



REPUBLIC OF KENYA



**Kuto v Tum (Environmental and Land Originating Summons
E021 of 2023) [2025] KEELC 229 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E021 OF 2023
GMA ONGONDO, J
JANUARY 30, 2025**

BETWEEN

KIMNGENY A. KUTO PLAINTIFF

AND

KIPSOGON ARAP TUM DEFENDANT

JUDGMENT

1. By an originating summons dated 22nd May 2023 and amended on 18th October 2023, brought under, inter alia, Sections 17 and 38 of the *Limitation of Actions Act* Chapter 22 Laws of Kenya, the plaintiff through Rotich Langat and Partners Advocates, has sued the defendant for;
 - a. A declaration that the rights and title of the said Kipsogon Arap Tum over land parcel No. Nandi/Kipsigak/187 (The suit land herein) has been extinguished by operations of the law of Adverse Possession and statute barred.
 - b. A declaration that the plaintiff has acquired freehold interest in the suit land by his adverse possession thereof for a period of more than 12 years which is from 1980 to date.
 - c. An order to issue requiring and directing the Land Registrar Nandi County to remove the entries relating to the title of the Defendant and in lieu thereof register the Plaintiff as the new registered owner over the suit land.
 - d. The Plaintiff took actual and physical possession of the whole of the suit land and he has been residing and cultivating the parcel of land since 1980. He has been in peaceful and actual physical occupation and possession of the said land continuously, uninterrupted from 1980 to date nec vi, nec clam and nec precario which is a period over 12 years.
 - e. Cost of this application be provided by the claimant.



2. The plaintiff's affidavit of sixteen paragraphs sworn on even date together with a copy of official search of the suit land (KAK-1) annexed thereto, anchor the originating summons. In summary, it is the plaintiff's lamentation that the defendant is the registered owner of the suit land which he sold to the plaintiff in the year 1978. That the letter of consent number 9366 of 23rd March 1978 following a meeting held on the same date, was issued to the plaintiff who has been in open, actual, continuous and physical possession of the suit land hence, precipitating this suit.
3. The defendant was duly served thus made aware of the existence of the suit papers as disclosed in the affidavit of service sworn on 11th January 2024 by Moses Osundwa Shikanda, a duly authorised process server. Nonetheless, he failed to respond to the suit.
4. In that regard, the suit proceeded for hearing as undefended pursuant to the directions of the court given on 16th September 2024.
5. The plaintiff (PW1) relied on his statement dated 22nd May 2023 as part of his evidence in chief. He stated in part that after he bought the suit land registered in the name of the defendant as per the certificate of official search-PExhibit 2, the defendant went underground. That thus, the plaintiff obtained a letter of consent (PExhibit 1) as well as a police abstract on loss of letter of consent-PExhibit 3 and a copy of his National Identity Card-PExhibit 4 as part of his evidence.
6. PW2, SAMUEL BIRGEN testified that being the assistant chief Kipsotoi sub location for 27 years, he knew both Kipsogon Arap Tum and PW2. That the former left the area about 40 years ago and the latter has lived on the suit land in excess of 27 years. That PW2 carries out tea farming thereon.
7. The defendant's case was deemed as closed further to his failure to defend the suit as stated at paragraph 3 hereinabove and the proceedings of 12th November 2024 herein.
8. Learned counsel for the plaintiff filed submissions dated 15th November 2024 and referred to the originating summons, the testimonies of PW1 and PW2, Sections 7, 13 and 37 of the *Limitation of Actions Act* (Cap 22 Laws of Kenya) and the case of Mtana Lewa-vs-Kahindi Ngala Mwangandi (2015) eKLR. Counsel submitted that the plaintiff has demonstrated that he has proved his claim against the defendant on a balance of probabilities and that the orders sought in the amended originating summons be granted accordingly.
9. It is settled law that the issues for determination in a suit generally flow from either the pleadings or as framed by the parties for the court's determination; see *Great Lakes Transport Company (U) Ltd-versus-Kenya Revenue Authority* (2009) KLR 720.
10. In light of the plaintiff's pleading, evidence and submissions on record, the issues for determination are condensed to whether or not the plaintiff has proved the essential ingredients as regards adverse possession; see *Wambugu-vs-Njuguna* (1983) KLR 172.
11. Moreover, this court subscribes to the case of *Elijah O.L Opar-versus-Tobias Odhiambo Abach* (2019) eKLR at page 6 where the Court of Appeal remarked-

“...evidence sufficient to prove on a balance of probabilities that he had entered upon the subject land openly, peacefully, without permission of Opar, and had continued in such possession for an uninterrupted period of at least 12 years thereby dispossessing Opar and extinguishing his right and title thereto. These are the ingredients of adverse possession.....”
12. In adverse possession, the claimant must not have the permission of the owner of the suit property to be thereon and no steps taken to repulse or eject the claimant from the property for the statutory



period of 12 years as stipulated under section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya; see Virginia Wanjiku Mwangi –versus- David Mwangi Jotham Kamau (2013) eKLR and Elijah O.L Opar case (supra).

13. It is noteworthy that the suit land is registered in the name of the defendant as per PExhibit 2. In the case of Wilson Kazungu Katana and 101 others-versus-Salim Abdalla Bakshein and another (2015) eKLR at page 7 where the Court of Appeal remarked-

“...First, the parcel of land must be registered in the name of a person other than the applicant.....”
14. The suit land has been identified as disclosed in PExhibit 2. In the case of Githu-versus-Ndeete (1984) KLR 776 and Gatimu Kinguru-versus-Muya Gathangi (1976-80) KLR 317, it was observed that a definite portion of land is an important and integral part of process of proving adverse possession claim.
15. It is established law that possession can take different forms such as fencing and cultivation of the land in dispute; see Titus Ong’anga Nyachieo-versus-Martin Okioma Nyauma & 3 others (2017) eKLR.
16. Besides, registration of land can be challenged by way of overriding interests including adverse possession under Section 28 (h) of the Land Registration Act 2016 (2012); see also Tayebali Adamji Alibhai-versus-Abdulhussein Adamji Alibhai (1938) 5 EACA 1 applied in Kimani Ruchine and another-versus-Swift Rutherford company Limited (1976-80) 1 KLR 1500, among other authoritative pronouncements.
17. The testimony of PW1 was that he planted tea bushes which he has been harvesting on the suit land, rear cattle and plant maize thereat. His evidence was affirmed by PW2, Assistant Chief of Kipsotoi Sub location who told the court that he has been an assistant chief for 27 years and that PW1 has lived on the suit land, planted maize and tea thereon for over the said years. That the defendant left the area about 40 years ago. Therefore, the defendant has been dispossessed of the suit land.
18. It is well settled that the burden of proof in civil cases is on a balance of probabilities even if the case was heard by way of formal proof; see Kirugi & another-vs-Kabiya & 3 others (1987) KLR 347.
19. In the present case, I find the plaintiff’s claim firm, consistent, cogent and proved against the defendant on a balance of probability.
20. The upshot is that judgment is hereby entered for the plaintiff against the defendant in terms of orders 1, 2, 3, 4 and 5 stated on the face of the originating summons dated 22nd May 2023 as set out in paragraph 1 (a) (b) (c) (d) and (e) hereinabove.
21. It is so ordered.

DATED AND DELIVERED AT KAPSABET THIS 30TH DAY OF JANUARY 2025.

G M A ONGONDO

JUDGE

Present;

1. W. Koskey instructed by Maritim learned counsel for the plaintiff
2. Walter, Court Assistant

