



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 175 OF 2017**

**PAUL RUGI MUKUHA**

**STEPHEN WACHIRA CHUTHA**

**SIMON KANYINGI GACHOKA**

**STEPHEN WAITHAKA GIKONYO.....PLAINTIFFS**

**VERSUS**

**JOYCE KURGAT.....DEFENDANT**

**JUDGMENT**

1. By Originating Summons (OS) dated 24<sup>th</sup> April, 2017 the plaintiffs sought a declaration and orders as follows:

*1. The Plaintiffs have acquired title by adverse possession to the whole of the parcel of land NAKURU/MUNICIPALITY BLOCK 29/291 (RONDA) situated within Nakuru Municipality in Nakuru County.*

*2. The said parcel of land be forthwith registered in the names of the Plaintiffs as tenants in common in equal shares AND the Defendant do transfer the said parcel of land to the Plaintiffs.*

*3. The costs of this suit be provided for.*

2. The OS was supported by an affidavit sworn by Paul Rugi Mukuha, the 1<sup>st</sup> plaintiff. The defendant responded to it through a replying affidavit sworn by herself. She also filed a Defence and Counterclaim in which she prayed for the following orders:

*a) Dismissal of Plaintiff's suit with costs.*

*b) The Defendant do yield vacant possession of Land Reference Number Nakuru/Municipality Block 29/291.*

*c) A declaration that the Plaintiffs are trespassers.*

*d) Damages for trespass.*

*e) An order compelling the Plaintiffs to remove forthwith any structures illegally erected on the Defendant's Land Reference Number Nakuru/Municipality block 29/291 or in default thereof, the Defendant do proceed and remove such structures at the cost of Plaintiffs.*

*f) Cost of the Suit and interest.*

3. The matter then proceeded to hearing. Stephen Wachira Chutha, the 2<sup>nd</sup> plaintiff, testified as PW1. He stated that he and the other plaintiffs had been in occupation of Land Reference Number Nakuru/Municipality block 29/291 since 1977 and that they have constructed residential houses on it which are occupied by tenants who pay rent totalling between KShs 20,000 and KShs 30,000 per month. That they also have various agents who manages the houses and a caretaker who is responsible for the day-to-day affairs of the houses and the tenants. He added that they have been in open, continuous and uninterrupted possession and occupation of the parcel for more than 40 years.

4. He further stated that he and the other plaintiffs purchased the land in 1977 from a Mr Kipchumba. He stated that they had a sale agreement but did not produce it. He added that he has never lived on the property and that some of the plaintiffs such as the 1<sup>st</sup> plaintiff have lived on it periodically. He went on to state that prior to the filing of this suit, the plaintiffs and a Mr Kurgat appeared before the Chief of Kaptembwo Location over the dispute now before the court.

5. The plaintiffs' case was then closed.

6. During defence hearing, the defendant testified as DW1. She stated that her correct name is Loyce Kurgat and showed to the court her national identity card. She added that the suit property belonged to her husband Stanley Kimutai Kurgat who passed away. That she obtained letters of administration in respect of his estate as well as confirmation of the grant. She produced copies of her husband's certificate of death indicating date of death as 27<sup>th</sup> December 1998, grant of letters of administration intestate issued on 9<sup>th</sup> November 2000 and certificate of confirmation of grant dated 25<sup>th</sup> November 2005.

7. She further testified that the suit property which was previously known as plot 2119 was sold to her late husband by Kalenjin Enterprises Ltd. That she went to the suit property and found some permanent and mud walled houses and that she wrote a letter dated 10<sup>th</sup> January 2007 to the area chief seeking his help to know the people who were on the plot. The chief investigated and informed her that the person who was responsible for construction on the land was residing in Nyeri. That they held a meeting at the chief's office where the plaintiffs were present.

8. DW1 went on to testify that she was issued with a title deed in respect of the suit property on 15<sup>th</sup> November 2007. That before her husband passed away, he had complained that some people had entered the plot.

9. David Kiprono Kiyai (DW2) stated that he was a director of Kalenjin Enterprises Limited and that the suit property which was previously plot 2119 was sold to Stanley Kimutai Kurgat in 1972. He stated that he took the defendant to the suit property in 2007 and they found it occupied with people living on it.

10. Stanley Kipkemoi Koech (DW3) stated that he was the Chief of Kaptembwo Location from 1995 to June 2018 and that the defendant's husband visited his office severally in 1996 and 1997 to seek help to identify trespassers on the suit property. That the plaintiffs had erected semi-permanent structures on the suit property but were not residing in them but were residing in Nyeri. That the plaintiffs rented the structures to tenants. That in March 2017, he managed to trace the plaintiffs and summoned them to appear before him in his office on 6<sup>th</sup> April 2017. That on that day, both parties presented their case and he reserved his ruling for 27<sup>th</sup> April, 2017. He stated that when the parties appeared before him on 27<sup>th</sup> April, 2017 and informed him that this case had been filed, he did not read his determination.

11. Defence case was then closed and parties filed written submissions.

12. The Plaintiffs relied on the cases of Wakaria Mboi Njaramwe & another v Loise Kaguu Munge [2013] eKLR and Peter Gichuki Wanjohi v Juliah Mumbi Muturi [2021] eKLR and argued that they have proven their case on a balance of probabilities. They urged the court to grant them judgment as prayed.

13. In response, the defendant argued that the plaintiffs have not established adverse possession in view of evidence on record that the deceased had prior to his death sought the chief's help to identify and remove the plaintiffs and further that the defendant and the plaintiffs met at the chief's office to resolve the dispute prior to the filing of this suit. Reliance was placed upon the cases of Muchambindwiga & Another vs Octavian Mwaniki Kariuki [2021] eKLR and Gabriel Mbui vs Mukindia Mutranya [1993] eKLR with further argument that an intruder claiming right by adverse possession must make physical entry and be in occupation of the land for the period and that the rightful owner must know that he has been dispossessed or must have parted and intend to part with possession.

14. It was also submitted that the time for adverse possession can only be computed from the time the defendant came to know that the plaintiffs were in possession of the suit property. The Court of Appeal case of Titus Kigoro Munyi vs Peter Mburu Kimani [2015] eKLR was cited. That the suit property was registered in the name of the Defendant in 2007 and consequently adverse possession could not run against her prior to 2007. The case of Ravji Karsan Saghani -vs- Peter Gakunu [2019] eKLR was cited.

15. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are whether the plaintiffs have established adverse possession and whether the reliefs sought should issue.

16. The essential features of adverse possession were discussed by the Court of Appeal in Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR as follows:

*Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act ....*

17. The Court of Appeal in Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR elaborated further on the required elements to prove adverse possession thus:

*18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of*

*12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See Jandu vs. Kirplal & Another (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in Wambugu vs. Njuguna [1983] KLR 173...*

18. There is no dispute that the defendant, whose proper name is Loyce Kurgat, is the registered proprietor of the parcel of land Nakuru/Municipality Block 29/291 (Ronda). Indeed, the defendant produced a copy of a title deed in respect of the property which demonstrates that she became registered proprietor on 16<sup>th</sup> August 2007 and a title deed issued to her on 15<sup>th</sup> November 2007.

19. To sustain their claim to acquire title to the suit property by adverse possession, the plaintiffs must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years.

20. There is evidence on record from the second plaintiff that prior to the filing of this suit, the plaintiffs and a Mr Kurgat appeared before the Chief of Kaptembwo Location over the dispute now before the court. That much is corroborated by the defendant who testified that the suit property belonged to her late husband Stanley Kimutai Kurgat and that before her husband passed away on 27<sup>th</sup> December 1998, he had complained to the area chief that some people had entered the plot. Similarly, Stanley Kipkemoi Koech (DW3) who was the Chief of Kaptembwo Location from 1995 to June 2018 testified that the defendant's husband visited his office severally in 1996 and 1997 and that he summoned the plaintiffs and the defendant who all appeared before him in his office on 6<sup>th</sup> April 2017 with a view to resolving the question of the plaintiffs being on the suit property. It will be noted that all those endeavours took place prior to the filing of this case on 26<sup>th</sup> April 2017.

21. In view of the foregoing, can the defendant be said to have omitted or neglected to take action against the plaintiffs in assertion of her title for twelve years? The answer is an emphatic no. By the time this suit was being filed there were concerted efforts by the defendant to get the plaintiffs and their tenants off the suit property.

22. Another important aspect of the case that the plaintiffs must prove is open and notorious use or occupation. The second plaintiff testified that they constructed residential houses on the suit property and installed tenants who are managed by various agents and a caretaker. He made it clear that he has never lived on the property and that only some of the plaintiffs such as the 1<sup>st</sup> plaintiff have lived on it and even then, only periodically. Both the defendant and DW3 testified that the plaintiffs reside not on the property but in Nyeri and that investigations had to be conducted to reveal their true identities.

23. It is trite that a litigant aspiring to acquire title to land by adverse possession must demonstrate an open possession for an uninterrupted period of 12 years as opposed to a stealthy one. He must come out openly and identify himself to the registered proprietor or make it possible for such a proprietor to identify him.

24. From the foregoing, I find that the plaintiffs have not satisfied the necessary ingredients of a claim to title to land by adverse possession. Their case is for dismissal.

25. On the other hand, the defendant is the undisputed registered proprietor of the suit property. By virtue of **Section 24 of the Land Registration Act**, she has the absolute ownership of the suit property together with all rights and privileges belonging or appurtenant such ownership. The plaintiffs' own case is that they have been in occupation of the suit property and that they have constructed residential houses on it which are occupied by their tenants. They further confirm that they have various agents and a caretaker on the property. Clearly, the defendant has established her counterclaim.

26. The defendant argued that she is entitled to general damages of KShs 4,200,000 for trespass on the basis that the plaintiffs have had 23 tenants on the suit property from whom they have been collecting a total average of KShs 25,000 per month. Nothing has been availed to show that the premises have always had 23 tenants since the defendant became registered proprietor on 16<sup>th</sup> August 2007. I consider that a sum of KShs 1,200,000 is appropriate under the heading of general damages for trespass.

27. In view of the foregoing, I find no merit in the plaintiffs' case and I dismiss it. I enter judgment in favour of the defendant and against the plaintiffs as follows:

**a) The plaintiffs, their tenants, servants and agents to vacate and yield vacant possession of Land Reference Number Nakuru/Municipality Block 29/291 (Ronda) to the defendant and to remove any structures they have erected thereon within 90 (ninety) days from the date of delivery of this judgment. In default, the plaintiffs, their tenants, servants and agents to be evicted from the said parcel of land and the defendant to remove such structures.**

**b) A declaration is hereby issued that the plaintiffs are trespassers on Land Reference Number Nakuru/Municipality Block 29/291 (Ronda).**

**c) KShs 1,200,000 (one million two hundred thousand) being damages for trespass.**

**d) The defendant shall have costs of the suit and interest.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 28<sup>TH</sup> DAY OF FEBRUARY 2022.**

**D. O. OHUNGO**

**JUDGE**

Delivered through electronic mail in the presence of:

Court Assistant: E. Juma