Chege & another v Kamau & another (Enviromental and Land Originating Summons E010 of 2023) [2024] KEELC 1825 (KLR) (4 April 2024) (Judgment)

Neutral citation: [2024] KEELC 1825 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E010 OF 2023

LN GACHERU, J

APRIL 4, 2024

BETWEEN

JACOB EDWARD MAINA KARIUKI CHEGE ..... 1ST PLAINTIFF

KEZIAH NJERI CHEGE ..... 2ND PLAINTIFF

AND

MARTHA WANGARI KAMAU ..... 1ST DEFENDANT

PATRICK KARANJA KAMAU (SUING AS LEGAL REPRESENTATIVES OF FRANCIS KAMAU EZEKIEL) ..... 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated 13th April 2023, the Plaintiffs herein Jacob Edward Maina Kariuki Chege, and Keziah Njeri Chege, have sued the Defendants herein, Martha Wangari Kamau and Patrick Karanja Kamau, for the following prayers;

    1. A declaration that the title of Francis Kamau Ezekiel(deceased), being 0.9 acres in title No. Loc 12/ sub loc 1/ 2174, has been extinguished and now belongs to the Plaintiffs;

    2. An order do issue requiring and directing the Land Registrar Muranga to register 0.9 acres in land parcel no Loc 12/ Sub Loc 1/ 2174, now registered in the name of Francis Kamau Ezekiel(deceased), in of Jacob Edward Maina Kariuki Chege and Keziah Njeri Chege;

    3. That the costs of the suit be borne by the Defendants.

2. The instant Originating Summons is based on the following grounds;

    a. That the Plaintiff's father now deceased in an agreement in writing dated 10th October 1997, bought 0.9 acres out of land parcel Loc 12/ Sub Loc 1/ 2174, for ksh 210, 000/=, and the Plaintiffs have been on the said land since then, and have had quiet uninterrupted possession.;

b. That the Plaintiffs have been in occupation and use of the said land since year 1997, and have enjoyed uninterrupted quiet possession of the same.

3. This Originating Summons is supported by the Supporting Affidavit of Jacob Edward Maina Kariuki Chege, who averred that he bought 0.9 acres from Francis Kamau Ezekiel, in the year 1997, from land parcel No. Loc 12/ Sub Loc 1/ 2174, and has been in occupation since 1997, a period of 26 years. He further averred that he has been in occupation and has been cultivating the said land exclusively. Further, that he has enjoyed quiet possession of the said 0.9 acres, for over 12 years, and has acquired the said land by adverse possession.

4. It was his contention that he has sued the Defendants as the Legal Representatives of the Estate of Francis Kamau Ezekiel(deceased), since they have not transferred the land to him. He urged the court to allow his claim.

5. In their claim, the Plaintiffs also attached the witness statements of Jacob Edward Maina Kariuki Chege and Keziah Njeri Chege, both Plaintiffs. The Plaintiffs also attached lists of documents, being the Certificate of Official Search, the Sale Agreements and Grant of Letters of Administration in support.

6. The Defendants herein opposed the Originating Summons, through the Replying Affidavit of each of them. The 1st Defendant Martha Wangare Kamau, filed her Replying Affidavit dated 3rd July 2023, and denied that she is the registered owner of the suit land, nor the Legal Representative of the estate of the registered owner, and therefore the suit against her is a non- starter.

7. It was her contention that she was not privy to the purported sale agreement and she could not sell that which did not belong to her. She contended that the sale agreement was a figment of the fertile imagination of the Plaintiffs herein. It was her allegations that the Plaintiffs have never used and/ or occupied the suit land at all.

8. In his Replying Affidavit Patrick Karanja Kamau, the 2nd Defendant, averred that the instant Originating Summons is misconceived, vexatious and is a blatant abuse of the Court process. He urged the court to dismiss it, as the Originating Summons herein does not raise plausible cause of action against him.

9. He also averred that the 2nd Plaintiff has no locus standi in the matter as she has not sworn any Affidavit in support of her alleged claim, and since parties are bound by their claim, the 2nd Plaintiff's claim cannot stand.

10. Further, he averred that his late father did not enter into a sale agreement with the Plaintiffs herein and that the purported sale agreement is not legally binding, as it does not comply with the law.

11. It was his allegations that the Plaintiffs herein have never been in occupation of the suit land, and they have not been utilizing the same. He claimed that the purported sale agreement and the translation thereon are at variance and this can be construed to mean the Plaintiffs are up to some mischief.

12. He deposed that going by the material before the court, the Plaintiffs are not entitled to the prayers sought and their suit should be dismissed with costs. He urged the court to dismiss the instant Originating Summons.

13. The Defendants attached their witness statements to their Pleadings in opposition to the instant claim.

14. After the Pre- trials, the matter proceeded for hearing via viva voce evidence. The Plaintiffs gave evidence through the 2nd Plaintiff Keziah Njeri Chege, and closed their case. The 1st Plaintiff had speech

impairment and could not give evidence in court. The Defendants gave evidence for themselves, and called no witness.

Plaintiffs' Case

15. PWI, Keziah Njeri Chege, the 2nd Plaintiff gave evidence and adopted her witness statement and that of 1st Plaintiff dated 13th April 2023. She relied on the said statements entirely. She also produced a list of documents as P.EXHIBIT 1.

16. It is her evidence that Jacob was her husband and is the 1st Plaintiff, but he cannot speak now. She told the court that she was giving her evidence on her behalf and that of her husband, the 1st Plaintiff.

17. She testified that she knew the Defendants herein as the 2nd Defendant and her husband sold the suit land to them at ksh. 210,000/= in the year 1997. That immediately after purchase and

    signing of the Sale Agreement. The Plaintiffs paid Ksh. 159,000/= to the Defendants and the balance was ksh. 51,000/=, which was to be paid after visiting the Land Control Board.

18. Further, that they have been cultivating the purchased portion of land from 1997, and have never been evicted. She also testified that the Defendants moved to Nyahururu, and later the husband to 2nd Defendant died and was buried in Nyahururu, and that the Defendants do not live on the suit land, but they live in Nyahururu.

19. On cross exam by counsel for the Defendants, she stated that they bought the suit land on 10th October 1997, and it is about 0.9 acres. She insisted that the said land was sold by Mr and Mrs Francis Kamau Ezekiel, but they did not finalize the said sale transaction since the vendors refused to attend the Land Control Board for consent.

20. Further, she admitted that she has a balance of Ksh. 51,000/=, and that she entered into the suit land on the date of the purchase, and she has built a house thereon, where she prepares tea for her workers.

21. She confirmed that she had not produced any evidence to confirm her occupation of the said house. She also told the court that Martha Wangare Kamau, 1st Defendant was present when she bought the land, and she paid the land in cash.

22. Further, she identified her sale agreement in court which had her signature thereon. However, the sale agreement does not show that she paid the money in cash and there was a balance of ksh. 51,000/=.

23. In Re- exam, she stated that the amount of money is indicated in the sale agreement, and the amount that she paid is included in the sale agreement.

24. The 1st Plaintiff could not testify since after the court assessed him through asking him a few questions, he could not express himself coherently and seemed to forget what he wished to tell the court. He forgot the words. The Plaintiffs case was consequently closed with evidence of PW1 only.

Defendants' Case

25. DW1, Martha Wangare Kamau, told the court that she is from Nyahururu area and is a peasant farmer. She identified her witness statement dated 4th July 2023, which she adopted as her evidence in chief.

26. Further, she stated that she knows the Plaintiffs as they are from the same village in Kangema. She denied ever selling the suit land to the Plaintiffs, and she further stated that they did not receive the alleged purchase price. She also denied ever signing the sale agreement specifically in October 1997.

27. It was her further evidence that her husband did not sell the suit land to the Plaintiffs, and she never heard him talk about the said sale of the suit land to the Plaintiffs. She also denied that the Plaintiffs are the ones using the suit land, and if they do, they are trespassers to their land.

28. Upon cross exam by counsel for the Plaintiffs, she stated that when she went to visit her suit land, she found the Plaintiffs using it, wherein they had planted maize, beans and other subsistence crops, but they were not cultivating the whole land.

29. Further, that she reported the matter to the Chief of Kangema area, and the Chief gave her a note to take to the Plaintiffs, but the Plaintiffs continued to trespass on her land.

30. She confirmed that her husband was buried in Nyahururu, because that is where they live, and she knows nothing about the sale agreement. She denied that she ever signed the said sale agreement. Further, that she has never used the suit land after moving to Nyahururu. She denied ever allowing the Plaintiffs to use the suit land.

31. On Re- exam, she said the signature on the sale agreement is not her signature and that she did not sign the purported sale agreement.

32. DW2, Patrick Karanja Kamau, told the Court that he lives in Nairobi. He identified his Replying Affidavit dated 3rd July 2023, which he adopted as his evidence in chief, together with his witness statement.

33. He testified that he saw the Plaintiffs on the suit land when he visited the said land which is at Kangema with his mother. It was his evidence that they visited the suit land in 2022, though they had not been in the land before. That he found the Plaintiffs using the land in 2022, but previously, they used to check on it.

34. It was his evidence that he knows nothing about the sale agreement, and he reported the matter to the chief of the area, but he did not know the action that the chief took.

35. On cross exam by counsel for the Plaintiffs, he admitted that he has never used the suit land as he had lived in Nyahururu since 1997. Further, he testified that he was born on the suit land in 1992, but moved to Nyahururu, when he was 5 years old.

36. It was his evidence that he used to visit Kangema area and check on the suit land often, and then in 2022, he found the 2nd Plaintiff cultivating the suit land. That when the 2nd Plaintiff saw her, she ran away, although she had cut the trees which were planted by his brother in 2009.

37. It was further his evidence that the Plaintiffs cut down all their trees and also destroyed the coffee bushes, and they have not been able to get the land back from the Plaintiffs. That they have reported the matter to the chief, and then the Plaintiffs alleged that the said land is owned by them since 1997.

38. Upon Re- exam he stated that the trees that have been left on the land are less than 20 in number, and there is nothing else on the land.

39. After the cross of viva voce evidence, parties filed written submissions. The Plaintiffs filed their submissions on 8th November 2023, through Karuga Wandai & Co Advocates, and submitted that they have proved their case on the required standard, and they urged the court to allow their claim.

40. Further, the Plaintiffs submitted that from the available evidence, the Defendants do not leave on the suit land, as they sold the suit land to the Plaintiffs and moved to Nyandarua, where they live todate. That the Defendants did not leave anyone to take care of the land for 26 years, because they sold the land to the Plaintiffs.

41. It was further submitted that there is sufficient evidence which evidence was admitted by the Defendants that the Plaintiffs live on the suit land. Further, that the 2nd Defendant is a young man who has never lived on the suit land, and his parents did sell the suit land to the Plaintiffs, and the Plaintiffs have lived on the suit land for more than 26 years.

42. On their part, the Defendants filed their written submissions on 4th December 2023, through Mwaniki Warima& Co Advocates, wherein they submitted that the Plaintiffs have failed to prove their case on the required standard and urged the court to dismiss their case.

43. It was the Defendants submissions that since a claim for adverse possession seeks to extinguish title of the registered owner, the Plaintiffs needed to prove that the suit land is owned by the Defendants through production as the certified extract of title as provided by Order 37 rule 7 of the Civil Procedure Rules.

44. For the above submissions, the Defendants relied on the case of Kiprono Arap Soi vs Peter Murmumet Tompoi& Anor(2016) eklr and Titus Kasuve vs Mwaani Investment Ltd & 4 Others (2004) eklr.

45. On whether the Plaintiffs purchased the suit land, it was submitted that there was no consent from the Land Control Board and failure to have it rendered the transaction a nullity. Reliance was placed in the case of Elizabeth cheboo vs Mary Cheboo Gimyigei, Civil Appeal No. 40 of 1978, where the court held; failure to get the Land Control Board Consent renders the agreement void and no specific references can be granted".

46. It was also submitted that the Plaintiffs testified that they entered into the suit land as a result of sale agreement, and therefore that entry was permissive and adverse possession cannot succeed. For this, they relied on the case of Mombasa Teachers Cooperative Savings & Credit Society ltd vs Robert Muhambi Katana & 15 others (2018) eklr, where the court stated;

> " likewise, it is well settled that a person seeking to acquire title to land by adverse possession must prove non- permissive or non- consensual, actual, open, notorious, exclusive and adverse use/ occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi, nec clam, nec precario"

47. On whether the Plaintiffs have met the threshold for grant of the orders for adverse possession, the Defendants submitted that there was no evidence that the Plaintiffs have been in possession and occupation of the suit land, and if they have entered into the suit land, the said entry was not open.

48. Reliance was placed in the case of Samuel Miki Waweru vs Jane Njeru Richu Civil Appeal No, 122 of 2001, where the Court of Appeal held;

> " .....it is trite in law that a claim for 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 the agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu vs Kirpal (1975) E.A 225, possession does not become adverse before the end of the period for which permission to occupy has been granted"

49. Further, it was submitted that there has been no dispossession of the Defendants by the Plaintiffs as was held in the case of Wambugu vs Njuguna, Civil Appeal No. 10 of 1992, where the court held;

> " the appellant must have an effective right to make entry and to recover possession of the land in order that the statue may begin to run. He cannot have that effective right if the person

in occupation is there under a contract, or other valid permission or licence, which has not been determined"

50. They also submitted that the Plaintiffs have not availed credible evidence to prove that they been in possession of the suit land since 1997 and they are therefore not entitled to a claim of adverse possession as their occupation and utilization has not been proved. That the Plaintiffs have not been in exclusive possession and utilization of 0.9 acres out of land parcel No Loc 12/ sub Loc 1/ 2174.

51. Consequently, the Defendants urged the court to dismiss the Plaintiffs suit with costs, since the same has not been proved.

52. The above is the summary of the Pleadings herein, the available evidence and exhibits produced thereto, the rival written submissions and the cited authorities, which this court has carefully read and considered. The court too has considered the relevant provisions of law and renders itself as follows; -

53. There is no doubt that the claim herein is for adverse possession. The Plaintiffs have alleged that they got into possession of the suit land by virtue of purchase of 0.9 acres of the suit land. The Plaintiffs attached sale agreements for 1997. It was the Plaintiffs evidence that the purchase price was ksh. 210,000/=

54. It also evident that this claim is brought under Order 37 Rule 7 of the Civil Procedure Rules which provides that; an application under section 38 of the *Limitation of Actions Act* shall be made by an Originating Summons; the Summons shall be supported by an Affidavit to which certified extract of title to the land in question has been annexed.

55. Of importance is annexing of a certified extract of the title to the land in question. The importance of annexing such extract of title is for confirmation of ownership of the suit land. A claim of adverse possession is brought against the registered proprietor as the Defendant, seeking to have the said proprietor's title extinguished by prescription or effluxion of time. For the court to issue such declaration, ownership has to be ascertained through production of certified copy of the title to confirm that the Defendant is indeed the proprietor.

56. The Plaintiffs herein have not produced the certified copy of title for the suit land. The provision of 0rder 37 rule 7(b) of the Civil Procedure Rules is couched in mandatory terms. Without production of such certified copy of the title, this court can safely find that the Plaintiffs have missed a mandatory requirement. See the case of Aloise Kariuki Ireri Vs. Jackson Ngari Nthia & Another (2010) eKLR, where the Court stated;

> " the law is very clear on this point....Order xxxvi Rule 3D(2) which is a applicable in this case clearly states;
>
> > "the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed"
>
> See also the case of Kasuve Vs Mwaani Investments Ltd & 4 others (2004) eKLR, where the Court of Appeal held that certified copies of the extract of title had to be annexed to the Originating Summons and certificates of title annexed thereon could not suffice.

57. However, the court has noted that the Plaintiffs did attach a Certificate of Official Search dated 5th February 2001, which search was conducted more than 20 years from the date of filing the suit herein. The Court is not sure who is the current registered owner as at 27th April 2023, when the suit herein was registered. However, the Defendants have not denied the proprietorship is in the name of Francis Kamau Ezekiel, as stated in the Certificate of Official Search produced by the Plaintiffs.

58. This Court will take refuge in section 35(1) & (2) of the *Land Registration Act*, to the effect that the certificate of official search produced in court by the Plaintiffs was a prima facie evidence of the contents of the documents. The said sections provides;

> 35. (1) Every document purporting to be signed by a Registrar shall, in all proceedings, be presumed to have been so signed unless the contrary is proved.
>
> (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.

59. Therefore, this court finds and holds that the suit land is registered in the name of Francis Kamau Ezekiel(deceased) since 1996. The Plaintiffs have produced Letters of Administration dated 9th May 2022, which shows that Patrick Karanja Kamau, the 2nd Defendant is the legal Administrator of the estate of the said Francis Kamau Ezekiel.

60. It is also evident that adverse possession attaches to the land and not title. See Civil Appeal No 164 of 2011;- Gachuma Gacheru Vs Maina Kabuchwa [2016] eKLR where the Court held that; "Adverse possession is a fact to be observed upon the land. It is not to be seen in a title"

61. Having dealt with the preliminaries, the court finds that the single issue for determination is ; whether the Plaintiffs have established the threshold for a claim of adverse possession, and whether they are entitled to the prayers sought.

62. The Plaintiffs claim is for adverse possession, which is a method of gaining legal title to real estate of another person by being in actual, open, hostile and continuous possession of the said land to the exclusion of the true owner for the period prescribed by the law. In Kenya, it is for a period of 12 years, as provided by the *Limitation of Actions Act*, Cap 22 laws of Kenya.

63. Further, adverse possession is one of the methods of acquisition of land as provided by Section 7 (d) of the *Land Act*, which states;

> Methods of acquisition of title to land
>
> Title to land may be acquired through—
>
> (a) allocation;
>
> (b) land adjudication process;
>
> (c) compulsory acquisition;
>
> (d) prescription;
>
> (e) settlement programs;
>
> (f) transmissions;
>
> (g) transfers;
>
> (h) long term leases exceeding twenty-one years created out of private land; or
>
> (i) any other manner prescribed in an Act of Parliament.

64. Section 7 of the *Limitation of Actions Act*, provides

> " Actions to recover land an action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

65. Further section 13 of the same ACT, provides;

> " Right of action not to accrue or continue unless adverse possession
>
> 1. A right of action to recover land does not accrue unless the land is in the 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 sections 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 adverse 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.

66. Again section 17 of the *Limitation of Actions Act* provides;

> " Title extinguished at end of limitation period
>
> 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."

67. And finally, section 38(1) and (2), provides;

> " Registration of title to land or easement acquired under Act,
>
> 1. 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 registered 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.
>
> 2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act."

68. It is evident that the combined effect of the above sections is to extinguish the title of a proprietor of land in favour of the claimant for adverse possession after expiring of 12 years of occupation, which the claimant must avail sufficient evidence to prove it.

69. Section 28(h) of the *Land Registration Act*, has also recognised the overriding interests on land, which are rights attached to land and where there is prove of existence of such overriding interests, the title of the proprietor can be extinguished.

> "28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register
>
> .....
>
> .....
>
> (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

70. What is evident is that right to adverse possession does not accrue automatically, and section 38 of *Limitation of Actions Act*, gives authority to the claimant to apply to court for orders of adverse possession. Such claimant has to assert his right through bringing a claim in court through an Originating Summons, such as what the Plaintiffs herein have done. See the case of Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR where the Court held;

> "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. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

71. The burden of proof for a claim of adverse possession is upon the person claiming, as provided by sections 107, 108 and 109 of the *Evidence Act*. Since the claim is to extinguish the title of a proprietor, such burden is high, and such claim is proved by way of facts, through calling of sufficient evidence. It is not just enough to say that one has been on the suit land for a period of 12 years. Section 107 of the *Evidence Act*, provides; -

> "(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any facts it is said that the burden of proof lies on that person."

72. There are plethoras of decided cases to support the above holding that the burden of proving a claim of adverse possession lies with the Plaintiff. See the case of Gabriel Mbui vs Mukindia Maranya (1993) eklr, where the court held;

> "The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by adverse possession (Mamuji v Dar [1935] 2 E A CA 111, Bwana v Ibrahim (1948) 15 EACA 7; and Forbes, JA, in Abdulkarim and another v Member for Lands and Mines and

another 1 [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner."

73. Further, in the case of Kasuve vs Mwaani Investments Ltd & 4 Others (2004) eKLR 184, the Court of Appeal held as follows;

> " 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 without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation"

74. For this court to determine whether the Plaintiffs have proved their case, this court must answer these questions;

i. how did the Plaintiffs acquire the suit land;

ii. how did the Plaintiffs enter into the suit land;

iii. what was the nature of the holding;

iv. how long have they been in possession?

75. In the case of Mbira vs Gachuhi (2002) 1 EALR 173, the court stated as follows;

> " ...a person who seeks to acquire title to land by the land method of adverse possession for the applicable statutory period, must prove non-permissive 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..."

76. This court has been guided enough by the decided cases. It is evident that the suit land is registered in the name of Patrick Kamau Ezekiel, now deceased, but represented by Patrick Karanja Kamau, the 2nd Defendant herein. The suit land is in Kangema area, while the Defendants live in Nyahururu. It was the evidence of both Parties herein that the Defendants initially lived in Kangema area, but later moved to Nyahururu in 1997.

77. The Plaintiffs alleged that the 1st Defendant and her husband Patrick Kamau Ezekiel sold the suit land to the Plaintiffs herein and thereafter they moved to Nyahururu, after entering into a sale agreement and receiving part of the purchase price. The full purchase price was alleged to be ksh. 210,000/=, wherein the Plaintiffs paid ksh. 159,000/= and the balance of ksh, 51,000/= was to be paid upon acquiring the Land Control Board Consent. However, the alleged sale agreements do not contain such condition. There is a default clause of refund of ksh.420,000/= in the event of failure to abide by the said agreement.

78. The Defendants have denied selling the suit land to the Plaintiffs herein. The 1st Defendant, Martha Wangare Kamau, denied signing the purported sale agreement. The available evidence are the words of the Plaintiffs against the words of the Defendants. The Plaintiffs are the one who have claimed and therefore, they ought to have called further evidence to support their claim.

79. A glean at the sale agreement dated 6th December 1997, shows that there was a witness by the name of Harun Irungu, who witnessed and signed the said agreement. The Plaintiffs never called him as a witness or explain to court why they could not call him as a witness. The Defendants have denied ever allowing the Plaintiffs to use the suit land at all. At least the Plaintiffs should have called independent witnesses from their neighbourhood who could have given evidence of whether indeed Plaintiffs are in possession and occupation of the suit land through purchase. Even the local administration should have been in the know, about the alleged sale of the suit land and also the alleged occupation and possession of the same by the Plaintiffs herein.

80. The evidence of purchase of the suit land by the Plaintiffs from the Defendant is not clear. Even if there was purchase, and the Defendants allowed the Plaintiffs to enter into the land, take possession and utilise the same, then their entry was by consent and has never been hostile. See the case of Samuel Miki Waweru vs Jane Njeri Richu (2007) eklr, where the court held;

> "....it is trite Law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise."

81. For a claim of adverse possession to attach, the entry into the suit land must be without the permission of the owner, and without force or secrecy as described in the Latin Maxim of nec vi, nec clam, nec precario. See the case of Eunice Karimi Kibunja vs Mwirigi M'ringera Kibunja(2013) eklr, where the Court of Appeal held;

> "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 apparent dispossession of the land from the owner. These elements are contained in the Latin phraseology nec vi, nec clam, nec precario.."

82. Having noted that the purported entry of the Plaintiffs was allegedly through purchase, and therefore permissive, then on the face of it, a claim of adverse possession cannot attach. However, courts in this country have variously held that once the last instalment has been paid, then time start running and the holding and possession of purchaser becomes adverse to the title of the vendor. See the case of Simon Nganga Njoroge vs Daniel Kinyua Mwangi (2015) eklr, where the court while applying the principles espoused in the case of Wambugu vs Kamau(1989) KLR 173, where the court held;

> "...where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession(like the Plaintiff herein has done), the rule is ; the claimant possession is deemed to have become adverse to that of the owner after the payment of the last instalment of purchase price and that the claimant will succeed under adverse possession upon occupation for the last 12 years after such payment...."

