



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 789 OF 2017

JEDIDAH WANJIKU KANGETHE.....APPLICANT

VERSUS

LENKAI OLE LENKAIKONI.....1ST DEFENDANT

OTELEKU OLE LENKAIKONI.....2ND DEFENDANT

IKOYO OLE LENKAIKONI.....3RD DEFENDANT

Sued on their own behalf and As administrators of the Estate Of the late Ntoika Ene Lenkaikoni

JUDGEMENT

By an Originating Summons dated the 21st June, 2017 the Applicant seeks for the following orders against the Respondents:

1. The Applicant be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1989 of ALL THAT five (5) ACRE parcel of land comprised in Title Number LR No. LTK/ ROMBO/'B'/2 situated in Loitokitok currently in the Applicant's possession.
2. This Honourable Court do issue an order compelling the Respondents to subdivide and effect transfer of a Five (5) acre portion of land out of LR No. LTK/ ROMBO/'B'/2 currently in the Applicant's possession and occupation pursuant to a Certificate of Confirmation of Grant issued in High Court Succession Cause No. 1185/1988 (Estate of the late Ntoika Ene Lenkaikoni) failing which the Deputy Registrar of the High Court do sign all the relevant subdivision as well as Transfer documents pertaining to the Transfer of the said Land.
3. A permanent injunction do issue restraining the Respondents by themselves, their servants, agents assigns or any other persons authorized by the Respondents from evicting, interfering with, encroaching and/or in any way dealing with any part of the Five (5) acre portion of land occupied by the Applicant out of LR No. LTK/ ROMBO 'B'/2
4. In the alternative to prayer No (2) above, the Respondents do refund to the Applicant the full current value of the 5 acre portion of land out of LR No. LTK/ ROMBO ' B' / 2 currently occupied by the Applicant pursuant to an Agreement of Sale between the Applicant and the Respondents dated the 13th September, 1989 pursuant to a valid written agreement of Sale between the Applicant and the Respondents.
5. The Respondents do bear the cost of the Valuation and any other incidental costs in respect of prayer No. 4 above.
6. Costs of this application be provided for.

The Respondents filed a Defence and Counterclaim including a replying affidavit sworn by OTELEKU OLE LENKAIKONI where they denied the averments in the Originating Summons and that the Applicant was in actual possession and occupation of the 5 acres of LR No. LTK/ ROMBO ' B' / 2 hereinafter referred to as the 'suit land'. He denied that the Respondents have never been administrators of the estate of NTOIKA OLE LENKAIKONI and that in 1988 they were minors and in no way capable of being the said administrators. He contended that the succession cause No. 1185 of 1985 being mentioned by the Applicant is a fraud and has never been heard and determined by any competent court. He explained that the actual succession cause for the estate of NTOIKA ENE LENKAINONI is Nairobi High Court Succession Cause Number 1854 of 2012 which appointed Jackson Maiyani Meregul and Joseph K. Kimaiyo as Administrators. Further, that Applicant is not a dependent of the estate of NTOIKA ENE LENKAINONI. He denied using any goons to harass the Applicant. He claims

after 1986 they have occupied suit land continuously and undisturbed and carried out construction of houses, built schools, churches shops and constructed roads, reared livestock including planting crops thereon. Further, that they reside on the suit land with their wives and children. He avers that their quiet enjoyment of suit land is under attack as the Applicant seeks to evict them. He reiterates that if the orders sought are grant, they will lose their home. In the counterclaim they sought for Judgement against the Applicants for:

1. A Declaration that the Respondents are the legal proprietors of the suit land being LR No. LTK/ ROMBO ' B' / 2 having acquired the same by way of inheritance.
2. This Honourable Court be pleased to issue a permanent injunction against the Applicant, prohibiting further interference with the Respondents' quiet enjoyment, use and possession of the suit property.
3. Costs of the suit, and
4. Interests on (c) above at Court rates.

The Applicant filed a further affidavit where she averred that the contents of the replying affidavit were not true. She reiterated that she was in occupation of the suit land which the Respondents are trying to evict her from. She contended that there exists a Certificate for Confirmation of Grant in Nairobi Succession Cause No. 1185 of 1985 in respect to the estate of NTOIKA ENE LENKAIKONI. She avers that the Grant of Letters of Administration Intestate in respect to the estate of NTOIKA EN LENKAIKONI issued on 18th December, 2012 produced by the Respondents is a fraud as Nairobi High Court Succession Cause No. 1854 of 2012 relate to the estate of KAMAU KABUGI alias SAMUEL KAMAU KABUGI as confirmed in the Nairobi High Court Deputy Registrar's letter dated the 30th August, 2017 including the Gazette Notice for 26th October, 2012. She denies that the suit land has been subdivided. She states that when the Respondents filed Succession Cause No. 1185 of 1985, her interest as a purchaser of the 5 acres was recognized and captured by the Court in the Certificate of Confirmation of Grant. Further, that all the Respondents were adults at the time of applying for the said Grant contrary to their averments in the Replying affidavit. She insists she obtained a copy of the Grant from the 1st Respondent as part of the Completion documents. She confirms that the Respondents have been intimidating her demanding that she vacates the 5 acres she occupies and have declined to transfer to her. Further, the Respondents have been uprooting her crops and trying to chase her caretaker away.

The matter proceeded for hearing where the Applicant called one witness while the Respondents failed to attend Court to testify.

Evidence of the Applicant

The Applicant as PW1 claims to have purchased five acres which was part of the suit land from the Respondents in 1989 for Kshs. 100,000/=. She produced a Sale Agreement dated the 13th September, 1989 which was executed by both parties as an exhibit. She explained that she first paid Kshs. 79,000/= and later paid Kshs. 12,050/= on 4th April, 1990. She produced a second agreement dated the 4th April, 1990 as an exhibit. Further, she paid the vendor Kshs. 4000 on 19th May, 1990 and Kshs. 8000/= on 25th June, 1997 and produced Agreements to that effect. It was her testimony that she paid him over Kshs. 100,000/= as he used to disturb her. Further, that the Respondents showed her a Grant from the Nairobi High Court Succession Cause No. 1185 of 1985 where she had been included as a purchaser. She produced the proceedings in the said succession cause as an exhibit. She contended that the vendor showed her the 5 acres of land, planted a sisal boundary to demarcate it, after which she took possession and commenced cultivating it. She explained that the vendor has never transferred the suit land to her despite finalizing to pay the purchase price. Further, that she has been in occupation thereon for more than 32 years but from August 2017, the Respondents restrained her from cultivating the suit land. It was her contention that the Respondents gave her an application for consent to the Land Control Board but declined to attend the Board. She produced the same as an exhibit. She testified that in 2017 the Respondents used the local administration to chase her away. She produced various correspondence and the succession proceedings in Nairobi High Court Succession Cause number 1854 of 2012 which the Respondents claimed was in respect of the Estate of NTOIKA EN LENKAIKONI.

The Applicant closed her case and the Court proceeded to close the Respondents/ Defense case as they were absent. The applicant further filed her written submissions.

Analysis and Determination

Upon consideration of the parties' pleadings herein, including Applicant's testimony, exhibits and submissions, the following are the issues for determination:

- Whether the Applicant has acquired five (5) acres of LR No. LTK/ ROMBO ' B' / 2 through adverse possession.
- Who should bear the costs of the suit.

As to whether the Applicant has acquired five (5) acres of LR No. LTK/ ROMBO ' B' / 2 through adverse possession. The Applicant's main contention in the instant OS is that she has acquired the suit land through adverse possession. The Respondents opposed the application but never attended court to tender evidence. In her submissions, the Applicant reiterated her claim and relied on the cases of **Boniface Musembi Kisome v Julius Musee Ndambuki (2019) eKLR**; **Phelista Mukamu Makau V Elizabeth Kanini Mulumbi (2015) eKLR**; **Motex Knitwear Limited V Gopitex Knitwear Mills Limited (2009) eKLR**; **Trust Bank Limited V Paramount Universal Bank Limited & 2 Others (2009) eKLR**; **Kamaljeet Singh Rekhi V Peter Wainaina Kamau & 2 Others (2016) eKLR**; **James Maina Kinya V Gerald Kwendaka (2018) eKLR** to buttress her claim herein.

Section 13 of the Limitation of Actions Act stipulates that:“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as

adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land. (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land. (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

Further Section 37 of the Limitation of Actions Act stipulates thus:- “ (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

In the case of *Haro Yonda Juaje V Sadaka Dzenge Mbauro & Another (2014) eKLR Angote J*, outlined the ingredients of adverse possession and summarized them as follows: ‘ a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.’

Further in the case of *Sisto Wambugu v Kamau Njuguna (1982-888)1KAR* Chesoni Ag JA (as he then was) at page 226 approvingly quoted Lindley MR in *Littledale v Liverpool college [1900] 1 CH 19, 21* as follows:

“The same point was made by Bramwell LJ in *Leigh v Jack [1879] 5 Ex D 264,272*, where he said referring to the Statute of Limitation; “Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. ”If this is the right way to approach the problem, the question becomes “has the claimant proved that the title holder has been dispossessed, or has discontinued his possession, of the land in question for the statutory period?” rather than “Has the claimant proved that he (through himself or others on whose possession he can rely) has been in possession for the requisite number of years?” it certainly makes it easier to understand the authorities if one adopts the first formulation.” (emphasis added).

On the question of dispossession his Lordship said:

“The next question, therefore, is what constitutes dispossession if the proprietor. Bramwell, LJ in *Leigh v Jack* said at 273, that to defeat a title by dispossessing the former owner” acts must be done which are inconsistent with his enjoyment of the soil for the purpose of which intended to use it.”

In a claim for adverse possession, a party claiming land should demonstrate that his occupation has been open, continuous, notorious and uninterrupted possession for a period of 12 years. Further, that permission of the registered owner was not acquired but the said owner was aware of the said entry. In line with these established principles, I will proceed to analyse the evidence presented in court.

PW1 testified that she entered into a Sale Agreement dated the 13th September, 1989 with the Respondents to purchase five (5) acres from the suit land for Kshs. 20,000/= per acre totaling Kshs. 100,000/=. She produced various Agreements dated 13th September, 1989; 4th April, 1990; 9th September, 1990 and 28th June, 1997 which were all witnessed by the District officer Loitokitok to confirm she indeed paid the purchase price. It was PW1’s testimony that she took possession of the portion of land she had occupied in 1989 after purchase, after it was surveyed and demarcated. Further, that she has been actual, open, continuous possession from 1989 upto August, 2017 when the Respondents with the support of the Provincial Administration chased her therefrom. She was emphatic that she had been cultivating the suit land from the time of purchase and had a caretaker thereon. She produced photos to confirm this. She claimed at the time of purchase the Respondents were awaiting conclusion of the Nairobi High Court Succession Cause No. 1185 of 1985 in respect to the Estate of Ntoika Ene Lenakaikoni who was the absolute owner of the suit land. She produced a copy of the Certificate for Confirmation of Grant from the said Succession Cause that confirmed that she was indeed included therein as a purchaser and granted the 5 acres of land. The Respondents in their Defence feigned ignorance in respect to the said succession cause. I note the Respondents filed in Court a different Grant issued on 18th December, 2012 vide Nairobi High Court Succession Cause No. 1854 of 2012 in respect to the estate of NTOIKA ENE LENKAIKONI but the Nairobi High Court Deputy Registrar vide her letter dated the 30th August, 2017 confirmed that the said Succession Cause relates to the estate of KAMAU KABUGI alias SAMUEL KAMAU KABUGI and not the deceased. Further, that the Applicant also produced a Gazette Notice for 26th October, 2012 confirming that the said Succession Cause is not for the estate of NTOIKA ENE LENKAIKONI. It was PW1’s testimony that the Respondents signed the application for consent of the land control board in her favour but have declined to effect transfer of the five (5) acres to her. The Respondents in their Defence and Replying affidavit denied that the Applicant was in occupation of the suit land but I note in a letter from their advocate messrs Ndeda & Company Advocates dated the 15th February, 2017 which was responding to the Applicant’s lawyer’s letter dated the 23rd January, 2017, they stated as follows:’ **Our client does not deny entering into a written agreement for sale of a portion of 5 acres of the aforesaid land with WANJIRU JEDIDAH KANGETHE your client herein. The above sale was subject to the applying and obtaining letters of administration which he did and was therein issued with a Certificate of Confirmation of Grant in the year 1985.** ‘

Further in a letter dated 24th March, 2017 from the Assistant County Commissioner Rombo Division addressed to the Applicant in respect to the dispute herein, he stated that:’ **Take Notice that your continued presence in the said sub divided land is illegal and therefore this letter serves you a period of one (1) month upon receipt of this letter to vacate from the said land failure of which the law will take its course.**’

Since the Respondents did not controvert the testimonies of PW1, to my mind this is a pointer that the Applicant as a purchaser indeed took

possession of the suit land. I note they provided fraudulent Certificate of Grant and this indeed brings a question to the credibility of some of their averments. Further, I note the notice issued by the said Assistant County Commissioner and the letter from the Respondent's lawyer were all written after 12 years had elapsed from 1989.

In the Court of Appeal case of **Peter Mbiri Michuki Vs Samuel Mugo Michuki (2014) eKLR** they held that: 'Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978, if any permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18th August, 1978 from Karuga Wandai & Co. Advocates. From 18th August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18th August, 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7th February, 1991.

33. Counsel for the appellant submitted that if any adverse possession existed, the same was terminated in 2011 when the appellant re-entered the suit property after the death of the plaintiff and the abatement of the suit. There are four issues for our consideration; first is whether the death of the plaintiff extinguished the claim to adverse possession; second whether abatement of the suit as filed by the plaintiff extinguished the claim for adverse possession; third whether the order reviving the suit after abatement revived the claim to adverse possession and lastly, whether re-entry in the suit property by the appellant after abatement of the suit extinguished the claim to adverse possession. The appellant submitted that the plaintiff died on 22nd December, 2002, and the suit abated in 2003; that an order reviving the suit was made in 2011, and in the intervening period the appellant had re-taken possession of the suit property and terminated any claim to adverse possession that the plaintiff could have had.

34. In *Mwangi & Another –v – Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 321 it is stated that a purchaser in possession has an overriding interest under the provisions of the Registered Land Act. Order 24 Rule 1 of the Civil Procedure Rules provides that the death of a plaintiff shall not cause the suit to abate if the cause of action survives or continues. The issue is whether the claim for adverse possession survives the death of a plaintiff. Section 16 of the Limitation of Actions Act (Cap 22 of the Laws of Kenya) provides that actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration. The effect of this provision is that when the letters of administration was granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death and an order reviving an abated suit does not operate prospectively to establish an interval of time between the abatement and revival of the suit but is retroactive; an order reviving a suit revives the case from the date the suit was filed by the deceased.

35. The dicta in *Mwangi & another –v – Mwangi*, (1986) KLR 328, establishes the principle that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. In *Public Trustee – v- Wanduru*, (1984) KLR 314 at 324, it is stated that in adverse possession, the title of a registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. In the instant case, the plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but an overriding interest binding on the land. Section 18 of the Limitation of Actions Act provides that subject to Section 20(1) of the Limitations Act, the Act applies to equitable interests in land ... and accordingly a right to action to recover the land ... accrues to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land. Sub-Section 18 (4) provides that where land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, a right of action to recover the land accrues during such possession to any person in whom the land is vested as trustees or to any other person entitled to a beneficial interest in the land or the proceeds of sale.

36. It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the Limitation of Actions Act applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the Limitation of Actions Act applies as it provides that a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run.

Further, Madan JA in the case of **Public Trustee Vs Wanduru (1984) KLR 314**, held that adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession.

In the current scenario, I note the Applicant commenced paying the purchase price in 1989 and finalized in 1997. The Vendors permitted her to take possession in 1989. Insofar as she finalized paying the purchase price in 1997 as per the evidence presented, I find that time begun to run from 1989 when she took possession. Further, that the 12 years to fulfill a claim for adverse possession over the five acres she occupies actually matured in 2001. I note she was included in the succession cause as a purchaser, and further the Respondents had actually applied for consent of the Land Control Board to effect transfer of the five acres to her. To my mind, from 2001, despite not having acquired the title to the suit land, the Respondents were actually holding the said title to the five acres in trust for the applicant. Since the Respondents failed to

controvert the Applicant's averments and based on the letter from the Respondent's lawyer and Assistant County Commissioner, I find that the Applicant was actually in open, continuous and non interrupted occupation of the suit land. The Respondents' efforts to have the Applicant evicted from suit land in August 2017 after this suit have been instituted and after 20 years of final receipt of the purchase price hence immaterial. Based on the decisions cited above, evidence before me and the legal provisions I have quoted, I find that the Applicant is indeed entitled to the five (5) acres of land she occupied which she purchased from the Respondents, through adverse possession.

As to who should bear the costs of the suit. Costs generally follow the outcome of a suit and I find that since she is the inconvenienced party, the Applicant is entitled to the costs of the suit.

It is against the foregoing that I find that the Applicant has proved her case on a balance of probability and will proceed to make the following final orders:

i. The Applicant be and is hereby declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1989 ALL THAT five (5) ACRE parcel of land comprised in Title Number LR No. LTK/ ROMBO/ 'B' /2 situated in Loitokitok currently in the Applicant's possession.

ii. The Respondents Counterclaim dated 22nd August, 2017 be and is hereby dismissed.

iii. The Respondents be and are hereby directed to subdivide and effect transfer of a Five (5) acre portion of land out of LR No. LTK/ ROMBO/ 'B'? 2 currently in the Applicant's possession and occupation pursuant to a Certificate of Confirmation of Grant issued in High Court Succession Cause No. 1185/1988 (Estate of the late Ntoika Ene Lenkaikoni) within 60 days from the date hereof failing which the Deputy Registrar of the Environment & Land Court do sign all the relevant subdivision as well as Transfer documents pertaining to the Transfer of the said Land.

iv. A permanent injunction be and is hereby issued restraining the Respondents by themselves, their servants, agents assigns or any other persons authorized by the Respondents from evicting, interfering with, encroaching and/or in any way dealing with any part of the Five (5) acre portion of land occupied by the Applicant out of LR No. LTK/ ROMBO ' B' / 2

v. The Costs of the suit are awarded to the Applicant.

Dated and delivered in Kajiado this 11th day of March, 2020

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Kariuki holding brief for MS/Njoroge for applicant

No appearance for respondent