



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 504 OF 2017**

**(Formerly Machakos ELC Case No. 12 of 2014)**

**MAILUA ESTATES LIMITED.....PLAINTIFF**

**VERSUS**

**PUSHAN MIATO.....1ST DEFENDANT**

**SELEYIAN MIATO.....2ND DEFENDANT**

**KETUKEI MIATO.....3RD DEFENDANT**

**REUBEN OLE NAKUO .....4TH DEFENDANT**

**COUNTY LAND REGISTRAR, KAJIADO COUNTY.....5TH DEFENDANT**

**THE HON. ATTORNEY GENERAL .....6TH DEFENDANT**

**JUDGMENT**

By a Plaint dated the 4<sup>th</sup> February, 2014 the Plaintiff prays for a judgement against the Defendants jointly and severally for:

- a) A declaration that the Plaintiff is the absolute owner of the whole of that parcel of land known as LR No. Kajiado/ Mailua/ 684 measuring 121.4 hectares.
- b) A declaration that the deliberation and award of the Kajiado Land Disputes Tribunal No. TC/472/09/09 as adopted by PMCC Land Dispute Tribunal No. 41 of 2012 is illegal, null and void.
- c) A permanent injunction restraining the Defendants, their agents, servants and or employees from trespassing into and / or in any way whatsoever interfering with the Plaintiff's quiet possession and enjoyment of the suit parcel.
- d) An order directing Kajiado County Land Registrar to cancel all excisions, transfers, registration made in favour of the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants and substitution thereof be made in favour of the Plaintiff.
- e) General damages.
- f) Costs of this suit.
- g) Any other or further relief the court may deem just to grant in the circumstances.

The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed a Defence dated the 28<sup>th</sup> February, 2014 which was amended on 7<sup>th</sup> April, 2014 where they denied the knowledge of the auction and averred that if there was a sale, the same was actuated on the part of the Plaintiff who failed to advertise the alleged auction; failed to execute a proper discharge; failed to obtain consent of the Land Control Board and ignored their presence on the land. They denied the allegations of fraud levelled against them and colluding in any way as alleged by the Plaintiff. They contend that they have resided on the suit land for over 30 years and entitled to be registered as owners of the 200 acres, which they occupy. They insist the title number KAJIADO/ MAILUA/ 684 has been extinguished by passage of time. They reiterate that the suit is a non starter; verifying affidavit is defective, the suit has been filed by strangers and is time barred. They filed a Counterclaim where they sought the following prayers against the Plaintiff:

1. That title No. KAJIADO/ MAILUA/ 684 be cancelled.
2. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be registered as owners of 200 acres they occupy on KAJIADO/ MAILUA/ 684 by adverse possession.
3. Costs

The 5<sup>th</sup> and 6<sup>th</sup> Defendants filed a Defence where they denied the contents of the Plaintiff except for the descriptive paragraphs. They denied the allegations of fraud in the Plaintiff and stated that they were not parties to the proceedings of the Tribunal Cause No. 472/ 09/09. They contended that the suit offends the provisions of the Government Proceedings Act.

The Plaintiff filed a Reply to Amended Defence and Counterclaim dated the 9<sup>th</sup> April, 2014 where it contended that the amended Defence is mischievous, untenable, frivolous and an abuse of the Court process since it seeks to circumvent a situation created by the 4<sup>th</sup> Defendant who in collusion with the other Defendants committed wanton acts of fraud that sought to defraud it of its land. It denied the particulars of fraud and asserted that it bought the suit land from the National Bank of Kenya through a public auction. Further, that the said Bank should be enjoined in this suit. It insists that filing the matter in the Land Disputes Tribunal without involving it, is mala fides and the award should be a nullity for want of jurisdiction and locus standi. It reiterates that the cause of action for adverse possession is not available to the Defendants and is a non-starter and more so that the Defendants cannot come to Court to plead for equity, from acts of fraud perpetrated by themselves.

### **Evidence of the Plaintiff**

PW1: STEPHEN WAIGWA MURAGE who is one of the Directors of the plaintiff testified that in 2004 they purchased the suit land through a public auction. The land was sold by messrs GARAM Auctioneers for Kshs. 8,000/= per acre. He confirmed that after they paid the purchase price, the Charge was discharged and they were issued with a title in the name of Mailua Estates Limited.

He claimed they took over possession and went to the suit land with the surveyor and pegged the beacons. It was his testimony that they did not do anything on the land but in 2013 they intended to sell a portion of it, to interested purchasers and when they visited the land, they were informed there had been a case at the Land Disputes Tribunal. He denied being served with summons from the Land Disputes Tribunal. They later learnt that the Land Dispute Tribunal had given an order for the subdivision of the suit land into two portions of 100 acres and 200 acres each. These was done without their knowledge yet they were the registered owners of the suit land.

In cross examination, he confirmed buying the suit land from a public auction in 2004. He explained that the auction was conducted in Ngong. He referred to the Green Card and that on 3<sup>rd</sup> January, 1996 there was a charge to National Bank of Kenya for Ksh. 105 Million. On 26<sup>th</sup> April, 2004 an entry of Mailua Estate Limited was entered, and Title Deed was issued. He averred that after purchasing the suit land, they visited it. He produced various documents as exhibits 1-12.

The Plaintiff thereafter closed their case.

### **Evidence of the Defense.**

DW1-PUSHAN MIATO confirmed that she sold suit land comprising of 300 acres to the 4<sup>th</sup> Defendant but he only paid for 100 acres but failed to pay for 200 acres. It was her testimony that she followed up with the 4<sup>th</sup> Defendant and instituted a claim at the Land Dispute Tribunal for the 4<sup>th</sup> Defendant to return her land but this was in vain. She confirmed that the Land Dispute Tribunal gave an Award for the suit land to be returned to her. She produced the proceedings of the Land Dispute Tribunal as well as an extract of the Green Card as Defense exhibits.

In cross examination, she could not recall signing any document in relation to her selling land to Reuben Ole Nakuo nor the purchase price that was paid. She confirmed that Reuben Ole Nakuo (4<sup>th</sup> Defendant) paid her for only 100 acres of land. It was her testimony that the 4<sup>th</sup> Defendant came to the Land Dispute Tribunal but someone spoke on his behalf. She denied that she sold land to the Plaintiff and did not know if the suit land was charged to the Bank as security for a loan. She denied selling land to the Bank.

DW2- KETUKEI OLE MIANTO confirmed his mother sold to the 4<sup>th</sup> Defendant 300 acres of land but he only paid for 100 acres. It was his testimony that the 4<sup>th</sup> Defendant failed to pay the full purchase price and they lodged a complaint at the Land Dispute Tribunal. He contended that the 4<sup>th</sup> Defendant admitted that he paid for 100 acres. He claimed that he had resided on the suit land since he was born.

In cross examination he denied signing the sale agreement nor witnessing it. It was his testimony that he was only 17 years old when the Agreement dated 23<sup>th</sup> January, 1994 was executed in his absence. He stated that they lodged a complaint 15 years later at the Land Dispute Tribunal in 2009. Further, that they did not report matter to the Police. He insisted his mother did not receive the balance of the purchase price. He confirmed that they went to the Land Dispute Tribunal because of the purchase price which had not been fully paid. He further confirmed that at the time they were proceeding to the Land Disputes Tribunal, they undertook a search, and discovered suit land was sold to Mailua Estates Ltd He further confirmed that they did not include Mailua Estates Ltd in the Land Dispute Tribunal case as they did not know who they were. Further that they never went to the bank to find out why they auctioned their land.

The Defendant thereafter closed their case. Both the Plaintiff as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed their submission that I have considered.

## Analysis and Determination

Upon consideration of the pleadings filed herein including the exhibits produced and upon hearing testimonies from all the witnesses as well as considering parties' submissions, the following are the issues for determination:

- Whether the Plaintiff is the absolute proprietor of land parcel number Kajiado/ Mailua/ 684.
- Whether the deliberation and award of the Kajiado Land Disputes Tribunal No. TC/472/09/09 as adopted by PMCC Land Dispute Tribunal No. 41 of 2012 is illegal, null and void.
- Whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entitled to the prayers of adverse possession for 200 acres of land.
- Whether the Plaintiff is entitled to General Damages.
- Who should bear the costs of the suit?

As to whether the Plaintiff is the absolute proprietor of land parcel number Kajiado/ Mailua/ 684. The Plaintiff contends that it was the registered proprietor of KAJIADO/ MAILUA/ 684 having purchased the suit land through a public auction. DW1 and DW2 did not deny in court that at the time they were proceeding to the Land Disputes Tribunal, the Plaintiff was already registered as the proprietor of the suit land. I infer an element of dishonesty and fraud on the part of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants knowing fully well that the Plaintiff was already the registered proprietor but they still proceeded and lodged a claim at the now defunct Land Dispute Tribunal, without summoning it. The Plaintiff insists it was not a party to the proceedings at the Tribunal and that the said Tribunal did not have jurisdiction on account of the provisions of the Land Disputes Tribunal Act Cap 303 (now repealed) in its Section 3(1) which provides that '**Subject to this Act, all cases of a civil nature involving a dispute as to— (a) the division of, or the determination of boundaries to land, including land held in common; (b) a claim to occupy or work land; or (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.**' From these provisions, it is evident that the Land Disputes Tribunal had no jurisdiction to entertain the dispute herein as it involved registered land.

Further, section 26 of the Land Registration Act provides as follows: '**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.'**

In the case of *Ahmed Ibrahim Suleiman and another v Noor Khamisi Surur* [2013] eKLR, *where it was held that: 'The Plaintiffs having been registered, as proprietors and having been issued with a certificate of lease over title No. Nairobi/Block 61/69 are in terms of section 26 (1) of the Registration of Lands Act entitled to the protection of the law.'*

*I find that since the Plaintiff was issued with a title over the suit land at the time it purchased it from a public auction; I will declare it as the absolute proprietor of the suit land.*

As to whether the deliberation and award of the Kajiado Land Disputes Tribunal No. TC/472/09/09 as adopted by PMCC Land Dispute Tribunal No. 41 of 2012 is illegal, null and void.

I wish to refer to Section 3(1) of the Land Disputes Tribunal Act Cap 303 (now repealed) which I have already cited above. I note the Plaintiff was already the registered proprietor of the suit land at the time the Land Disputes Tribunal (LDT) commenced its proceedings. From the evidence presented, PW1, DW1 and DW2 confirmed the Plaintiff was not a party to the proceedings at the Land Disputes Tribunal. Further, that it was not summoned as they did not know where to find it. I note the LDT proceeded to make adverse orders against it, which orders were adopted by the PMCC Court. I note the LDT was an administrative body that should have granted the Plaintiff a chance to be heard. The LDT actions herein contravened the Plaintiff's Constitutional rights. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the court decree had already been executed and new numbers given. Further, the said decree has not been set aside and since the Decree remains unchallenged it will be not possible to allow the prayer. They relied on the case of *JOHN KIPLAGAT TUWEI –VS- JOHN KIPSEREM KITUR* (2016) eKLR. I disagree with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' reasoning and note that since the Land Disputes Tribunal had no jurisdiction to entertain the dispute herein and proceeded to cancel the title, the aggrieved party should have filed an Appeal at the Provincial Appeals Committee within 30 days of the said decision or sought for the same to be quashed through judicial review. However, in the current scenario, the Plaintiff never did so and insofar as I concur with it that the proceedings were null and void, I am unable to make an order to that effect as this current suit is not the prescribed avenue to do so.

As to whether the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are entitled to the prayers of adverse possession for 200 acres of land they occupy.

Adverse possession is governed by Section 38 (1) and (2) Limitation of the Actions Act that provides as follows:

**(1) 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.**

**(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.**

For adverse possession to mature into title to land the following conditions must be fulfilled:

- (1) The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- (2) The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- (3) The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- (4) The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.

(5) The possession has to be *Exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

In the case of *Karuntimi Raiji Vs. M'makinya* (2013) eKLR, the court of appeal while citing the case of *Wambugu Versus Njuguna* 1983 KLR 174 held that **'in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.'**

From the evidence presented by all the parties, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continued to be in occupation of the suit land after the 1<sup>st</sup> Defendant sold it to the 4<sup>th</sup> Defendant in 1994. As per the Green Card, the Plaintiff was registered as the owner of the suit land on 7<sup>th</sup> July, 2004 while the 4<sup>th</sup> Defendant was registered as its owner on 26<sup>th</sup> April, 1995. It emerged that the 4<sup>th</sup> Defendant while registered as the owner of the suit land, proceeded to charge it to the bank to secure a loan which he never paid. The Bank later sold the suit land by public auction in 2004 but the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants continued to reside thereon. It was PW1's testimony that he visited the land in 2004 before buying the same and later took a surveyor to it, who placed beacons thereon but they have never been in occupation. It is the Plaintiff's submission that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have absolutely no locus standi to bring this matter up in any forum as they were devoid of any registrable interest over the suit parcel. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that the claim being an equitable claim is time barred. Despite being registered as owner of the suit land on 26<sup>th</sup> April, 1995, the 4<sup>th</sup> defendant never evicted the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Further, after the Plaintiff purchased the suit land through a public auction in 2004 and got registered as its owner on 7<sup>th</sup> July, 2004, he never bothered to evict the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants therefrom and only filed this suit in 2014 to do so. This in essence means from the time the 4<sup>th</sup> Defendant was registered as the owner of the suit land in 1995, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were let to continue residing thereon to date and this is cumulatively 29 years.

Section 7 of the Limitation of Actions Act provides that: **'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.'**

Further, section 17 of the Limitation of Actions Act, Cap 22 provides that:

**"subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land(including a redemption action), the title to that person to the land is extinguished."**

Section 28 (h) of the Land Registration Act provided that: **' Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register— (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;'**

In the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR, Court of Appeal held as follows: **' With respect, we agree with the learned Judge that the appellant ought to have exercised diligence at the time it purchased the suit premises by inspecting it. The manner it dealt with the acquisition was evidently contrary to its own policy not to purchase land occupied by squatters or one with a dispute. As this court stated in Mweu v. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430:**

**"Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it."**

**It follows therefore that when the appellant instituted the action in 2008 its title to the suit premises had been extinguished.'**

Further, in the case of *Samwel Nyakenogo v Samwel Orucho Onyaru* [2010]Eklr the Court of Appeal upheld a claim of the adverse possessor and held inter alia that the mere change of ownership of the land which is occupied by another under adverse possession does not

interrupt such person's adverse possession.

In relying on the above cited legal provisions as well as the Court of Appeal decisions, I find that since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had been openly, notoriously and uninterruptable residing on the suit land after it had been registered in a third party's name from 1995, the rights of any registered owner over the said suit land extinguished 12 years later in 2007. The mere change of title did not extinguish the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' right to the suit land. I hold that it was the duty of the Plaintiff to inspect the suit land and seek to evict the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in 2004 when he purchased the same but it opted not to do so until 2014, when 12 years had passed. I further hold that the even though the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's lodged a complaint at the Land Disputes Tribunal in 2009, this did not amount to an interruption of their occupation as they had already been in the suit land for over 12 years. It is against the foregoing that I find that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants indeed acquired the portion of the 200 acres of the suit land which they claim, through adverse possession.

Whether the Plaintiff is entitled to General Damages.

PW1 did not present any evidence in respect of the damages the Plaintiff had suffered in relation to the Defendants' actions. The burden of proof was upon the Plaintiff to prove the damages it had suffered. It was PW1's evidence that they had not developed the land. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants contended that they had constructed houses thereon but did not provide proof of the buildings. It was the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants submissions that the claim for general damages has not been proved and is also time barred in view of section 4 of the Limitation of Actions Act.

The Plaintiff submitted that the suit was filed in 2014 while it was issued with Title Documents in 2004. It only discovered that the 1st, 2nd and 3rd defendants were interfering with the parcel in 2014 when it was informed by third parties. It is at that time that the Plaintiff discovered that the 3rd defendant was indeed making attempts to subdivide the suit parcel. It insisted the cause of action then properly arose in 2014, and it was entitled to general damages from the defendant's actions. It however never furnished court with evidence to prove the damages it had suffered. I concur with the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that the claim for general damages must fail as it has not been proved by the plaintiff. It is against the foregoing that I find that the Plaintiff is indeed not entitled to General Damages.

Who should bear the costs of the suit?

The Costs generally follow the cause. However I note that it is 4th Defendant's actions which led to the dispute herein.

Since the Plaintiff as well as the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants have been inconvenienced by the 4<sup>th</sup> Defendant's actions, I will grant them the costs of the suit.

It is against the foregoing that I find that the Plaintiff as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have established their case on a balance of probability and will proceed to make the following orders:

- a) The Plaintiff be and is hereby declared the absolute proprietor of all that parcel of land known as LR No. Kajiado/ Mailua/ 684 measuring 121.4 hectares.
- b) The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants be and are hereby declared to have acquired 200 acres out of land parcel number KAJIADO/ MAILUA/ 684, which they occupy through adverse possession
- c) The Kajiado County Land Registrar be and is hereby directed to cancel the title number KAJIADO/ MAILUA/ 684 in the name of the Plaintiff and register 200 acres out of the the said land in favour of the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> Defendants respectively and the remaining 100 acres to the Plaintiff.
- d) The costs of this suit is awarded to Plaintiff, 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants which is to be borne by the 4<sup>th</sup> Defendant.

**Dated signed and delivered in open court at Kajiado this 26<sup>th</sup> day of February, 2019**

**CHRISTINE OCHIENG**

**JUDGE**