



**Buko v Atika (Environment & Land Case 27 of 2018)
[2022] KEELC 2710 (KLR) (5 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 27 OF 2018**

JM ONYANGO, J

JULY 5, 2022

BETWEEN

SAMWEL BONUKE BUKO PLAINTIFF

AND

WILSON MISIA ATIKA DEFENDANT

JUDGMENT

1. The Plaintiff approached the court by way of originating summons seeking that he be declared to have become entitled to a portion of land measuring 0.94 Hectares out of land parcel number Nyaribari Chache/keumbu/1550 by adverse possession for being in occupation, possession and having developed the same for a period of over 12 years. He also prayed that he be registered as the proprietor of the said portion of land parcel number Nyaribari Chache/keumbu/1550 for the reason that he has occupied the said parcel for a period of over 12 years.
2. The Originating Summons is based on the Supporting Affidavit of Aileen Bonuke to whom the Plaintiff donated a special Power of Attorney to institute the case on his behalf. In her affidavit she depones that the Plaintiff purchased a portion of land parcel number Nyaribari Chache/keumbu/1550 measuring 0.94 Hectares from the late Atika Misia in 1994. The deceased however died before he transferred the said portion to the Plaintiff.
3. After the Plaintiff paid the full purchase price, the deceased gave the Plaintiff vacant possession and the Plaintiff had occupied the said portion of land which he has been cultivating since 1994. After the demise of Atika Misia, his beneficiaries applied for a Grant of Letters of Administration vide Kisii High Court Succession Cause No. 231 of 2011 without disclosing that the Plaintiff was entitled to a portion of the deceased's property. The Plaintiff applied for revocation of Grant but the court declined to revoke the same as the Plaintiff had not obtained consent of the Land Control Board within three months in respect of the sale agreement entered into between himself and the deceased



4. Upon being served with the Originating Summons the Defendant filed a Replying Affidavit sworn on the 16th January 2019 in which he denied the Plaintiff's claim. He denied that there was an oral agreement for the sale of the suit property to the Plaintiff. He deponed that after his father's death they never received any complaint that he had sold his land to anyone. He averred that he is not the registered owner of the suit property as it is still registered in the name of his late father. He contended that the two agreements of 1966 bore different signatures and there was no consent of the Land Control Board. He also pointed out that the parcel number referred to in the sale agreement is land parcel number Nyaribari Chache/keumbu/699 and the Applicant did not buy land parcel number 1550. He stated that the person who bought a portion of land from his later father in 1903 was one Bikeri Onchari who had obtained a title in his name. He faulted the Plaintiff for failing to attach an extract of the title in respect of the suit property.
5. He contended that the Plaintiff's application for revocation of grant in respect of the deceased's estate was dismissed after which he filed a Notice of Appeal. He urged the court to dismiss the suit as the Plaintiff had run out of ideas.

The suit proceeded by way of *viva voce* evidence and both parties testified.

Plaintiff's Case

6. The Plaintiff testified as PW1 and called five witnesses. He stated that he purchased a portion of land parcel number Nyaribari Chache/keumbu/699 from the late Atika Misia in 1966 vide a sale agreement dated April 10, 1966. He produced a copy of the sale agreement.
7. The Plaintiff told the court that the property he bought is now known as land parcel number Nyaribari Chache/keumbu/1550. He stated that the deceased also sold a portion of his land to one Henry Bikeri but the portion that he (Plaintiff) bought is comprised in parcel number 1550. He testified that before his demise, the deceased had applied for consent of the Land Control Board in 1993 but he died before transferring the suit property to the Plaintiff. He wanted to produce a copy of the application for Land Control Board consent as an exhibit but counsel for the Defendant objected to it and the same was marked as MFIP2.
8. The pPlaintiff told the court that they went to the Land Control Board for purposes of obtaining consent to divide land parcel no. 1550 on July 28, 1993. He referred to the mutation forms and stated that according to the said forms he was to take parcel number 1573 measuring 0.94 acres while Atika Misia was to take parcel number 1572 measuring 4.60 acres. Counsel for the Defendant objected to the production of the mutation forms and they were marked as PFM1 3.
9. The Plaintiff testified that Atika Misia died before transferring the suit property to him but he put him in possession and he had been cultivating the suit property peacefully without any interruption or interference since 1966. He stated that he had planted blue gum trees, tea bushes and Napier grass. He said he had constructed any house on the suit property as it was next to his home.
10. The Plaintiff told the court that after Atika Misia died, he approached his son Wilson Atika to take out Letters of Administration in respect of his late father's estate but he refused. The Plaintiff then instituted citation proceedings via Kisii HC Succession Cause No. 136 of 2016. However, when he served the defendant, he discovered that the defendant had obtained a Grant vide HC Succession Cause No. 231 of 2011. In the said Succession Cause the defendant had not mentioned that the Plaintiff was entitled to a share of the deceased's estate as a purchaser. This prompted the plaintiff to apply for revocation of the Grant but his application was dismissed. Thereafter, he instituted this case against the defendant.



