



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 392 OF 2013**

**(FORMERLY HCCC No. 114 OF 2005)**

**JOSEPH NDUNGU KAMAU.....PLAINTIFF**

**VERSUS**

**JOHN NJIHIA.....DEFENDANT**

**JUDGMENT**

1. Proceedings herein commenced way back on 25<sup>th</sup> April 2005 when the plaintiff filed plaint in the High Court. The case was later transferred to this court. The plaintiff averred in the plaint that he is the registered proprietor of the parcel of land known as Nakuru/Piave/920 hereinafter “the suit property” and that the plot had been allotted by Settlement Fund Trustees around 1976 to his mother Maria Nyambura Kimani who later passed away in 1985. He further stated that the defendant moved into the suit property around 1985 without his permission or that of his late mother and has forcefully remained thereon as a trespasser to date. That he filed Nakuru HCCC No. 348 of 1991 against the defendant on 3<sup>rd</sup> June 1991 seeking his eviction from the suit property while one Peter Mburu Nduati filed Nakuru HCCC No. 93 of 1991 against him (the plaintiff) and that both suits were struck out on 8<sup>th</sup> July 1998. He therefore seeks judgment against the defendant for:

*(a) A declaration that the plaintiff is the sole and legal owner of Title No. Nakuru/Piave/920 and an order be made that the defendant do move out of the said land and failing which he be evicted therefrom.*

*(b) Costs*

*(c) Interest*

2. The defendant filed defence and counterclaim in which he averred that he moved into the suit property in the year 1978 and that he has remained therein since and that the plaintiff’s case is therefore time barred. He further stated that the plaintiff fraudulently procured registration of the property in his name. He admitted that indeed Nakuru HCCC No. 348 of 1991 and Nakuru HCCC No. 93 of 1991 were filed and were struck out. He therefore urges the court to dismiss the plaintiff’s case and to enter judgment in his favour for:

*(a) A declaration that the plaintiff has acquired title of the suit premises against the defendant through adverse possession and that the plaintiff’s title be cancelled and another one be issued to the defendant.*

*(b) Costs of the suit and of the counterclaim.*

3. At the hearing, the plaintiff testified and told the court that he resides in Kitale and that he is the registered owner of the parcel of land known as Nakuru Piave/920. The plot was allocated in 1977 or thereabouts to Maria Nyambura who was his mother. She was one of the traditional dancers who used to entertain President Kenyatta. She passed away in 1985. He added that she used to live in Eldoret and also Njoro and that when she was allocated the plot she informed him and his 4 brothers and they all went to see it. From 1977 to 1985 they used to go and check on the plot. In 1990 Peter Mburu Nduati went to my place of business in Kitale and told him that he wanted to buy the plot. The plaintiff told him he had to consult all the beneficiaries. The plaintiff later went to the plot and found John Njihia, the defendants, living on it. He reported to the district officer (D.O) who wrote to the defendant and demanded that he produce all documents showing any right to be on the land. He neither produced any nor vacated. The family filed Eldoret Probate and Administration Cause No. 39 of 1988 in respect of their mother’s estate. A grant was issued to the plaintiff on 9<sup>th</sup> December 1988 and confirmed on 9<sup>th</sup> July 1990. The plaintiff was later issued with title deed in respect of the property on 17<sup>th</sup> July 1990. He produced a copy of the title as well as a certificate of search dated 7<sup>th</sup> July 2014. He further stated that he owns the plot as a trustee for the family and urged the court to order that the defendants be evicted.

4. Under cross examination and re-examination, he stated that the plot was allocated to his mother in 1977 and that she did not occupy it until she passed away. He added that when he first went to the plot in 1979 he found it being cultivated but there was no house on it. Later a

temporary wooden house with iron sheet roof was constructed on it by Peter Mburu but he demolished it when the plaintiff and his family demanded that he does so. The plaintiff's case was then closed.

5. The defendant testified next as DW1 and stated that he lives on the suit property. He added that he bought it in 1984 from Peter Mburu Nduati. They did not seek any consent from the Land Control Board. He added that he occupied the plot from May 1985 and that he remains there to date. He stated that Peter Mburu bought the plot from Maria Nyambura Ndungu, the plaintiff's mother, pursuant to an agreement made in 1977. He added that Peter Mburu showed him all documents relating to the sale process. He produced inter alia copies of a ballot paper, a settlement receipt for KShs 191 and some documents said to be agreements but which are not of any use to the court since they are neither in English nor Kiswahili languages. He added that he has been on the plot peacefully over the years and that no one has ever demanded that he vacates. He plants fruits, trees and maize on it, has fenced it and also has a house on it. He urged the court to cancel the plaintiff's title and to order that he be registered as the owner of the plot.

6. Under cross examination and re-examination, he stated that he did not know the plaintiff's mother and that the plot was in the name of a woman since the plots were gifted women who used to entertain President Kenyatta.

7. Next was Hannah Thanwa (DW2) who stated that she is 93 years old and lives at Piave in Njoro on plot No. 916 which she was given by President Kenyatta as a member of Nyakinyua Dancers and singers who used to entertain him. She added that she does not know the plaintiff's mother and that her neighbour is the defendant herein who owns plot number 920. Under cross examination and re-examination, she stated that Nyakinyua women were more than ten and that they were all allocated plots on the same day. She added that she knows some but not all of them and that each was allocated a 4 acre plot.

8. Lastly, Grace Wangari Mburu (DW3) testified and stated that her husband was Peter Mburu Nduati who passed away on 16<sup>th</sup> June 2016. That her husband owned the suit property and that he sold it to the defendant in 1984. That her husband bought the plot in 1977 and that from the time he bought it until he sold it her mother-in-law used to live on the plot. She added that during all the time her husband owned the land she never saw or knew the plaintiff and only got to know him when he filed this case. She however knew the plaintiff's mother who she stated sold the land to her husband.

9. Defence case was then closed.

10. Parties filed and exchanged written submissions. It is argued on behalf of the plaintiff that there is no dispute that the plaintiff's mother was the one allotted the suit property. Regarding the contention by the defence that the plaintiff's mother sold the suit property to one Peter Mburu Nduati, it is argued for the plaintiff that the purported agreements relied on by the defendant to support that contention are in a language that is strange to the court and that in any case the said Peter Mburu Nduati never filed any witness statement to support the defendant's case despite this case having been in court since 25<sup>th</sup> April 2005. It is further argued that the defendant's claim that he purchased the suit property cannot hold in the absence of consent of the Land Control Board and that the defendant has not satisfied ingredients for the adverse possession claim. In particular, it is argued that since the property was owned by the Settlement Fund Trustees until issuance of title, time could not and did not run from 1976 to 1990 when title deed was issued. Further, that since between 1991 and 1998 there was pending in court a suit for the defendant's eviction, possession during that period was not adverse to the plaintiff. Additionally, it is argued that the claim for adverse possession is bad in law since it was commenced by way of a counterclaim and not originating summons. The plaintiff relies on the cases of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** and **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** among others.

11. For the defendant, it is conceded that any sale transaction between the plaintiff's mother and Peter Mburu Nduati was void for want of consent of the land control board and that therefore the defendant's claim is majorly based on adverse possession. It is argued that the defendant has been in possession since 1984 to the present and that he has therefore established a claim for adverse possession and an overriding interest under section 28 of the Land Registration Act. Further, citing the case of **Kithinji Kiragu v Tabitha Mugo [2018] eKLR**, it is argued that the claim for adverse possession herein was properly introduced through a counterclaim.

12. I have considered the parties' respective pleadings, evidence and submissions. There is no dispute that the plaintiff is the registered proprietor of the suit property. Although the defendant had claimed in his defence that the plaintiff fraudulently procured registration of the property in his name, he seems to have climbed down from those allegations and going by his submissions, he is focusing on establishing his claim for adverse possession. Thus, only two issues emerge for determination: whether the claim for adverse possession is established and whether the parties are entitled to the reliefs sought.

13. The law on adverse possession is well settled and is founded on **Sections 7, 13, 17 and 38 of Limitation of Actions Act**. The Court of Appeal discussed the circumstances under which the cause of action accrues as follows in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**:

*So when does the cause of action accrue? Section 13 provides that:*

*“(1) A right of action 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.....” (Emphasis added)*

*Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of **Benjamin Kamau Murima & Others vs. Gladys Njeri**, C A No. 213 of 1996 where it was held that:*

*“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”*

*Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; which provides that:-*

*“(1) 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 then registered as proprietor of the land.”*

*[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant 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 endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)*

*[14] Consequently and as rightly submitted by the appellants’ counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...*

14. The material on record shows that the plaintiff became the registered proprietor of the suit property on 17<sup>th</sup> July 1990. There is no dispute his title was the first one following the allotment of the suit property by Settlement Fund Trustees around 1976 to his mother Maria Nyambura Kimani who later passed away in 1985. His mother was never issued with any title. Thus, until 17<sup>th</sup> July 1990 the proprietor of the suit property was the Settlement Fund Trustees which was a statutory corporation established under **Section 167** of the **Agriculture Act** (repealed). Its successor is the Agriculture and Food Authority, another statutory corporation established under **Section 3** of the **Agriculture and Food Authority Act, 2013**. As a state corporation, **Section 41** of the **Limitation of Actions Act** protects its land from acquisition by adverse possession. Consequently, although the defendant claims to have been in possession since 1984, time could not run for the duration that the suit property was still owned by the Settlement Fund Trustees. In other words, time could not run between 1984 and 17<sup>th</sup> July 1990.

15. There is no dispute that the plaintiff filed Nakuru HCCC No. 348 of 1991 against the defendant on 3<sup>rd</sup> June 1991 seeking his eviction from the suit property and that the suit was struck out on 8<sup>th</sup> July 1998. It is trite law that the filing of a claim for recovery of possession interrupts the running of time. In Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR the Court of Appeal stated:

*... If there was any time running in their favour towards adverse possession, it was interrupted when the suit was filed in March 2002. As this Court stated in Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura [1996] eKLR:*

*“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.*

*...He must therefore make a peaceable and effective entry, or sue for recovery of land.”*

*24. We have said enough on the first issue to satisfy ourselves that the claim for adverse possession was not proved and therefore no orders could be made in favour of the appellants. ...*

16. It follows therefore that the period between 3<sup>rd</sup> June 1991 and 8<sup>th</sup> July 1998 must be omitted from reckoning of time for purposes of the claim for adverse possession. Time started to run afresh from 9<sup>th</sup> July 1998. This suit was filed on 25<sup>th</sup> April 2005. From 1998 to the filing of this suit, only 7 years had lapsed. Thus, the defendant has not met the requirement of 12 years of uninterrupted adverse occupation. The defendant has therefore failed to establish the claim for adverse possession.

17. There being no dispute that the plaintiff is the registered proprietor of the suit property, he is entitled to the privileges and benefits accorded by **Section 24** of the **Land Registration Act**. Under **Section 26** of the Act, the court is bound to accept his certificate of title as conclusive evidence of proprietorship. The said sections provide as follows:

#### **24. Interest conferred by registration**

*Subject to this Act—*

*(a) 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 appurtenant thereto; ....*

#### **26. Certificate of title to be held as conclusive evidence of proprietorship**

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a 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. ...*

18. Further, **Section 25** of the aforesaid Act protects the plaintiff's rights as a registered proprietor in the following terms:

**25. Rights of a proprietor**

*(1) The rights 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 interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

19. Although under **Section 28** of the Act all registered land is subject to such overriding interests as trusts including customary trusts which do not have to be noted on the register, the defendant has not pleaded any case under the said section. There is no reason why the plaintiff should not get the relief he seeks so that he fully enjoys his rights as a registered proprietor.

20. In the result, I am satisfied that the plaintiff has established his case. The defendant's counterclaim fails. I therefore make the following orders:

**(a) A declaration is hereby issued that as between the plaintiff (Joseph Ndungu Kamau) and the defendant (John Njihia), the plaintiff is the sole and legal owner of Title No. Nakuru/Piave/920.**

**(b) The defendant (John Njihia) to vacate Title No. Nakuru/Piave/920 within 90 (ninety) days from the date of delivery of this judgment. In default, the defendant (John Njihia) be evicted from the said property.**

**(c) The defendant's (John Njihia's) counterclaim is dismissed.**

**(d) The plaintiff (Joseph Ndungu Kamau) shall have costs of both the suit and the counterclaim and interest thereon at court rates.**

21. This judgment is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's "Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic" (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17<sup>th</sup> April, 2020).

**Dated, signed and delivered at Nakuru this 21<sup>st</sup> day of May 2020.**

**D. O. OHUNGO**

**JUDGE**