



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NYAHURURU

ELC NO 89 OF 2017

(FORMERLY NAKURU 358 OF 2013)

JOHN KIMINI KAMUTU.....PLAINTIFF

VERSUS

JOSEPH MACHARIA NGUNJIRI.....1st DEFENDANT

NATHAN NGURUIYA GITONGA.....2nd DEFENDANT

FRANCIS WACHIRA MARANO.....3rd DEFENDANT

NDIANGUI NGINGA K.....4th DEFENDANT

JUDGEMENT

1. The Plaintiff's suit was filed at the Environment & Land Court then sitting at Nakuru vide an amended Originating Summons of the 24th July 2014. The said Originating Summons was accompanied by a Notice of Motion Application both filed on the 24th July 2014 where the Plaintiff sought the determination of the following questions:-

- i. Whether the Plaintiff has acquired title by Adverse Possession over LR No. Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 which are a subdivision of LR No. Nyandarua/Aberdare Forest North Block 1/822.
- ii. Whether the title deeds for LR No. Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 should forth with be cancelled and revert to LR No. Nyandarua/Aberdare Forest North Block 1/822.
- iii. Whether LR No. Nyandarua/Aberdare Forest North Block 1/822 should forthwith be registered in the names of the Plaintiff and the 1st Defendant be ordered to sign all the necessary transfer instruments and in default the Executive Officer of the Court be authorized to sign the same
- iv. Who should bear the costs of the suit.

2. Vide the aforementioned Notice of Motion Application, the Plaintiff sought interim injunctive orders restraining the Defendant/Respondent by himself and/or his assigns from evicting them or having any transaction or dealing with the suit land pending the hearing and final determination of this suit.

3. On the 12th February 2014, directions were taken that the Originating Summons be disposed of by way of oral evidence.

4. On the 23rd September 2015, parties recorded a consent to maintain the status quo maintaining on the suit properties, pending hearing of the suit and further, that the suit be determined by viva voce evidence upon compliance with the provisions of Order 11 of the Civil Procedure Rules.

5. Upon the Plaintiff having confirmed compliance, the matter was fixed for hearing on the 19th June 2018 when the Court had been informed that despite service, neither Counsel for the Defendant nor the Defendant had turned up to defend their case. Counsel for the Plaintiff sought that the matter proceeds for hearing ex-parte, pursuant to the provision of Order 12 Rule 2 of the Civil Procedure Rules.

6. The Court obliged him after confirming that a proper hearing notice had been effected upon Counsel for the Defendant.

7. The Plaintiff herein took to the witness stand where he testified that he was the proprietor of land measuring 12 acres which he had balloted for and was issued in the year 1978 through shares of Gatarakwa Farmers Company Ltd, herein referred to as the Company. He produced the ballot paper dated the 10th December 1977 as Pf exhibit 1.

8. He proceeded to testify that after balloting for the land, he had taken possession of and occupied it with his wife and children after a surveyor called Kamau, who had been employed by the Company had identified the same. That in the year 1978, he had proceeded to build his house, keep cattle and plant trees on 6 acres which he had fenced before he subsequently started to utilize the whole 12 acres.

9. He testified that he had fully repaid the loan to the Company as evidenced by receipts which he produced as Plaintiff exhibits 2(a-f) in the following sequence:

- i. receipt dated 26/3/1979 for Ksh 1,220/=
- ii. receipt dated 31/5/1979 for Ksh 2,440/=
- iii. receipt dated 31/5/1979 for Ksh 280/=
- iv. receipt dated 9/11/1979 for Ksh 400/= for two cows and two calves
- v. receipt dated 26/3/1979 for Ksh 140/=
- vi. receipt for November 1986 for Ksh 1,490/=

10. That in the month of February 2013, Mr. Macharia Ngunjiri, the 2nd Defendant whom he had not known before and who was in the company of his daughter and other people had gone to his home wherein the said Defendant's daughter had started abusing him telling him that the land was theirs.

11. That after abusing him they had left and he had gone to the Land's office where he had conducted a search and found that one part of his land measuring 6 acres where he had built his house had been grabbed by the 2nd Defendant. He informed his advocate of the same. He produced the Official search dated 26th March 2013 as PF Exhibit 3 and a green card dated 9th May 2013 as Pf exhibit 4.

12. It was his evidence that as soon as he had bought the land in 1978, he had taken possession of the same being registration No. Nyandarua/Aberdare Forest North block 1/832 and that even upon the passing away of two of his daughters and his son's wife, he had buried them on the suit land. He produced the death certificate for Josephine Wambui who died in the year 2007 and was buried on the suit land as Pf Exhibit 5(a), the death certificate for Monica Wanjiru, his son's wife who had died on 26th July 2002 and was also buried on the suit land as Pf exhibit 5(b). He proceeded to testify that during the burial, nobody had complained or filed any suit against him.

13. He also produced a photograph showing his homestead as Pf exhibit 6 (a) and a photograph showing the 3 graves near his house as Pf exhibit 6 (b), as well as a photograph showing the vegetation and trees on the land parcel as Pf exhibit 6 (c).

14. His further testimony was that after the year 2013, the Defendant had gone to his land again and had had him arrested, wherein his Advocate had secured his release after which he had placed a Caution on the land on the 8th March 2013. That the Defendant had subsequently secured another title deed from the land's office where he had then sub- divided 6 acres of the suit land into 5 portions and sold the resultant parcels to third parties.

15. That the resultant 5 portions were referenced as No. 2131–2135 and the persons who had bought the said resultant parcels were the 3rd and 4th Defendants wherein the new titles had been issued on the 17th February 2014, while the case was still pending in court and the caution was still in place.

16. That since he took possession of the suit land, he had not moved from the same. That save for 2nd Defendant who was his neighbor and who knew that he was the proprietor of the suit land, the rest of the Defendants lived in Nairobi.

17. He produced the official search for the subdivision of parcels no 2131-2135 as PF exhibit 7 (a-e) and a letter evidencing that he had been given the land, dated the 27th February 2013 as Pf exhibit 8.

18. His prayer to the Court was to have the resultant titles cancelled and his land returned to him.

19. He denied ever having appeared with the 1st Defendant for a case before a Disputes Tribunal in the year 2008 and even when he was referred to Tribunal Disputes Proceedings of 2008, he denied ever attending to such proceedings. He also denied ever receiving Ksh 5,000/- from the 1st Defendant so that he could leave the suit land.

20. In the end, he sought for costs of the case.

21. The Plaintiff's Counsel then marked their case as closed and submitted that although the Defendants had filed a Replying Affidavit to the Originating Summons, yet in view of their absence for the hearing, that their case be marked as closed too. The defence case was marked as closed.

22. Before the Plaintiff could file their written submission, they filed and served an Application dated the 24th October 2018 seeking to re-open their case so as to enable them file and produce the green cards for LR No Nyandarua/Aberdare Forest North block 1/2130 – 2135.

23. There having been no opposition to the said Application, the same was allowed unopposed and the Plaintiff's case was re-opened wherein the Plaintiff was recalled and on the 7th May 2019 and he proceeded to testify that although the green card to parcel No LR No Nyandarua/Aberdare Forest North block 1/2130 was missing despite a search from the Land Registrar, yet he had managed to secure 5 green cards to land parcels No Nyandarua/Aberdare Forest North block 1/2131-2135 which he produced as Pf exhibit 9 (a-e) and closed their case.

Plaintiff's Submissions.

24. The Plaintiff's issue for determination was whether he had acquired a title over the suit property by Adverse Possession. After summarizing the evidence on record, it had been submitted that after the Plaintiff had taken possession of the suit land in 1978, he had enjoyed quiet and uninterrupted possession until the year 2013, some 35 years later, when the 1st Defendant showed up in his compound claiming ownership. That although he had proved ownership of the land, his only mistake had been the delay in procuring the title deed wherein the Defendant had taken advantage and had acquired the title on 16th June 1987 but had neither taken possession nor developed the property.

25. That the law, under Section 28(b) of the Land Registration Act allowed a squatter or a trespasser, who had occupied land to claim interest on the same in cases where the land owner had failed to secure their eviction within a certain period of time.

26. That pursuant to the provisions of Sections 7 of the Law of Limitation Act, after title had been issued to the 1st Defendant, the time for dispossession begun to run from the date he had obtained his title. In this case the 1st Defendant had obtained title on the 6th June 1987 and therefore time began to run from that date, and his rights to possession over the land lapsed on 16th June 1999 which was 12 years from the date he had acquired interest.

27. The Plaintiff laid down the requirements that one needed to meet in order to prove Adverse Possession to wit:

i. The actual possession of the land and the requisite intention to process animus possidendi. That in this case, the Plaintiff had fenced the suit land, cultivated on the same and reared cattle therein.

ii. Open enjoyment, possession that is notorious to the world at large.

iii. The intention of animus possidendi involved the intention to possess and not to dispossess the owner. That in the instant suit, the Plaintiff herein took possession of the suit land lawfully and he had no intention to dispossess the owner herein being the 1st Defendant.

iv. Possession must be adverse and the stay peaceful and uninterrupted. That the Plaintiff had no legal title to the suit land yet he had been living on the same consistently and peacefully since the year 1978. The interruption only came about in the year 2013.

v. The Stay must be continuous for 12 year. That in this case, the Plaintiff had lived on the land for more than 35 years.

vi. That where the owner had a future use for the land in mind, even if he could prove that it existed, the intension of the squatter was the one to be considered.

28. That the Plaintiff having met all the above requirements, he had thus acquired the suit property by Adverse Possession. The Plaintiff relied on the decided case of **Jane Wanjiru Kamau vs Bensomn Wamai [2008] eKLR** to buttress their submissions.

29. The Plaintiff's further submission was that the provisions of Section 7 of the Limitations of Actions Act also provided that an action to recover land could not be brought after the expiry of 12 years from the date upon which the right accrued as was held in the Case of **Gulam Miriam Noordian vs Charo Karisa [2015] eKLR**.

30. They further submitted that the suit property should forthwith be registered in the names of the Plaintiff where the Defendant should sign all necessary instruments, and in default, the Executive Officer of the Court to sign the same.

31. The Plaintiff's submission was that upon discovering that the 1st Defendant had subdivided the suit property and was bent on disposing the same, he had placed a caution on the property on the 4th August 2013, but this did not deter the 1st Defendant who proceeded to dispose the resultant sub divisions to the 2nd, 3rd and 4th Defendants and that despite there being a caution in place. That by this time, the 1st Defendant and no right to pass regarding the suit land and therefore the Plaintiff could still be registered as proprietor of the suit land despite the title having changed as he had acquired good title over it. He relied on the case of **Jane Wanjiru Kamau vs Benson wamai [2008] eKLR** in his submission.

Determination.

32. Suffice to note that although Counsel for the Defendants had filed his defence and had even been served with the hearing Notice, he and his clients, the Defendants herein, chose to keep away and not to avail any evidence in defence on the day the matter was scheduled for hearing, whereby the court proceeded with the Plaintiff's case ex-parte as per the provisions of Order 12 Rule (2) (a) of the Civil Procedure Rules.

33. Upon consideration of the Plaintiff's evidence, his submissions as well as the documents produced in evidence, the law applicable and the authorities herein cited, I find the issues arising herein for determination as being;

i. Whether the Plaintiff is entitled to the possession and legal ownership of the suit land Ref No.. Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 which are a subdivision of LR No. Nyandarua/Aberdare Forest North Block 1/822 vide the principle or claim of Land through Adverse Possession.

34. The doctrine of Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

'An action may not be brought by any person to recover land after the end of 12 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'.

35. Section 13 of the Limitation of Actions Act aforesaid further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.

36. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court Order vesting the land in him.

37. Section 37 of the Limitation of Actions Act provides that:

Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement 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.

38. In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by Adverse Possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner.

39. The Plaintiff has instituted the present Originating Summons in which he has asked the Court to declare him as the absolute owner of parcel of land known as Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 which are a subdivision of LR No. Nyandarua/Aberdare Forest North Block 1/822 having taken possession of the same since the year 1978.

40. The law in respect to Adverse Possession is now settled. For one to succeed in a claim of Adverse Possession (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

"Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

41. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by Adverse Possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it

42. As was stated by the Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:**

"The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land."

43. The onus is on the person or persons claiming Adverse Possession:

".. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration"

44. The main the elements of Adverse Possession that a claimant has to prove include :

i. actual,

ii. open,

iii. exclusive

iv. and hostile possession of the land claimed.

