



**Maroa v Seria (Sued as the Legal Representative of Seria Boroye Sinda – Deceased) (Enviromental and Land Originating Summons E026 of 2021) [2024] KEELC 5099 (KLR) (31 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 5099 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E026 OF 2021  
MN KULLOW, J  
JANUARY 31, 2024**

**BETWEEN**

**STEPHENE WAIKENA MAROA ..... PLAINTIFF**

**AND**

**SAMWEL WILSON SERIA (SUED AS THE LEGAL REPRESENTATIVE OF SERIA BOROYE SINDA – DECEASED) ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein commenced this suit by way of an Originating Summons dated 29<sup>th</sup> June, 2021 against the Defendant seeking a determination of the following ISSUES: -
  - i. That the rights of the Defendant to recover a portion of land parcel No. Bukira/ Bwisaboka/77 measuring 8 Acres is barred under the provisions of *Limitation of Actions Act* and the Defendant’s title thereto is extinguished on the grounds that the Plaintiff has been in open, peaceful, quiet, uninterrupted and continuous possession and occupation thereof for a period of more than 18 years hence this court ought to make a declaration accordingly.
  - ii. That having been in such occupation and possession of the portion of the suit property in the manner aforesaid, the Plaintiff’s interest in the suit property amounts to an overriding interest as envisaged under the provisions of the *Land Registration Act* and merits registration and the court ought to make a declaration accordingly.
  - iii. That this Court therefore, upon finding that the title to the Defendant over a portion of the suit property measuring 8 Acres has been extinguished by effluxion of time, does issue an order for the subdivision and transfer of the said portion to the Plaintiff.
  - iv. That there be an Order or Permanent Injunction restraining the Defendant (erroneously indicated as the Plaintiff) by himself, his agents, his servants, employees, family members or any



person claiming under him or acting with his express and/or implied authority from alienating, transferring, entering, re-entering, trespassing onto, disposing off in any way or interfering with the Plaintiff's possession, occupation and quiet enjoyment of the portion of the suit property measuring 8 Acres.

- v. That in furtherance of the issues herein and in default of the Defendant executing such requisite documents and/or instruments to effect the subdivision and transfer of the portion to the Plaintiff, the Executive Officer of this Court be directed to so execute the said documents and instruments.
  - vi. That the costs of these proceedings be borne by the Defendant.
2. The Originating Summons is premised on 11 grounds thereon and on the Plaintiff's Supporting Affidavit sworn on even date. He avers that sometimes around 28/5/2002; he entered into an Agreement for the sale of a portion of the suit parcel measuring approx. 8Acres with one Wilson Seria Boroye (the Defendant's father) for a consideration price of Kshs. 140,000/= which was paid in full.
  3. It is his contention that at the time of the said sale, the suit parcel measuring 40.0Ha in total was registered in the name of Siriria Boroyi (the Defendant's grandfather). Upon execution of the sale agreement, he took immediate vacant possession of the purchased portion measuring 8 Acres and has remained in occupation thereof to date.
  4. However, despite the Defendant's father duly executing the sale agreement in his favor, he did not take any steps to have the portion purchased transferred to the Plaintiff, no consent of the Land Control Board to transfer the said portion was obtained within the requisite period. Be as it may, he has continued to occupy the said portion since the year 2002 to date and neither the deceased nor the defendant took any steps to interfere with his possession and occupation of the said portion.
  5. It is his claim that the defendant is the Administrator of the estate of his late father Sereria Boroye Sinda, the grant has been confirmed and a Certificate of Confirmation of Grant issued to that effect. The Defendant has however refused to transfer the said portion to him.
  6. He thus maintained that having been in occupation of the suit land, extensively developing the same, putting up structures and carrying on farming activities on the said portion for a period of more than 18 years, the Defendant's title thereto has been extinguished by effluxion of time and his right to recover the same is barred pursuant to the provisions of section 38 of the Limitation of Actions Act. That consequently, he has acquired prescriptive rights over the said portion and thus urged the court to allow the suit and grant the orders sought.
  7. The Respondents entered Appearance through the firm of Ezra Odoni Awino & Co. Advocates and filed a Replying Affidavit sworn on 4<sup>th</sup> August, 2021 by the Defendant. He confirmed that he is the Administrator of the estate of the late Seria Boroye Sinda and holds a Certificate of Confirmed Grant vide Succ. Cause No. 721 of 2014.
  8. It is his claim that one Wilson Seria Boroye (2<sup>nd</sup> deceased) was not an Administrator of the estate of Siriria Boroye Sinda and thus he had no capacity to deal and/or sell any portion of the suit parcel No. 77 which comprised the estate of the 1<sup>st</sup> deceased Seria Boroye Sinda. He thus dismissed the dealings by the 2<sup>nd</sup> deceased of selling a portion of the suit land as amounting to intermeddling with the estate of a deceased person contrary to section 45 of the Laws of Succession Act.
  9. It was further his contention that any occupation of any portion of the suit land has been met with hostility by virtue of the several cases instituted against the Plaintiff to wit, Migori ELC Case No. 3 of



2017, Kehancha PM Court Criminal Case No. 676 of 2015, Criminal Case No. 795 of 2014, Criminal Case No. 717 of 2014 and Criminal Case No. 475 of 2013.

