



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 91 OF 2020**

**JOSEPH BAKER KIAMBA MWANIKI.....PLAINTIFF**

**VERSUS**

**ABDI GODANA DIDA**

**DAVID NYANGA (SECRETARY)**

**SHAWN FRANCIS WAMBUA (YOUTH LEADER).....DEFENDANTS**

**SIMON MWAURA (MEMBER) (Sued as the Officials of KIBAGARE SLUMS ASSOCIATION)**

**JUDGMENT**

**BACKGROUND**

1. The plaintiff brought this suit through a plaint dated 3/6/2020. He sought the following verbatim orders against the defendants:

*a) A permanent and perpetual injunction restraining the defendants, whether by themselves, their agents, employees, servants and/or otherwise, howsoever, from trespassing on, letting, alienating, entering, occupying, residing on, remaining on, or otherwise claiming title or interest whatsoever in the suit properties or any part thereof and or in any other way interfering with the plaintiff's quiet possession of his suit properties, parcels of land known as Land Parcel No LR No 209/9002/2 and Land Parcel No LR No 209/9002/3, Grant No IR 32481/1.*

*b) That this honourable court do issue eviction orders for the eviction of the defendants, whether by themselves, their agents, employees, servants and/or otherwise howsoever from the plaintiff's suit properties, parcels of land known as Land Parcel No LR No 209/9002/2 and Land Parcel No LR No 209/9002/3, Grant No IR 32481/1.*

*c) That the defendants, their agents, employees, servants and/or otherwise howsoever be ordered to compensate the plaintiff for damages and for the loss of user of his suit properties since May, 2020 to date.*

*d) A declaratory order that the defendants their agents, employees, servants and/or otherwise howsoever are trespassers on the plaintiff's suit properties.*

*e) A declaratory order that the plaintiff was the rightful allottee from the Government of Kenya of the suit properties.*

*f) General damages for trespass*

*g) Costs of this suit together with interest at court rates*

*h) Any such other or further relief as this Honourable Court may deem just and fit to grant*

2. His case was that he was the registered proprietor of **Land Reference Numbers 209/9002/2 and 209/9002/3 (the suit properties)**. The two parcels of land were subdivisions out of **Land Reference Number 209/9002**. He had held and enjoyed quiet possession of the two parcels since 1977 when the Government allocated him Land Reference Number 209/9002. In mid-May 2020, a group of people under the name **Kibagare Slums Association**, with the defendants as their leaders, trespassed onto the two parcels of land and commenced erection of illegal structures thereon. This prompted him to report the trespassers to the Police. Apprehensive that the said trespassers would continue

with the trespass and would continue to erect illegal structures on his land, he moved to this court seeking the above reliefs.

3. The defendants filed a statement of defence and counterclaim dated 9/2/2021. Their case was that members of Kibagare Slums Association had been in adverse possession of the suit properties for over seven (7) decades, with the full knowledge of the plaintiff. They contended that members of the Association had acquired title to the suit properties under the doctrine of adverse possession.

4. By way of counterclaim, they sought the following verbatim orders against the plaintiff:

*(i) A declaration that the defendants (plaintiffs in the counterclaim) and members of Kibagare Slums Association have acquired legal and equitable interests in the suit properties by way of adverse possession and under the doctrine of prescription.*

*(ii) A declaration that the plaintiff's (defendant in the counterclaim) interest in the suit properties LR Nos 209/9002/2 and LR No 209/9002/3 has been extinguished by the open, notorious and continuous use and possession of the suit properties by the defendants (plaintiffs in the counterclaim).*

*(iii) An order of permanent injunction be and is hereby issued restraining the plaintiff (defendant in the counterclaim) whether by himself or his agents, servants, employees, representatives, or anyone claiming under him from entering upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, alienating, charging, disposing or in any other manner howsoever from dealing or otherwise claiming interests and/or interfering with the plaintiffs' quiet enjoyment, possession, and use of the suit properties being LR No 209/9002/2 and LR No 209/9002/3 situated in Loresho, Nairobi.*

*(iv) An order directed to the Chief Lands Registrar, Nairobi; to process and issue the defendants (plaintiffs in the counterclaim) with a certificate of title over the suit properties being LR No 209/9002/2 and LR No 209/9002/3.*

*(v) This honourable court be pleased to order the plaintiff (defendant in the counterclaim) to sign all relevant papers and give effect to order (iv) above within 14 days of judgment.*

*(vi) In default of complying with prayer (v) of the orders above the Deputy Registrar of this honourable court be authorized to sign all documents and instruments of transfer of the suit properties being LR No 209/9002/2 and LR No 209/9002/3 and a title deed be issued to the plaintiff.*

*(vii) Costs of the suit.*

5. The plaintiff filed a reply to defence and a defence to counterclaim dated 12/2/2021. He reiterated the averments made in the plaint. He denied the allegation that the defendant and members of Kibagare Slums Association had been on the suit properties for seven (7) decades. He reiterated that he had enjoyed quiet possession of the suit properties upto mid-May 2020 when the defendants trespassed on the land and started dishing it out. He urged the court to dismiss the counterclaim.

## **Evidence**

6. Evidence was taken on 5/7/2021. The plaintiff testified as PW1 and closed his case. He said he was a valuer by profession and a retired public servant who previously served as the Chief Government Valuer in the Ministry of Lands and Physical Planning. He adopted his written witness statement dated 3/6/2020 as part of his sworn evidence-in-chief.

7. In summary, his testimony was that, in 1977 the Government of Kenya allocated him a parcel of land designated as *Unsurveyed Plot V Kibagare Way*, measuring approximately 2.5946 acres. The land was subsequently surveyed as **LR No 209/9002**, measuring 1.112 hectares. **Grant Number IR 32481** was subsequently processed and registered in his name on 28/8/1978 and subsequently issued to him. He subsequently subdivided the said land into five (5) plots surveyed as **LR Nos 209/9002/2, 3, 4, 5 and 6** respectively. LR No 209/9002/1 was surveyed as the access road to the five subdivisions. He was thereafter granted consent to sell three of the five plots, namely 209/9002/4, 5 and 6. He retained two plots, namely LR No 209/9002/2 and LR No 209/9002/3. The two plots, though surveyed, were still comprised in the mother title [Grant No IR 32481] because the local authority wanted him to first tarmac the road and install water supply lines. He added that the matter had since been resolved between him and the relevant authority and all that was awaited was the processing of titles for the two plots which had registered survey numbers.

8. He added that LR No 209/9002/4 was in 1988 sold and transferred to Lincoln Bailey and Evelyn Wangari Bailey while LR No 209/9002/5 was in 1988 sold and transferred to Iqbal Janowalla. LR No 209/9002/6 was in 1988 sold and transferred to Mika Omeri Mitoka and Rosemary Okinda.

9. The plaintiff added that in mid-May 2020, he learnt from his neighbour that some people unknown to him were masquerading as the owners of his properties, LR No 209/9002/2 and LR No 209/9002/3, and had proceeded to dish the properties out and had commenced construction of illegal structures thereon. He immediately reported the matter to the Police under OB No 23/29/05/2020. Upon investigations, the Police advised him that the defendants had branded themselves as officials and leaders of Kibagare Slums Association and were responsible for the offending activities. When he realized that the Police were not removing the trespassers, he brought this suit. He added that the illegal structures were fresh when he brought this suit.

10. In cross-examination, he stated that there was nobody on the land when it was allocated to him in 1977. He took possession of the land in 1977. He did not reside on the land. He allowed some women to cultivate the land but there was no formal lease to that effect. He sued officials and leaders of Kibagare Slums Association because he had established that they were behind the invasion and the illegal structures

erected on his land. The land was unoccupied until May 2020 when it was invaded by the trespassers. He had not fenced the land.

11. The defendants called two witnesses. Margaret Tukusi Kimuhu testified as DW1. She adopted her written witness statement dated 20/1/2021 as part of her sworn evidence-in-chief. In summary, her evidence was that she lived in Kibagare Slums. She had lived in Kibagare Slums since 1986. She was a member of Kibagare Slums Association. She was testifying on behalf of the Association. She entered Kibagare in 1986 at the age of 14. In 1989, she got married. She had stayed on the land where she lived for 35 years. She had been farming on the land. The plaintiff did not authorize her to live on the land. She had not been paying rent to anyone. She had been cultivating the land. She did not know the land reference number of the land where she built the house in which she lived in Kibagare Slums. The house was a *mabati* structure. There was no local authority building approval for the structure in which she lived. She did not know when the trees on the land were planted. The trees were planted by the Government under the *Kazi Kwa Vijana Programme*. She urged the court to grant the prayers itemized in the counterclaim.

12. In cross-examination, she stated that she was born in Nakuru. She was welcomed to Kibagare by one Teresia Wambui Ngugi who subsequently died. She did not know the owner of the land where she lived. She did not have registration documents relating to Kibagare Slums Association. There were about 36 occupants on the land. She did not know the beacons of the plaintiff's land. Her residential structure was not visible in the photographs exhibited before the court. She did not have a permanent or approved structure on the land. She had not taken out an originating summons against the plaintiff for orders of adverse possession. She did not know if the plaintiff was the registered proprietor of the land where she lived. She doubted the title documents exhibited by the plaintiff. She did not think the plaintiff was the registered proprietor of the land on which she lived. No other person had laid claim to the land. Residents of Kibagare authorised her to occupy the land. The trees on the land were not in the photographs exhibited to the court.

13. John Mwangi Kamau testified as DW2. He adopted his witness statement dated 18/1/2021 as part of his sworn evidence-in-chief. In summary, his evidence was that he was a member of Kibagare Slums Association. He moved to Kibagare Slums in 1965 together with his mother. He was a boy at that time. There were other people living in Kibagare Slums. To erect a structure on land in Kibagare Slums, one had to get the Area Chief's consent. His mother obtained consent, erected a structure and settled in the structure. His mother also carried out farming activities on the land where they lived. When his mother died, he continued to farm on the land. Nobody had ever claimed the land. He did not know the plaintiff and he had never met him. He did not know the land reference number of the land they have lived on since 1965.

14. In cross-examination, he stated that he was 15 years old when he entered Kibagare Slums. Prior to that, they lived in Kahawa. He did not know the owner of the land on which they lived. Village elders were the ones who would authorize construction and/or settlement on land in Kibagare. His witness statement which made reference to the Area Chief was not correct. He intended to continue living on the land until the Government settles him. No one had ever claimed the land. He did not know if the land on which he lived was registered. His structure was not visible in the photographs exhibited to the court.

15. In re-examination, he stated that he was able to identify his structure in the pictures exhibited. There were many people cultivating land in Kibagare. Individually, one could not lay claim to any particular portion of land in Kibagare. He was aged 70 years.

### **Plaintiff's Submissions**

16. The plaintiff filed written submissions dated 5/7/2021 through the firm of *Kamende & Company Advocates*. Counsel for the plaintiff identified the following as the two key issues falling for determination in this suit: (i) *Has ownership of the suit properties been established, and if so, do the defendants have a claim on the suit properties as per the counterclaim;* and (ii) *Has the plaintiff established a case to warrant grant of the reliefs sought in the plaint?*

17. On the first identified issue, counsel submitted that the plaintiff had demonstrated, and the defendants had conceded, that the plaintiff was the registered proprietor of the suit property. Counsel added that compliance with the special conditions in the plaintiff's title was not an issue to be raised or relied upon by the defendants. Counsel argued that the special conditions did not grant the defendants the right to enter into the plaintiff's land. Counsel added that the plaintiff's counterclaim in which they contended that they took possession of the suit properties seven decades ago was not bonafide because the plaintiff was allocated the land in 1977 and in 1988 he sub-divided and sold three sub-divisions out of the land. Counsel contended that sub-division and sale would not have happened in 1988 if the plaintiffs were in possession of the land at the time. Counsel added that the defendants' case was contradictory because they had contended that they were in quiet possession of the land for seven decades and at the same time alleged that the sub-division and sale which took place in 1988 was by use of force. It was the view of counsel that had the defendants been in possession of the suit properties for a period of seven decades, they would have taken out originating summons to claim title to the land. Relying on the decision in **Kiplagat Shelisheli Mutarakwa v Joseph Rotich Kones [2018] eKLR**, counsel submitted that the defendants' invasion of the plaintiff's land was a violation of his property rights.

18. On whether or not the plaintiff had established a case to warrant grant of the reliefs sought in the plaint, counsel submitted that the defendants had not denied encroaching on the plaintiff's land and constructing illegal temporary structures thereon. Counsel added that the photographs exhibited did not support the defendant's contention that they had been in possession of the suit property for 70 years because the structures were under construction and were fresh. Counsel urged the court to grant the reliefs sought in the plaint.

### **Defendants' Submissions**

19. The defendants filed written submissions dated 29/7/2021 through the firm of *CM Advocates LLP*. Counsel identified the following as the two key issues falling for determination in this suit: (i) *Whether the defendants have a claim in adverse possession;* and (ii) *Whether the defendants' counterclaim on adverse possession was adequately answered.*

20. On the first identified issue, counsel submitted that the defendants had enjoyed open, notorious, quiet and peaceful possession of the suit properties for a period exceeding 12 years and were therefore entitled to ownership under the doctrine of adverse possession. Counsel relied on the following decisions to buttress the defendants' claim: (i) **Kasuve v Mwaani Investments Limited & 4 Others 1 KLR 184;** (ii)

**Gabriel Mbui v Mukindi Maranya [1993] eKLR;** (iii) **Wilson Njoroge Kamau v Nyanga Muceru Kamau [2020] eKLR;** and (iv) **Wairimu Mburu v Chege Thaiya [2019] eKLR.** Counsel argued that the defendants had testified that they had carried out farming; lived on the suit properties; and carried out activities on the suit properties for over five decades. Counsel added that knowledge of the survey number of the suit properties was not a requirement under the doctrine of adverse possession.

21. On whether the defendants' counterclaim was adequately answered, counsel submitted that the plaintiff failed to respond to the defendants' counterclaim by way of pleadings or evidence. Counsel contended that besides failing to file a defence to the counterclaim, the plaintiff said nothing regarding the defendants' claim of title to the suit property under the doctrine of adverse possession. The defendants relied on the following decisions: (i) **Daniel Otieno Migore v South Nyanza Sugar Co. Limited [2018] eKLR;** (ii) **Anne Wambui Nderitu v Joseph Kiprono Ropkoi & Another [2005] 1 EA 334;** and (iii) **Chevron (K) Limited v Harrison Charo Wa Shutu [2016] eKLR.** Counsel urged the court to dismiss the plaintiff's suit and grant the prayers sought in the counterclaim.

### **Analysis and Determination**

22. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal framework and jurisprudence. Before I frame the key issues falling for determination in this suit, I will dispose the question as to whether the defendants' counterclaim is undefended.

23. The defendants submitted at paragraphs 28 and 29 that the plaintiff neither filed a defence nor led evidence in response to the defendants' counterclaim. That assertion is not correct because the plaintiff filed a reply to defence and defence to counterclaim dated 15/2/2021. The e-portal shows that the said reply to defence and defence to counterclaim were filed by the firm of Kamende DC & Company Advocates on 31/5/2021 at 04:05:40. Secondly, no challenge relating to the plaintiff's defence to counterclaim was raised at the commencement of the hearing or during the hearing. Had it been raised, the court would have issued appropriate directions on whether the counterclaim was defended or not. The defendants having failed to challenge the reply to defence and defence to the counterclaim which was uploaded on 31/5/2021, their contention that the counterclaim is undefended is misleading. The contention is rejected. I now turn to the key issues.

24. Two key and intertwined issues fall for determination in the primary suit and in the counterclaim. The first issue is whether the defendants are trespassers on the suit properties. The second issue is whether the defendants have demonstrated a claim of title to the suit properties under the doctrine of adverse possession. Because the two issues are intertwined, I will dispose them simultaneously.

25. At paragraph 3 of their statement of defence, the defendants denied the fact that the plaintiff was the registered proprietor of the suit properties. They nonetheless proceeded to make a counterclaim against the plaintiff, invoking the doctrine of adverse possession against the plaintiff. From the uncontroverted evidence presented by the plaintiff, the suit properties were part of unsurveyed and unalienated government land upto 1977. On 20/7/1977, the Commissioner of Lands allocated the land to the plaintiff. The land was subsequently surveyed as LR No 209/9002, measuring 1.112 hectares and registered as in Grant No IR 32481. The title was subsequently issued to the plaintiff. The two suit properties are sub-divisions which were surveyed out of LR No 209/9002. The other sub-divisions were sold and transferred to the respective purchasers in 1988 as evidenced by entry numbers 4, 5, and 6. Sub-division titles relating to the two suit properties have not been processed. The two suit properties are therefore still comprised in Grant No IR 32481 which is registered in the name of the plaintiff. The two official searches exhibited by the plaintiff, dated 18/5/2020 and 19/5/2020 respectively, confirm that the plaintiff is the registered proprietor of the suit properties. A copy of Grant No IR 32481 was exhibited, bearing six entries relating to registration of the Grant, registration of the certificate of sub-division, and registration of transfers relating to the other three sub-divisions that were disposed in 1988. Based on the above uncontroverted evidence, the court is satisfied that the plaintiff has proved that he is the registered proprietor of the two suit properties. What remains to be answered is whether the defendants have acquired the suit properties under the doctrine of adverse possession as contended by them.

26. The four defendants were sued in their capacities as chairman, secretary, youth leader and member of Kibagare Slums Association. They elected to bring a counterclaim in the same capacity. Among the prayers they seek in the counterclaim is a declaration that the four of them and members of Kibagare Slums Association have acquired legal and equitable title to the suit properties under the doctrine of adverse possession. It is not clear from the defendants' pleadings and evidence whether or not Kibagare Slums Association is a registered entity under any of Kenya's laws.

27. Title to land under the doctrine of adverse possession accrues to a specific adverse possessor upon proof of appropriate degree of physical control of the land for the prescribed limitation period. Secondly, where the adverse possessors are several, they must demonstrate that there was a single possession by them jointly but not severally. The **Rt Hon Sir Robert Megarry and Sir William Wade** in their book **The Law of Real Property, Eighth Edition [Sweet & Maxwell], page 1465 – 1466** observe thus:

*“For a squatter to prove that he had factual possession he must show that;*

*(i) he had an appropriate degree of physical control of the land;*

*(ii) his possession was a single possession: there can be a single possession by several squatters jointly, but not severally;*

*(iii) his possession was exclusive, a squatter cannot be in possession at the same time as the true owner; and*

*(iv) he dealt with the land in question as an occupying owner might have been expected to deal with it and no one else has done.”*

28. The defendants claimed that they had been in adverse possession of the suit properties for the seven decades which preceded their defence and counterclaim. None of the four named defendants testified to demonstrate to the court that they jointly became adverse possessors of the suit properties seven decades ago as alleged in their defence and counterclaim. None of the two witnesses who were called

by the defence led evidence to suggest that there was a joint single possession by specified adverse possessors seven decades ago.

29. Secondly, neither of the two defence witnesses was able to identify the survey numbers of the land that the defendants claim to have occupied as adverse possessors for seven decades. DW1 said that she doubted the plaintiff's registration as proprietor of the suit properties. DW2 testified that he did not know if the land on which he lived was registered. There was no evidence to suggest that any of the defendants brought a suit under **Sections 37 and 38 of the Limitation of Actions Act** during the seven decades they alleged to have been in adverse possession of the suit properties.

30. On his part, the plaintiff demonstrated that he had been in possession of the suit property from 1977 when he acquired it and until May 2020 when unknown people masquerading as owners of the suit properties entered the suit properties and started erecting thereon unapproved makeshift structures. He demonstrated that the unapproved structures were still fresh when he initiated this suit. He also demonstrated that upon learning about the trespass, he reported the matter to the police and he subsequently learnt from the police that the defendants held themselves as officials and leaders of Kibagare Slums Association and were responsible for the trespass. Further he demonstrated that in 1988, he sub-divided and sold part of the land.

31. The view I make of the evidence of the two defence witnesses is that they may be residents of Kibagare Slums. They, however, failed to demonstrate that they have been in adverse possession of the suit properties for the last seven decades. They also failed to demonstrate that they have been in adverse possession of the suit properties for twelve years. I therefore agree with the plaintiff that the suit properties were invaded by trespassers in mid-May 2020. The invaders cannot be said to be persons who have acquired adverse title to the suit properties because the invasion took place in May 2020 and the plaintiff promptly resisted the invasion. The plaintiff is therefore entitled to eject them from his land with the assistance of the law enforcers.

32. In the absence of evidence of joint single possession by the defendants as adverse possessors for seven (7) decades as pleaded in their defence and counterclaim, the defendants cannot be said to have proved their claim. On his part, the plaintiff has demonstrated that he is the registered proprietor of the suit properties and he has had quiet possession of the suit properties from 1977 to mid- May 2020 when the defendants invaded the land.

33. In light of the foregoing, it is the finding of this court that the defendants are trespassers on the suit properties. Further, it is the finding of this court that the defendants have failed to demonstrate a claim of title to the suit properties under the doctrine of adverse possession. The net result is that the plaintiff's suit succeeds while the defendants' counterclaim fails wholly.

34. The plaintiff made a plea for general damages. He did not, however, lead any evidence relating to assessment of reasonable general damages. I will in the circumstances award the plaintiff nominal general damages for trespass in the sum of Kshs. 2,000,000 (Kenya Shillings Two Million only).

#### **Disposal Orders**

35. In light of the above findings, the plaintiff's suit and the defendants' counterclaim are disposed as follows:

***a) It is hereby declared that John Baker Kiamba Mwaniki is the lawful proprietor of the suit properties, LR No. 209/9002/2 and 209/9002/3 comprised in Grant Number IR32481, and that the defendants together with their agents, servants and members of Kibagare Slums Association are trespassers on the said land.***

***b) A permanent injunction is hereby issued restraining the defendants, their agents and servants, together with members of Kibagare Slums Association, against trespassing on, occupying, remaining on, or interfering with the quiet possession of Land Reference Numbers 209/9002/2 and 209/9002/3 comprised in Grant Number IR 32481 belonging to Joseph Baker Kiamba Mwaniki who is the registered proprietor and the person entitled to quiet possession thereof.***

***c) The defendants together with their agents, servants and members of Kibagare Slums Association are ordered to cease trespassing on the said parcels of land by vacating the land within fifteen (15) days from today and in default they are to be evicted therefrom.***

***d) The Police Commander in charge of the Sub-County shall ensure observance of law and order during the eviction.***

***e) The plaintiff, Joseph Baker Kiamba Mwaniki, is awarded nominal damages for trespass in the sum of Kshs. 2,000,000 against the defendants jointly and severally.***

***f) The counterclaim herein is dismissed for lack of merit.***

***g) The plaintiff, Joseph Baker Kiamba Mwaniki, shall have costs of both the primary suit and the counterclaim***

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 16TH DAY OF SEPTEMBER 2021.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Kimende for the Plaintiff

Mr. Waigwa for the Defendants

Court Clerk - Lucy Muthoni

**NOTE:**

*This suit was heard and a judgment date fixed while I was serving at Nairobi (Milimani) Environment and Land Court Station. Due to the subsequent transfer, I have delivered the Judgment virtually at Thika Environment and Land Court Station.*

**B M EBOSO**

**JUDGE**