights over the suit property?

63. From the pleadings relating to Kisii ELC Case No. 1044/2016, the DW2 produced the pleadings thereof as D.Exhibit No. 2 of particular interests is the statement Defence filed therein.
64. In that 26 paragraph defence dated 30th of July 2013, the Defendant therein who is the Defendant herein did not plead a counter-claim in respect of the suit property Transmara/Ntulele B/212.
65. The significance of the defence is that although the Defendant pleaded at paragraph 10 thereof that he was in possession of the suit land, having filed the defence he becomes aware of the Plaintiff's occupation of the suit property, from at least when the suit was filed against him, on 30th October 2012.
66. This leads to the second question as to whether the report to the Aea Chief and the police by the Defendant was an assertion by the Defendant's of his rights over the suit property?
67. In Mwangi Githu Vs. Livingstone Ndeete 1980 (eKLR) the court of Appeal gave scenarios in which time stopped running for purposes of adverse possession the court held *inter alia*
"Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice cannot be effective assertion of right for the purpose of stopping time under the Limitation of Actions Act."
68. D.W.1 Produced D.Exhibit 1, a letter authored by the Chief dated 28.08.2012, this letter was a quit notice, in which the chief informed the D.O that he had told Mr. Boniface Koech to leave the suit property but had not done so and the letter was thus notifying the D.O to take further action.
69. The Defendant reported to the police and an O.B extract was produced. No investigation and or Criminal Proceedings were taken

against Mr. Koech, in fact a Civil remedy was recommended. It follows that from the letter and report, the Defendant did not assert his rights as the quit notice was ineffectual and no legal proceedings were commenced. (see also Benson Mukuwa Wachira Vs. Assumption Sisters of Nairobi, Njuguna Ndatho Vs. Masai Itumo and w Other and Paul Kamande Vs. Jacob Kiayua Kiragu (2018) (eKLR)). Had the Defendant filed a counter-claim together with his defence in the Kisii ELC Case, then he would have commenced legal proceedings capable of stopping the time for purposes of adverse possession.

70. Hence from the time the Defendant was issued with the title to his property, time started running and by the time the Plaintiff filed suit the 12-year period had crystalized as the Defendant did not take action to assert his rights and stop time from running.
71. The court finds that the 12 year period was proven.
72. On Actual possession, All the witnesses including the Defendant confirmed that the Plaintiff and her family were in actual possession of the suit property, this element was thus proved.
73. On open and notorious occupation, P.W.2 and P.W.3 testified that they knew the Plaintiff openly hence this element was proven.
74. The entry started in the 1960s and was without force on the part of the late Pauline Rotuk, her descendants had also lived thereon peacefully. The report made to the police was not an Arson or Malicious damage claim but was a forcible detainer claim, hence there was no proof of entry by force made³ on suit property by the Plaintiff.
75. The Plaintiff thus proved that their entry was without force.
76. The Defence admitted living in a different suit parcel, hence the suit parcel is under the Plaintiffs and her family exclusive possession. The Plaintiff thus proved this element.
77. Turning on the defence and the counter-claim, the defence was mainly that the suit was prematurely filed in counter-claim of Section 7

and 38, had been addressed thereon. The counter-claim for the suit property was filed on 15th of January 2025.

78. The period for adverse possession had crystalized on or about 4th April 2023, and the counter-claim is thus time barred, since the right to file a suit for recovery of the suit property accrued to the Defendant when he became registered on 5th April 2011, counter-claim was filed on 15th January 2025, more than 12 years and contrary to Section 7 of the Limitation of Actions Act. In a nutshell the Defence and counter-claim as filed cannot be upheld.

79. On the contrary the Plaintiff has proven the elements of adverse possession as earlier analyzed and has discharged the burden of proof under Sections 107 109 of the Evidence Act.

80. On a balance of probability, the court finds that the Plaintiff has proven her case and answers issue No. 1 in the affirmative.

81. On what reliefs ought to issue, the Plaintiff having proven her case is entitled to the declaratory prayers sought in the Originating Summons dated 25th of November 2024.

Disposition

82. Accordingly, Judgment be and is hereby entered in favour of the Plaintiff in terms that

(i) The Defendants interests and title over Transmara/Ntulele B/212 is hereby declared to be extinguished under Section 38 of the Limitation of Actions Act, and his title is hereby cancelled.

(ii) The Plaintiff has acquired title and interest over Transmara/Ntulele B/212 by virtue of the doctrine of adverse possession and is entitled to be registered as an owner thereof on Behalf of the Estate of Pauline Chelangat Rotuk.

(iii) The Land Registrar to register the Plaintiff herein as the new proprietor on behalf of the Estate of Pauline Chelangat Rotuk within 90 days from today.

(iv) Costs of the suit are awarded to the Plaintiff.

Dated at Kilgoris 2nd day of March, 2026

Hon. M.N. Mwanyale
Judge

In the presence of

CA - Sylvia/Sandra/Clara

Mr. Bigogo for the Defendant

Mr. Kiprotich for the Plaintiff