



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**ELC CASE NUMBER 55 OF 2013**

**(FORMERLY HCCC NO. 2 OF 2009 AT NAKURU)**

**LOISE WANJIRU KINUTHIA.....PLAINTIFF**

**(legal representative of the Estate of JAMES MUTURA NJAMI (DECEASED))**

**-VERSUS-**

**JOHNSON MUIGAI NJAMI.....DEFENDANT**

**JUDGMENT**

**1. BACKGROUND AND PLEADINGS**

This suit was filed on the 7<sup>th</sup> January 2009 by the **plaintiff James Mutura Njami** against the defendant Johnson Muigai Njami. The plaintiff is a brother to the defendant and the registered owner of land parcel **No. LR No. Nyandarua/Tulaga/1002 but later subdivided into several parcels No. Nyandarua/Tulaga/5208 – 5220.**

It is alleged that the plaintiff in 1975 allowed his brother the defendant to occupy and settle on one of the subdivision **LR Nyandarua/Tulaga /5217** but upon acquiring his land **Plot No. 4111 Utheri Wa Rari** and upon request to move out of the suit land has failed to necessitating filing of this suit.

2. The plaintiff's contention is that the defendant's settlement on the land parcel was that of a tenant at will and therefore had no rights or interest thereon, and upon termination of the tenancy the defendant ought to have given vacant possession to the plaintiff.

He therefore sought the following orders/declarations against the defendant:

***a) A declaration that the plaintiff is the absolute legal and registered owner of the suit property.***

***b) A declaration that the defendant's tenancy has been terminated and his continued stay on the suit property now is that of a trespasser.***

***c) Vacant possession and eviction orders.***

***d) Costs.***

3. The defendant by his defence and counter-claim dated 18<sup>th</sup> May 2009 and filed on the 19<sup>th</sup> May 2009 denied being a tenant of the plaintiff but that the plaintiff holds the suit land in trust for himself and their siblings.

4. By his counterclaim, the defendant seeks order for:

***a) Declaration that the trust has terminated and the plaintiff do transfer to the defendant 39.5 Acres in the suit land Nyandarua/Tulaga/1002(formerly Nyandarua/Tulaga/5208-5220) and any transfers to 3<sup>rd</sup> parties be cancelled.***

***b) Alternatively and without prejudice a declaration that the plaintiff's title to Nyandarua/Tulaga/1002 has been extinguished and the defendant has acquired title by adverse possession to 39.5 Acres in the said parcel (Nyandarua/Tulaga/5208 – 5220).***

***(c) Costs.***

5. From the above narrative it is evident that the suit before me concerns a dispute over title, occupation and use of land.

Before the enactment of the **Environment and Land Court Act Chapter 12A**, all land cases were being heard and determined by the High Court. This case was thus heard before the Hon. H. Omondi J who finalised with the plaintiffs evidence. Defence case (DW2) Evidence was taken before me.

6. The jurisdiction to the High Court to continue hearing and determination of part heard land cases was donated vide **The Hon. The Chief Justice Directions gazetted under Notice No. 5178 on the 25<sup>th</sup> July 2014**.

It is on that basis that I am now seized with the determination of his land case.

7. I am called upon to determine whether the plaintiff is the exclusive and absolute owner of the suit property or whether he holds the same in trust for the defendant and their other siblings and in the alternative, whether the defendant has acquired title to the suit land by Adverse possession.

#### **8. PLAINTIFF'S CASE**

Three witnesses testified in support of the plaintiff's case.

**PW1 JAMES MUTURA NJAMI** is the plaintiff.

This evidence was that he was given the suit land **L.R No. Nyandarua/Tulaga Block 8217** by the Settlement Fund Trustee as the sole owner on loan and that he finished paying in 1977. He produced a letter of allotment dated 23<sup>rd</sup> August 1977 – it reads **Nyandarua/Tulaga 435–PExt 1**, and that he subdivided it into three portions, **Nyandarua/Tulaga 1000, 1001 and 1002** and further subdivided **Plot No.1002 to create Plot No. 5208 to 5220**.

He testified that the suit property is **Plot No. 5217** out of the subdivision of Plot No. 1002 and which plot the defendant occupies since 1968. He produced a title Deed in his name – PExt 2.

9. He testified that he allowed the defendant, his brother to settle on the suit land as a tenant at will (“Muhoi”) but later bought his own land around **Mai Mahiu, Plot No. 4111**, but upon being requested to vacate in 1980, he failed to, and proceeded to place a caution on the land in 2002.

10. The plaintiff further testified that in 2004, he filed a suit against the defendant being **Naivasha CMCC No. 706 of 2004** seeking vacant possession of the suit land. He reiterated that the suit land is not family land nor did he hold it in trust for the defendant or anyone else and that it is only the defendant among his other 12 siblings who claims the land.

11. Upon cross examination, PW1 testified that his mother was buried on the suit property and that the defendant also buried his grandchild and others on the suit land, and that he too had a semi-permanent house thereon where he brought up his family. He denied that the defendant cultivates 20 acres out of the 90 acres, but that he has sold all to 3<sup>rd</sup> parties including his children but could not produce any documents for the sale of the land. He further stated that the defendant's family does not live on the land except the defendant alone.

12. On the 18<sup>th</sup> November 2013, the plaintiff who died on the 30<sup>th</sup> June 2012 was substituted with **Loise Wanjiru Kinuthia as the plaintiff**.

#### **13. DEFENDANT'S CASE.**

The defendant called 3 witnesses.

DW1 was the defendant **Johnson Muigai Njami**.

His testimony was that the plaintiff is his elder brother and that he has lived at **Tulaga Scheme, Original Plot No. 435 since 1972**, that his father had four wives and after purchasing the Plot No. 435 from the Settlement Fund Trustees had it registered in his eldest son's name, the plaintiff, in trust for the family, and that the loan to their father was paid by their father not the plaintiff.

14. It was his testimony that all his other brothers lived therein upto 2004 when the plaintiff subdivided the Parcel 435 and moved to subdivision 1002 which their father had set aside for their mother, and that the plaintiff asked him to settle thereon on plot No. 1002.

He produced the GreenCard DExt 1 and 2 – that confirms the plaintiff was registered as the proprietor on 21<sup>st</sup> September 1977 and for the subdivision 1002 also in the plaintiff's names.

15. The defendant further testified that Plot No. 1002 measures 39½ Acres (16 Ha), that the plaintiff brought his children to settle thereon together with others and obtained registrations in their names – Greencards - PExt 2-15 – showing the registered owners.

16. The defendant further testified that the plaintiff sued him at **Naivasha CMCC No. 706/2004 for an eviction order** which case was dismissed and the Appeal being Nakuru HCCA No. 32/2005 was also dismissed for want of prosecution. He further testified that he registered a restriction on the property on the 27<sup>th</sup> September 2002 to protect his interest in the same.

17. It was his further evidence that having occupied the suit property uninterrupted and peacefully for more than 12 years, from 1972 he has acquired title by adverse possession of the 39.25 acres exclusively to himself. He urged cancellation of the title to the plaintiff in his favour.

18. In cross examination, the defendant reiterated that the plaintiff was registered as trustee for the entire family of the suit land. He agreed that he did not have evidence that his father bought the land from one Juma Kagunda nor evidence of payments to the said Juma Kagunda. He stated that none of his brothers and sisters lived on the suit land, and that his father too did not live therein, but constantly visited.

He agreed that no trust was registered against the title, and that in the **Naivasha case** their mother was coached to testify against him. He however admitted that he occupied the suit land by permission of the plaintiff and also by authority of his father.

19. **DW2 Joseph Mashamba** testified as a Settlement Officer Nyandarua South District, and keeper of all the settlement scheme documents.

His evidence was that Plot No. 435(original plot) within the scheme was originally allocated to one Kamau Kagunda in 1963 and later cancelled and given to James Mutura Njami (plaintiff) upon a transfer signed by both Kamau Kagunda and James Mutura on 27<sup>th</sup> August 1966 – as shown in Folio No. 36 & 37 – DExt 21. He further produced a transfer showing that James Mutura Njami (plaintiff) took over payments of the loan in instalments.

On cross examination, this witness stated that the suit plot No. 435 was allocated to the plaintiff alone and not in trust for his family or the Defendant.

20. **DW3 SAMUEL NJUGUNA NJONI**, is a brother to the parties' father. He testified that Plot No. 435 Tulaga Scheme originally belonged to one Juma Kagunda but the development loan was paid by the plaintiff's father in 1965. He testified that the plot was registered in the plaintiff's name but on behalf of his father whose name could not be registered as he had another *shamba* that the whole family moved into the suit land from 1992, but left in 1976 when he bought his land. It was his testimony that the defendant lived on the *shamba* from 1972 up to date. Despite stating that the father of the plaintiff and defendant paid the loan, he failed to produce any evidence to show that his brother and father to the parties paid for the plot.

He further testified that the defendant has another *shamba* elsewhere as they all had, and that the defendant has no ownership claims over the suit land.

21. From the above evidence, it is evident that the main issues for determination are:

*1. Whether the plaintiff holds the Title to the suit property Nyandarua/Tulaga/1002 later subdivided into Nyandarua/Tulaga/5208-5220 solely to himself or in trust for the defendant, and if so, what acreage out of the entire suit property he is entitled to.*

*2. Whether the defendant has acquired title to 39.5 Acres out of the suit property by Adverse- possession*

*3. Whether the plaintiff and the defendant are entitled to their respective reliefs as stated in the plaint and counter claim respectively.*

## **22. ANALYSIS OF EVIDENCE SUBMISSIONS AND FINDINGS**

It is not in dispute that the suit property **L.R Nyandarua/Tulaga/1002** and the Subdivisions thereof, being **Nyandarua/Tulaga/5208-5220** are registered in the plaintiff's names. Abstracts of Titles respectively were produced as exhibits by the plaintiff. It is also not in dispute that Plot No. 435 was allocated to the plaintiff by the Settlement Fund Trustee on the 23<sup>rd</sup> August 1977 in his sole names, and that later he subdivided it to create **LR. Nyandarua/Tulaga 1000-1002**. Later, the plaintiff sub-divided Plot No. 1002 to several other subplots Nos. 5208 to 5220.

**It is subdivision No. 5217 that is in dispute.** It is agreed by all the parties that the plaintiff invited his brother the defendant to settle and occupy this Plot No. 5217 as he did not have his own land in 1972. He was then only 24 years old.

23. However, evidence was lead that the defendant bought/acquired his own land at **Uthari Wa Rari, Plot No. 4111** upon which his brother, the plaintiff asked him to leave and go to his plot but he refused, and laid a claim of ownership of **39.5 Acres out of Plot No. 5217**.

24. I have confirmed that **Plot Nyandarua/Tulaga/5217** is registered in the plaintiff's names (PExt 2).

The plaintiff's claim is that the entire suit property from which the sub divisions were created belonged to him and did not hold it in trust for the defendant or anybody else as he alone paid for the purchase price to the settlement Fund Trustee through a loan that he paid in instalments.

I have particularly considered evidence of **DW2 Joseph Mashamba, the Settlement Officer Nyandarua South District**. He narrated from documents that he produced as exhibits that the suit plot was allocated to one Kamau Kagunda in 1963 but he declined it, that it was then re-allocated and transferred to the plaintiff vide a transfer between the 1<sup>st</sup> allottee to himself including the development loan that he paid. No where did the Settlement Fund Trustee show that the said plot was allocated to the plaintiff in trust for his brother the defendant. This evidence was not challenged or controverted.

25. DW3 The brother to the plaintiff's father and defendant, DW3 laid no claim on the suit plot. His evidence that the loan to the settlement

Trustee was paid by the parties father was not supported by any evidence. He went further to state that his late brother did not tell them that the suit land was held in trust by the plaintiff for the defendant or anybody else. It is instructive that at all the material times, during the allotment of the suit plot to the plaintiff, the parties father was alive and did not raise any objection that the plaintiff was holding the suit plot for himself to the exclusion of his brother/family.

26. The defendant admitted having been invited to the suit property by his brother the plaintiff as he looked for money to buy his own land. For that, the plaintiffs submission that the defendant was a tenant at will of the plaintiff holds ground.

A tenant at will is a person who occupies real property owned by another until such time as the landlord gives him notice of termination of the tenancy at any time. The tenant occupies the property with the Landlords permission, ordinarily it is an oral tenancy agreement and usually between family members. The defendant in his evidence stated that he did not bring himself to the suit property but was by the plaintiffs authority, and permission.

In **Eunice Karimi Kibunja -vs- Mwirigi M'ringera Kibunja (2013) e KLR in Court of Appeal No. 89 of 2009(Nyeri)** in very similar circumstances to the present case, the Honourable Judges of Appeal stated principles upon which a claim for adverse possession by a tenant at will may claim ownership of land. Citing the case **Kasive -vs- Mwaani Investments Ltd & Others (2004) 184**, they stated:

***“In order to be entitled to land by Adverse possession the claimant must prove that he has been in exclusive possession of 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.”***

27. A licensee and therefore a tenant at will cannot claim ownership of land by dint of the doctrine of adverse possession as he does not have time running in his favour.

**See Delamere Estates Ltd -vs- Ndungu Njai & 42 Others Nakuru HCCC No. 184 of 2003 (2006) e KLR** where Musinga J (as he then was ) rendered

***“If a person is an employee of another and by virtue of his employment is allowed to reside on his employers property his entry and occupation thereon is not adverse to his employers rights because he entered therein with permission of his employer.”***

28. In the present case, it is on record that the defendant did not have peaceful and uninterrupted occupation of the suit land for a continuous period of 12 years. He was requested to leave and vacate the suit land in 1980. This is the first time the occupation was interrupted, a period of 8 years from 1972. Thereafter, a suit was filed for his eviction vide **Naivasha CMCC No. 706/2004, followed by HCCC No. 2 of 2009 and now ELC No. 55 of 2013.**

It is my finding that the defendant never had uninterrupted and peaceful occupation of the suit land since 1980 when the plaintiff decided to terminate the Tenancy at will.

29. Had the Defendant entered the plaintiffs land as a trespasser, the position would be different. Further, the defendant did not demonstrate by any tangible evidence what type of occupation he had. He did not demonstrate his claim over the 39½ Acres – what he did on the said land on the ground other than stating that he was invited by the brother to the land. See **Belinda Murai & 9 Others -vs- Amos Wainaina (1981) e KLR.**

It was the defendants onus and duty to tender evidence to show his actual occupation on the ground. That he failed to do See **ELC No. 931 of 2012 Wellington Lusweti Barasa & 75 Others -vs- Lands Ltd & Another (2914) e KLR and Eunice Karimi Kibunja -vs- M'ringera Kibunja (2013) e KLR and Kasuve -vs- Mwaani (Supra).**

30. In the matter on whether the plaintiff held the suit property on trust for the defendant, the defendant has failed to conclusively and satisfactorily prove the claim on trust. The settlement officer (DW2) was categorical, and documents produced confirmed that the suit land was allocated to the plaintiff for himself and not in trust.

31. Allegations stated by the defendant and his witness - DW1 – that the intention of the plaintiffs father was that the suit land would be registered in the plaintiff's name on his behalf was not substantiated nor proved. The alleged payments by him of the development loan on behalf of the plaintiff too remain as allegations.

As stated in the case **Mwangi & Another -vs- Mwangi(1986) e KLR**

***“The registration of a Title to land is a creation of the law and one must look into the considerations surrounding the registration in order to determine whether it was envisaged that trust should be created.”***

The title of a registered owner of land is free from all interests and encumbrances except those shown against the register such as overriding interests that exist and need not be noted in the register. **Section 28 Land Registration Act, 2012.**

32. I am not persuaded that a constructive trust was created or arose when the plaintiff was registered as the owner. That intention to have a trust created has not been adequately demonstrated. This is more so that when all the registrations, subdivisions and request to the defendant to leave the plaintiffs land were being done, the plaintiffs and Defendants father was alive. Had that been the intention he would have said so to his two warring sons. He died in 1986. The dispute started in 1980.

**Section 28(b) LR Act 2012** states that a trust including customary trusts are overriding interests that may not be registered or noted on the register.

33. Having found that the suit property was acquired by the plaintiff by direct allotment and purchase from the original allottee of the same, then and without any evidence of a trust, I find that suit property, and more specifically the subdivision known as **Nyandarua/Tulaga/1002** is the property of the plaintiff and that the defendant has no legal or beneficial claim either by trust or by adverse possession.

34. It is worth to note that the Settlement Fund Trustee Officer DW3's evidence was not challenged, and therefore the suit property was an allotment to the plaintiff by the fund after the original allottee rejected it. No other contrary evidence was adduced. It is my finding that that evidence was credible and uncontroverted.

35. The **Land Registration Act (2012) Section 24(a)** states:

***“The registration of a person as the proprietor of land shall vest in that person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.***

**Section 25(1)**

***“----but subject to:***

***a) to the leases, charges and other encumbrances and to the conditions and restrictions,if any shown in the register.***

***b) to such other liabilities rights and interests----as declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.”***

***(2) Nothing in this Section shall be taken to reliev a proprietor from any duty or obligation to which the person is subject to as a trustee.”***

36. The above are clear legal provisions that nothing, other than that which is stated as an encumbrance or that need not be noted thereon eg. a trust ought to interfere with a proprietors interests and rights on the land.

It is noted that both the plaintiff and the defendant registered restrictions on the suit land to protect their perceived and/or real interests on the suit land. Having come to the finding that the defendant's interest in the land as a beneficiary under a trust and by adverse possession have not been proved to the required standard, it follows that the restriction against the title by the defendant by virtue of the then pending suit **CMCC No. 706/2004** ought to be lifted. That suit was dismissed as well as the appeal being **HCCA No.32 of 2005**.

37. Accordingly I come to the following findings to the issues as framed:

***1. That the plaintiff does not hold the title to the suit property Nyandarua/Tulaga/1002 in trust for the defendant or any other person, and therefore the defendants occupation of the 39 ½ acres out of the suit property is not only illegal but also unlawful.***

***2. Further, it is my finding that the defendant has no title or entitlement to 39½ acres out of the suit property either by way of Adverse possession as none was established to have been so acquired demonstratably proved to the required standards, upon a balance of probability that the declarations of ownership of the suit property ought to be issued in his favour.***

38. The Defendant having admitted and confirmed that he took possession of the suit property by permission and authority of the plaintiff, and therefore a tenant at will, and upon the said tenancy at will having been terminated in 1980 when he was requested to give vacant possession, the obvious action that the defendant ought to do is to honourably leave and give vacant possession of the suit property to the plaintiff as his continued stay thereon constitutes an act of trespass.

39. For those reasons, the defendant's counterclaim is dismissed, and judgment entered for the plaintiff against the defendant as follows:

***1. A declaration is hereby issued that the plaintiff James Mutura Njami is the absolute proprietor of the suit property Nyandarua/Tulaga/1002, (now subdivided into land parcels Nyandarua/Tulaga/5208-5220) and particularly the suit property, Nyandarua/Tulaga/5217.***

***2. That the defendant is hereby declared to be a trespasser on the plaintiffs land parcel stated above.***

***3. That the defendant is ordered and directed to give vacant possession of the suit land to the plaintiff within 120 days(four months) from the date of this judgment.***

***4. That this suit being a dispute between family members over land ownership, I direct each party to bear own costs of the suit.***

**Dated and Signed this 6<sup>th</sup> Day of October 2017.**

**J.N. MULWA**

**JUDGE**

**Delivered on the 24<sup>th</sup> Day of October 2017.**

**R. LAGAT KORIR**

**JUDGE**