45. Has the Plaintiff herein demonstrated the said elements

46. The facts upon which the claim for Adverse Possession is made is that the Plaintiff herein who had shares in Gatarakwa Farmers Company Ltd balloted for the suit property measuring 12 acres, on the 10th December 1977 and was issued with the same. That after he had off set the loan owed to the Company, he took possession of the suit land and moved therein with his family where he settled in the year 1978 and proceeded to fence 6 acres where he put up his house, kept cattle and planted trees and further, that he had even buried some of his kin on the land. That later he had also started to utilize the other 6 acres making it a total of 12 acres of land in which he was in possession and occupation. The Plaintiff did not procure title deed to the suit land.

47. It was the Plaintiff's contention that since he took possession of the suit land in the year 1978, he had been in open, peaceful and uninterrupted occupation only for the 1st Defendant to resurface in the year 2013 which was about 35 years later, claiming ownership of the suit land.

48. That consequently he had placed a caution on the suit land which the 1st Defendant had disregarded, subdivided the land and sold it to the 2nd, 3rd and 4th Defendants herein.

49. That in accordance with the common law doctrine of Adverse Possession, the 1st Defendant's title to the land had been extinguished, he had no title to pass and that he (Plaintiff) ought to be registered as the owner of the subject said parcel of land.

50. I have however gained sight of the search certificate dated the 26th March 2013 and the green card produced as Pf exh 3 and 4 respectively and note that the suit land herein Reg No Nyandarua/Aberdare Forest North Block 1/822 had been registered to the 1st Defendant on the 16th June 1987 and a title deed issued thereafter. This was after the Plaintiff had already balloted for, discharged the loan to the land and settled on it. The 1st Defendant having acquired proprietorship of the suit land on the 16th June 1987, therefore constituted the Plaintiff a trespasser or squatter there being no evidence of fraud adduced as to the said registration.

51. The time to dispossess the suit land from the Plaintiff began running on 16th June 1987 according to the provisions of Section 7 of the Limitation of Actions Act herein above mentioned, and stopped after 12 years which was on the 16th June 1999 as rightly stated by the Plaintiff.

52. Indeed it is in evidence that from the time the Plaintiff occupied the suit property, he had engaged in acts that were inconsistent with the 1st Defendant's title, for instance putting up a fence on the suit property, building of his houses, planting trees, cultivating and even burying his kin thereon. There is nothing to suggest that that occupation was secret or that it was not known to the 1st Defendant. The fact that the Plaintiff had extensively developed the suit property is a demonstration of animus possidendi, (intention to possess) a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the 1st Defendant's rights. The 1st Defendant was, as such dispossessed of the suit premises by those acts. The Plaintiff's acts were *nec vi, nec clam, nec precario* (that is, neither by force, nor secretly and without permission).

53. The Court of Appeal in **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** reminded themselves of the rationale of acquiring land by Adverse Possession as explained in the decision in **Adnam v Earl of Sandwich (1877) 2QB 485** that:

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at 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”

54. It follows therefore that by the time the 1st Defendant subdivided the suit land and sold it to the 2nd, 3rd and 4th Defendants who were subsequently registered as proprietors of the resultant parcels of land being No. Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 as is evidenced by Pf exhibit 9(a-e), the 1st Defendant's interest to the suit land had been extinguished and he therefore had no title to pass.

55. I find and hold that the Plaintiff has proved on a balance of probabilities that his right of action as against the 1st Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of Section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

56. In the circumstance herein the Plaintiff's Originating Summons dated the 9th May 2013, amended on 24th July 2014 and filed on the equal date succeeds with the following orders;

i. The Plaintiff herein has acquired title by Adverse Possession over LR No. Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 and 2135 which are a subdivision of LR No. Nyandarua/Aberdare Forest North Block 1/822.

ii. The title deeds for LR No. Nyandarua/Aberdare Forest North Block 1/2130, 2131, 2132, 2133, 2134 are herewith cancelled and revert to LR No. Nyandarua/Aberdare Forest North Block 1/822.

iii. LR No. Nyandarua/Aberdare Forest North Block 1/822 should herewith be registered in the names of the Plaintiff wherein 1st Defendant shall sign all the necessary transfer instruments and in default, the Deputy Registrar of the court be authorized to sign the same

iv. The Plaintiff shall have the cost of the suit.

57. It is so ordered.

Dated and delivered at Nyahururu this 6th day of May 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE