



**Waweru v Koech (Civil Suit E027 of 2021)
[2024] KEELC 4047 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4047 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
CIVIL SUIT E027 OF 2021
JM ONYANGO, J
APRIL 29, 2024**

BETWEEN

FRANCIS JUMA WAWERU PLAINTIFF

AND

ABRAHAM KIBET SINGOEI KOECH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit by way of Originating Summons (O.S) dated 16th June, 2021 seeking orders that:
 - a. The Plaintiff has obtained title of land parcel Eldoret Municipality/Block 28/277 measuring approximately 0.0458 Ha.
 - b. The Defendant's title over land parcel Eldoret Municipality/Block 28/277 measuring approximately 0.0458 Ha has been extinguished by lapse of time.
 - c. Abandoned on 19th December, 2023.
 - d. Pursuant to (1) and (2) above, the Land Registrar; or Registrar in charge of the Uasin Gishu District Land Registry do delete the name of the Defendant and in lieu thereof enter the name of the Plaintiff and issue the Plaintiff with a title deed to land parcel Eldoret Municipality/Block 28/277 measuring approximately 0.0458 Ha.
 - e. Pursuant to (1), (2) and (3) above, the Land Registrar in charge of the Uasin Gishu District Land Registry or Registrar having lawful custody of the register for the Parcel Eldoret Municipality/Block 28/277 be ordered to issue a fresh title deed to the Plaintiff over the said land parcel Eldoret Municipality/Block 28/277.
2. The O.S is supported by the Affidavit of Francis Juma Waweru, the Plaintiff herein sworn on 15th June, 2021. He deposed that he purchased Eldoret Municipality/Block 28/277 (the suit property) from the



- Defendant in the year 2004, but the Defendant never transferred the parcel to him and the statutory period for transfer thereof lapsed. It was his further deposition that he immediately took possession of the suit property in the same year, moved in with his family and has been in actual possession to date. The Plaintiff avers that he put up a permanent matrimonial house, connected water and electricity to the house and further built rental houses and planted trees. He averred that he lost all his documents including the sale agreement in the post-election clashes of 2007. He deposed that he was among the first people to develop the area and the neighbours around him came later and found him already settled there.
3. It was his contention that since the year 2004, he has been in actual, open, uninterrupted, peaceful and continuous possession of the suit property for 17 years preceding the taking of the summons herein and thus he has acquired prescriptive rights over it. It is his deposition that his entry into and stay on the suit property was without force and his possession has been *nec clam, nec vi, nec precario* and the Defendant has never taken possession of the suit property. Consequently, it is his contention that the Defendant's title stood extinguished by the year 2016 under the doctrine of adverse possession. He averred that the original sale was void for lack of Land Control Board Consent, and that it is just and fair that judgment be entered in his favour. Annexed to the Plaintiff's Supporting Affidavit is a copy of the Title Deed to the property marked 'FJW - 1a', a copy of the Certificate Official Search dated 3rd June, 2020 marked 'FJW - 1b' and a bundle of photographs bearing a date stamp of 26th June, 2021 marked as 'FJW - 2'.
 4. The O.S was also supported by the Affidavits of Grace Njeri Juma and Mary Wambui Juma, both sworn on 15th June, 2021. They separately deposed that they were the wife and daughter of the Plaintiff respectively, and in essence reiterated the averments contained in the Plaintiff's Supporting Affidavit. Mary Wambui added that she was 22 years old when the property was purchased and that the transaction was well within her knowledge. They both prayed that the reliefs sought be granted on grounds of justice and fairness. Other Affidavits filed are those of Phillip Ndegwa and James Tanui, also sworn on 15th June, 2021. They alleged that they are neighbours of the Plaintiff and reiterated the averments in the Plaintiff's Supporting Affidavit.
 5. Having failed to trace the Defendant, the Plaintiff sought leave to serve him by way of substituted service, which leave was granted on 30th May, 2023 and service was effected by way of advertisement in the Daily Nation on 28th June, 2023. The Defendant failed to enter appearance or file a Defence, and on 9th October, 2023 the court directed that the suit would proceed by way of viva voce evidence.

