



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Case 189 of 2001**

**ESTHER WANGUI NDUNGU.....PLAINTIFF**

**VERSUS**

**JAMES MWANIKI GARURU.....DEFENDANT**

**JUDGMENT**

This case was heard by Musinga J who has since been transferred to another station. Pursuant to the provisions of Order 17 Rule 10 of the Civil Procedure Rules I am called upon to prepare and deliver judgment on the basis of the evidence he took.

The Plaintiff is the registered proprietor of all those pieces of land known as Title Nos. Nyandarua/South Kinangop/3377, 3379, 3380, 3381 and 3382. She avers in her plaint that the Defendant is a trespasser on them and seeks his eviction and a perpetual injunction restraining her from going back. She concedes that the Defendant bought 10 acres of the original piece of land from the Plaintiff's husband for Kshs.60,000/- but asserts that consent of the local Land Control Board having not been obtained that transaction is void for all purposes. She further asserts that the defendant's claim in Naivasha RMCC No.112/89 for the land based on the same transaction was dismissed on the same ground following which she deposited the entire purchase price of Kshs.60,000/- plus collection charges of Kshs.1,800/- in court but the Defendant has refused to collect it and instead has remained and continued trespassing on her said pieces of land.

In his defence the Defendant maintains his claim to the land on the basis of the purchase in 1977. In his evidence he conceded that consent was not obtained and said that if he is to vacate he should be refunded the purchase price and also be compensated for the developments he has carried on the land. He also claims that his appeal against the Naivasha court decision is on course.

The Defendant through his present advocates applied to amend the plaint and raise the claim of adverse possession but for unknown reason he did not pursue that application. In his submissions counsel for the Defendant has nonetheless urged me to find that the Defendant has acquired title to the suit land by adverse possession. He has in the alternative also argued that the defendant having been on the land since October 1977 the Plaintiff's claim is statute barred under the Limitation of Actions Act.

The other defence raised is that the value of the land having been far beyond the Naivasha court's pecuniary jurisdiction it had no jurisdiction to entertain the claim and its decision should therefore be ignored. All these defences failing he urged me to give the defendant time to harvest his trees on the land.

I have considered the matter. It is common ground that no consent was obtained for the purchase by the

Defendant of the suit land. By virtue of Section 6 of the Land Control Act and numerous authorities of this court and the Court of Appeal including Chemilil Sisal Estates Ltd Vs Makongi Ltd [1967] EA 171 that transaction is therefore null and void for all purposes.

Even if I were to ignore the decision of the Naivasha court on the ground that it had no pecuniary jurisdiction to deal with the matter, that would not help the defendant. He would revert to the original position which is that his claim to the land is based on a void transaction.

As I have stated, in his submission counsel for the Defendant has urged me to find that the Defendant has acquired title to the suit land by adverse possession. He has in the alternative also argued that the defendant having been on the land since October 1977 the Plaintiff's claim is statute barred under the Limitation of Actions Act. Neither adverse possession nor limitation arises from operation of law. They must be pleaded and proved.

Order 6 Rule 8 is not exhaustive as to the matters that should be specifically pleaded. So that no party is taken by surprise, for the court to grant any relief in respect of limitation and adverse possession, those claims must be specifically pleaded and proved.

It is also trite law that parties are bound by their pleadings. In Galaxy Paints Co. Ltd. Vs Falcon Guards Ltd. [2002] EA 385, the Court of Appeal stated:-

“It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings and unless pleadings are amended in accordance with the Civil Procedure Rules, the trial court, by dint of the provisions of Order XX Rule 4 of the aforesaid Rules, may only pronounce judgment on issues arising from the pleadings or such issues as the parties have framed for the court's determination.”

See also Samuel Emuru Vs Ol Suswa Farm Ltd Nakuru HCCCA No.6 of 2003.

Much as I sympathize with the Defendant, limitation and adverse possession having neither been pleaded nor proved in this case, I must reject as I do counsel's submission on those points.

For these reasons I find that the Plaintiff has proved his claim on a balance of probabilities. Consequently I grant an order for the eviction of the Defendant from the suit land. I also grant a perpetual injunction to restrain the Defendant, by himself, his family, agents or servants, having been evicted, from returning to the suit land.

As I have said the Defendant has asked for time to harvest his trees before vacating the suit land. Given the fact that the Defendant was put into possession of the suit land after paying the full purchase price of Kshs.60,000/- and that it is the Plaintiff's late husband who refused to go to the Land Control Board for consent I think he is entitled to that prayer.

Pursuant to that entry the defendant has been on the suit land for over 30 years and has extensively developed it including planting trees the value of which he says is now over Kshs.22,000,000/-. Even if he had been allowed to amend his defence and filed a counter-claim, given the Court of Appeal decisions in Richard Kamau Nganga, Civil Appeal No.16 of 2001 (CA NRB) and Kariuki Vs Kariuki [1983] KLR 225 which I do not agree with but I am nonetheless bound by, the Defendant could not have recovered compensation for the improvements he has carried on the suit land.

In the circumstances I find that the defendant requires reasonable time to harvest and sell his trees and remove any improvements he has erected on the suit land. I therefore order that the Defendant has a period of one year from the date of this judgment to harvest and sell his trees and remove any other improvements he may have carried out on the suit land and vacate it failing which he shall be evicted.

Given the history of this matter I order that each party bears its own costs of this suit.

DATED and delivered this 15<sup>th</sup> day of October, 2009.

**D. K. MARAGA**

**JUDGE.**