83. In this case the Plaintiffs have alleged that they paid part payment of the purchase price, but remained with a balance of ksh. 51,000/=, which was to be paid upon acquisition of the Land Control Boards Consent. Therefore, the last instalment has never been paid and time never started to run for the

purpose of computing time for prove of adverse possession. See the case of Wanyoike v Kahiri [1979] KLR, at page 239, where Justice Todd (as he then was), held that;

> " in a purchase scenario, the period of limitation starts to run on the date of the payment of the last instalment of the purchase."

84. Even if the last instalment had been paid, which has not, then the Plaintiffs needed to prove that their holding of the suit land is open, exclusive and has dispossessed the owner of the said land. See the case of Sisto Wambugu Vs Kamau Njuguna (1983) eklr, where the court held;

> " in order to acquire by statute of limitation title to land that 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 the enjoyment of the soil for the purpose of which he intended to use it"

85. The Plaintiffs herein needed to prove that they are in occupation of the suit land, and that their action of being in possession has dispossessed the owners of their parcel of land. How could they prove such? The Plaintiffs ought to have produced photographic evidence of their activities on the suit land, which activities would prove or show that they are inconsistent with the registered owner's possession of the same. The Plaintiffs did not avail such evidence, and the court cannot find and hold that they are in such open, and actual possession.

86. The Defendants alleged that they have been visiting the suit land to check on it, that they planted different trees, which the Plaintiffs destroyed in the year 2022. As the court stated earlier, the neighbours in this area and even the local administration know the truth, and this court should have been allowed the benefit of one such witness who is on the ground. Since adverse possession is proved through facts and evidence, the Plaintiffs should have called some of them to support their claim that indeed in 1997, the Defendants sold their land to the Plaintiffs and relocated to Nyahururu. This was not done.

87. Further, the Plaintiffs should have availed a Report of the Land Valuer to confirm that the Plaintiffs do utilize the 0.9 acres of the suit land and they have been in possession and use, and the evidence of such use and possession ought to have been attached to the said Report. None was availed, and this court cannot hold and find that the Plaintiffs have been in possession of the suit land for period of over 12 years, and that their possession and activities thereon are inconsistent with the owner's possession, and therefore, the owners have been dispossessed and has discontinued their possession.

88. The Plaintiffs had submitted that the Defendants did admit in their testimony that they moved to Nyahururu in 1997, and they never left the land under anybody's care. The fact that the Defendants moved to another County and left the land un- utilised did not mean that they had abandoned it. The Defendants told the court that they discovered about the Plaintiffs occupation of the land in the year 2022. For adverse possession to attach, the occupation of the claimant must be open, with the knowledge of the owner, who then fails to assert his right within the prescribed time. Such occupation should not be in secret. See the case of Samuel Kihamba vs Mary Mbaisi (2015) eklr, where the court held;

> " open and willing dispossession has been interpreted to mean that the owner has knowledge, whether actual knowledge or not, or means of having that knowledge of the occupation of his or her property by the claimant"

89. Having carefully considered the available evidence, the court finds that the Plaintiffs herein have failed to prove all the ingredients for a claim of adverse possession. If their entry was through purchase, then it was permissive, and could only have become adverse upon payment of last instalment. It is trite that occupation of land by consent or licence does not accrue any right of adverse possession on the claimant. (See the case of Mwinyi Hamisi Ali vs Attorney General & Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997).

90. The Plaintiffs testified that the last payment is not yet paid. Further, there is no evidence of actual, open and exclusive possession, which possession could have dispossessed and discontinued the owners enjoyment of the suit land.

91. For the above reasons, the court finds and holds that the Plaintiffs have failed to prove their case against the Defendants on the required standard of balance of probabilities.

92. Consequently, the court dismisses the Plaintiffs suit entirely which is brought vide an Originating Summons dated 13th April 2023. The instant Originating Summons is dismissed entirely with costs to the Defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 4TH DAY OF APRIL, 2024.

L. GACHERU

Judge.

Delivered Virtually in the presence of; -

Mr Karuga Wandai for the 1st Plaintiff and 2nd Plaintiff

M/s Waititu for the 1st Defendant and 2nd Defendant

Joel Njonjo – Court Assistant

L. GACHERU

JUDGE

4/4/2024.