10. He therefore maintained that the Plaintiff is not entitled to benefit under the doctrine of adverse possession and urged the court to dismiss his case with costs. The Defendant however filed a Notice to Act in Person dated 13<sup>th</sup> December, 2022.

### **Trial**

11. The Plaintiff's case proceeded for hearing ex-parte on 4.7.2023, the Plaintiff testified as PW1 and thereafter closed his case. He adopted his witness statement and Supporting Affidavit as his evidence in chief.
12. He produced the documents annexed to his supporting affidavit as Plaintiff Exhibits 1 – 5 as follows; copy of the Green Card of parcel No. Bukira/ Bwisaboka/77 as Pexh. 1, copy of the Grant of the Letter of Administration Intestate as Pexh. 2, Copy of the Certificate of Confirmation as Pexh. 3, copy of the sale agreement dated 28/5/2002 as Pexh. 4 and bundle of photographs of the developments on the suit parcel No. 77 as Pexh. 5. He urged the court to grant him the orders sought.
13. The Defendant, who is acting in person, despite being served with the hearing date and an Affidavit of Service duly filed to that effect, failed to attend court or send a representative to prosecute his case. His case was therefore deemed closed.
14. Upon close of the defence case, I issued directions on the filing of submissions. Only the Plaintiff filed his submissions which I have read and considered.

### **Analysis and Determination**

15. I have reviewed the pleadings herein, the respective exhibits and parties' rival submissions in totality and it is my considered opinion that the following issues arise for determination: -
  - a. Whether the Applicants have sufficiently proved their claim on Adverse Possession.
  - b. Whether the Applicants are entitled to the reliefs sought.
16. Sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and Section 28 (h) of the [Land Registration Act](#) provides the statutory framework for the doctrine of adverse possession.
17. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -

“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, it 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 or under the licence 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](#).....”
18. The requirements for a claim of adverse possession are now well settled; the land in question must be registered in the name of a person other than the claimant, the claimant must demonstrate that he took possession of the parcel of land, asserted his rights over it in an adverse manner to the title of the land owner and the said title holder did not take any precipitate action against the said claimant for a period



of 12 years. Lastly, he must then demonstrate that his possession and occupation of the said land was not by force or under the licence of the land owner and that the said possession was open, in continuity for an uninterrupted period of over 12 years.

19. A claimant must also establish the date he took possession, the nature of his possession, the duration of his possession and whether the same was open and uninterrupted for the 12 years' statutory period. See Court of Appeal decision in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR)
20. I will now proceed to analyse the various exhibits produced by the plaintiff vis a vis the necessary requirements to be proved in a claim of adverse possession. The first ground to be proved is that the suit land must be registered in the name of a person other than the plaintiff. The registration and ownership of the suit parcel is not in question, the plaintiff acknowledged that the land is owned by the defendant; the same was originally registered in the name of the defendant's grandfather but has since been transferred vide transmission in Succ. Cause No. 721 of 2014 and the same has since been registered in the name of the defendant. The plaintiff produced a copy of the Green Card of the suit land No. 77 as Pexh. 1. This fact was further confirmed by the defendant in his Replying Affidavit.
21. The next issue for determination is that of possession of the suit land. As earlier pointed out, the onus is on the plaintiff who is alleging the occurrence of an event to demonstrate the duration and nature of his possession and whether the same accrued any prescriptive and overriding rights over the suit land, capable of registration.
22. The plaintiff contends that he took possession of a portion of the suit land measuring approx. 8Acres in the year 2002, pursuant to a sale transaction between himself and Wilson Seria Boroye for the portion measuring 8Acres, he produced a copy of the Sale Agreement dated 28/5/2002 as Pexh. 4 in support of the said averments. The Defendant denied the said averments and maintained that the late Wilson Seria Boroye, who is his father, lacked the requisite capacity to enter into a sale agreement with the plaintiff for the reason that he did not have the requisite Grant of Representation to the estate of his grandfather – Siriria Boroye Sinda. It was thus the defendant's contention that the acts by the late Wilson Seria Boroye and the plaintiff amounted to intermeddling with the estate of the deceased Siriria Boroye Sinda contrary to the provisions of the Succession Act. He further averred that the plaintiff's occupation of the suit land has been met with hostility.
23. It is well settled that in a claim for adverse possession, possession must be non-consensual or non-permissive and not by the licence of the land owner. Pexh. 4 which is a copy of the sale agreement signifies that the plaintiff's entry into the suit land was by the consent and permission of the land owner. Even though the defendant averred that the vendor- Seria Boroye Sinda lacked the requisite capacity to sell the said portion for lack of Grant of Representation of the estate of the late Siriria Boroye Sinda, I must however point out that the validity of the said sale agreement is not an issue for determination in the instant claim for adverse possession and this court will only refer to the same as proof of the plaintiff's entry into the suit land.
24. Permissive possession is inconsistent with adverse possession; therefore, the plaintiff is duty bound to demonstrate how and when his possession ceased to be permissive and became adverse. The court in the case of *Jandu v Kirpal* [1975] EA 225 held that possession does not become adverse before the end of the period for which permission to occupy has been granted.
25. Guided by the decision above; I am of the considered view that even though the plaintiff's entry into the suit land was by consent and with the permission of the land owners, time for adverse possession started to run upon the expiry of the license period.



26. In the instant case, the sale agreement was entered into in the year 2002. However, the defendant's father, the late Wilson Seria Boroye, did not make/ initiate any steps to have the 8 Acres portion purchased to be transferred to the plaintiff. He did not obtain the requisite Land Control Board Consent within the requisite period, which at the time of making the contract was 6 months. Failure to obtain the said Consent within the strict timelines thus made the agreement void upon lapse of the 6 months. Time for adverse possession thus started running in November, 2002 and crystallized in November, 2014. At the time of filing the instant suit, the plaintiff had been in possession and occupation for a period of 19 years, which is in excess of the 12 years' statutory period.
27. Even though the defendant averred that the plaintiff's occupation and use of the suit land has been met with hostility by virtue of several cases filed against the plaintiff, it is imperative to point out that the defendant did not attend court to prosecute his case, no exhibit was adduced into evidence to support the said averments. Further, there was no evidence that the plaintiff had been evicted or his occupation of the suit land interrupted.
28. Lastly, the plaintiff must demonstrate whether the said possession and use of the suit land was adverse to the rights of the defendant over the same land. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR)
29. The plaintiff produced Pexh. 5 as proof of his occupation and use of the suit land; he has put up structures and is carrying out farming activities. This evidence was not challenged or controverted by the defendant. Thus, Pexh.5 is the actual reflection of the status of the suit land and the same confirms that the plaintiff is in actual possession of the suit land.
30. Adverse possession is a fact to be observed upon the land and not on the title. Therefore, even though the original land No. 77 has since been transferred and registered in the name of the defendant by virtue of transmission; any subsequent registration from the name of Siriria Boroye Sinda did not affect and/ or interrupt the plaintiff's occupation and use of the said land. At the time of the said registration vide transmission in the year 2016, the plaintiff had already acquired prescriptive and overriding rights over the property, which rights were adverse to the defendant's rights and are capable of registration.
31. The totality of the foregoing is that the plaintiff has sufficiently demonstrated that he has acquired prescriptive rights over the portion of the suit parcel measuring 8 Acres by virtue of his occupation and use of the suit land and has proved his claim on a balance of probabilities to warrant the reliefs sought.
32. In view of the foregoing, having held that the Plaintiff has proved his claim on adverse possession against the Defendant's title to the required standard, I find that he is entitled to the reliefs sought.

## Conclusion

33. The upshot of the above is that the Plaintiff has proved his claim against the Defendant and I accordingly allow the Originating Summons dated 29<sup>th</sup> June, 2021 on the following terms;
  - i. A Declaration be and is hereby made that the rights of the Defendant to recover a portion of land parcel No. Bukira/ Bwisaboka/77 measuring 8 Acres is barred under the provisions of *Limitation of Actions Act* and the Defendant's title thereto is extinguished on the grounds that the Plaintiff has been in open, peaceful, quiet, uninterrupted and continuous possession and occupation thereof for a period of more than 18 years. hence this court ought to make a declaration accordingly.



- ii. Consequently, it is hereby Ordered that a portion of land parcel No. Bukira/ Bwisaboka/77 measuring 8 Acres be registered in the name of the Plaintiff within 60 days from the date of this Judgment. The Defendant is hereby directed to execute all the necessary documents for purposes of transfer and registration in favor of the Plaintiff and in default, the Deputy Registrar is hereby directed to execute the said documents for purposes of the Transfer and registration in favor of the Plaintiff.
- iii. Further, an Order of Permanent Injunction is hereby issued restraining the Defendant (erroneously indicated as the Plaintiff) by himself, his agents, his servants, employees, family members or any person claiming under him or acting with his express and/or implied authority from alienating, transferring, entering, re-entering, trespassing onto, disposing off in any way or interfering with the Plaintiff's possession, occupation and quiet enjoyment of the portion of the suit property measuring 8 Acres.
- iv. Costs of the suit be borne by the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 31ST DAY OF JANUARY, 2024.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

**Sam Onyango for the Plaintiff**

**No appearance by the Defendant**

**Court Assistant - Tom Maurice/Victor**

