



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NYAHURURU

ELC NO. 2 OF 2017

(Formerly ELC Nakuru No. 15 of 2012)

JOSHUA NDIRITU NDUHIU.....PLAINTIFF

-VERSUS-

FRANCIS MWANGI MAINA.....DEFENDANT

JUDGEMENT

1. The Plaintiff's suit was filed at the Environment & Land Court then sitting at Nakuru vide a Plaint and a Notice of Motion application dated 12th October, 2012 and filed on the same day. The Plaintiff sought the following orders:-

i. A declaration that the Plaintiff is the lawful registered proprietor of parcel of Land Reference No. NYANDARUA/MILANGINE TOWNSHIP/60

ii. A permanent injunction to issue restraining the Defendant, his agents, servants, employees or anybody purporting to act under him from entering, remaining, constructing, trespassing, cultivating, occupying and/or in any manner whatsoever interfering with the Plaintiff's quiet occupation and utilization of parcel of Land Reference No. NYANDARUA/MILANGINE TOWNSHIP/60 in perpetuity.

iii. Any other or further relief that this Honourable Court may deem fit and just to grant.

iv. Costs of this suit and interest at court rates.

2. Vide the aforementioned Notice of Motion application, the Plaintiff sought interim injunctive orders restraining the Defendant/Respondent by himself and/or his assigns from having any transaction or dealing with the suit land pending the hearing and final determination of this suit.

3. On 12th October, 2012, the Notice of Motion application was conversed ex-parte. It was certified as urgent and temporary orders granted accordingly. The court directed that the Defendant/Respondent be served.

4. On 6th November, 2012, the Defendant entered appearance on the 15th November, 2012 and filed a Defence and Replying Affidavit on 19th December, 2012. The Plaintiff filed a Reply to Defence and a Supplementary Affidavit dated 19th December, 2012. Through an application dated 9th June, 2017, the Defendant applied to amend his Defence and file a Counter-Claim. Upon obtaining leave on 25th July, 2017 he filed an Amended Statement of Defence and Counter-Claim. On 22nd August, 2017 the Plaintiff filed a Reply to Defence and Defence to the Counter – Claim respectively.

5. On 5th February, 2015, the Plaintiff and Defendant entered into a consent. It was recorded and adopted in Court under the following terms:-

i. *The Notice of Motion application dated 12th October, 2012 be compromised.*

ii. *The status quo on the ground be maintained.*

iii. *None of the two parties undertook any construction or development on the subject land pending hearing and determination of the main suit.*

6. On the 16th March, 2017 upon the establishment of the Environment and Land Court at Nyahururu the suit was transferred therein from Nakuru wherein upon compliance with the Provisions of Order 11 of the Civil Procedure Rules, the matter commenced for hearing on the 21st November, 2017 thereof.

Plaintiff's case.

7. PW -1 Joshua Nderitu Nduhiu testified by stating that he lived at Milangine. He was an officer attached with the Kenya Defence Force (KDF) and a farmer. He stated that in September 2009 he bought the suit land which had been shown to him by one Wainaina Muringai Kahiga, land which was registered to his wife Millenia Nyambura Wainaina.

8. That he had requested for a letter of allotment and had been given a copy thereof as well as receipts confirming payments therein. That after conducting due diligence and confirming that the land belonged to M/s. Wainaina, on the 6th October, 2009, he and Ms. Wainaina had entered into a sale agreement for the purchase of the suit land at a consideration of Ksh. 300,000/=.

9. The Plaintiff produced several documentary evidence as exhibits, being the sale agreements, original letter of Allotment, the receipts of payment of registration, receipt for payment to the surveyor and banker's cheque, original Certificate of Lease, receipt to the Land Control Board, Valuation form, Transfer form, Stamp duty receipts and Certificate of Official Search all marked as Plaintiff Exhibits 1 to 11 respectively.

10. That upon entering into the sale agreement, he had started the process of obtaining the Certificate of Lease in his names where he had fully paid the prerequisite dues and had been issued with the official receipts and documents thereof. The Certificate of Lease had been subsequently transferred to him.

11. It was his testimony that prior on 16th September, 2009 when he had gone to the land it had been vacant. That from the years 2009 to 2010, he had travelled out of the country on official duties. However, in the year 2012 upon his return, he had found that the land had been ploughed. His investigation revealed that the Defendant was responsible for the ploughing.

12. That he had approached the Defendant and urged him to remove his crops from the land but he refused stating that he owned the land.

13. That two weeks later, the Plaintiff had received a letter dated 12th April, 2012 from the Land Registrar requesting him to appear at his offices and present all the registration documents pertaining to the land in his possession. That on the 19th April, 2012, he had appeared before Land Registrar in his office where he had met the Defendant and that although he had all the requisite documents, the Defendant had none. According to PW1, the Defendant vowed that he would never vacate the suit land unless upon his death.

14. That the problem was not resolved and the Defendant had continued being in occupation and possession of the land although not continuously and uninterruptedly for 30 years as the land had been allocated in August 1995 wherein the Defendant had entered thereon in the year 2012 after the death of the vendor's husband.

15. He refuted the allegation that the registration documents he held were obtained fraudulently and proceeded to testify that the Defendant being the Chairman to the allocation committee ought to have known that the plot had been allocated to the vendor. That since the defendant had no documents that he be granted the relief sought in the Plaintiff.

16. On Cross-examination the Plaintiff held that he had bought the suit land in the year 1999 and thereafter he had travelled out of the country for the period 2009 to 2010 but upon his return he had found that the Defendant had occupied and was utilizing the same wherein in the year 2011, the Defendant had put building materials on the land. That he had also fenced off the land using iron sheet which he had removed upon the Plaintiff filing the present suit.

17. The Plaintiff's witness PW2 one Millania Nyambura Wainaina, testified that she lived in a place called Leisako. It was her testimony that she was the legally registered owner of the Land Reference Number NYANDARUA/MILANGINE TOWNSHIP/60 having been issued the same in the year 1965 by one Mr. Ronaldo who had been using the government plots.

18. She testified that she had been issued with the registration documents after having made her payment in Nairobi where she had been issued with receipt and took possession of the land thereafter. That she had later sold the land to the Plaintiff, to whom she had given all the documents, at time when there was no one in occupation of the land.

19. On Cross-examination, she stated that she was given the land in the year 1965 two (2) years after independence of the Republic of Kenya. That she had not been 14 years old at the time when she had been given the land. She confirmed that that she was born in the year 1945 and had been given the land by Mr. Ronaldo who also gave her the Letter of Allotment at a place called "Wakiongo".

20. She also confirmed that there existed a duly executed Sale Agreement dated 6th October, 2009, for the purchase price of Kshs. 300,000/= sold to the Plaintiff which was paid in two (2) installments Kshs. 20,000/=. She stated that the Government had closed all the registration of land in the years 2003 – 2017.

21. That the Certificate of Title was in the name of the Plaintiff. That she had paid a sum of Kshs. 5,040/= and issued with a receipt dated 3rd October, 2002. She held that since she got the land in the year 1965, she had never made any development on it. She stated that the Defendant entered onto the land after the death of her husband although she could not remember when exactly.

22. She refuted the assertion raised by the Defendant that he had lived on the land from the year 1960. She stated she did not know whether

the Defendant had a Letter of Allotment to the land dated 25th August, 1995. She confirmed that the Plaintiff had not started building because the Defendant had already started ploughing on the same. She refuted that the Defendant was the Chairman of the town Committee Milangine Township and confirmed that he had not been present when the land was being allocated.

23. In re-examination, she testified that at her age she could not make fraudulent papers to 'grab' land from anybody.

The Defendant's case

24. The Defendant filed an Amended Defence and Counter Claim on 25th July, 2017 where he sought for the suit filed by the Plaintiff to be dismissed with costs. In his Counter Claim, the Defendant (Now Plaintiff) prays for the following orders:-

(a) A declaration that the Plaintiff in the Counter Claim has acquired title to the parcel of land known as Plot No. NYANDARUA/MILANGIBE TOWNSHIP/60 by way of adverse possession.

(b) The Certificate of Lease issued to the Defendant in the Counter Claim be revoked and a Certificate of Lease be issued in the names of the Plaintiff in the counterclaim.

(c) Costs of the Suit.

25. On the 17th May 2018, DW 1, Francis Maina Mwangi the Defendant, now Plaintiff herein testified that he lived in Milangine and was a farmer. That he was the Chairman of Milangine Wakiongo Community Self Help Group which group was formed for the interest of squatters within Milangine Township.

26. He informed court that the people who were not allocated farms by the Government were brought to Milangine Township and allocated plots to farm there. That he had lived in the township from the year 1960 to 1964 and was the proprietor to the plot No. 60 measuring 0.045 Hectares which was approximately 50x100 acres.

27. That grass thatched houses had been built in the year 1969 for the people but which huts had later been demolished so that they could build permanent houses. That he did not build the house but started ploughing on the land which he stated had been allocated to him on the 25th August, 1995 wherein he had been issued with a letter of allotment attached with the PDP showing the position of his land on the ground. The said Allotment letter was marked as Df MF1 1.

28. That he had been using the land since the year 1969, land which had been surveyed and beacons via a Certificate dated 6th March, 2002 which was marked as DMFI 2.

29. He testified that the Chief of the area Known as Lucy Nyambura knew that he was the proprietor of the suit land and had even written a letter dated 23rd February, 2015 to that effect which letter was marked as DMFI 3. He also produced photographs depicting that he had occupied the land as Df exh 4(a-d).

30. He asserted that he knew PW-2 who used to live on the land before she and her husband left 5 years earlier. That PW 2 had not been on the list of the people who were allocated land within Milangine Township.

31. He held that there were no Letters of Allotment issued from Nairobi and that apart from himself there was no one else allocated Plot No. 60. He affirmed that his Letter of Allotment was genuine and that he had lived on the land for 40 years without any complaint.

32. That until the 2nd May, 2018, no leases had been issued. It was his testimony the survey work had been completed and only awaiting the Registered Index Map (when shown RIM he refused to look at or touch it stating the Plaintiff's knew where they had got it from). He held the Letters of Allotment and Certificate of Lease issued to Plaintiff were not genuine. He reiterated his prayer in the Counter Claim to have the Certificate of Lease cancelled. He also prayed for title by Land adverse possession having lived on the suit land for over 40 years.

33. On Cross-examination, the Defendant held that nobody else apart from himself had been allocated the suit land and should it had been allocated to anybody else he would have known having been the Chairman of the Self Help Group Committee.

34. He also stated that the Certificate of Lease issued to the Plaintiff dated 15th September, 2011 was not meant for Milangine Township but for a plot situated in Nairobi. He confirmed that the Government was the original owner to the suit land. He was illiterate but could only read his name and years jotted down on any document.

35. The next defence witness DW2, Mercy Njeri Nyambura stated she was from Milangine. That she was the Senior Chief of Sabugo Location. She was referred to her letter dated 23rd February, 2018 which she confirmed having written it. She confirmed knowing DW1 for over 20 years and that she had been seeing him use the land since the time he was allocated in 1969.

36. She testified that she was born in the year 1974 where she had schooled and lived within the area. She produced the letter 23rd February, 2018 as Df exh3.

37. On cross-examination she confirmed that on being born on 24th January, 1974 and was not alive in the year 1969 hence she could not comment on what took place then. She stated that DW1 never lived on the suit land but on the land opposite to the suit land of the road and that she had meant to state that he had been using the land. She confirmed that DW1 had requested her to write the letter although she did not

know its purpose.

38. DW3, Mr. Stephen Kihenjo Mwaura- the County Land Administration Officer, Nyandarua stated that his role was mainly to administer Government land, as well as leases. He confirmed that the Letter of Allotment DMFI 1 was an authentic document which emanated from the officer of the Commissioner of Lands, Nairobi. That the land had been un surveyed land and was not registered within the Land Registry. That the allotment had been addressed to Francis Maina Mwangi DW-1. He the same Df exhibit –1.

39. On Cross-examination, he stated Df exh 1 was not a scanned document and that when the letter of allotment was issued there was a mother file maintained at the Ardhi House, Nairobi where its authentication could be confirmed.

40. DW3 had been stood down to produce the mother file from Ardhi House. Unfortunately, despite the matter being adjourned several times at the instance of the Defendant, DW-3 never appeared to be cross examined further wherein the Defence close their case.

41. Parties filed their submission thereafter where the Plaintiff in his written submissions dated the 6th November, 2019 and filed in Court on 8th November, 2019 submitted that pursuant to the evidence both oral and documentary that he was the legally registered proprietor of the suit land with the leaseholder interest from the Government of Kenya for a period of 99 years from 1995. That he had become the registered proprietor on 30th September, 2011 as per the Certificate of Lease, upon the purchase of the plot from PW2.

42. The Plaintiff submitted that the documents that the Defendant relied on and in particular the Letter of Allotment were clearly suspect as they were not genuine. Plaintiff submitted that the Defendant testified that he owned plot No. 60 having been allocated to him on 25th August, 1995 yet he had been occupying the same since the year 1969.

43. That in his Replying Affidavit in opposition to the said application on 15th November, 2012, the Defendant had deponed under Paragraph 4 that:-

‘if the plot had been up for allocation I would have been the first person to know since I was in charge of Plot allocation’.

44. Having deponed that the plot was never allocated he could not now turn around to state that in the year 2018 he had been allocated the said plot. That the document that the Defendant was relying on had been filed in Court on 22nd March, 2018 and if they had been in existence in the year 1995, they ought to have been in the year 2012 when he had filed his pleadings and in particular the Replying Affidavit.

45. The Plaintiff invited the Honourable Court to examine the said documents in terms of the font used in the various sections which ostensibly had been typed using a type writer, and to come to its conclusion that it was a scanned document and not an original letter of allotment.

46. The Plaintiff submitted that DW 2 had been stood down to avail the original records held by the allocating authority for purposes of cross-examination but the said witness had disappeared despite being accorded several opportunities to appear in court with the records. Thus, his evidence was not subjected to cross- examination. The said disappearance could be taken to mean that there was no original documents available and that the documents used by the Defendants were not genuine. That in the circumstance Pw2’s entire evidence ought to be expunged from the records as the same was never subjected to cross-examination.

47. To support his argument that he held a Certificate of Lease in opposition of an alleged Letter of Allotment held by the Defendant, the Plaintiff relied on the decision of the Court of Appeal (Nairobi) in **Civil Appeal No. 164 of 2004 – ‘Satrya Investments Limited – Versus- J.K Mbugua’** to wit:-

‘The temporary occupation license issued in 1926 could not oust the certificate of title granted under the Registration of Titles Act. The Appellant does not possess title under the Act’.

48. He also relied on the case in **Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua’** where the court held that:

‘It is trite to land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

49. That the Defendant failed to demonstrate that he had accepted the offer within 30 days stipulated, that he had made the payment or had complied with the conditions set out in the letter of allotment.

50. The Plaintiff submitted that the Certificate of Lease held by him is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of The Land Registration Act No. 3 of 2012.

51. That the Defendant’s allegation that the Certificate of Lease held by the Plaintiff was obtained through fraudulent means was never supported by any documentary evidence as required by law hence it remained as a mere allegation.

52. The Plaintiff sought that the court dismisses the claim of title by Land Adverse Possessions advanced by the Defendant on claim that the Defendant had been in occupation of the land for over 30 years, based on the evidence adduced for reason that the Plaintiff took possession of the suit land from PW2 in the year 2009 prior to which PW2 had been in occupation and possession thereof between the years 1995 to 2009

53. That suit land had been Government property for which no adverse possession claim could lie against. That the lease had been issued to PW2 for the first time on 15th September, 2011. The Plaintiff had been issued with a Certificate of Lease on 5th January, 2012, the limitation of time begun to run from 15th September, 2011 when the lease was issued to PW 2.

54. The Plaintiff relied on the decided cases of **Nakuru Environment and Land Court No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 Others** and **Chuka Environment and Land Court No. 110 of 2017 – M'Mbaoni M'Thaara – Versus- James Mbaka** to buttress their submission and to conclude that he had proved his case and was entitled to prayers sought in the Plaintiff and with costs.

The Defendant's Submissions

55. The Defendant filed their Submissions dated 2nd December, 2019 on 3rd December, 2019 wherein he posed two (2) issues to be considered by this Court which issues were:-

- i. Whether the Plaintiff was the lawful proprietor to the Suit land.
- ii. Whether the Defendant had acquired the suit land by way of Land Adverse Possession.

56. With regard to the first issue, the Defendant held that the Plaintiff was not the lawful proprietor to the suit land. He submitted that the lease in the name of Millania Nyambura Wainaina was received for registration on 15th September, 2011, wherein on the 30th September, 2011 she had been officially issued with the Lease document but effected the transfer of the same to the Plaintiff. It was his submission that the legality of this transaction was doubtful for reason that he had already been allocated the land which he had already taken possession.

57. He asserted that the authenticity of the letter of the allotment could not be vouched out merely for failure of DW3 to produce the mother file from the Ardhi house. That under the provisions of Section 116 of the Evidence of Act, the Plaintiff had the option to have any Officer from the Ardhi House to bring and produce the mother file.

58. The Defendant drew the attention of the Court to a Presidential directive up to June 2017 placing an embargo on the issuance or processing of any lease documents and wondered how PW2 got her Certificate of Lease in the year 2011, and how she could have been registered and transferred the suit land to the Plaintiff despite the existence of the Embargo on Registered Title Act Transactions.

59. On the second issue regarding the defence of the Defendant having acquired title deed through the claim of Land Adverse Possession, the Defendant submitted that he had been in active occupation and use of the land since the year 1965 long before the suit land had been registered.

60. That the Land had been issued to squatters in Milangine he being among them wherein he had taken possession as was affirmed by the letter dated 23rd February, 2015 herein produced as Df exhibit 3.

61. The Defendant cited the Provisions of Section 7 of the Limitation of Actions Act and submitted that time started running when PW 2 was issued with a Letter of Allotment on the 25th August, 1995 by which time she never took possession or developed the suit land but sold the land to the Plaintiff while the Defendant was still in occupation. To support their argument the Defendant relied on the Court of Appeal case of **Githu vs Ndeete [1984] eKLR 776**. That the mere transfer of the suit land by PW 2 to the Plaintiff did not interrupt the right of acquiring the same by way of Land Adverse Possession.

62. The Defendant also cited the case of Court of Appeal **Benson Mikuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR** to buttress their contention that time started running when PW2 was issued with a letter of allotment but failed to evict the Defendant from the suit land. That further, since the lease had indicated that the subject land was leased to one Milanie Nyambura Wainanina for a period of 99 years commencing on 1st September, 1995, the Defendant's occupation on the suit land was adverse to the interest of the Plaintiff and hence he should be registered as its proprietor as was held in the case of **Guham Mariam Noordin vs Julius Charo Karisa (2015) eKLR**.

Analysis and Determination

63. I have carefully considered the Plaintiff's claim against Defendant, the Defendant's defence and counterclaim herein, the evidence, submissions as well as the law applicable and the Authorities herein stated. I find the matters arising for determination thereto as being;

- i. Whether the Plaintiff is legally and rightfully entitled as the registered proprietor to all the suit land being Land Reference No. NYANDARUA/MILANGINE TOWNSHIP/60.
- ii. Whether the Defendant is entitled to the possession and legal ownership of the suit and vide the principle or claim of Land through Adverse Possession.
- iii. Whether the parties are entitled to the reliefs sought.
- iv. Who will bear the costs of the suit?

64. On the 1st issue for determination as to whether the Plaintiff is legally and rightfully entitled as the registered proprietor to the suit land

being Land Reference No. NYANDARUA/MILANGINE TOWNSHIP/60, I find that from the evidence adduced, initially the suit land was legally registered to one Milania Nyambura Wainaina, PW 2 herein who had been issued with a letter of Allotment Reference No. 74001/T/G/Vol.11 from Nairobi dated 25th August, 1995 Vol. Govt/ 1027/49/18GA/ Vol. IV/25 by an Officer Mrs. Olando E.S. A keen observation of the pre-requisite conditions on the letter of allotment states as follows:-

2) I should be glad to receive your acceptance of the attached conditions together with the bankers' cheque for the amount as set out below within (30) days of the post mark

"If acceptance and payment respectively are not received within thirty (30) days from the date hereof the offer herein contained will be considered to have lapsed".

65. PW2 had made some payments of a sum of Kshs. 5,040/= for the approval of the un-surveyed plot NYANDARUA/ MILANGINE TOWNSHIP/60 and had been issued with official receipt dated 3rd October, 2019. Additionally, she proceeded to make further payments for the Registered Index Map (RIM) amendment and was issued with an official receipt No. 0660884 for a sum of Kshs. 4,380/= dated 10th April, 2008 produced as Pf exh 3. She thus issued a bank cheque printed on 28th August, 2007 in the name of the Director of Surveyor herein produced Pf exh 4 (b).

66. Additionally, based on the pre-condition/ directions on the Letter of Allotment which stated that *the issue of the Government grant or Lease will be undertaken as soon as circumstances permit*, PW 2 applied and obtained a Certificate of Lease for a period of 99 years with effect from 1st September, 1995 but was registered by the Commissioner of Lands on 15th September, 2011.

67. Likewise, it is evident that the Defendant was also issued with a letter of Allotment herein produces as Df exh1, to the suit land on 25th August, 1995 Ref No. 74001/7/G/Vol II for 99 years, by an officer in the office of the Commissioner of Lands Mr. S.K Mburungu on authority of Vol GOVT/1027/49/18GA/26. To further support his ownership to the plot, DW1 also produced a beacon Certificate dated 6th March, 2000 issued by a Land Surveyor Z.M Moria, but unlike, the Plaintiff, the Defendant did not prove any payments as stipulated by the conditions thereto.

68. The effect of Registration of Lands is founded in the Provisions of Section 24 of the Land Registration Act which provides as follows:-

"Subject to this Act – The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenances thereto and;

69. Section 25 of the Land Registration Act provided as follows:-

"The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever....."

70. Both the Plaintiff and the Defendant had a conviction that the documents of registration held by the adverse party were doubtful and forgeries.

71. In order for the Court to effectively deal with this issue the provisions of Section 26(1) of the Land Registration Act would come into operation to wit:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;-

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

72. In the case of **Joseph Komen Somek vs Patrick Kennedy Suter [2018] eKLR** the court clearly spelt out the purpose of above Provisions of Section 26 (1) (b) which was to protect the genuine title holders from being deprived of their title by subsequent transactions.

73. To advance on this legal proposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case, the Lease is deemed to be the *prima facie* evidence of the stated registration. In this case PW2 produced the original Certificate of Lease registered in her names on 15th September, 2011.

74. Subsequently, PW2 vide a Sale Agreement dated 6th October, 2009 and transfer forms duly executed, letter of consent to transfer dated 15th September 2011, a valuation acquisition form for stamp duty form dated 30th September, 2011, Stamp duty receipt dated the 30th September, 2011, transferred the suit land to the Plaintiff PW-1 who then produced an official search dated 12th November, 2012 confirming that indeed he was the registered proprietor to the suit land.

75. It was thus not sufficient for the parties to merely testify and/or allege that the adverse party herein had obtained title to the suit parcel of

land through fraudulent means. The onus was on them to prove these allegations. Fraud is a serious matter which must be proved to the required standard as was held in the case of **R.G Patel vs Lalji Makanji 1957 E.A 314**, where the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

76. It is trite law and as founded under Sections 107 and 108 of The Evidence Act that he who alleges fraud or any such a claim has to prove it. None of the parties herein have been able to prove the allegation of fraud by either filing a report by an investigation agency or forensic document examiner, or a report from the Division of Criminal Investigation Office being the established expert on demonstrating the allegation fraud were produced nor summoned. For that reason the Court is left to conclude that the Certificate of Lease held by the Plaintiff is genuine and the conclusive *Prima Facie* evidence that he is the legal and registered proprietor to the suit land.

77. On the second issue as to whether the Defendant was entitled to the possession and legal ownership of the suit land vide the principle or claim of Land Ownership through adverse Possession

78. The Defendant has pleaded in his Defence and Counter Claim Paragraph 4 thus:-

“.....been in occupation of the parcel of land for a period of over 30 years and all the developments erected thereon were effected long before the alleged date September, 2012”

79. In his testimony in Chief the DW-1 testified having been allocated the land from the year 1969 and from then he had lived on the land for over 40 years and there had never been a complaint. Indeed the evidence by DW2, the chief of the Sabongo location vide a hand written letter dated 23rd February, 2018 stated that the Defendant had lived, occupied and used the land from the year 1969. Indeed he has vehemently submitted this position vide the filed Written Submissions supported with authorities. It's for this reasons that he prayed for declaration he acquires title to the Suit land by way of Adverse Possession.

80. The Law is settled on how a Claimant may acquire title and claim of title by way of the Land Adverse Possession under the Provisions of Sections 7, 13, 17 and 38 of The Limitations of Actions Act Laws of Kenya.

81. Section 7 of the Act provides inter alia:-

“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of actions accrued to some person through when he claims to that person”.

82. Section 13 of the Act provides that :-

A right of actions to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession.”

83. Section 17 of the Act is to the effect that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover the land title of that person to the land stands extinguished.

84. Finally, the Provisions of Section 38 of the Act states:-

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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 registered as proprietor of the land.”

85. The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri C.A No. 213 of 1996** held that:-

“The combined effect of the relevant Provisions of Section 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 a Land Adverse Possession of the same at the expiry of 12 years of adverse possession of that land.”

86. The onus is on the person or person claiming adverse possession as in this case the Plaintiff in the Counter Claim:-

“..... to prove that they have used this land which they claim as of right; “Nec Vi, Nec clam; nec precario” (No force, no secrecy; no evasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the Possession or occupation. The Possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

87. The main element which a Plaintiff ought to prove to be entitled to a claim or title of land possession are:-

i. He must have used or be in possession of the suit land as a right for over 12 years.

ii. The registered owner **MUST** know of the possession or occupation.

iii. The possession of the land **MUST** be continuous and uninterrupted.

88. The burden of proof of occupation is on the person claiming the title which includes:-

i. It be actual.

ii. It be open.

iii. It be exclusive and

iv. It be hostile possession of the land claimed.

89. In the present case has the Defendant/Plaintiff in the Counter-Claim proved these threshold and /or elements?

90. It is not in dispute that the Defendant has and is currently in occupation and uses the suit land for cultivation of crops and grass as per the evidence adduced as well as the documentary evidence being the bundle of photographs produced Df exh 4(a-d)

91. I have taken Judicial Notice pursuant to the testimony of DW1, 2 and 3 that the Defendant utilized the suit land only for agricultural activities but lived on a parcel of land across the road from the suit land.

92. The court has also noted from the Defence evidence that the Defendant/ Plaintiff in the counter claim started using the suit land by taking possession therein in the year 1969. The Defendant/Plaintiff heavily relied onto the testimony of DW 2 and her letter dated 23rd February, 2015 to authoritatively state that he occupied the suit land from the year 1969.

93. From my own assessment, I find this evidence not credible at all. I say so as the DW 2 in her own testimony stated that she was born on 24th January, 1974, and therefore could not confirm that the Defendant had settled on the land in the year 1969.

94. Further, it was the Plaintiff and PW2's evidence that when they entered into a sale agreement for the sale of the land on 6th October, 2009, the land was vacant. That the Defendant had started occupying the land after the death of PW 2's husband in the year 2012 wherein he instituted the present suit, thus limitation period set by the law for a claim of adverse possession fell short.

95. As stated above, the Defendant had already questioned the legality of the Letter of Allotment and Certificate of Lease granted to the PW2 for reason that they were not genuine. It is trite laws that one cannot claim adverse possession against a title that is allegedly defective. This position was the position of the Court of Appeal in the case of **Haro Yonda Juanje -Versus- Sadake Dzenge Mbauro (2014) eKLR** where the court held that:-

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a Claimant to aver that the title held by the registered proprietor was fraudulently acquired and claim the same parcel of land under the doctrine of adverse possession. If the P1's averment is that the title which was issued to the Def was fraudulently acquired, then his cause of action would be for rectification of title by cancellation pursuant to the Provisions of Section 143 of the Registered Land Act (repealed) and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”

96. For the above reasons it is my considered opinion that the defence and the Counter Claim by the Defendant of having acquired the suit land title through the doctrine of land adverse possession automatically fails.

97. Having found as above, I accordingly enter judgment in favour of the Plaintiff as against the Defendant and proceed to dismiss the Defendant's Defence and the Counter Claim. Specifically, I award the Plaintiff the following reliefs:-

i. A declaration that the Plaintiff is the lawful registered proprietor of the parcel of land No. NYANDARUA/ MILANGINE TOWNSHIP/60.

ii. A permanent injunction issued restraining the Defendant, his agents, servants, employees or anybody purporting to act under him from entering, remaining constructing, trespassing, cultivating, occupying and/or in any manner whatsoever interfering with the Plaintiff's quiet occupation and utilization of the parcel land known as Land Reference No. NYANDARUA/MILANGINE TOWNSHIP/ 60.

iii. An order of legal eviction from the suit land by the Defendant within the next 60 days from this date hereof. In default forceful eviction to ensue at the Defendant's expenses.

iv. The County Commander of Police and the Officer in Charge of Police Station (OCS) Nyandarua to ensure that these orders are fully complied with without failure.

v. The cost of the Suit and interest at the Court's rate is awarded to the Plaintiff.

It is ordered.

Dated and Delivered at Nyahururu this 3rd day of March 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE