



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC CASE NO. 4 OF 2020

MUCHERU KARIUKI MWENDA.....PLAINTIFF

VERSUS

KARANJA JESSIE.....DEFENDANT

JUDGMENT

Vide a Plaint dated **11th March 2020**, the Plaintiff sought for the following orders against the Defendant herein; -

- a. An Order declaring that the Plaintiff has acquired that parcel of land known as, LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749 and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747, by way of adverse possession, having occupied the said parcel of land for more than a period of 12yrs and that the Defendant's title to the said parcels has been extinguished in favour of the Plaintiff.**
- b. An order for specific performance ordering the Defendant to transfer the Parcels of land known as LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749 and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747, to the Plaintiff namely, MUCHERU KARIUKI MWENDA.**
- c. An order for permanent injunction restraining the Defendant, or his agents, servants, workers, staff, wife, children and/ or cronies from interfering with the Plaintiff's quiet and peaceful enjoyment of that parcel of land known as LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749 and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747.**
- d. Costs of this suit and any other relief.**

It is the Plaintiff's averments that the Defendant is the registered owner of land parcels known as **LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749**, and **LR LOC 2/KANGARI/2747**, which parcels of land are located in Kangari within Murang'a County. That around the year **1995** and **1997** the Plaintiff and the Defendant entered into sale agreements whereby the Defendant sold **LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749** and a portion of land measuring **0.1** of an acre to be excised out of **LR LOC 2/KANGARI/2747**, to the Plaintiff. That as per the terms of the said sale agreement, the Defendant was to transfer the aforementioned parcels of land to the Plaintiff within **90 days**, from the time of purchase or within a reasonable time. That the Plaintiff has been in active possession of the suit properties from **1997**, and since then, he has cultivated the said land, built a farm house and/or structure for his farm land without interference from the Defendant.

The Plaintiff further averred that his prayer was for specific performance and/or an order declaring that the Plaintiff has acquired the said **LR LOC 2/KANGARI/2748, LR LOC/KANGARI/2749**, and a portion of land measuring **0.1 of an acre** to be excised out of **LR LOC 2/KANGARI/2747** by way of **adverse possession**, having occupied the suit lands for a period of more than 12 years. Further, the Plaintiff prayed for a declaration that the actions of the Defendant of trespassing on the said suit lands were unlawful since the Plaintiff had acquired ownership by way of adverse possession.

The suit was not contested by the Defendant as he neither entered appearance nor filed a Defence within the requisite time, even after service of summons. As a result, the Court on 29/10/2020, made an order for the matter to proceed to formal proof hearing.

The matter proceeded for formal proof hearing by way of viva voce evidence on **22nd November 2021**, wherein the Plaintiff gave evidence for himself and called no witness.

PLAINTIFF'S CASE

PW1, Mucheru Kariuki Mwenda, adopted his witness statement dated **11th March 2020**, as his evidence in chief. He also adopted the list of documents dated 11/3/202, the one dated 14/10/2021, and the one dated 1/11/2021 and produced the documents therein as **P. Exhibits 1, 2 and 3** respectively.

He further testified, that he had a sale agreement and a receipt of payment of the debt to **AFC**. That he paid the money directly to AFC as the entire property had been charged to **Agricultural Finance Corporation(AFC)**. That he paid because the deadline was fast approaching. That once he cleared with **AFC**, he paid the balance to the Defendant. That after the titles were discharged, the Defendant failed to release the same to him.

Further, that together with the sale agreement dated 20/12/1995, there was an acknowledgment of debt agreement dated 29/1/1996. That at the time he had already paid the other amount to **AFC** and he did not owe the defendant any amount. That he had paid the Defendant the entire purchase price.

That the Defendant had granted the Plaintiff **vacant possession** and he has been using the land since **December 1995**, and the land is situated in **Kangari in Kigumo Subcounty**. That he filed the matter in Court when he noticed that the Defendant had started to interfere with the suit land by uprooting his fence and the crops that he had planted. That since he occupied the land in **1995**, he had lived without any interference until **2020**, when the Defendant interfered with the said land. He urged the Court to allow his prayers as stated in the Plaintiff dated **11th March 2020**.

After *viva voce* evidence, the Plaintiff filed his written submissions, through the **Law Firm of Karanja Kang'iri & Co Advocates**, dated **30th November 2021**. He submitted that for the Plaintiff to succeed in a claim for adverse possession, he needed to prove that;

- a. That the entry to the land in question was adverse and non-permissive but nonetheless without force.*
- b. That the Defendant did not issue a notice to the Plaintiff to vacate, and*
- c. The Possession was real and uninterrupted for a period of 12 years.*

Further that the Plaintiff had produced evidence that met the threshold prescribed in law for grant of an order for adverse possession. He relied on the cases of **Benjamin Kamau Murma & Others vs. Gladys Njeri CA No. 213 of 1996**; **Peter Okoth vs. Ambrose Ochid Andajo & Another, Kisumu ELC 48 of 2018** and **Paul Kamande Gicheha vs. Jacob Kinyua Kiragu Nyahururu ELC Case 239 of 2017 (OS)**

The Court has carefully read and considered the pleadings herein, the evidence adduced, written submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;

- i. Whether the Plaintiffs has met the threshold for grant of orders for adverse possession?**
- ii. Whether the Plaintiff is entitled to LR LOC 2 /KANGARI/2748, LR LOC 2/KANGARI/2749 and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747?**
- iii. Who should bear the cost of the suit?**

1. Whether the Plaintiff has met the threshold for grant of orders for adverse possession?

The Plaintiff alleged that he has been in **continuous, uninterrupted, occupation, and possession** of the suit property for a period in excess of **12 years**. The burden of proving these allegations was upon the Plaintiff.

The fact that the instant suit was not contested and that the Defendant neither entered appearance nor filed a Defense, is not automatic prove of Plaintiff's case. The law requires the Court to look at the weight of the evidence adduced by the Plaintiff even where the same is uncontroverted. See the case of **Gichinga Kibutha Vs Caroline Nduku [2018] eKLR** where the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case however much the opponent has not made a presence in the contest.”

The burden of proof is placed on the person alleging the occurrence of an event, and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for **adverse possession** to wit extinction of right to property, the burden of proof is higher. The burden squarely lies on the Plaintiff to demonstrate that he has met the requirements for the grant of an order of **adverse possession**. The Plaintiff is the one who has alleged and must prove. (See **Nairobi Civil Appeal No. 95 of 2014;- Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui [2017] eKLR**, where the Court stated as follows;

“It is not enough therefore to show that Josephine occupied the land for more than 12 years if that occupation was with the permission of Ruth. We have on record affidavit evidence on the consensual occupation which Josephine, as the party who had the onus of proof, did not endeavour to challenge by cross examining the deponents of the affidavits rebutting her assertions.”

This Court will proceed to look at the issues outlined above. The doctrine of adverse possession is enshrined under the **Limitation of Actions Act**. Section 7 said of the Act 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.

Further, Section 13 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”.

This right though provided for, does not accrue automatically and must be invoked through a Court of Law by the person who wishes to benefit from it. Section 38 of the **Limitation of Actions Act** gives authority to the claimant to apply to Court for Orders of adverse possession. In the case of **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, the Court held:

“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 nor 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.”

The period of **twelve** years starts to run from the moment the trespasser takes **adverse possession** of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of **Wambugu –Vs- Njuguna (1983) KLR 173**, the Court of Appeal held thus:

“1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

3. The Limitation of Actions Act, on adverse possession, contemplates two concept; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

To determine whether the Plaintiff’s right of adverse possession had accrued, the Court will seek to answer the following

- **How did the Plaintiff take possession of the suit properties?**
- **When did he take possession and occupation of the suit properties and for how long has he remained in possession?**
- **What was the nature of his possession and occupation?**

The Plaintiff contends that he was a bonafide purchaser for value and obtained possession of the suit properties via sale agreements dated **20th December 1995** and **12th May 1997**, respectively. That he paid the entire purchase price as agreed upon by the parties and the Defendant herein granted him possession of the suit properties upon payment of the last instalment. That he had been in possession of the suit properties for **24 years** without any interference by the Defendant.

For a claim of adverse possession to succeed, the claimant must demonstrate that his entry into the suit land was non-permissive and non-consensual and without license. (See **Mombasa Civil Appeal No. 53 of 2017 Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR**, where the Court stated as follows;

“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 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

Therefore, a claim based on a sale agreement cannot issue since the vendor's consent and permission is obtained before one can gain ingress into the land.

However, every rule has an exception, and Courts have found that **adverse possession** can accrue where an agreement for sale exists only after payment of the purchase price in full. In the case of *Public Trustee – Vs- Wanduru, (1984) KLR 314 at 319*, cited with approval in *Peter Mbiru Michuki v Samuel Mugo Michuki [2014] eKLR*, the Court stated as follows;

“Adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favor the period of limitation can run.”

In the case of *Wanyoike –Vs- Kahiri (1979) KLR*, the Court held that:-

“In a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase price.”

Further in the case of *Wambugu –Vs- Njuguna (1983) KLR*, the Court stated that;

“Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated.”

The entry of the Plaintiff into the suit properties was with permission of the Defendant as the vendor. The Plaintiff possession became adverse to the suit properties upon payment of the last instalment, which was sometime in 1997 as per the records that was placed before this Court.

This Court is bound by the decision of the Court of Appeal in *Civil App No. 82 of 2014;- Wilfred Kegonye Babu Vs Henry Mose Onuko [2019] eKLR*, which quoted with approval the case of *Wambugu v. Njuguna [1983] KLR 172*, where it had been held that:-

“where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of a purchaser pending completion, when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can therefore only become adverse once the contract is repudiated”

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have been adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

Taking into account the findings of the foregoing cases to the instant case, time begun running from 1997, when the Plaintiff made the last installment, though he had been in possession since 1996.

The second element that the Plaintiff has to satisfy this Court is **actual** and **continuous** possession. Any person claiming right of ownership by **adverse possession**, must make physical entry and be in actual possession or occupancy of the land for the Statutory period. Time does not begin to run unless there is some person in **adverse possession** of the land. It does not run merely because the land is vacant. Adverse possession rests on *de facto* use and occupation by an entrant. The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable. Possession is a matter of fact, depending on all the particular circumstances of the case, and the type of conduct which indicates possession varies with the type of land. There must be actual possession (which requires some sufficient degree of physical occupation for the requisite period).

In the instant case, the Plaintiff contends that he has been in actual possession of all the suit properties since 1997, when he was allowed entry onto the said land after payment of the entire purchase price. The Plaintiff further contends that since he gained entry, he has been using and cultivating the said impugned properties for well over **20 years**. This being an undefended suit, the Plaintiff was under a duty to attach photographic evidence or invite the Court for a site visit to demonstrate actual possession. Be that as it may, this Court has no reason to doubt the testimony of the Plaintiff as well as his demeanor in Court.

Having held as above, this Court holds and finds that the Plaintiff has been able to demonstrate actual possession of the parcels of land as stated in his claim.

As to the nature of possession and occupation the same must be continuous, open, and honest, with the proprietor's knowledge. To determine the nature of possession, this court is guided by the decision in *Kisumu Civil Appeal no. 27 of 2013;- Samuel Kihamba Vs Mary Mbaisi [2015] eKLR*, where 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 Plaintiff contends that he has been in open, uninterrupted, continuous occupation of the land with the knowledge of the Defendant. This Court has already found that the Plaintiff has demonstrated that he was in actual possession. The Plaintiff has therefore demonstrated continuous occupation of the suit land for over **20 years** with the knowledge of the Defendant.

To this end, this Court finds and holds that the Plaintiff has demonstrated all the elements and has met the threshold for the grant of orders of ownership of the suit properties by virtue of adverse possession.

2. Whether the Plaintiff is entitled to LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749 and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747?

Order 37 Rule 7(2) of the **Civil Procedure Rules** makes it a requirement that summons be accompanied by an extract of title. Attached to the Plaintiff's List of Documents dated is a Certificate of Search. The legal effect of this certificate of search is provided for under **Section 35** of the **Land Registration Act**, which provides:

(1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.

(2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document

While some courts have found that failure to attach an extract of title rendered the suit incurably defective, the Court of Appeal in **Nyeri in the case of Johnson Kinyua Vs Simon Gitura Rumuri [2011] eKLR**, held that a Certificate of Search can suffice under the order. There being a Certificates of Search whose authenticity has not been challenged, the Court will be guided by the above findings of the Court of Appeal.

3. Who should bear the costs of the suit?

It is trite that costs shall follow the event, and that the successful party should be awarded costs. The Plaintiff herein is the successful litigant and the Court finds no reasons not to exercise its discretion in his favour.

Consequently, the Court finds that the Plaintiff has proved his case against the Defendant herein on the required standard of balance of probabilities. The upshot therefore is that the Court enters judgment for the Plaintiff against the Defendant in the following terms; -

a) That the Plaintiff has proved his claim for adverse possession.

b) That the Plaintiff is entitled to be registered as the owner of LR LOC 2/KANGARI/2748, LR LOC 2/KANGARI/2749, and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747 to the exclusion of all others, by virtue of adverse possession.

c) A Permanent Injunction be and is hereby issued restraining the Defendant either by himself, his agents and/ or personal representatives from interfering with

the Plaintiffs quiet enjoyment of LR LOC 2 /KANGARI/2748, LR LOC 2/KANGARI/2749 and a portion of land measuring 0.1 of an acre to be excised out of LR LOC 2/KANGARI/2747

d) The Plaintiff is awarded costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10TH DAY OF FEBRUARY, 2022.

L. GACHERU

JUDGE

Delivered virtually(online):

In the presence of

M/s Kanja H/B for Mr Karanja Kangiri for the Plaintiff

N/A for the Defendant

Kuiyaki – Court Assistant

L. GACHERU

JUDGE