



**Njagi v Ngai & 2 others (Environment & Land Case 333 of 2015)
[2022] KEELC 14565 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 14565 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 333 OF 2015
A KANIARU, J
SEPTEMBER 22, 2022**

BETWEEN

MARGARET RWAMBA NJAGI PLAINTIFF

AND

JOSEPH MUGO NGAI 1ST DEFENDANT

DAVID KIONGO WACHIRA 2ND DEFENDANT

LAWRENCE P.K NYAGA 3RD DEFENDANT

JUDGMENT

1. The plaintiff –Margaret Rwamba Njagi– impleaded the defendants – David Kiongo Wachira and Lawrence P K Nyaga– here vide originating summons dated 12.10.2015 and filed on 13.10.2015. Via this suit, she wants to defeat the defendants titles to land parcels Numbers, Gaturi/weru/10398, 10399, and a portion of 10404.

Pleadings

2. The plaintiff claims ownership by way of adverse possession of land parcels Gaturi/Weru/10398, Gaturi/Weru/10399 and a quarter of an acre of land parcel Gaturi/Weru/10404. The entire portion claimed measures two (2) acres and is said to be encompassed in resultant subdivisions of the original land parcel No Gaturi/Weru/282. According to the plaintiff, the land was owned by the late Ngai Kamwigire, father to the 1st defendant, who allegedly sold to her husband two acres of land, which they took possession of and have extensively developed together with her children.
3. The transfer was never effected in her husband’s favour. Nonetheless, the family continued occupying and utilizing the land. It was deposed that upon the demise of both her husband and the 1st defendant’s father, she entered into another agreement with the 1st defendant for transfer of the two acres but this too did not materialize.



4. The plaintiff claimed that the 1st defendant, invaded her home on 4/9/2015 in the company of unknown persons and removed the fence which marked the boundaries of a portion of her land. She was then ordered to vacate the land. Upon visiting the land registry, she realized that the register for the original parcel Gaturi/Weru/282 had been closed and the land had been subdivided into new land parcels *viz*: Gaturi/Weru/10351 to 10354. According to her, her portion fell on land parcels Gaturi/Weru/10398, 10399 and a quarter acre portion of land parcel is in Gaturi/Weru/10404 which parcels were said to be further sub divisions of land parcel No 10351. The said parcels were said to be owned by 1st, 2nd & 3rd defendants respectively.
5. She averred that she had been in open, continuous and uninterrupted occupation, and use and possession of the subject parcels for over 28 years and had extensively developed the said portions to wit; she had a house, her son's house, a kitchen, a church, a poultry house, a livestock house, twenty three grafted mango trees and Khat (*Miraa*). She contended that the defendants have never been in occupation nor have they ever utilized the said land. Her claim is that she has acquired the land by way of adverse possession and the 1st defendant and his father were holding the two acres of land parcel Gaturi/Weru/282 in trust for her and her family. Further, that the 1st defendant in the circumstances had no title to transfer to the 2nd and 3rd defendants and as such the said defendants are holding their respective titles in trust for the plaintiff.
6. She sought orders that the titles owned by the 1st and 2nd defendants to land parcels Gaturi/Weru/10398, Gaturi/Weru/10399 had extinguished, and also that a quarter of a portion of land parcel Gaturi/Weru/10404 owned by the 3rd defendant had also become extinguished. She also asked for cancellation of the titles owned by the 1st and 2nd defendants and excision of the quarter portion of the land owned by the 3rd defendant and vesting of title in her name. She further prayed for registration of the said parcels of land in her name, having acquired them as an adverse possessor. Finally she asked for costs of the suit.
7. The 1st defendant opposed the suit by way of replying affidavit dated 10.11.2015 and filed on 18.11.2015. He confirmed that the suit parcel of land belonged to his father who entered into an agreement with the plaintiff's husband in the year 1987. That at that time, the suit had been fraudulently transferred to other persons and his father had filed a suit against John Kanja Munene and Alfred N Mwaniki to get back his land in Embu High Court No 263 of 1986, which suit he said was dismissed on technicalities. His father preferred an appeal in Nyeri, High Court Appeal No 19 of 2013 which appeal was determined in his father's favour.
8. With regard to the dispute, he deposed that the plaintiff's husband was purchasing a portion of the land from the suit land. He however passed on during the subsistence of the suit and as there was a pending case over the sale, the wife opted to pursue a refund of the purchase price instead. This was done through an agreement between him and her. It was argued that the plaintiff was then to remove her structure and relocate to her husband's land. According to 1st defendant the plaintiff had not had uninterrupted possession of the land as there had been a dispute for a very long period. There were also various incidents over the matter reported to police, and finally that notices to vacate had been issued against her. The court was urged to evict the plaintiff from the land as the sale by her husband had stalled and could not be enforced.
9. The 2nd and 3rd defendants also opposed the suit by filing their respective replying affidavits. They basically deposed to have purchased their respective parcels of land from the 1st defendant free from all encumbrances. They stated that the plaintiff was aware of the ownership dispute between the 1st defendant's father and John Kanja Munene and Alfred N Mwaniki. They finally urged the court to stop the plaintiff from interfering with their proprietary rights.



Hearing

10. The suit was set down for hearing on 22.3.2021. The plaintiff called five witnesses. PW1 was the plaintiff. She adopted her witness statement and list of documents dated 24.2.2016 as evidence in her case. In cross examination, she reiterated her husband had bought two acres of land at Kshs 60,000/= and that the 1st defendant was a witness to the said sale agreement. Her husband had also signed the agreement. Upon being shown the agreement, she averred that it was her husband purchasing the land and she was claiming the land on his behalf but confirmed not having letters of administration to her husband's estate. She further stated that they visited the chief but could not recall when that was. While there, they agreed to renew the sale agreement. She stated that the reason why she had gone to the chief was because the 1st defendant used to graze his animals on her land. She even averred that the 1st defendant had been jailed by the court for it.
11. She further said that her husband had another wife and that upon his demise, he was buried on a different parcel of land. She stated that she had a shamba on that other piece of land and her husband also had a share in that land. She denied that her children had ever held a meeting to remove her from the subject piece of land. She also testified that she had three houses on the land and a church which she allowed to be constructed on it and further said that she had been fined for putting it up the church there contrary to a court order. According to her, she utilizes one and a half acre of the piece of land and her three sons also utilize the land but she was not sure of the size they utilize.
12. In re-examination, she reiterated that her husband had a wife who resided in Manyatta and that she also used to reside there until her husband bought her the suit parcel of land.
13. PW2 was one Martin Mbogo Njagi. He stated to be a businessman and son to the plaintiff. He adopted his witness statement as evidence in the plaintiff's case. He stated that they had been living on the suit land from the year 1987 when his father bought it from the 1st defendant's father, who then changed his mind and refused to transfer it to his father. He further said that the original land was Gaturi/Weru/282, later subdivided into various parcels and their parcel falls onto parcels No 10398, 10399 and partly on 10404. He said that they had renewed the sale agreement with the 1st defendant upon his father's demise but he had failed to honour it.
14. In cross examination, he stated that they had a one acre piece of land elsewhere, which land they did not reside on. With regard to the suit land, he said that he was neither a party nor a witness to the sale agreement entered between his father and the 1st defendant's father. He stated that upon his father's demise, his family renewed the agreement with the 1st defendant in the year 2002. He averred that the transfer was to happen after conclusion of a court case, which case he stated was lost. He said that there was a case in which they reported the 1st defendant for grazing on their land and another one in which his mother was fined for allowing people to construct a church on the land. He said that they have never decided to have her mum move to another piece of land. With regard to the renewed agreement, he stated that it was made in the presence of elders and they had planted euphorbia to mark the boundary.
15. PW3 was Jane N. Njagi, a pastor and farmer. She adopted her witness statement as evidence in the case. She said that she knew both the plaintiff and the 1st defendant and had been on the plaintiff's place from the year 2001. According to her, the plaintiff has a house, goat shed, chicken coop, church, houses for her children, mango trees and avocado trees on the land parcel. She estimated the land to be around two acres. In cross examination she said that she had attended the plaintiff's father burial (but I think she meant the plaintiff's husband) and that he was not buried on the land in dispute but on a land at a place called Kambiu where she was aware he had another family. She stated to have knowledge



of a dispute between the plaintiff and the 1st defendant in which the 1st defendant had sought to evict the plaintiff, which dispute she said had escalated to the police.

16. PW4 was Samuel Ndambo Ngugi, a farmer. He adopted his witness statement as evidence in the case. He said that he hails from the same area as the plaintiff and stated to know all the parties to the suit since they are from that area too. As for the plaintiff, he knew her from the year 1987 when she settled on the suit land with her husband and children. According to him, the land first belonged to the 1st defendant's father who died in the year 1992 and at the time, the plaintiff was still on the land. He however said that in the year 2002, there was dispute over the land between the 1st defendant and the plaintiff's husband and he was summoned by the area chief regarding a dispute on boundary. The plaintiff and her husband sought to have the boundary well defined but despite the 1st defendant agreeing to do so he had never done it. He, like the rest of the witnesses, stated that the land was developed.
17. In cross examination, he testified that the land was owned by the 1st defendant's father but that in the year 1987 it belonged to someone else. He stated that during the 1st defendant's father burial, the plaintiff's husband stood and informed the mourners that the deceased had sold him two acres of land.
18. PW5 was Joseph Ndwiga Njage, a son to the plaintiff. His evidence was similar to that of his brother, PW2. With regard to the disputes alluded to between the parties, he said that they had never fought but only disagreed because the 1st defendant used to graze on their land and that the 1st defendant's son had been fined in court for that. He further said that his father was polygamous and had been buried on a different parcel where the other family lived.
19. The defence commenced its hearing by calling four witnesses. DW1 was Tarcisio Ndwiga Njagi, step son to the plaintiff. He said that he was a legal administrator to his late father's estate. That his father had entered into an agreement with the 1st defendant's father but that the land had a dispute as the seller had no land to sell. That they had instructed the seller to refund the purchase price of Kshs 155,000/= and he had refunded Kshs 50,000/= out of which Kshs 25,000/= had been given to the plaintiff.
20. In cross examination, he stated that the plaintiff resided on the suit land from around the year 1990 and that there are developments on the land. However, in re-examination, he deposed that the plaintiff does not reside on the land but lives in Kangaru and had moved there when the case started.
21. DW2 was David Kiongo Wachira. He adopted his witness statement and bundle of documents as evidence in support of the defence case. He stated that he was the owner of land parcel Gaturi/Weru/10399 and produced his title deed as evidence of such ownership. He said that the land initially belonged to the 1st defendant. He also said that he utilized his portion of land.
22. In cross examination, he said that he has been using the land and there was a house on it, which belonged to his worker. However, he had not enjoyed peaceful possession as the court had issued restraining orders stopping him from utilizing it. He still maintained that he uses his portion and the portion which has contention was parcel No 10399. He testified that there were mango trees on his land which he found when he bought the land. He also said that there was a house on the land which belonged to the seller. Further that the plaintiff was said to reside on land parcel No 10404 which is next to his land which portion he said had houses on it and a church. He refused to call his workers to testify in court but invited the court to visit the land and confirm that he indeed utilizes his farm.
23. In re-examination he stated that there was about a quarter of an acre which at the time of purchase had napier grass on it and that he was utilizing the portion that had no napier grass. Even then, he said the portion with the nappier grass is not used by the plaintiff.



24. DW3 was Lawrence Nyaga, the 3rd defendant. A trader, farmer and businessman, he adopted his witness statement and bundle of documents as evidence in his case. He said that he was the owner of land parcel 10404 and produced his title document to prove ownership of the said parcel.
25. In cross examination, he said that his parcel was one and a half acres and that a quarter of the land was occupied probably by the plaintiff or other people. He said that there was a church and houses on the quarter acre and that the houses were there when he bought it. There were also mango trees but he was not aware who planted them there. He said he was not aware of the portion occupied by the other people and further stated that there was a portion he did not occupy which had nappier grass. With regard to the houses, he stated he had not demolished them as there was a court order prohibiting that. He contested the quarter acre claimed by the plaintiff and stated that no one has ever measured the portion to establish its acreage. He further said that the plaintiff was on his land when he bought it and the seller had assured him not to worry about the houses on the land, which he said he would ensure were removed. In re-examination he said that he had been informed that the occupiers of the houses resided there temporarily and would go away.
26. DW4 was Joseph Mugo Ngai, the 1st defendant. He too adopted his witness statement and bundle of documents as evidence in the defence case. He testified that land parcel Gaturi/Weru/282 belonged to John Kanja Munene and Alfred Mwaniki who he said had “stolen” the land. He stated that his father then filed a suit against them but died during the pendency of the suit, which he then took over. That he did not know the plaintiff but knew her husband, Njagi Karugu, who had sought to purchase land from his father. That his father then informed him that the land had a court dispute and asked the buyer to help him with the case and in exchange, he would sell him the land if he won the case.
27. He further said that his father lost the case and at this time the plaintiff’s husband had passed on and as he had paid purchase price for the land, they resolved to refund him the purchase price. That they entered into another agreement for refund of the purchase price and he refunded Kshs 50,000/= As a result the plaintiff was to vacate the land. She was said to have vacated and later came back into the land. That he gave her a written notice to vacate. He testified that, there were several cases in which they disagreed with the plaintiff when he grazed animals on her land and another when he was accused of assaulting the plaintiff. It was his testimony that the plaintiff should not be given the suit land as the sale was conditional upon the success of the land dispute but which his father had lost.
28. In cross examination, he said that his father had been the owner of the land in the year 1961 and upon his demise the land became his. He stated that the plaintiff’s husband was shown a portion of land to occupy by his father. Upon entering into an agreement, the plaintiff’s husband occupied the land in the year 1987 with his family. It was his further testimony that no land control board consent was obtained. He said that he wasn’t sure what was on the portion of land occupied by the plaintiff but later stated that the portion has 3 or 4 houses, a church and some trees. He said that the plaintiff has been living on the land from the year 1987 and resides there to date. He further testified that he sold the portion where the plaintiff lives to the 2nd and 3rd defendant. Further that the plaintiff also uses a portion of parcel 10398 that belongs to him. With regard to the refund he said that he gave the money to DW1 and that there was a written agreement to that effect.

Submissions

29. The suit was canvassed by way of written submissions. The Plaintiff filed her submissions on 1.4.2022. She gave a synopsis of the case as presented by each party and she identified two issues for determination by the court. The first was whether she was entitled to land parcel numbers Gaturi/Weru/10398, 10399 and 10404 through adverse possession. She relied on the provisions of Section 38 of the Limitations



- of Actions Act which states the process of claiming land by way of adverse possession. She averred that her claim on adverse possession was based on the fact that they had occupied the 2 acres of the suit land, now land parcels Gaturi/Weru/10398, 10399 and partly 10404, from the year 1987, a cumulative period of 28 years.
30. The plaintiff submitted that she has remained on the land without force, secrecy or evasion and that the said occupation was uninterrupted until her husband's demise and even after such death. To buttress this point, she relied on the case of *Peter Mbiri Michuki v Samuel Mugo Michuki*: Civil Appeal No 22 of 2013 which cited with approval the case of *Kimani Ruchire v Swift Rutherford & Co. Ltd* (1980) KLR 10 in which it was stated that a plaintiff has to prove, among other things, that he has used the land which he claims as of right, without force, secrecy or evasion. Additionally, the occupation should be continuous and uninterrupted.
 31. The plaintiff relied on the same case also where the court cited with approval the case of *Public Trustee v Wanduru* (1984) KLR where it was stated that adverse possession is calculated from the date of payment of the purchase price to the full span of twelve years. It was averred that the plaintiff's husband, upon executing the sale agreement, made part payment of the purchase price and took possession of the land. Reliance was also made on the case of *Mwangi & another v Mwangi* (1986) KLR 328 where it was stated that rights of a person in possession or occupation were equitable rights binding on the land and that the land was subject to those rights.
 32. The second issue for determination was whether the plaintiff's claim for adverse possession was interfered with upon subdivision, change or ownership and/or sale and transfer of land to the 2nd and 3rd defendants. The plaintiff submitted that the subdivision or transfer to the 2nd and 3rd defendants did not interfere with the adverse possession. In support of this she relied on the case of *Janet Ngendo Kamau v Mary Wangari Mwangi* Civil Appeal No 173 of 2007 (2007) eKLR in which the court held that adverse possession had commenced before the defendant in that case was registered as owner of the land. In conclusion, the plaintiff stated that she had proved her claim for adverse possession and urged the court to determine the suit in her favour and equally award costs of the case to her.
 33. The defendants filed their submissions on 30.5.2022. They too gave brief facts of the case as presented by the parties to the suit. They submitted that the plaintiff had presented her case based on ownership by way of adverse possession and sale. They sought to establish whether the two issues can go hand in hand. On adverse possession, they laid out three issues that ought to be proven for such a claim to succeed to wit; possession that is peaceful, undisturbed and open for a period of twelve years and finally possession that is non-consensual.
 34. They submitted that the plaintiff's possession on the land had frequent interruptions, which included criminal cases when the 1st defendant was resisting forceful occupation of the land. They relied on the case of *Mbira v Gachubi* (2002) 1 EALR 137 which set out the elements to be proven in a claim of adverse possession. Also relied on was the case of *Mistry Valji v Jenandra Raichard and 2 others*: C.A 46 of 2005 (2016) eKLR where it was stated that such occupation should be by consent of owner or through an agreement. Finally, they relied on the case of *Richard Wafwafwe v Ben Wafwafwe*: Kisumu Civil Appeal No 110 of 2016 where it was held that when one enters by way of permission one cannot therefore turn around and claim to be an adverse possessor.
 35. The second issue was on the element of sale. On this, it was submitted that the sale agreement was conditional on completion of a pending case - HCCC No 263 of 1986 - and obtaining consent from the land control board. It was also submitted that the plaintiff did not have locus standi to claim her husband's land as she had not taken out a grant of letters of administration. According to the defendants, the sale between the plaintiff's husband and the 1st defendant had rescinded, hence the



1st defendant refunded the purchase price to the plaintiff and her step sons. In conclusion, the court was urged to dismiss the suit and make a finding that the plaintiff's possession was challenged. It was never uninterrupted for 12 years. It was consensual and ended when the agreement was rescinded. The plaintiff lacked *locus standi*, the claim was contrary to the provisions of the [land control act](#), and the [limitations of actions act](#) and that the plaintiff had land elsewhere.

Analysis & Decision

36. I have considered the pleadings, the evidence and the submissions by the parties. The plaintiff filed this suit seeking to be registered as owner of suit parcels of land Gaturi/Weru/10398, Gaturi/Weru/10399 and a quarter acre of land parcel Gaturi/Weru/10404 as an adverse possessor. She contended that her husband had purchased the suit parcel in the year 1987 and that she has been in open, exclusive, notorious and continuous occupation for a period of over 28 years. The sole issue for determination therefore is whether the plaintiff has proved a case of adverse possession. The burden of proof lies on the plaintiff to demonstrate that she has indeed acquired the suit land by way of adverse possession.
37. However, before I proceed to look at the issue in question, I note that the defendants have alleged that the plaintiff lacks locus standi to bring this suit as it is her late husband and not her who purchased the suit parcel of land. Locus standi connotes the right to be heard. Simply put, it is the capacity or the undeniable right of a person to appear before the court. Where one challenges the capacity or right of a person to appear in a matter, then this goes to the jurisdiction of the court as the court is divested of jurisdiction if a party lacks capacity to appear before it. The plaintiff has been accused of bringing the suit on behalf of her husband, the purchaser, yet she has not obtained letters of administration to her husband's estate as required of the law.
38. I note that the suit brought herein is not one for enforcing of the sale agreement between the parties but one based on adverse possession. The nature of a suit on adverse possession is that the person bringing the suit ought to be the one in possession and occupation and one in favour of who time could run against the registered owner. The plaintiff's issue on the sale of the land was simply to lay a basis of how she came to occupy the land. In my view, she has brought this suit in her own capacity as she is seeking registration of land by virtue of being personally in possession of it together with her family and not by virtue of having purchased it. She is not claiming the land as a purchaser but as an adverse possessor.
39. As to the issue of adverse possession, it occurs when a person takes possession of land and asserts rights over it while the title holder omits or neglect to take action against the person in possession. It occurs when such omission or neglect runs for a period of twelve years. The process commences by default or inaction of the owner and the occupier of the land neither occupies it by force, stealth or, under the licence of the owner. The possession must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner. See the case of [Mtana Lewa v Kahindi Ngala Mwagandi](#) [2015] eKLR.
40. Further, in the case of [Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch](#): [2021] eKLR, which cited with approval the Indian Supreme Court decision in the case of [Kamataka Board of Wakf v Government of India & others](#) [2004] 10 SCC 779, the court stated thus:-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in



publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

41. These authorities are clear that a person seeking to be established as having become owner of land by way of adverse possession has to prove that they have been in peaceful, open and continuous occupation of land. The occupation must be notorious, without force, and must be adverse to the owner. Further, the claim must be against the registered owner of land. Has the plaintiff satisfied the said elements?
42. For starters, this claim has been brought against the 1st, 2nd and 3rd defendants who are the registered owners of suit parcels of land Gatari/Weru/10398, 10399 and 10404 respectively. It is in relation to these parcels that the plaintiff seeks to be registered as owner. This issue is not in dispute and I find that the plaintiff has satisfied this first requirement.
43. The next one is whether the plaintiff has been in possession of the land. The plaintiff has pleaded and testified that her husband purchased two acres of suit parcel of land Gatari/Weru/282 from the 1st defendant’s father in the year 1987 and that she has been in occupation of the land ever since. She has put up structures on it, one being her house and three houses for her children together with a church. The same has been echoed by her witnesses who all aver that the plaintiff has been in possession of the land. PW2 and PW5, sons to the plaintiff, testified that their family occupied the suit land in the year 1987 when their father purchased the land from the 1st defendant’s late father. Though they confirmed not being parties or witnesses to the agreement, they aver that they were brought up and raised on the land and have been there ever since.
44. PW3 also stated to have known the plaintiff from the year 2001 and that from the time she knew her, the plaintiff has been residing on the land ever since. She also said that the land has developments on it. PW4, who is a neighbor to the plaintiff, described how the plaintiff came to settle on the land neighboring his in the year 1987 together with her family. He seemed to know the family quite well and even described the year her husband died and how he attended disputes between the plaintiff’s family and that of the 1st defendant. In general, he said the plaintiff has been on the land and resides there to date.
45. The defendants on their part all gave contradictory statements. DW1 a stepson to the plaintiff stated that her step mother used to live on the suit land but later moved to Kangaru when the case was filed and has been residing there ever since. DW2 on his part said that he utilized his land but there are mango trees which he found there and a house that belongs to the seller. Regarding where the plaintiff resides, he stated she resides on land parcel 10404 where she has three houses and where there is also a church. DW3 had initially stated that there were people who occupied a quarter of his parcel of land. However he later seems to acknowledge that indeed the plaintiff resides on his land and has developments on it. DW4, who is the person that sold land to DW2 and DW3, despite denying the plaintiff’s occupation of the land, later agrees that she has been on the land from the year 1987. He even went ahead to state that she resides on the parcels he sold to DW2 and DW3.
46. From the defendants evidence, this court can deduce that the DW1 evidence cannot be relied upon. Either he does not know where his stepmother resides or he has chosen to lie before this court. I say this for the reason that the rest of the defendants, despite initially denying the plaintiff’s presence on the land, later came to agree that she is on the land, and had developed it as per her claim. Though the defendants seem to evade the issue of the portion in which she occupies in their evidence, they later came to admit it. I find that the plaintiff resides on the suit land and has been residing there from the year 1987 to date.



47. Further, the issue raised that the plaintiff has another land elsewhere has no relevance in this case as the evidence presented by the plaintiff and corroborated by her witnesses, coupled by even the evidence of the defendants, shows that the plaintiff is currently in occupation of the suit land. The plaintiff has therefore satisfied the other requirement in that, she has been in open and notorious occupation of the suit land.
48. The other element to be met is whether such occupation was with the knowledge of the defendants who are the registered owners of the land. I have already outlined the nature of the plaintiff's occupation of the land and the defendants of their own admission have all along been aware of the plaintiff's possession and occupation of their respective parcels of land. That requirement too is met.
49. The occupation by the adverse possessor should also be without interruption by the owner and should be continuous. There are several instances when the 1st defendant is said to have been reported to the police and arraigned in court for assaulting the plaintiff and grazing on her land. There is also a notice to vacate issued to the plaintiff in the year 2005. I have also come across a letter dated 10.9.2002 drawn by the district officer and addressed to the 1st defendant in which he is summoned to discuss a dispute between the parties. From all the evidence before the court, the plaintiff and the 1st defendant seem to have been having issues and disputes during the period of occupation.
50. However can these instances be said to have amounted to the 1st defendant asserting his ownership of the land? Was there interruption of the quiet possession of the plaintiff to warrant the court to hold that the plaintiff did not have open, exclusive and uninterrupted possession? What exactly amount to assertion of title? The Court of Appeal in Civil Appeal No 121 of 2006; - *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR affirmed the sentiments of the Court in *Amos Weru Murigu v Marata Wangari Kambi & another* where the Court held:
- “...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.
51. Further, in the case of *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR the Court of appeal held thus:
- “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”.
52. The 1st defendant did not at any point file a suit against the plaintiff or her family seeking to assert his right over the suit parcel of land. Despite the notice to vacate and the numerous local disputes between the parties, the plaintiff's occupation of the suit land, in the absence of a suit against her, can not be said to have been interrupted.
53. The other key element is that the occupation and possession should be without permission or license of the owner of the land. Where entry into the land is with consent, permission, and/or licence of the titled owner, possession or occupation can never be said to be adverse. Possession or occupation becomes adverse when continued after consent, permission or licence is withdrawn or terminated. In



Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch [2021] eKLR the court cited with approval the case of *Samuel Miki Waweru v Jane Njeri Richu*: Civil Appeal No 122 of 2001, (UR), where the following dictum appears:

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

54. The claim by the plaintiff is that her husband entered into a sale agreement for sale and purchase of two acres parcel of land to be hived off from land Parcel Gaturi/Weru/282 owned by the 1st defendant's father. According to the 1st defendant, the agreement entered between his father and the plaintiff's husband was pegged on the success of the outcome of a law suit on ownership of the land between the 1st defendant's father and two other persons. These two were alleged to have fraudulently transferred the land to themselves. They are not parties to this suit.
55. I have looked at the said agreement which is attached to the defendants' bundle of documents. From the agreement, the plaintiff's husband paid a deposit of Kshs 20,200/= and a balance of Kshs 39,800/= was to be paid in installments pending the outcome of a suit - HCC No 263 of 1986. This suit was between the 1st defendant's late father and the two persons who had fraudulently transferred the land to themselves. There is also the other condition set for transfer to be effected, which is obtaining of the land control board consent.
56. I have already found as a fact that the plaintiff went into possession and occupation of the suit land in 1987. It is well shown that her possession and occupation has been open, continuous and uninterrupted. The crucial question to answer however is whether time was running in her favour all this time that she has been in possession and/or occupation. Adverse possession is a legal concept that applies only to those in whose favour time can run.
57. In the book “*Law of Limitation and Adverse Possession*, Volume II, 5th Edition, pages 1374 and 1375, KJ Rumtonji makes a very crucial observation which is to the effect that whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings on facts.
- That is the challenge in the matter before the court now. The plaintiff has been in possession. But is that possession adverse?
58. It is important always to appreciate the character or nature of possession in order to determine whether it is adverse. In addition to what I have said elsewhere in this judgement, I find it useful to quote an observation from *KJ Rumtonji's book (supra)*. The writer states:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open uninterrupted, notorious exclusive and continuous. When such possession is continued for the requisite period (12 years) it confers an indefeasible title upon the possessor. (Colour of title is that which is title in appearance, but not in reality).

Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and the second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact. It can not be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with



intent to hold adversely. These terms (claim or colour of title) mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all the others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on defacto use and occupation. To make possession adverse, there must be entry under a colour of right claiming title hostile the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupants use, done publicly and notoriously.”

59. The plaintiffs entry into the land and her subsequent possession was through permissive arrangements with the seller, the late father of the 1st defendant. From the terms of the agreement, it is clear that she was all along on the land as a prospective purchaser whose full rights as a registered owner would crystallize after successful prosecution and win of a pending case filed by the seller against some people who had fraudulently registered themselves as owners. It was a high court case and the seller lost the case vide a judgement delivered on 19/3/2009. It is clear that the seller, through his son, 1st defendant, decided to appeal. He then won vide a court of appeal judgement delivered on 6/5/14.
60. In my view, the plaintiff should have come out clearly to show at what point she ceased to be a prospective purchaser who had paid only part of purchase price to an adverse purchaser whose possession and occupation was hostile to that of the owner. It is also important to understand that from 1987 to 2014, neither the 1st defendant nor his deceased father – who was the seller – was the registered owner of the suit land. The suit land was in the name of people said to be fraudsters. Without being the registered owner of the land, and with a case on ownership still pending in court, it is clear that neither the 1st defendant nor his late father had a title in respect of which the running of time for purposes of adverse possession could be assumed. Indeed, the two were still battling for ownership of the suit land in court. They were not title holders. Time could not therefore run against them.
61. It is clear that two distinct scenarios obtain in this case: one, neither the 1st defendant nor his deceased father had title to the suit land during the period the plaintiff says she was an adverse possessor. Two, the plaintiffs entry into the suit land and her subsequent possession and occupation was through permissive arrangements with the seller. All along, she was awaiting conclusion of a pending court case so that she could complete payment of purchase price with a view to being made a registered owner. The case ultimately concluded in 2014. The law is clear: adverse possession can only be against a registered title holder. Neither the 1st defendant nor his late father were such title holders. Adverse possession does also not count where possession or occupation is with permission or consent of the owner.
62. If there is any time possession or occupation of the plaintiff became adverse, it is probably the time the 1st defendant became registered owner in 2015 or possibly when he won the appeal in 2014. This case itself was filed in the year 2015. Quite clearly, the requisite period of 12 years was only beginning. The period had certainly not matured.
63. The 2nd and 3rd defendants were purchasers of the land from the 1st defendant. I have concentrated on the 1st defendant because the case before the court stands or fall on the basis of proof, or lack of it, of adverse possession against the 1st defendant. If adverse possession is proved against 1st defendant, the 2nd and 3rd defendant would be affected by it no matter what they may say about their innocence.
64. In this regard, it is instructive to appreciate the observation of the court in *Ngati Farmers Co-operative Society Limited v Councilor John Ledidi & 15 others*: C A No 94 of 2004, Nakuru where it was held, *inter alia*, that mere change of ownership of land which is occupied by another person under adverse



possession does not interrupt that persons right of adverse possession. The point I am making here is that had the plaintiff demonstrated that she is an adverse possessor, the fact of purchase of the suit land by 2nd and 3rd defendants would not have defeated her interests.

65. To show further that adverse possession can not co-exist with permission from the owner of the land, the case of *Samuel Miki v Jane Njeri Richu*: CA No 122 of 2001 is relevant. The court observed:

“It is trite law that a claim of adverse possession can not succeed if the person asserting the claim is in possession with the permission of the owner of or in pursuance of an agreement of sale, or lease or otherwise.”

66. In this matter, I feel sympathetic to the plaintiff who has been on the suit land for a long time, and has even developed it, yet purchase arrangements seem to have failed and her case here as an adverse possessor is set also to fail. Yet I have to bear in mind that it is the law, not sympathy, that determines a case. In this regard, I appreciate the words of the court in the case of *Mwinyi Hamis Ali v Attorney General & Philemon Mwaisaka Wanaka*: CA No 125 of 1997, which were as follows:

“adverse possession does not apply where possession is by consent and in a court of law sympathy does not take a second stand as the court is governed by statutes.”

Ultimately, my finding is that the plaintiff has not been an adverse possessor for the 12 years required. She has not even been an adverse possessor for half that time.

67. The upshot, in light of the foregoing, is that the plaintiff has not made out a case of adverse possession against the defendants. She was largely on the land with permission. For much of that time also neither the 1st defendant nor his late father was a titled owner of the land. There was also a case on ownership pending in court. I therefore dismiss her case but given the history and background given in this case, I make no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22ND DAY OF SEPTEMBER, 2022.

A.K. KANIARU

JUDGE

In the presence of Rose for M/s Beth Ndorongo for defendants and Okwaro for plaintiffs.

Court Assistant: Leadys

