



Munai v Langat (Sued in his capacity as the Administrator and Personal Representative of the Estate of Taplelei w/o Chemosit alias Taplele w/o Chemosit - Deceased) (Environment and Land Case Civil Suit 80 of 2018) [2023] KEELC 146 (KLR) (19 January 2023) (Judgment)

Neutral citation: [2023] KEELC 146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE CIVIL SUIT 80 OF 2018
MC OUNDO, J
JANUARY 19, 2023**

BETWEEN

MOSES MUTAI MUNAI APPLICANT

AND

ELIJAH KIPKOSKE LANGAT (SUED IN HIS CAPACITY AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF TAPLELEI W/O CHEMOSIT ALIAS TAPLELE W/O CHEMOSIT - DECEASED) RESPONDENT

JUDGMENT

1. By an Originating Summons dated 13th December, 2018 filed under the provisions of order 37 rule 7 of the *Civil Procedure Rules*, and Section 38 of the *Limitation of Actions Act*, the Applicant herein claims to be entitled to (1) one acre of land comprised in L.R No. Kericho/Kibwastuiyo/433 and for the determination of the following:
 - i. Whether the Applicant is entitled to one (1) acre of land comprised in the land parcel L.R No. Kericho/Kibwastuiyo/433 registered in the name of Taplelei w/o Chemosit (Deceased) by virtue of the Applicant's adverse possession of the same in an open, quiet and peaceful occupation for a period of over 38 years.
 - ii. Whether the Applicant should be registered as the proprietor of the said one (1) acre comprised in the land parcel number L.R No. Kericho/Kibwastuiyo/433.
 - iii. Whether the Respondent should be ordered to execute the transfer of all the requisite forms and perform all acts necessary to effect registration of the Applicant as the proprietor of the said one (1) acre and in default the Deputy Registrar of the court be authorised to execute them.



- iv. Whether or not the Applicant is entitled to an order of a permanent injunction restraining the Respondent, his brothers, agents, employees and other beneficiaries of the estate of Taplelei w/o Chemosit (deceased) from entering, cultivating, occupying, trespassing, alienating, transferring, and/or in any other manner adversely dealing with the Applicant's portion measuring one (1) acre.
 - v. Whether an order do issue that the Officer Commanding Station (OCS), Litein Police Station oversees the enforcement and compliance with these orders.
 - vi. Whether the Respondent should be ordered to pay the costs of this suit to the Applicant.
2. The Originating Summons was premised on the grounds stated on the face of it as well as on the Supporting Affidavit of Moses Mutai Munai the Plaintiff /Applicant herein, sworn on the 10th of December, 2018.
 3. Together with the originating summons the Plaintiff sought for interim orders against the Respondent, which orders were granted on the 8th October 2019 there having been no response from the Respondent upon service of the application seeking the same.
 4. The matter did not take off immediately due to numerous adjournments caused in pursuit to serve and secure the Respondent's appearance in court. The Respondent did not file a Replying Affidavit nor turn up either by himself or through his Counsel and therefore, the Applicant sought that the matter proceeds for formal proof.
 5. Directions were taken on the 21st March 2022 that the formal proof be heard by way of viva voce evidence wherein the Originating Summons would be deemed as the Plaint and the Supporting Affidavit be deemed as the witness statement.
 6. The matter then took off for formal hearing on 30th May, 2022 after the court had satisfied itself that the Respondent was not interested in defending the suit. The Plaintiff's Counsel then requested that copies of documents in their possession be used pursuant to Section 68 (1) (c) as read with Sub Section 2 (a) of the *Evidence Act*, since the Plaintiff had misplaced some of them and/or could not trace them by reason of his old age of around 86 years old.
 7. The Plaintiff, Moses Mutai Munai testified as PW1 to the effect that he was a businessman who lived at Chebwagon around Litein. That he had sued the Defendant in his capacity as the administrator and Personal Representative to the estate of the late Taplelei w/o Arap Chemosit who was the registered proprietor of land parcel L.R Kericho/Kibwastuiyo/433. That the said Defendant was the eldest son of the late Taplelei w/o Arap Chemosit.
 8. That in the year 1977, the Plaintiff had bought one (1) acre of land comprised in L.R Kericho/ Kibwastuiyo/433 from the Defendant's mother who had a problem of repaying a loan from Agricultural Finance Co-operation, herein referred to as AFC. That he paid the loan which was about Kshs. 10,000/= by paying a sum of Kshs. 5,000/= to AFC office and later, at the request of the vendor, paid the remaining a sum of Kshs. 5,000/= to the vendor. He produced the Land Register to land No. 433 as Pf Exh.1.
 9. He went on to testify that after he purchased the land in the year 1977, he fenced it, ploughed it and planted maize in it until the year 2014 when the vendor's sons Elijah Langat, Samuel Langat and the wife of the vendor's deceased son removed the fence and placed it on the Plaintiff's adjacent land. He produced the photographs of the posts where the wire mesh was placed, a picture showing the land without fence and a person watching what had happened, as Pf Exh. 2 (a-c)



10. His further evidence was that he had reported the vendor's sons to the Assistant Chief who had summoned them so that they could tell him why they had demolished the fence, but they never turned up. That the Assistant Chief summoned them again to a meeting twice but they did not attend. He produced Letters by the Assistant Chief dated 14th January 2016, 4th February 2016 and 12th February 2016 as Pf Exh. 3 (a-c).
11. That although he had informed the Assistant chief of his intention to be included in the vendor's succession cause upon her demise, he had been surprised to learn that the vendor's sons had filed the Succession Cause No. 121 of 2012 at Kericho High Court without involving him. He produced the grant of letters of administration dated 6th May 2013 as Pf Exh. 4.
12. The Plaintiff reiterated that his name was not included in the Certificate of Confirmation of Grant. That the beneficiaries listed were Elijah Kipkoskei Langat, Betty Chepkirui Mitei and Samwel Kibet Langat. He produced the Certificate of Confirmation of Grant dated 13th May 2014 as Pf Exh. 5
13. His testimony was that after learning that his name was not included in the grant, he engaged M/s Bett & Co. Advocate who conducted the said Succession Cause and to whom he had complained that she had been misled and had requested her to reverse the case. That the said Advocate conceded to what he had informed her and therein after referred him to his present Counsel. That subsequently, the vendor's sons had also accepted that they had done wrong to exclude him from the Succession Cause wherein M/s Bett Advocate had compiled a consent form to rectify the confirmation and he had been asked to pay Kshs. 27,000/= for the services of the Counsel. Unfortunately, the Defendants and rescinded on their statement and had torn up the forms.
14. He proceeded to testify that he had made the said payments on 14th March 2016 wherein he had given his Counsel the original copy of the receipt. He produced the copy of the receipt dated 14th March 2016 as Pf Exh.6
15. The Plaintiff then summarized his testimony by reiterating that he purchased the land in the year 1977 and had used it in the lifetime of vendor who had given him the land certificate and her identification card to wait for the Land Board Consent. That after the death of the vendor, the vendor's sons requested for the said land certificate and vendor's identification card to which he had given them.
16. He testified further that even after the death of the Vendor on 13th November 1994, he continued using the land until when the vendor's sons removed the fence, took the land and had continued using it even after interim orders were issued. He acknowledged that he was guilty of not registering the said land to his name immediately after the purchase. He prayed that the court renders justice in his favour as per his request in the Originating Summons dated 13th December 2018. The Plaintiff then closed his case and filled written submissions.

Plaintiff's Submissions

17. The Plaintiff summarized the background of the matter in issue as well as the evidence as adduced in court before framing the issues for determination as follows;
 - i. Whether the Applicant is entitled to one (1) acre of land comprised in the land parcel L.R No. Kericho/Kibwastuiyo/433 registered in the name of Taplelei w/o Chemosit (deceased) by virtue of his adverse possession of the same in open quiet and peaceful occupation for a period of over 38 years.
 - ii. Whether the Applicant should be registered as the proprietor of the portion measuring one (1) acre comprised in the land parcel number L.R No. Kericho/Kibwastuiyo/433.



