



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 1 of 2012

BEATRICE SYOKAU GATHUMBA.....PETITIONER

VERSUS

KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> RESPONDENT

THE COMMISSIONER FOR LANDS.....2<sup>ND</sup> RESPONDENT

THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

J U D G M E N T

INTRODUCTION

1. The Petitioner, Beatrice Syokau Gathumba, is a 78 year old woman who was married in 1957 to John Gathumba Makuthi, (now deceased). Her Petition dated 4<sup>th</sup> January, 2012 is expressed to be brought pursuant to the provisions of **Articles 27, 28 and 40** of the **Constitution**. She seeks the following Orders;

- a) **That this Court declares that the petitioner's fundamental right to property was grossly violated by the compulsory acquisition of all that parcel of land known as LR. No.7075/3 by the Government of Kenya through the Respondents without compensating the petitioner for the acquisition.**
- b) **That this Court does order the Respondents to compensate the Petitioner for the compulsory acquisition of her 49 acres of land in the property originally known as LR. No.7075/3 at the current market rates.**
- c) **That this Court declares that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have discriminated against the petitioner by failing to consider her application for allocation of her land while allocating the land currently occupied by the Petitioner to 3<sup>rd</sup> parties.**
- d) **That this court declares that once land is acquired compulsorily by the Government for specific purposes, that land cannot be used for any other purpose other than the purpose it was acquired for.**
- e) **That the petitioner is entitled to exemplary damages and aggravated damages for the deliberate conduct of the Respondents.**
- f) **Cost and interest of this Petition.**

**g) Any further orders that this Court may deem as fit and proper to issue in the interest of justice.**

2. The Petition is supported by the Affidavit sworn by the Petitioner on 4<sup>th</sup> January, 2012, a further Affidavit sworn on 28<sup>th</sup> March and a second further Affidavit sworn on 24<sup>th</sup> April, 2012. The 1<sup>st</sup> Respondent filed a eplying Affidavit sworn by Joy Nyaga, the 1<sup>st</sup> Respondent Corporation Secretary and Chief Legal Officer on 13<sup>th</sup> March, 2012. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in opposing the Petition filed grounds of opposition dated 30<sup>th</sup> April 2012. The matter proceeded by way of written submissions and each party has complied with the order to file submissions.

**The Petitioner's case**

3. It was the Petitioner's case that she got married to her deceased husband in 1957 and moved in to cohabit with her husband on all that parcel of land known as L.R No. 7075/3 (*herein after referred to 'suit premises'*) which he was occupying prior to their marriage and in fact from 1938 or thereabouts. She alleged that her deceased husband was a farmer who kept over 700 cows and goats on the suit premises and he had taken possession of the suit premises by fencing the homestead in accordance with *Kamba* customary practice. They had also developed the suit premises by building a cowshed, temporary houses and planted trees. These developments are still on site and she has continued living on the suit premises, to date.

4. The Petitioner presented the history of the suit premises as follows; that despite her husbands use and occupancy of the suit premises, the colonial government granted Laura Ellen Woodley a lease of the suit premises for a term of 999 years with effect from 1<sup>st</sup> July, 1917 to 1<sup>st</sup> July 2916 through a grant registered as I. R No. 4587/1 on 26<sup>th</sup> April, 1938. Thereafter, Laura Ellen Woodley appointed the Petitioner's deceased husband as the manager of her domestic animals grazing on the land and she never interfered with the Petitioner's husband's possession, occupation and use of the suit premises. Following Laura Ellen Woodley's death, the administrators of her estate transferred the suit premises to Frank William De Meduvc Woodley and Elizabeth De Meduwc Destro as beneficiaries of her estate in 1961. The suit premises were later on sold to Navandas Damodar in 1964 for Ksh.7,000. She then contends that even during the process of these transfers she continued to use, possess and control the suit premises with the full knowledge of all the registered proprietors. On 28<sup>th</sup> April 1972, the suit premises were compulsorily acquired by the government of Kenya under **Section 19(1)** of the **Land Acquisition Act** of 1968 (now repealed) for the purposes of expansion of Jomo Kenyatta International Airport through Development Notice Number 1106.

5. The Petitioner contends that following this acquisition of the suit premises by the Government, she was the only one who presented her claim of the suit premises to the Land Acquisition Compensation Tribunal for compensation and she has never been compensated despite the fact that she has followed up the matter with several relevant Government departments. She claimed that officers of the Respondents have in any event confirmed her claim of the suit premises as genuine. She was indeed issued with a title document number NA/A5/04/145 by the 2<sup>nd</sup> Respondent though it was later on termed as 'a fake title deed'. She produced in evidence this 'fake title deed' and letters of correspondences as between herself, the Provincial Administration, Office of the President and officers of the 2<sup>nd</sup> respondent. She then contends that even after the acquisition of the suit premises by the Government she was not evicted from the suit premises and has continued to occupy the same. However, she alleges that the 2<sup>nd</sup> Respondent has subsequently allocated the suit premises to third parties who have erected permanent structures on part of the suit premises.

6. Lastly, the Petitioner submitted that she had acquired possessory title to the suit premises prior to 1971 when the same was compulsorily acquired by the Government by way of adverse possession. She therefore alleges that the failure to compensate her for compulsorily acquiring the suit premises under the provisions of the Land Acquisition Act violated her right to own property as stipulated by **Section 75** of the **Repealed Constitution**. She also claims that the allocation of the suit premises to third parties

without regard to her claim over the suit premises amounts to discrimination and is against the constitutional right not to be discriminated against as provided for by **Section 82** of the **Repealed Constitution**.

### **1<sup>st</sup> Respondent's case**

7. It was the 1<sup>st</sup> Respondents case that the suit premises forms part of the land within the confines and boundaries of the 1<sup>st</sup> Respondent's parcel of land known as L.R No. 21919 on which the 1<sup>st</sup> Respondent has erected an airport known as Jomo Kenyatta International Airport (herein after to be referred to as "JKIA") which was earlier on known as Nairobi Airport. Joy Nyaga, the 1<sup>st</sup> Respondent 's Corporation Secretary and its Chief Legal Officer, explained how JKIA acquired the suit premises. She stated that originally the suit premises were not part of JKIA but they subsequently became so by virtue of the Aerodromes (**Control of Obstruction**) **Act, Cap 396** Laws of Kenya which deemed the suit premises as a "Declared Area". This Act defined Declared Area as '**any area adjacent to or in vicinity of an aerodrome, which the Minister may by notice in the Gazette, declare to be a declared area...**' and as at 1953, the suit premises formed part of the declared area within the JKIA.

8. Thereafter, by Gazette Notices Nos. 1105 and 1106 of 26<sup>th</sup> April, 1971, the government proceeded to compulsorily acquire *inter alia* the suit premises and all other parcels of land mentioned in that gazette notice. Consequently, the suit premises became part of JKIA and thus under the management and control of the former Department of Aerodromes which was later on vested on the 1<sup>st</sup> Respondent in 1994 by virtue of the enactment of the **Kenya Airports Authority Act Cap 395** Laws of Kenya, and through the Vesting Order contained in Legal Notice No. 201 of 1994. Therefore, by virtue of the Vesting Order the suit premises were lawfully transferred from the Government to the 1<sup>st</sup> Respondent.

9. The 1<sup>st</sup> Respondent further contends that by virtue of the Vesting Order, the suit premises cannot be available for further allocation to the Petitioner or anyone else since it belongs to the 1<sup>st</sup> Respondent by dint of the operation of the Land Acquisition Act and it is being used by the 1<sup>st</sup> Respondent for public purposes and, as a result it is denied that the suit premises are being sub-divided and allocated to third parties, as alleged by the Petitioner.

10. In distancing itself from the Petitioner's claim, the 1<sup>st</sup> respondent also submitted firstly that, the Petitioner ought to have lodged her claim for compensation if any with the Commissioner of Lands and the Land Acquisition Compensation Tribunal (if dissatisfied with the Commissioner's determination) and if still dissatisfied, file an appeal to the High Court. And secondly that, the Government did not acquire the Petitioner's parcel of land but acquired land belonging to Navadas Demodar as is evident from the Certificate of Title annexed to the Petitioner's affidavit sworn on 4<sup>th</sup> January, 2012. Thirdly, that, the Petitioner could not seek compensation for the compulsory acquisition of the suit premises by virtue of a claim of adverse possession because her rights and or interest over the suit premises have not been determined by way of filing an Originating Summons for adverse possession as required by law. And lastly that, the Petitioner has approached the Constitutional Court in an attempt to circumvent the limitations of making an application to the Land Acquisition Compensation Tribunal, or filing an appeal to the High Court or filing an Application for adverse possession.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's case**

11. In opposing the Petition, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed grounds of opposition where they stated *inter alia* that; the petition is misconceived, incompetent and bad in law for the reasons that it does not disclose any violation of the Petitioners' rights and in any event the rights premised in the petition, *to wit*, **Articles 27, 31 and 40** are subject to limitations as contemplated by the **Constitution**. And further that the Petitioner has not evidenced any document showing that she was the rightful owner of the suit premises nor has she produced any transfer documents as she had alleged in her Petition. The last ground of opposition was that the Declarations sought by the Petitioner could not issue since the Petitioner has not demonstrated how her rights have been violated by the Respondents or any of them. The 2<sup>nd</sup> and 3<sup>rd</sup>

respondents therefore termed the petitioner's petition as an abuse of the court process.

12. In their written submissions, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents further disputed the Petitioner's ownership of the suit premises and argued that the Petitioner has never at any time been the registered owner of the suit premises (including even before the compulsory acquisition) thereof. Indeed, they agreed with the Petitioner that at the time the suit premises were compulsorily acquired by the Government, the suit premises were registered in the name of Navandas Demodar who had bought the suit premises for Ksh. 7,000. They also disputed the Petitioner's allegation that she had acquired any interest over the suit premises since she had failed to furnish the court with any evidence of how the interest vested on her either by way of a conveyance or otherwise. They argued that even if Laura Ellen Woodley, the first registered owner of the suit premises had given the Petitioner and her deceased husband any interest on the suit premises as claimed, the same would not be recognized in law because they were never at any time registered as owners of the 49 acres they now claim. It was therefore the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's submission that the Petitioner and her deceased husband are mere squatters in the suit premises and cannot now claim ownership of the same.

13. It was also the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's position that no interest could vest on the Petitioner even if she were to claim adverse position for two reasons. First, in law adverse possession can only be claimed after the statutory limitation of twelve (12) years from the time the land was registered either in the names of Laura Ellen Woodley in 1938 or Navandas Demodar in the year 1964. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent, the Petitioner would fail to satisfy the requirement that she has been in continuous and open possession of the suit premises for a period of 12 years without the registered owner making a claim over the suit premises. In this regard, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent relied on the case of *Githu v Ndeete (1984) KLR 88* in support of that proposition. Secondly, the petitioner has never filed any suit in any civil court or elsewhere claiming adverse possession and her claim for adverse possession in this court cannot now be sustained.

14. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent's also disputed the Petitioner's contention that she presented her claim for compulsory acquisition to the Government because she had failed to tender any evidence in respect thereto. In addition to this, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent contends that the Petitioner also failed to present a schedule of payment to prove either her claim over the suit premises nor evidence that the registered owner, Mr. Navandas Demodoar, was never compensated.

15. As regards the claim that certain officers of 2<sup>nd</sup> Respondent had confirmed to the Petitioner that she was the recognized owner of the suit premise, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the contents of the letters produced by the Petitioner and drew the Court's attention to the fact that the letters in question are in reference to LR No. 7149/9 and not the suit premises (LR No. 7075/3). Further, that the Ministry of Lands had at also denied ever allocating the Petitioner's deceased husband the suit premises and with regard of the Petitioner's contention that the Respondents took advantage of her illiteracy to deny her rights over the suit premises, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that ignorance is not a defence and the Petitioner ought to have been diligent and prudent if at all she had a valid claim over the suit premises.

### **Issues for Determination**

16. Having considered the rival submissions of the parties and noting the evidence on record, I would narrow the issues for determination as follows;

- (i) Whether the Petitioner has any right or interest over the suit premises.
- (ii) Whether the Petitioner's constitutional rights under **Article 27, 31 and 40** of the **Constitution 2010** or (**Sections 75 or 82** of the Repealed Constitution) have been violated?

### **Whether the petitioner has any right or interest over the suit premises.**

17. It is not in dispute that the suit premises were compulsorily acquired by the Government of Kenya vide Gazette Notices Nos. 1105 and 1106 of 26<sup>th</sup> April, 1971, and that an entry was made on the Certificate of Title on 28<sup>th</sup> April, 1972 to the effect that the suit premises had been acquired by the Government of Kenya under **Section 19(1)** of the **Land Acquisition Act** of 1968. Later on, the suit premises were vested on the 1<sup>st</sup> Respondent by virtue of Vesting Order contained in the Legal Notice No. 201 of 1994. It is also not in dispute that at the time of acquisition, the suit premises were registered in the name of Navandas Damodar who had bought the suit premises for the sum of Ksh. 7,000. In my view therefore, what is in dispute is whether the Petitioner or her deceased husband had acquired any rights or interest on the suit premises before the suit premises were compulsorily acquired by the Government of Kenya for the benefit of the 1<sup>st</sup> Respondent.

18. As stated earlier, the Petitioner's claim to the suit premises stretches way back before 1938 when she alleges that her deceased husband had moved into the suit premises where he kept over 700 animals, i.e. before the first registration was made in the names of Laura Ellen Woodley in 1938. She further alleged that her husband had taken possession of the suit premises by fencing the homestead in accordance with *Kamba* customary practice and also developed the suit premises by building a cowshed, temporary houses and had planted trees. Notably, (and it is admitted by the Respondent) these developments are still on the suit premises. It was also her submission that when she got married to her deceased husband in 1957 she moved in with him and occupied the suit premise and has continued to do so to date.

19. The Petitioner's case begins from the time the government acquired the suit premises compulsorily in 1971 for the benefit of the 1<sup>st</sup> respondent. She contends that she was never compensated for the loss of her 'land' after it was compulsorily acquired by the government. She claims that she had acquired title to the land by way of adverse possession because even after the transfers of the land from Laura Ellen Woodley, to her beneficiaries Frank William De Meduvc Woodley and Elizabeth De Meduwc Destro and later on the transfer to Navandas Demodar she continued to use, possess and control the suit premises with the full knowledge of all the registered proprietors. The question I must address myself to at this point is whether the Petitioner by these actions had held any rights or interest in the suit premises prior to the acquisition of the same by the Government in 1971.

20. It is clear from the evidence before this court that the Petitioner does not hold any certificate of title to the suit premises. Her claim is based on various correspondences as between several departments of the 2<sup>nd</sup> Respondent, the Office of the President and the Provincial Administration. She even contends that she had been confirmed as the owner of the suit premises and even issued with a title deed which was later on, in her own words, said to be "*fake*". I have perused these correspondences and I agree with the counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the confirmation given to her by officers of the 2<sup>nd</sup> respondent, that she is an owner of a land is in regard to a property known as LR No. 7149/9 which is not the subject of this proceedings. I have also studied the letter dated 18<sup>th</sup> March, 2010 signed by one, E.O. Otworu on behalf of the 2<sup>nd</sup> Respondent stating that the land parcel no LR 7075/3 (*the suit premises herein*) was allocated to the Petitioner. I will treat the contents of this letter as mere hearsay because the Petitioner never produced in evidence the letter of allotment neither did she nor any of the Respondents address me on the import of the contents of that letter. Even so, the Petitioner cannot peg her claim on a letter that is unauthenticated nor can she rely on words of the mouth alone. Accordingly, I find that as at 1971, when the suit premises were compulsorily acquired by the Government, the Petitioner did not hold any valid title to the suit premises.

21. The second question would be whether the Petitioner can claim adverse possession of the suit premises? The Respondents submitted that the Petitioner could not claim adverse possession of the suit premises for four reasons. First, the Petitioner's evidence pointed that that her deceased husband was employed as a manager of the animals owned by the first registered owner; Laura Ellen Woodley. Secondly, the Petitioner had failed in establishing that she was in continuous occupation of the suit premises prior to 1938 or 1957 or 1971 and she did not produce any evidence that she got married in 1957 thus moving in to the suit premises to cohabit with her deceased husband. Thirdly, the Petitioner cannot be in adverse possession as against the Government. And lastly that to date the Petitioner has not filed any application for her interest for adverse possession to be determined as against the registered owner prior

to the compulsory acquisition by the government. In particular, the respondent submitted that the constitutional court could not be used to determine the adverse possession rights of the petitioner if any for the reason that there is a procedure envisaged by civil procedure law as stipulated by **Order 36 Rule 3D** of the **Civil Procedure Act Cap 21** Laws of Kenya. In the end, the Respondents referred the Petitioner as a squatter who occupies a negligible part of the suit premises where she has constructed semi-permanent structures.

22. I will first settle the fourth ground as made by the Respondents that this court cannot be used for determining adverse possession rights as the same are subject to the **Civil Procedure Act** as provided for under **Order 36 Rule 3D** of the **Civil Procedure Rules 1985**. (Now contained under **Order 37, Rule 7** of the **Civil Procedure Rules 2010**). This Rule provided as follows;

**“(1) An application under section 38 of the Limitations of Actions Act shall be made by originating summons.**

**“(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.**

**“(3) The court shall direct on whom and in what manner the summons shall be served.”**

In **Kenyenga v Ombwori Civil (2001) KLR 103** the Court of Appeal held that;

**“Order 36 Rule 3D of the Civil Procedure Rules specifically stipulates as to the manner such claims are brought to court. Such claims for adverse possession are brought by way of originating summons. This is a mandatory provision and it has been repeatedly held by this court that failure to comply with this mandatory provision makes a suit incontestably bad in law”**.

This was also the position in the cases of **Lali Swaleh Lali & Others v Stephen Mathenge & Others, Civil Appeal No. 132 of 1993**, **Bwana v Said (1991) 1 KAR 262** and **Ndatho v Itumo & 2 Others, Civil Application No. 231 of 1999**. Consequently, it follows that an order for adverse possession can only be made in favour of an applicant if he has complied with **Order 36, Rule 3D** of the **Civil Procedure Rules**.

23. I am dully guided by decisions above and I say so conscious of the fact that this Court in exercising its jurisdiction under **Article 23(1)** of the **Constitution** should be mindful of the procedures and laws stipulated under the realm of private law. This was actually the reasoning in the case of **Abraham Kaisha Kanzika & Anor v Governor of Central Bank of Kenya (2006) e KLR** where the Court stated;

**“In my view failure by a Constitutional Court to recognize general Principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that applicants would in some case ignore the enforcement of their rights under the general principles of law in order to convert their subsequent grievance into a ‘constitutional issue’ after the expiry of the prescribed limitations periods...”**

24. I am alive to the principles enumerated above and under the Constitution I am also in agreement with the Respondents that the Petitioner cannot make a serious claim adverse possession in a Constitutional Court. However, in my view, the Petitioner has not only filed a claim based on adverse possession in this Court but also a claim that her right to own property has been violated by the Respondents, though the interest to that property may have been acquired by way of adverse possession. Accordingly, I find that it would be in the wider interest of justice for this Court to determine the Petitioner’s claim for land allegedly obtained by adverse possession in so far as her right to property may be violated aforesaid. In so holding, I am persuaded by the reasoning in **Dominic Arony Amolo v Attorney General, Misc Application No. 494 of 2003** where the learned Judge held that,

**“Claims under the constitution are neither claims in tort nor contract so that the redress can be given based on the constitution and the constitution alone.”**

25. I will therefore the question as to whether the Petitioner had any valid interest or right of the suit premises and whether she may have obtained it by adverse possession. This would be helpful in assessing whether any of the Petitioners rights have been violated by the Respondent. Adverse possession is defined in the Black's Law Dictionary 9<sup>th</sup> Edition, as, **“the doctrine by which title to real property is acquired as a result of such use or enjoyment over a specified period of time”** It therefore follows that in adverse possession title to land is acquired without the normal conveyancing practice of buying or paying for it in the traditional sense, or through some other legal disposition, such as by inheritance or trust. This was the observation in the case of Mbui v Maranya (1993) KLR 726 at Pg. 736.

26. The period of time for which title to real property is acquired through the doctrine of adverse possession is provided for under **Section 7** of the **Limitations of Actions Act Cap 22** Laws of Kenya. **Section 7** of this **Act** reads;

***“An action may not be brought by any person to recover land after the end of 12 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”.*** (Emphasis mine.)

The issue of time has also settled by case Law where it has been held over and over again that time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In the case of TayebaliAdamjiAlibhai – Vs – AbdulhusseinAdamjiAlibhai (1938), 5 E.A.C.A 1, it was held that in respect of a registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is *prima facie* entitled to possession and, therefore, entitled to take action against any intruder to the land. This was later on quoted with approval in the case of Peter Wanyoike Gathure – Vs – A. Beverly (1965) E. A at Pg. 514 where it was held;

(i) ***That certificates of ownership issued under the Land Titles Ordinance must be regarded as conferring an absolute and indefeasible title to the property referred to therein subject to no other interest than those mentioned therein.***

(ii) ***That no period of prescription as against the title shown in a certificate of ownership could begin to run prior to the date of the grant of certificate.***

27. Having set the law as above, I must therefore address the issue as to whether the Petitioner had acquired any adverse possessory rights. But before I do that, I will first deal with the issue of possession of the suit premises before 1938 when it was registered in Laura Ellen Woodley's name. It is unfortunate that the Petitioner did not furnish this court with any evidence that her deceased husband was in occupation of the suit premises before 1938. In any event, even if he were, the same stood extinguished by the registration of the suit premises in the names of Laura Ellen Woodley. In so holding I have in mind the provisions of **Section 23(1)** of the **Registration of Titles Act Cap 281** Laws of Kenya (*now repealed*) but was the governing statute to the suit premises at the time. That Section provided as follows;

***“The certificate of title issued by the registrar to a purchaser of land upon Transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of that land is the absolute and indefeasible owner thereof, subject to encumbrances, easements, restrictions, restitutions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.***

28. In respect of the registration of title to Laura Ellen Woodley, therefore it is now an agreed fact that the Petitioner's husband had been employed as a manager of the animals owned by Laura Ellen Woodley, the first registered owner. Accordingly, I do find that the Petitioner's husband was on the suit premises with the permission of Laura Ellen Woodley as the manager of her animals. Following the death of Laura Ellen Woodley, the Petitioner's husband continued being in occupation of the suit premises *albeit* this time as a licensee. This is because the beneficiaries of Laura Ellen Woodley who were later registered as owners of the suit premises continued visiting the suit premises even though the Petitioner's husband was in occupation. In fact the Petitioner alleges in her affidavit that even after the death of Laura Ellen

Woodley, she and her husband continued occupying the suit premises and she never paid rent nor was she issued with notice to vacate. Clearly, the Petitioner and her husband were on the suit premises with valid permission of Frank William De Meduvc Woodley and Elizabeth De Meduwc Destro the beneficiaries of Laura Ellen Woodley and the new registered owners of the suit premises.

29. I must emphasize that it is an element of adverse possession that it ought to be 'hostile' and without permission from the true owner of the land. The fact that the petitioner's husband was permitted occupancy of the suit premises at one time as a manager of the animals and in the second time as a licensee is inconsistent with the doctrine of adverse possession because an intruder who is given permission or a license has no cause of action during the period of his permission or license. This was stated in the case of Wanje v Saikwa, Civil Appeal No. 72 of 1982 (1984) KLR Pg. 284, wherein the Court of Appeal held that; '**A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in the reality he has not dispossessed the owner of the land and the possession is not illegal.**' This was also confirmed in the case of Wambugu v Njuguna, Civil Appeal No 10 of 1992 where it was stated that;

***"...an appellant must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or licence, which has not been determined."***  
***(emphasis mine)***

30. As regards, the possession of the suit premises from 1964 when it was registered in the names of Navandas Demodar, to 1971 when it was compulsorily acquired by the Government, I am also constrained to hold that the Petitioner had not acquired the suit premises by way of adverse possession. In so holding, I am guided by the further principle governing adverse possession that, it must be continuous, uninterrupted and unbroken for the necessary statutory period. This means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as the period of limitation, being at the moment, 12 years. The Petitioner did not furnish any evidence to show that she was in the possession of the suit premises even after they were registered in the names of Navandas Demodar. In her Affidavit, she contends that Navandas Demodar is the one who informed her that the Government had compulsorily acquired the suit premises and she would be compensated together with him. She also averred that, Navandas Demodar had kept in touch with her until his death and he had revealed to her, prior to his death, that he had not been compensated by the Government for the compulsory acquisition of his land. However, it is not clear from the evidence on record and from the parties' submissions, as to where Navandas Demodar was all this time and what had transpired to the Petitioner after he acquired the suit premises. Was she still in occupation of the suit premises?

31. That notwithstanding, and even if I was to assume for a moment that the Petitioner continued being in occupation of the suit premises, would her occupation amount to adverse possession? The answer would be made after examining the element of an uninterrupted possession required of adverse possession. As stated earlier, it is an undisputed fact that the Government compulsorily acquired the suit premises in 1971. Accordingly, even if the Petitioner was living on the suit premises, a simple count would reveal that she had done so for a period of about seven (7) years from 1964 before it was compulsorily acquired by the Government. In finding that the Petitioner had not acquired the suit premises by adverse possession before the Government compulsorily acquired the same, I am guided by the Court of Appeal decision in Ahmed Abdulkarim & another – Vs – Member for Lands and Mines & another Civil Appeals Nos. 16 and 18 of 1958 (1958) E.A Pg. 436 where it was observed that the limitation period shall not begin to run unless the true owner is aware that someone else is in possession, and is holding it adversely to himself. The Court held;

***"Unless someone is in adverse possession, the owner of the property does not lose his right to the property merely because he happens not to be in possession of it for 12 years.....his right is extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that someone else in possession is holding adversely to himself."***

32. From the foregoing, it is obvious that the Petitioner had not acquired the suit premises by way of possessory title recognized in adverse possession either as against Laura Ellen Woodley or her beneficiaries or Navandas Demodor. So can she now acquire the suit premises in adverse possession as against the Government? The law in this regard is well stipulated in case law that one cannot obtain adverse possession as against the Government. See ***Peter Mwashu & Anor V Javan Mwashu & Others, Eldoret HCC 38 OF 2004***. The Petitioner in her submission is also in agreement that she cannot obtain adverse possession as against the Government and so the issue is beyond contest.

**Whether the Petitioner's constitutional rights under Article 27, 31 and 40 have been violated.**

Following my findings above and in answer to the question above,

33. The Petitioner submitted that she had acquired possessory title to the suit premises by way of adverse possession prior to 1971 and I have said that she has not. She alleges that the failure to compensate her for compulsorily acquiring the suit premises under the provisions of the **Land Acquisition Act** violated her right to own property as stipulated by **Section 75** of the **Repealed Constitution. Section 75 (2)** of the **Repealed Constitution** provided that;

***“Every person having an interest or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-***

***(a) The determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and***

***(b) The purpose of obtaining prompt payment of that compensation.”***

34. It follows from the reading of this sub section that a person shall have direct access to the High Court to determine the interest or right of that person to the property which has been compulsorily acquired the legality of the acquisition and the amount of compensation he is entitled to. I must pose here to address each of these issues in so far as the Petitioner's case is concerned.

35. As elaborated earlier in this judgment, it is clear that the Petitioner does not hold any interest or right over the suit premises for the reasons advanced elsewhere above. The issue that I must therefore address is on the legality of acquisition of the suit premises by the Government.

36. The Petitioner claimed that the 1<sup>st</sup> Respondent has allocated the suit premises to third parties without regard to her claim on the same and this violates her rights to property and amounts to discrimination. **Section 75 (1)** of the **Repealed Constitution** protected and safeguarded property against compulsory acquisition unless the conditions stipulated have been met. These conditions have been set out as follows;

***(a) The taking of possession or acquisition is necessary in the interests of defence.....or the development or utilization of property so as to promote the public benefit; and***

***(b) The necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and***

***(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.***

Compulsory acquisition of land is a serious matter and obviously one that would cause hardship to the owner or proprietor of the land to be acquired and perhaps this could be the reason why the Constitution provided that compulsory acquisition of land should be for the public benefit and such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property. See ***Commissioner of Lands and Anor v Coastal Aquaculture Ltd, KLR (E & L) 1 and Re Kisima Farm Ltd [1978] KLR 36.***

37. In contesting that the 1<sup>st</sup> Respondent has not used the suit premises for the public purposes intended for which they were acquired, the Petitioner claimed that the 1<sup>st</sup> Respondent has re-allocated the suit premises to third parties who are now carrying out private business on the suit premises. On their part, the Respondents disputed any sub divisions of the suit premises and issuance of new titles to third parties as alleged by the Petitioner since she failed to adduce any evidence to that effect. In particular, the 1<sup>st</sup> Respondent submitted that it was in the public domain that the 1<sup>st</sup> respondent since last year has been involved in demolitions to remove illegal structures erected within or near critical and sensitive facilities of the JKIA. And further that, it is also common knowledge that there are pending suits in Court between the 1<sup>st</sup> Respondent and people who have purported been allocated titles to portions of the 1<sup>st</sup> Respondent land. Unfortunately, the Respondents never referred the Court to any of the suits that have been instituted as against the said third parties. The petitioner produced photos taken of some buildings and construction as evidence to show that the suit premises are in occupation of other persons rather than the 1<sup>st</sup> respondent. She also produced survey maps where the alleged sub-divisions have been delineated. I am not satisfied that this photos would be enough evidence to establish the allegations made by the Petitioner and I am also unable to find the correlation between the original map and the current map. The L. R numbers, folio and register numbers are all different in the two maps. In the circumstances, I am unable to find that the 1<sup>st</sup> Respondent is not utilizing the suit premises for the purpose for which they were compulsorily acquired for.

38. The third condition is that of prompt compensation made to all the persons who have an interest or a right over the suit premises. The Petitioner is challenging the failure of the Government to compensate her when it compulsorily acquired the suit premises which she had a possessory interest in. She also alleges that the registered owner, Navandas Demodar was never compensated. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent submitted that the Petitioner failed to provide any evidence that she presented her claim to the Land Compensation Tribunal and further that, no schedule of payment was adduced by the Petitioner to prove her claim or even the fact that the registered owner was never paid. I have perused a copy of the schedule of payments produced in evidence by the Petitioner and noticed that the suit premises, LR 7075/3 is not captured in that schedule. However, the Petitioner has also not produced any other evidence showing that she lodged her claim and it was disregarded by the Land Compensation Tribunal. It is also difficult to tell whether Navandas Demodar the then registered owner was compensated as he is not party to this proceedings neither did the parties present any evidence that would guide the Court.

39. As regards compensation, the 1<sup>st</sup> Respondent claimed that the Petitioner never followed the laid down procedures provided for in the Land Acquisition Act, nor sought any redress at any court, as a result this Petition must fail. The procedure alleged by the 1<sup>st</sup> Respondent was stipulated by the **Land Acquisition Act**, (now repealed) in summary as follows, that upon the publication of the notices for compulsory acquisition by the Minister responsible under **Section 6 (1)**, there shall be held an inquiry as provided for under **Section 9(1)** for all the persons affected by the acquisition of the land by the Government. Under **Section 10**, the Commissioner of Lands was mandated to prepare an award for compensation of a person who has been determined to have an interest in the land. Under **Section 29(2)** of the same **Act**, established the Land Compensation Tribunal and **Section 29(7)** provided that a person who was dissatisfied with an ward made by the Commissioner had a right of an appeal to the Tribunal, which would determine his interest over the land, the amount of compensation awarded to him under section 10 and the amount of compensation paid under **Sections 5, 9, 23, 25 or 26. Section 29(10)** then provides that a person who was dissatisfied with the award made by the Tribunal had a right to appear to the High Court in the prescribed manner under **Section 72(3)** of the Repealed Constitution on appeal on any of the following grounds, viz. that;

- (a) **The decision of the Tribunal was contrary to law or to some usage having the force of law;**
- (b) **The decision failed to determine some material issue of law or usage having the force of law;**
- (c) **A substantial error or defect in the procedure provided by or under this Act has produced an error or defect in the decision of the case upon merits.**

Under subsection 11 of the same section, a party who was dissatisfied with the decision of the High Court had fifteen (15) days within which to apply to the Court of Appeal.

40. Notably, the Petitioner has challenged the legality of **Section (29)** by stating that it is void in so far as it is inconsistent with **Article 40** of the Constitution, 2010 by removing the original jurisdiction of the High Court to hear a Petition for an alleged infringement of the fundamental right under the Constitution, 2010. I am unable to adopt this reasoning by the Petitioner for obvious reasons. First, the proviso to **Section 75 (2)** of the **Repealed Constitution** provided that ;

***“...if parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter”.***

It is therefore clear that the jurisdiction of the High Court to entertain suits emanating from the Land Tribunal was on appeal which was as of right. Thus **Section 29(1)** has the back up of a provision anchored in the Constitution and I am unable to find that one provision of the Constitution could be inconsistent with another. In any event, the Petitioner is taking issue with a Section of a Statute which has now been repealed, by virtue of **Section 161** of the **Land Act** of 2012. Accordingly, I cannot examine this Section *viz a vis* **Article 40** of the **Constitution, 2010**.

41. Having been satisfied that **Section 29** was constitutional, I will now examine whether the petitioner followed the procedure envisaged under the enabling statute i.e. the **Land Acquisition Act**. The Petitioner alleged that she was assured by officers of the 2<sup>nd</sup> Respondent that she would be compensated for the loss of her land as they recognized her as the owner. She also claimed that she has since 1971 visited many Government offices seeking their assistance to get her land and /or compensation. She also pleaded ignorance caused by illiteracy as the failure for her to act in time. As much as I empathise with the Petitioner, I am unable to bend the Law in her favour. The procedure was set out very clear under the **Land Acquisition Act** as discussed above. This is the Law and it is what the Petitioner ought to have invoked in having her claim to the suit premises addressed. This Court cannot now sit as the Commissioner of Lands or as the Tribunal established under the enabling Act and I will therefore refuse to heed the Petitioner’s claim in that regard.

42. From the foregoing, it is obvious that I see no merit in the Petition and will dismiss it.

### **Conclusion**

43. As to costs, the nature of the dispute will necessitate an order that each party should bear its own costs,

44. Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2012**

**ISAAC LENAOLA  
JUDGE**

### **In the presence of:**

*Irene – court clerk*

*Mr. Khaminwa Advocate holding brief for Mr. Kivuva*

**ISAAC LENAOLA  
JUDGE**