



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ENVIRONMENT AND LAND CASE NO 159 OF 2017

(FORMERLY NAKURU ELC 170 OF 2014)

CHARLES MURAGE NJOGO.....PLAINTIFF

VERSUS

JANE WAIRIMU KIMANI (as the administrator of the estate of

DANIEL KIMANI MUIRURI).....DEFENDANT

JUDGEMENT

1. The Plaintiff filed this matter on the 18th June 2014 by way of Originating Summons where he claimed to be entitled to be registered as the proprietor of parcel No. Nyandarua/ Ol Joro Orok Salient/1732 measuring approximately 0.25 acres, in place of Daniel Kimani Muiruri, who was presently the registered proprietor, by reason that he, Charles Murage Njogo had been in continuous, open and adverse possession of the said suit land for a period exceeding twelve (12) years.
2. Alongside the Originating Summons, the Plaintiff had also filed an application dated the 20th May 2015 seeking injunctive orders against the Defendant herein wherein on the 9th June 2015 Hon Munyao Sila J directed that the application be served for inter parties hearing on the 5th October 2015.
3. The matter did not proceed on the said day because counsel for the Plaintiff made an application seeking to file a supplementary affidavit to the Originating Summons, wherein the court granted their application and held the application dated 20th May 2015 in abeyance.
4. Subsequently, on the 24th January 2017, this matter was transferred to the Environment and Land Court sitting in Nyahururu wherein a notice to show cause pursuant to Order 27 rule 2 of the Civil Procedure Rules dated the 27th February 2017 was served upon the parties for reasons that no step had been taken by either party to prosecute the matter for one year.
5. On the 6th April 2017, counsel for parties appeared before me wherein they submitted that the Plaintiff was still interested in having the matter prosecuted and further that by consent they had agreed to have the matter set down for hearing to which they took directions to have the Originating Summons disposed of by way of viva voice evidence. That further, parties be at liberty to file and exchange witness statements as well as their list of documents and to be at liberty to call witnesses.
6. The matter was subsequently fixed for mention on the 30th May 2017 to confirm compliance with the provisions of Order 11 of the Civil Procedure Rules and to fix a date for the hearing of the application dated 17th June 2014.
7. Came the 30th July 2017, the court was informed by counsel for the Plaintiff that the matter was coming up for mention to confirm compliance of provisions of Order 11 of the Civil Procedure Rules and that parties had partially complied with the same.
8. The Court directed parties to fully comply and the hearing was re-scheduled for the 19th September 2017 wherein parties were not ready to proceed as counsel for the Plaintiff was involved with election petitions. The matter was taken out of the days' cause list and re-scheduled for hearing on the 27th November 2017 on which day it did not proceed for hearing but directions were taken again pursuant to the provisions of Order 37 of the Civil Procedure Rules to the effect that the Originating Summons together with the supporting affidavit be treated as a plaint whereas the two affidavits filed by the Defendants be treated as their defence and the supporting affidavit by the Plaintiff be treated as a reply to the defence. Further that the matter to proceed by way of viva voice evidence. In essence therefore, the application dated the 17th June 2014 had been abandoned.
9. On the 21st May 2017 the matter proceeded for hearing wherein the Plaintiff testified as PW 1 to the effect that he lived at Kibathi within

Gatimu location in Oljoro Orok. That as a farmer, he was the owner of a portion of land within the larger piece of land No Nyandarua/Oljoroorok Salient/1732 herein referred to as the suit land.

10. It was the Plaintiff's testimony that he knew the owner of the plot as Daniel Kimani Muiruri and that the Defendant herein was Daniel's wife. That in the year 1979, Daniel had asked him to look after the suit land as a caretaker because he (Daniel) lived far away.

11. The Plaintiff further testified that in the cause of looking after the suit land, that in the year 1999, he had entered into an agreement with Daniel to purchase from him $\frac{1}{2}$ an acre of his land, to be excised from the larger parcel of plot No. 1732, at a consideration of Ksh. 200,000/=

12. That he could not raise the whole sum of money at once but on the 8th September 1999 he had paid Daniel Ksh. 30,000/=. That after his agreement with Mr. Daniel Kimani and upon payment of the Ksh 30,000/= parties had agreed that the balance was to be paid on 20th January 2000.

13. That when he could not raise the balance of Ksh. 170,000/=. on the 28th January 2000, Daniel had agreed to sell him $\frac{1}{4}$ an acre of land for a consideration of Ksh 50,000/= instead.

14. The Plaintiff testified that this 2nd agreement had been recorded in Kikuyu language and that the translation of the same was annexed to the Originating Summons as annexure CN1. He produced the agreement dated 28th January 2000 as Pf exhibit 1.

15. That subsequently on the 28th January 2000, he had paid Daniel Ksh. 12,000/= thus making the total payment for his portion of land total Ksh. 42,000/=. That in the month of April, he further paid Daniel Ksh 5,000/= thus making a total payment of Ksh. 47,000/= that he had cleared the balance of Ksh 3,000/= on 6th June 2002 thus totaling the monies paid to Daniel Ksh. 50,000/=. The witness produced an agreement dated 6th June 2000 as Pf exhibit 3.

16. The Plaintiff testified that after he had completed paying the purchase price for his $\frac{1}{4}$ acre of land, Daniel had informed him that he no money to pay the surveyor and requested the witness to pay him (surveyor) and that he would refund him later.

17. That he had subsequently paid the surveyor a fee of Ksh. 5,000/= and produced a receipt dated 14th June 2004 as Pf exhibit 2, to confirm the payment. He went on to testify that plot was surveyed by a Mr. Mathenge in the year 2000 and his share of $\frac{1}{4}$ acre was excised from the larger plot so that he could take possession of his share. That subsequently, Mr. Daniel had put him in possession of the land and informed him that he could now build thereon. That he had constructed both his house and that of his son's as well as a cattle shed thereon wherein he had lived thereon from the year 1999 up to December 2012. That further, Daniel had passed away in the year 2010.

18. That on the 27th December 2012, the Defendant hired more than 30 youth who went on the land and evicted him wherein they threw his household goods on the road and destroyed his documents in the process.

19. That it was while the goons and/or youth were in the process of demolishing his house that the Officer Commanding Station (OCS) of Oljoro Orok had gone to the scene where he had found the youth destroying his home. The Officer Commanding Station (OCS) had then gone back to the station to get reinforcement wherein the youth were arrested and charged in the Nyahuru Magistrate's Court in Criminal case No. 2287 of 2012. The case was later dismissed for lack of sufficient evidence to support the charge.

20. He testified that the eviction from his land by the Defendant was done without any court order although he had received a demand notice dated the 27th November 2012 from the Defendant's advocate informing him to vacate the land within 7 days failure to which they would take legal actions against him. No such legal action was taken. That he was not sued in court. He produced the notice dated 27th November 2012 as Pf exhibit 4.

21. The Plaintiff testified that after Mr. Daniel had died on 15th January 2010, the Defendant had been made his administrator. That through Succession Cause No. 94 of 2010, the Defendant had inherited plot No. 1732. He produced in evidence a copy of the certificate of confirmation of grant in the Succession Cause as Pf exhibit 5.

22. He also produced as Pf exhibit 6 a copy of a chief's letter dated 21st July 2010 confirming that he was in occupation of that plot. Coupled with that letter, he also produced as Pf exhibit 7, a copy of a letter dated the 21st July 2010 written to him by the Defendant confirming that he was in occupation of a portion of that plot.

23. The Plaintiff further testified that after the Defendant had forcefully evicted him from the land, he had sought legal advice wherein his advocate had written a letter to the land's office, dated the 26th October 2015 herein produced as Pf Exhibit 8, seeking for a copy of an extract of the green card in respect of the suit property.

24. That a copy of the said green card was availed which he produced it as Pf exhibit 9 and that that the proprietor of the plot on the green card was not clear. He had subsequently placed a caution on the title to protect his interest as the buyer of a portion from plot No.1732

25. He testified that before he had been evicted, everybody knew that he was in occupation of the suit land. Further that his piece of land had been marked with beacons and that he had fenced the same in the presence of the deceased proprietor and the Defendant.

26. That the deceased/proprietor had been his friend and that he had never tried to evict him. That the problem had started after the proprietor

had died. He was categorical that he had lived on the suit land for 14 years after signing the agreement and there had been no case filed against him save for the notice dated 27th November 2012.

27. That after the signing of the agreement, they had not gone to seek transfer of the land from the Land Control Board. He prayed for the court to help him procure his title to the ¼ acre of the suit land as well as for costs of the case.

28. When examined by the court, the Plaintiff stated that he had placed a caution on the land on the 13th June 2014 because he had been forcefully evicted from his plot.

29. On cross examination, the Plaintiff reiterated that he had bought the land from Daniel. That at the time they signed the 1st agreement, the Defendant was there but she did not sign the same. That the Defendant's husband had signed the same because he was the proprietor of the land. That before he purchased the land, he had gone to the Settlement office wherein he had conducted a search wherein he had been assured that the land had belonged to Daniel.

30. That at that time Daniel had no title as he had a loan with Settlement Fund Trustee and therefore the land was still registered in the name of Settlement Fund Trustee as at 15th August 1990.

31. That Daniel Kimani was registered as the proprietor of the suit land on 10th January 2012 and when he had asked him about his title in the year 2000, after payment of the 50,000/=, they had gone to the offices of the Settlement Fund Trustee wherein Daniel had been informed that since he had a loan with them, that he needed to re-pay the same first so that he could be discharged before being issued with the title. The Plaintiff testified that he did not know when Daniel had finished re-paying the loan.

32. The witness testified that at the moment he had rented a house in the area of Kibathi where he farmed at a forest at Kibathi. That he now rented farms to farm thereon. That initially he used to be a caretaker of the suit land and that the agreement he had entered into with Daniel had been destroyed when he was evicted.

33. That further, in the agreement dated 1999, he had not indicated that he was a caretaker because Daniel had agreed to sell to him the land as per Pf exhibit 1 dated 28th January 2000.

34. That he had been allowed by Daniel to build on the parcel of land after the completion of his debt which he had finished paying on 6th June 2000. That the Defendant had not signed the said agreement although she had been present at the time. He testified that he had witnesses to the agreement who had come from that area.

35. That further, the Defendant had not signed the agreement because her husband had signed the same on her behalf and that after paying the purchase price, the surveyor had excised the ¼ acre of land for him.

36. He confirmed that he did not have the plan for the land and further that although the green card showed a subdivision of plot No. 1732 yet the same did not indicate his ¼ acre of land.

37. He testified that the subdivision was done after the succession Cause which he had not been informed of and as such, he could not have gone to court to revoke the same as he was not aware of the proceedings before court.

38. He testified that they had had other cases with the Defendant's family which cases had totaled to 4 and that the said cases were in relation to the said suit land. That he was forcefully evicted on 27th December 2012 from the suit land, from which day he had never gone back since his house had been demolished.

39. That he had then filed this case on 18th June 2014 by which time he was not on the suit land as he had been evicted.

40. When referred to Pf exhibit 7, the Plaintiff testified that the Defendant had not signed the same but that she had put her thumb print thereon since she was illiterate. He confirmed that he had been the one who had paid the survey fee and stated that normally the person who paid the survey fee was the one who was considered as a proprietor of the land. That when he paid the survey fee, he had already finalized paying his debt and now the vendor was the one who owed him ksh. 5,000/= and a title deed.

41. He testified that he had no letter permitting the surveyor to enter onto the land to survey the same. Further that they had not written any agreement with Daniel permitting him to pay the surveyor's fee.

42. On Re-examination with reference to Pf Exhibit 1 and 2, the Plaintiff confirmed that these were not the last agreements and that he had not been allowed to build on the suit land until he had finished paying Daniel all his money. That it was in another agreement that he had been permitted to build on the suit land. He reiterated that he had not objected to the Succession Cause because he had not been informed of the same by the Defendant and her children. He also testified that he could not remember when he had learnt of the letters of grant.

43. When referred to Pf exhibit 6, the Plaintiff stated that he had been mentioned as the 6th person who had bought ¼ acre of land from the suit land, by the chief. That there were about 4 cases involving the suit land which included an assault case, destruction of tees, none of which pertained to a case of adverse possession. That the surveyor had gone onto the plot with the permission of the Defendant and her husband who did not object to his presence thereon. The Plaintiff thus closed his case.

44. The defence opened its case by calling DW 1, Jane Wairimu Kimani who testified that the late Daniel Kimani Muiruri, was her husband

and that he had passed away on the 15th January 2010. That the said Daniel was the proprietor of plot No. 1732, land which he had been given by the government through the settlement scheme.

45. That the said Daniel was to pay the rates for the land and that they had not procured the title to the same. That as at the time he died, Daniel had not completed paying for the title (sic) to which she had paid for in the month of August during the same year that Daniel died.

46. The Defendant testified that before her husband died, there had been no cases with the Plaintiff but that after the death of her husband, they had started having cases with the Plaintiff.

47. She confirmed that her husband had indeed sold to the Plaintiff the said parcel of land but that the said sale had been illegal as she had not signed anywhere on the agreement.

48. Further, that after the Plaintiff had bought the land, he had been shown where to build his house. That during this period, she had lived in Nakuru wherein her husband used to work in Muranga before he went to Kibathi. That after her husband went to Kabathi, she had left Nakuru to go and live with him in Kibathi in the year 2000.

49. That when she went to live in Kabathi in the year 2000, she had found that the Plaintiff had built a house where he had been shown and was living there. That at that time, they had not been issued with the title as yet.

50. She further testified that at the time the Plaintiff and her husband were entering into the agreement, she had refused to sign the same, but the Plaintiff had paid Ksh. 30,000/= anyway. That she did not know whether he had paid the balance of Ksh. 20,000/= or not as her husband had not informed of the same.

51. The witness also confirmed that indeed a private surveyor had gone onto the land but she was not sure whether her husband had signed the mutation form or not.

52. She further confirmed that the Plaintiff used to occupy $\frac{1}{4}$ acre of the land but no longer occupied the same as he had been evicted pursuant to a court order issued in court proceedings wherein it was found that the land was not the Plaintiff's land.

53. The witness testified that she did not remember the date the Plaintiff was evicted as he was evicted by her children. She also confirmed that by the time her husband died, he had no title deed to the whole parcel of land.

54. That she had filed the Succession Cause to enable her distribute the land at which time there had been no objection. That she had been issued with the title deed a short time after filing of the Succession Cause.

55. She stated that the person who sold to the Plaintiff the land was no longer there to give him the said land. That from the time the Plaintiff was evicted, he had not gone back on the suit land and that she had subdivided the same and sold 16 plots to other people.

56. She testified that the whole suit land had measured 5 acres and after the Plaintiff had been evicted, she was the one who now farmed on the $\frac{1}{4}$ acres of land. She ended her examination in chief by seeking that the suit be dismissed with cost to her.

57. On Cross examination, the witness testified that she had known the Plaintiff since the year 2000 and that the caretaker of the suit land had been her brother in law called Simeon Gachau who had built on the suit land. That at the time she was not using land and was not in a position to state how the same was being used because she had visited it only once when the same had been allocated to her husband.

58. She testified that they had not build on the suit land but when they used to go to see the land, they would only find her sister in law thereon.

59. She confirmed that although her husband had sold the land yet she had not signed the agreement because the Plaintiff had not indicated when he would pay the balance. That when she saw the Plaintiff remove the Ksh. 30,000/= to pay for the land, she had left. That at the time the Plaintiff and her husband entered into the agreement, the suit land was her husband's land and not the government's land.

60. She further confirmed that after the signing of the agreement, the Plaintiff had been put in possession of the land and shown where to build. That he had lived on the plot for 2 years before she went there in the year 2000.

61. The Defendant testified that she had not taken any action upon finding the Plaintiff on the land because all that while she had known that the $\frac{1}{4}$ acre of land had belonged to her husband even though he had sold part of it to the Plaintiff.

62. That as at the time, her husband died, he had not filed any case against the Plaintiff. She stated that she had objected to the agreement between her husband and the Plaintiff because she had not been happy and after the signing of the agreement by all parties and witnesses she had informed them that she was not happy because the Plaintiff had not indicated when he would pay the balance.

63. That all the while the suit land was her husband's, she did not file any case in court because her husband had prevailed upon her to leave him to take the money, which she had obliged.

64. The witness confirmed that a private surveyor had gone to the land although she had not known if he had put beacons on the Plaintiff's $\frac{1}{4}$ acre. That when she come in the year 2000, she had found when the Plaintiff had fenced his $\frac{1}{4}$ acre of land although she did not know when he had done so.

65. That the Plaintiff had lived on the land with his family, but that she had not seen his animals. She confirmed that she did not know how to read.

66. On further cross examination, the Defendant testified that she knew the senior chief of Gatimu Location called David Macharia. That she was aware that the chief had included the Plaintiff in his letter produced as Pf exhibit 5 which she had used to file the Succession Cause wherein she had inherited the whole 5 acres. That she had not included the Plaintiff as a beneficiary of the deceased's property because he had refused to adhere to what he had been asked to do by the chief and District Officer.

67. The Defendant testified that although there was no written agreement, the Plaintiff had been asked to give her Ksh. 20,000/= which he refused. That her children had evicted him on her behalf because he used to threaten that he would use the police to arrest her.

68. She confirmed that she was the one who was using the ¼ acre of land which the Plaintiff had built on. That she had evicted him from the plot because he had been given notice by the court. She claimed to have the court order which she had forgotten to carry to court.

69. When the witness was asked in which case the court order had been issued, she remained silent.

70. When she was referred to her affidavit sworn on 22nd July 2014, the witness stated that she had not mentioned the issue of the court order because she had not been asked about it.

71. When Paragraph 13 of her defence was read to her, she stated that it was not true that they had removed the Plaintiff from his portion of the land by force. That whereas she had a court order, the Plaintiff had his own copy too.

72. When she was referred to Pf exhibit 4, she stated that the Plaintiff had been given a notice of 7 days to vacate from the land but she did not know if the said exhibit/letter was what she had served the Plaintiff with. That at the time the Plaintiff was being evicted, she was in court and had found when the Plaintiff's house had already been demolished.

73. That there was no case she had filed to evict the Plaintiff from her land. That she had sold to people part of the suit land and had not discriminated against the Plaintiff.

74. When the Defendant was Re-examined, she reiterated that her children were upset after the Plaintiff had caused her arrest and that was when they had decided to remove him from the land.

75. That he had been removed on the 25th December 2012 while she was in the cells just before being arraigned in court. That after the death of her husband, they had commenced with the construction on the land in the month of August.

76. She reiterated that before her husband died, she used to live in Nakuru but went to live with him on the suit land in the year 2000.

77. The witness was questioned by the court to which she responded that in the year 2000 when she arrived from Nakuru, she and her husband had lived in a house that her brother in law had built on the suit land. That she had sold part of the suit land to other people after getting the title and further that the land had now been registered in her name. Further that she had not considered the Plaintiff as a beneficiary to her husband's estate because she did not know how he had bought the land from him.

78. The court noted that the Defendant not truthful and remained silent when questioned as to what orders she had obtained that gave her the right to evict the Plaintiff. She seemed to disassociate herself from the said eviction.

79. The Defence thus closed its case and parties then filed their respective written submissions.

Plaintiff's Submissions.

80. The Plaintiff's argument was that he had acquired adverse possession of the suit land having been in possession of the same continuously for more than 12 years and as such, the title of the owner of the land one Daniel Kimani Muiruri (whom we shall refer to as the deceased) as well as his remedy to recover the land had been extinguished by virtue of the provisions of Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act. The Plaintiff relied on the statute as well as the decided case **of Wambugu vs. Njuguna [1983] KLR 172** that laid down the general principles to the claim of adverse possession, to buttress their submissions.

81. The Plaintiff's case was that he was to purchase ½ an acre of land from its proprietor for a consideration of Ksh. 200,000/= vide a sale agreement dated the 8th September 1999. The same was to be excised from the whole parcel being No. Nyandarua/ Ol Joro Orok Salient/1732. That he had paid Kshs 30,000/= on the execution of the agreement with a balance to be paid on the 20th January 2000. That since he could not raise that money, on the 28th January 2000, the parties had entered into another agreement wherein they agreed that the Vendor would excise land equivalent to the sum already paid which was now Ksh 42,000/= and the balance to be paid on the 6th March 2000.

82. That upon execution of the agreement and payment of the balance the Plaintiff took possession of his portion of land and had remained therein up to when he was evicted by the Defendant.

83. That the possession was therefore calculated as per the time there was payment of the purchase price to the full span of twelve years when the purchaser took possession of the property because as at that time, the true owner had been disposed of the property. They based

their submission on the decided case of **Public Trustee vs Wanduru [1984] KLR 314 at 319.**

84. That the Plaintiff had used the suit land in exclusion of the owner and had even planted trees and carried on farming activities thereon activities which were confirmed by the Defendant.

85. That there was evidence adduced in court that although the Defendant's Husband had sold the land to the Plaintiff, yet the Defendant had not consented to the sale although she was present during the signing of the agreement. That a surveyor was engaged wherein the Plaintiff took possession of $\frac{1}{4}$ acre of land without consent of persons claiming entitlement under him. That this possession was known to the Defendant who took no action to take back possession of the $\frac{1}{4}$ acre of land hence she was disposed of the land. Reliance was placed on the decided case of **Boniface Oredo vs Wabumba Mukile, Civil Appeal No.170 of 1989.**

86. That the registration of the deceased and the Defendant on the 10th January 2012 did not interrupt the running of the period of the adverse possession running in favour of the Plaintiff. The interest of the deceased arose as early as the year 1980 as an allottee and the registration of the Settlement Fund Trustee was to protect its interest as a financier. That the property was rightfully owned by the Deceased and the Settlement Fund Trustee was only a financier.

87. That the agreement being a basis upon which the Plaintiff entered into possession was between him and the deceased. That after the payment of the balance of the purchase price on the 6th March 2000, the occupation of the Plaintiff become adverse 6 months in the absence of the consent from the Land Control Board to validate the transfer in his favour.

88. That based on the decided case of **Joseph Mutafati Situma vs Nicholas Makahnu Cherongo [2007]eKLR**, where a purchaser of land is permitted to be in possession of the land by the seller pending completion of the sale, transaction thereafter becomes void if the parties fail to obtain consent from the Land Control Board, such permission is terminated by the operation of the law and continued possession is illegal, it thus becomes adverse from the time the transaction becomes void. That there was evidence adduced in court that the Plaintiff was in peaceful and open occupation on the suit land during the lifetime of the vendor.

89. That the claim by the Plaintiff could still be sustained as against the estate of the deceased through the duly appointed administrator, the Defendant as was held in the decided case of **Peter Thuo Kairu vs Kuria Gacheru [1988] 2 KLR 111.**

90. That the removal of the Plaintiff from the suit land on the basis of a demand letter was not in enforcement of a valid court order nor an act of recognizing the entitlement of the registered owner by the Plaintiff. The actions of the Defendant's children were not sanctioned by any court of law.

91. The Plaintiff submitted that they had discharged the ingredients for a claim of adverse possession in this case and was entitled by way of adverse possession to a specific identifiable portion of and to be excised from land parcel No. Nyandarua/Ol Joro Orok Salient/1732.

92. On the issue of costs, the Plaintiff submitted that having taken time to institute the present suit and prosecute the same he was entitled to costs. He relied on the decided case of **Joseph Oduor Anode vs Kenya Red Cross Society [2012] eKLR.**

Defendant's Submission.

93. The Defendant opposed the Plaintiff's Originating submissions to the effect that the Plaintiff had not established any plausible and justifiable ground that would entitle him to claim a portion of land parcel No. Nyandarua/Ol Joro Orok Salient/1732.

94. That the Plaintiff had not met the statutory period that would entitle him to claim adverse possession of the portion of land. That on the 27th December 2012, the Plaintiff had been evicted from the suit land and that he cannot lay claim of adverse possession to the same as he has never gained possession of the said land.

95. That the Defendant was in agreement to the fact that the Plaintiff purchased the land from the deceased in the year 1999. That the Plaintiff took possession of $\frac{1}{4}$ acre of the suit land. The Defendant was also in agreement that at the time of the purchase, the Settlement Fund Trustee was the registered proprietor of Nyandarua/Ol Joro Orok Salient/1732 and that on the 10th January 2012 it transferred the same to the deceased and by way of transmission through Succession cause No. 44 of 2010, it transferred the land to the Defendant. They also did not dispute the fact that on the 27th December 2012 the Plaintiff had been evicted from the portion of land within the whole Nyandarua/Ol Joro Orok Salient/1732.

96. That from the abstract of the title for Nyandarua/Ol Joro Orok Salient/1732, its register was opened on the 15th August 1990 wherein the Settlement Fund Trustee was its first registered proprietor.

97. That on the 10th January 2012, the Settlement Fund Trustee had transferred that parcel of land to the deceased, Daniel Kimani Muiruri and the same was eventually transferred to the Defendant. That the period stating the 15th August 1990 to the 10th January 2012, did not count in a claim of adverse possession as per the decided cases of **Jaber Mohsen & Another vs Priscillah Boit & Another [2-14] eKLR** and **Ann Itumbi Kiseli vs James Muriuki Muriithi [2013] eKLR.**

98. That the time for computation of the claim for adverse possession could only be computed from 10th January 2012. That the instant suit was filed in the year 2014 which is hardly 2 years after the suit land had ceased being public land. The doctrine of adverse possession did not apply in the present instance.

99. The Defendant also submitted that time stopped running from the time the Plaintiff was evicted from the disputed portion of land he was

occupying on land parcel No. Nyandarua/Ol Joro Orok Salient/1732 on the 27th December 2012. That the suit was instituted at the time when the Plaintiff was already out of the land thus he was no longer in continuous occupation. The period had therefore been interrupted.

100. The Defendant relied on the decided cases of **Paul Kamande Gicheha vs Jacob Kinyua Kiragu** and **Githu vs Ndete [1984] KLR** to submit that after the Plaintiff was evicted from the portion of land within Nyandarua/Ol Joro Orok Salient/1732, and the Defendant took possession of the said land, time stopped running from the 27th December 2012. By the time the suit was filed, time had stopped running and the Plaintiff was no longer an adverse possessor.

Analyses and determination

101. In the case of **Wambugu vs Njuguna (1983) KLR 173**, the Court of Appeal held as follows:

a. "For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.

b. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years."

102. The court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

103. **Section 7** of the **Limitation of Actions Act** provides as follows:

a. "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him..."

104. **Section 13** of the **Limitation of Actions Act** aforesaid further provides that:

a. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 (of the Act) 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.

105. **Section 37** of the **Limitation of Actions Act** provides that:

a. 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, 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."

106. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession exclusively and has lived on the suit property continuously without interruption for a period of over 12 years.

107. It is against this background of the law, the evidence adduced in court as well as the written submissions and annexed authorities herein submitted, that the issues arising for my determination are herein under:

i. Whether or not the Plaintiff has acquired the suit property by way of adverse possession.

ii. Whether adverse possession can be claimed against the Defendant herein.

108. **It is not in dispute that** on the 8th September 1999, **the Plaintiff herein did purchase ¼ acre of land from the deceased, Daniel Kimani Muiruri, to be excised for the bigger parcel of land** No. Nyandarua/Ol Joro Orok Salient/1732 wherein upon completion of the purchase price, he had taken possession of the said portion and had settled thereon. This was acknowledged through the oral evidence as adduced by both the Plaintiff and the Defendant herself as well as through the Plaintiff's documentary evidence being:

i. Pf exhibit 1, agreement dated the 28th January 2000

ii. Pf exhibit 6, the chief's letter dated the 21st July 2010

iii. Pf exhibit 7, a letter by the Defendant dated the 21st July 2010

109. It is also not in dispute that the deceased person passed away on the 15th January 2010 wherein on the 27th December 2012, the Defendant's Children using a demand notice, had evicted the Plaintiff from the said portion on the suit land. The plaintiff had then he filed the present suit claiming adverse possession of the same while he was no longer on the portion of land on the suit land.

110. Section 42(1)(d) of the Limitation of Actions Act stipulates as follows:

This Act does not apply to—

(d) proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connexion with any such recovery....

111. In the decided case of **Githu vs Ndeete [1984] KLR 776** wherein it was held that:

Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.

112. It is also not in dispute that by the time the Plaintiff and the deceased were entering into the sale agreement in the year 1999, the suit property No. Nyandarua/Ol Joro Orok Salient/1732 **was still** registered in the name of the Settlement Fund Trustees as is evidenced from Pf exh 9 being the abstract of the title for Nyandarua/Ol Joro Orok Salient/1732. That its register was opened on the 15th August 1990 wherein on the 10th January 2012, the said land No. Nyandarua/Ol Joro Orok Salient/1732 was transferred to the deceased and by way of transmission, subsequently transferred to the Defendant on the same date.

113. From the above captioned provisions of the law and authority cited, it therefore goes without saying that time for the purpose of maintaining an action for adverse possession could not start running when the land was still registered in the name of the Settlement Fund Trustee. The time started running when parcel No. Nyandarua/Ol Joro Orok Salient/1732 was registered in the name of the deceased on the 10th January 2012. The present suit was filed on the 18th June 2014. Judging from when the time started running for adverse possession to the time the suit was filed, it cannot be said that the period of 12 years had lapsed.

114. Further, going by the evidence adduced in court, the Plaintiff was evicted from the portion of land on parcel No. Nyandarua/Ol Joro Orok Salient/1732 on the 27th December 2012, wherein he had filed the present suit almost two years later, on the 18th June 2014, by which time he was no longer in actual possession of the portion of land on the suit land. I find that in the circumstance, the Plaintiff did not enjoy a peaceful and uninterrupted occupation of the portion of land on the suit land for a continuous period of 12 years.

115. I find that in the present case, that the Plaintiff has not proved that he had dispossessed the Defendant of the portion of land on the suit land for a period of 12 years. It is clear that for the purposes of adverse possession if any, time started to run from 12th January 2012 when the deceased got registered as the proprietor of the suit land up to 18th June 2014 when the Plaintiff subsequently commenced legal proceedings. That effectively stopped time from running, which makes it about two years thus making the filing of the present suit premature.

116. Again sight must not be lost to the fact that upon the eviction of the Plaintiff from the portion of land on the suit land on the 27th December 2012, he had not filed suit immediately but had done so after a period of about two years which technically put, he had been in possession of the said parcel of land for about 11 months

117. At best, what the Plaintiff ought to have done was to file suit against the Defendant for specific performance.

118. I find and hold that the Plaintiff has not proved on a balance of probabilities, that his right of action as against the Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

119. In the circumstance herein I strike out the Plaintiff's Originating Summons dated 17th June 2014 with no costs.

Dated and delivered at Nyahururu this 5th Day of November 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE