



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC SUIT NO.226 OF 2013 (OS)**

**IN THE MATTER OF NIKANIN FARM LR NO 946/12 (SHAMBA 2)**

SAMUEL NJENGA KIMANI.....1<sup>ST</sup> PLAINTIFF

COSMUS NJOROGE KIBUE.....2<sup>ND</sup> PLAINTIFF

ANN WARURIE NJENGA.....3<sup>RD</sup> PLAINTIFF

*(Suing as officials and on behalf of members of Juja Nurseries Self Help Group)*

VERSUS

JOMO KENYATTA UNIVERSITY OF

AGRICULTURE & TECHNOLOGY (JKUAT).....DEFENDANT

**JUDGEMENT**

1. The Plaintiffs instituted filed this suit by an Originating summons dated 12th February 2013. However, a prayer by the Defendant to convert it to a plaint as it intended to file a counterclaim and seek for vacant possession was granted by this Honourable Court.
2. It is brought under Order 37 Rule 7 of the Civil Procedure Rules, Section 7, 37 and 38 of the Limitation of actions Act, Cap 22 Laws of Kenya and all enabling provisions of the law.
3. It seeks determination of the following questions:
  - a) *A declaration that the Defendant's rights to recover Land Reference No.9461/12(SHAMBA 2) in Juja is barred under Limitation of Actions Act (Chapter 22 Laws of Kenya) and the title thereof extinguished on the grounds that since the year 1995, the Plaintiffs have openly, peacefully and as of right been in occupation, peaceful and quiet possession and use of part of the suit premises of land that is to say for a period of over 12 years preceding the presentation of this summons.*
  - b) *That there be an order that the Plaintiffs be registered as the owners of the said Land Reference No.9461/12(SHAMBA 2) absolutely in place of the Defendant under Section 37 and 38 of the Limitation of Actions Act Cap 222 laws of Kenya.*
  - c) *That costs of this suit be awarded to the Plaintiffs.*
4. The Originating Summons was supported by grounds set out on the face of the originating summons in paragraphs 1 to 7.
5. The Originating Summons was supported by the affidavit of Samuel Njenga Kimani sworn on 12<sup>th</sup> February 2013. He also filed a witness statement dated 16<sup>th</sup> February 2016.
6. He stated that Juja Nurseries Self Help Group was initially formed in 1993 before it was registered with the Ministry of Social Services. He added that initially, members were planting tree seedlings and flowers for sale along Kia-Ova Road which is along the Defendant's fence before they were relocated by the local administration in conjunction with the Defendant to a power line and Thirika River reserve which is part of the suit land.

7. He stated that the new site was barren, rocky and formless and no plant would grow there other than dessert vegetation and wild plants as it was a dumping site of waste rocks and debris from the Nairobi-Thika Highway construction in 1978, therefore the group took it upon themselves to bring in red soil, manure, levelling and dig out barren soil to replace and make it productive.

8. He added that the group established an elaborate tree and flower seedlings nursery, fish pond, and amusement park, an attraction site, car wash center and environment conservation center and employed 25 permanent workers and they have operated peacefully and uninterrupted since 1995.

9. He also stated that National Environment Management Authority knows their activities and the local authority has been issuing them with water for their irrigation scheme. He added that it has also partnered with the local community, students, non-governmental organizations and as a result, the group's twenty-two (22) members have been accredited and invited to workshops and trained on how to plant, maintain and keep records and better ways of managing the nursery and marketing.

10. He further stated that the Defendant has never demanded any rent from the group and have been aware of its existence as on 1<sup>st</sup> January 2007, the Defendant acknowledged the Plaintiffs' good work and invited them as a stakeholder of Juja Community Development Committee which was established in May 2006 with the mandate of comprehensively planning Juja location into a university city for the benefit of the local community.

#### **The Defendant's response.**

11. The Defendant filed a replying affidavit sworn on 27<sup>th</sup> February 2013 but by Vivian N. Waithaka who described herself as the Defendant's Chief Legal Officer. She deponed that the Defendant is the registered owner of the suit property and it has a Certificate of Title issued on 20th September 2005.

12. She admitted that the Defendant had consented and given permission to the Plaintiffs occupying the said parcel of land for use in the activities of tree nursery as such the possession was not *nec vic nec claim nec precario* and that the Plaintiff sublet it without permission to a 3<sup>rd</sup> party who runs a bar without approval which formed grounds of issuance of the notice to vacate.

13. She stated that the Plaintiff has not established his claim of continuous possession at it was registered in 2012. She also stated that the Defendant is a government institution established under the Universities Act and adverse possession cannot be brought against a government or a government institution.

14. She further stated that the suit property has been earmarked for development of an industrial park being a vision 2030 project jointly implemented between the Defendant and the Ministry of Industrialization and it has already issued a tender for the fencing off of the suit property.

15. He prayed that eviction order issues to ensure the Defendant now enjoys the benefit of the suit property.

16. The Defendant also filed the defence and counterclaim dated 17<sup>th</sup> July 2013 seeking orders:

*a) That the Defendants grant vacant possession of the suit property to the Plaintiff.*

*b) Mesne profits for trespass on the Plaintiff's property from the date the notice to vacate was to take effect.*

*c) Interest on (b) above at court rates from the date of filing this counterclaim until payment in full.*

*d) Costs of this suit*

*e) Any other or further relief that this Honourable court may deem fit to grant.*

17. By a the reply to defence and counterclaim dated 30<sup>th</sup> July 2013, the Plaintiff contended that the Defendant's title to the suit premises has been extinguished on grounds that the Plaintiffs have been in open occupation, use and possession of the suit premises since 1995 hence their right for adverse possession. They denied to have sublet the suit premises to third parties and prayed that the Defendant's counterclaim be dismissed.

#### **The Plaintiffs' evidence**

18. PW1, the 1<sup>st</sup> Plaintiff testified on 28<sup>th</sup> March 2019. He told the court that the group was started in 1993 and in 1995, they were relocated to the suit property. He stated that group was registered in the year 2000 and certificate of registration issued.

19. When he was Cross-examined by Defendant's counsel, he stated that the Suit land measures 40 feet by 50 feet but it is near the river. He further stated that in June 2013, they were issued with a notice to vacate the suit property.

#### **The Defendant's evidence.**

20. DW1, Richard Wokabi Kariuki, the Defendant's legal officer adopted his witness statement dated 7<sup>th</sup> October 2015 in which he stated that the Defendant is a Government institution and it granted the Plaintiffs permission to utilize the suit property for limited purpose of tree

nursery activities but the Plaintiffs sublet it to other individuals who are running a bar and carwash thus the Defendant through its advocates issued the Plaintiffs with a notice to vacate.

21. He also stated that the suit property is earmarked for development and the Defendant has already issued a tender thus it stands to be sued for breach of contract.

22. When Cross-examined by Plaintiff's counsel, he stated that the Defendant was issued with Certificate of Title in 2005 and that the Plaintiffs occupy one side of the road. He further stated that the suit property was not previously a dumping site though he could not tell what was there before.

23. He further stated that there is a river adjacent to the suit land and that the Plaintiffs' do not occupy the riparian reserve. Defendant allowed the Plaintiff to utilize the suit land in 1995 and the local administration was involved to move them into the suit land. He added that he had no documentation to show the Plaintiffs were permitted on the land.

24. On the 26<sup>th</sup> April 2021 Mr. Kimani who was holding brief for Mr. Gathii for the Plaintiff sought and was granted 14 days to file their written submissions. The matter to confirm filing of submissions was set for 29<sup>th</sup> June 2021.

25. On 29<sup>th</sup> June 2021, Mr. Kimani indicated that the submissions had been filed and a Judgment date was then reserved for 18<sup>th</sup> November 2021. As at the time of writing this judgment, the Plaintiff's submissions are not on record.

### **The Defendant's Submissions**

26. They are dated 2<sup>nd</sup> September 2020. Counsel for the Defendant submitted on the following issues:-

*a) Whether the suit property is Government public land.*

*b) Whether the Plaintiffs have satisfied the claim of adverse possession.*

*c) Whether the Defendant is entitled to mesne profits from the date of the notice to vacate the suit properties being 12<sup>th</sup> February 2013 to date.*

*d) Which party is to bear costs?*

27. On whether the suit property is government land, Counsel for the Defendant submitted that the title to the suit property was issued on 20<sup>th</sup> September 2005 to the 1<sup>st</sup> Defendant which is a public University established under The Universities Act No.4 of 2012 thus the suit property is public land in terms of Article 62(1) of the Constitution. He further submitted that under Section 41(a) (i) of the Limitation of Actions Act, government land cannot be subject to adverse possession. He relied on the case of **Mohamed Salim Husein & 3 Others vs Egerton University [2013] e KLR** and on the case of **Masek Ole Tinkoi & 3 Others vs Kenya Grain Growers Limited & 2 Others [2018] e KLR**.

28. On whether the Plaintiffs have satisfied the claim for adverse possession, he submitted that they did not satisfy the elements to succeed in a claim for adverse possession stated in **Samuel Kihamba vs Mary Mbaisi [2015] e KLR** since though the Plaintiffs occupied the suit property openly, without force and without secrecy, they occupied with the Defendant's permission. He added that the Plaintiffs admitted that they took possession of the suit property with the knowledge of local administration and with authority and approval of the Defendant and that the Defendant had on several occasions acknowledged their good work. He relied on the case of **Moses vs Lonegrove [1952] 2 QB 533** as quoted in the case of **Mbira vs Gachuhu [2002] HCK** for the position that permission or consensual occupation is not adverse possession.

29. He also submitted that the Plaintiff's claim to have had uninterrupted possession on the suit property for the statutory period of 12 years to warrant an adverse possession claim has not been proved by evidence since the photos of the property annexed have a date stamp for the year 2009 and the Plaintiff's group was registered in the year 2012. He added that it is trite law that a claim for adverse possession will commence after the date of the paper title thus time started running in 2005 when the title to the property was issued to the Defendant.

30. On the issue of the Defendant's entitlement to mesne profit, he submitted that since the Plaintiff's occupation was only a licence, and the Plaintiffs have duly acknowledged receipt of the Defendant's notice to vacate issued on 12<sup>th</sup> February 2013, the Defendant is entitled to mesne profits from the date of the notice since the Plaintiffs continued to benefit from the suit property without the Defendant's consent.

31. I have considered the pleadings and the evidence on record. I have considered the written submissions filed and the authorities cited. the issues for determination are:-

*(i) Whether the prerequisites for a claim of adverse possession have been met.*

*(ii) Are the Plaintiffs' entitled to the reliefs sought?*

*(iii) Is the Defendant entitled to the reliefs sought in the counterclaim?*

*(iv) Who should bear costs of this suit?*

32. It is not in dispute that the Defendant was issued with a certificate of title on 20<sup>th</sup> September 2005. It is the Defendant's submissions that since the Defendant is a public university under the public universities Act No 4 of 2012 the suit is public land under Article 62(1) of the Constitution. It further submitted that under Section 41(a) of the Limitation of Actions Act, government land cannot be subject to a claim for adverse possession. I find that the suit property is not government land as it has already been alienated. It therefore does not fall under the provisions of Section 41(a)(i) of the Limitation of Actions Act (Cap 22 Laws of Kenya). The Defendant is established under the Universities Act, 2012. There is nothing in the statute which provides that the provisions of the Government Proceedings Act shall apply to public universities. I rely on the case of **Simon Mbugua vs County Government of Trans Nzoia & 2 Others [2015] eKLR**.

33. It is the Plaintiff's case that the Defendant has been aware of their occupation of the land since 1995 hence they are entitled to the claim of adverse possession.

34. The ingredients of the doctrine of adverse possession were discussed by the Court of Appeal in the case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2005] eKLR**, where it was stated that:-

*“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in asserting of his title for a certain period, in Kenya 12 years”.*

Similarly, in the case of **Samuel Kihamba vs Mary Mbaisi [2015] eKLR** it was held as follows:-

*“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.*

*....The person invoking the doctrine of adverse possession must prove that his occupation was adverse to the owner of the suit land. He must prove that the occupation was without the consent of the owner of the suit land. Further, even if he had entered the land with consent of the owner, he may also have to prove that the consent was later withdrawn but he, nonetheless, continued to occupy the land in excess of 12 years after the withdrawal of the consent”.*

35. It is the Defendant's case that the Plaintiffs occupied the suit property with permission. The Plaintiffs took possession of the suit property with the knowledge of the local administration and with authority and approval of the Defendant in 1995. The Plaintiffs were given authority to plant trees, seedlings and flowers along Kia-ova road along the university fence before they were reallocated by the local administration in confirmation with the university to a power line and Thirika River Reserve which is part of the suit property.

36. PW1, Samuel Njenga Kimani confirmed in his testimony that they started their project near the fence of the university but were later moved by the Defendant and the local administration to another location on the suit property. He also admitted on cross examination that they were given notice to vacate in January 2013.

37. I am satisfied that the Plaintiffs occupied the suit property with the permission of the Defendant. In the case of **Mbira vs Gachuhu [2002] eKLR** which quoted with approval the case of **Moses vs Lovegrove [1952] 2QB 533** it was held:-

*“It is elementary principle that possession and use of the land for the requisite statutory period does not in themselves give rise to a claim for adverse possession. It has always been the law that permission or consensual occupation is not adverse possession”.*

38. The Defendant was issued with the Certificate of Title on 20<sup>th</sup> September 2005. It issued the Plaintiffs with a notice to vacate in January 2013. The computation of time is from 2005 to when the Plaintiffs were issued with notice to vacate. This was less than 12 years. For this reason, the statutory period of 12 years to warrant a claim for adverse possession has not been proved and cannot stand.

39. I agree with the Defendant's submissions that the Plaintiffs were granted a licence to occupy the suit property for the sole purpose of planting trees and flowers. The Plaintiffs admitted the breach of the license by subletting the suit property to other individuals who are running a car wash service, erected a semi-permanent structures and are running a bar business without the requisite liquor license. This was confirmed by the Deputy Registrar's Report following a site visit. I find that the claim for adverse possession has not been proved and the Plaintiffs claim fails. The suit is dismissed with costs to the Defendant.

40. From the foregoing findings, the Defendant is entitled to the reliefs sought in the counter claim. It is the Defendant's case that the suit property has been earmarked for development of an industrial park being a 2030 vision, jointly implemented by the Defendant and the Ministry of Industrialization. The Defendant is exposed to being sued for breach of contract as it had issued a tender for the fencing off the suit property to facilitate the development of the industrial park.

41. The notice to vacate was issued in January 2013. They refused to vacate. They have benefited from the activities undertaken on the suit property without the Defendant's consent. The Defendant is entitled on mesne profits.

According to **section 2** of the Civil Procedure Act mesne profits are defined as:-

*“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually*

*received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”*

42. I am guided by the case of **Attorney General vs Halal Meat Products Ltd [2016] eKLR** where the Court of Appeal stated as follows:-

*“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on damages on 18<sup>th</sup> Ed. Para 34-41”.*

The Plaintiffs have admitted that they were served with a notice to vacate in January 2013. I find that the Defendant is entitled to mesne profits from that period. I award Kshs.300,000/-which I find reasonable.

43. In conclusion, I find that the Plaintiffs’ claim for adverse possession fails. The suit is dismissed.

44. The Defendant succeeds in its counterclaim. I enter Judgement in its favour as follows:-

*(a) That the Plaintiffs do give vacant possession of the suit property to the Defendant within sixty (60) days of the date of this Judgment, failure to which the Defendant be at liberty to evict them from the suit property.*

*(b) That the Defendant is awarded Kshs.300,000/- as mesne profits.*

*(c) That the costs of this suit be borne by the Plaintiffs.*

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021.**

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**L. KOMINGOI**

**JUDGE**

**IN THE PRESENCE OF:-**

**NO APPEARANCE FOR THE PLAINTIFFS**

**MR. OLUOCH OLUNYA FOR THE DEFENDANT**

**STEVE - COURT ASSISTANT**