



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Kaguima (Environment & Land Case 47 of 2019)  
[2022] KEELC 3476 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3476 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 47 OF 2019**

**YM ANGIMA, J  
MAY 12, 2022**

**BETWEEN**

**PETER NJUGUNA ..... PLAINTIFF**

**AND**

**JOSEPH MBUGUA KAGUIMA ..... DEFENDANT**

**JUDGMENT**

1. By an originating summons dated 02.10.2019 brought under Section 38 of the Limitation of Action Act (Cap.22), Order 37 rule 7 of the Civil Procedure Rules, 2010 the Plaintiff sought determination of the following questions:
  - a. Whether the Plaintiff has acquired title deed by adverse possession over a 50 x 100ft Plot to be excised from L.R.No.Nyandarua/Oljoro-orok Salient/7462.
  - b. That the Plaintiff be registered as the proprietor of the 50 x 10ft Plot to be excised from L.R.No.Nyandarua/Oljoro-orok Salient/7462 having acquired the title by virtue of the doctrine of adverse possession thereof since 1998.
  - c. That the Plaintiff be authorized by the court to engage a surveyor to excise the 50 x 100ft Plot from L.R.No.Nyandarua/Oljoro-orok Salient/7462.
  - d. That the Defendant be ordered to apply for the requisite consents for subdivision and transfer and execute the mutation and transfer documents in favour of the Plaintiff and release to the Plaintiff the original title deed, copies of his PIN, ID and passport size photographs within seven (7) days of the date of the judgment and in default the Honorable Court's Executive Officer be authorized to execute the necessary documents.



- e. That the District Land Registrar and Surveyor Nyandarua do dispense with the production of the original title deed for L.R.No.Nyandarua/Oljero-rok Salient/7462 and proceed to subdivide the land and to issue a title in favour of the Plaintiff.
  - f. Whether all cautions and restriction placed on L.R.No.Nyandarua/Oljero-rok Salient/7462 should be removed forthwith.
  - g. That the costs of this suit be borne by the Defendant.
2. The said summons was based upon the grounds set out in the supporting affidavit sworn by Peter Njuguna on 02.10.2019 and the exhibits thereto. The Plaintiff contended that vide a sale agreement dated 16.3.1998 he bought a portion of 50 x 100ft of land to be excised from Title No.Nyandarua/Oljero-rok Salient/7462 (the suit property) from the Defendant. He further stated that he took possession in the same year and settled thereon together with his family members. He further stated that he developed the said portion of land extensively by constructing houses, erecting a perimeter fence, installing a steel gate and planting trees. He contended that the Defendant never took steps to evict him over the years even though the consent of the Land Control Board (LCB) for the sale transaction was never obtained. The Plaintiff consequently contended that he had acquired a portion of 50ft by 100ft of the suit property through adverse possession.

### **B. The Defendant's Answer To The Suit**

3. The Defendant filed a replying affidavit sworn on 11.11.2019 in response to the originating summons. Although he admitted being the registered proprietor of the suit property, he contended that he was merely a trustee of his late mother, Mary Wanjiru Kagwima. He also conceded having sold a plot measuring 50ft by 100ft and put the Plaintiff into possession in 1988 and that he constructed a dwelling house thereon. It was the Defendant's case that the Plaintiff only occupied the suit property between 1988 and 2015 when he sold it to a third party, Margaret Wairimu Mukabi. The Defendant further contended that the suit property had been cautioned and prohibitory order registered against it thereby indicating that there were other adverse claims against it.
4. By a supplementary affidavit sworn on 21.5.2021 the Defendant contended that there was no evidence to demonstrate that the photographs annexed to the Plaintiff's supporting affidavit were taken on the suit property. He further stated that there was no requirement for consent of the LCB to be obtained under the terms of the sale agreement between the parties. He further stated that the Plaintiff's possession was with his permission hence the issue of adverse possession could not arise. The Defendant contended that the Plaintiff had failed to satisfy the requirements of adverse possession as required by law and consequently prayed for dismissal of the Plaintiff's claim.

### **C. The Issues For Determination**

5. The court has considered the pleadings, evidence and documents on record. Even though the Plaintiff has listed several questions for determination in the Originating Summons, the court is of the opinion that the key issue for determination is whether or not the Plaintiff has demonstrated his claim for adverse possession as required by law. The rest of the questions are consequential matters dependent upon the success of the claim for adverse possession.

### **C. Analysis And Determination**

6. The requirements for proving adverse possession were restated in the cases of: *Wambugu –vs- Njuguna* [1983] KLR 172; *Githu –vs- Ndeete* [1984] KLR 776, *Kasuve –vs- Mwaani Investments Ltd & 4 Others* [2004], 1KLR 184 and *Kimani Ruchine –vs- Swift Rutherfords & Co. Ltd* [1980] KLR 10.



7. In the case of *Kasuve –vs- Mwaani Investments Ltd & 4 Others* (Supra) the elements of adverse possession were summarized as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2 [1984] KLR 284*. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land....”

8. The court has considered the evidence and submissions on record. The Plaintiff’s evidence at the trial was as per his supporting affidavit dated 2.10.2019 whose contents he adopted as his evidence in-chief. It was common ground that the Plaintiff took possession of the plot in dispute in 1998 upon purchasing it from the Defendant. It was also common ground that he fenced the same and constructed some houses thereon. What was disputed was whether or not he was still in possession. Whereas the Plaintiff contended that it was his mother in-law who was in occupation, the Defendant contended that the Plaintiff had actually sold of the plot to a third party.
9. The Defendant submitted that the Plaintiff could not establish adverse possession because the suit property was encumbered with a caution at the material time; that the Plaintiff was in possession with his permission and that in any event there was no requirement in the sale agreement for the consent of the LCB to be obtained. The court is not persuaded that the existence of a caution, prohibitory order or other encumbrance in the land register can legally exclude a claimant from obtaining adverse possession of the subject land. The court is also not persuaded that parties can legally circumvent the provisions of the *Land Control Act* by doing away with the requirement of consent of the LCB with respect to agricultural land. If the subject land is agricultural land, it would be subject to the provisions of the law whether or not the contracting parties provide for it or their sale agreement.
10. The court has also considered the Defendant’s contention that all along the Plaintiff was in possession with his permission or licence pending completion of the contract of sale hence the Plaintiff could not claim adverse possession of the suit property. The court is of the opinion that since the consent of the LCB was not obtained within the requisite period of 6 months or at all, the sale agreement dated 16.3.1998 become null and void for all purposes. Accordingly, the Defendant could not purport to grant permission to the Plaintiff to continue in possession of the suit property pursuant to a void sale agreement. Consequently, time for purposes of the *Limitation of Actions Act* started running with effect from 15.9.1998.
11. The Defendant disputed that the Plaintiff had been in continuous and exclusive possession of the suit property for the requisite statutory period. The Defendant further contended that the Plaintiff had voluntarily vacated the suit property in 2015 and sold it to a third party known as Margaret Wairimu Mukabi. The evidence at the trial revealed that the said Mukabi was in fact the Plaintiff’s mother in-law and the houses on the suit plot belonged to the Plaintiff. The court is thus satisfied that the Plaintiff has maintained his possession of the suit property to the exclusion of the Defendant since 1998 without any interruption as known to law. There was no evidence on record to demonstrate that the Defendant had made an effective entry or sued for possession prior to the institution of the originating summons for adverse possession.
12. The court is thus satisfied that the Plaintiff has demonstrated that he has been in adverse possession of the suit land for a period exceeding 12 years without any interruption as known to law. The Defendant has never regained possession of the suit land since 1998 and he has never utilized or developed it since



then. The identity of the person physically residing thereon is really irrelevant since that person is an agent of the Plaintiff.

13. The court is not persuaded that the Defendant's alleged capacity as trustee of the suit property has any effect on the Plaintiff's claim for adverse possession. The court is not aware of any law which exempts private property (as opposed to public land) from the application of the Limitation of Actions Act on account of an alleged trust. Needless to state that the alleged trust was not proved at the trial. None of the beneficiaries of the alleged trust testified at the trial.

### **C. Conclusion And Disposal**

14. The upshot of the foregoing is that the court is satisfied that the Plaintiff has proved his claim for adverse possession to the required standard. Accordingly, the court makes the following orders for disposal of the originating summons dated 02.10.2019:
- a. A declaration be and is hereby made that the Plaintiff has acquired title to a portion of 50ft x 100ft out of Title No.Nyandarua/Ol Joro-orok Salient/7462 on account of adverse possession.
  - b. The Plaintiff is hereby authorized to appoint a surveyor to excise a portion of 50ft x 100ft the subject of the suit from Title No.Nyandarua/Ol Joro-orok Salient/7462.
  - c. The Defendant shall sign all necessary forms, documents and instruments to facilitate the transfer of the said portion of land measuring 50ft x 100ft to the Plaintiff within 14 days from the date hereof in default of which the Deputy Registrar of the Court is hereby authorized to do so on his behalf.
  - d. The Land Registrar Nyandarua County shall dispense with the production of all documents in the possession, custody or control of the Defendant including the original title deed during the transfer of the said portion of the suit land to the Plaintiff.
  - e. Any restrictions, cautions or other encumbrances against Title No.Nyandarua/Ol Joro-orok Salient/7462 are hereby lifted to facilitate the transfer of the portion of 50ft x 100ft to the Plaintiff.
  - f. The Defendant shall bear the costs of the suit.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 12TH DAY OF MAY, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Waichungo for the Plaintiff

Mr. Muchangi for the Defendant

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**

