



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC CASE NO. 388 OF 2013**

**(FORMERLY NAKURU HCCC NO. 338 OF 2012)**

**MICHAEL MUNGAI NG'ANG'A.....PLAINTIFF**

**VERSUS**

**PAUL KIPROTICH BII.....1<sup>ST</sup> DEFENDANT**

**JOHN WACIRA CHIRI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Originating Summons dated **3/09/2012** was filed on **10/9/2012**. The plaintiff sought the following a determination of the following questions:

**1. Whether the 2<sup>nd</sup> defendant's title to plot number Elburgon/Elburgon Block 5/1 has been extinguished by the plaintiff's adverse possession thereof for a period of more than twelve (12) years in terms of Section 38 of the Limitation of Actions Act (Chapter 22 Laws of Kenya).**

**2. Whether the plaintiff has acquired title to the said piece of land by his adverse possession thereof for a period of over twelve (12) years from 1993 to date.**

**3. Whether the plaintiff herein ought to be registered as an absolute proprietor to the said parcel of land in place of John Wacira Chiri the 2<sup>nd</sup> Defendant who is the present registered owner thereof in terms of Section 38 of the Limitation of Actions (Chapter 22 Laws of Kenya)**

**4. ...Spent.**

**5. Whether the defendants should be condemned to costs of this suit.**

2. The grounds upon which the originating summons is brought are as follows: that sometime in June **1993**, the plaintiff entered into a sale agreement with the 1<sup>st</sup> defendant for the sale of land parcel No. **Elburgon/Elburgon Block 5/1** for a consideration of **Ksh. 80,000/=**; upon execution of the sale agreement, the plaintiff paid **Ksh. 1,000/=** to the 1<sup>st</sup> defendant and on **18/06/1993**, he paid a further sum of **Ksh. 49,000/=** totaling to **Ksh. 50,000/=** as deposit leaving a balance of **Ksh. 30,000/=**.

3. He took possession of the suit property on the same date and has been in occupation since then, hence a period of over **12** years has already lapsed. On various subsequent dates he paid to the 1<sup>st</sup> defendant **Ksh. 5,000/=**, **Ksh. 7,000/=** and **Ksh. 15,000/=** totaling to **Ksh. 27,200/=** thereby making the total payments of **Ksh. 77,200** leaving a balance of **Ksh. 2,800/=** which was to be repaid upon transfer of the suit property to his name. The 1<sup>st</sup> Defendant never obtained the Land Control Board consent and he is said to have informed the plaintiff that he could not transfer the suit property because the original title to the suit land got lost and the same had been advertised in the Kenya Gazette; that in the year **2002**, the plaintiff constructed a residential house that he has been in occupation of to date; in **November 2011**, he found out that the 1<sup>st</sup> defendant had sold the suit property to the 2<sup>nd</sup> Defendant and it had already been registered in the latter's name; on **18/01/2012**, the plaintiff registered a restriction on the suit property; he states that the sale by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was a nullity as the 1<sup>st</sup> defendant had no registrable interest in the property since his proprietary interests had been extinguished by the plaintiff's adverse possession of the suit land. The plaintiff therefore sought for a declaration that he has become entitled to the suit property by way of adverse possession as he has been in occupation for a period in excess of **12** years.

4. The 2<sup>nd</sup> defendant filed a replying affidavit in response to the originating summons on **15/03/2018**. He stated that he is the registered owner of land parcel **No. Elburgon/Elburgon Block 5/1 (Riboti)** having purchased it from the 1<sup>st</sup> defendant herein; that he is an innocent purchaser for value and that prior to purchase he conducted a search at the Lands Registry where he confirmed that the property title had no encumbrances on it; that by then the plaintiff was not in actual possession or occupation and neither had he filed suit for adverse possession and therefore good title passed to him. He also stated that the plaintiff cannot obtain orders of adverse possession against the 1<sup>st</sup> defendant and yet the latter is not the registered owner of the suit land; that neither can the plaintiff claim legal ownership by adverse possession against the 2<sup>nd</sup> defendant as he was registered as the owner of the suit property only one year before the filing of the instant suit and that he has brought this suit against the 1<sup>st</sup> defendant after ownership has already been transferred. He asserts that time in respect of adverse possession begins to run with effect from the date of registration of an owner's title; that at the time he was buying the land, the plaintiff had not built anything on the suit property and that he has now constructed temporary structures. That he has no legal basis to seek for an order of nullification of the sale agreement and the subsequent transfer of title to himself; that the green card shows that the interest of the plaintiff was as a *purchaser* and it was registered after the 2<sup>nd</sup> defendant had been registered as proprietor. That the plaintiff has not demonstrated what action he took in respect of specific performance; that the plaintiff did not bring a suit for adverse possession against the 1<sup>st</sup> defendant before the land was transferred to him and so the plaintiff is in occupation of the suit property without his consent.

