



**Tue (Suing as the Legal Administrator of the Estate of Kipkoech Arap
Tue - Deceased) v Nganga (Enviromental and Land Originating Summons
E8 of 2023) [2025] KEELC 563 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 563 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E8 OF 2023
A OMBWAYO, J
FEBRUARY 13, 2025**

BETWEEN

**MARY CHEMNGENO TUE (SUING AS THE LEGAL ADMINISTRATOR OF
THE ESTATE OF KIPKOECH ARAP TUE - DECEASED) PLAINTIFF**

AND

GIBSON NGARUIYA NGANGA RESPONDENT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide Originating Summons dated 2nd March, 2023 against the Respondent seeking the following orders:
 1. That be declared the owner of three (2.5) acres of land in Nakuru/Ol Rongai /457 by adverse possession having occupied, cultivated and tilled the said Two And Half (2.5) acres of land continuously and uninterrupted for over 40 years since 1975 and that this Honourable Court do direct that Nakuru Land Registrar rectify the Land Registrar accordingly and _ register Mary Chemngeno Tue being the legal administrator of the administrator of the Estate of Kipkoech Arap Tue (deceased)as the sole proprietor of two and half (2.5)acres of land and that the Plaintiff herein be issued with a Title Deed for the said two and half (2.5) acres.
 2. That the costs of this suit be borne by the Defendant who has occasioned this action.
2. The Respondent in response filed his Replying Affidavit sworn on 6th October, 2023 as well as grounds of objection dated 6th October, 2023.



Plaintiff's case

3. Mary Chemngeno Tue testified as PW1. It was her testimony that Kipkoech Arap Ture was her father who died in 2022. She produced the letters of administration ad litem as PEX1. She testified that the Defendant moved their boundary prompting them to file suit. She further testified that they have lived on the land from 1960 adding that they have been brought up on the land. She testified that the 2.5 acres belonged to them but registered in the name of Kipkoech Arap Tuwei. She went on to testify that her father had 5 acres and that the Respondent had no land. She testified that they utilize 2.5 acres and that there is a boundary between their land. She added that the Respondent was given title in 1997. She testified that her father's land was 389 Olelengu settlement scheme and that it neighbors that of the Defendant. She produced the letter dated 12th September, 2022 as PEX 4, survey report PEX 5 and the death certificate. PW1 testified that they were given permission by the Respondent.
4. Upon cross examination by Ikua for the Respondent, she denied ever having had a dispute with the Respondent. She was referred to GNIV where she confirmed that the same was a dispute between his father and the Respondent. She stated that she did not participate in the 2022 dispute. She confirmed that Sheila Chepkosgei Tuwei, her sister, participated in the dispute. She denied knowing John Tuwei and stated that John Koech was her brother. PW1 confirmed that according to the survey, there was a boundary dispute. She added that the Respondent never utilized the land. PW1 stated that their land was 2.5 acres or rather 5 acres. She further stated that the Respondent's land was 5 acres (witness was very evasive).
5. Upon re-examination, she stated that she did not appeal since their brother was arrested. She stated that their land was 5 acres and that in 2022, they were pushed further by 2.5 acres.
6. That marked the close of the Plaintiff's case.

Respondent's case

7. Margaret Wanjiru Kairu testified as DW1. She testified that the Respondent is her brother who resides in America. She testified that she has the power of attorney. She testified that the replying affidavit dated 6th October, 2023 be treated as evidence. She added that the annexures GNI-GNIV be produced as DEX1 to DEX 4. It was her testimony that the Respondent bought the land in 1994 and got the title in 1997. She went on to testify that he then entered the land and used it after which he left it for them. She testified that the Plaintiffs entered the land. She further testified that the disputes were finalized in September 2022. She also stated that John Tuwei the Plaintiff's brother gave evidence. She stated that they had a dispute on the parcel of land and that the summons were issued on 10th March, 1997.
8. Upon cross examination by Gatheca, DW1 stated that the Respondent travelled to America in 2002. She further stated that there was a house on the land and that the land was fenced. She went on to state the house was constructed in a year. She admitted that the land is not utilized. She also confirmed that they went to court in 2023 after the death of Tuwei. She stated that the Respondent complained at the land office.
9. Upon re-examination, DW1 stated that no appeal was filed and that the boundaries were removed.
10. That marked the close of the Respondent's case.

Submissions

11. Counsel for the Plaintiff filed his submissions dated 26th November, 2024 where he identified two issues for determination. The first issue was whether the Plaintiff has proved her claim for adverse possession.



He relied on Section 7 of the [Limitation of Actions Act](#) and the case of Mtana Lewa V Kahindi Ngala Mwangandi [2015] eKLR , Wilson Kazungu Katana & 101 Others V Salim Abdalla Bakshwein & Another [2015] eKLR and Court of Appeal case of Ruth Wangari Kanyagia V Josephine Muthoni Kinyanjui [2017] eKLR

12. He submits that the Plaintiff was contented with the boundaries and that the surveyor's report confirmed that the Plaintiff was in full occupation of the 2.5 acres belonging to the Defendant. He submits that the Defendant was an absentee landlord. It was his submission that the Plaintiff has been adversely occupying the Defendant's portion. He added that the Defendant did not give the Plaintiff permission to occupy the suit land but that he was aware of the said occupation. He submits that the Defendant has never had interest on the land or ever moved the court to have the Plaintiff evicted. He further submits that DW1 confirmed that the land was idle and that he has been living in the United States of America. Counsel relied on Section 18 (2) of the [Land Registration Act](#)
13. The second issue on costs, he relied on Section 27 of the [Civil Procedure Act](#) and the case in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & Another V Mutula Kilonzo & 2 Others [2013] eKLR and urges the court to award the Plaintiff costs of the suit.
14. Counsel for the Respondent filed his submissions dated 13th January, 2025 where he submits that the issue between the parties is a boundary dispute. He submits that the Plaintiff through his representatives participated in the Boundary dispute as evidenced in the regional surveyor's report. Counsel submits that PW1 admitted that there was disputes between the parties since the Respondent bought the parcel. It was counsel's submission that having fully participated in the proceedings, the estate could not now turn around and file the same as a claim for adverse possession. He submits that the only recourse was for the Plaintiff to appeal against the decision of the boundary dispute. Counsel relied on Section 18(2) and 86 of the [Land Registration Act](#) and submits that the dispute having been settled, this court cannot be invited to re-open the same as a claim for adverse possession.

Analysis and Determination

15. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
 - a. Whether occupation and possession by the Plaintiff over the suit property constituted adverse possession.
 - b. Who should bear the costs of the suit.
16. The doctrine of adverse possession is founded under Section 7, 13, 37 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...”



17. In *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

18. In 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...*”

19. It was the Plaintiff’s case that they have been in occupation of 2.5 acres of the Respondent’s property for over 40 years with his knowledge. She claimed that they have since acquired the land by way of adverse possession. Upon cross examination, she however confirmed that there has always been a boundary dispute between her late father and the Respondent. She also found it difficult to state the exact acreage of the suit land and that of the Respondent.
20. The Respondent on the other hand claims that the present case does not qualify as an adverse claim but a boundary issue which has been long ongoing since 1997 and determined by the Land Registrar on 30th September, 2022. It was also the Respondent’s case that the Plaintiff ought to have appealed the outcome instead of filing the present application. DW1 confirmed that the Respondent bought the suit land put a house and fenced it.
21. I have keenly perused the court record and it is not in dispute that there has been an ongoing boundary dispute touching on the suit land since 1997 as evidenced by the boundary dispute summons (DEX 4). It was the Plaintiff’s case that the occupation of the land became adverse from 31st January, 1997 and this was the same time the dispute summons were issued to Kipkoech arap Tue (deceased). It is also not in dispute that the outcome of the boundary dispute by the Land Registrar was that parties had the option to appeal to the chief land registrar or a court of law within 30 days from 30th September, 2022. The court finds that time starts running on the 30th September 2022 and therefore 12 years have not crystalized. In the upshot, I find that the Plaintiff failed to satisfy the requirements on adverse possession. Consequently, the originating summons dated March 2, 2023 is hereby dismissed with costs. It is so ordered.

JUDGMENT DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAKURU THIS 13TH DAY OF FEBRUARY 2025.



A.O.OMBWAYO
JUDGE

