



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**ELC NO. 3 OF 2021**

**JOHNSON MWANGI MACHARIA.....PLAINTIFF**

**-VERSUS-**

**DAVID KIMANI MUHOI.....DEFENDANT**

**JUDGEMENT**

By Amended Originating Summons dated **30<sup>th</sup> November, 2021**, the Plaintiff sought for orders:

**a. THAT this Honorable Court be pleased to declare that the Defendant's claim to 1<sup>1/2</sup> acre in title to land parcel LOC 2/ MAKOMBOKI/ 567, has become extinguished by operation of law and that the Plaintiff herein has become entitled to 1<sup>1/2</sup> acre out of land parcel LOC 2/ MAKOMBOKI/ 567, through adverse possession.**

**b. THAT the Court be pleased to order that 1<sup>1/2</sup> acre be excised from land parcel NO. LOC 2/ MAKOMBOKI/ 567, and be registered in the name of JOHNSON MWANGI MACHARIA**

**c. The Defendant do execute all the necessary documents to effectuate the transfer of all that parcel of land known as LOC 2/ MAKOMBOKI/ 567, as to the Plaintiff and in default the Deputy Registrar of this Honorable Court be empowered to do so.**

**d. The costs hereof be provided for by the Defendant**

This Originating Summons is premised on **FIVE GROUNDS** and the Supporting Affidavit of **JOHNSON MWANGI MACHARIA**, sworn on the **12<sup>th</sup> August, 2016**. It is the Plaintiff's contention that he has been in open, peaceful, uninterrupted and exclusive occupation of the suit land for over **27 years**, and has become adverse to it. He averred that he bought the suit land from the Defendant vide a sale Agreement dated **8<sup>th</sup> June, 1989**, for a consideration of **Kshs.65,000/=**. That upon purchase, he took immediate occupation of the land, developed it and has remained so up to date. That the Defendant never attempted to evict him from the suit property. By his occupation and stay on the suit property, he has acquired possession of the suit land and he should be registered as the owner thereof.

The Defendant was served by way of substituted service, but never entered appearance and so the suit was uncontested. The Plaintiff contended that after he bought the suit land, from the Defendant, he lost touch with him, perhaps the reason personal service could not be effected. The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called no witness.

**PW1 JOHN MWANGI MACHARIA** adopted his witness statement dated **5<sup>th</sup> November, 2019**, and his list of documents filed on the **7<sup>th</sup> November, 2019**, as evidence in chief and asked the Court to find in his favor.

The Plaintiff thereafter filed his written submissions on the **18<sup>th</sup> February, 2022**, and raised one issue for determination by this Court. It is the Plaintiff's submission that he acquired the suit land through purchase on **11<sup>th</sup> May, 1993**. He further submitted that he has satisfied the ingredients for the grant of ownership by virtue of adverse possession and he relied on the case of **George Muli Mutua & 19 Others vs David Waweru Ndungu & 3 Others (2021) eKLR**, where the Court relied on the case of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR** and enumerated ten grounds that a claimant must show to establish the elements of adverse possession.

What flows from the pleadings is that land parcel **No. Loc. 2/ Makomboki/567**, is registered in the name of **DAVID KIMANI MUHOI**, measuring **2.23ha**. There are two interests registered on the property, a caution registered on the **9<sup>th</sup> March, 2004**, by the Plaintiff herein claiming purchaser's interest and a second caution was registered on the **2<sup>nd</sup> June, 2004**, by **Dominic Kimani** claiming licensee interest. Further, there are two Agreements:- one dated **11<sup>th</sup> May, 1993**, between the Plaintiff and the Defendant which shows that the Defendant put the Plaintiff in possession of land pending refund for purchase of **1<sup>1/2</sup> acres** for a consideration of **Kshs.65,000/=**. The other is dated **8<sup>th</sup>**

June, 1989, between the Plaintiff and the Defendant for the sale of **one acre** for a consideration of **Kshs.40,000/=** to be paid in installments.

The suit is not opposed, but this Court will not adopt the pleadings and the Plaintiff's evidence as the absolute evidence. This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the Plaintiff is entitled to the prayers sought. This court has pronounced itself on uncontroverted evidence in **Murang'a ELCA No. 16 of 2017:- Gichinga Kibutha v Caroline Nduku [2018] eKLR**, to the strength that It is not automatic that in instances where the evidence is not controverted, the claimant shall have his way in Court. He must discharge the burden of proof and must proof his case, however much the opponent has not made a presence in the contest.

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

- a) **Whether the Plaintiff has met the threshold for grant of orders for adverse possession?**
- b) **Whether the Plaintiff is entitled to one and half (1 1/2) Acres to be excised out of land parcel Number LOC 2/ MAKOMBOKI/ 567?**
- c) **Who should bear the cost of the suit?**

**(i) Whether the Plaintiff has met the threshold for grant of orders for adverse possession?**

It is the Plaintiff's case that he has been in **continuous uninterrupted occupation** and **possession** of the suit property for a period of **over 27 years**. The burden of leading the Court to ascertaining this allegation lies with the Plaintiff herein.

It is trite that a claim for adverse possession is attached to land and not to the title and it matters not in whose name title was registered in, unless if it was owned by the Government. This was the position in **Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR** as quoted in **Civil Appeal No 164 of 2011:- Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR**, where the Court held that: **"Adverse possession is a fact to be observed upon the land. It is not to be seen in a title"** Title Deed was issued to the Defendant sometime in 1994.

Claims under adverse possession are set out in several provisions of the **Limitation of Actions Act. Section 7** places a bar on actions to recover land after **12 years** from the date on which the right accrued. Section 13 provides adverse possession as the exception to this limitation:

**" (1) A right of action to recover land does not accrue unless the land is in 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."**

Finally, **Section 38 of the Act** provides that:

**"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."**

The principle of adverse possession was more elaborately set out in the case of **Wambugu vs Njuguna [1983] KLR 172**, where the Court held that:

**"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 of which he intended to use it."**

And that:

**"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 of the requisite number of years."**

This right to be adverse to land does not automatically accrue, unless the person in who's this right has accrued takes action. Section 38 of the Limitation of Actions Act gives authority to the claimant to apply to Court for orders of adverse possession. The **Court in Malindi App No. 56 of 2014:- Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR** 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.*

Further, in the case of **Mbira v. Gachuhi (2002) 1 EALR 137**: the court stated as follows;

*“... 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 statutorily prescribed period without interruption...”*

Therefore, to determine whether the Plaintiff's rights accrued, the Court will seek to answer the following; -

- i. How did the Plaintiff take possession of the suit property?**
- ii. When did he take possession and occupation of the suit property?**
- iii. What was the nature of her possession and occupation?**
- iv. How long has the Plaintiff been in possession?**

The Plaintiff contends that he acquired possession of the suit property through a sale agreement of 1989. This Court has had a chance of going through the Sale Agreement and notes that the same is for purchase of **one acre** of land for a consideration of **Kshs. 40,000/=** which was to be paid in installments. His mode of entry was as a result of a sale agreement, which means it was a permissive one. It is trite that for a claim for adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See **Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR**, where the Court enumerated the required elements to prove adverse possession 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.”*

His occupation having been permissive, it will follow that a claim for adverse possession may not issue. However, Courts have found that such claim can be sustained after payment of the last installment. The Court in **Nairobi App No. 73 of 1982:- Public Trustee vs Wanduru Ndegwa [1984] eKLR**, found that Limitation of action begun running from the date of final payment. In the case **Hosea vs Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577**, held that once payment of the last installment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.

What is clear from the agreement is that payment was to be made in installments, but there is no evidence that money was ever paid. The Plaintiff submits that he took possession vide a sale agreement of 1993. A look at that agreement intimates that the Defendant put the Plaintiff in possession of land pending refund for purchase of **1½ acres** for a consideration of **Kshs. 65,000/=**. The Plaintiff took possession of the land through a conditional agreement, adverse possession would start running when the condition is fulfilled and the Plaintiff continues to be in occupation. In the instant case, what flows from the evidence is that the condition was never fulfilled and the Plaintiff continued to be in occupation after three months of **11<sup>th</sup> May, 1993**.

As stated by the Court in **Wambugu – v- Njuguna, (1983) KLR 172**, that time for adverse possession starts running when license or leave is determined. In the present case, the license was determined at the expiry of three months, since there is no evidence that it was renewed.

As to when he gained entry, this Court has looked at the evidence and notes that the Plaintiff was put in possession of the suit property in 1993. While in 1989, there was a sale agreement, there is no doubt that the agreement was not actualized, and being a sale by installment, time would start running from the last payment. The tone of the 1993 agreement is indicative of a revocation of the 1989, one and it follows therefore that for purposes of computing time for adverse possession, the 1993 translation agreement would suffice. As to the nature of occupation, the same must be ***nec vi nec clam nec precario, open, continuous and notorious***.

The Plaintiff contends that he has been in occupation of the property and has developed the same and he attached photographs to his claim to show that he planted tea leaves thereon and has been supplying tea bushes to **Makomboki Tea Factory**.

This Court has no reason to doubt the veracity of the Plaintiff's evidence as the action of planting tea bushes shows that the Plaintiff had the intention of taking possession of the suit property. Undoubtedly, the same could not have been undertaken without the knowledge of the owner. As rightly put by the Court in **Malindi ELC CIVIL Appeal No.17 of 2016:- Chevron (K) Ltd vs Harrison Charo Wa Shutu [2016] eKLR** where it held:

*“We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the Defendant manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The Defendant's acts were *nec vi, nec clam, nec**

***precario (that is, neither by force, nor secretly and without permission)."***

It is not clear whether the Plaintiff sought the Defendant's permission before planting the tea bushes, but this Court draws inference that the planting of the tea bushes and trees was without permission from the agreement of 1993, which allowed the Plaintiff to be in occupation of the land for a period of only three months.

There is attached certificate of search showing that the Plaintiff cautioned the property in 2004, and one by **Dominic Kimani** who claimed licensee interest. This Court cannot find that the registration of caution could stop time from running. What can stop time from running is the filing of a suit to assert rights. In **Malindi CoA Civil Appeal No. 29 of 2016:- Peter Kamau Njau vs Emmanuel Charo Tinga [2016] Eklr**, the Court held

***"in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.***

The cautioner, **Dominic Kimani Kamanjuri** is a stranger not known to this Court, as he was not the registered owner. Guided by the above provisions of the law, it follows therefore that nothing stopped time from running. For the purpose of computing time for adverse possession and this Court will adopt 1993 as the definite year. It would be right to find that the Plaintiff has been in occupation of the land for a period of more than **12 years** and precisely **29.7 years**. To this end, this Court finds and hold that the Plaintiff has met the threshold for the grant of adverse possession.

**(ii) Whether the Plaintiff is entitled to one and half (1½) Acres to be excised out of land parcel Number LOC 2/MAKOMBOKI/567?**

What flows from the pleadings is that the land herein is not surveyed. However, the agreement expressly states that the Plaintiff was entitled to **one and half acres (1½)** to be excised from parcel No. **LOC 2/MAKOMBOKI/567**. From the attached Certificate of Official Search, it is evident that the land is registered under the name of the Defendant. What this Court appreciates is that the land can easily be identified.

For a claim of adverse possession to issue, it is important that land is clearly identified as was held by the Court in **Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR** where the Court observed:-

***"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."***[Emphasis added]

The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of **Order 37 Rule 7 of the Civil Procedure Rules**, which requires that an application for adverse possession be accompanied with a title deed extract. The search certificate shows that the land measuring **2.23ha** identified as **LOC 2/MAKOMBOKI/567**. This Court has not enjoyed the benefit of being able to identify the exact occupation of the Plaintiff out of the entire parcel **LOC 2/MAKOMBOKI/567**, but what is not in dispute is that the Plaintiff is occupying part of the land which is one and half acres. It would not be difficult for this Court to conclude that the Plaintiff is aware of the confines and or borderlines of the larger portion notwithstanding.

In totality, this Court finds and hold that the Plaintiff has on a balance of probability demonstrated that he is entitled to one and half (**1 ½**) acre piece of land to be excised from **LOC 2/ MAKOMBOKI/ 567**.

**(iii) Who should bear costs.**

It is trite that costs shall follow the events, and that the successful party be awarded costs. It is not in doubt that the Plaintiff herein is the successful party and this Court has no reason not to exercise its discretion in his favour. To this end, this Court finds and holds as follows:

- a) That the Plaintiff has proved his claim for adverse possession**
- b) That the Plaintiff is entitled to 1½ acres to be excised from **LOC 2/ MAKOMBOKI/ 567****
- c) That Land Registrar Murang'a be and is hereby directed to issue title in the name of the Plaintiff for a portion of 1 ½ acres upon the conclusion of the requisite process of demarcation and survey.**
- d) The Defendant do execute all the necessary documents to effectuate the transfer of all that parcel of land known as **LOC 2/ MAKOMBOKI/ 567**, as to the Plaintiff and in default the Deputy Registrar of this Honorable Court be empowered to do so.**
- e) The Plaintiff is entitled to costs of the suit.**

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**L. GACHERU**

**JUDGE**

21/4/2022

Delivered virtually in the presence of:

Kuiyaki .....Court Assistant

Mr. Kangiri Karanja .....Plaintiff

N/A for Defendant

**L. GACHERU**

**JUDGE**

**21/4/2022**