



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 205 OF 2018**

**BERNARD NDUNGU.....PLAINTIFF**

**VERSUS**

**DAVID KOMU MUKUMBU.....DEFENDANT**

**J U D G M E N T**

1. The plaintiff, a nephew of the defendant, commenced the instant suit by way of an originating summons dated 17<sup>th</sup> November 2004 which was subsequently amended on 8<sup>th</sup> November 2006. By the amended originating summons the plaintiff sought the determination of the following questions by the Court:-

*(a) That whether the Defendant's title to that property formerly known as parcel No. Nakuru Municipality Block 2/202 and now known as parcel No. Nakuru Municipality Block 2/203 should be declared to have become extinguished and that the plaintiff be declared to have acquired title thereto by virtue of adverse possession having been in peaceful open and uninterrupted possession thereof for a period exceeding 12 years?*

*(b) That should the plaintiff be registered as proprietor of all that parcel of land formerly known as No. Nakuru Municipality Block 2/202 and now known as Nakuru Municipality Block 2/203 having acquired title thereto by virtue of adverse possession after being in peaceful open continuous and uninterrupted possession thereof since the year 1977 to date, a period well in excess of 12 years?*

*(c) That should the defendant be ordered to execute the relevant transfer documents in favour of the plaintiff within 7 days of service of the order failing which the Deputy Registrar of this honourable court be authorized to execute the same?*

*(d) That should the costs of this suit be borne by the defendant?*

2. The amended originating summons was supported on the affidavit sworn by the plaintiff on the 8<sup>th</sup> November 2006 and the annexures thereto. The plaintiff claims that he has adversely occupied and possessed land parcel Nakuru Municipality Block 2/202 now known as Nakuru Municipality Block 2/203 (**"the suit property"**) for a period in excess of the statutory period of 12 years which entitles him to be declared as the legal owner of the property by virtue of prescription. The plaintiff averred that he had occupied the suit property from 1965 after having been allowed/permitted by his grandmother, Agnes Njeri who was registered as co-proprietor of the property with the defendant. He stated that the grandmother passed away about 1977 and he continued in occupation and possession of the suit property and that he was collecting rents from the tenants therein. He however averred that the defendant secretly applied for grant of letters of administration to the estate of his (plaintiff's) grandmother and was issued with letters of administration and the grant was confirmed in 1990 indicating the defendant was entitled to 100% share of the suit premises. The plaintiff nonetheless stated he continued in adverse possession of the suit premises and asserted that he had as at the time of the institution of the suit become entitled to be registered as owner of the suit property as the defendant's title had become extinguished by virtue of the doctrine of adverse possession.

3. The defendant filed a response to the amended originating summons vide the replying affidavit sworn and filed by the defendant on 10<sup>th</sup> November 2006. The defendant in response stated that he purchased the suit plot in 1960 when he was working with the Kenya Police Force and had the same registered in his name and the name of Agnes Njeri (deceased) who was his aunt as Co-proprietors. He stated Agnes Njeri moved to reside on the plot he had purchased though instead of occupying plot No. 202 she inadvertently moved into and occupied plot No. 203, while one Ms Ruby Arthur Lathe (also deceased) who had at the same time purchased plot No.203 moved into and inadvertently occupied plot No.202. The defendant affirmed that the register of titles was rectified by way of exchange so that the occupancies on the ground could correspond with the titles held.

4. The defendant stated that the plaintiff moved into the suit property with his permission initially so that he could attend school in Nakuru and later as a caretaker to collect rent on his behalf from the tenants. The defendant's position therefore was that the plaintiff had entered

into the property and continued in possession with his consent as the uncle and that the plaintiff's possession could not constitute adverse possession as claimed by the plaintiff .

5. The matter was initially part – heard before the High Court but the parties on 20<sup>th</sup> September 2016 agreed to have the matter heard de novo before this court. I heard both the plaintiff and his witness and the defendant with his witness on 5<sup>th</sup> November 2019 whereafter the parties were directed to file their final written submissions. Both parties filed their written submissions.

### **Evidence by the Parties**

6. The plaintiff gave oral evidence and basically relied on his written and filed witness statement and the bundle of documents he had filed in court in support of his evidence. The plaintiff's bundle of documents as per the filed list were admitted and produced as "PEX1-12". It was the plaintiff's evidence that he entered onto the suit property in 1965 with his grandmother Agnes Njeri who together with the defendant were jointly registered as the owners of the property. He stated his grandmother died in 1977 but he continued in possession of the property and was collecting rent from the 8 tenants who were in the property and that he continues to receive rent from the tenants to date.

7. The plaintiff explained that his grandmother and his uncle ( the defendant) were registered as the owners of land parcel Nakuru Municipality Block 2/202 but on the ground they physically occupied plot No. Nakuru Municipality Block 2/203 while one Ruby Artha Gatta( Ruby Mactough) who was the owner of land parcel Nakuru Municipality Block 2/203 occupied plot Number 202 on the ground. The anomaly was rectified in 2006 when the land registry registered changes in the titles to correspond with what the parties occupied on the ground.

8. The plaintiff stated he was not occupying the suit premises as a tenant of the defendant and he testified that when about 2004 the defendant started claiming ownership of the plot and demanding that he (the plaintiff) pays rent, he filed a suit against the defendant vide Nakuru CMCC No.1741 of 2004 seeking orders restraining the defendant from demanding or levying distress for rent and/or interfering with his possession and/or occupation of the suit premises. The plaintiff stated the Court in Nakuru CMCC No. 1741 of 2004 ruled that he was not a tenant of the defendant in the said premises. The plaintiff denied that during the period 1992 to 1996 he was not residing on the suit property. He admitted his aunt (defendant's sister) together with her family came and stayed in the suit premises in 1992 when tribal clashes erupted in Londiani but stated she returned when the clashes ended. The plaintiff insisted that he had only accommodated his aunt and her family and that it was not that his aunt had been permitted and authorised by the defendant to come and reside on the property and take care of the same on the defendant's behalf. The plaintiff further denied there was ever a time he was residing in Othaya and not on the suit property.

9. Under cross examination by Mr. Wachira advocate for the defendant , the plaintiff stated he came to the plot in 1965 on the invitation of his grandmother and that he has ever since resided on the suit property. The plaintiff stated further that his grandmother was the one who educated him using the proceeds from the suit property. He stated his grandmother had no children of her own but had adopted some children who were also residing with her at the suit property and that she was also educating them.

10. The plaintiff further testified that the defendant's daughter, Priscilla Wambui was also residing on the plot with him and the grandmother upto the time the grandmother died in 1977. He stated the defendant's daughter resided on the plot upto 1980 when she left. The plaintiff explained that in regard to the letters he wrote to the defendant exhibited in the defendant's bundle of documents at pages 26 to 28, he was paying school fees for the defendant's daughter. The plaintiff further reiterated he was not collecting rent on behalf of the defendant. He maintained that though the defendant visited the plot on few occasions he never resided on the plot and that other than Priscilla Wambui, the other children of the defendant never stayed on the suit property. The plaintiff denied one Hannah Wambui Kagiri was at any time collecting rent from the tenants on behalf of the defendant and /or that he paid any rent to her for onward transmission to the defendant. The plaintiff further stated the defendant secretly filed a succession cause respecting the estate of his late grandmother and obtained confirmed grant of letters of administration which enabled the defendant to get the whole interest in the suit property registered in his name. The plaintiff stated the caution that he had placed against the title of the suit property was removed through an order of the court.

11. The plaintiff called as his witness one Duncan Muchiri (PW2) whose evidence was to the effect that he knew the plaintiff and that he resided in the suit property in 1971 and 1972 as a tenant and that during that time his parents were paying rent to the plaintiff's grandmother. The witness stated that after he came back to Nakuru from Nairobi he rented premises in the Free Area of Nakuru which were close to the premises where the plaintiff resided. He was emphatic that the plaintiff was residing at the suit premises during the period 1990 to 1996. He recounted a time in 1991 when he stated the plaintiff permitted them to utilise space at the premises to make funeral arrangements since the premises had a big space. The witness stated he never knew the defendant and had never found him at the suit premises.

12. The defendant testified as DW1 and it was his evidence that the plaintiff was his nephew being a son of his sister. The defendant adopted and placed reliance on his written and filed witness statement dated 17<sup>th</sup> September 2016. It was the defendant's evidence that he was a retired Police Officer and that he purchased the suit property while he was working as a Police Officer through the firm of M/s Dagama Rose & Nahar Singh Advocates of Nakuru in 1960 and caused the same to be registered in his name and that of Agnes Njeri who was his aunt. The defendant explained that a Ms Ruby Arthur purchased the adjacent plot next to the one he had purchased and that at the time of taking occupation his aunt, Agnes Njeri occupied land parcel Nakuru Municipality Block 2/203 and not 2/202 while Ms Ruby Arthur occupied Nakuru Municipality Block 2/202 and not block 2/203 as per the respective titles that had been registered in their respective names. The anomaly continued upto 2006 when rectification was done by way of exchange such that the occupancies corresponded with the titles held. The defendant was thus registered as owner and issued title of land parcel Nakuru Municipality Block 2/203 in place of Nakuru Municipality Block 2/202 pursuant to the deed of exchange.

13. The defendant in his evidence explained that he and his aunt permitted the plaintiff to come and reside at the suit premises so that he could conveniently attend school from there. He stated his daughter was equally residing in the suit premises with the plaintiff and his deceased aunt. The defendant further stated when the plaintiff completed school, and following the death of his aunt, who hitherto had been collecting rent from the tenants, he authorised the plaintiff to act as his agent and that the plaintiff was collecting rent and accounting to him. The defendant stated that the plaintiff was utilising the rent income to pay school fees and meet other needs. The defendant further

explained that a part from his daughter Wambui, two of his sons also stayed on the suit premises at various times and that his sons equally would collect the rent and send to him.

14. The defendant further in his evidence stated that in 1992 when tribal clashes erupted, his sister who had been residing in Njoro came and she stayed at the suit premises for about 4 or 5 years before she returned to Njoro. He explained that he used to visit the suit property often particularly when he was on leave. He stated that other than the plaintiff, one Hannah Wambui, who was a tenant in the premises would collect rent from the other tenants and she would send to him and/or he would collect the same from her whenever he visited. The defendant further testified that he was the one who was paying land rent and rates for the plot as evidenced by the receipts exhibited in the bundle of documents.

15. The defendant testified that after the death of his aunt, Agnes Njeri he filed succession proceedings and grant of letters of administration were issued to him and whatever interest she had in the property was transferred to him. He stated no one raised any objection during the succession proceedings though the defendant had in 1996 registered a caution claiming a beneficiary interest. The caution was however removed on application by the defendant pursuant to a court order in Nakuru HC Misc. Application No.369 of 2003 issued on 16<sup>th</sup> July 2004 as per Ruling exhibited at page 68 in the defendants bundle of documents.

16. The defendant in cross examination by Mr. Karanja advocate for the plaintiff stated that he wrote the letters dated 25<sup>th</sup> April 1984 to the plaintiff and M/s Muigai Commercial Agencies Ltd exhibited in the plaintiff's bundle of documents. It was his evidence that he was requesting the plaintiff to account the rent he had collected and at the same time appointing Agents to henceforth collect the rent on his behalf from the tenants. He however stated the tenants did not pay the rent to the Agents. He stated it was after he made the demand to the plaintiff that he later lodged the caution which was subsequently removed on the defendant's application. The defendant maintained that he had never attempted to evict the plaintiff from the suit property.

17. DW2 Rahab Nyambura Njoroge was the Defendant's sister and aunt to the plaintiff. She testified that in 1992 during the tribal clashes she sought refuge at the suit property which she stated was owned by her brother and her aunt. She said she contacted her brother, the defendant herein who allowed her and her family to be accommodated at the property which she considered to be family property. She stated at the time she stayed at the property the defendant's children were also staying there. She stated she did not collect any rent for her brother. She affirmed during the period she stayed in the premises, the defendant visited them severally.

18. DW3 Charles Warui Komu was the defendant's son and it was his evidence that he moved into the plot in 1986 after completing standard 8. He stated that during his secondary school he was residing on the suit property during the holidays. He stated that his brother Francis Mwangi and his sister Priscilla Wambui were equally staying at the property. He stated during the period 1990- 1996 he was employed in Nakuru and was residing on the property and that during this period he was collecting rent on behalf of his father. He stated during the period 1992-1996 the plaintiff was not at the property as he had moved to Nyeri. Although he stated the plaintiff and his family were paying rent he said he did not have any record of the tenants and or any record of payments.

19. After the closure of the trial the parties advocates filed final written submissions as directed by the court. The plaintiff's written submissions were filed on 10<sup>th</sup> February 2020 while the defendant's written submissions were filed on 18<sup>th</sup> March 2020. The parties advocates by their submissions rehashed the evidence adduced by the parties and their witnesses and submitted on legal issues and made reference to various authorities to support the position they each advocated.

### **Submission, analysis and determination**

20. It was the plaintiff's submissions that he had been in continuous and uninterrupted possession of the suit property from 1965 when he entered into occupation with his late grandmother, Agnes Njeri; and that after the death of his said grandmother in 1977 he continued in possession until the time of institution of the instant suit. The plaintiff's advocate submitted that the plaintiff's possession was adverse and satisfied the conditions necessary for the plaintiff to be adjudged as having acquired title to the suit property by way of adverse possession for being in such possession for the statutory period of twelve (12) years. The plaintiff placed reliance in the cases of **Paul Kamande Gicheha -vs- Jacob Kinyua Kiragu (2018) eKLR; Celina Muthoni Kithinji -vs- Safiya Binti Swaleh & 8 others (2018) eKLR; Mbira -vs- Gathoni Gachuhi (2002) 1 EALR 137; Jandu -vs- Kirpal & Another (1975) EA 225 and Mtana Lewa -vs- Kahindi Ngala Mwangandi (2005) eKLR**. In all the referenced cases the courts considered what constitutes adverse possession and what a party claiming title to land by way of adverse possession must prove. In the case of **Celima Muthoni Kithinji -vs- Safiya Binti Swaleh & 8 others (supra)** the judge in setting out what constitutes adverse possession placed reliance on past decisions of the Courts. The judge stated:-

*“9. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have discussed by the Courts. In **Wambugu -vs- Njuguna (1983) KLR 173**, the Court of Appeal held that Adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of Adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.*

*10. The requirements for Adverse possession in Kenya has also been set out in the case of **Mbira -vs- Gachui (2002) 1 EALR 137** in which the court held that :-*

*“---a person who seeks to acquire title to land by the method of Adverse possession for the applicable statutory period must prove non-permission or non-consensual actual, Open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption---“*

*Likewise in **Jandu -vs- Kirpal & Another (1975) EA225** it was held :- “ --- to prove title by adverse possession, it is not sufficient to show that some acts of Adverse possession must be adequate in continuity, in publicity and in extent to show that it is Adverse*

to the owner . It must be actual, visible, exclusive, open and notorious”.

21. The plaintiff has submitted that he was invited to the suit property by his grandmother about 1968 and lived on the property with his grandmother until 1977 when she died. After his grandmother’s death the plaintiff submitted he continued possession of the suit property and was receiving the rent from the other tenants and was not making any remittance to the Defendant who was the registered Co-owner of the property with his deceased grandmother. The plaintiff’s position is that his possession of the suit property became adverse when he commenced collecting rent as the owner following the death of his grandmother and he contended the defendant acknowledged this as the defendant in February 1984 even attempted to bring in M/s Muigai Commercial Agencies Ltd to collect rent on his behalf but the effort was unsuccessful and the tenants continued to pay rent to the plaintiff . The plaintiff contended that his acts were hostile and without the approval of the defendant who was the registered owner. He contended the defendant never asserted his rights as the owner of the property and in consequence the defendant’s title to the land became extinguished and the plaintiff acquired title to the land by prescription on account of being an adverse possessor. The plaintiff placed reliance in support of this submission on the cases of **Francis Kanyoro Muniu -vs- Salim Mandatally Manji (2018) eKLR**; **Sundiata Nathan Mutende -vs- Willy Mwololo Miondi (2018) eKLR**; and **Kenneth Njoroge Kamau -vs- Macson Githumbi Kariuki & 2 others (2015) eKLR**.

22. The submissions made by counsel on behalf of the defendant were to the effect that the plaintiff occupied the suit property with the consent and approval of the defendant. It was the defendant’s evidence that the plaintiff’s mother had requested him ( the defendant) to assist her with the education of the plaintiff which he agreed to and allowed the plaintiff to come and reside at the suit property with Agnes Njeri and attend school from there. The defendant’s daughter Priscilla Wambui was equally residing on the suit property. The rental proceeds from the premises was being utilised to pay school fees for the defendant’s children and the plaintiff. The defendant submitted that he had entrusted the plaintiff the responsibility of collecting rent from the tenants after the plaintiff completed school but the plaintiff became erratic in accounting the rent which prompted him ( the defendant) to demand that the plaintiff pays rent and the collection of rent be taken over by an estate agent as per the letter dated 17<sup>th</sup> February 1984 and 25<sup>th</sup> April 1984 exhibited in the plaintiff’s bundle of documents.

23. The defendant further submitted the plaintiff’s occupation and possession of the suit premises did not constitute him an adverse possessor. Firstly, the Defendant submitted that the plaintiff had occupied only a portion of the land with his permission as member of the family, and secondly the plaintiff never had exclusive possession of the suit property as he occupied the premises together with the defendant’s children and that indeed between the period 1986 to 1996 it was DW3, the defendant’s son who was collecting the rent on behalf of the defendant. The defendant in support of his submissions among other authorities relied on the case of **Gabriel Mbui -vs- Mukindia Maranya (1993) eKLR** where Kuloba J while considering the test to be adopted in determining a claim for adverse possession cited with approval the case of **Ernest Wesonga Kweyu -vs- Kweyu Omuto CA Civil Appeal No. 8 of 1990** ( unreported) and stated thus:-

*“As stated by Gicheru, JA in Kweyu’s case, opcit, in deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts, which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from that fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on the given facts. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely and under a claim of right. Defacto use, and defacto occupation must be shown”*

24. The defendant further cited the case of **Njenga Kimani & 2 others -vs- Kimani Nganga Wainaina (2017) eKLR** by this court where my brother Hon Justice Munyao considered the application of the doctrine of adverse possession where the parties happen to be close relatives as in the instant case. In the case while disallowing a claim for adverse possession the learned judge stated as follows:-

*“ A lot more is indeed needed for a close relative to prove a claim for adverse possession because of the reason that it is common for relatives to allow each other possession and one would not expect them to be kicked out before the expiry of every period of 12 years merely to defeat any claim for adverse possession. On my part, I am persuaded by the evidence of the defendant that he permitted his uncle, the 1<sup>st</sup> plaintiff to occupy the land. Indeed, the defendant stated in his evidence that he has absolutely no intention of evicting him, and he can continue living on the land for as long as he wishes. I wonder what purpose would serve the 1<sup>st</sup> plaintiff by claiming the land by way of adverse possession yet he has a lifetime licence to live on it”*

25. The twin issues in the present suit is whether the plaintiff’s possession of the suit property was adverse to the interest and rights of the defendant and whether the plaintiff has as a consequence thereof acquired title to the suit property by prescription by reason of being in adverse possession for the statutory period of 12 years immediately before the institution of the suit.

#### **Whether the possession was adverse?**

26. The issue whether or not a claimant is in adverse possession of land is a matter of evidence and the standard of proof is on a balance of probabilities. It is not enough for a claimant to prove possession only. He or she must prove the possession to be adverse and such possession must have been open, exclusive and uninterrupted for a period of 12 years. The court of Appeal in the case of **Wambugu -vs- Njuguna (1983) KLR 173** laid down the applicable principles/conditions to prove adverse possession . Inter alia the Court held that:-

*“ In order to acquire by the statute of limitations title to land which has a known owner that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with enjoyment of the soil for the purpose of which he intended to use it.*

*The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years”*

27. Further the Court of Appeal in the case of *Samuel Kihamba -vs- Mary Mbaisi (2015) eKLR* considering the applicable principles in adverse possession claims stated:-

*“ strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin phrasedogy necvi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”*

28. In the case of *Kasure -vs- Mwaani Investments Ltd & 4 others (2004) KLR 184* at page 188 the Court of Appeal stated thus:-

*“ In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on own volition. See Wanje -vs- Saikwa 91984) KLR 284”*

29. The above cited authorities illustrate how the courts have approached adverse possession claims. Of note is that the owner of the land must have been dispossessed of the land and/or he must have discontinued possession of the land of his own volition and that the claimant must have possessed the land openly and without any interruption for a continuous period of 12 years and that the possession must have been without the consent, approval and/or permission of the owner. The claimant must also over the period been utilising the land in a manner that was inconsistent and/or hostile to the interests and /or rights of the owner. In other words the claimant must have been exercising rights that would be said to be synonymous with rights of ownership as opposed to the real owner's rights.

30. In the evidence adduced by the parties in this matter it is irrefutable that the entry of the plaintiff onto the suit property was with the permission of the registered owners. Although the plaintiff insists he was invited by his deceased grandmother who was the co-owner of the property with the defendant, I am satisfied the defendant was aware of the plaintiff's presence on the property and that he sanctioned it. The plaintiff's occupation and possession on the basis of the evidence was in the first instance with the permission and approval of the registered owners.

#### **Was the plaintiff's possession exclusive?**

31. On the evidence on record I am persuaded that it was indeed the defendant who purchased the suit property noting that at the time of purchase he was in employment as a police officer and that he got the property registered under his name and that of his aunt, Agnes Njeri. The plaintiff admitted in evidence that the Defendant's children used to reside with him in the suit property. Indeed in 1992 following the outbreak of tribal clashes in Njoro, the defendant's sister (DW2) came to seek refuge at the property where she resided for some considerable period. In her evidence she affirmed it was her brother, the defendant from who she obtained permission. The defendant confirmed it is him she contacted to request for accommodation. DW3 the son of the defendant also gave evidence that he resided on the property when he was attending school and after he completed school from 1986 to 1996. The defendant's daughter, Priscilla Wambui equally resided on the suit property over a long period of time. Although the plaintiff disputed, DW3 testified that whilst he was residing on the property he used to collect rent on behalf of his father.

32. On the basis of the evidence adduced by the parties there is irrefutable evidence that the suit property served as a family property within Nakuru Municipality where family members were residing apparently without paying any rent. Any rooms that were not taken up by family members were of course rented out and it would appear the plaintiff who undoubtedly was more available and present at the plot was collecting rent from these tenants. The correspondences exhibited of letters dated 16<sup>th</sup> September 1983 and 7<sup>th</sup> November 1983 at pages 64 & 65 of the defendant's bundle of documents point to the plaintiff having been collecting and accounting rent to the defendant. Taking into account the occupancies of the suit premises by various family members at different times with the tacit consent and/or approval by the defendant, I am not able to find that the plaintiff had exclusive possession of the suit premises and/or that the defendant had been dispossessed and/or had discontinued possession for the requisite statutory period of 12 years.

33. Besides, the court having come to the conclusion that the plaintiff entered into the suit property with the permission and consent of the registered owners, he continued in possession and occupation of the suit property as a licensee of the owners. The death of the plaintiff's grandmother did not terminate the licence and the plaintiff continued in possession with the consent of the defendant, who was the remaining owner. The fact that the plaintiff may have been entrusted the task of collecting and accounting the rent to the plaintiff and he defaulted in accounting for rent that did not make him an adverse possessor. He was in the property with the consent of the owner and the fact that he may have defaulted on the duties assigned to him and/or entrusted to him that could not convert him to an adverse possessor. I do not think the doctrine of adverse possession was ever intended to be weaponised such that relatives who have all along been afforded a place of abode can suddenly wake up one day and thrust on the face of their benefactors ( who are also relatives) the doctrine of adverse possession to claim ownership of the land which they have been allowed to occupy and utilise. That would constitute abuse of the doctrine.

34. In the present case, the plaintiff all along was aware his uncle the defendant was the registered owner of the suit property and it appears he lay in wait for an opportune time to unleash the doctrine of adverse possession in an attempt to acquire the suit property from the defendant. The court however upon full evaluation and analysis of the evidence and the applicable law, is not satisfied the plaintiff has proved on a balance of probabilities that the doctrine of adverse possession is applicable in the circumstances of this case. The elements necessary to prove adverse possession have not been proved to the required standard and accordingly the plaintiff's suit must fail.

35. The plaintiff's suit is accordingly dismissed with costs to the defendant and the plaintiff is ordered to vacate from the Defendant's land parcel Nakuru Municipality Block 2/203 within 30 days from the date hereof failing which an order for his eviction to issue. Considering the suit involved close family members, I exercise my discretion not to award costs of the suit to any party. Each party shall bear their own costs of the suit.

36. Orders accordingly.

**Judgment dated signed and delivered at Nakuru virtually this 28<sup>th</sup> day of January 2021.**

**J M MUTUNGI**

**JUDGE**