- iii. Whether the Respondent should be ordered to execute the transfer and all the requisite forms and perform all acts necessary to effect registration of the Applicant as the proprietor of the said one (1) acre and in default the Deputy Registrar of the court be authorised to execute them.
 - vii. Whether the Applicant is entitled to an order of permanent injunction restraining the Respondent, his brothers, agents, employees and other beneficiaries of the estate of Taplelei w/o Chemosit (deceased) from entering, cultivating, occupying, trespassing, alienating, transferring, and/or in any other manner adversely dealing with the Applicant's portion measuring one (1) acre.
 - iv. Whether an order do issue that the Officer Commanding Station (OCS), Litein Police Station should oversee the enforcement and compliance of above orders.
 - v. Whether the Respondent should be ordered to pay the costs of this suit to the Applicant.
18. On the first issue for determination, the Plaintiff relied on the Court of Appeal decision in *Peter Mbiri Michuki vs. Samuel Mugo Michuki* [2014] eKLR to submit that the oral agreement was valid despite the Plaintiff not having produced the Sale Agreement. That courts had since held that contracts orally entered into before the amendment introducing Section 3(3) of the *Law of Contract Act*, Cap 23, were valid despite failure to have them in writing if part performance in terms of occupation accompanies it.
 19. While still relying on the holding in the cases of *Peter Mbiri* (supra) and *Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch* [2021] eKLR where the court quoted the case of *Kaswe v Mwaani Investments Limited & 4 others* [2004] 1KLR 184, the Plaintiff submitted that he had enjoyed open, quiet, peaceful and uninterrupted occupation of the one (1) acre for a period of 38 years from the year 1977 to 2015 when the Defendant, his brothers and sisters had destroyed the fence. That the Plaintiff had fenced the land and had been cultivating and planting maize and other crops every year from the time of purchase. That he was subject to the principle of adverse possession given his long period of occupation, development and investment over the property. That the Defendant's family had never lived nor utilized the suit property since the year 1977 when he took possession, which was way more than the statutory limitation period of 12 years of bringing up a suit. That the said occupation had been uninterrupted for the entire period up until December 2015.
 20. The Plaintiff also relied on the combination of the provisions of Sections 7, 13, 38(1) and (2) of the *Limitation of Actions Act* and Section 28(h) of the *Land Registration Act*, to submit that he had proven on a balance of probability that he was entitled to one (1) acre comprised in L.R No. Kericho/ Kibwastuiyo/433 by virtue of his Adverse Possession between the years 1977 and 2015.
 21. On the second issue, the Plaintiff submitted that having demonstrated in evidence that the Defendant was determined to ensure that he did not get his portion by excluding him from the Succession Cause and destroying his fence, an order should issue to the Defendant to execute necessary forms of transfer, as the administrator of the estate of Taplelei w/o Chemosit, within such duration of time as the Court considers just, failing which the Deputy Registrar be authorised to execute them.
 22. That the Plaintiff was also entitled to an injunction order restraining the Defendant, his brothers, agents, employees and other beneficiaries of the estate of Taplelei w/o Chemosit from interfering with his enjoyment, use, occupation and ownership of his portion of one (1) acre and further, given the previous conduct of the Defendant and his siblings, the Officer Commanding Station, Litein Police Station be ordered to ensure compliance with the court's order.



Determination.

23. The court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (cap 22) in these terms:

“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 is first accrued to some person through whom he claims, to that person”.

24. Section 13 of the Act is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

25. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

26. The Court of Appeal in the case of *Benjamin Kamau Murma & Others vs Gladys Njeri*, C A No. 213 of 1996 held as follows:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

The onus is on the person or persons claiming adverse possession:

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

27. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

Has the Plaintiff herein demonstrated the said elements?

28. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale vs Liverpool College* (1900)1 Ch.19, 21.



29. The Plaintiff's case is that he entered into the suit property in the year 1977 after entering into an oral sale agreement with Taplelei w/o Arap Chemosit (the Defendant's mother) and registered proprietor wherein he had bought one (1) acre of land comprised in L.R Kericho/Kibwastuiyo/433 That the said Taplelei w/o Arap Chemosit had a problem of repaying a loan from Agricultural Finance Co-operation (AFC) wherein he had re-paid the loan which was about Kshs. 10,000/= by paying a sum of Kshs. 5,000/= to AFC office and later, at the request of the vendor, he had paid her the remaining a sum of Kshs. 5,000/=
30. In essence therefore the Plaintiff entered on the suit land as a purchaser, in 1977 and lived on the same for 17 years before its proprietor passed away and he continued to live on the land for a further 24 years, making it a total of 41 years. From the year 1977-2018, the Plaintiff had been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the Defendants for more than 41 years since he bought it, which period is more than the 12 years required under the law for him to acquire title against the Defendant by way of Adverse Possession.
31. It is further not in doubt that the sale agreement became null and void after the expiry of the respective six months, for lack of consent of Land Control Board under the *Land Control Act*.
32. Indeed the Court of Appeal in *Samuel Miki Waweru v Jane Njeri Richu* [2007] eKLR held as follows:
- “In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the *Land Control Act* for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”
33. This being a matter where the Plaintiff has sought for orders that he be registered as proprietor of (one) 1 acre comprised in parcel LR No. Kericho/Kibwastuiyo/433 having acquired the title by virtue of the doctrine of adverse possession, and in view of the fact that the registered proprietor is now deceased, I find the issues arising for my determination as being:
- i. Whether prescription affects not only present holders of the title but their predecessors
 - ii. Whether the Plaintiff has acquired title of 1 (one) acre comprised in LR No. Kericho/Kibwastuiyo/433 by way of adverse possession.
34. I have considered the undisputed evidence on record, as well as the applicable law on the doctrine of Adverse Possession, I have also gained sight of the copy of the land register to land LR No. Kericho/Kibwastuiyo No. 433 herein produced as Pf Exh. 1, which document confirms that as at 5th January 1970 the suit land had been registered to one Taplalei W/O Chemosit wherein the same had been charged to the AFC on the 27th April 1981 and discharged on the 29th October 1989.
35. I also note that Letters of Administration to the estate of Taplalei W/O Chemosit was issued to the defendant on the 6th May 2013 (Pf Exh 4) thereafter via a certificate of Confirmation of Grant dated 13th May 2014 in the matter of the Estate of the late Taplalei W/O Chemosit in P & A Succession Cause No 121 of 2012, (Pf exh 5) the suit property herein was shared equally between the Defendant as administrators of the estate of the deceased, and his siblings wherein each of them got 3.4 acres of land.
36. The Plaintiff's evidence to the effect that he took possession of the suit land in the year 1977 and had not left the same ever since was not controverted and therefore time started running in 1977 as there has



been no evidence adduced that the suit land had been registered to the Defendant and/or his siblings as beneficiaries of the vendor's estate.

37. The record shows that the Plaintiff's possession of the suit property was nec vi, nec clam and nec precario and possession continued uninterrupted and without force during the lifetime of vendor who had even given him the land certificate and her identification card to wait for the Land Board Consent. That after the death of the vendor on 13th November 1994, he continued using the land and had been in continuous possession for a period of almost forty-two years as at the time of filing the Originating Summons.
38. In *Douglas Mbugua Mungai v Harrison Munyi* [2019] eKLR the Court of Appeal held that;
- “The issue in the Githu case was whether the mere change of ownership of land that is occupied by another person under adverse possession would interrupt such person's adverse possession. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under Section 7 of the *Limitation of Actions Act*, those rights are overriding interests by virtue of section 30(f) of the RLA, to which the new registered purchaser's title will be subject.”
39. The same view was followed by the Court in the case of *Kairu v. Gacheru* [1986-1989] E.A where it was held that:
- “The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 *Limitation of Actions Act*).”
40. In the case of *Titus Kigoro Munyi v. Peter Mburu Kimani* (2015)eKLR it had been observed that:
- “It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors.”
41. It is therefore clear from the foregoing provisions of the law and case law that a claim for adverse possession can be sustained against the estate of a deceased person. Having said that, I find that the Plaintiff/Applicant herein has sufficiently demonstrated the elements required to establish a claim to his portion measuring (one) 1 acre comprised in L.R No. Kericho/Kibwastuiyo/433 by Adverse Possession.
42. The Plaintiff's Originating Summons dated the 13th December, 2018 is herein allowed in its entirety as prayed.
43. However costs shall be at a lower scale since the suit was undefended.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19TH DAY OF JANUARY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

