



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 46 OF 2019 (OS)

IN THE MATTER OF SECTION 7, 9(1), 37 & 38 OF THE LIMITATION OF ACTIONS ACT CAP 22

LAWS OF KENYA & ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF ACQUISITION OF L.R NO. 12715/ 374 BY WAY OF ADVERSE POSSESSION

BETWEEN

HANNINGTON OLOO OGUMBO.....PLAINTIFF

VERSUS

ALBERT MAKAU KYAMBO.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

JUDGMENT

Introduction:

1. This suit was commenced by way of an Originating Summons dated 12th April, 2019. In the said suit, the Plaintiff has prayed for the following reliefs:

a) A declaration that the 1st Defendant title to ALL THAT Piece of Land known as L.R No. 12715/374 registered under Grant Number I.R 44857 has been extinguished in favour of the Plaintiff by virtue of Adverse possession pursuant to Section 7, 9(1), 37 & 38 of the Limitation of Actions Act Cap 22 Laws of Kenya having occupied the said land for more than twelve (12) years preceding the filing of this suit.

b) That the Plaintiff is entitled to be registered forthwith as the owner of ALL THAT Land known as L.R No. 12715/374 registered under Grant Number I.R 44857 which said land he has held on adverse possession since 2005 to date for a period of more than twelve (12) years immediately preceding the filing of this suit, the same being land which the Plaintiff has occupied openly and continuously as of right and without any interruption from the 1st Defendant or its predecessors in title.

c) That the Chief Land Registrar at Nairobi to delete the name of Albert Makau Kyambo the 1st Defendant herein and register Hannington Oloo Ogumbo the Plaintiff herein in place thereof absolutely.

d) That the 1st Defendant has no legal right to the said land at all.

e) That the costs of this Application be provided for.

2. The Originating Summons is supported by the Affidavit of the Plaintiff who has deponed that on or about December, 2005, he entered and 'squattered' on land known as L.R. No. 12715/374 situate in Syokimau (*the suit property*); that he has been living on the suit property uninterrupted for a period of twelve (12) years and that he is entitled to be registered as the proprietor of the said land by way of adverse possession.

3. The Plaintiff deponed that during his stay on the suit property, he came to learn that the owner of the land is Albert Makau Kyambo who used to threaten him with eviction wherever he visited the land; that other than cultivating maize and vegetables, he has also constructed a house on the land and fenced it and that the said occupation has been with the full knowledge but without the permission of the 1st Defendant and was open, continuous and uninterrupted.

4. It is the Plaintiff's deposition that on 12th March, 2019, some people claiming to have been sent by the 1st Defendant demanded that he vacates the suit property; that for a period of over twelve (12) years that he has lived on the suit property, no one had asked him to vacate the land and that he is entitled to the suit property by operation of the law.

5. In response to the Originating Summons, the 1st Defendant deponed that he purchased the suit property from one Peter Mwau on the 7th September 1984 as per the annexed copy of the Sale Agreement; that at the time he purchased the property, he was working at the Immigration Department in Nyayo House; that after the purchase of the suit land, the seller transferred the suit property to his name and that although he fenced the land, he did not develop it because he used to travel a lot in the course of his employment.

6. According to the 1st Defendant, he retired from employment in the year 1998 and went to do farming in his rural area in Kiboko in Makeni County and that sometimes in 2013, his fence was pulled down and when he learnt about it from his neighbour, he went to Nairobi and found that it was not only the fence that had been pulled down but some beacons had been placed on the land.

7. It was the deposition of the 1st Defendant that when he went to confirm at lands office the status of his property, he was shocked to find out that the Deed File was missing and that he was advised by the Land Registrar to consult an Advocate and have the Deed File reconstructed since he had his original Title Deed.

8. According to the 1st Defendant, he consulted the firm of Harit Advocates in December 2013 and after instructing them, they took up the matter and prepared the necessary documents; that he executed the Deed of Indemnity on 16th December, 2013 having been issued with the Rent Clearance Certificate on the 10th December, 2013 and that he thereafter presented his original Title Deed and the documents to the land registry for purposes of reconstruction of the Deed File.

9. The Plaintiff deponed that on 9th May 2014, the Land Registrar gazetted the reconstruction of a lost or destroyed land register and gave the statutory sixty days' notice; that the whole of the year 2014, there was no trespass on the land or pulling down of the fence he put up in 2013 and that it was not until the year 2015 that his neighbor called him and told him that a group of men had pulled down his fence and constructed an illegal mabati structure.

10. The 1st Defendant deponed that he travelled from his home and found that indeed his fence had been pulled down and a mabati structure erected on the land; that he reported the matter to Mlolongo DCI office on 28th October, 2015 vide OB NO/906/28/10/15 and that he recorded a statement with the police on 30th October, 2015.

11. According to the 1st Defendant, after reporting to the CID headquarters, he felt comfortable and went to Mavoko Sub County office to pay for his rates; that he was shocked to find that a lady by the name Grace Akinyi Omware had changed the ownership documents of his property to her name and that the said Grace Akinyi had even applied for approval to construct a temporary structure and authority to fence the land on 16th October 2015.

12. The 1st Defendant deponed that from November 2015, his land was not invaded until he received a letter from the Chief Land Registrar dated 8th March 2019 claiming that the Cabinet Secretary had received a complaint from Job Maingi Muriuki, Titus Koceyo and Grace Akinyi Omware; that he was summoned to appear before the Chief Land Registrar on the 21st March, 2019 with all his documents and that the structure exhibited in the Affidavit of the Applicant was constructed after the said meeting and at the same time the Plaintiff filed this suit.

13. The 1st Defendant finally deponed that he doesn't know the Plaintiff; that the only person who has been claiming ownership of the suit land is Grace Akinyi Omwari; that it is the said Grace who applied for authority to fence and construct a structure on the suit property in 2015 which he pulled down; that the Plaintiff has not stayed on his land for more than twelve (12) years as alleged and that the Plaintiff's Application is bad in law, misconceived and should be dismissed with costs.

The Plaintiff's case:

14. The Plaintiff, PW1, informed the court that he has been in occupation of the suit property since the year 2005; that he has been doing farming on the suit property since then and that he grows maize and vegetables on the land. According to PW1, he has never been stopped from utilizing the suit property since the year 2005 by the Defendant and that it was only in the year 2009 that someone went on the land and identified himself as Albert Makau.

15. PW1 stated that the said Albert Makau never evicted him as claimed; that he has a house on the land; that he is still in possession of the land and that the 1st Defendant demolished the house which he had put up on the land.

16. In cross-examination, PW1 stated that he has lived on the suit property for fifteen (15) years; that he farms the land and that he works on the construction sites within the area where the suit property is situated to earn a living. According to the evidence of PW1, in the year 2009, the 1st Defendant identified himself as Makau; that later on, another person also came on the land and identified himself as the owner of the land and that it was only in the year 2019 that the said Makau went on the suit property with 'thugs' and had him evicted from the suit property.

17. PW1 informed the court that he knows his neighbours and that one of the neighbours is known as Dominic and his wife who used to buy vegetables from him. According to PW1, when the Plaintiff demolished his house in December, 2019, he went to the police and reported the incident and that he rebuilt the said house. According to PW1, he has never been evicted from the suit property.

18. PW2 informed the court that he has lived in Syokimau area, where the suit property is situated, since the year 2001; that he is a contractor in the area and that he knew the Plaintiff in the year 2006. According to PW2, since he knew the Plaintiff in the year 2006, he has always lived on land reference number 12715/374 (*the suit property*) and that in December, 2019, he witnessed the 1st Defendant demolish the house that the Plaintiff had constructed on the suit property.

19. It was the evidence of PW2 that after the Plaintiff's house was demolished, he assisted him to get an advocate to ventilate his rights; that he lives near the suit property; that there was a lot of commotion which he witnessed during the demolition of the Plaintiff's house in the year 2019 and that they reported the issue of the demolition to the police.

The Defence case:

20. The 1st Defendant, DW1, informed the court that he purchased the suit property from one Peter Mwau on the 7th September, 1984; that as at the time he purchased the suit property, he was working at the Immigration Department at Nyayo House and that after he purchased and transferred the property in his name, he fenced it but did not develop it because he used to travel a lot in the course of employment at the Immigration Department.

21. It was the evidence of DW1 that he retired from employment in the year 1998 and went to do farming in his rural home at Kiboko, Makeni County; that Sometimes in the year 2009, he became acquainted with one Dominic Kivuva who had just moved to Syokimau during that year and that he requested Mr. Kivuva to watch over the suit property.

22. It was the evidence of DW1 that in the year 2013, he learnt from Dominic Kivuva that his fence had been pulled down; that he travelled to Nairobi and found that it was not only the fence that had been pulled down but there were beacons which had been erected on the land which he removed and threw away and that no one was in occupation of the land at that time.

23. According to DW1, he went to the Lands Office to investigate the status of his property; that he was shocked to find out that the Deed File was missing and that he did execute the Deed of Indemnity on the 16th December, 2013 having been issued with Rent Clearance Certificate on 10th December, 2013.

24. It was the evidence of DW1 that he put up another fence in the year 2013; that there was no trespass on the suit property until sometime in October 2015 when Dominic Kivuva called him and informed him that a group of men came and pulled down his fence and constructed an illegal mabati structure and that he did report the matter to Mlolongo DCI Office on the 28th October, 2015 vide OB NO/906/28/10/15.

25. DW1 stated that after reporting the matter to the police and recording a statement, he proceeded to Mavoko Sub County office to pay for the rates; that he was shocked to find out that a lady by the name of Grace Akinyi Omware had changed the ownership documents of his property to her name and that from November, 2015, the suit land was not invaded until he received a complaint letter from the Chief Land Registrar dated 8th March, 2019.

26. It was the evidence of DW1 that on 22nd October, 2019, he went with the police on the suit property and pulled down the structure that had been put on the land; that they were accompanied by the county government *askaris* during the demolition of the structure that was on the land and that no one ever occupied the land until the year 2013 when he found beacons on the land which he uprooted and threw away.

27. DW1 stated that the Plaintiff has not lived on his property for more than twelve (12) years as alleged; that the Plaintiff cannot claim for adverse possession on the said land; that the structure which the Applicant claims is the suit property was erected in March 2019 and was pulled down on the 19th December, 2019 and that the Plaintiff's intention is to grab his land. DW1 urged the court to dismiss the suit with costs.

28. In cross-examination, DW1 stated that the names on his Title Deed are Albert Makau Kyambo while the names appearing in his national identity card are Albert Athanus Makau Kyambo; that the names are one and the same; that his national identity card number is 3460562 while the identity card number appearing in the Sale Agreement is 29743354/65.

29. It was the evidence of DW1 that he was a member of Syokimau Farm Limited; that during the allocation of the suit land, the current LR number did not exist; that the suit property was a sub-division of L.R. No. 7149/11/R; that the purpose of signing the indemnity was to enable the Land Registrar to reconstruct the Deed File and that he did not see the need of filing a suit.

30. DW2 informed the court that he is a businessman dealing in construction; that he lives in Syokimau, along Kalembe Road; that he has been a resident of Syokimau since the year 2009 and that he has always known the 1st Defendant, Albert Makau Kyambo, as the proprietor of the suit property.

31. It was the evidence of DW2 that when he moved to Syokimau, and having become acquainted to the 1st Defendant, the 1st Defendant asked him to watch over his property, and to inform him of any interference or any acts of trespass; that Sometime in the year 2013, a group of unknown men invaded the property and pulled down the fence that the 1st Defendant had erected and that the said people proceeded to place beacons on the suit property.

32. It was the evidence of DW2 that he called the 1st Defendant to inform him of the development; that the 1st Defendant travelled to

Nairobi, came up to the suit property, removed the beacons that had been put up by the group of unknown men, and repaired his fence.

33. DW2 stated that sometime in October 2015, another group of men went to the property, and pulled the fence down; that this time round, the group put up a *mabati* structure; that he called the 1st Defendant and informed him of the new development and that the 1st Defendant reported the trespass at Mlolongo Police station.

34. DW2 testified that sometime in March 2019, another group of men invaded the property and put up a *mabati* structure which was demolished on the 19th December 2019 by county officers and that the 1st Defendant put up another fence. It was the evidence of DW2 that on 26th of December, 2019, another group of men invaded the property and put up another *mabati* structure.

Submissions:

35. The Plaintiff's advocate submitted that the Plaintiff attached photos of the various activities he has been carrying out on the suit premises; that there is no doubt that the Plaintiff has been working on the suit land for many years; that the evidence of the 1st Defendant was full of contradictions and that the documents he has relied on to support his case are questionable.

36. The Plaintiff's counsel submitted that the names appearing on the 1st Defendant's Identity Card are Albert Athanas Makau Kyambo and whose identity card number is 3460562; that this compared to the names appearing on the title document are not the same and that the names appearing on the title documents are Albert Makau Kyambo.

37. It was submitted by the Plaintiff's counsel that the Sale Agreement dated 7th September, 1984 was between Peter Mwau I/D NO. 2974354/65 and Albert Makau Kyambo, I/D NO. 29743354/65; that in this Agreement, it's clear that the I/D Number of Albert Makau Kyambo is different from the I/D Number of Albert Athanas Makau Kyambo and that this presupposes that the two could be different personalities.

38. Counsel submitted that the L.R. NO. cited in the Agreement, being L.R. No. 7149, does not belong to Syokimau properties as Syokimau Properties bears L.R. No. 12715; that the property indicated in the Agreement therefore is not the suit property and that the transfer of share dated March 1984 done in favour of the 1st Defendant by Peter Mwau indicates L.R. No. 7149/11/r as the property and the identity card indicated therein reads 29743354/65 for Albert Makau Kyambo.

39. The Plaintiff's counsel submitted that as at 6th August, 1981 or 15th April, 1982 when the Allotment Letter was signed, the Agreement between Peter Mwau and Albert Makau Kyambo dated 27th September, 1984 had not been executed/came into existence and therefore there was no basis for appending the I/D Number 2974354/65 belonging to Albert Makau Kyambo on the Allotment Letter. This document, it was submitted, therefore is questionable.

40. It was submitted by counsel that the share certificate in favour of Peter Mwau dated 24th July, 1981 contradicts the Allotment Letter dated 6th August, 1981 as it's the Allotment Letter which comes before the share Certificate is issued; that the documents being relied on by the 1st Defendant are not genuine documents and are an attempt by the 1st Defendant to falsify documents to try and prove ownership and that these documents, together with the evidence of the 1st Defendant, are unreliable and should be dismissed by the court.

41. The Plaintiff's counsel submitted that going by the evidence on record, the Plaintiff has proved his case; that the Plaintiff has acquired title to the suit land by operation of the law and that the Plaintiff has dispossessed the title holder of the said parcel of land by his continuous occupation for over twelve (12) years. It was the Plaintiff's submissions that the Plaintiff has been in adverse possession of the suit land openly, quietly and without let or hindrance by the 1st Defendant.

42. Counsel submitted that the 1st Defendant's actions did not stop time from running and that his title to the suit land stood extinguished. Counsel relied on the case of **William Gatuhi Murathe vs. Gakuru Gathimbi (1998) eKLR** which followed the decision in the case of **Joseph Gahimu Kiritu vs. Lawrence Munyambu Kabura Civil Appeal No. 20 of 1993 (unreported)** where it was held that the filing of a suit for recovery of land would stop time from running for purposes of Section 38 of the Limitation of Actions Act under which a person may claim to have become entitled to land by adverse possession.

43. The Plaintiff's counsel submitted that the 1st Defendant did not and has not filed any suit against the Plaintiff herein to stop the time from running and therefore the time continues to run and that the court should proceed to grant the prayers sought in the suit.

44. The 1st Defendant's advocate submitted that it is trite law that parties are bound by their pleadings; that the issues before this court are whether or not to grant the injunction order sought and adverse possession of the Defendant's suit property by the Plaintiff and that the Plaintiff cannot claim adverse possession yet in the same breath challenge the Respondent's title. Counsel relied on the case of **Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd [2018] eKLR**, where Mrima J. held as follows:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Anor. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the

averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

..In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

45. It was submitted that any evidence adduced by the Plaintiff touching on the validity of title held by the 1st Defendant is to be disregarded and that the title as presented in court is evidence of the fact that the 1st Defendant holds a title to the suit property.

46. While relying on the case of *Kasuve vs. Mwaani Investments Limited & 4 Others 1 KLR 184*, counsel for the 1st Defendant submitted that the onus is on the person or persons claiming adverse possession to prove that they have used the land which they claim as of right.

47. It was submitted that by virtue of the 1st Defendant entering the suit property, removing beacons and rebuilding the fence in 2013 and 2015 and demolishing the structure which was built on his property in 2015, time stopped from running and thus interrupted the adverse possession of the suit property by the Plaintiff. According to counsel, time started running a fresh because of the 1st Defendant's actions of entering into the suit property, demolishing the mabati structure which had been set up, rebuilding the fence, placing warning signs on the suit property with the wordings “Land not for sale” and removing the beacons which had been set in place.

48. Counsel relied on the case of *Githu vs. Ndeeto (1984) KLR 776* where it was held that time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by the adverse possessor. Assertion of right, it was submitted, occurs when the owner takes legal proceedings or makes an effective entry into the land.

49. According to the 1st Defendant's counsel, the 1st Defendant's actions do constitute assertion of his rights and the entry and constant inspection he used to make on his suit property from time to time, which actions extinguished adverse possession claims.

50. It was submitted that possession by the adverse possessor must be continuous, open and uninterrupted for a period of not less than twelve (12) years and that the adverse possessor must over the said period engage in acts in regard to the property which are inconsistent with the rights of the true owner. Counsel submitted that the acts have to be hostile to the rights and interests of the real owner.

51. Counsel submitted that the photographs tendered in evidence by the Plaintiff have no evidential value; that the photographs are undated; that it is not clear when they were taken and that the photographs cannot give evidence as to how long the structures have been on the suit property. **It was submitted that the Plaintiff has not met the threshold for adverse possession and thus the prayers he has asked the court to grant him cannot be granted.**

Analysis and findings:

52. **From the pleadings, the evidence and the submissions, the only issue for determination in this matter is whether the Plaintiff is entitled to land known as L.R. No. 12715/374 situate in Syokimau, Machakos County (the suit property) by way of adverse possession.**

53. Notwithstanding the fact that there is only one issue for determination by this court, the Plaintiff's counsel, in his detailed submissions, challenged that validity of the title that the 1st Defendant is holding in respect to the suit property. According to the Plaintiff's counsel, the 1st Defendant is not the registered owner of the suit property because the names appearing in his national identity card number are Albert Athanas Makau Kyambo and whose identity card number is [...]while the names appearing on the title documents are Albert Makau Kyambo.

54. It was submitted by the Plaintiff's counsel that the Sale Agreement dated 7th September, 1984 was between Peter Mwau I/D No. [...] and Albert Makau Kyambo, I/D No. [...]; that in this Agreement, it's clear that the I/D Number for Albert Makau Kyambo is different from the I/D Number for Albert Athanas Makau Kyambo and that this presupposes that the two could be different personalities.

55. **The Plaintiff's advocate further submitted that** that the L.R. NO. cited in the Agreement, being L.R. No. 7149, does not belong to Syokimau properties as Syokimau properties bears L.R. No. 12715; that the property indicated in the Agreement therefore is not the suit property and that the transfer of the Share Certificate dated March 1984 in favour of the Plaintiff by Peter Mwau indicates L.R No. 7149/11/r as the property and the identity card indicated therein reads [...] for Albert Makau Kyambo.

56. **All the above averments by the Plaintiff's counsel, including the alleged discrepancies in the Share Certificate and the Letter of Allotment that was issued to one** Albert Makau Kyambo, was not pleaded in the Originating Summons and the Supporting Affidavit of the Plaintiff.

57. It is trite law that parties are bound by their pleadings. In the case of *Daniel Otieno Migore vs. South Nyanza Sugar Co. Ltd [2018] eKLR*, Mrima J. held as follows:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance

with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“...it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

58. In the case of **Chumo Arap Songok vs. David Keigo Rotich [2006] eKLR** the court held as follows:

“The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties.”

59. Again, in the case of **Chalicha FCS Ltd vs. Odhiambo & 9 Others [1987] KLR 182** the court stated as follows:

“Cases must be decided on the issues on the record. The court has no power to make an order, unless by consent, which is outside the pleadings. In this instance, the issues raised by the Judge and the order thereon, was a nullity.”

60. It is clear from the above cited cases that a court should not make any findings on matters not pleaded or grant any relief which is not sought by a party in the pleadings. The only issue that arises from the pleadings herein, as I have already stated above, is whether the Plaintiff is entitled to the suit property by way of adverse possession, and not whether the 1st Defendant fraudulently obtained the title document.

61. That being so, this court cannot delve into the issue of whether indeed the 1st Defendant is the registered proprietor of the suit property, or whether the title to the suit property was validly issued to the 1st Defendant.

62. In any event, the Plaintiff cannot claim the suit property by way of adverse possession and in the same breath challenge the 1st Defendant's title. By the mere fact that the Plaintiff is claiming the suit property by way of adverse possession, he has conceded to the fact that the 1st Defendant is the *bona fide* registered proprietor of the suit property.

63. Furthermore, the mere fact that one name appearing in the 1st Defendant's national identity card is missing in the title document cannot be a good reason to hold that the suit property is not registered in favour of the 1st Defendant.

64. On the issue of the different identity card number in the Sale Agreement between Peter Mwau and the 1st Defendant and the one appearing in the 1st Defendant's identity card, the evidence shows that the seller's identity number (*Peter Mwau*) is the same number that is reflected as the identity card number of the 1st Defendant, which is a normal typographical mistake that happens all the time.

65. Therefore, notwithstanding the fact that the issue of the validity of the 1st Defendant's title was not before this court, it is the finding of this court that the Plaintiff did not prove that the 1st Defendant or DW1 is not the registered proprietor of the land. The title document in respect of the suit property was validly transferred to the 1st Defendant on 20th September, 1990.

66. I will now address the issue of whether the Plaintiff is entitled to the suit property by way of adverse possession. The law pertaining to adverse possession is now settled. Section 7 and 38(1) of the Limitation of Actions Act provide as follows:

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

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

67. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of **Kimani Ruchine vs. Swift Rutherford & Co. Ltd [1980] KLR**, the court held as follows:

“The Plaintiffs have to prove that they have used this land which they claim, as of right: *nec vi, nec clam, nec precario*...The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration”.

68. In **Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) eKLR**, the Court of Appeal held as follows:

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

69. In **Benjamin Kamau Murima & Others vs. Gladys Njeri, Civil Appeal No. 213 of 1996**, the Court of Appeal held as follows:

“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 possession of that land”

70. The Supreme Court of India, in **Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779**, stated as follows:

“In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

71. The evidence by the Plaintiff was that he entered the suit property in the year 2005, and that he has been living on the land since then. According to the evidence of the Plaintiff, during his stay on the land, he came to know the 1st Defendant as the owner of the suit property in the year 2009 when the 1st Defendant visited the land and threatened him with eviction. However, it was the evidence of the Plaintiff that it was not until the year 2019 that the Defendant actually evicted him by demolishing the structure that he had built on the suit property.

72. The 1st Defendant's evidence is that he purchased the suit property from one Peter Mwau on the 7th September 1984; that at the time he purchased the suit property, he was working at the Immigration Department in Nyayo House; that after the purchase of the suit land, he transferred the suit property to his name and that although he fenced the land, he did not develop it because he used to travel a lot in the course of his employment.

73. It was the evidence of the 1st Defendant that sometimes in 2013, his fence was pulled down and when he learnt about it from his neighbour, DW2, he went to Nairobi and found that it was not only the fence that had been pulled down, but some beacons had been placed on the land which he removed.

74. The 1st Defendant informed the court that the whole of 2014, there was no interference with the suit property and that in October 2015, his neighbour, DW2, informed him that a group of people had pulled down his fence and put up a mabati structure on the land. The Defendant produced in evidence the statement that he recorded with the police on 30th October, 2015 on the issue of the encroachment on the suit property by third parties.

75. In the statement that the 1st Defendant recorded, the 1st Defendant stated as follows:

“During all this time my land had been intact and untampered with except the occasional notorious theft of my fencing poles and barbed wire, which I have always thought to be petty theft.”

76. As was held by the Court of Appeal in **Kasuve vs. Mwaani Investments Limited & 4 others 1 KLR 184**, a Plaintiff in a claim for adverse possession has to prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of twelve (12) years, either after dispossessing the owner or by discontinuation of possession by the owner of the land on his own volition.

77. The Plaintiff has not informed this court the circumstances under which he entered the suit land in the year 2005, if at all. Indeed, there is no evidence before this court to show that the Plaintiff put up any structure on the suit property in the year 2005, or immediately thereafter.

78. Indeed, the Plaintiff did not rebut the evidence of the 1st Defendant that other than the destruction of the fence that the 1st Defendant had put up in the year 2013, there was no occupation of the suit property until the year 2015 and 2019, and after his complaint to the Cabinet Secretary.

79. Although the Plaintiff produced in evidence photographs showing seasonal vegetables on a piece of land, the said photographs are neither dated nor show the person who took them. Indeed, it is not clear to this court if the vegetables and the mabati structure in the background are on the suit property or on a different piece of land and for how long the same have been on the land.

80. As was held in the case of *Karnataka Board of Wakf vs. Government of India & Others [2004] 10 SCC 779*, in the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title.

81. As already stated above, a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the true owner.

82. The Plaintiff failed to produce evidence in this court to show that his occupation of the suit land has been adequate and continuous for a period of twelve (12) years. Indeed, the Plaintiff did not dislodge the 1st Defendant's evidence that other than the occasional interference with the suit property by unknown people, including the purported transfer of the land to one Grace Akinyi in the year 2015, there has never been any form of occupancy of the suit property by the Plaintiff or at all.

83. Having not proved the suit on the balance of probabilities, I dismiss the Plaintiff's suit with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 16TH DAY OF JULY, 2021.

O. A. ANGOTE

JUDGE