5. The replying affidavit contains a counterclaim in which the 2<sup>nd</sup> defendant prays that judgement be entered in his favor against the plaintiff for the following reliefs:

- a. A declaration that the 2<sup>nd</sup> defendant/respondent is a *bona fide* owner of Elburgon/Elburgon Block 5/1 (Riboti) which is duly registered in his name.**
- b. An order of eviction do issue against the plaintiff/applicant.**
- c. The plaintiff/applicant do pay *mesne profits* for the use of the land with effect from 4<sup>th</sup> November 2011 to be quantified by a valuer.**
- d. The plaintiff/applicant be condemned to pay the costs of this suit and meet the costs of the suit.**
- e. Any other relief as this honorable court deems fit to grant in the circumstances.**

6. On **29/03/2018**, the plaintiff filed a further affidavit sworn on the same date where he deposed that **paragraph 9** of the affidavit sworn by the 2<sup>nd</sup> defendant John Wachira Chiri is not true as he had been in possession of the suit property since **1993** and that he is not a trespasser on the suit property.

#### **The evidence of the Plaintiff**

7. The plaintiff testified on **18/06/2019** and adopted his supporting affidavit sworn on **03/09/2012**, his further affidavit sworn on **29/03/2018** and his witness statement filed on the same date as his evidence. He went on to testify that the suit property originally belonged to the 1<sup>st</sup> defendant, Paul Kiprotich Bii, who needed funds for school fees and who sold it to him for that reason. He testified that he took possession and started farming before building a house thereon in the year **2002**.

8. He testified further that he has lived in the plot since the year **2002** and has buried his wife, two sons and one daughter on it. After he bought the suit property, he was not issued with a title deed as he was informed that it had been lost and later on, a gazette notice was issued. He also testified that they did not go to the Land Control Board. He testified further that he was informed that the 1<sup>st</sup> defendant had sold the suit property to the 2<sup>nd</sup> defendant which led him to file this suit, register a restriction on the suit property and report the matter to the Criminal Investigation Department.

9. On cross-examination he confirmed that land parcel No. **Elburgon/Elburgon Block 5/1** was previously owned by the 1<sup>st</sup> defendant and that he bought it from him through a land sale agreement for Ksh. **80,000/=**. He also confirmed that he paid the purchase price in instalments leaving a balance of **Ksh. 2,800/=** which he is yet to pay because he has not been given the title deed.

10. He reiterated that they did not go to the land control board as his wife was sick and passed away in **1997**; that the 1<sup>st</sup> defendant had informed him that the original title was lost and the gazette notice to that effect is dated **3/12/1993**. He confirmed further that he does not know where the 1<sup>st</sup> defendant resides because he had been informed that he had moved to Eldoret and that he was not able to serve him with the summons to enter appearance.

11. He stated that it is not true that the 1<sup>st</sup> defendant had reported him to the chief and that there was no case before the chief on claims that he had cut his trees. He confirmed that he reported the 1<sup>st</sup> defendant to the police so that he could give him his title deed but he did not have the police OB number. He also reiterated that he was informed by the Land Registrar that the 1<sup>st</sup> defendant had transferred the suit property to the 2<sup>nd</sup> defendant and so he lodged a restriction against the title to the suit land on **18/01/2012** and claimed purchaser's interest.

12. He confirmed that the 2<sup>nd</sup> defendant was issued with a title deed on **4/11/2011** which was before he filed this case and the 1<sup>st</sup> defendant was no longer the proprietor. He confirmed further that he had built a temporary house on the suit property in the year **2002** and that he had buried his people on the land but he had no proof of the same. The plaintiff then closed his case.

#### **The evidence of the 2<sup>nd</sup> Defendant**

13. The 2<sup>nd</sup> defendant testified on 25/11/2021 and adopted his witness statement dated 14/03/2018. He testified that though the plaintiff is claiming the land through adverse possession, the 2<sup>nd</sup> defendant had bought the suit property from the 1<sup>st</sup> defendant and that they went to the land control board, obtained the consent and was issued with a title. He produced a copy of the title deed as **DExh.1** issued on 4/11/2011.

14. He also testified that when he went to the land, there was maize planted thereon and he was informed that it belonged to someone who had leased the land from the seller. He testified further that there were no structures on the land and that one has to stay on the land for an uninterrupted period of twelve years before seeking adverse possession against the registered owner. He maintained that the plaintiff has not achieved the adverse possession threshold.

15. On cross-examination he confirmed that he bought the land barely one month before he got the title. He also confirmed that the 1<sup>st</sup> defendant was not residing in the land but was in Kericho and that when he visited the suit property, he was informed by the neighbors that the 1<sup>st</sup> defendant was the owner. He further confirmed that there was maize planted on the property but he was not given the name of the person who had planted it; that the owner of the maize harvested it and after that he identified the beacons on the land. He reiterated that there were no temporary houses on the property and neither were there any graves and that there was only a makeshift structure at one end; that after the plaintiff filed the case, he was informed that someone was putting up a structure on the suit property made up of old drums.

16. He stated that he was informed by the neighbors that an old man from Elburgon named “*Michael*” was putting up the structure. That he reported the matter to the police but he did not have the OB number; that this happened in January 2012 and that he was sued in September of that year. He also stated that the agreement for sale of land was in writing but conceded that he did not produce it in court. He also conceded that he had no evidence of payment, no consent of the land control board and no certificate of official search; that at the moment he does not know who is in occupation of the suit property.

17. On re-examination he stated that when he bought the suit property it was in the name of the 1<sup>st</sup> defendant and the maize planted thereon belonged to a lessee. He reiterated that there were no structures on the land and that he did an agreement, paid all the consideration and got the title deed. The 2<sup>nd</sup> defendant’s case was then closed.

18. As the 1<sup>st</sup> defendant never appeared in court to give evidence, his case was also deemed closed by court and a timeframe for filing of submissions was given.

#### **Submissions**

19. The plaintiff filed his submissions dated 28/01/2022 while the 2<sup>nd</sup> defendant filed his submissions dated 2/02/2022 on 4/2/2022.

#### **Analysis and determination**

20. After considering the pleadings, the evidence and submissions of the parties, the only issues for determination are whether the plaintiff has established that he has acquired the suit property by way of adverse possession and whether the defendant is entitled to the declaration of ownership and eviction orders sought in his counterclaim.

21. I will first address the issue of whether the plaintiff has acquired the suit property by way of adverse possession.

22. The requirements for adverse possession have been set out in the case of Mbira –v- Gachuhi (2002) I EALR 137 where the court held that:

**“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”**

23. Further in the case of Jandu –v- Kirplal & Another (1975) EA 225, it was held that:

**“...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious.”**

24. The Court of Appeal in the case of Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR also held as follows:

**“Adverse Possession is essentially a situation where a person takes possession of land, 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 12 years.”**

25. The plaintiff submitted that he has been in open, notorious and continuous use of the suit property as he has been conducting farming on it since 18/06/1993 before putting up a residential house in the year 2002. He also submitted that he has been in actual possession and exclusive use of the land and relied on the case of Virginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau [2013] eKLR.

26. He further submitted that the consent of the Land Control Board was not obtained as required by the Land Control Act and therefore the sale became void six months from the date of the agreement. So, the twelve years period begun to run from December 1993 to December

2005 which extinguished the 1<sup>st</sup> defendant's title and he therefore held the land in trust for the plaintiff.

27. The 2<sup>nd</sup> defendant on the other hand submitted that adverse possession is only sought against the registered proprietor and relied on the case of **Ravji Karsan Sanghani vs Peter Gakunu [2019] eKLR**. He went on to submit that the plaintiff occupied the suit property with the consent of the proprietor and therefore the same cannot amount to adverse possession. Further, that time would only begin to run after the plaintiff had paid the full purchase price which he admits that he did not pay in full and he therefore failed to prove his case for adverse possession.

28. From the evidence on record, the plaintiff entered into a land sale agreement with the 1<sup>st</sup> defendant to purchase the suit property sometime in the year **1993** for a consideration of **Ksh. 80,000/=** which was paid in installments, admittedly leaving a balance of **Ksh. 2,800/=** and then he entered into possession of the suit property. Evidence on the court record shows that the plaintiff took possession of the suit property in the year **1993** and has been in occupation to date while the 2<sup>nd</sup> defendant obtained title in the year **2011**. It is the plaintiff's case that his occupation was open, uninterrupted and based on the claim of a *bona fide* purchaser for value. I do not think that the 2<sup>nd</sup> defendant has been able to adduce evidence that would demonstrate that the plaintiff was not in occupation of the suit land since **1993**. In this court's view, the plaintiff's evidence is credible. Indeed, the 2<sup>nd</sup> defendant contends that the plaintiff was in possession of the suit property with the consent of the 1<sup>st</sup> defendant. As noted before, the plaintiff entered the suit property pursuant to the agreement for sale of land that executed with the 1<sup>st</sup> defendant sometime in the year **1993**. It is therefore the case that the plaintiff's entry into possession was therefore with the permission of the 1<sup>st</sup> defendant under a contract which was subsequently rendered void for want of a land control board consent.

29. In line with the decision of the court in the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319**, the period of adverse possession should be calculated from the date of payment of the purchase price and consequent dispossession of the registered title holder to when the period of twelve years comes to an end. If a purchaser immediately takes possession of the suit property upon purchase, the then registered owner is dispossessed of the ownership after the lapse of twelve years from the date of purchase. In the case of **Mwangi & another –v – Mwangi, (1986) KLR 328** the court held that rights in possession of land are equitable rights that are binding on the land.

30. In the present matter the plaintiff has been in occupation of the suit property since the year **1993**. Though consent was admittedly not obtained for the sale transaction the decision of the Court of Appeal in the **Public Trustee case (supra)** considered that the provisions of the **Land Control Act** barring any claim under the voided agreement are not applicable to a claim under adverse possession as it does not amount to “*an agreement, a transaction or a dealing in agricultural land*” envisaged in the Act.

31. In this court's view failure of the plaintiff to pay the purchase price in full is relegated to the back seat while the issue of lack of consent of the land control board is being considered; the want of consent voided the contract, and the subsequent occupation of the plaintiff was without the permission of the 1<sup>st</sup> defendant. As submitted by the plaintiff, the period of adverse possession began to run from December **1993** to and it clearly had run the full course of the statutory **12** years by the time the instant claim was lodged. It is my view that the plaintiff has proved that he has been in occupation of the suit property *nec vi, nec clam* and *nec precario*.

32. The 2<sup>nd</sup> defendant alleges that he bought the suit property from the 1<sup>st</sup> defendant in the year **2012**. In this court's view the transfer of the suit land to a third party by a person against whom adverse possession can be claimed does not extinguish the plaintiff's claim in adverse possession. **Section 7** of the Act does not envisage that possibility. It 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.”**

33. In this court's view, the effect of that section is that if the right to recover the suit land accrued to the 1<sup>st</sup> defendant, the person through whom the 2<sup>nd</sup> defendant got the title, when the plaintiff became a trespasser and remained on the suit land for more than 12 years, then no action by the 2<sup>nd</sup> defendant may lie. The rationale for this is that the 1<sup>st</sup> defendant's title had been extinguished. The consequence of that interpretation is that the 2<sup>nd</sup> defendant's counterclaim is expressly barred by the provisions of **Section 7** of the Act. Therefore, though the 2<sup>nd</sup> defendant claims that the plaintiff's claim for adverse possession against him can not stand, that is not the case. The present suit is against both the 2<sup>nd</sup> defendant and the person through whom he claims the land by way of purchase. The claim for adverse possession, contrary to the 2<sup>nd</sup> defendant's belief, is similarly raised against the 1<sup>st</sup> defendant through his express inclusion in the pleadings. A transfer could not under **Section 28** of the **Registration of Lands Act** have the effect of extinguishing those unregistered interests that were in the process of being created. In this case the agreement between the plaintiff and the 1<sup>st</sup> defendant having become void in the year **1993**, the 2<sup>nd</sup> defendant acquired title too late in **2011** after the lapse of the requisite **12** years; the 2<sup>nd</sup> defendant's title was therefore null and subject to the plaintiff's unregistered interest in the suit land.

34. It is this court's opinion that since the plaintiff's rights in adverse possession accrued against the 1<sup>st</sup> defendant, then the 1<sup>st</sup> defendant had no proprietary interest to pass to the 2<sup>nd</sup> defendant.

35. In the end, I find that the plaintiff has established his claim of adverse possession contained in the originating summons on a balance of probabilities and it should be allowed and that he ought to be registered as an absolute proprietor to the said parcel of land in place of John Wacira Chiri the 2<sup>nd</sup> Defendant who is currently registered as owner thereof.

36. On the other hand, the 2<sup>nd</sup> defendant has failed to establish his counterclaim to the required standard and it ought to be dismissed.

37. I therefore issue following final orders:

- a. A declaration is hereby issued declaring that the plaintiff has been in continuous, peaceful, open and adverse possession of plot number Elburgon/Elburgon Block 5/1 for a period in excess of 12 years from 1993;
- b. A declaration is hereby issued declaring that the 1<sup>st</sup> defendant's title to plot number Elburgon/Elburgon Block 5/1 was extinguished by operation of the law due to the plaintiff's adverse possession thereof for a period of more than twelve (12) years and therefore the 1<sup>st</sup> defendant had no title to transfer to the 2<sup>nd</sup> defendant;
- c. That the plaintiff has acquired title to all that piece of land known as Elburgon/Elburgon Block 5/1 by way of adverse possession thereof for a period of over twelve (12) years from 1993 to date;
- d. That the Land Registrar Nakuru County shall cancel the name of the 2<sup>nd</sup> defendant from the land register and he shall in lieu thereof register the plaintiff herein as absolute proprietor of all that land known as plot number Elburgon/Elburgon Block 5/1.
- e. The defendants shall bear the costs of this suit jointly and severally.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30<sup>TH</sup> DAY OF MARCH, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU