



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT

AT THIKA

ELC NO. 17 OF 2017

KHADIJAH ALI OMAR & AHMED OMAR

(Suing as the administrators and beneficiaries of the estate of

OMAR KHAMISI deceased.....PLAINTIFF

-Versus-

KAUSHUM WAMBUI.....DEFENDANT

JUDGMENT

By Plaint dated **12th May 2016**, the Plaintiffs instituted a suit against the Defendant for orders; -

1) THAT vacant possession of the suit properties i.e. all those properties known as LR No. 4953/933, IR. 33891, LR No. 4953/202, IR 33948 and LR No. 4953/931, IR 33886 (hereinafter collectively referred to as the suit properties) were owned by Halima Njeri.

2) Costs of this suit.

It is the Plaintiffs' claim that the suit properties were owned by **Halima Njeri**, who died in **2005**, without any issue. That **Halima Njeri** was married to **Omar Khamisi**, who was the Legal Administrator of her Estate vide **Nairobi Succession No. 1512 of 2006**, and whom all the properties vested in. That on **17th February, 2010**, Omar Khamisi died and the Plaintiffs took out Letters of Administration vide Succession Cause no. 1460 of 2012.

Further, that during the pendency of **Succession Cause No. 1512 of 2006**, in respect of the estate of **Halima Njeri**, the Defendant claimed interest on the suit properties on the assumption of an existing marriage, but which claim was dismissed. The Defendant preferred an Appeal but the same was dismissed too. That despite losing the Appeal, the Defendant has refused to give vacant possession, denying the Plaintiffs the use and enjoyment of the suit properties.

In response to the suit, the Defendant filed a Defence and Counterclaim. In her Defence, the Defendant averred that she entered into a woman to woman customary marriage with **Halima Njeri's** mother. That after the marriage, she moved into the suit properties where she has lived up to date and has even been collecting rent and raised her children therein. That she has lived on the suit properties since **1972**, and she is entitled to ownership of the properties since the Plaintiffs have never lived therein.

In her Counter claim, the Defendant maintained that she was married to **Khadija Nyambura**, who was the original owner of the suit properties. That by dint of their marriage, she acquired ownership of the properties and that she **enjoyed continuous, open and uninterrupted use** of the suit properties. Moreover, that she is entitled to the suit properties in light of the developments she has made thereon. Further, that there has never been a determination of interest over the suit properties in the suits cited by the Defendant. She sought orders that this Court makes a declaration that she has beneficial interest on the suit properties.

The matter came up for hearing of the Plaintiffs' case on **2nd November, 2020**. **PW1 AHMED OMAR**, adopted his statement dated **12th May, 2016**, and produced a bundle of documents as per the List of Documents dated **12th May, 2016**, as evidence in chief. On cross examination, he told the Court that the properties are located in **Majengo, Thika** and the Defendant's children have been collecting rent.

That their father, **Omar Khamisi**, had been collecting rent prior to his death. Further, that the suit properties are under lease which was to end in **2017**, but they sought for renewal. That the Defendant used to work for their father and he was not aware of any marriage between the

Defendant and **Khadija Nyambura**.

The Defendant called two witnesses. **DW1 KAUSHUMU WAMBUI** testified that the Plaintiffs were known to her as their father **Omar Khamisi** was married to **Halima Njeri**. Further, that the three plots in Thika are residential and she has been collecting rent from thereon. That she came into occupation of the property in **1972**, before **Omari** had been born. **That Khadija Nyambura**, was the only one living thereon. That **Khadija Nyambura**, did not have any children and she got married to Khadija under kikuyu customary law, and she gave birth on her behalf. She also testified that **Halima Njeri** was the daughter of **Khadija Nyambura**, and a wife to **Omar Khamisi**. That after the death of **Halima Njeri**, **Omar Khamisi** took title deed, but the Respondent reported him to the elders.

On cross examination, she told the Court that she was married in **1972**, and she had two children before **Khadija** died, but that Khadija had one child called Halima. Further, that Khadija paid dowry to her father. On re-exam, she told the Court that she was taking care of Khadija's property and that **Halima Njeri** lived in **Kibera** and she could only come to stay with her.

DW2 BONFACE MBUCHU, testified that he is a teacher and an **MCA**, for **Majengo Ward** and knows the Defendant who came to live in the homestead of **Khadija Nyambura** on a property near the school where he was teaching. That the residential properties have been there since 1950, and whose rent was collected by **Khadija** and later the Defendant after Khadija died.

On cross examination, he testified that there was a family dispute concerning the property and **Khadija** did not want the property to be given to **Omar** as he was **Nubian**. That Khadija married the Defendant so that she could sire kids for her and that they were witnesses of Khadija's wishes over suit property.

DW3 DANIEL NDUNGU, adopted his statement dated **3rd December 2020**, as evidence in chief. On cross examination, he told the Court that the Defendant was taking care of **Khadija** when she was sick and was also her wife.

Parties filed and exchanged their written submissions. The Plaintiffs crafted one issue for determination by this Court being; - **whether the Defendant was married to the late Khadija Nyambura**.

In submitting to the negative, the Plaintiff largely relied on the opinion by the Kadhi and also submitted that there was adduced no evidence that indeed the customary rights were undertaken. Further, that the properties were registered in the name of **Halima Njeri** in **1979**, as first registration. There is no evidence that the properties were inheritance from her mother **Khadija**. In submitting, that the Defendant is not entitled to the properties, the Plaintiffs submitted that the Defendant failed to tender any evidence as to any improvements alleged to have been done. In the end, they urged this Court to dismiss the Defendant's claim.

The Defendant submitted on two issues; - **whether the Defendant was a wife** and **secondly whether the Defendant and her children had beneficial interest on the suit properties**.

On the first issue, the Defendant submitted that she got married to Khadija in **1972**, and at the time of their marriage, Khadija had a daughter, **Halima**. That there has been adduced adequate evidence to demonstrate that the Defendant was the wife of Khadija and this Court should be so guided.

On the issue of beneficial interest, the Defendant drew the Court's consideration to Section 9 of the **Matrimonial Property Act**, to the extent of her contribution in improving the suit properties. Similarly, the Defendant submitted on the provisions of Section 2 of the Aforementioned Act that her contribution towards the suit property entitles her to acquire beneficial interest. That her children were dependents of the estate of **Khadija**, by dint of Sections **27** and **29** of the **Law of Succession Act** and they therefore have beneficial interests on the suit properties.

The Defendant further submitted that she has been in open and continuous occupation of the suit properties and she cannot be reduced to a trespasser. The Defendant brought to Court's attention that the Plaintiffs are step-children of **Halima Njeri** and now want to benefit from her properties. That allowing the prayers would amount to injustice and would lead to perpetuating an illegality and fraud. Reliance was placed on the case of **Board of Trustees, National Social Security Fund Vs Michael Mwalo {2015}eKLR**, where the Court held that a Court may refuse to enforce a transaction if it is established that there was an illegality. The Defendant also made submissions on **Section 76** of the **Law of Succession Act**, and urged this Court to be so guided.

The Plaintiffs filed further submissions in countering the Defendant's submissions. The Plaintiffs maintained that there was no evidence of any marriage between the Defendant and Khadija, and if really there were any rites done, then it was illegal as the muslim religion did not recognize such kind of marriage. That the **Matrimonial Property Act** does not apply to the instant suit, as the said Act came into force after the transactions. The Plaintiffs' further submitted that the Defendant cannot raise an issue for presumption of marriage yet she did not plead it.

A perusal and analysis of the evidence, pleadings and submissions yield the uncontroverted facts that; - the suit properties are registered in the name of **Halima Njeri Omari**. Halima Njeri Omari was the daughter of **Khadija Nyambura**, and wife to **Omari Khamisi**. The suit properties are held on leasehold and the Certificate of Title indicates that the properties were issued to **Halima Njeri** on diverse years. This Court has not had the benefit of any evidence to determine whether **Khadija Nyambura** was the first owner of the suit properties. Withal, **Halima Njeri** died in **2005** and **Omari Khamisi** took out Letters of Administration over her estate. Also **Omari** and **Halima** were never blessed with an issue, but **Omari** was polygamous and had issues in the said marriage who are the Plaintiffs herein. Subsequently, **Omari** died in **2010**, and the Plaintiffs took out Letters of Administration over his estate.

Technically, the Plaintiffs are Halima's step children and this Court is not well acquainted with the relationship between **Halima** and the Plaintiffs prior to her death. Be that as it may, the Plaintiffs are entitled to benefit from

their father's estate.

The issues for determination by this Court are

- i. Whether this Court has the Jurisdiction to determine the existence of marriage between Khadija Nyambura and the Defendant**
- ii. Whether the Defendant has beneficial interest over the suit properties**
- iii. Whether the Defendant should yield vacant vacation of the suit properties**
- iv. Who should pay costs**

(i) Whether this Court has the Jurisdiction to determine the existence of marriage between Khadija Nyambura and the Defendant

The jurisdiction of this Court is founded under Article 162(2) of the **Constitution** and it draws its power from Section 13 of the **Environment and Land Court Act**, which provides:

“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes?

- a) Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
- b) Relating to compulsory acquisition of land;**
- c) Relating to land administration and management;**
- d) Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
- e) Any other dispute relating to environment and land.”**

A look at the foregoing powers, this Court has no jurisdiction to determine issues of marriage as submitted by the parties. The question of jurisdiction was laid down in the case of **Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1**, where the Court held;

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of Law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”

Parties made a number of references to an existing marriage between **Khadija Nyambura** and **the Defendant** and one of the issues parties wish this Court to determine is whether there was marriage between the parties. As demonstrated above, this Court lacks the jurisdiction to determine the issue as raised.

While the pleadings revolve around land ownership which this Court has the jurisdiction, parties have largely submitted on marriage. The Defendant has submitted on consideration of the property as a matrimonial property. **Section 17 of the Matrimonial Property Act, hereinafter referred to as MPA**, cloths this Court with the jurisdiction to hear matrimonial matters. The purpose and intent of the section is to apportion rights from one spouse to the other. (*See Nairobi CoA Appeal No. 128 of 2014 PNN vs. ZWN [2017] eKLR*). Similarly, the Court in **Eldoret ELC No. 317 of 2014;- Jane Wambui Ngeru Vs Timothy Mwangi Ngeru [2015] eKLR** held:

“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014, in addition provides that the Courts that will hear matrimonial causes arising under the Act are Resident Magistrate’s Courts and within the limits provided under the law as to their jurisdiction.

It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land”.

Therefore, this Court can only determine the existence of any rights on land considered as matrimonial property. Having so held, this Court cannot determine the issue of marriage. Even so, if this Court had the requisite jurisdiction, the Court in **Nairobi HCC No. 1512 of 2006**, in the **Estate of Halima Njeri Omari** determined the issue of marriage. (*See page 8 of the Ruling*).

On whether the Defendant has beneficial interest in the suit property, the Defendant filed a **Counter Claim** for orders of beneficial interest in

the suit property. The Defendant averred that having married **Khadija Nyambura**, the original owner of the suit properties, she was entitled to benefit from it. That she is entitled to the property by dint of marriage and the improvements done on the suit property during her occupancy.

Section 7 of the **Land Act** lists ways through which land can be acquired to wit:

Title to land may be acquired through—

- (a) Allocation;*
- (b) Land adjudication process;*
- (c) Compulsory acquisition;*
- (d) Prescription;*
- (e) Settlement programs;*
- (f) Transmissions;*
- (g) Transfers;*
- (h) Long term leases exceeding twenty one years created out of private land; or*
- (i) Any other manner prescribed in an Act of Parliament.*

The Defendant's claim is based on the matrimonial property falling under **section 7(i)** of the above. What is not in dispute is that the Defendant has been in occupation of the suit property and continues to be. As to when the Defendant came into occupation, the Defendant alleged to have gained entry into the land in 1972, a contention confirmed by DW2. The circumstance of her entry is a subject of dispute between parties. Whereas the Plaintiffs claim she came in as **Khadija's caregiver**, the Defendant maintains she was married to **Khadija**.

To determine whether the Defendant has beneficial interest based on a claim under matrimonial property, this Court will seek to determine whether the property is a matrimonial property or not. The Certificates of Title shows that the properties are registered under the name of **Halima Njeri**, which registration took place in 1979. Omari Khamisi later acquired ownership by transmission and transfer effected in **2009**. It is not clear whether the property was ever registered in the name of **Khadija Nyambura**, as to qualify to be a matrimonial property or not.

Matrimonial Property is defined under section 6 of the Matrimonial Property Act as

(1) For the purposes of this Act, matrimonial property means—

- (a) The matrimonial home or homes;*
- (b) Household goods and effects in the matrimonial home or homes; or*
- (c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.*

Matrimonial Property Act is "**An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes**" The catch line is **spouses**, and so parties claiming interest in land must be spouses whether married or divorced.

The marriage between the Defendant and **Khadija Nyambura** was found by the Court in **HCC No. 1512 of 2006**, to be **illegal** and a **nullity**. Therefore, no claim can arise out of an illegality. The Defendant has invited this Court to draw a presumption of marriage; this Court does not have the jurisdiction to determine issues of marriage. The High Court found the said marriage if any was a nullity and there is nothing this Court can do or pronounce to give breathe to the illegality.

The Court of Appeal sitting in **Nairobi in Appeal No. 332 of 2014 O K N v M P N [2017] eKLR** quoted the holding of **Lord Denning in Macfoy Vs United Africa Co. Ltd [1961] 3 All E.R. 1169:**

"...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it, is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

There being no marriage, the properties if available cannot be subjected to the provisions of the Matrimonial Property Act. This Court associates itself with the holding of the Court in **O K N vs M P N supra**, where the Court in choosing to apply the provisions of the Repealed **Registration of Titles Act** in place of **Matrimonial Property Act** held "**There being no marriage between the parties, the two properties cannot be shared in accordance with family law**".

The Defendant relied on **Sections 2 and 9** of the said **Matrimonial Property Act** to allege that she contributed to the improvement of the suit properties. This is a blanket statement and without evidence, and this Court is not properly guided. As was held by the Court of Appeal, in **Civil Appeal No. 128 of 2014, supra** contribution must be proved and assessed. While this Court has a duty to fairly assess and determine the contribution, parties must lead Court to their contributions. As found above, the suit properties are not matrimonial properties within the meaning of it under the Matrimonial Property Act.

Furthermore, the suit properties are not registered under the name of **Khadija Nyambura**, but **Halima Njeri**. **Section 26** of the **Land Registration Act** gives sanctity to title. It provides;

“(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.”

The Defendant submitted on issues of **fraud**, but did not raise it in her pleadings. While submissions are a parties marketing skill, parties are bound by their pleadings. It is trite that allegations of fraud and illegality must not only be stated, but also particularized and proved. The Defendant failed to do so and cannot now submit on it. Allegations of fraud are grave and when stated, must be specifically pleaded (*See CoA Appeal No. 329 of 2009;- Richard Akwesera Onditi vs Kenya Commercial Finance Company Limited [2010] eKLR*). Further, **Sections 107 to 109** of the **Evidence Act**, placed the onus of proving allegation of fraud on the Defendant. The Court of Appeal in **Mombasa Civil Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR** stated;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.

The Defendant has invited the Court to the provisions of **Section 76** of the **Law of Succession Act**, on revocation of Grant as the basis for the illegality. The jurisdiction on annulment of Grant lies with the High

Court and was properly dealt with by the trial Court. There being no challenge on the title deed in the name of **Halima Njeri**, this Court finds that the title as prima facie evidence that **Halima Njeri** is the legal owner. To this end, the Defendant cannot claim beneficial interest on the basis of matrimonial property.

The Defendant has alluded to adverse possession by averring that she has lived on the suit property since **1972**, and has been in open and continuous occupation. The procedure for instituting adverse possession claim is well laid down in **Order 37 Rule 7** of the **Civil Procedure Rules**, that such a claim should be by way of Originating Summons. While the Defendant did not expressly state a claim for adverse possession, she has listed down the ingredients of it. The Court of Appeal in **Malindi App No. 26 of 2015 Gulam Miriam Noordin v Julius CharoKarisa [2015] Eklr** held:

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813, where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted”.

In the interest of doing justice, this Court is guided by the above findings of the Court of Appeal as well as the provisions of **Article 159(2)(d)**, of the Constitution and shall proceed to determine whether there is any prescriptive right.

A claim for **adverse possession** can only issue against the registered owner or personal representatives. **Halima Njeri** passed on and her properties devolved to **Omari Khamisi** who passed on and the Plaintiffs were appointed administrators. Such a claim can issue against them. (*See CoA, Appeal No. 94 of 2016;- Esther Wamwere Nyori Vs Joseph Maina Wachira [2021] eKLR*).

The law on **adverse possession** is provided for under the Limitation of Actions Act, hereinafter referred to as *Limitation of Actions Act*. **Section 7** of the said Act, it provides

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Section 13 further provides

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the

period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. The Court of Appeal in Kisumu **Civil Appeal No. 110 of 2016**;- **Richard Wefwafwa Songoi Vs Ben Munyifwa Songoi [2020] eKLR** opined that a person claiming adverse possession must establish the following

- i. On what date he came into possession.*
- ii. What was the nature of his possession?*
- iii. Whether the fact of his possession was known to the other party.*
- iv. For how long his possession has continued and*
- v. That the possession was open and undisturbed for the requisite 12 years.*

Similarly, in **Kisumu Civil Appeal no. 27 of 2013**:- **Samuel Kihamba Vs Mary Mbaisi [2015] eKLR**, the Court held;

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

The Defendant led evidence that she entered into the suit property in 1972, and has lived thereon with her kids. The Plaintiffs did not object to this, and there was an affirmation that she has occupied the property. The Plaintiffs have not acquired title to the property, but are Administrators of the registered proprietor. Be that as it may, a claim for adverse possession does not accrue to title but land.

DW3 and DW2 lead evidence as to the lengthy of stay the Defendant has had on the suit property. This Court had the benefit of taking the evidence and the demeanor of both the witnesses did not give any reasons as to why the Court would doubt their evidence. It is not in dispute that the Defendant has been in **open, continuous and uninterrupted** occupation of the suit property, until the filing of the instant suit. There was no evidence that the Defendant has done any development on the suit property. What came out from the testimonies is the Defendant has been collecting rent over the property. The application of **Section 13 (3)** of the **Limitation of Actions Act** to the Defendant’s conduct of collecting rent makes her adverse to the title.

This Court concurs with the sentiments of **Justice Kuloba J**, as he then was, in **Nairobi Civil Case No. 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] eKLR**, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

There was no evidence to rebut the Defendant’s testimony that she has occupied and utilized the suit property. Time for computing possession starts to run when there is someone adverse to the land. Time began running from **1972**, when the Defendant gained entry into the suit property. Even if title changed hands, nothing can curtail time from running (**See Civil Appeal No 164 of 2011:- Gachuma Gacheru Vs Maina Kabuchwa [2016] eKLR**). What can stop time from running is when the registered owner takes the legal steps to assert title. By the time the Plaintiffs brought out this suit, the land had already become adverse to the Defendant.

Halima Njeri and Omari Khamisi did not at any point attempt to evict the Defendant; they had the option to recover this land, but they failed to exercise the said right. To this end, this Court finds that the Defendant has on a balance of probability proved that she has beneficial interest on the suit property by dint of adverse possession.

On whether the Defendant should vacate the suit property, the Plaintiffs are entitled to benefit from the suit property as beneficiaries of **Omari Khamisi**. The Grants issued to Omari and now the Plaintiffs have never been revoked and are therefore valid. The status of **Nairobi Civil Appeal No. 173 of 2014**, is not known to this Court and there was no order preventing the Plaintiffs from claiming ownership of the land. That being the case, the Plaintiffs maintains the right to claim properties belonging to their father’s estate.

The right of the Plaintiffs to access, use and utilize the land is protected by Section 24(a) and 25(1) of the Land Registration Act which

Provides:-

24(a) Subject to this Act—

(a) The registration of a 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;

25(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”

There was no adverse evidence to challenge the validity of the title and the Plaintiffs are entitled to benefit from it. The Plaintiffs cannot enjoy such rights if the Defendant is in occupation. The Defendant is, as a matter of Law expected to yield vacant possession to the Plaintiffs who are the beneficiaries of the registered owner.

However, the Court in *Nairobi Civil Case No. No. 535 of 2000:-Cross Current Indigenous Network Ltd Vs Commissioner of Lands & another [2005] eKLR*, when considering an issue of vacant possession held:

“The above trilogy of authoritative Court of Appeal decisions is crystal-clear as to the status of claims by a registered land-owner running against claims by the physical occupant of a suit land. Unless (i) the physical occupant meets the conditions of an adverse possession claim, and he has moved the Court through prescribed procedure for having his claim upheld, and his claim has been upheld; or (ii) the physical claimant proves to the satisfaction of the Court that the registered title-holder attained his proprietorship status by fraud or he was party to a misrepresentation which brought him thither , then the registered land-owner wins the argument hands down; and the physical occupant must yield, quit, or be evicted”.

Having found that the Defendant has met the threshold for grant of ownership by virtue of **adverse possession**, a prayer for vacant possession cannot issue on the land available for adverse possession.

Nonetheless, this Court **takes judicial** notice that there are **three** suit properties herein. None of the parties informed the Court the specific land which the Defendant is occupying and which the rental houses are built on. That being the case, this Court finds that the Defendant is entitled to be the owner of the suit property by **adverse possession**, but this is only to the specific land that she resides on. Further by application of **Section 13(3) of Limitation of Actions Act Cap 22**, Laws of Kenya the Defendant is adverse to the land on which the rental houses are built on. The Plaintiffs are entitled to vacant possession on the other parcels of land which are not adverse to the Defendant herein.

(iv) who should bear costs of the suit

On who should pay costs, the Court is guided by Section 27 of the **Civil Procedure Act**, and given the circumstances of this case and the fact that the parties herein are somehow related, the court directs that each party should bear its own costs.

The end results is that the Court finds that the Defendant herein is entitled to **ownership** of a specific portion of the suit property by virtue of **adverse possession** and that is **only** on the specific land that she occupies and on which the rental houses are built on.

Further the Plaintiffs are entitled to vacant possession of the other parcels of land which are not adverse to the Defendant herein.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 27TH DAY OF JANUARY, 2022.

L. GACHERU

JUDGE

Delivered online;

In the presence of

M/s Barbra Ouma H/B for Mr Mungla for the Plaintiffs

Mr Mabachi H/B Mr Mathenge for Defendant

Kuiyaki – Court Assistant

L. GACHERU

JUDGE