11. Upon cross-examination he stated the he went to live in the U.S.A in 1996 and he donated a Power of Attorney to his daughter Aileen to represent him in all his cases. He claimed that she did not inform him of the outcome of Succession Cause no. 231 of 2011. He admitted that Aileen filed HCCC No. 275 of 2016 (O.S) but he was not aware of the same.
12. He maintained that he bought the suit property in 1966 and he first went to the Land Control Board in 1968 and obtained consent to sub-divide land parcel number 699 but he did not know if the consent that was given was for parcel No.1550. He stated that his son John Ndege aged 20 was present during the signing of the sale agreement. Asked whether he knew that Ndege had said that he was aged 9 when his father entered into the sale agreement, he said, he did not know if the Ndege was lying. He claimed that his son Gilbert Machoka who was born in 1957 also signed the sale agreement in 1966 when he was aged 11 years.
13. The Plaintiff told the court that he took long to follow up on the transfer of the suit property as he had been sickly and he had not paid the full purchase price. He said he did not get any permit to plant the tea bushes and he could not remember who prepared the sale agreement. He also could not remember if there was an appeal in respect of HC Succession Cause No. 231 of 2011. He stated that they used a Government Surveyor to sub-divide the land.
14. He stated that Bikeri also bought land from Atika Misia after the Plaintiff and he got his title deed but the Plaintiff did not get his title as he had not completed the purchase price.
15. In re-examination he stated the he wanted to be registered as the owner of the suit property as he had been in occupation thereof for a period of over 50 years without any interference.
16. David Monda Nyabuti who testified as PW2 testified that he was he was a nephew of the late Atika Misia and a clan elder. He told the court that he witnessed the sale agreement between the deceased and the Plaintiff. He stated that the Plaintiff had been occupying the suit property peacefully and he had planted tea bushes and food crops thereon. Upon cross-examination he stated that he did not know the parcel number of the acreage of the land that the Plaintiff bought from the late Atika Misia.
17. Gilbert Machuka Samuel testified as PW3. He told the court that he was the Defendant's son while the late Atika Misia was his uncle. He stated that the defendant bought land from the late Atika Misia in 1966 and they had been in occupation of the said parcel of land since 1966 without any interference.
18. Upon cross-examination, he admitted that he had testified in respect of the suit property during the objection proceedings. He confirmed that in 1966 he was 9 years old. He confirmed that the land that his father bought and which they were occupying was now known as parcel number 1550.
19. Stephen Nyagucha Machuka testified as PW4. It was his testimony that the plaintiff bought land from the late Atika Misia and he had been occupying it for a long time without any interference. He stated that the Defendant had hired him to till his land and that he had planted tea bushes and trees thereon.
20. Charles Ndege Buko who is the defendant's younger brother testified as PW5. He corroborated the evidence of PW1-PW4 that the defendant had bought land from the late Atika Misia and that he had planted tea bushes, trees and bananas thereon. He said he had testified in the Succession Cause. He however did not know the size of the land or parcel number.
21. Steve Mokaya, the Land Registrar Kisii County testified as PW6. He produced the application for consent of the Land Control Board dated February 8, 1994, the mutation form dated July 21, 1993 as plaintiff's exhibits 3 and 4 and the letter of consent as Plaintiff's exhibit 6. He also produced certified copies of the extract of the register for parcels 699 and 1550 and 1551 as plaintiff's exhibits 7, 8 and 9 respectively.



Defendant's Case

22. The Defendant testified as PW1 and called 2 witnesses. He relied on his witness statements dated June 17, 2019, July 26, 2019 and October 8, 2019. He produced the documents in his List of Documents dated June 17, 2019 as Defendant's exhibits 1-6 in the order in which they appear in the said list.
23. It was his testimony that his father was the registered owner of land parcel No. Nyaribari Chache/keumbu/699. The said parcel was subsequently sub-divided and it gave rise to parcels nos 1550 and 1551. He said he was not aware that the Plaintiff had bought any of the parcels mentioned.
24. He stated that the Plaintiff applied for revocation of the Grant he had obtained in respect of his late father's estate vide HC Succession Cause No. 231 of 2011 but his application was dismissed. He told the court that the Plaintiff had no valid claim to the suit property as he never obtained consent of the Land Control Board in respect of the alleged sale agreement between himself and the defendant's late father.
25. Upon cross-examination he stated that the Plaintiff moved into the suit property in 1966 with the consent of the defendant's late father and had been cultivating it upto 2016 though he still plucks the tealeaves thereon. He confirmed that the Plaintiff had planted tea bushes and trees on the suit property- parcel no. 1550. He also confirmed that the Plaintiff had not constructed any structure on thereon.
26. He stated that after the sub-division of parcel No. 699 into parcels no. 1550 and 1551, his late father transferred parcel no. 1551 and remained with parcel no. 1550. It was his testimony that his late father never bequeathed any land to him and therefore he was a beneficiary of his father's land parcel no. 1550. He stated that he was not aware that the Plaintiff had bought a portion of land from his late father as he thought that the plaintiff was leasing the suit property. He told the court that if indeed his father had sold him land then he should have transferred it to him.
27. In re-examination he confirmed that the sale agreement between the Plaintiff and the Plaintiff was made in 1966. He told the court the suit property measures over 14 acres. He said he was not sure of the size the plaintiff was claiming. He confirmed that his late father did not have any dispute with the Plaintiff.
28. Benson Nyamari Atika testified as DW2. He told the court that the Defendant was his elder brother. He denied that the Plaintiff bought the suit property and stated that he was merely leasing it. He said that he was only aware that his father had sold a portion of his land to one Henry Bikeri. He denied that his father had obtained consent of the Land Control Board to transfer his land to the Plaintiff. He stated that before his death, his late father had divided parcel number 1550 between his two wives and that the said land was their ancestral land.
29. Upon cross-examination, he stated that the defendant and him belong to the house of their father's first wife. He confirmed that during his lifetime his father had divided his land between his two houses and shown each of his six sons where to build their houses. He confirmed that the land he divided among his family members excluded the portion that the plaintiff had been cultivating. He conceded that the plaintiff had utilized the suit property for many years and he assumed that he had leased it. He stated that he had no problem with the plaintiff.
30. James Nyariki Atika who testified as DW3 corroborated the evidence of DW2 save that he disputed the evidence that PW3 witnessed the sale agreement between the Plaintiff and his late father as PW3 was only 9 years old in 1966. He stated that his step brothers had no dispute with the Plaintiff over the suit property though he denied that the plaintiff bought the suit property and wanted him to vacate the land. He confirmed that the Plaintiff still plucks his tea from the suit property.



Plaintiff's Submissions

31. Learned counsel for the Plaintiff summarized the evidence adduced by both parties and submitted that the plaintiff had proved that he had been in peaceful, uninterrupted occupation of the suit property since 1966. He relied on sections 7, 13 and 38 of the Limitation of Actions Act and contended that the effect of the said sections was to extinguish the title of the land in favour of the adverse possessor at the expiry of 12 years of occupation of the land.
32. He submitted that section 28 of the Land Registration Act, 2012 recognizes interests in land including rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. It was his contention that under section 7 of the Land Act 2012, prescription is one of the ways of acquiring land.
33. Counsel relied on the case of Kasuve v Mwaani Investments Limited & 4 Others 1KLR 184 where the Court of Appeal held that:

“In order to be entitled to land by prove 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”
34. Counsel further submitted that the defendant failed to prove that the plaintiff had leased his land as he did not file a Counterclaim. He submitted that the plaintiff had proved that he was entitled to the suit property by way of adverse possession and he was therefore entitled to the reliefs sought.

Defendant's Submissions

35. On his part learned counsel for the Defendant also summarized the evidence of both parties and framed the following questions for determination:
 - i. Has adverse possession be adequately proved?
 - ii. Is the Respondent properly sued?
 - iii. Was Land Control Board consent given?
 - iv. What is the acreage of the land sold?
 - v. Was mutation done and filed in the Lands office?
 - vi. What is the title deed no. of the land sold?
 - vii. When was the agreement made?
36. With regard to the first question, counsel submitted relied on the case of Peter Okoth v Ambrose Ochido & Benedict Odhiambo (2021) eKLR where the court relied on the case of Kasuve v Mwaani Investments Limited & 4 Others (2004) 1KLR where the court while dealing with a case of adverse possession stated that for plaintiff to stake a claim of adverse possession he must prove that he entered the land as a trespasser or without the consent of the owner. The Court observed as follows:

“In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of



12 years after the, such applicant would be perfectly entitled to sue on account of adverse possession”

37. It was counsel’s contention that having entered the suit property with the consent of the owner, the Plaintiff can only claim the suit property by way of adverse possession if the period permitted lapses and the registered owner does not make any step to evict him.
38. With regard to the second question counsel submitted that the Defendant is not the registered owner of the suit property as it is registered in the name of Atika Misia-deceased. He added that the defendant has been sued in his personal capacity and not as the administrator of the estate of Atika Misia (deceased). Counsel relied on the case of *Melckizedeck Shem Kamau v Beatrice Waitbera Maina & 2 Others* (2020) eKLR where the court held that the Defendant was not the proper party to be sued as he had not taken out a Grant of Letters of Administration and he therefore lacked the locus standi to be sued.
39. On the issue of consent of the Land Control Board, counsel submitted that the plaintiff was relying on a sale agreement entered into in 1966. He contended that under part 3 Chapter X1 of the 1963 Constitution of Kenya and the Kenya (Land Control) Transaction Provision) Regulations, 1963, consent was required for any transactions dealing with agricultural land. The said consent was supposed to be obtained within three months after signing the agreement. He submitted that in this case the consent was neither obtained in 1966 nor was it obtained within the requisite period. He submitted that the consent that was obtained in 1993 was 27 years late and was therefore in contravention of the law and the agreement was thus void.
40. With regard to the acreage of the parcel claimed by the plaintiff. counsel contended that the plaintiff did not state the acreage of the parcel he is claiming nor is it disclosed in the sale agreement.
41. Finally, counsel submitted that no sub-division of the land was done as the Land Registrar who testified as PW6 denied that they had the mutation of the Plaintiff’s portion of land in their records.

Issues for Determination

42. Having carefully considered the pleadings, evidence on record and the rival submissions, the following issues fall for determination:
 - i. Whether the Defendant has locus standi to be sued
 - ii. Whether the Plaintiff has proved that he is entitled to the suit property by way of adverse possession.

Analysis and Determination

43. Learned counsel for the Defendant submitted that the Defendant has not been properly sued as the suit property is still registered in the name of Atika Misia deceased. It is however not in dispute that the defendant is the administrator of the estate of Atika Misia- deceased and he therefore has the locus standi to be sued.

