



Miruri v Mbaya [Legal Rep' of Ayub Mbaya Mwongera] & 4 others (Enviromental and Land Originating Summons 60 of 2011) [2024] KEELC 3240 (KLR) (8 February 2024) (Judgment)

Neutral citation: [2024] KEELC 3240 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 60 OF 2011
CK YANO, J
FEBRUARY 8, 2024**

BETWEEN

MWONGERA MIRURI PLAINTIFF

AND

**NANCY KANUGU MBAYA [LEGAL REP' OF AYUB MBAYA
MWONGERA] 1ST DEFENDANT**

PATRICK MBAABU RUCHA 2ND DEFENDANT

MBAABU SILAS M'IKIARA 3RD DEFENDANT

FESTUS MBAABU NGARUTHI 4TH DEFENDANT

HENRY MBOBUA M'MWONGERA 5TH DEFENDANT

JUDGMENT

1. In this case, I am required to write a judgment based on the evidence that was partly taken by Hon. L. Mbugua J, who was seized of the matter before she was transferred. The learned Judge took the evidence of PW1 and PW2. Pursuant to the provisions of Order 18 Rule 8(1) of the Civil Procedure Rules, I proceeded with the matter and took the evidence of PW3 and DW1 and concluded the matter.
2. Both the Original plaintiff and defendant are deceased and have been substituted in the matter.

PLAINTIFF'S CASE.

3. The plaintiff moved this court by an originating summons dated 2nd October, 1995 and amended on 9th May, 2014. The plaintiff is seeking for a declaration that the defendant holds two (2) acres of LR. NO. KIIRUA/KIIRUA/324 now (1404 – 1409) in trust for the plaintiff and that the plaintiff has acquired 2 acres of the said property by way of adverse possession.



4. The plaintiff pleaded that, before 3rd April, 1976, one Elijah Nkubito was the registered owner of all that parcel of land known as KIIRUA/KIIRUA/324. That the said Elijah Nkubito sold and gave two (2) acres of the said land to the plaintiff, but did not officially transfer the same to the plaintiff.
5. It is averred that the said Elijah Nkubito thereafter sold and transferred the suit land to the defendant on 3rd April 1976 subject to the plaintiff's interest of two (2) acres which the defendant agreed to transfer to the plaintiff. That in 1976, the plaintiff requested the defendant to subdivide the land and transfer two (2) acres to the plaintiff, but the defendant failed to do so since the defendant had charged the land in favour of Standard Chartered Bank Limited.
6. The plaintiff pleaded that on 11th June, 1980, the defendant stated in writing that he held two (2) acres of the suit land for the plaintiff and agreed to transfer the same to the plaintiff. That the defendant even engaged the services of a private surveyor to excise the said two (2) acres from the main land and as such, had the boundaries of the two (2) acres clearly marked but never registered.
7. The plaintiff averred that they had been in possession of the said two (2) acres since he bought the same from the said Elijah Nkubito and his possession has been continuous, uninterrupted, open and notorious. That on 16th September, 1995, the defendant gave the plaintiff notice to vacate purporting that the plaintiff was a trespasser on the said land. That after receipt of the notice, the plaintiff proceeded to court and obtained an order of injunction restraining the defendant from evicting the plaintiff and the plaintiff stayed there until 2010.
8. The plaintiff stated that sometime between 2010 and 2011 while the matter was pending in court, the 1st defendant in fragrant breach of the agreement subject herein subdivided Parcel KIIRUA/KIIRUA/324 into Nos. 1404, 1405, 1406, 1407, 1408, 1409 and transferred them to the defendants. The plaintiff stated that he was and still in continued possession for over 30 years despite disruptions which Court of Appeal stopped vide injunctive Order in Civil Application No. 146 of 2011 which possession of 2 acres gave rise to the right under adverse possession. Further, that by virtue of the 1st defendant accepting to be registered and hold the 2 acres share of the plaintiff and transferred later created trusteeship, which was breached by the failure to transfer the same as agreed.
9. The summons was supported by the affidavit of M'Mwongera Miruri in which he reiterated the averment made in the Originating Summons and the annexures thereto. These are copies of agreement, acknowledgement receipts certificates of search and letters.
10. Dr. Kimathi Mwongera testified as PW1. He testified that he is a dental surgeon staying in Meru. He adopted his statement dated 12/11/2019 as his evidence and produced the documents in his bundle of the same date as exhibits. The documents are order dated 25/6/2019 and the next two items 1 -9 as P. Exh. 1 -9, list dated 17/2/2020 as P. Exh. 10 – 15, list dated 16/1/2023 as P. Exh. 16 – 18 and list dated 18/1/2020 as P. Exh. 19 – 25 respectively. The court observed that the said documents were not in order and as such the court assistant did not mark on them. Although the plaintiff counsel promised to assist to evidence such was done. PW1 stated that his father Mwongera Miruri entered into a sale of land agreement of 2 acres with Elijah Nkubito to be excised from LR. No. KIIRUA/KIIRUA/227. That the total acreage of the land of Elijah Nkubito was 11 acres.
11. PW1 stated that all transactions and payments were done through Ayub Mbaya Rimita & Co. Advocates where Mr. Ayub Mbaya Mwongera was an advocate. That upon payment of all requisite purchase price of the two acres, Mr. Elijah Nkubito gave Mwongera Miruri the two acres pending transfer. That Ayub Mbaya Mwongera expressed interest in purchasing the remaining 9 acres from Mr. Elijah Nkubito.