Plaintiff's Evidence

6. On 19th December, 2023 the matter came up for formal proof hearing and the Plaintiff, Francis Juma Waweru, testified as PW1. He testified that he was a carpenter living at Annex in Eldoret Town, and relied on his Supporting Affidavit as his evidence in chief. He stated that he purchased the suit property from the Defendant in 2004 at the price of Kshs.120,000/- but the Agreement for Sale and Receipt were lost during the 2007 post-election violence. He showed the Original Title Deed to the Court testifying that it was given to him by the Defendant. He produced a copy of the title as Pexb-1 and a bundle of photographs as Pexb-2(a) to (h).
7. PW1 testified that he has been living on the suit property since 2006 but left briefly during the 2007 post-election violence, to return after 2 months in the same year. It was his testimony that he has lived on the suit property peacefully without interruption since 2007. PW1 testified that he conducted a search on the suit property and obtained a Certificate of Official Search dated 3rd June, 2020 which he



produced as Pexb-3. He prayed that the prayers in the Originating Summons be granted. After PW1's testimony, the Plaintiff's case was closed and counsel opted not to file written submissions.

Analysis and Determination

8. From the pleadings and the evidence adduced, this court frames the following questions for determination;
 - a. Whether the Plaintiff can claim adverse possession arising from an Agreement for Sale
 - b. Whether the Plaintiff has met the threshold for grant of orders of adverse possession
9. The Plaintiff herein contends that he bought the suit property in the year 2004 and subsequently moved into the property, built a home and has raised his family thereon. It is his case that despite the passage of time, the transaction is yet to be completed as the Defendant never transferred the suit property to him. He has also pointed out that the parties never obtained Land Control Board Consent with respect to the said transaction and thus the sale became void and his occupation/possession of the suit property is consequently adverse to the interests of the registered owner. It is the Plaintiff's contention that he has been in continuous, uninterrupted occupation and possession of the suit property for over 12 years, and consequently he has acquired the suit property by way of adverse possession. Further, that he is now entitled to registration as the owner of the suit property.

Whether the Plaintiff can Claim Adverse Possession Arising From an Agreement for Sale

10. The definition of adverse possession was given by the court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where Makhandia, JA stated 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 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 of stealth nor 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.”

11. To answer the question whether adverse possession can arise out of an agreement for sale, in *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, the court explained that:-

“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kabiri* [1979] Kenya LR 236 at 239; also see among others, Simpson J (as he then was), in *Hosea v Njiru and others* [1974] EA 526 at 529, 530).”

12. In most instances, a purchaser in possession is allowed onto the property by virtue of the intended or ongoing transaction, pending completion thereof. Completion may be by way of payment of the purchase price, or if he has already paid it in full, then, pending compliance with the requisite statutory formalities. As was noted in the above case, such a purchaser is not allowed onto the property as a trespasser, and the concept of permission would certainly take away the element of trespass from such an arrangement as the possession is deemed to be permissive, or a license from the registered owner.



The parties to the sale sometimes end up allowing the transaction to drag on endlessly, and when the transaction later falls through, the purchaser in retrospect alleges to have been in fact a person in adverse possession.

13. In *Public Trustee vs. Wanduru* where Madan JA stated as follows: -

“.... 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 of 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.

14. Similarly, in *Cathy Alucia Jebor Kiplagat v Vincent Komen* (2018) eKLR the Court held that adverse possession can be claimed where the registered owner fails to complete the land sale process to frustrate the buyer who is in possession and occupation of the suit land.

15. In the instant suit, the Plaintiff claims to have been in occupation of the suit property originally under a sale agreement, pointing at a licence from the Defendant, bringing about the element of permissive possession. In such cases, time begins to run once the contract becomes null and void by operation of law.

16. The Plaintiff testified that the vendor did not obtain the consent of the Land Control Board hence the sale became void in terms of the provisions of the *Land Control Act*.

Whether the Plaintiff has Met the Threshold for Grant Of Orders of Adverse Possession

17. A claim for adverse possession is founded under the *Limitation of Actions Act*, Cap. 22 Laws of Kenya, which at Section 7 provides as follows;

“7. 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.”

18. Section 13 of the same *Act* is also of relevance and provides as follows;

“1) A right of action to recover land does not 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 Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land in reversion is taken to be adverse possession of the land”.



19. Finally, Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

20. The Plaintiff in a claim for adverse possession has to demonstrate that his occupation of the land has dispossessed the registered owner thereof. The burden of proving this fact to the Court lies with the Plaintiff. The adverse character of the possession must thus be established as a fact and cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for the requisite period. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right, see Mukindia vs Maranya (*supra*), where it was held that:-

“It is well-known in our law, that the adverse characters of the intruder’s possession of another’s land must be proved as a clear fact, and cannot be assumed as a matter of law from mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the Court is to draw legal inferences as to whether there was or there was no adverse possession. The inference one way or the other is a legal one. This means that the acts of possession are factual data from which a legal conclusion may or may not arise as to whether they amount to adverse possession. In the words of Gicheru, JA:

‘In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts’ Kweyu v Omuto, CA Civ Appeal 8 of 1990 (as yet unreported).’

21. A person who seeks to acquire title to land by way of adverse possession must first prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those whom he claims under for the statutorily prescribed time period without interruption. This was the finding of the Court of Appeal in Mombasa, in the case of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR, where the court held that:-

“18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See Jandu vs. Kirplal & Another (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in Wambugu vs. Njuguna [1983] KLR 173.”

22. The Plaintiff herein needed to prove that his stay on the land was non-permissive, non-consensual and without license. The Plaintiff has indicated that his mode of entry was as a result of a sale agreement, which points to the fact that the entry was permissive or licensed by the registered owner. From the



copy of the Title and certificate of Official Search produced in court, this Court notes that the land in question is registered in the name Abraham Kibet Singoei Koech (the Defendant herein). The Plaintiff has explained that his initial entry into the suit property was pursuant to a sale agreement hence his possession the Original Title Deed for the suit property. However, the said sale became void when the vendor failed to obtain the consent of the Land Control Board within a period of six months after the sale agreement was signed and the purchase price was paid.

23. The existence of buildings as showcased in the photographs produced in evidence proves the fact of possession or occupation by the Plaintiff. It proves that the said occupation though initially permissive became unlawful once the sale agreement was rendered void.
24. Time started running six months after the date of the sale agreement in the year 2004 as was held in *Public Trustee v Wanduru* (*supra*).
25. The Plaintiff was no longer relying on the license to occupy the land. The fact that the sale agreement was rendered void effectively terminated the Defendant's license and allowed him the right to assert his rights over the suit property by claiming entitlement under adverse possession. His stay thereon which has been open, peaceful and uninterrupted for a period of more than 12 years is therefore adverse to the rights of the registered owner.
26. Consequently, it is my finding that that the Plaintiff has proved his case on a balance of probabilities and he is therefore entitled to the reliefs sought.
27. Accordingly, I enter judgment for the plaintiff and make the following final orders:
 - a. A declaration is hereby issued that the Plaintiff has been in open, peaceful and continuous occupation of the parcel of land known as Eldoret Municipality/Block 28/277 measuring approximately 0.0458 Ha.
 - b. The Defendant's title over land parcel Eldoret Municipality/Block 28/277 measuring approximately 0.0458 Ha has been extinguished by lapse of time.
 - c. Pursuant to (a) and (b) above, the Land Registrar; or Registrar in charge of the Uasin Gishu District Land Registry is hereby directed to delete the name of the Defendant herein and in lieu thereof enter the name of Francis Juma Waweru, the Plaintiff herein and issue the Plaintiff with a title deed to land parcel Eldoret Municipality/Block 28/277 measuring approximately 0.0458 Ha.
 - d. Pursuant to (1), (2) and (3) above, the Land Registrar in charge of the Uasin Gishu District Land Registry or Registrar having lawful custody of the register for the Parcel Eldoret Municipality/Block 28/277 is hereby ordered to issue a fresh title deed to the Plaintiff over the said land parcel Eldoretmunicipality/Block 28/277.
 - e. No order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 29TH DAY OF APRIL 2024.

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J.M ONYANGO

JUDGE

In the presence of:



1. Mr. Githaiga for the Plaintiff
 2. No appearance for the Defendant.
- Court Assistant: Brian K

