



**REPUBLIC OF KENYA**

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

**THIKA ELC NO. 310 OF 2017**

**(FORMERLY NRB ELC 834 OF 2014)**

**MWAURA GITUKUI MBEMBE.....PLAINTIFF**

**VERSUS**

**SIMON KAMERE.....DEFENDANT**

**COUNTER CLAIM**

**SIMON KAMERE.....1<sup>ST</sup> PLAINTIFF**

**GLADYS WACHEKE KAMERE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MWAURA GITUKUI MBEMBE.....DEFENDANT**

**JUDGMENT**

By a Plaint dated **24<sup>th</sup> June 2014**, the plaintiff sought for the following orders against the Defendant;

- a) An order directing the Defendant to remove the illegal fence he has put around the Plaintiff land parcel No. Kikuyu/Kikuyu Block 1/110.***
- b) A permanent injunction to restrain the Defendant his agents, servants or persons claiming under him from entering or altering boundary features , encroaching or otherwise howsoever interfering with the Plaintiffs quiet possession of land parcel No. Kikuyu/Kikuyu Block 1/110.***
- c) General damages***
- d) Costs of this suit.***

In his statement of Claim, the Plaintiff averred that he was the registered owner of the suit property, which borders the Defendant land and that he has always utilized the suit property to grow nappier grass for his cows as he resides on a different piece of land . He further averred that in **January 2014**, the Defendant started encroaching on his land by moving or altering the boundary features as a result of which he orally requested him to desist.

Further that when the encroachment persisted, he reported the matter to the office of the District Land Registrar and District Surveyor of Kiambu County. That the District land Surveyor wrote to both parties on **17<sup>th</sup> February 2014**, inviting them to appear on the suit property **on 12<sup>th</sup> March 2014**, for purpose of demarcating and establishing its corner beacons, which the Defendant has interfered with. That the Defendant did not appear prompting the surveyor to postpone the exercise to **22<sup>nd</sup> May 2014**. He contended that on **22<sup>nd</sup> May 2014**, the Defendant once again did not appear and the surveyor was to proceed in his absence at a later date. That the Defendant thereafter fenced off the Plaintiff's land thus physically annexing it onto his own land and blocking the Plaintiff's access to the property. It was the Plaintiff's further contention that the Defendant's conduct is an act of trespass and deprivation of his right to his own property. He further urged the Court to order the Defendant to cease encroaching onto his land and that the Defendant be ordered to remove the fencing that he has put up.

The suit is contested and the Defendant filed a statement of Claim and Counter Claim dated **4<sup>th</sup> August 2014**, and denied all the allegations

made in the Plaint and averred that the Plaintiff has never occupied the land bordering his land. He further averred that he has marinated the same boundary, fence and beacons which he was shown at the time he purchased the land in **1980**. He admitted having received the letter on **15<sup>th</sup> March 2014**, and averred that it is the District Surveyor who postponed the meeting of **22<sup>nd</sup> May 2014**, and advised the Defendant that it was not a matter to be resolved through the surveyor's office. He contended that his land borders a public road and has always had a Kei apple and barbed wire boundary fence. That in **February 2014**, they fortified the existing fence with iron sheets in preparation for the renovation of the existing building in the land. It was his further contention that the Plaint is bad in law as it is misconceived, incompetent, frivolous, scandalous, and vexatious and does not disclose any reasonable cause of action.

In their Counter Claim the Plaintiffs, averred that they purchased **L.R No. 12341/2**, in the year **1980**, and took possession and occupied the building therein, erected a gate and expanded the existing building and has been in quiet possession until **January 2014** when the Plaintiff laid claim to the property bordering their land. It was their further contention that the title to the suit property has been extinguished by their Adverse and exclusive possession and occupation of over **33 years**. Therefore, they urged the Court to dismiss the Plaintiff's suit and allow their Counter Claim for orders that;

*a) That the Defendants / Counter Claimants be declared to have become entitled by adverse possession of over 33 years to all that piece of land registered under the Land Act and known as Land Reference Number Kikuyu/ Kikuyu Block 1/110.*

*b) A vesting order do issue vesting the aforesaid land unto the Defendants/ Counterclaimants free from all charges and encumbrance.*

*c) Costs of this suit.*

*d) Any other or further relief that this Honourable Court may deem fit and just to grant to the Defendants/ Counter Claimants.*

The Counter Claim is contested and the Plaintiff filed a Reply to Defence and Defence to Counter Claim and denied all the allegations made in the Defence and Counter Claim. It was his contention that his claim has nothing to do with Defendants property being **L.R 12341/2**, or how it was acquired . He averred that the suit property was purchased from one **Peter Njuguna** and that the Defendant has never occupied or utilized it until **2014**. That the house the Defendant claims to have been renovating is not in his land and has nothing to do with the claim. The Plaintiff further contended that the addition of a 2<sup>nd</sup> Defendant **Gladys Wacheke Kamere** in the suit at the stage of filing a Defence is improper and unprocedural and shall he shall crave leave to have the said name be struck out. Further that the Counter Claim as presented is improper , misconceived and unlawful and the same ought to be dismissed.

After Close of pleadings the matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called one witness. The Defendant gave evidence for himself and called no witness.

#### PLAINTIFF'S CASE

**PW1 Mwaura Gitukui Mbembe**, testified that the Defendant lives in **Kikuyu** near Ondiri opposite Kidfarmaco . It was his testimony that the suit property is registered in his name having bought it from one **Peter Njuguna**, vide a sale agreement dated **15<sup>th</sup> July 2012**, to which he paid **Kshs. 200,000/=** after conducting due diligence. That he got the Consent of the **Land Control Board** for the transfer the land dated **25<sup>th</sup> June 2012**, and made all the required payments.

He further averred that he visited the Defendant so that the boundary can be aligned as he wanted to fence the plot and the Defendant advised him to get the District Surveyor from Kiambu who was to identify where the beacons were. That the Defendant was served with the summons through the District Officer, but that the Defendant prevented the District Surveyor from carrying out the alignment of the boundaries. Further that the Defendant put a boundary using iron sheets and planted some beacons .He produced his bundle of documents as Exhibit 1. He also produced the photographs of fence erected by the Defendant as exhibit 2 (a) and (b). He further produced the supplementary list of documents as Exhibit 2. He denied that the Defendant Kamere had occupied his land for 30 years nor that he had title to the suit land. He further testified that he started using the land by growing nappier grass and that the portion is not part of his land.

It was his evidence that he did not know whether **Peter Njuguna** was alive or dead . That the sale agreement was prepared by **Kamangu Advocate** and denied that the sale is fictitious. He acknowledged that he did not have the consent from the Land Control Board nor consent from the Commissioner of Lands. Further, that in the agreement, the date is not given and that was the document they used to transfer the land. It was his testimony that he signed the transfer before Advocate **Kamangu** and paid the stamp duty.

Further that the Defendant was to remove his gate and he had discussed the matter with the Advocate though he had not stated the same in his statement. He alleged that the Defendant's land does not border the road and that the Defendants land was fenced with Kei Apple fence. That when he bought the land in **2012**, there was a fence by the Company that sold the land and a metal gate in the Defendant's gate and to enter the Defendants land, one had to go through the metal gate. He further testified that his plot is between the tarmac road and the Defendant's plot. It was his testimony that the photographs were taken on **17<sup>th</sup> June 2014**, and that the Defendant erected the iron sheets after the suit was filed on **25<sup>th</sup> June 2014**. He denied that his title was extinguished by being disposed of the said property . He further testified that there was no fence between him and the Defendant and that the fence was on the side of the road, to prevent the cows from straying from the road.

**PW2 Solomon Ngure** adopted his witness statement dated **26<sup>th</sup> October 2015** . It was his testimony that the Plaintiff has been his neighbour since **1952**. It was his testimony that the Plaintiff bought the suit property from **Njuguna**, and that the same was initially owned by a Whiteman and later bought by Kikuyu farmers and that the Defendant had not been using the land.

It was his further testimony that he has never been to the plot and that he did not know if the Defendant was using the land or not. However,

he knew where the plot was, but did not know the exact plot. That he did not know how the Plaintiff acquired the plot, but the Plaintiff was using the plot and he uses the said plot to date to grow grass. Further that he did not know the Defendant or who sold the plot to the Plaintiff, and that he only knew what he had been told.

## **DEFENCE CASE**

**DW1 Simon Kamere** testified that he is an Advocate of the High Court of Kenya, and he resides in **Kikuyu** Kiambu County. He adopted his witness statement dated **4<sup>th</sup> August 2014**. He relied on his affidavit filed in opposition to the Notice of Motion Application by the Plaintiff. He produced his list of documents filed on **4<sup>th</sup> August 2014**, as exhibit 1. He further produced his further list of documents dated **30<sup>th</sup> June 2014**, as Exhibit 2. He told the Court that his wife who was the Counter claimant passed on **6<sup>th</sup> March 2018**. He urged the Court to declare that he is entitled to the suit property by virtue of Adverse Possession.

He acknowledged that the suit property exists as an independent title and that he became aware of the existence of that title in **2014**. He testified that the Plaintiff informed him that he owned the land and that he wanted to bring the surveyor to put beacons on his plot and that the District surveyor promised to visit the disputed area. That he received the letter on **15<sup>th</sup> March 2014**. Further that the District Surveyor wrote another letter dated **8<sup>th</sup> May 2014**, but that he received it on **14<sup>th</sup> May 2014**, and all parties were to attend. That he sought the beacons to be re-established and that the District surveyor informed him of the company that sold the land held by the Plaintiff and that the land borders tarmac road. It was his evidence that he had been using the land all together and from the time he bought the land, that has always been the boundary. That the surveyor suspended the visit when he found that it was an issue of land claim. He told the Court that his land is **L.R No. 12341/2**, in Kikuyu, which was a subdivision of **L.R No. 1234/1**, and that he has established that there is another parcel of land next to his. Further that he could not go to Court as he was not the one claiming the land. It was his evidence that the land needed to be declared as his land by **adverse possession**. That he anticipated the Plaintiff to file a claim and that as far as he was aware he had utilized the land for **33 years** and he was aware that in the event of a suit, he would file a Counter claim. He further testified that the layout sets out his parcel of land and that the sketch shows the boundary of his land .It was his contention that the sketch emanated from the office of the District Surveyor and that from the sketch, there is a parcel between him and the road and that the boundary he was shown in **1980** is the one he has used all along. Further that he had a deed plan, showing where his land extends to and that he is the sole proprietor of their property as when his wife died, he became the sole proprietor.

Further that he did not know the land belonged to the Plaintiff and that he put the fence in **February 2014**, as he wanted to renovate his house and all along the barbed wire was there and the Kei Apple fence was also there. That the Plaintiff mistook an encroachment and he had discussed the matter with the Plaintiff, and there were never allegations of encroachment.

That Plaintiffs title was issued in the year **2012**, and he wondered why the Plaintiff had not complained before. He stated that he had presented evidence to show that his land borders a public road and that he has been using the land all along and that the Plaintiff has seen him using the land all along and the Plaintiff has never planted Nappier grass on the suit property.

After close of viva voce evidence, the parties filed written submissions which the Court has now carefully read and considered. The court renders itself as follows:-

The Plaintiff has filed this suit seeking for orders that the Defendant be directed to remove the illegal fence he has put on his suit property. The Plaintiff has further sought for an order of permanent injunction to restrain the Defendant from entering and altering boundary features. The Plaintiff has also sought for general damages and the costs of this suit. The Defendant has however also filed a Counter claim against the Plaintiff and has averred that he has acquired the suit property by way of adverse possession and therefore sought to be declared the owner of the suit property and for vesting orders.

The Court notes that though the Plaintiff has sought for orders directing the Defendant to remove his illegal structures on the suit property, the Defendant has on the other hand claimed that he has acquired the suit property by way of adverse possession. For the Court to be able to determine whether or not the structures on the suit property are illegal, it must first determine whether the Defendant had acquired the suit property by way of Adverse possession or not.

Further the Plaintiff has sought for an order of Permanent injunction to restrain the Defendant from altering the boundary features and therefore encroaching on the suit property. However, it has been the Defendant contention that he has been in occupation of the suit property from the year **1980**, when he bought his property that is adjacent to the suit property and that the fence has always been there. The Court recognises that it is the duty of the Land Registrar to fix boundaries as per **Section 19 of the Land Registration Act**. Further **Section 18(2), the Land Registration Act, 2012 (LRA)**, prohibits this Court from entertaining any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in that section. It provides as follows:

***“The Court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”***

The Court also recognises that first there is a dispute as to the ownership of the suit property. Therefore, the Court must first determine the said ownership for it to be able to determine whether the same must then be referred to the Land Registrar, to fix the said boundaries.

The Defendant has claimed that he has acquired the suit property by way of Adverse possession. It is his contention that he bought **L.R No. 12341/2**, in the year **1980** and thereafter erected a gate and that he has been in occupation of the same even before the Plaintiff started to lay a claim on the same. On the other hand, the Plaintiff has averred that he bought the suit property in the year **2012**, from one **Peter Njuguna** and that he has been planting Nappier grass on the said suit property. Further, it is the Plaintiff’s contention that the fence that was put up by the Defendant was put in the year **2014**, when he had asked the Defendant to go with him to the Land Surveyor so that the beacons could be re-established. He further submitted that the right of the Defendant to acquire the suit property was extinguished when the suit property was transferred and registered in his name.

The Plaintiff had brought in PW2 to help in his case, but it is the Court's considered view that the said PW2 kept contradicting himself as he had stated that he had never seen the Defendant, he did not know the plot, he knew that the Plaintiff had planted grass on the said property and finally admitted that he only knew what he was told.

The guiding provisions of law with regards to Adverse Possession is **Section 38 (1) and (2) Limitation of the Actions Act that provides as follows:**

*(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, 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.*

*(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.*

For a party to succeed in a claim of Adverse Possession, the person must satisfy the Court that he/ she has been in **Continuous and uninterrupted** possession without the consent of the owner of the land; that his/her interests were **inconsistent** to the interests of the true owner of the land. The possession has to be **Open and notorious**, The possession has to be **actual**, to enable the owner have a cause of action which if he/she fails to act on within the required legal period, then he/she will be estopped by the law of Limitation to claim back the land, The possession has to be **Exclusive**, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

In the case of Wairimu Mburu ...Vs...Chege Thaiya [2019] eKLR the Court held that;

*“The period of twelve years starts to run from the moment the trespasser takes Adverse Possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of Wambugu Vs. Njuguna [1983] KLR 172, the Court held as thus;*

*“1. The general principle is that until the contrary is proved, possession in law follows the right to possess.*

*2. In order to acquire by the statute of limitations, title to land which has a known owner, that owner must have lost his right 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 for which he intended to use it.....*

*3. The Limitation of Actions Act, on Adverse Possession, contemplates two concepts; dispossession and discontinuance of possession. 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 for the requisite number of years.*

*4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession become adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.....*

*5. The rule on "permissive possession" is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.....*

*6. Adverse Possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour.....time cannot run in favour of a licensee. A licensee therefore has no Adverse Possession (Hughes v. Griffin [1969] 1 WLR 23. "*

*Apart from the above, the following principles also apply when considering an application under Section 7 of the Limitation of Actions Act;*

*i) For the registered owner of land to be dispossessed, the party claiming ownership by Adverse Possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. See Ngati Farmers' Co-operative Society Limited V. Councillor John Ledidi & 15 others, Nkr CA No. 94 of 2004.*

*ii) The mere change of ownership of land which is occupied by another person under Adverse Possession, does not interrupt such person's Adverse Possession.*

*iii) Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. See Githu V. Ndeete [1984] KLR 776. Running of time will not be interrupted by sending a notice or letter from the true owner to the claimant.*

*iv) Exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the*

*manner in which land of that nature is commonly used or enjoyed. See Powell V. McFarlane [1977] 38 P & Cr. 452.”*

In the instant case, it is not in doubt that the Plaintiff is currently the owner of the suit property having been registered as such in the year **2012**. The Court notes that there has been allegations of the suit property being acquired fraudulently. However, there is no any determination of the same that has been produced before this Court to give evidence that any competent legal authority had made such a finding and therefore the same remains mere speculation.

During cross examination, the Defendant acknowledged that the suit property exists as an independent property and therefore the existence of the said suit property is not in doubt. It is not in doubt that as per the documents produced before this Court, the said suit property was registered in the name of the **Peter Njuguna**, who has been registered as the owner from **1999 to 2012** and the Plaintiff became the registered owner of the suit property in **2012**. It is also not in doubt that though the Plaintiff became the owner in **2012** and the dispute between him and the Defendant arose in **2014** when he sought to claim the land.

The Defendant has testified that the barbed wire fence and the Kai Apple fence existed before and the only change that was made was the iron sheet were added. The Court has seen the report by the Hon. Deputy Registrar dated **24<sup>th</sup> October 2018**, in which it was reported that the live fence and the iron sheet were bordering each other and there was no fence in between. The Court take cognisance of the submissions by the Plaintiff that it had been five years and a lot has changed, However, it is the Court’s considered view that whether the fence was placed two days or five years if there was a space in between, then the same would most definitely show. The Plaintiff also acknowledged that the fence existed and what was added was the iron sheets, and therefore the Court is satisfied that the Defendant had been in occupation and in possession of the suit property since **1980**.

The Plaintiff has testified that he had grown Nappier grass on the said suit property. It is not clear when the said grass was grown and given that he is the one who has alleged, he ought to have called evidence to prove the same, It is the Court’s considered view that the Plaintiff has not proved that he has ever been in possession of the suit property. Further as already stated above, the said **Peter Njuguna** was the registered owner of the suit property from **1999 to 2012**. These are **13 years**, and the Defendant has been in possession and occupation of the suit property from the year **1980** well above the required **12 years**. Therefore, the Court finds that by the time the suit property was passing to the Plaintiff in **2012**, the Defendant had already acquired the suit property by way of Adverse possession. More so because even though the Plaintiff acquired the suit property in **2012**, he did not assert his rights until **2014**, which added two more years to the Defendant’s occupation and possession of the suit property. There is no evidence that the said **Peter Njuguna**, was ever in possession of the suit property. Possession of the Defendant was exclusive, uninterrupted and open, then he indeed dispossessed the registered owner. It was not clear why the Plaintiff failed to call **Peter Njuguna** who allegedly sold the suit property to him as his witness.

In the case of **Wairimu Mburu ...Vs...Chege Thaiya(supra)** the Court in quoting the case of **Wambugu Njuguna** stated that

*“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 for the requisite number of years.”*

In this case, the Defendant has testified that he has always been in occupation of the suit property. His evidence has not been controverted and the Court is satisfied that the same is true as there is an allegation by the Plaintiff that the Defendant has encroached onto his property. He can only have encroached if he was in possession. Further as already held above, by the time the Plaintiff was acquiring the suit property, the Defendant had already acquired the suit property by way adverse possession. Therefore, the mere change of ownership did not interrupt his rights to adverse possession.

Consequently the Court finds and holds that the Defendant had acquired the suit property by way of Adverse of possession. Having found that the Defendant has acquired the suit property by way of adverse possession, then it is clear that the Defendant’s counter claim is merited.

Further the Court finds and holds that the Plaintiff’s claim is not merited, as the Defendant is the owner of the suit property, and therefore, the fence that he has erected is not illegal. Further the matter cannot be referred back to the Land Registrar for fixing of the boundary as there is no boundary to fix.

On the issue of costs, ordinarily costs do follow the events. However as per Section 27 of the Civil Procedure Act, the Court has discretion to grant costs depending on the Circumstances. It is clear that the reasons for granting costs is not to punish, but to compensate the successful litigant. In this instant looking at the circumstances of the case and being that the plaintiff bought property that was already acquired by way of adverse possession, the Court finds and holds that each party should bear its own costs of the suit

The Upshot of the foregoing is that the Plaintiff has failed to prove his case on the required standard of balance of probabilities and therefore the Court finds and holds that his claim as stated in the Plaint dated 24<sup>th</sup> June 2014, is not merited and the same is dismissed entirely. The Court however finds and holds that the Counter Claim by the Defendant dated 4<sup>th</sup> August 2014, is merited and the same is allowed entirely. Each party to bear his own costs of the suit.

It is so ordered

**Dated, signed and Delivered at Thika this 30<sup>th</sup> day of July 2020.**

**L. GACHERU**

**30/7/2020**

**JUDGE**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With consent of:**

**Kiarie Njuguna & Co. Advocates for the Plaintiff**

**Kamere for the Defendant**

**COUNTER CLAIM**

**Kamere Advocates for the 1<sup>st</sup> & 2<sup>nd</sup> Plaintiff**

**Kiarie Njuguna for the Defendant**

**L. GACHERU**

**30/7/2020**

**JUDGE**