



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 1246 OF 2016

(FORMERLY HCCC No. 257 of 2009)

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF LR NO. CENTRAL KITUTU/DARAJA MBILI/1792 (RESULTING FROM SUB-DIVISION OF LR NO. CENTRAL KITUTU/DARAJA MBILI/1362)

JONES MOKAYA.....PLAINTIFF

VERSUS

EDWARD MOENGA NYAANGA.....DEFENDANT

J U D G M E N T

Background and the Pleadings:

1. The Plaintiff instituted the instant originating summons on 26th November 2009 claiming that he had acquired title to **LR No. Central Kitutu/Daraja Mbili/1792** a resultant subdivision from **LR No. Central Kitutu/Daraja Mbili/1362**, (hereinafter referred to as “**the suit property**”) by way of adverse possession and sought determination by the court of the following issues and grant of orders thus:-

1. A declaration that the Defendant rights to recover the whole of LR No. Central Kitutu/Daraja Mbili/1792, is barred under the Limitations of Actions Act, Chapter 22 of the Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 22 years.

2. That there be an order that the Plaintiff be registered as the proprietor of the whole of LR No. Central Kitutu/Daraja Mbili/1792 in place of the Defendant, who currently holds the title of the suit land.

3. That there be an order of permanent injunction restraining the Defendant by himself, agents, servants and/or employees from interfering with the Plaintiff’s peaceful possession and occupation of the said parcel of land, that is, LR No. Central Kitutu/Daraja Mbili/1792, in any manner whatsoever and/or howsoever.

4. Costs of this originating summons be borne by the Defendant.

5. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.

2. The Originating summons was grounded on the grounds set out on the body of the Originating Summons and on the annexed affidavit of Jones Mokaya, the Plaintiff/Applicant herein, sworn in support of the Originating Summons dated 26th November 2009. The Plaintiff’s assertion was that on or about 1st July 1987 he purchased from one Mokua Gesanda (now deceased) a portion of **LR No. Central Kitutu/Daraja Mbili/1362** measuring approximately 140feet by 66feet as per the agreement of sale dated 1st July 1987. The Plaintiff averred further that he was let into possession, fenced the property, and erected a permanent structure on the portion of land and has been in

uninterrupted occupation and possession of the portion of land since 1987. The Plaintiff contended that his possession was adverse to the rights and interests of the Defendant and that he had become entitled to be registered as the owner of the suit property by virtue of adverse possession.

3. The Defendant/Respondent swore a replying affidavit in opposition to the Originating Summons through one Jackson Maeba to whom he had donated a Power of Attorney to represent him in the suit. The Defendant vide the replying affidavit sworn on 15th June 2010 affirmed he was aware that the Plaintiff had entered an agreement of sale with Mokuia Gesanda on 1st July 1987 for the purchase of a portion of land parcel **Central Kitutu/Daraja Mbili/1362** measuring 140feet by 66feet. The Defendant further deponed that even though the Plaintiff failed to honour the contractual terms with the said Mokuia Gesanda, the Plaintiff through dubious means got the portion he had contracted to purchase transferred to him (Plaintiff) as **LR No. Central Kitutu/Daraja Mbili/1791**. The Defendant deponed that the Plaintiff has been in occupation of land parcel **Central Kitutu/Daraja Mbili/1791** and not **1792** as he claimed. The Defendant however averred that in the year 2007 the Plaintiff with the intention of grabbing a portion of the Defendant's land encroached into and fenced the portion of the Defendant's land measuring approximately 50feet by 62feet and hurriedly commenced the construction of a building thereon.

4. It was the Defendant's position that the Plaintiff had not adversely occupied and possessed land parcel **Central Kitutu/Daraja Mbili/1792** for the statutory period of 12 years so as to be entitled to the orders sought in the Originating Summons.

5. Directions were given for the Originating Summons to be heard viva voce and though hearing commenced before Makhandia, J. (as he then was), following his elevation to the Court of Appeal, the parties agreed to have the hearing start denovo. The matter was part heard before Okongo, J. before whom the Plaintiff and his one witness testified and were cross examined by the Defendant's advocate. The Defendant also testified in chief before Okong'o, J. on 8th December 2014 but was cross examined before me on 12th June 2017. The witnesses called by the Defendant (DW2 and DW3) testified before me on 27th June 2018 when the trial closed. The parties subsequently filed and exchanged their final closing submissions.

The Evidence by the Parties:

6. The Plaintiff testified that he entered an agreement of sale dated 1st July 1987 with one Mokuia Gesanda who later changed his name to Mokuol Olisanda to purchase a portion of his land **LR No. Central Kitutu/Daraja Mbili/1362** measuring 140feet by 66feet for the agreed consideration of kshs. 300,000/=. He stated he paid kshs.100,000/= in cash and that the balance of kshs. 200,000/= was to be in kind where he was to construct 8 rental housing units for the vendor. The copy of the agreement was produced as "**PEx.1**" in evidence. The Plaintiff further stated that he took possession of the land after the agreement and commenced putting a perimeter brick wall and also commenced the construction of a permanent house on the property. He stated the house was a storeyed residential housing unit. The Plaintiff referred to the photographs annexed to the supporting affidavit as "**JM6(a) and (b)**" which were produced as "**PEx.2(a) and 2(b)**" to illustrate the permanent developments he had effected on the suit property. The Plaintiff explained that the portion he purchased was never transferred to him although the subdivision of land parcel 1362 was carried out and the resultant subdivision of the portion he purchased became **Central Kitutu/Daraja Mbili/1792**.

7. The Plaintiff further testified that after subdivision land parcel **Central Kitutu/Daraja Mbili/1792** was initially registered in the name of Mokuia Gesanda on 4th December 1990 but it was later on 6th October 1997 transferred and registered in the name of the Defendant as shown in the abstract of title (green card) "**PEx.4**". It was the Plaintiff's evidence that he has been in possession and occupation of land parcel **1792** from 1987 when he purchased the portion from Mokuia Gesanda. He testified that the defendant has never occupied the suit property and that even in 1997 when the same was transferred to the 2nd Defendant, it was him (the Plaintiff) who was in possession and that he had not only fenced the property but had also constructed a permanent house thereon.

8. The Plaintiff testified that when he discovered the land had been transferred to the Defendant, he registered a restriction on 19th August 1999 claiming a purchaser's interest over the suit property. He stated that although the Defendant was registered as the owner he has never been in occupation of the land and has never interfered with the Plaintiff's possession and occupation of the land. The Plaintiff stated that his possession of the land had been open, continuous and uninterrupted since he entered into possession. He stated that at the time the Defendant got registered he (the Plaintiff) was in possession of the land, a fact that the Defendant could easily see and notice had he cared to undertake due diligence.

9. The Plaintiff stated further that although he bought another parcel of land from Mokuol Olisanda, **LR No. Central Kitutu/Daraja Mbili/1791** which was transferred to him, Mokuol Olisanda did not take him to the land control board in regard to land parcel **1792** and hence the same was never transferred to him (the Plaintiff). The Plaintiff stated that land parcel **1791** which was transferred to him was on the lower side on the Kisii - Migori Highway while parcel **1792** was on the upper side of the Highway. He said the two parcels of land are separated by the Highway as evidenced by the Registry Index Map (RIM) produced as "**PEx.6**". The Plaintiff stated he did not know how the Defendant got to be registered as the owner of land parcel **1792** and stated that by the time the Defendant was registered, he (the Plaintiff) had already been in possession of the land for 10 years and that by the time he instituted the instant suit he had been in uninterrupted possession of the land for 22 years. The Plaintiff stated that he became aware of the Defendant's registration as owner in 1999 when he was served with summons respecting a boundary dispute.

10. The Plaintiff stated that he had initially filed a suit Kisii CMCC No. 258 of 2000 against Gesanda Mokuia and Edward Nyaanga Moenga but said he withdrew that suit as the court did not have the jurisdiction to deal with the matter. The Plaintiff denied that the agreement that was annexed to the Defendant's replying affidavit was the agreement that he (the Plaintiff) had entered into with Mokuia Gesanda ("**PEx.1**").

11. In cross-examination by O. M. Otieno counsel for the Defendant, the Plaintiff stated that the portion of land parcel **Central Kitutu/Daraja Mbili/1362** that he purchased (140feet by 66feet) was equivalent to 0.09Hectares. The Plaintiff maintained that he honoured his part of the contract by paying kshs.100,000/= as agreed and constructing the residential rooms. He stated however the vendor's sons disposed of the houses together with the unused materials that were on side to one Mr. Osiemo who utilized them to construct on his own site.

12. The Plaintiff explained that land parcel **Central Kitutu/Daraja Mbili/ 1791** was transferred to him in exchange for his land parcel **Matutu Settlement Scheme/390** measuring 4 acres which he transferred to the son of Mokuol Gesanda one, Paul Nyangarie. The Plaintiff stated that he had been constructing the house on land parcel **1792** slowly and denied he entered into possession of the land in 2007 as alleged by the Defendant. The Plaintiff stated that apart from the house on the suit land he planted trees and put up a fence as seen in the photographs “**PEx.2(a)** and **2(b)**”.

13. PW2 Ayub Ongati testified that he was a clan elder and that the Plaintiff was a neighbour. He stated that the Plaintiff purchased land from Mokuia Gesanda on which he has put up a house. He stated the plaintiff had been in occupation of the land he bought since 1987. He denied any knowledge of the Defendant. In cross-examination the witness affirmed he was not a witness to the agreement between the Plaintiff and Mokuia Gesanda. He however stated he knew the land the Plaintiff was occupying to have belonged to Mokuia Gesanda.

14. Jackson Maeba the duly constituted Attorney of the Defendant testified as DW1. He stated that the Defendant purchased land parcel **Central Kitutu/Daraja Mbili/1792** in 1987 from Mokuia Gesanda. He stated land parcel was a subdivision from land parcel **Central Kitutu/ Daraja Mbili/1362** which had been subdivided into three portions namely parcels **1790, 1791** and **1792**. It was DW1’s further evidence that land parcel **1790** was further subdivided to create parcels **2182, 2183** and **2184** and that parcel **2182** was further subdivided into parcels **2964, 2965** and **2966**. The witness further stated that parcel **1792** bordered parcel **2966** and parcel **1364** on the upper part and left side respectively while the main road is on the lower side. He stated land parcel **2966** is owned by the son of the late Mokuia Gesanda, one Peter Onsongo and parcel **1364** is owned by the Plaintiff.

15. The witness stated after the Defendant purchased land parcel **1792** he was issued with title in 1997 and he fenced the land and thereafter left for the USA but when he came back he found the boundary of his plot had been interfered with. He stated the boundary of land parcel **1364** had been moved into the Defendant’s plot **1792** and covered a portion of the Plot measuring 50feet by 62feet. The witness stated that initially land parcel **1792** measured 140feet by 66feet. The witness stated that after the boundary was shifted, a wall was put up inside land parcel **1792** and there is a building covering a portion of Plot No. **1792** measuring 50feet by 62feet. The witness testified the building was put up by the Plaintiff. He stated the construction of the building started in 2008 and was ongoing even during the pendency of this suit. The witness did not know when the wall inside parcel **1792** was constructed or when the Plaintiff started occupying land parcel **1364**.

16. The witness in his evidence made reference to Kisii CMCC No. 258 of 2000 and produced in evidence an affidavit sworn by Gesanda Mokuia on 2nd June 2000 (“**DEx.4**”) where under paragraph 9 the said Gesanda had admitted he had sold to the Plaintiff a portion measuring 140feet by 66feet out of land parcel **1362** and had also sold land to the Defendant. The witness maintained that the Plaintiff had encroached onto the Defendant’s land parcel **1792** and denied the Plaintiff had adversely possessed the land for 22 years as at the institution of the suit.

17. Cross examined by Mr. Ochwangi Advocate for the Plaintiff, DW1 stated that the Plaintiff resides on land parcel **1364**. He further stated land parcel **1792** on the ground is presently partly occupied by the Plaintiff’s building on one portion and by the grand children of the original seller Mokuia Olisanda on the remaining part. He further stated the Plaintiff commenced construction on the plot in 2007. DW1 further stated the Plaintiff’s house occupies a portion of land parcel **1792** and a part of land parcel **2966**.

18. DW2 Edwin Omuga Osongo testified that Mokuol Olisanda was his grandfather. It was his evidence that the Plaintiff was sold land parcel **1364** and the Defendant land parcel **1792**. He stated the Plaintiff was sold some other land which he stated was land parcel **2966** where he said the Plaintiff has constructed his house though he said the building has encroached onto land parcel **1792**. The witness testified that land parcel was subdivided into land parcels **1790, 1791** and **1792** and parcel **1790** was further subdivided into parcels **2182, 2183** and **2184**. The witness said it was a portion of parcel **1790** that was sold to the Plaintiff so that the Plaintiff could build some rental houses for his father.

19. DW3 Yunuke Birundu Tinega testified that the Defendant purchased a plot that she had been cultivating from Mokuol Olisanda and after the purchase she still continued to cultivate on the plot with the Defendant’s authority. The witness stated the Defendant had fenced the plot but the Plaintiff removed the fence before he started constructing a house. According to the witness the Plaintiff and the Defendant purchased their parcels of land from the sons of Mokuol Olisanda.

20. Under cross-examination the witness stated the Defendant had never resided on the suit property, had no house on the property and had never used the land in any manner. The witness said she did not know who removed the fence that had been put by the defendant but affirmed the house constructed by the Plaintiff has encroached on the suit property. The witness stated when the Defendant reported the issue of encroachment to the elders, the Plaintiff declined to attend before the elders for arbitration.

Issues for Determination:

21. The parties filed their final submissions following the closure of the trial. After reviewing the pleadings, the evidence and after considering the submissions by the parties, the following issues emerge for determination:

(i) Whether the Plaintiff had entered into an agreement to purchase a portion of land parcel Central Kitutu/Daraja Mbili/1362 measuring 140feet by 66feet from Mokuia Gesanda alias Mokuol Olisanda on 1st July 1987?

(ii) Whether the Plaintiff took occupation and possession of the portion he purchased, and if so whether that is the portion that became land parcel Central Kitutu/Daraja Mbili/1792 after land parcel Central Kitutu/Daraja Mbili/1362 was subdivided?

(iii) Whether the Plaintiff was in adverse possession of land parcel Central Kitutu/Daraja Mbili/1792 for the statutory period of 12 years such that the title of the Defendant over the suit property became extinguished?

(iv) Whether the Plaintiff is entitled to the reliefs sought in the Originating Summons?

(i) Whether there was an Agreement?

22. On the first issue, it is not in dispute that the Plaintiff entered an agreement to purchase a portion of land from Mokuia Gesanda. The defendant in his replying affidavit under paragraph 19 unequivocally affirmed he had knowledge of the Plaintiff's agreement with Gesanda Mokuia. He deponed thus:-

19. That, further, I know of my own knowledge that the Plaintiff herein entered into a land sale agreement with one Gesanda Mokuia, whereby he had purchased from the same a portion of LR No. Central Kitutu/Daraja Mbili/1362 measuring approximately 140ft by 66ft. Copy of the sale agreement dated the 1st day of July 1987, hereto annexed and marked as Exhibit JM6.

23. Indeed as an annexure to the same replying affidavit the Defendant annexed as exhibit 9 a replying affidavit that was sworn by Gesanda Mokuia in Kisii CMCC No. 258 of 2000 on 2nd June 2000 where under paragraph 4 Gesanda Mokuia had deponed thus:-

4. That in July, 1987 being the sole registered proprietor of land parcel number Central Kitutu/Daraja Mbili/1362 did sell a portion of it to one Jones Mokaya measuring 140ft by 66ft as per annexed land sale agreement dated 1st July 1987 marked "GM1".

At paragraph 6 of the same replying affidavit Gesanda Mokuia stated thus:-

6. That with my consent Jones Mokaya has since occupied the said portion without any interruptions and carried out substantial developments save for the regrettable delay to transfer to him the said portion due to domestic nagging which has been settled.

It is on the basis of the foregoing evidence, irrefutable that the Plaintiff had indeed entered into an agreement with Mokuia Gesanda to purchase a portion of land parcel 1362 and was pursuant to the agreement let into possession thereof. I therefore answer the first issue in the affirmative.

(ii) Whether the Plaintiff Occupied and took Possession of the Suit Property?

24. The agreement the Plaintiff entered into with the said Mokuia Gesanda provided inter alia under clauses 2 and 3 as follows:-

(2) The parties hereto have agreed to appear before the appropriate Land Control Board for its consent to the above transaction within time prescribed by law.

(3) The vendor undertakes to take all necessary steps to have the aforesaid piece or parcel of land on sale transferred to the purchaser's names free from all encumbrances and the purchaser to take immediate vacant possession of the parcel of land.

25. On the evidence adduced by the parties, it is apparent that no consent of the land control board was sought and/or obtained for the transaction within the period prescribed under the provisions of the Land Control Act, Cap 302 of the Laws of Kenya. However, there is credible evidence that the Plaintiff took possession of the portion he had purchased and commenced developments thereon. The Plaintiff testified that he took possession of the land in 1987 and commenced developments thereon. The Plaintiff testified that he fenced the property with a brick perimeter wall and started constructing a permanent house on the property. The Plaintiff exhibited photographs "**PEx.2(a) and 2(b)**" which showed the single storey permanent house, the brick perimeter wall and trees that the Plaintiff stated he had planted on the plot. In the replying affidavit by Mokuia Gesanda earlier referred to in this judgment, he stated under paragraph 6 that the Plaintiff had occupied the portion of land and had carried on substantial developments thereon. The Plaintiff, when he discovered in 1999 that the vendor had transferred the portion of land that he had purchased to the Defendant, registered a restriction over the property to protect his interest over the suit property and further instituted a suit vide Kisii CMCC No. 258 of 2000 (OS) seeking to be declared as the owner of land parcel **Central Kitutu/Daraja Mbili/1792** on account of having acquired it by prescription. The suit before the lower court was withdrawn by the Plaintiff whereupon he instituted the present suit.

26. The Defendant took the position that the Plaintiff was not in occupation of land parcel **Central Kitutu/Daraja Mbili/1792** but had merely encroached onto the property from his adjacent parcel of land **Central Kitutu/Daraja Mbili/1364** which was registered in the Plaintiff's name. The agreement the Plaintiff entered into was clear that he was buying a portion of land parcel **Central Kitutu/Daraja Mbili/1362** measuring 140feet by 66feet. It is this property which was subdivided into land parcels **Central Kitutu/Daraja Mbili/1790, 1791 and 1792**. The Plaintiff explained that he was registered as owner of land parcel **1791** which measured 0.22Hectares in exchange of his land in **Matutu Settlement Scheme** which measured 4 acres. The Defendant concedes that land parcel **Central Kitutu/Daraja Mbili/1792** measured 140feet by 66feet (approximately 0.09Hectares). It is not clear how the Defendant got land parcel **Central Kitutu/Daraja Mbili/1792** transferred to himself. Although he stated he purchased the land, he did not, save for the Certificate of Title, exhibit any agreement or instrument of transfer. The Defendant has never occupied or utilized the said parcel of land.

27. On the evidence adduced by the Plaintiff and taking into account the totality of the evidence adduced by the Defendant and his witnesses, I am satisfied that indeed the Plaintiff occupied and took possession of the portion of land that he purchased. This is the portion that was subdivided from parcel **1362** to create parcel **1792** which indeed corresponds to the size of the portion the Plaintiff purchased being 140feet by 66feet or 0.09Hectares. Although the residential house the plaintiff has constructed on the property may only have occupied a portion of land parcel **1792**, that is perfectly in order, since under the development conditions a house is not supposed to fully occupy the entire area of the plot.

28. Thus on the second issue, it is my finding and I hold that the Plaintiff occupied and took possession of the portion of 140feet by 66feet

that he purchased out of land parcel **Central Kitutu/Daraja Mbili/1362** and that was the portion which after subdivision became **Central Kitutu/ Daraja Mbili/1792**. In my view, it was not a coincidence that parcel **1792** had the same measurements as the portion sold to the Plaintiff. It was the actual portion that was intended for the Plaintiff. This is the land the Plaintiff occupied and what is not explained is how the Defendant got to be registered as the owner of the land yet there are no supporting documents. The evidence of DW2 and DW3 does not shed any more light on the matter save to confirm that indeed the Plaintiff is and has been in possession of parcel **1792** or a portion of the same.

(iii) Whether the Plaintiff's Occupation and Possession constituted Adverse Possession?

29. The third issue was whether the occupation and possession of the Plaintiff of land parcel **Central Kitutu/Daraja Mbili/1792** constituted adverse possession. The doctrine of adverse possession applies where a person openly occupies the land of a registered owner and carries on activities that are not consistent with the rights and interests of the real owner. The person in possession, as it were, uses the land as though it solely belonged to him and in doing so exercises rights consistent with ownership. The actions of an adverse possessor are hostile and against the interest of the real owner. See the case of **Harrison Ngige Kaara –vs- Gichobi Kaara & Another [1997] eKLR** where the Court of Appeal stated:-

“The law on adverse possession is clear. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya provides for a 12 years limitation period for actions to recover land. That period does not start running unless the land is in the possession of some person or persons whose interest in it is hostile to that of the owner thereof. Possession is hostile if it is open, without right, without force or fraud and exclusive. In other words the adverse possessor must be shown to be using the land as though it is solely his own before right of action to recover it can be said to have accrued for the limitation period to start running.”

30. In the present case, the court has held and found that the Plaintiff took possession of the suit property after entering the sale agreement with the vendor on 1st July 1987. The Defendant has in his submissions argued that the entry into possession was with the permission of the owner and therefore the possession could not be adverse. The Defendant in support of his submission placed reliance on the cases of **Erick Chepkwony Aengwo vs- Jonathan Ruttor Kibie Sango [2013] eKLR**, **Samson B. Khatenge -vs- Philip W. Silungi [2018]eKLR** and **Njeka Ochuanyi -vs- Mohawlal Girdha Shah [2000]eKLR**. In the case of **Erick Chepkwony [supra]** Munyao, J. stated as follows at paragraph 34:-

“For agricultural land in which consent of the Land Control Board is required, it may not matter that the full purchase price has not been paid. This is because such agreement if consent has not been granted, becomes void, six months after. Since the agreement is voided, possession thereafter will not be founded on any agreement and it can therefore sustain a claim for adverse possession. This point is however not in issue here, for in the circumstances of this case, the full purchase price was paid by the Plaintiff to the Defendant. It follows therefore that time was capable of running against the Defendant from the year 1978 if the land was registered. But the land was not yet registered in 1978. It was unregistered land at the time of sale.”

31. In the present case, the Defendant has additionally submitted that adverse possession could not accrue since the Plaintiff had not completed payment of the purchase price/consideration as per the agreement of sale. I do not think that this submission would be sustainable as the Defendant was not the person who sold the land to the Plaintiff. The seller, Mokuia Gesanda was not a party to this suit and there was no evidence tendered that the Plaintiff had not paid the full purchase price. To the contrary the Plaintiff testified that he fully honoured his side of the bargain and that evidence was not rebutted.

32. However, even if the full purchase price was never paid, the sale transaction related to a controlled transaction which was subject to the provisions of the Land Control Act. The sale agreement dated 1st July 1987 under clause 2 acknowledged the transaction to be a controlled transaction. Clause 2 provided as follows:-

2. The parties hereto have agreed to appear before the appropriate Land Control Board for its consent to the above transaction within time prescribed by law.

No consent was sought or obtained and consequently the sale transaction became null and void for all purposes under the provisions of Section 6(1) of the Land Control Act, Cap 302 of the Laws of Kenya.

33. There is ample judicial authority that where a sale transaction has become null and void by reason of failure to obtain the consent of the Land Control Board, a purchaser in possession of the land continues in possession as an adverse possessor from the time the contract of sale became void by operation of the law. The registered owner of such land must initiate action to recover the land before the expiry of 12 years from the date the agreement became void otherwise his action would be statute barred under Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya and the adverse possessor can after the expiry of 12 years appropriately move the court to be registered as the owner of the land as the registered owner's title is deemed to have been extinguished.

34. The Court of Appeal in the case of **Samuel Miki Waweru -vs- Jane Njeri Richu [2007]eKLR** considered the application of the doctrine of adverse possession where the initial entry into possession is pursuant to an agreement/permission in a controlled transaction. The Court stated as follows:

“It is not in contention in this case that the Land Control Act applied to the alleged lease or sale of the portion of land claimed by the respondent or that the consent of the Land Control Board was neither applied for within the stipulated period nor granted. It follows therefore, and Mr. Gitonga concedes, that, the alleged sale or lease became void for all purposes as provided by Section 6 (1) of the Land Control Act with the consequences stipulated in Section 22 of the Land Control Act. Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of

possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner.”

The Judges went further to hold in the same case as follows:-

“In our view, where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of the Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of the law and the continued possession, if not illegal, becomes adverse from the time the transaction becomes void.”

35. In the instant matter the sale transaction having been a controlled transaction within the meaning of Section 6(1) of the Land Control Act, became null and void on the expiry of 6 months from 1st July 1987 such that as at 1st January 1988 the permission of the vendor for possession was terminated and possession of the suit land henceforth by the Plaintiff became adverse and time of adversity started running as from January 1988. The activities of the Plaintiff on the suit land of erecting a brick wall and commencing the construction of a permanent storeyed residential house were clearly hostile to the rights and interests of the registered owner. The possession was open, quiet and uninterrupted until the Plaintiff instituted the present suit.

36. The vendor after subdividing the property the subject of the sale, land parcel **Central Kitutu/Daraja Mbili/1362** into land parcels **1790, 1791 and 1792** opted to have land parcel **1792** registered in his name initially in 1990 rather than cause the same to be transferred to the Plaintiff. The vendor, Mokuia Gesanda in 1997 caused land parcel 1792 to be transferred and registered in the Defendant's name. All this time the Plaintiff was adversely in possession of the property. Had the Defendant carried out due diligence, he would have discovered the Plaintiff was in actual possession of the property. Under Section 30 of the repealed Registered Land Act, Cap 300 Laws of Kenya, overriding interests over land needed not to be registered or noted in the register. The plaintiff had acquired or was in the process of acquiring rights that would have entitled him to be registered as owner of the land by virtue of prescription or adverse possession.

37. Section 30(f) and (g) of the Registered Land Act provides:-

30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;

Section 30(g) of the Registered Land Act was reproduced under Section 28(g) of the Land Registration Act, 2012 underpinning the need for buyers of land to exercise due diligence lest one is burdened by an encumbrance that could vitiate the title of the land that he was purchasing. Overriding interests over land are encumbrances of the land, and a purchaser is duty bound and/or under an obligation to verify the status of the property to ascertain there are no overriding interests that affect the title. If that is not done the transfer of the land becomes subject to any overriding interests that subsist as at the time the transfer is effected.

Conclusion and Determination:

38. In the circumstances of the present matter, it is my view and finding that the Defendant was registered as owner of the suit property in 1997 subject to the Plaintiff's overriding interest. The Plaintiff's period of adversely possessing the land was running and the registration of the Defendant as owner did not interrupt the running of time. As at 1st January 2000 the statutory period of 12 years had run out and the Plaintiff's right to be declared owner of the suit land had crystallized. The title of the registered owner had become extinguished by effluxion of time. The running of time could only have been interrupted by the vendor and/or the Defendant after he got registered before the period of 12 years had elapsed after it started running in January 1988.

39. On the basis of my evaluation of the evidence and the analysis thereof, it is my determination that the possession of the Plaintiff was adverse to the interest and rights of the registered owner and that the Plaintiff had adversely possessed the suit land for a period in excess of 12 years before the institution of the suit. The title of the registered owner had become extinguished in favour of the Plaintiff.

40. The upshot is that I find and hold that the Plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in favour of the Plaintiff and make the following final orders:-

1. A declaration be and is hereby issued that the Defendant's rights to recover the whole of LR No. Central Kitutu/Daraja Mbili/ 1792 is barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and his title thereto extinguished on the grounds that the Plaintiff herein has acquired title to the land by virtue of being in adverse possession of the land for a period in excess of twelve (12) years.

2. The land registrar, Kisii is hereby directed to cancel the title in respect of LR Central Kitutu/Daraja Mbili/1792 held in the name of the Defendant, and in place thereof to register Jones Mokaya, the Plaintiff hereof as the owner.

3. That a permanent injunction is hereby issued restraining the Defendant by himself, agents, servants and/or employees from interfering in any manner with the Plaintiff's possession and occupation of the said land parcel LR No. Central Kitutu/Daraja Mbili/1792.

4. The costs of the suit are awarded to the Plaintiff.

JUDGMENT DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF JULY 2019.

J. M. MUTUNGI

JUDGE