



**Mpusia v Kimorgo (Environment & Land Case 242 of 2017)
[2022] KEELC 3300 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3300 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 242 OF 2017**

CG MBOGO, J

MAY 31, 2022

BETWEEN

SIRERE OLE MPUSIA PLAINTIFF

AND

NDALAMEYA OLE KIMORGO DEFENDANT

JUDGMENT

1. The decision of this court emanates from a consolidation of two suits i.e. ELC Case No 242 of 2017 and Civil Suit No 247 of 2017 (OS) which was arrived at by consent before court on 17th December, 2020.
2. On the 21st February, 2017 the plaintiff in this matter filed a plaint dated 17th February, 2017 seeking the following orders: -
 - a. An injunction restraining the defendant, their servants, workmen, agent from entering on and/or from erecting, causing to be erected thereon any structures, any continued interference with the Plaintiff's use and enjoyment of the plaintiff's property.
 - b. An order of eviction from the said premises.
 - c. Damages.
 - d. Interest thereon.
 - e. Costs of this suit.
3. In Civil Suit No 247 of 2017 dated 21st February, 2017, and filed in court on even date, the applicant/plaintiff herein, Ntalamea Ole Kimorgo, by virtue of adverse possession sought for determination of the following questions: -



- a. Whether the plaintiff has been in adverse possession of the defendant's land parcel number Cis-Mara/Nkareta/ 483 for a period of over 12 years.
 - b. Whether the plaintiff should be registered as the proprietor of parcel No Cis-Mara/Nkareta/ 483.
 - c. Whether the defendant should be restrained by an order of an injunction from selling, transferring, entering or in any other manner howsoever interfering with the plaintiff's peaceful use, occupation and or enjoyment of parcel No Cis-Mara/Nkareta/483 both pending the hearing of this suit and after determination hereof.
 - d. Who should pay the costs of this suit.
4. In the plaint, the plaintiff averred that he is the registered owner of Cis-Mara/Nkareta/ 483 and that on 22nd January, 1999, the plaintiff and the defendant entered into a land swap agreement for the exchange of their parcels of land namely Cis-Mara/Nkareta/ 483 with Cis-Mara/Nkareta/469 and that the terms of the agreement were to the effect that the plaintiff swaps or exchanges land with the defendant.
 5. The plaintiff further averred that the exchange never materialized and transfer was never effected and that the land swap agreement became null and void by default on the premise of no exchange. That since then the defendant has continually trespassed on the suit land and has refused him entry and continues to waste the suit land.
 6. The defendant filed a statement of defence dated 27th July, 2019 and while denying the contents of the plaint, stated that whereas the plaintiff is the registered owner of the suit land, he has acquired adverse rights over the same by way of adverse possession and has filed Originating Summons in respect of the same which he seeks to acquire title.
 7. This matter proceeded for hearing on 3rd June, 2021. The plaintiff adopted his statement dated 17th February 2017 as evidence. He relied on his documents marked as P. exhibit 1,2,3 and 4 which is a copy of title deed of the suit land, official search, sale exchange agreement and demand notice.
 8. On cross examination, the plaintiff testified that the defendant moved into the suit land in 2017 and he has not used the land since. The plaintiff further testified that the agreement which was drafted in the English language was written by the defendant who approached him for the exchange of land and that it is not true that he approached the defendant to be close to his father since there are about six plots separating him from his father. He further testified that parcel number 469 is from the suit land and that they did not notify the Adjudication Committee and the area Chief but he moved to parcel number 469 and the defendant moved to parcel number 483 which he occupies to date. He admitted that he has been living in parcel number 469 for too long and the defendant has never disturbed his occupation. The plaintiff never reported the cancellation of the exchange agreement and in the year 2016, he processed the title deed.
 9. The matter proceeded for defence hearing on 21st October, 2021. The defendant testified that Mbenek Ndepashi was subdivided by Nkareta Group Ranch where each member was allocated a parcel of land and during subdivision, part of the group ranch was bushy. After the subdivision, the plaintiff approached him so that they could swap their parcels of land because the plaintiff's land was in a bushy section and that he wanted to be near his father. He produced defendant's exhibit number 1-4 being a copy of the exchange agreement, a bundle of photographs showing his homestead, a certified copy of the green card and a letter dated 13th February, 2017 from the Land's Registrar. He further testified that together with the plaintiff, they submitted, the exchange agreement and paid transfer fees but the surveyors did not execute the transfers.



10. On cross examination, the defendant testified that he is the one who wrote the agreement and during this time, he did not have a title deed for parcel number 469 and neither did the plaintiff have a title deed for parcel number 483. He further testified that he did not know whether a title deed had been issued for the suit land. Further, that he has not processed the title for parcel number 469. He confirmed that he attended the Land Control Board where they authorized the board to execute the agreement and that he does not have evidence of the board meeting that they attended. Apart from costs he incurred in developing the suit land, he has an attachment over the suit land.
11. The defence hearing proceeded further on 10th November, 2021 where the defendant's first witness- Kinanda Ole Kapekdei (DW1) testified that he is aware that the plaintiff and the defendant exchanged their parcels of land although he was not present when the same was done. That both of them live in each other parcels of land and they have been doing so for approximately 20 years and both of them are his neighbours. He further testified that they have had several mediations between the two but it has been in vain and the same was caused by the plaintiff who wanted his land back. On cross examination, he testified that the plaintiff has a title deed to the suit land and cannot confirm whether the defendant has a title to his parcel number 469. That whereas, he attended several meetings to resolve the dispute between the two parties, there are no minutes to the same.
12. The plaintiff filed written submissions dated 22nd November, 2021. The plaintiff raised 4 issues for determination as follows: -
 1. Whether or not the exchange agreement dated 22nd January, 1999 is valid and enforceable.
 2. Whether or not the defendant has made out a case for adverse possession with respect to all that parcel of land known as Cis-Mara/Nkareta/483.
 3. Whether or not the defendant has trespassed on the plaintiff's parcel of land being Cis-Mara/Nkareta/483.
 4. Who should pay the costs of this suit.
13. The plaintiff submitted that both parties have conceded in their pleadings that the mutual agreement entered into on 22nd January, 1999 was null and void and never took effect and owing to this the defendant cannot depart from the same during trial. He submitted that a party is bound by his own pleadings as was in the case of *Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. Further that the agreement was also void since both parties entered into a mutual agreement whereas none of them had been registered as proprietors of their parcels of land as provided in Section 24 of the *Land Registration Act*. For this reason, both parties were legally unable to enter into a contract with respect to a suit land which did not exist at the time.
14. On whether the defendant has made out a claim for adverse possession, the plaintiff submitted that it is the defendant's case that he has been in occupation of the suit land even before demarcation began, if at all this was true, then the demarcation process would have found him in occupation of the suit land and he would have been issued with a title deed. The Plaintiff further submitted that by the defendant's own pleadings, the agreement cannot be a basis for claim of adverse possession. Further that the defendant could not claim to have extensively developed the suit land since semi-permanent structures cannot be categorized as extensive development. Further that even the defendant's witness could not tell the parcel of land or provide documentary evidence to confirm that there were any developments thereon. That the photographs annexed have not been accompanied by a certificate of electronic records as required under Section 106b of the *Evidence Act*. To buttress this submission, the plaintiff relied on the case of *John Lokitare Lodinyo v IEBC & 2 others* [2018] eKLR and *Richard Nyagaka Tong'i v IEBC & 2 others* [2013] eKLR. The plaintiff submitted that the defendant has trespassed on the suit land for



that reason, his intrusion is unjustifiable. The plaintiff relied on the case of *Park Towers Limited v John Mithamo Njika & 7 others* [2014] eKLR.

15. The defendant filed written submissions dated 21st February, 2022. The defendant has raised 5 issues for determination as follows: -
 1. Whether or not the exchange agreement dated 22nd January, 1999 is valid and enforceable.
 2. Whether or not the defendant has made out a case for adverse possession with respect to all that parcel of land known as Cis-Mara/Nkareta/483.
 3. Whether there was a constructive trust created by the exchange agreement.
 4. Whether or not the defendant has trespassed upon the plaintiff's parcel of land number Cis-Mara/Nkareta/483.
 5. Who bears the costs of this suit?
16. The defendant submitted that the exchange agreement was initiated by the plaintiff who expressed his intention to live close to his father and that both parties expressed a wish to record the same changes with the Adjudication Committee and the exchange agreement was done voluntarily. The defendant submitted that since both parties entered into the agreement voluntarily, the same was binding on both parties and the court should therefore order specific performance of the same. The defendant submitted that Section 38 (2) of the *Land Act* stipulates the requirement that contracts for disposition of an interest in land should be in writing does not affect the creation or operation of a resulting, implied or constructive trust and that since trusts are overriding interests to which land is subject, all laws have to be construed in conformity with the *Land Act*.
17. On claim of adverse possession, the defendant submitted that he has been in occupation of the suit land since 1999. Up until the filing of the suit in 2017, he has accumulated 18 years which is more than the period provided in law. The defendant relied on the case of *Wambugu v Njuguna* [1998] KLR 173.
18. The defendant further submitted that the parties had created a constructive trust from the exchange agreement and further actualized the same by swapping the parcels of land and taking possessions immediately. The defendant submitted that both parties presented themselves to the area chief who wrote the agreement on their behalf since they are illiterate. That the plaintiff went secretly to the land registry and obtained title to the suit land. The defendant further relied on the case of *Willy Kimutai Kitilit v Micheal Kibet* [2018] eKLR and *Charles Kanyagia v Alfred Musavi & another* [2020] eKLR and *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR. The defendant submitted that this court should enforce the intention of the parties in the exchange agreement. The defendant further submitted that there is no trespass because the defendant occupied the suit property with the express authority of the plaintiff.
19. I have analysed the pleadings in both matters, documents relied upon and the written submissions filed by both parties and there are 3 issues for determination before this court which are as listed below: -
 1. Whether the exchange agreement dated 22nd January, 1999 is valid and enforceable.
 2. Whether the defendant has made out a case for adverse possession of the suit land.
 3. Who is to bear the costs of this suit.
20. The dispute herein culminates from a written agreement with the heading 'Exchange of Plots' dated 22nd January, 1999 signed by both parties. In this agreement, the plaintiff stated that he is the owner of parcel number 469 which is far from the land belonging to his father whereas the defendant is the



owner of plot number 483. By this agreement, parties agreed to change ownership with the records at the Adjudication Section Committee. In paragraph 7, 8 and 9 of the affidavit in support of Originating Summons dated 21st February, 2017, the defendant deponed that in the year 1999 they actualized their mutual agreement by executing the exchange of plots agreement dated 22nd January, 1999 and that they were supposed to inform the Land Adjudication Officer but they never did and the changes were never effected. In paragraph 12 of the said affidavit in support of summons, the defendant deponed that the agreement dated 22nd January, 1999 and executed by both parties was null and void. In paragraph 11 of the replying affidavit sworn by the plaintiff on 8th March, 2017, the plaintiff deponed that the exchange agreement entered into by the parties never materialized and in paragraph 12, the plaintiff deponed that the botched exchange agreement is an illegality and not capable of enforcement by any competent court.

21. In paragraph 6 and 7 of the plaint, the plaintiff averred that the parcel exchange never materialized and transfers were never effected and that the agreement became null and void. In paragraph 5 of the defendant's statement of defence, the defendant averred that if at all there was an agreement to swap or exchange parcels of land, then the same was void. Just to be clear, the exchange agreement dated 22nd January, 1999 refers to the plaintiff as the owner of parcel number 469 and the defendant as the owner of parcel number 483. During trial, both parties testified in Maasai language. The plaintiff testified that it was the defendant who approached him for the exchange of land and that the suit land belongs to him but that he has been in occupation of the defendant's parcel of land without disturbance. The defendant testified that he is the one who wrote the agreement in the English language. It was also clear to me during trial that the defendant is the owner of parcel number 469 because he testified that he does not have title to his parcel of land being Cis-Mara/Nkareta/469 at the time of preparing the agreement and that he has not processed the title deed for the same. In his written submissions, the defendant submitted that they presented themselves to the area chief who wrote the agreement for them for they are both illiterate. I find the defendant's testimony as contradictory which raises doubt as to his credibility. The defendant also testified that they went to the Land Control Board to have the changes effected. He did not prove the same. It is trite law that a party who alleges must prove. The defendant failed to do so.
22. Section 3 (1) of the Trespass Act, Cap 294 provides that:

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.” Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.
23. Section 6 (1) of the Land Control Act provides as follows: “Each of the following transactions that is to say –
 - (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal or dealing with any agricultural land which is situated within a land control area;

is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”. Emphasis added.
24. Black's Law Dictionary 9th Edition defines the term void as follows: “of no legal effect; null”
25. Since the agreement between the parties was subject to the consent of the Land Control Board being obtained in terms of the provisions of Section 6 (1) of the Land Control Act, and in the absence of



such consent, the agreement became null and void and cannot therefore be enforced by this Court. Consent was necessary for the exchange transaction herein, and since none was applied for, or granted, the exchange transaction is void and therefore unenforceable.

26. On whether the defendant has made out a case for adverse possession, the defendant deponed in his affidavit in support of Originating Summons sworn on 21st February, 2017 that he has been in occupation of the suit land since 1998 and that his occupation since then has never been interrupted and that he has extensively developed the suit land. For this reason, he has acquired rights that are adverse to those of the defendant (plaintiff in ELC No 247/17). The defendant also deponed that he has been in occupation way before the demarcation process began. Further that owing to their mutual agreement, they were supposed to inform the Land Adjudication officer to effect the agreement.

27. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

“7. 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.

13.

(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”.

27. The Court of Appeal in Kisumu Civ App. No 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR opined that a person claiming adverse possession must establish the following: -

- (a) On what date he came into possession.
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party.
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.



28. The defendant contends that he entered into the parcel of land in the year 1999 and has been in occupation since then for a period of 18 years which is beyond the statutory claim.
29. To determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No 27 of 2013 Samuel Kihamba v 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”

30. The plaintiff is the registered owner of the suit land, and by an exchange agreement, the defendant took possession of the land. Be that as it may, it is not enough for the defendant to simply state that he has been in open, continuous and uninterrupted occupation. He ought to prove the said allegation. The Court concurs with the sentiments of Justice Kuloba J, in Nairobi Civ No 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto use, and de facto occupation must be shown*”.

31. The defendant’s witness testified that they have had several mediations talks since 2016 in a bid to resolve the issue but the same has been in vain. It is also clear that the plaintiff wrote a demand letter to the defendant on 9th January, 2017. Based on the above it appears that interruptions as to the occupation by the defendant began in the year 2016 or 2017 thereabout. In between the years, the plaintiff did not interfere with the occupation of the defendant.
32. Arising from the above, I find that the defendant has become adverse possessor of the plaintiff’s suit land from 1999 even though in my view, the same effectively began on the 19th November, 2001 as can be seen from the copy of green card in respect of land parcel No Cis Mara/Nkareta/483 registered in the name of Sirere Ole Mpusia annexed to the defendant’s replying affidavit sworn at Nakuru on 8th March, 2017 as annexure No 4b.

In the circumstances, therefore, I dismiss the plaintiff’s suit and proceed to allow the defendants originating summons dated 21st February, 2017 as hereunder:-

- a. The defendant has been in adverse possession of the plaintiff’s parcel No Cis Mara/Nkareta/483
- b. The defendants should be registered as proprietor of parcel No Cis Mara/Nkareta/483
- c. The District Land Registrar, Narok is directed to register the plaintiff as the proprietor of parcel No Cis Mara/Nkareta/483 in place of the defendant.

As regards both matters, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 31ST MAY, 2022.

MBOGO C.G

JUDGE



In the presence of: -
CA: Timothy Chuma

