



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 27 OF 2014
IN THE MATTER OF LIMITATION OF ACTIONS ACT
SECTION 37 AND 38 CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF THE LAND ACT SECTION 7 (d)
AND
IN THE MATTER OF LAND PARCEL INOI/KERUGOYA/194/NOW
SUB-DIVIDED INTO INOI/KERUGOYA/3069, 3070, 3071 AND 3072

THE REGISTERED TRUSTEE CATHOLIC DIOCESE OF MURANG'A.....PLAINTIFF

VERSUS

MICERE NJAU.....1ST DEFENDANT

JACKSON WACHIRA NJAU.....2ND DEFENDANT

SYMON KIBARA NJAU.....3RD DEFENDANT

LYDIA WAGITWE.....4TH DEFENDANT

JUDGMENT

In an originating summons dated 18th February, 2014, the plaintiff prays for determination of the following questions:

- 1. Whether the CATHOLIC DIOCESE OF MURANG'A REGISTERED TRUSTEE, the Plaintiff herein has become entitled by prescription to**
- 2. proprietorship of land parcel No. INOI/KERUGOYA/194 now purportedly subdivided into INOI/KERUGOYA/3069, 3070, 3071 and 3072.**
- 3. Should the plaintiff be registered as the sole proprietor of all that parcel known as INOI/KERUGOYA/194 or the resulting number INOI/KERUGOYA/3069, 3070, 3071 and 3072 in Kirinyaga County in place of the defendants.**
- 4. Whether the defendants hold land parcel number INOI/KERUGOYA/194 or the new resulting number INOI/KERUGOYA/3069, 3070, 3071 and 3072 in trust for the plaintiff who has acquired title to land by prescription.**
- 5. Has the occupation by the plaintiff been, open, continuous and un-interrupted.**

6. Has NJAU NDUNA (deceased) or the defendants ever occupied or in any manner interfered with the occupation of the suit land INOI/KERUGOYA/194 by the plaintiff since 1965.

7. Should the titles issued to the defendants in respect of land parcel INOI/KERUGOYA/194 or the resultant parcels INOI/KERUGOYA/3069, 3070, 3071 and 3072 be cancelled.

8. Who should pay the costs of the suit?

The said originating summons is supported by a 26 paragraphs affidavit by Sister Peninah Wanjiku Muchiri, of which the following are the major averments:

1. That St. Michael Primary school is a primary school established on land parcel INOI/KERUGOYA/194 by the plaintiff since 1965.
2. That ever since 1965 the school has been in exclusive and continuous occupation of the suit land to date.
3. That the land upon which the plaintiff developed the school as subsequently compensated by Kirinyaga County Council which transferred land parcel INOI/KAMONDO/628 to NJAU NDUNA in exchange.
4. That in 2006 the defendants petitioned for grant of letters of administration to the estate of NJAU NDUMA in Embu High Court Succession Cause number 282 of 2006.
5. That upon learning of the filing of the said succession cause the plaintiff filed a caveat but the defendants proceeded to obtain a grant in the High Court of Embu.
6. That the defendants on 10th January, 2014 unlawfully and fraudulently purported to partition land parcel INOI/KERUGOYA/194 among themselves with resulting numbers INOI/KERUGOYA/3069, 3070, 3071 and 3072.
7. That the plaintiff acquired title to land parcel INOI/KERUGOYA/194 by prescription from the said NJAU NDUNA and that the Defendants hold the resulting numbers INOI/KERUGOYA/3069, 3070, 3071 and 3072 as trustees for the plaintiff.

The defendants filed an objection to the originating summons dated 18th March, 2014 of which the following are the major averments:

1. That the land in issue INOI/KERUGOYA/3069, 3070, 3071 and 3072 were all resultant parcels from land parcel INOI/KERUGOYA/194, which was registered in the name of their deceased father, Stanley Njau Nduna.
2. That in 2006, the defendants petitioned for grant of letters of administration to the estate of NJAU NDUMA in Embu High Court Succession Cause number 282 of 2006.
3. That the grant was obtained and the defendants proceeded to distribute the estate as per the confirmed grant.
4. That the plaintiffs filed an application for revocation of grant in Embu High Court on 11.4.2013 but have not bothered to prosecute the application.
5. That this matter can only be addressed in the succession case and this court lack jurisdiction.
6. That the claim for adverse possession cannot lie because the plaintiffs are not in occupation of any of the parcels in issue as their school is built on land parcel INOI/KERUGOYA/250 which is registered in the name of the County Council of Kirinyaga and which forms part of Kerugoya township.
7. That the defendant's father was originally allocated 12 acres of the land by his Uceera clan and when the township was created he gave out six acres of his allocation and was left with six acres which became land parcel INOI/KERUGOYA/194, while the County Council consolidated all the parcels it had acquired from various members of the Uceera clan and it became land parcel INOI/KERUGOYA/250.
8. That the defendant's father was compensated with land parcel INOI/KAMONDO/628 where he settled and planted trees in land parcel INOI/KERUGOYA/194.
9. That the applicants had caused the Chief Land Registrar to lodge a restriction on the land, but upon investigations he realized that the applicants had no valid claim on the land and he removed it.
10. That the application has no merit and should be dismissed with costs.

Plaintiff's Case

The plaintiff's case was heard on 2nd October 2019 and 21st November 2019 respectively where three witnesses testified.

PW1 - Peninah Wanjiku Muchiri

She testified on 2nd October, 2019 and adopted her statement dated 21st September, 2015 as her evidence. She also produced the plaintiff's list of documents dated 21st September 2015 which contains 18 exhibits.

She testified that she was the secretary of the Board of Management of St Michael Boarding School in Kerugoya. It was her evidence that the school was started in 1965 on land parcel INOI/KERUGOYA/250 where the church is built. The school then expanded to land parcel INOI/KERUGOYA/194 and land parcel INOI/KERUGOYA/250. The land parcel INOI/KERUGOYA/194 is wholly occupied by St Michael Girls Boarding School, St Joseph Primary and St. Joseph Secondary School.

She testified that nobody has ever claimed the suit land from the plaintiff or its school management until January 2014 when the defendants invaded the school and attempted to subdivide the land.

In the year 2006, the defendants petitioned for grant of letters of administration to the Estate of NJAU NDUMA in Embu High Court Succession Cause number 282 of 2006 without involving the plaintiff who later filed a caveat.

It is the plaintiffs' case that they consistently utilized the suit land for 55 years.

PW1 further testified that the original owner of land parcel INOI/KERUGOYA/194 - NJAU NDUNA was compensated by Kirinyaga County Council with land parcel INOI/KAMONDO/628.

On cross-examination by the defendants, she testified that the suit land is occupied by St Michael Boarding School which is under the Catholic Diocese of Murang'a.

PW2 – Joseph Maina Njoroge

He testified that he was a trustee of the Catholic Diocese of Murang'a. He was referred his witness statement recorded on 21/09/2015 which was adopted in his evidence

On cross-examination by the defendants, he testified that the suit land parcel INOI/KERUGOYA/194 is occupied by St Michael Boarding School, a public school. It is run by the Board of Management of the Catholic Diocese of Murang'a.

He testified that they have occupied the land without disturbance since the school was started. The disturbance came in 2014 from the defendants.

PW3- Sister Consolata Wangare Gakure

She introduced herself as a secretary of the B.O.M from 2015 to 2017.

She testified that the suit land is occupied by St Michael Boarding School which is under the Catholic Diocese of Murang'a.

On cross-examination, she testified that the Catholic Church did not occupy the land but a separate land parcel INOI/KERUGOYA/250 and that one Njau Nduna had been laying claim to the property.

She testified that the land had been charged by AFC and a restriction placed on the land in 1978. Further, she is aware of the Embu Succession cause. She is not aware of the outcome of the revocation.

On further cross- examination, she testified that the defendants have never come to the suit land until 2014 when they sought to subdivide it.

Defence Case

The defence case was heard on 12th February, 2020 and 03/11/2020 respectively.

DW1 – Lydia Wagitwe Njau

She testified on behalf of the defendants.

The witness adopted her statement dated 12th February, 2020. She also produced the defendant's list of documents dated 25th November, 2015.

She testified that land parcel INOI/KERUGOYA/194 was the property of their father NJAU NDUNA who had charged it in 1963 to the AFC. In the 1970s, the plaintiff invaded the land and built St Michael Boarding School under the incitement of the Kirinyaga County Council. There has been protracted battle to reclaim the land since then.

The witness alleged that the green card of land parcel INOI/KAMONDO/628 was forged by Roselyn Miano to indicate that there was an exchange with land parcel INOI/KAMONDO/628. The land parcel No 628 was first registered on 3/9/1976. In 1974 it was not in existence.

The school, St. Michael Boarding School was constructed on land parcel 250.

The plaintiff does not occupy land parcel INOI/KERUGOYA/194.

She testified that prior to her father's demise, he had written numerous letters to the Chief land Registrar in an attempt to recover the suit land. Thus, the plaintiffs have not been in exclusive and uninterrupted occupation of the suit land as alleged.

On cross-examination, she confirmed that she has never lived in the suit land.

Plaintiff's submissions

The plaintiff framed the following issues for determination:

- 1. Whether the Plaintiff herein has become entitled by prescription to proprietorship of land parcel INOI/KERUGOYA/194 now purportedly subdivided into INOI/KERUGOYA/3069, 3070, 3071 and 3072.**
- 2. Whether the deceased NJAU NDUNA had any valid title to the land parcel INOI/KERUGOYA/194 which could be inherited by the defendants.**
- 3. Whether the plaintiffs have proved their case on a balance of probabilities.**
- 4. Who should pay the costs.**

Whether the Plaintiff herein has become entitled to the suit land by prescription

The plaintiff's originating summons are premised on *Section 37 and 38 of the Limitation of Actions Act and Section 7(d) of the Land Act*

The plaintiff submitted that St Michael Boarding School in Kerugoya was started in 1965 on land parcel INOI/KERUGOYA/250 where the church is built. The school then expanded to land parcel INOI/KERUGOYA/194 and land parcel INOI/KERUGOYA/250. The land parcel INOI/KERUGOYA/194 is wholly occupied by St Michael Girls Boarding School, St Joseph Primary and St Joseph Secondary School.

The plaintiff submitted that the Land Registrar had been ordered to visit the suit premises and give a report to the Court. In the report dated 14th September, 2016 he found out that the whole land parcel INOI/KERUGOYA/194 measuring 2.6 hectares is wholly occupied by St Michael Girls Boarding School.

The defendant did not adduce any evidence of occupation of any part of land parcel INOI/KERUGOYA/194. DW1, Lydia Wagitwe confirmed in cross-examination that they reside in land parcel INOI/KAMONDO/628 which is about three kilometers from Kerugoya Town while the suit land is about 500 metres from the court.

From the plaintiff's evidence, the plaintiff has been in occupation of the suit land since 1965, a period of 56 years. The defendants testified concerning the invasion of their land by Kerugoya Girls Primary school which belonged to the Consolata Catholic Mission in 1970. This translates to 41 years occupation.

Black's Law Dictionary defines **prescription** as "**the extinction of a title or right by failure to claim or exercise it over a long period. The acquisition of a title to a thing (especially an intangible thing such as the use of real property) by open continuous possession over a statutory period.**"

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".

The plaintiffs submit that no action was brought to claim land parcel INOI/KERUGOYA/194 from the plaintiffs within the statutory period of 12 years.

The defendants had filed P.M.C.C 288 of 2002 in 2002, which was withdrawn on 18th April, 2013. The limitation period of 12 years had expired by the time of filing the suit.

The defendants had filed a medical report dated 25th November, 2015. No evidence was led to showing that their father Njau Nduna was under any disability.

The plaintiff occupation was open, notorious and uninterrupted from 1965 until 2014 when the defendants purported to invade the land to carry out subdivision provoking this suit.

The defendants testified that the suit land had been charged to AFC and due to the registered charge, the Plaintiff could not acquire title by prescription.

Section 38 of the Limitation of Actions Act provides that:

(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.**

Hence, an order for adverse possession shall take effect subject to any other entry on the register including the charge to the AFC.

The decision in **Civil Appeal No. 84 of 2019 at Malindi (2002) e KLR Loise Nduta Itotia v Aziza Said Hamisi** describes the issues to be considered in a case of adverse possession.

Whether the deceased NJAU NDUNA had any valid title to the land parcel INOI/KERUGOYA/194 which could be inherited by the defendants.

The plaintiff deposed at paragraph 6 of the supporting affidavit sworn by Sister Peninah Wanjiku Muchiri on 18th February, 2014 as follows:

“That the land upon which the plaintiff developed the school as subsequently compensated by Kirinyaga County Council which transferred land parcel INOI/KAMONDO/628 to NJAU NDUNA in exchange.”

The plaintiff submitted that the defendant in this suit admitted in cross-examination that they reside on land parcel INOI/KERUGOYA/628 and have no recollection of having lived on the suit land parcel INOI/KERUGOYA/194.

The plaintiff further submitted that at the time of death of Njau Nduna, the property in land parcel INOI/KERUGOYA/194 had already extinguished and title passed to the plaintiff and that there was no interest to pass to his beneficiaries. The claim by the defendants to land parcel INOI/KERUGOYA/194 would amount to unjust enrichment as the deceased had already been compensated with the land parcel INOI/KERUGOYA/628.

Whether the plaintiffs have proved their case on a balance of probabilities

The plaintiff submitted that the gist of the defendants’ case was that they had acquired the suit land by transmission through Embu High Court Succession cause No. 282 of 2006, and that that succession case constituted an interruption to the plaintiff’s adverse possession and further that having acquired new title numbers, time would only start running from the date they acquired the new titles.

The plaintiffs also submitted that the defendant’s title to land parcel INOI/KERUGOYA/194 was extinguished 12 years after the plaintiff went into occupation from 1965. The time ran out in 1977 when the defendants’ title was extinguished.

They relied on the decision in:

Kipketer Togom v Isaac Cipriano Shingore [2012] e KLR

The Respondent must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property. Alternatively the Respondent should have proceeded to institute legal proceedings in a court of law against the trespasser asserting his rights against the trespasser with prayers for his eviction and ejection from the property. Then only is there interruption to occupation and possession and then only does time stop running.

The proceedings, initiated or instituted by the Plaintiff do not amount to interruption. The onus to file suit is upon the Respondent asserting his right to Title as against the Plaintiff herein.

From the above, authority, the filing of succession cause does not amount to assertion of title as would interrupt occupation or stop time from running. Further, the jurisdiction of the court on adverse possession is not ousted by the succession cause.

Finally, they pray for judgement to be entered in favour of the plaintiff as prayed in the originating summons dated 18th February, 2014 by having the defendant’s title cancelled and an order that the suit land be registered in the name of the plaintiff.

Defence submissions

The defendant’s framed the following issues for determination.

- 1. Does the plaintiff have locus standi to sue on behalf of a public primary school?**
- 2. Did Sister Peninah Wanjiku Muchiri have the locus standi to swear the affidavit on behalf of the registered trustee of the Catholic Church Diocese of Murang’a?**
- 3. Who is in occupation of the suit land? Is it the Catholic Church through the plaintiffs? Is it St. Michael Girls Boarding Primary School? or is it St. Joseph Primary School? Or is it St Joseph Secondary School?**

4. Has the plaintiff satisfied the requirements for the granting the orders sought?

Whether the plaintiff has locus standi to institute this suit

The plaintiff's witnesses testified that St. Michael Girls Boarding Primary School which occupied the suit land is a public boarding primary school.

The governing of public schools is provided for in the **Basic Education Act No. 14 of 2013**. **Section 55(1)** provides for a board of management.

Section 59 provides for the function of the Board of Management.

The fourth schedule of the **Basic Education Act** paragraph 1 provides that the Board of Management is a body corporate capable of suing and being sued.

Suing and being sued

The plaintiff's witnesses testified that St. Michael Girls Boarding Primary School which occupied the suit land is a public boarding primary school. Further, they testified that the Catholic Church does not occupy land parcel INOI/KERUGOYA/194 but is occupied by the school. Moreover, they testified that the Catholic Church is a sponsor to the school but not the owners.

In that regard, the plaintiff do not have locus standi to institute this suit and maintain it since they neither own the school nor do they occupy the suit land. The best suited body to institute this suit was the Board of Management of St. Michael Girls Boarding Primary School as provided for in **Section 55 and 56 of the Basic Education Act No. 14 of 2013**.

In the case of **JULIAN ADOYO ONGUNGA V FRANCIS KIBERENGE ABANO Migori Civil Appeal No. 119 of 2015** which was cited with approval in the case of **Hawo Shanko v Mohamed Uta Shanko [2018] e KLR**, the Court held that:

“Further, the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction. Since it all amounts to null and void proceedings. “

Further, **In** the case of **JULIAN ADOYO ONGUNGA V FRANCIS KIBERENGE ABANO Migori Civil Appeal No. 119 of 2015**, the Court held that:

“In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintains the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a

nullity and as such lack the legal leg to stand on. In coming to this finding this Court is alive to the truism that the matter is quite an old one and involves the loss of a loved one in a family. Be that as it may, it is this Court's belief that all is not lost as the matter can be legally revisited.

The defendants submit that the plaintiff lacks locus standi to maintain this suit and it ought to be struck out with costs.

Whether Sister Peninah Wanjiku Muchiri have the locus standi to swear the affidavit on behalf of the Plaintiff

The supporting affidavit to the originating summons sworn by Sister Peninah was signed by a stranger as she was not a registered trustee of the plaintiff neither did she attach the authority to swear the affidavit

The same ought to be struck out.

Who is in occupation of the suit land

The defendants submit that it is the evidence of the plaintiff's witness that the Catholic Church does not occupy the suit land herein. The plaintiff witness testified that the land is occupied by St. Michael Girls Boarding Primary School, partly by St. Joseph Primary School and St Joseph Secondary School.

The plaintiff did not testify as to when the said occupants started occupying the suit land. In the case of **M'Mbaoni M'Thaara v James Mbaka (2017) e KLR**,

the learned judge dismissed the suit for adverse possession on the grounds that the court was not able to determine whether the plaintiff was in possession of the entire parcel of land and also the time when the plaintiffs entered the suit land was not well evidenced.

Whether the Plaintiff satisfied the requirements for the granting the orders sought

The defendants submit that the Catholic Diocese of Murang'a under whom the plaintiffs have sued as the registered trustees have never occupied the suit land.

Their claim is that the land is occupied by among others St. Michael Boarding Primary school which they sponsor. The school moved to the suit land after it was given/allocated to them by the County Council of Kirinyaga.

In the case of **MUGO NDEMERO VS EDWARD MUGANDA NGARE [2010] e KLR**, the court held that:

*“The other issue that I wish to discuss here which was not raised by either counsel, is if the plaintiff’s own admission that when he moved into the plot he did so because he believed it belonged to his father and the same was pointed out to him by his father. Even if this court had found that the plaintiff had moved into the land in 1978 as he claims, would his occupation amount to adverse possession? It is trite law that possession per se even for over the 12 years does not necessarily amount to adverse possession. As stated by **K.J. RUSTOMJI** in his book on the Law of Limitation and Adverse Possession, Vol. II, 5th Edition at pages 1366-1367.*

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous...A mere adverse claim to the land for the period required to form the bar is not sufficient. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupants’ use, done publicly and notoriously”.

The catch word here is **“true owner”**. This quotation was cited with approval by the **Court of Appeal in Civil Appeal No. 8 of 1990 at Kisumu**.

In this case, the **“hostility”** or **“adverseness”** must be to the true owner of the parcel of the property and not an assumed owner. In this case, the true owner of the parcel was the defendant, yet according to the plaintiff when he entered the land, it was on the belief that it belonged to his father. He only learnt that the same was in the name of the defendant in 2001. From his own testimony therefore, the hostility or adverseness to the true owner of the property came into existence in 2001 when the defendant took him to the chief and the elders claiming ownership of the plot.

A claim for adverse possession would therefore not lie. Whichever way I look at it therefore, the plaintiff’s claim under adverse possession cannot possibly hold. I am satisfied that he has not proved his claim against the defendant on a balance of probabilities as required by law. His claim must therefore fail. The same stands dismissed with costs to the defendant.

The upshot is that the plaintiff in this suit did not testify as to when the adverseness to the true owner of the land began. As such the claim by the plaintiff is not proved and must fail.

ISSUES

1. Whether the plaintiff herein has become entitled to proprietorship of land parcel No. INOI/KERUGOYA/194 now purportedly subdivided into INOI/KERUGOYA/3069, 3070, 3071, and 3072 by prescription?
2. Whether NJAU NDUNA (DECEASED) had any valid title to the land parcel No. INOI/KERUGOYA/194 which could be inherited by the Defendants?
3. Whether the plaintiffs have proved their case on a balance of probabilities?
4. Who should pay the costs?

ANALYSIS

1. Whether the plaintiff herein has become entitled to the proprietorship of land parcel No. INOI/KERUGOYA/194 now purportedly subdivided

into No. INOI/KERUGOYA/3069, 3070, 3071 and 3072 by prescription?

The plaintiffs’ claim is based on **Section 37 and 38 of the Limitation of Actions Act** as well as **Section 7(d) of the Land Act**. The plaintiff through her witnesses St. Michael Boarding School in Kerugoya was started in 1965 on land parcel No. INOI/KERUGOYA/250 where the church is built and expanded to land parcel No. INOI/KERUGOYA/194 and that land parcel No. INOI/KERUGOYA/194 is now wholly occupied by St. Michael Girls Boarding School, St. Joseph Primary and St. Joseph Secondary School.

The plaintiff further submitted that the Land Registrar had been ordered to visit the suit premises and in a report dated 14th September 2016, he found out that the whole parcel No. INOI/KERUGOYA/194 MEASURING APPROXIMATELY 2.6 Hectares was wholly occupied by St. Michael Girls Boarding School. The said report and the testimony of the plaintiffs’ witnesses was no controverted. To the contrary, the defendant’s witness Lydia Wagitwe on cross-examination confirmed that they do not live on the suit land but reside in land parcel No. INOI/KAMONDO/628. From the evidence adduced, it is clear that the plaintiff has been in occupation of the suit land since 1965, a period of 56 years. **Section 7 of the Limitation of Actions Act** provides as follows;

“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”.

The plaintiffs testified that no action was brought to claim the suit land by the registered proprietor or the defendants within the stipulated period of 12 years. They further stated that the defendants had filed PMCC 288 of 2002 but the case was subsequently withdrawn on 18th April, 2013. By the time the said suit was being filed, the limitation period of 12 years had lapsed. I am satisfied that the plaintiff has acquired the suit property parcel INOI/KERUGOYA/194 by the doctrine of Adverse possession *nec vi, nec clam, nec precario*. The claim by the defendant that the adverse possession was interrupted when the proprietor of the land parcel INOI/KERUGOYA/194, NJAU NDUMA charged the land to secure a loan from A.F.C does not hold. An order for adverse possession shall take effect subject to any other entry on the register including the charge to the AFC. The plaintiff herein has therefore become entitled by prescription to the proprietorship of land parcel No. INOI/KERUGOYA/194.

2) Whether the deceased NJAU NDUMA had any valid title to the land parcel INOI/KERUGOYA/194 which could be inherited by the defendants herein?

The plaintiff in paragraph 6 of the Affidavit in support of the originating Summons sworn by Sister Peninah Wanjiku Muchiri sworn on 18th February, 2014 deposed as follows;

‘6. The land upon which the plaintiff developed the school as subsequently compensated by Kirinyaga County Council which transferred land parcel INOI/KAMONDO/628 to NJAU NDUNA in exchange.’

The defendant in cross-examination admitted that they do not reside in the suit land and that they live on land parcel INOI/KAMONDO/628. The defendants also testified that the suit land parcel INOI/KERUGOYA/194 was the property of their father NJAU NDUNA (deceased) who had charged it to AFC in 1963 and that the plaintiff invaded the land and built St. Michael Boarding School under the incitement of the Kirinyaga County Council and that there has been protracted court battles to reclaim the land since then. However, the defendants did not provide any court cases showing that the plaintiff’s possession and occupation of the suit property was interrupted and that time stopped from running. Other than alleging that the green card of land parcel INOI/KAMONDO/628 was forged, the defendants did not lead any evidence showing that the land they are occupying being parcel INOI/KAMONDO/628 was not exchanged with the suit land parcel INOI/KERUGOYA/194. I find that by the time of death of NJAU NDUNA, the original proprietor, the property in land parcel INOI/KERUGOYA/194 had already extinguished and title passed to the plaintiff and there was no interest by his Estate to pass to the defendants as beneficiaries. I hasten to add that the claim by the defendants to the suit property parcel INOI/KERUGOYA/194 would amount to unjust enrichment as the deceased had already been compensated with land parcel INOI/KAMONDO/628.

3. Whether the plaintiffs have proved their case on a balance of probabilities?

Whereas this Court has made a finding that the original proprietors title to the suit land parcel INOI/KERUGOYA/194 had extinguished and that the plaintiffs have acquired the same by the doctrine of adverse possession, it is imperative to note that the defendants in their Replying affidavit sworn on 18th March, 2014 had opposed the plaintiffs’ claim. At paragraph 11 & 14 thereof, the defendants deposed as follows;

“11) THAT when my father died, we instituted H.C Succession proceedings in Embu H. C Succession Cause No. 282/2006.

14) THAT we then proceeded to subdivide land parcel number INOI/KERUGOYA/194 and obtained our titles to the resultant parcels”.

The gist of the defendants’ case was that they had acquired the suit land by transmission through the High Court Succession Cause No. 282/2006 and that that succession case constituted an interruption to the plaintiffs’ claim for Adverse possession and further that having acquired new title numbers, time would only start running from the date they acquired the new titles. That argument in my view is untenable as the deceased’s title to land parcel INOI/KERUGOYA/194 was extinguished in 1977, twelve (12) years after the plaintiffs’ went into occupation of the suit property. The defendants’ suggestion that the limitation period should start to run afresh from the moment they acquired new titles is for outright rejection. It has been held again and again for purposes of **limitation of Actions** does not stop to run on account of change of ownership of the land. A claim for adverse possession runs with the land irrespective of the change of ownership. A mere change of ownership does not affect a claim for adverse possession. The taking out of succession proceedings by the defendants in H.C Succession Cause No, 282/2006 (Embu) and the subsequent issuance of new titles to the resultant parcels was tantamount to nothing but an exercise in futility. The purported new titles were tiger papers which did not stop time from running for purposes of adverse possession.

Before I conclude my analysis, I have noted that the defendants in their submissions have raised an issue that the plaintiffs have no **locus standi** to sue on behalf of a Public Primary School. An issue as to whether a party has capacity to sue or be sued is a serious matter which ought to be pleaded and taken in the earliest opportunity possible. The issue was not pleaded nor raised during the hearing. The issue only came up in the defendants’ submissions. Submissions are not evidence but a summary of the evidence and opinions by their parties or their counsels. They are marketing skills employed by parties to discredit their opponents and persuade the Court to find in their favour. That was the holding in the case of **Daniel Arap Moi Vs Mwangi Stehen Muriithi & Another (2014) e KLR** where it was held;

“Submissions cannot take the place of evidence. The 1st respondent has failed to prove his claim by evidence. What happened in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties ‘marketing language’ each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence of all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented”.

Based on my evaluation, I find the issue raised by the defendants in their submissions whether the plaintiffs have locus standi to institute this

suit cannot be taken as an issue for determination between the parties

The appropriate approach to the issue of *locus standi* was for the defendant to raise the matter in their defence or by way of a Preliminary Objection to the Originating Summons (O.S) or taken in the earliest opportunity possible.

CONCLUSION

In view of all the matters aforesaid, I enter judgment for the Plaintiffs against the Defendants jointly and severally as follows;

- a) **A declaration that the title(s) in the name(s) of NJAU NDUNA (deceased) in respect to land parcel INOI/KERUGOYA/194 now purportedly sub-divided into land parcels INOI/KERUGOYA/3069, 3070, 3071, & 3072 have been extinguished by the Plaintiffs' adverse possession thereof for a period of more than 12 years in terms of the Limitation of Actions Act.**

- b) **That the Plaintiffs have become entitled by Adverse possession as absolute proprietors of land parcel No. INOI/KERUGOYA/194 now purportedly sub-divided into land parcels No. INOI/KERUGOYA/3069, 3070, 3071 & 3072 respectively in place of the Defendants herein.**

- c) **An order that the County Land Registrar Kirinyaga do register the Plaintiffs herein as absolute proprietors of land parcel No. INOI/KERUGOYA/194 now purportedly sub-divided into land parcels INOI/KERUGOYA/3069, 3070, 3071, & 3072 respectively.**

- d) **That the County Land Registrar, Kirinyaga be and is hereby directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Defendants to the Plaintiffs.**

- e) **The costs of this suit shall be borne by the Defendants jointly and severally.**

JUDGMENT READ, DELIVERED, AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.

.....

HON. E.C. CHERONO

ELC JUDGE

In the presence of:

- 1. *Mr. P.M. Muchira for the Plaintiffs*

- 2. *Mr. Kmata holding brief for Ngigi for the Defendants*

- 3. *Kabuta – Court Assistant.*