As was held by the Court of Appeal in the case of *Peter Thuo Kairu v Kuria Gacheru* [1988] 2KAR which I relied on in the case of *Kiprono Chepkwony v Bornes Taprandich Barmalel & Another* [2019] eKLR:

“The law relating to prescription affects not only present holders of title but their predecessors in title”.



44. Further, in the case of *Mwangi and Another v Mwangi* [1986] KLR 328 it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.
45. Turning to the second question, it is common ground that the plaintiff has been in possession of a portion of land parcel number Nyaribari Chache/keumbu/1550 pursuant to a sale agreement dated April 10, 1966. The said occupation was initially with the consent of the late Atika Misia (deceased) who was the father of the defendant. Although the Plaintiff claims that he obtained consent to subdivide the land in 1993, the Land Registrar testified that there was no such consent in their records. Be that as it may, such consent even if it had been obtained was not obtained within the requisite period of three months as provided in section 221 of the 1963 Constitution of Kenya and the Kenya and the (Land Control) Transaction Provision) Regulations, 1963 and the sale agreement was therefore rendered null and void.
46. It is not in dispute that the Plaintiff's occupation on the suit property between 1966 and 2016 was peaceful and uninterrupted as he planted tea bushes and Napier grass and he continues to pick the tea. What is in contention is whether the plaintiff's occupation of the suit property which spans over a period of 50 years amounts adverse possession.
47. In the case of of *Kasuve v Mwaani Investments Limited & 4 Others* 1KLR 184 the Court of Appeal held that:
- “In order to be entitled to land by prove 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”
48. The court further observed that in order to prove adverse possession one must demonstrate the following:
- “his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of 12 years after the, such applicant would be perfectly entitled to sue on account of adverse possession”
49. In the instant suit the entry was with the consent of the owner and even though the registered owner never transferred the suit property to the plaintiff, he did not chase him away. In *Public Trustee vs. Wanduru*, 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.
50. Similarly, in the case of *Rhoda Mongina Ondore & 2 Others v Johnstone Nyanyuki Menge* [2019] eKLR the court held that:
- “The Plaintiff having taken possession of the suit property pursuant to the sale agreement is deemed to have taken possession with the permission of the owner in accordance with the



terms of the agreement. During the validity of the agreement, the possession of the plaintiff could not be adverse to the rights and interests of the owner. The respective agreement however became null and void after the expiry of six months from the date of execution for failure to comply with section 6(1) of the *Land Control Act*. The period of adversity in the premises could only start running after six months as it was as from that time that the right of the owner to recover the land from the plaintiff accrued”.

51. From the above authorities it is clear that a purchaser is not precluded from claiming land by virtue of adverse possession as long as he can demonstrate that he paid the full purchase price and took possession of the land. In the instant case, the plaintiff entry into the suit property was with the registered owner’s permission but the said permission lapsed when he failed to obtain the consent of the Land Control Board within a period of three months after the sale agreement was signed and the plaintiff’s occupation therefore became adverse. Since the agreement was signed in June 1966, the period of adversity should be calculated from July 1966. The period of 12 years therefore accrued in December 1978.
52. As regards the size of the parcel claimed by the plaintiff, the plaintiff claims a portion measuring 0.94 acres out of land parcel number 1550. The defendant and his witnesses conceded that the plaintiff has been in occupation of a defined portion where he has planted tea bushes trees and Napier grass and that their father did not interfere with this portion when he divided his land between his two houses. In the circumstances, the same is clearly identifiable and can easily be hived off with the assistance of a surveyor.
53. In view of the foregoing, it is my finding that the Plaintiff has proved his case on a balance of probabilities.

Consequently, I enter judgment for the Plaintiff in the following terms:

- a. A declaration is hereby made that the Plaintiff is entitled to a portion of land parcel number Nyaribari Chache/keumbu/1550 measuring 0.94 Ha by way of adverse possession.
- b. The County Surveyor Kisii County is hereby directed to demarcate the portion measuring 0.94 Ha out of the suit property after which the same shall be registered in the name of the Plaintiff.
- c. Since the parties are relatives and neighbours who will continue to live side by side, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