12. PW1 stated Parcel NO. KIIRUA/KIIRUA/227 was subdivided into two and Parcel No. KIIRUA/KIIRUA/324 was given to Mwongera Miruri and Ayub Mbaya. That Parcel No. KIIRUA/KIIRUA/324 was to be subdivided into 2 acres for Mwongera Miruri and 9 acres for Ayub Mbaya.
13. PW1 further stated that on the day when they were to go to the land board to obtain consent for KIIRUA/KIIRUA/324 to be subdivided into 2 acres and 9 acres, Mwongera Miruri was in hospital. That they mutually agreed that the whole of LR. KIRUA/KIIRUA/324 was to be transferred to Ayub Mbaya with the understanding that the he would later transfer two acres to Mwongera Miruri. That on 11th June 1980, Ayub Mbaya agreed to transfer the 2 acres to Mwongera Miruri and Mwongera Miruri continued to develop the land uninterrupted up to 1995.
14. That in 1981, Ayub Mbaya took a loan and used LR. KIIRUA/KIIRUA/324 as collateral to Commercial Bank of Africa and agreed to transfer the 2 acres once he finished paying the loan. However, in 1995 after finishing repaying the loan Ayub Mbaya refused to transfer the two acres and Mwongera Miruri instituted Civil Proceedings in court to compel Mr. Ayub Mbaya to transfer the said two acres.
15. That in 1995, the court in Meru Case no. 8907 of 1995 issued an injunction restraining Ayub Mbaya Mwongera from interfering with the possession of the land until the matter was heard and determined. That Ayub Mbaya Mwongera passed on before the matter was concluded, and his wife Zipporah Mbaya stated that she was not the administrator of the estate of Ayub Mbaya & Company Advocates. PW1 stated that they waited for the family to start Succession proceedings for the estate of Mwongera, but the administrator was appointed secretly, and Zipporah Mbaya and Nancy Mbaya un-procedurally removed the caution Mwongera Miruri had put on the land and discharged the title from commercial Bank of Africa and transferred KIIRUA/KIIRUA/324 to Nancy Mbaya with the knowledge of Mwongera Miruri. That once Mwongera Miruri became aware of the transfer, he moved to court of Appeal and retraced the order on subdivision, but Nancy Mbaya disregarded the Court of Appeal Orders and continued to do so up to date. PW1 stated that during the Succession Cause of the estate of Ayub Mbaya, Nancy Kanugu with collaboration with the officials at the Land Office, un-procedurally altered the Search Certificate which disregarded the caution that had been put on Kiirua/Kiirua/324.
16. When he was cross-examined by Mr.Gatari Ringera, PW1 stated that he was aware of the facts surrounding the land and relied on his statement. He stated that his father developed a medical condition and he was substituted in his place.
17. PW1 stated that his father and one Nkubitu had an agreement dated 25/8/1975 in respect of land parcel Kiirua/Kiirua/227. He stated that there was an agreement between his father, Elijah and Ayub Mwongera and his father tried to get consent to subdivide the land, but Ayub had taken a loan and was to finish paying the loan then have the land subdivided. PW1 admitted that he did not have copies of the Land Control Board Consent. That as per the Green Card, Land Parcel NO. 324 was transferred to the defendant on 3/4/1976. PW1 stated that his father was paying for the land in instalments and was still making payment to Elijah Nkubitu when the land was transferred to Ayub. That a consideration of Ksh. 18,000 was paid by Ayub way back on 3/4/1976.
18. PW1 stated that his father used to pay through Ayub Mbaya Advocate who was also buying 9 acres. He stated that they were to go to the land Control Board in 1976, but he had no copy of the application for consent to the land control Board. That Parcel No. 227 was the whole land and in their documents, parcel NO. 324 registered in the name of Ayub Mbaya does not appear. PW1 did not know the other parcel number that resulted from the subdivision of 227. He stated that there was an agreement dated 11/6/1980 in which the identity card of the defendants is not indicated. He stated that he did not know his signature but assumed it is there. He further stated that there was no witness. He stated that he was



- not aware of the agreement. PW1 stated that there was no acknowledgement to the payments made to Ayub Mbaya. He further stated that they were chased away from the land adding that his father is not on the land, although the Court of Appeal said he should be on the land. That his family members are also not on the land.
19. PW1 further confirmed that there was a case where his siblings were charged with stealing and damage to property which concerned the property and land of the defendant. PW1 stated that he knew that Parcel 324 was restricted over a long period of time of about 10 years, and that the restriction was lodged in 1985 and removed in 1997. He stated that they came to court and were told to await for the appointment of administrator of (the estate) of Ayub who died in 2001. That from 1995 when Ayub died. 6 years had lapsed. He stated that they lodged restriction in 1995 but are not the ones who lodged the restriction lodged in 1985. That the restriction lodged was fraudulently removed by the defendant, though item No. 4 entry No. 9 in the Green Card showed that it was “Withdrawn via an Order in Case no. 2319 of 1981”. PW1 stated that his father followed up the restriction for entry 7. He further stated that Ayub Mbaya had taken a loan with Commercial Bank of Africa with the land (as security) and that the land was advertised for sale by public auction. He stated that they talked and agreed the loan was to be paid. That his father’s claim is for 2 acres out of the suit land that he entrusted his advocate. He stated that in 1995, the defendants required his father not to enter the land, and they continued to occupy the land until 2017 when the court of Appeal decision was disobeyed. PW1 stated that his father entered the land for the first time in 1976. That he was aware his father requested the defendants to transfer the land in writing in 1975, and that is when they came to court on 16/9/1995. The PW1 stated that his father and Mbaya used to talk mutually and that Mbaya would agree to transfer the two acres.
 20. When he was re-examined, PW1 stated that he had an agreement of 11/6/1980 in which Ayub agreed to transfer 2 acres to his father and that the defendant never disputed the agreement. He further stated that he had acknowledgment receipts showing he was giving money to Elijah Nkubitu, even after 1980. That by 1976 when the land was transferred, PW1’s father could not have sought the consent of the land Control Board since he was sick and admitted in hospital.
 21. PW1 stated that Ayub Mbaya was their advocate and family friend and the agreement dated 11/6/1980 was drawn in the firm where Ayub was a partner. That in between 1976 and 1981 his father was paying and was also in occupation of the land since 1976, and that all that time the defendants never objected to the said occupation. PW1 stated that his father developed the land in 1995 and that they requested Ayub to transfer the land, but he wrote a letter which they responded through an advocate vide a letter dated 20/9/1995 asking for surrender of the 2 acres. That Ayub responded vide letter dated 21/9/1995.
 22. PW1 stated that they had no notice of the case between Commercial Bank of Africa and Ayub adding that Elijah Nkubitu has another number for the land and was the plaintiff’s witness. PW1 reiterated that there was a Court of Appeal Order Inhibiting Parcel 324 and an injunction which were disobeyed. That he had not seen agreement between Elijah Nkubitu and Ayub Mwongera to sell the land.
 23. Elijah Nkubitu testified as PW2. He stated that he is a farmer and herder from Kiirua. That he knows both the plaintiff. Mwongera Miruri and Ayub Mbaya, the defendant. He stated that Mwongera Miruri was looking for land and he told him he was selling 11 acres of his parcel of land 227. That the whole land was 28.53 acres. PW2 stated that Mwongera told him that he did not have enough money so he was to look for another person to combine efforts to buy the suit land, and he brought his brother Ayub. That they went to Mbaya and Rimita Advocates where Mbaya was an advocate, and Mwongera was to take 2 acres while Mbaya was to take 9 acres. PW2 stated that they wrote an agreement to that effect and that Mwongera paid him Ksh. 3,000 while Mbaya paid 10,000/= before Rimita Advocate, though he stated that he could not recall well since it was a long time ago. PW2 stated that he then gave them the land upon taking measurements.



24. PW2 stated that thereafter, Mwongera fell sick. That later Mbaya called PW2 in his office and gave him Ksh. 600,000/= and sent him to Githongo at the farm high up and was told upon arrival, he would see Muthamia's home and went and that was Mwongera's home. PW2 stated that he arrived in that market and was shown the said home, but was told he (Mwongera) was at hospital in Nkubu. That he informed his wife that the reason why he was there was because he wanted him to fill land control Board forms.
25. PW2 stated that he went back and informed Mbaya who told him that he could still proceed as he knew Mwongera both as his advocate and brother, and assured him that he would give Mwongera his portion hence they went to the Land Control Board and the Board passed the resolution, but in the name of Mbaya. PW2 stated that he then gave them the title for 11 acres and Mbaya got the title. That when Mwongera recovered, the three of them met and Mbaya told Mwongera that he would give him his portion and that they wrote an agreement. That Mbaya just said they would give Mwongera 2 acres. That they were brothers. The agreement is the one dated 11/6/1980.
26. PW2 further testified that Mbaya had the title, got a power of attorney to Kanya Kamundi and Advocate in Nairobi and they got a loan with the bank. That Mbaya said that when the title was discharged from the bank he would give Mwongera his share of the land but he didn't. PW2 stated that he had been paid fully by Mwongera and Mbaya for their respective portions of the land. He further stated that Mwongera used to give Mbaya the money who would in turn pay him for the parcel 227 but upon subdivision theirs became 324. Parcel 227 was the original parcel and PW2 sold them a portion of it which upon subdivision became 324.
27. PW2 stated that the problem arose when Mbaya started having many problems with Law Society, and hotels and standard Chartered Bank and even had a case with Kipkenda & Lelei. PW2 stated that Milimani Hotel was owned by Mbaya and also had a problem involving African Tours.
28. PW2 stated that Mwongera just wanted his 2 acres which he took immediately and so did Mbaya while PW2 remained with the rest of his land. That when the case of Milimani Hotel was finished they used it to have the land subdivided. That the case went to court and Mbaya went to the Court of Appeal and his advocate was Mithega. That there were restrictions on the land because of that case. That Mbaya died before sub-dividing the land and the wife Nancy Karugu Mbaya took over the matter and never gave Mwongera his share of the land. That Mwongera was arrested and charged and was not able to go back to the land because Nancy is the one who had the title. PW2 stated that he knew that there was a court order from Court of Appeal Nyeri stopping Nancy from taking the land. He reiterated that Mwongera ought to have 2 acres while Nancy's share is 9 acres. He stated that Mwongera took over the land from the time they entered into an agreement in 1976 and was evicted on 22/2/2017 when a Court of Appeal order was issued. PW2 identified the receipts which he got paid from the plaintiff's bundle.
29. When he was cross-examined by Mr. Gatari Ringera, PW2 stated that he recorded a statement on 30/3/2016 which he signed. That they went to Meru Central Sacco and Mwongera got 3000/= and they went to Mbaya's office. He stated that he did not do an agreement on 25/8/1975 with Mwongera alone because they did the agreement where Mbaya was to take 9 acres and Mwongera 2 acres. PW2 stated that he could not recall any agreement of 1975. That Mwongera was giving money to Mbaya as the latter was his advocate and Mbaya would give PW2 the money. PW2 stated that he no longer had the documents, but stated that he applied for consent and signed the application for consent of the land control Board. That surveyors came to parcel 227 and hived off 11 acres. That he filled a transfer form for 11 acres to Ayub Mbaya who went to the board with him. Mwongera was not present. That the board did not prepare the scheduled meeting because they filed one form. PW2 stated that he had not



been given 18,000/= in total as per the green card. That they filled the transfer form and Mbaya paid for 9 acres and Mwongera for 2 acres. He could no recall when Mbaya got title. He also could not recall if Mwongera had paid him everything by the time Mbaya got title. That Mbaya got title because he was a brother and advocate to his brother Mwongera. That he did not sign the agreement between Mbaya and Mwongera although he was present as by then there was no dispute. That Mbaya and Mwongera trusted each other, and he too trusted them. PW2 stated that he was the one who allowed Mwongera to use the land. That Mwongera entered the land peacefully.

30. PW3 was Calvin Willie Otieno an advocate practicing under the name and the style of Otieno C & Company Advocates. He stated that in 2012, he was working in the firm of Charles Kariuki Advocates. That on 2/2/2012 he was instructed by the said firm to serve a ruling upon Nancy Karugu. That on 3/2/2012, he proceeded to Milimani Hotel along Makutano – Kinoru Stadium Road which he knew very well and served the said Nancy Karugu whom he also knew very well. That Nancy Karugu advised one Mbaabu Festus who was with her to receive the copy of the ruling by stamping it and the stamped copy was returned to him. That on the same date he served the firm of Gatari Ringera & CO. Advocates with the said ruling. That he had earlier on served the OCS, Kiirua Police Station with the said ruling and he duly received and stamped. That the area chief of Kiirua was also served through his agent by the name Patrick Mwangi who was manning the chief's desk, and who also received it.
31. PW3 stated that on 11/4/2012, he was instructed by the said firm to serve a copy of an order from the court of Appeal upon the firm of Gatari Ringera. That on 29/4/2012, there was a Criminal Case No. 698 of 2011 at Meru Law Courts which involved the parties herein. PW3 stated that he was personally in court and he met Festus Mbaabu and Nancy Karugu and handed over the copy of the order to Festus Mbaabu who acknowledged receipt, but never signed PW3 signed an affidavit of service dated 9/8/2012 which he produced as P. Exh. 21.
32. When PW3 was cross-examined by Mr. Ringera, he stated that on 3/2/2/12, he served a copy of a ruling in Civil Appeal No. NAI 146 of 2011, but could not recall the date of the ruling and had not attached the same in his affidavit of service. That there was nothing to show that he served the ruling on the persons named. He stated that there is a copy of an order dated 22/2/12. That there was a penal order on the order that he served. That the matter was dealt with by Charles Kariuki (now a Judge). PW3 stated that he was not aware of orders of status quo.

DEFENDANT'S CASE

33. In reply to the Originating Summons, the defendants filed a replying affidavit sworn by Nancy Karugu Mbaya the 1st defendant herein on 21st July, 2014 wherein she averred that she has never had any dealings with the plaintiff over the subject matter of this suit. She further deposed that following the death of her husband, she petitioned for an administration of his estate and proceeded to distribute the estate to the various beneficiaries in keeping with his wishes. The deponent stated that due process was followed and believed that she had faithfully administered the estate of the deceased, including the suit land, and that none of the beneficiaries was complaining. The deponent stated that the grant of letters of administration that she holds remains valid and believes the suit land cannot be transferred to the plaintiff in contravention thereof. That the plaintiff is aware of the said cause as his attempt to have the grant revoked failed. A copy of the ruling by the court marked "NKM1" was annexed and stated that the said decision has not been appealed against nor has review of the same been sought. That the beneficiaries of the deceased are in occupation of their respective portions of the suit land and the plaintiff was not using any part thereof. The deponent further stated that she was under no obligation to the plaintiff and his claim against her and her co-defendants had no basis at all, and prayed for the plaintiff's claim to be dismissed with costs.



34. Nancy Karugu Mbaya testified as DW1 and stated that she is the widow for the late Ayub Mbaya Mwongera with whom they got married to in 1972. That they lived together until her husband died in 2001. DW1 adopted her statement dated 25/11/2019 as her evidence in chief. Briefly, it is her evidence that her late husband bought the property known as parcel No. KIIRUA/KIIRUA/324 measuring 11 acres from Elijah Nkubitu and the land was transferred to him by the seller and he immediately took possession thereof. That there was no condition attached to the transfer of the land and that both parties attended the relevant land Control Board and obtained consent to transfer. It was her evidence that the deceased was firm that he never gave the plaintiff an undertaking to transfer 2 acres of the land to him. That the deceased denied having signed the alleged transfer document and argued that there would have been absolutely no reason for him to do so as he had not received any consideration from the plaintiff. That if there was any agreement the same was a forgery.
35. DW1 stated that she knew that the plaintiff was given notice to cease trespassing on the suit land in 1995 and he ceased his activities and brought this case. She stated that following the death of her husband, she filed Succession cause No. 350 of 2006 wherein the plaintiff made applications seeking to prevent the distribution of the estate of the deceased in vain. That being dissatisfied, the plaintiff filed an appeal before the Court of Appeal which he failed to pursue, and DW1 proceeded to distribute the estate of the deceased as ordered by the High Court, and orders of inhibition placed against the property were ordered to be lifted by the court. She further stated that she knew that the deceased obtained a loan against the security of a charge against the title to the suit property and that the loan was fully repaid after the demise of the deceased. That the plaintiff never raised the issue of the land being offered as security for repayment of the loan. She stated that they were in possession of the suit land and believes that the plaintiff's claim against them has no basis adding that the statements of Elijah Nkubitu is false and that he is the only person best placed to give land to the plaintiff. She prayed for the suit to be dismissed with costs.
36. DW1 Further testified that apart from the plaintiff, there were other people utilizing the land with the authority of her husband. She produced the ruling in case No. 60 of 2011 (OS) and Succession Cause No. 350 of 2006 as D. Exh. 1 & 2 respectively.
37. When cross-examined by Ms. Kiome DW1 stated that her husband was a lawyer by profession and could not tell if the plaintiff was his client at the time. On being shown the agreement produced by the plaintiff, DW1 stated that the signature thereon did not belong to her late husband. That she was not able to answer about the office of her late husband. She stated that the plaintiff left the land before the year 2006, but was not very certain on the dates. She stated that she was aware the matter went up to the Court of Appeal where an order was issued on 22/2/2012. That as at 22/2/2012, the defendants were on the land, and denied that the plaintiff was on the land.
38. DW1 stated that she was aware that her husband had taken a loan using the suit land as security. She stated that she is the one who repaid the loan. She further stated that she was not working in the office of her late husband, but was aware of this transaction. She was not aware if the plaintiff had placed an inhibition on the land. That her husband died in 2001 and the caution was registered in 1995. DW1 stated that she did not know under what circumstances the plaintiff entered the land. That her husband filed a case against the plaintiff for entering the land, but DW1 could not remember the case number or whether the case was heard. She stated that there were people who inherited the land, including her brothers-in-law and others including Festus Mbaabu who was her manager. That her late husband had expressed his wish on who should be given the land, though he never wrote a Will. That those people entered the land after succession in 2006. That the plaintiff was on the land when the Succession Cause was filed. That the plaintiff was not given land because he had no interest on the land.



39. DW1 stated that she did not know when the plaintiff entered the land nor when her late husband bought the land. She however, stated that her husband bought the land from Elijah Nkubitu, but she did not have the agreement though she had the title deed.
40. When DW1 was re-examined by Mr. Ringera, she stated that her late husband wrote to the plaintiff in 1995 to vacate from the land. That from the Green Card, the land was transferred to her husband on 3/4/1976, and is measuring 4.45 hectares. That it had restrictions. She stated that she could not remember which year the plaintiff left the land. She also confirmed that she gave the land to among officers, her secretary, but stated that it was as per the wish of her late husband. That she distributed the whole land and titles have been issued.

PLAINTIFF'S SUBMISSIONS

41. The plaintiff filed submissions dated 22nd November, 2023 through the firm of M/s Charles Kariuki & Kiome Associate Advocates who submitted that the issue for determination is whether or not the plaintiff has acquired title by way of adverse possession, and if yes, when did time start running for purposes of these rights and finally whether or not the plaintiff is entitled to the prayers in the originating summons.
42. With regard to the Law in respect to adverse possession, the plaintiff's counsel submitted that the same is settled and relied on the case of Maweu Versus Lin Ranching and Farming Cooperative Society (1985) KLR 430 and Samuel Miki Waweru Versus Jane Njeru Richu, Civil Appeal No. 122 of 2001.
43. The plaintiff's counsel submitted that it is evident from the documents filed that the plaintiff had been on the land from 1976 when the sale agreement was done until 2012 when he was forcefully evicted by the defendants. That the fact that the plaintiff had extensively developed the suit property is a demonstration of animus possidendi (intention to possess) to the exclusion of the defendants. That he was also using or occupying the land in contrast to the title (hostile) usage to the right of the title owner(defendant). That the open, continuous and hostile occupation has not been broken from 1976, a period in excess of 12 years.
44. The plaintiff's counsel cited Article 64(c) and 40 of *the Constitution* on definition of private land and protection right to property and submitted that the doctrine of adverse possession in effect allows a party to acquire land in accordance with the law. That the said Article 40 also protects every person from arbitrary Limitations or restriction of this right to property by discrimination. That in addition, any person who has an interest in property is assured of the right of access to a court of law before any deprivation. Learned counsel for the plaintiff also cited Sections 7, 13, 16, 17 and 38 (1) & (2) of the *Limitation of actions Act* the combined of which is to extinguish the title of the proprietor of land in favour of the adverse possessor at the expiry of 12 years of occupation of the adverse possession on the suit land. The plaintiff's counsel also cited Section 28(h) of the *Land Registration Act, 2012* which recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the Limitation of actions or by prescription. They also cited Section 7 of the *Land Act* which provides for prescriptions as one of the ways of acquisition of land.
45. The plaintiff's counsel relied in the case of Kasure Versus Mwaani Investments Limited & 4 others KLR 184, Joseph Gakumi Kiritu Versus Lawrence Munyambu Kaura CA No. 20 of 1993 and Kweyu Versus Omuto CA. Civil Appeal 8 of 1990 and submitted that the key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. That in this particular case, it is the plaintiff's case that upon purchase of the suit land from Elijah Nkubitu in 1976 he and his father settled on the suit land up to the year 2012 when they were forcefully dispossessed of the property



despite having served a court order against the defendant. The plaintiff's counsel submitted that in deciding the issue of adverse possession, the primary function of a court is to draw legal inference from proved facts. That such inferences are clearly matter of law whereas possession is a matter of fact.

46. The plaintiff's counsel further cited Sections 37 and 38 of the Limitations of Actions Act and Section 75(6) (v) of the repealed Constitution and submitted that the plaintiff has been able to prove that indeed he had been occupying the land for a period of more than 12 years to the exclusion of the defendant and has satisfied the requirements of the law on adverse possession. That it is settled principle that a claim for adverse possession can only be maintained against a registered owner and that in this case, the defendant became the registered owner in the year 1976. The plaintiff's counsel relied on the case of Sophie Wanjiku John Versus Jane Mwhaki Kimani Nairobi ELC Civil Suit No. 490 of 2010.
47. Learned counsel for the plaintiff submitted that the rationale of acquiring land by adverse possession is as explained in the passage from the decision in Adrian Versus Earl of Sandwich (1877)2 QB 485 as follows:

“The legitimate object of all statutes of Limitations is in no doubt to quiet long continued possession, but they all rest upon the broad and inelible principles that persons, who have some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties”.

48. The plaintiff's counsel further relied on the case of Mweu Versus Kiu Ranching & Farming Cooperative Society Ltd (1985)KLR 430 and submitted that the plaintiff's claim is merited and urged the court to grant the orders sought

DEFENDANTS'S SUBMISSIONS

49. The defendants filed their submissions, dated 18th December, 2023 through the firm of M/s Gatari Ringera & Company Advocates who gave a summary of the case and submitted that the plaintiff has totally failed to adduce sufficient evidence in support of his claim. That there was no agreement of the purchase of the suit land by the plaintiff from PW2 as a joint venture by the plaintiff and the defendant or even evidence of payment or undertaking. It was further submitted that there is no nexus between the purchase of the land by the defendant from PW2 and the purchase of part of parcel No. Kiirua/Kiirua/227 from PW2 by the plaintiff.
50. Learned counsel for the defendants further submitted that the evidence on record clearly establishes that the plaintiff was in occupation of the suit land with the permission of the defendant. That on this ground alone, his claim for adverse possession must fail. The defendants' counsel relied on the case of Francis Waweru Mwangi Versus Samuel Kirumba Kariuki & Another (ELC NO. 48 of 2917(OS) and Khairunnisa Momamedali Harunani & another Versus Nirayan Zaverchand Shah & 3 Others (2015)EKLR.
51. It was further submitted that there is evidence to show that the suit land was subdivided and transferred following completion of a Succession Cause relating to the estate of the deceased defendant. That the deceased defendant's legal representative cannot be condemned for discharging her obligations. The defendants' counsel urged the court to find that the plaintiff having acknowledged that he was a licensee on the land has failed to meet the threshold for a declaration for adverse possession as sought and also that no trust has been established against the defendants. The defendants counsel urged the court to dismiss the plaintiff's suit with costs.



ANALYSIS AND DETERMINATION

52. Having reviewed and considered the pleadings, the evidence and the submissions, the key issue for determination is whether the plaintiff has proved a claim for adverse possession.

53. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard, the plaintiff must prove on a balance of probabilities that he has been in occupation of a portion measuring 2 acres of the suit land for a period exceeding 12 years, that such occupation was open, notorious, peaceful and continuous without interruption for the requisite period and that such occupation was adverse or inconsistent with the right of the registered owner. This is in line with the well-established principles and requirements for a claim for adverse possession as discussed by the courts.

54. The doctrine of adverse possession is embodied in Section 7 of the Limitations of Actions Act which provides as follows:-

“An action may not be brought by any person to recover land after the end of twelve years from the dated on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person”.

55. Section 13 of the same Act states as follows:-

“(1) 1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession) and where under Section 9,10,11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land”.

56. Section 17 of the same Act states that:-

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

57. Further Section 38 of the [Limitation of Actions act](#) provides as follows:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.



58. In addition, order 37 rule 7 of the Civil Procedure Rules provides that:-

- “(1) An application under Section 38 of the [Limitation 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”.

59. In this case, it is the plaintiff's case that he purchased 2 acres from Elijah Nkubitu (PW2) out of Land Parcel No. Kiirua/Kiirua/227 in the year 1976 and that he was put in possession immediately after the sale. That his brother and advocate Ayub Mbaya Mwongera (Deceased) also bought 9 acres from the same person. However, upon subdivision and transfer both the portions purchased were combined in one subdivision being Parcel Kiirua/Kiirua/324 which was registered in the name of Ayub Mbaya Mwongera (deceased). Mwongera died before excising the two acres which the plaintiff claims are his. On his death, Ayub Mbaya Mwongera's wife filed Succession Cause no. 350 of 2006 and distributed the land to the beneficiaries of the estate of the deceased including the two acres which the plaintiff claims he bought and was in occupation of since 1976. Prior to the death of Ayub Mbaya Mwongera the plaintiff filed Meru Chief Magistrate Case NO. 80 of 1995 which however abated before determination on merit.

60. It is not in dispute that land in dispute LR. No. Kiirua/Kiirua/324 being a subdivision of Kiirua/Kiirua/227 was registered in the name of Ayub Mbaya Mwongera (deceased) on 3/4/1976. By then the plaintiff was in possession and occupation of a portion thereof measuring two acres. The plaintiff is now claiming the said two acres by way of adverse possession. From the material on record, the defendants acknowledge that the plaintiff was in possession and occupation of the suit land. Indeed, the defendants termed the plaintiff a trespasser and through their advocate wrote to him on 22nd June 2011 asking him to vacate from the land. The plaintiff's evidence is that he entered the land in the year 1976 and remained thereon until he was forcefully evicted in 2012. The plaintiff's evidence was corroborated by the evidence of Elijah Nkubitu (PW2) the original owner of the land who confirmed that the plaintiff entered the land in 1976 immediately after the sale with him. Nancy Karugu Mbaya the 1st defendant and who testified for the defendants as the only witness stated that she did not know when the plaintiff entered the land. In my view therefore, the plaintiff's contention that he entered the land in 1976 has not been challenged at all.

62. In this case, the defendants allege the plaintiff was a trespasser. It therefore means that the plaintiff was in possession and occupation of the land without the authority of the owner and his possession was adverse. There was no explanation given by the defendants why the plaintiff was permitted to occupy and utilize land which was registered in the name of Ayub Mbaya Mwongera (deceased) from 3/4/1976 until he was forcefully removed in 2012. The defendants have submitted that the plaintiff was in occupation of the land with the permission of PW2. However, the suit herein which is a claim for adverse possession is against Ayub Mbaya Mwongera (Deceased) the then registered owner of the land. In this case the plaintiff has not sued Elijah Nkubitu and therefore the alleged defence of permission cannot, in my view be of assistance to the defendants' in this case. The plaintiff's occupation and possession of the land from 1976 up to 2011 or 2012 or even 1995 was adverse to the rights of Ayub Mbaya Mwongera (Deceased) the registered proprietor of the land. From the pleadings and evidence, it is clear to me that the plaintiff was on the land without the permission of the deceased as the registered proprietor of the land and the deceased and the defendants never took any steps to remove the plaintiff



from the land before the expiry of 12 years. A person alleging a right of title on adverse possession must show by clear and unequivocal evidence that his possession was not permissible, open and with the knowledge of the true owner and excluded the true owner from the enjoyment of his property. In this case, the plaintiff's claim was initially against Ayub Mbaya Mwangera (now deceased) as the registered proprietor of the suit land LR. No. Kiirua/Kiirua/324 and later the defendants herein who acquired the land through transmission. Therefore, as the case was not against Elijah Nkubitu where a defence of permission could have been raised, the defence on that ground must fail.

63. In the case of *Mtana Lewa Versus Kahindi Ngala Mwangandi* [2015]eKLR, the court of appeal stated as follows:-

“adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya is twelve (12) years. The process Springs into action essentially by default or inaction of the owner.....”

64. In this case, the registered owner of the suit land Parcel No. Kiirua/Kiirua/324 was Ayub Mbaya Mwangera as at 3/4/1976. The evidence on record clearly indicates that the plaintiff was in occupation of the suit land from 1976. It has not been shown that the plaintiff had the permission of Ayub Mbaya Mwangera (Deceased) to remain in possession and occupation from 1976 until 2011 or even until 1995. The defendants, as owners of the suit land, never asserted their right to remove the plaintiff for all those years, which is a period in excess of 12 years. Indeed, there is no claim filed by the defendants including a counter-claim in this suit, to have him legally removed and restrained from using the land. Even if there was a claim in my view, the plaintiff's claim for adverse possession had crystalized and any such claim would have been time barred. It is also necessary for a person claiming ownership under adverse possession to show a belief held, even where the belief is untrue, as to his entitlement to the property. IN this case, the plaintiff believed he purchased the land and same was his. However, it is clear from the material on record that the title is not in the name of the alleged seller but in the defendants' name.

65. From the material presented before this court, I find and hold that the plaintiff has on a balance of probabilities proved that he is entitled to 2 acres out of the suit property. Whereas the defendants have argued that the suit land has been sub-divided and transferred following completion of a Succession Cause relating to the estate of the deceased defendant, it is my view that such argument cannot assist the defendants since adverse possession is a right over the land and not the title. As at the time the land was sub-divided and transferred, the plaintiff's right had accrued. Indeed the probate court in Succession Cause No. 350 of 2006 acknowledged that the plaintiff's rights to the two acres remained undetermined. The same has now been determined in this case.

66. In the result, I find that the plaintiff has on a balance of probabilities proved that he had adversely remained in possession and occupation of 2 acres of the suit property for a period in excess of 12 years to the exclusion of Ayub Mbaya Mwangera (Deceased) who was the registered owner of the land. The defendants as registered owner(s) have certainly lost their right over the said 2 acres and the plaintiff has now acquired prescriptive rights over the same by way of adverse possession.

67. Consequently, I enter judgment for the plaintiff against the defendants jointly and severally as follows:-

- a. A declaration that the plaintiff has acquired 2 acres of Kiirua/Kiirua/324 (now 14040/1405/1406,1407,1408 & 1409) by way of adverse possession.



- b. An order is hereby made directing the defendants to excise and transfer 2 acres of Kiirua/Kiirua/324 (1404 – 1409) to the plaintiff.
- c. In the event of failure by the defendants to sign all relevant documents to facilitate sub-division and transfer of the 2 acres as stated in (b) above, the Deputy Registrar of the Court is authorized to sign the same.
- d. Permanent injunction restraining the defendants and/or their agents and/or servants and/or anybody else acting on their behalf from interfering with the plaintiff's quiet and peaceful possession, user and occupation of the 2 acres of the suit land.
- e. Costs of the suit to be borne by the defendants.

68. Orders accordingly.

Dated signed and delivered at Meru this 8th day of February 2024.

Hon. C. Yano

ELC – Judge

In the presence

Court Assistance: Kiragu

Ringera for defendants

Ms. Gikundi holding brief for Ms. Kiome for plaintiff

5

ELC NO. 60.2011

JUDGMENT

