



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC NO 211 OF 2017

(Formally Nakuru ELC No. 212 of 2015)

PETER NGURE MACHARIA.....PLAINTIFF

VERSUS

PATRICK GAIITHO MACHARIA.....DEFENDANT

JUDGEMENT

1. The Plaintiff 's suit was filed at the Environment & Land Court then sitting at Nakuru vide an Originating Summons dated the 23rd July 2015 and filed on the 24th July 2015 wherein the Plaintiff sought for the following orders:-

- i. A declaration do issue that the Plaintiff has become entitled to be registered as proprietor of Title No. Nyandarua/Shamata/1305 measuring 2.126 hectares by virtue of the doctrine of Adverse Possession.
- ii. That the honorable Court's Deputy Registrar be authorized to execute all the necessary documents to facilitate transfer of Title No. Nyandarua/Shamata/1305 in favour of the Plaintiff.
- iii. Costs of the suit be provided for.

2. On 12th August, 2015, the Defendant entered appearance wherein he filed his Replying Affidavit on the 8th September 2015.

3. Directions were taken on the 7th November 2016 to the effect that the case do proceed by way of viva voice evidence wherein the Originating Summons and Supporting Affidavit were to be deemed as the Plaint and the Replying Affidavit a defence. Subsequently upon the establishment of the Environment and Land Court in Nyahururu, the matter was transferred therein where it was registered with it's present number and parties re-took directions that the Originating Summons and Supporting Affidavits to be deemed as the Plaint and witness statements respectively, while the Replying Affidavit be deemed as the defence statements. The matter was to proceed by viva voice evidence.

4. On the 24th May 2018 the Plaintiff testified as PW1 to the effect that he was a farmer, kept cattle and used to farm pyrethrum, that further, he and the Defendant were siblings whose parents were now deceased.

5. That their mother had a plot No. 151 in Shamata Settlement Scheme within Ndaragwa in Nyandarua County. That the said land had been sub divided whereby he and his siblings, save for the Defendant herein, got their respective shares.

6. He testified that he lived on plot No. 1305 which he bought from his brother the Defendant in April 1986 for a sum of Ksh. 68,250/= being Ksh 13,000/= per acre wherein they had recorded a sale agreement which was written by one Macharia Mbugua, his nephew and son to Raphael Mbugua.

7. It was his evidence that in the year 1996, his brother got title to that land and took the sale agreement with the sole purpose of transferring the land to him which was never to be.

8. The Plaintiff testified that at the time the Defendant bought the land from one Moses Matu Wachira in the year 1983, he used to live in Kericho and that after having purchased the land, he had gone back to Kericho. That prior to buying the land from his brother, he used to live with his mother wherein after the purchase in 1986, he had taken possession in the year 1987.

9. His evidence was that he had paid the Defendant the full sum of Ksh 68,250/= in cash and in the presence of their parents, and that one Ndirangu and Peter, Kagia had been present when he bought the land wherein they had all signed the agreement. He testified that initially the

Defendant had given him and his 5 siblings (brothers) the land to farm on but after he bought the same, he had asked his brothers, to stop farming and he had started constructing on the land in the year 1986.

10. That initially, he had built a 3 bedroomed mud house with corrugated iron sheets, but in the year 2014 he built a 5 bedroomed timber house. That he had also planted trees and fenced the land with a barbed wire whereupon he had installed piped water. That in 2006, he had buried his daughter Margaret Wangechi Ngure on that land where he had lived in peace up to the 12th January 2013 when the Defendant and other people had invaded his land, destroyed his fence and driven away his cattle.

11. That the Defendant had then filed a Criminal Case against him where had had been charged at the Nyahururu Law Court. That in a subsequent case filed in Nakuru vide No. 224 of 2013, the Defendant had sought to evict him from the land. That the said case had been transferred to Nyahururu Magistrate's Court where it had been registered as Nyahururu PM's Court No. 27 of 2014. His testimony was that he had refused to move from that land because it was his property having lived there since the year 1987. His prayer to the Court was that the land be transferred to him and he be issued with a title deed.

12. He produced photographs as Plaintiff exhibit 1(a-i) to show the developments he had carried out on that land. The said photographs included the following:

- i. 1st photo showing his store
- ii. 2nd photo showing his 2nd house (5 roomed house)
- iii. 3rd photo showing his blue gum trees
- iv. 4th photo showing a mixed species of trees that is Cyprus, vine and blue gum)
- v. 5th photo showing a pit latrine
- vi. 6th photo showing fruits- peas and plums
- vii. 7th photo showing Cyprus trees
- viii. 8th photo showing pine and Cyprus trees which were at the boundary of the land
- ix. 9th Photo showing pears and a cow that had been tethered thereon

13. He also produced as Pf exh 2 (a) and (b) photos showing his brothers including the Defendant (2nd from left) during the burial of his daughter Margaret Wangechi who was buried on the suit land, attached to the photo was her death notification dated 4th October 2007. He produced the burial Certificate as Plaintiff exh 3.

14. Further he produced the pleadings where he was charged in Nakuru Court in No. 224/2013 as Plaintiff exhibit 4 and a copy of the register to the suit land (green card) showing that the Defendant had been registered as the proprietor on 3rd December 1996, as Pf exhibit 5.

15. The Plaintiff testified that it was not true that the Defendant had given him the suit land to look after it for him and reiterated that after they had ploughed the same with his brothers, he had subsequently bought it in the year 1986 wherein his brothers had moved out. He further stated that it was not true that the mud house on the land had been built by the Defendant but by one Simeon Mwita.

16. The Plaintiff testified that he had not been summoned before a Chief or District Officer and that the Criminal Case had been dismissed. That it is was not true that the Defendant had given him a license to live on the suit land. He testified that all his witnesses to the agreement, were now deceased.

17. That the agreement had been witnessed by independent people to whom the Defendant had not objected to at the time. That he had been able to pay for the land as from the farm produce money.

18. That the Defendant had not permitted him to bury his daughter on the land because he was the owner of land and therefore needed no permission. The Plaintiff sought for orders as prayed in the Originating Summons as well as costs of the suit.

19. In Cross examination, the Plaintiff reiterated his evidence in chief and added that he had entered on that land peacefully where he had ploughed with his brothers for 3 years with the Defendant's permission. That later he had bought the land and therefore was not in possession of the same with permission. He testified that he did not have the agreement, because the Defendant had taken his copy. That their parent's land measured approximately 15 $\frac{3}{4}$ acres whereby he had received 2 $\frac{3}{4}$ acres as his inheritance.

20. That the Defendant had bought the suit land measuring 5 $\frac{1}{4}$ acres from Moses Matu Wachira for Ksh 9,000/= per acre, towards the end of 1982.

21. He further confirmed that he had 3 dairy cows, and ploughed on 4 acres of his mother's land where he had planted pyrethrum. That he had sold 1 kg of pyrethrum at the cost Ksh 32/= to the Co-operative Society wherein he was paid Ksh. 2,000/= each month, money which he

had saved at KCB bank.

22. That subsequently, he had closed the account and since he had no use of the saving book or the banking slips, they had got lost. He confirmed that the Defendant tried to evict him in the year 2013 wherein he had filed suit in the year 2015. That he built many houses on the land and that further that he could not remove the developments on the land because it was his land. That he had not written a formal letter to the Defendant requesting for the title, because he was his brother and they used to talk by word of mouth.

23. That only one witness out of the people who had witnessed the signing of the agreement was still alive the rest having died. He stated that he was not ready to leave the land even if the Court found that he should move out because he had lived there for many years.

24. PW2, testified to the effect that he had known the Plaintiff since the year 1987 when he bought plot No 212 in their area which was known as Karandi in Shamata Settlement Scheme. That the suit land initially belonged to one Matu Wachira wherein the Plaintiff and his 4 brothers used to plough around the year 1984. That later his brothers went away and left Ngure on the land where he had helped him build a 3 bedroomed mud house with an iron sheet roof.

25. That the Plaintiff, whom he referred to as Ngure lived in the house with his family. He confirmed that the Plaintiff had fenced the land, kept cattle and had installed piped water and even planted Cyprus and blue gum trees as well as fruits. That later the Plaintiff had demolished the mud house and built a timber house.

26. He confirmed that he had never seen the Defendant live on that land. That from the year 1986 to 1987, no other person had been using the land and that he knew the Plaintiff, who was the chairman of the village in the sub location for 16 years, as the owner of the land. That he had recently come to know the Defendant, who used to live in Kericho and that he had his land across the hills far from where he and the Plaintiff lived. He also confirmed that the Plaintiff's daughter called Phyllis Wangechi had been buried on the suit land.

27. In cross examination he confirmed that initially the Plaintiff and his brothers had been ploughing the suit land and that the first house had been built thereon in the year 1987. He also confirmed that he did not know who the registered proprietor was and that further that he did not know how the Plaintiff acquired the suit land. That at the time all the brothers were ploughing the land there had been trees on the far end of the land which occupied $\frac{1}{8}$ of the land which measured about $5\frac{3}{4}$ acres in total although he was not sure of the exact acreage. The Plaintiff then closed it case.

28. The Defendant testified as DW1 and adopted his Replying Affidavit sworn on the 26th August 2015 and filed on 8th September 2015 as his evidence to the effect that he lived in Shamata in Mwioko location and was a retired primary school teacher. He confirmed that the Plaintiff was his elder brother and that they lived in the same area.

29. He further testified that he did not sell the suit land to the Plaintiff. That he had bought the land Reg. No. Nyandarua/Shamata/1305 with 34 tress thereon between the year 1983 and 1984 from one Moses Matu Wachira, for Ksh. 43,210/=. That he used to work in Kericho at the time and had allowed his 5 brothers Raphael Mbugua, Muchoki Macharia, Mwangi Macharia and Njonjo Macharia, including the Plaintiff, who lived with their mother, to use the land. That in the cause of ploughing, they had informed him that the land was far from their mother's house wherein he had built for them a temporary 3 roomed house on the land. The Plaintiff had then moved into that house, married a wife and chased away his other siblings, destroying all their crops in the process.

30. That when he came back from Kericho, the Plaintiff had sought for his permission to live on the land and since he had nobody to look after the same, he had allowed the Plaintiff to stay on it pending the subdivision of their mother's land.

31. That after their mother passed away in the year 2010, they had filed a Succession Cause where her land had been subdivided in the year 2012. That on the 30th November 2012, he had issued Notice to the Plaintiff to leave his land as he had wanted to take possession of the same in January 2013. That on 12th March 2013, he had sent his sons to plough the land alongside other persons who were to help them wherein upon arrival therein, the Plaintiff had attacked them and even caused injury to others which had then prompted them to procure P3 forms and file suit at Nyahururu Court. The matter did not proceed as the file got lost. That he then decided to file civil suit in Nyahururu PMCC being No. 224/2013 to have the Plaintiff evicted from his land.

32. That he had testified in that case but while the matter was still pending, he had been informed that the Plaintiff had filed the present suit. The matter in the Chief Magistrate's Court was stopped so that the present case could proceed. That he had not been informed why the matter in the CM's Court had been halted.

33. That although he had allowed the Plaintiff to take possession of his land, the permission had ended on the 30th November 2020 wherein he had given him notice to vacate on the 30th November 2012 but the Plaintiff had not responded to the notice. He denied ever selling the land to the Plaintiff or having had any agreement with him.

34. He testified that he did not know any Macharia Mbugua. That his nephew had witnessed him buy the land. He confirmed that the title deed to the land herein produced as Df exh 1, had been issued to him on the 3rd December 1996 that the Plaintiff had started staying on the land in the year 1986, that he had built the house in the year 1985. He also produced the photocopy of the agreement, the original agreement having been produced in the Civil Case No. 224/2013, as Df exh 2(a) in (Kikuyu language) and the translated version as DF Exhibit 2 (b).

35. The Defendant proceeded to testify that the Plaintiff had been his witness to the agreement when he bought the land which was paid for in installment, the first installment being Kshs. 38,000/- and that there had been 34 trees on the land at the time he had bought it.

36. That the Plaintiff had destroyed the trees, they had planted together wherein he had planted other trees. That he had made a loss of Ksh 10,000/= which he would have made upon the sale of the tress.

37. That he had allowed the Plaintiff to build the house on the land because their mother had taken long to subdivide her land and the building materials would have been spoiled. That the pictures produced in the Court by the Plaintiff had been modified. That he had not allowed the Plaintiff to plant the Cyprus trees. That they had mixed the trees when they were planting and he had not counted them.
38. He acknowledged that Margaret Wangechi Ngure was the Plaintiff's child, and that they had agreed that she was to be buried on their mother's land in the family cemetery, but the Plaintiff had refused and had instead dug a grave at a place of his choice. Their mother had been upset and had asked him to bury his daughter elsewhere wherein he had asked the Defendant to allow him to her on his land.
39. He conceded that although their mother's land measured about 15 acres, he had no share thereon but that the Plaintiff had 2 ¼ acres therein although he did not know who was utilizing the same and therefore he had a place to go were the Court to evict him. He sought that the Plaintiff goes back to his land so that he could utilize the suit land with his sons. He also sought for cost of this case as well as for mesne profit for the time the Plaintiff had utilized his land.
40. When cross-examined, the Defendant confirmed that he had bought the land which had 64 trees. That there were other smaller trees which were not counted. That they had planted trees on ¼ acres with the Plaintiff. That after the Plaintiff entered upon the land, he (Plaintiff) had cut down the trees without his knowledge and not shared the proceeds with him.
41. That upon the Plaintiff getting onto the suit land in 1986, he had chased away their brothers claiming ownership to the land.
42. That he had left Kericho between the years 1992 and 1993 but had not taken possession of the suit land because he had another land in Kericho. That further they had agreed with the Plaintiff that upon the subdivision of their mother's land, the Plaintiff would leave his land.
43. He confirmed that he had not planted the fruit trees on the land and that the Plaintiff had brought piped water thereon because he could not live without water. He also confirmed that there had been a case filed in Nakuru which was later transferred to Nyahururu being case No. 224/2013 where there had been a witness called Muchoki Machari Mbugua who could tell why they had been chased away by the Plaintiff. He denied ever having entered into any agreement with the Plaintiff who had started being aggressive in the year 2013 when he had informed him that he had wanted to take possession of the land and that was why he had gone to Court seeking for his eviction.
44. DW2 one Muchoki Macharia Mbugua testified that he lived in Shamata and that he was a farmer. He went on to testify that both the Plaintiff and the Defendant were his brothers. That the suit land No. Nyandarua/Shamata/1305 measuring 5 ¼ acres belonged to the Defendant who had bought it from Moses Matu in the year 1983 through a sale agreement. That the Defendant has been issued with a title. That thereafter, his bothers, Peter, Raphael, George and Peter Mwangi and himself had been granted permission by the Defendant to plough the land to help themselves.
45. That they had started ploughing the land from the year 1984 to 1988. That in the year 1987, the Defendant, Patrick Gaiho had started destroying their property. That after the Plaintiff built a house, the Defendant then moved onto the land and destroyed their maize and pyrethrum. His evidence was that the Plaintiff did not buy the land from the Defendant.
46. He also confirmed that the Plaintiff was the one who had planted the trees. That he had built the house on the suit land on request by the Plaintiff. That he had not demand for payment because they had been using the land. That the material used to build the house had been bought by the Defendant.
47. He also confirmed that there was piped water on the suit land and that the Plaintiff's child had also been buried thereon, but that he did not know how the child had been buried on the Defendant's land because they had a cemetery on their mother's land.
48. When cross-examined, the witness reiterated that the Defendant had never lived on the suit land as he used to live in Kericho where he worked as a teacher, and only paid a visit to his parents when on holiday. That he had bought the land but did not transfer the same to the Plaintiff.
49. That after the Defendant left Kericho, he had come to Nyandarua in the year 1992, but had not utilized the suit land. That the Plaintiff had chased them away from the land but had not informed them that he had bought the same.
50. He confirmed to being a witness in a case that the Defendant had filed and that he had recorded a statement before M/s Waichungo Advocate where he had appended his signature.
51. He was referred to Pf Exhibit 2 wherein denied having recorded that the Plaintiff had bought the land. That after they had informed Defendant that the Plaintiff had chased them away, the Defendant had reported the issue to the District Officer who had directed the Plaintiff to move out of the land but to date, the Plaintiff was still on the land. He also confirmed that the Plaintiff had many houses on the land but that he did not know who had built them.
52. He also testified that he did not know the number of trees on the suit land but that they were many and that they had been planted by the Plaintiff. He also confirmed that the Plaintiff's daughter had been buried on the suit land and that he did not know whether the piped water had been put thereon by the Plaintiff, but that at the time they had been on the land, they used to get water from the neighbors since they were not living on the land.
53. In his examination in chief, DW 2 reiterated that they had been to see the Chief in the 1980's and the District Officer's in the year 2014. That the Plaintiff had claimed to have bought the land but when the District Officer asked for the agreement, he did not have it. The Defence closed the case and parties filed their written submissions.

Plaintiff's written submissions.

54. After summarizing the prayers sought in the Plaint as well as the evidence adduced both for the Plaintiff and the Defendant, the Plaintiff framed his issues for determination as follows:

- i. Whether the Plaintiff is entitled to be registered as the owner of LR no. Nyandarua/ Shamata/1305 by way of Adverse Possession
- ii. Who should bear the cost of this suit?

55. On the first issue for determination, the Plaintiff's submission was that the law on Adverse Possession was found in sections 7, 13, 17 and 38 of the Limitation of Actions Act.

56. That in the decided case of **Mtana Lewa vs Kahindi Ngata Mwangandi [2015] eKLR** the elements of Adverse Possession pursuant to the provisions of sections 7, 9, 13, 17 37 and 38 of the Limitation of Actions Act had been summarized therein.

57. That in the present case, it was not in dispute that the Plaintiff and his brothers had first entered onto the suit land and started using it with the permission of the Defendant. The question to be asked therefore was when this license expired and the possession became adverse.

58. It was their submission that the Adverse Possession started running in April 1986 when the Plaintiff purchased the suit land from the Defendant and took possession thereof. That there is no doubt that the Plaintiff was in exclusive possession of the suit land from the aforesaid date as was verified by the witnesses thereto, and in particular when the Plaintiff stopped his other brothers from accessing the land and moved his family thereon.

59. That the Defendant's actions and omissions also strengthened the Plaintiff's claim that he was a purchaser for value. The Defendant bought the land in 1984 while he was working as a teacher in Kericho. He however moved to Shamata in the aftermath of the 1992 post-election violence, but of interest is that he did not move his family onto the suit land despite there being a house which he claimed to have built thereon. Instead, he had bought another property within the same locality and settled his family there.

60. Further, that the Defendant had never utilized the suit land despite it being in the same area where he had settled. That despite being aware of the massive developments that the Plaintiff had embarked on and the undertaking on the suit land, the Defendant had not stopped him this despite stating that the permission he had given to his brothers had been for the purpose of crop farming only. That the Defendant's actions were not actions of a diligent and reasonable land owner.

61. The Plaintiff placed their reliance on the decided cases of **Public Trustee vs Wanduru Negwa [1984] eKLR** where the Court of Appeal had an occasion to discuss the question of when time started running for a purchaser in possession of the land, to which they came to an anonymous conclusion that time started running the moment the purchaser came into exclusive possession of the land.

62. That even assuming that the Plaintiff was not a purchaser for value, his claim was still qualified to be termed as an adverse possessor as far back as the year 1987 when he had informed his brothers that he was the sole owner of the suit land and barred them from cultivating on the same. That the only action that the Defendant had taken was to report the matter to the area chief. It was therefore the Plaintiff's submission that when a licensee exceeded the terms of a license, usurped the role of the actual owner and declared to all and sundry that he was now the owner of the property in question, he could no longer be termed as a licensee as he was now a person who had asserted a hostile title and disposed the true owner.

63. That the Defendant's license to his brothers was limited to only crop farming but the Plaintiff's activities on the suit land however went beyond farming to the effect that he planted trees built houses, connected piped water to the land and even buried his daughter on the land. His activities were therefore akin to those of an owner exercising and/or asserting his rights over his land.

64. Most importantly, the Plaintiff's occupation of the land went to the exclusion of all the others including the Defendant. A mere licensee would not and should not have been able to keep out the true owner of the land from his land.

65. That way back in the year 1988, the Defendant was aware of the fact that the Plaintiff had been claiming to be the land owner as evidenced in the pleadings produced as Pf exh 2 being pleadings in Nakuru High Court No. 227 of 2013.

66. That even upon being summoned before the Chief in 1988, the Plaintiff had refused to relinquish the suit land whereby the Defendant did not institute legal proceedings immediately.

67. That even after the Defendant had acquired the title deed in December 1996, he did not institute eviction proceedings against the Plaintiff even when the Plaintiff had never acknowledged him as the owner of the suit land. The Defendant only filed suit to evict the Plaintiff in the year 2013 by which time the said suit for eviction was statute barred by virtue of the provisions of Section 7 of the Limitation of Actions Act because the Plaintiff had already acquired prescriptive rights over the suit land.

68. The Plaintiff's final submission was that he had proved on a balance of probability that he had been in exclusive possession of the suit land for a period exceeding 12 years, the said possession was hostile to the registered owner's title, that the possession had not been achieved through violence, that the owner of the land had been aware of the said possession. The Plaintiff had thus acquired prescriptive rights over the suit land and was thus entitled to be registered as the owner of land Ref No. Nyandarua/Shamata/1305 by way of Adverse Possession.

69. The Plaintiff made reference Section 27 of the Civil Procedure Act to submit that they had proved their case on a balance of probability and therefore deserving of the costs.

Defendant's submission.

70. The Defendant, after a summary of the evidence adduced, framed his issues for determination as follows;

- i. Whether the Plaintiff is entitled to be registered as the proprietor of all parcels of land known as Nyandarua/Shamata/1305 by way of Adverse Possession as a purchaser.

71. Their legal and factual analysis was whether the Plaintiff's use and occupation on the suit land was adverse to the Defendant's proprietary rights or whether the Plaintiff was a legal licensee occupying the suit land with the consent of the Defendant.

72. That the law under Section 107 of the Evidence Act was clear on the onus of proof to the effect that he who alleges must prove. That it had been the Plaintiff's prayer that he be declared as proprietor of the suit land by way of Adverse Possession by virtue of his narrative that he had purchased the suit land from the Defendant. That despite the Defendant having denied that fact, it was therefore trite law that parties are bound by their pleadings and hence for the purpose touching on the instant suit, the Plaintiff ought to be treated as a purchaser of the suit land.

73. They relied on the decided case in **Malawi Supreme Court of Appeal in Malawi Railways Ltd vs Nyasulu [1998] MWSC 3** which was quoted with approval for an article by Sir Jack Jacob entitled 'The present importance of Pleading', published in 1960 in 'Current legal problems' at page 174.

74. They also relied in the Ugandan Court of Appeal judgment in the case of **Libyan Arab Uganda Bank For Foreign Trade and Development & Another vs Ada Vassiliads [1986] UG CA 6** cited with approval the dictum of Lord Denning in **Jones vs National Coal Board [1957] 2 QB 55** as well as the Nigerian Supreme Court decision in **Adetou Oladeji (NIG) Ltd vs Nigeria Breweries PLC SC 91/2002** to submit that the Court holds the Plaintiff as a person claiming Adverse Possession premised on the alleged purchase of the suit land from the Defendant.

75. The Defendant submitted that for a claim of 'Adverse Possession' to succeed, the Applicant ought to prove that he had had an non-permissive or non- consensual actual, open, notorious, exclusive and adverse use of the land in question for the statutory prescribed period without interruption. They relied on the decided case of **Mbira vs Gachuhi [2002] IEALR 137 and Jandu vs Kirplal & Another [1975] EA.**

76. The Defendant submitted that it was imperative to note that for a claim of Adverse Possession to succeed the Applicant must prove three important facts to which;

- i. That entry to the land in question was adverse and non-permissive but nonetheless without use of force.
- ii. That the Defendant did not issue a notice to vacate to Plaintiff.
- iii. That the possession was for an uninterrupted period of 12 years.

77. It was their submission that a purchaser for value or an alleged purchaser of a suit land could not claim that the entry and possession of the suit land was adverse since the same was precedent by a contract of sale that permitted or consented to the use and possession of the suit land by the Defendant.

78. That it was therefore a well settled legal principle that an Applicant could not claim Adverse Possession or interest if the possession and use of the land in question was obtained through a contract of sale because there was no proof of non-permissive use of the land. They relied on the decided case in **Samuel Miki Waweru vs Jane Njeri Richu Ca No 122 of 2011** to buttress their submission.

79. The Defendant further submitted that from the facts laid down before the Court, the Plaintiff's possession to the suit land was by way of a claim of the purchase of land but nonetheless even if the Court was to hold that the alleged sale would not hold water due to the objection by the Defendant, the honorable Court's recourse then would be that the possession by the Plaintiff was as a result of the permission granted by the Defendant since the Plaintiff never objected to that fact. That permission of license to process and use the suit land granted to the Plaintiff by the Defendant was not reminiscent of any Adverse Possession and it was therefore trite to note that the adverse claim could only arise once the permission or license was revoked.

80. Reliance was placed on the case of **Sisto Wambugu vs Kamau Njuguna [1982-88] KLR 217** to submit that the Plaintiff could not claim or predicate his case on Adverse Possession wherein pleading that he had come into possession of the suit land as a purchaser since the same was contradictory, his claim should have been premised on either a claim for Adverse Possession or a purchaser for value.

81. That in the present scenario, and the Plaintiff's claim for Adverse Possession was primarily premised on the long period of stay on the suit land which long stay alone, did not entitle him to acquire the land, the doctrine of Adverse Possession. Their submission was based on the decided case of **M'mbaoni M'thaara vs James Mbaka [2017] eKLR**. The Defendant sought for the Plaintiff's case to be dismissed with costs

82. Analysis and Determination.

83. I have carefully considered the Plaintiff's claim against Defendant, the Defendant's defence herein, the evidence, submissions as well as the law applicable and the authorities herein stated. I find the matters arising for determination thereto as being;

- i. Whether the Plaintiff was a purchaser for value and therefore could not subsequently claim Adverse Possession.
- ii. Whether the Plaintiff's occupation of the suit land was with leave and license of the Defendant.
- iii. Whether the Plaintiff is entitled to the possession and legal ownership of the suit land Ref No. Nyandarua/Shamata/1305 vide the principle or claim of Land through Adverse Possession.
- iv. Who will bear the costs of the suit?

84. 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'.

85. 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.

86. 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.

87. 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.

88. 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. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:

(i) An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(ii) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

89. 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 LR No. Nyandarua/Shamata/1305 having taken possession of the same since the year 1986.

90. 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".

91. 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. See **Littledale vs Liverpool College (1900)1 Ch.19, 21**, where it was held that;

"In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it the next question, therefore, is what constitutes dispossession of the proprietor"acts must be done which are inconsistent with his (the owner's) enjoyment of the soil for the purpose for which he intended to use it."

92. 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."

93. 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”

94. 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.

95. Has the Plaintiff herein demonstrated the said elements

96. The facts upon which the claim for Adverse Possession is made is that the Plaintiff's brother the Defendant herein, who used to live in Kericho had bought the suit land from one Moses Matu Wachira in the year 1983 wherein after, he had gone back to Kericho leaving his 5 siblings (brothers) to farm on the same.

97. That later, in April 1986 the Defendant had sold to him the parcel of land for a sum of Ksh 68,250/= being Ksh 13,000/= per acre wherein they had recorded a sale agreement which was later confiscated by the Defendant on the pretext that he was to secure the land board consent for him.

98. That he immediately took possession of the land and started constructing thereon in the year 1987, wherein he had asked his brothers, to stop farming therein. They had left and he had proceeded to develop the suit land as herein above stated.

99. Thereafter the Defendant had been issued with his title deed in the year 1996 but did not take possession of the land only for him to file suit in Nakuru vide No. 224 of 2013 for the first time seeking to evict him from thereon.

100. It was the Plaintiff's contention that since the execution of the agreement of sale in 1986 and his possession thereof of the suit land in the year 1987, he had been in open, peaceful and uninterrupted occupation and the Defendant had only taken out legal proceedings in an attempt to evict him from the suit land in the proceedings of 2013 which was about 26 years later. That consequently and in accordance with the common law doctrine of Adverse Possession, the Defendant's title to the land had been extinguished and that he (Plaintiff) should be registered as the owner of the subject matter of the suit land

101. The Defendant's position on the other hand was that if the Court found that the Plaintiff was a purchaser for value of the suit land, he could not claim that the entry and possession of the same was adverse since the same was precedent by a contract of sale that permitted or consented to the use and possession of the suit land by the Plaintiff.

102. The Defendant's argument was that the Plaintiff's occupation of the suit land was as a result of the permission granted by him and that the said permission or license to use the suit land was not reminiscent of any Adverse Possession and therefore an adverse claim could not arise unless and until the permission or license had been revoked.

103. I have looked at the copy of the Green Card and Title Deed herein produced as Pf exh 5 and Df exh 1 respectively and find that at the time the Plaintiff entered into the alleged agreement for sale with the Defendant in 1986, which sale has been vehemently opposed by the Defendant, the land had not been sub-divided and was still registered to Moses Wachira as Land parcel No. Nyandarua/Shamata/ 212. The Defendant therefore had no title to pass as the suit land was registered to his name on the 3rd December 1996 by which time the Plaintiff was already in occupation and time did not stop running or interrupt. **See Githu v Ndeete [1984] KLR 776**. I also find that apart from the pleadings, no evidence was adduced informing me that the parties herein did indeed enter into an agreement for sale on any date. The above aside, I do not have any document that can term itself an agreement for sale, or indeed any document that can be said to be evidence of a transaction between the Plaintiff and the Defendant, and the terms thereof. It is trite law that if one wished to enforce an agreement for sale over land, then such transaction ought be in writing as provided for Section 3 (3) of the Law of Contract Act, which provides as follows :-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subSection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.

104. The existence of such sale agreement was denied and therefore it was incumbent on the Plaintiff to produce documentary evidence thereof.

105. There was also evidence that that no consent of the Land Control Board had ever been applied for and therefore none had been issued. It therefore goes without saying that even if there had been the sale of the suit land as the plaintiff would want the Court to believe, such sale was null and void and cannot be given effect to. This line of argument must therefore fail.

106. On the second issue as to whether the Plaintiff was in occupation of the suit land with leave and license of the Defendant, it is clear from the evidence on record that initially in the year between 1984-1985 the Defendant had permitted his siblings, the Plaintiff inclusive to plough on the suit land, that subsequently, the Plaintiff had driven away his siblings in the year 1986 wherein he had taken exclusive possession of the suit land in 1987 where he proceeded to develop it and has remained to date.

107. Indeed it is in evidence that from the time the Plaintiff occupied the suit property, that he had engaged in acts that were inconsistent with the Defendant's title, for instance putting up a fence on the suit property, building permanent houses, placing piped water, planting trees and fruits, 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 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 Defendant's rights. The 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).

108. 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”

109. It follows therefore that by the time the Defendant instituted an action in 2013, his title to the suit premises had been extinguished.

110. I find and hold that the Plaintiff has proved on a balance of probabilities that his right of action as against the 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.

111. In the circumstance herein the Plaintiff's Originating Summons dated the 23rd July 2015 and filed on the 24th July 2015 succeeds in its entirety as prayed with costs.

112. It is so ordered.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE