



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO. 20 OF 2018 (OS)

JOSEPH MWANGI MUNGA.....PLAINTIFF

VERSUS

DUNCAN KIMANI NJOROGE.....DEFENDANT

JUDGEMENT

1. Before me for determination is an amended Originating Summons amended on the 28th June 2019, the original Originating Summons dated the 28th March 2018 having been filed in Court on the 11th April 2018.

3. In the said amended Originating Summons the Plaintiff /Applicant sought for determination of the following:

i. Whether the Plaintiff has acquired title deed by adverse possession over parcel of land LR (sic) measuring approximately 5 ¼ acres which was to be excised from parcel of land title No. Nyandarua/Kaimbaga/34.

ii. Whether the Plaintiff is entitled under Section 37 and 38 of the Limitation of Actions Act Cap 22 laws of Kenya to be registered as proprietor of the entire portion on parcel of land measuring approximately 5 ¼ acres to be excised from parcel of land title No. Nyandarua/Kaimbaga/34 having acquired the title by virtue of the doctrine of adverse possession since the year 1992.

iii. Whether the Defendant was the registered proprietor of parcel of land measuring 5 ¼ acres which was to be excised from parcel of land title No. Nyandarua/Kaimbaga/34 in trust for the Plaintiff.

iv. Whether the Defendant should transfer approximately 5 ¼ acres which was to be excised from parcel of land title No. Nyandarua/Kaimbaga/34 failing which the Deputy Registrar of the high (sic) Court Nyahururu should be authorized to execute the transfer documents in favour of the Plaintiff.

v. That the Defendant be ordered to apply for the requisite consents and execute the relevant transfer document in favour of the Plaintiff and release to the Plaintiff the original title deed, copies of his identity card, PIN certificate and passport size photographs within seven (7) days of the date of the judgment and in default the honorable Court's Deputy Registrar be authorized to execute the necessary documents.

vi. The District Land Registrar and the District Surveyor to dispense with the production of the original title deed and proceed to issue a title in favour of the Plaintiff.

vii. Who pays the cost of the suit.

3. The Originating Summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn on the 20th June 2019 by the Plaintiff.

4. The Defendant's replying affidavit sworn on the 14th September 2018 was to the effect that the Originating Summons had been tainted with lies, misrepresentation and was an abuse of the Court process. That the true position had been that the Plaintiff had on several occasions failed to comply with terms of their sale agreements wherein the Defendant had in turn been restrained from transferring the land to the Plaintiff who then had filed the present case seeking to compel him to transfer the land to him (Plaintiff). The Defendant sought for the suit to be dismissed.

5. Directions were subsequently issued on the 15th October 2018 wherein the matter had proceeded for hearing on the 4th February 2020

when the Plaintiff had testified as follows;

6. That he was a farmer who lived in Nyeri but had a 3 acre land in Olkalou which land he had bought from the Defendant one Duncan Kimani Njoroge on the 4th January 1992 at Ksh 22,000/- per acre totaling to Ksh. 66,000/-. That the said piece of land which was situate at Kaimbaga scheme was to be exercised from plot No. 34.

7. That they had entered into a written agreement in Kikuyu language, which agreement had been translated. That parties had signed the said agreement which he had produced as Pf Exhibit 1 (a) and (b)

8. The Plaintiff proceeded to testify that after he had bought the land, he had not taken occupation of the same but had embarked on cultivating on 1 ½ acres out of the 3 acres which the Plaintiff had shown him and wherein he had planted blue gum trees. The other 1 ½ acres he had left fallow.

9. That after executing the agreement parties had not gone to the Land Control Board in the year of 1992 and he never got title to the land. That on the 30th December 2004 the Defendant had sold to him a second piece of land measuring 2 ¼ acres for Ksh 55,000/- per acre which totaled Ksh.125,750/- and which land was also to be exercised from the same plot No. 34 Kaimbaga Scheme.

10. His evidence was that for the first Plot, he had paid the Defendant Ksh. 69,580/- but for the 2nd plot, he paid the Defendant in instalments the first one being Ksh 26,580/-. That he had subsequently paid other monies where he had remained with a debt of Ksh. 34,670/-.

11. That later both parcels of land had been amalgamated making an acreage of a total of 5 ¼ acres to which he had fenced. He produced the subsequent agreement dated the 30th December 2004 which was also in Kikuyu, and the translated version as Pf exhibit 2 (a) and (b).

12. He then testified that from the year 1992–2004 when he got the additional 3 ¼, acres he used to utilize the whole land, but later in the year 2014, the Defendant had sold 1 acre of his 5 ¼ acres to a certain woman known as Mama Julia who had proceeded to plough it.

13. The Plaintiff testified that the Defendant had sold to him the 5 ¼ acres of land because at the time, he was faced with financial challenges that the Defendant had no title and the land was still registered to the Settlement Fund Trustee where the Plaintiff had helped him acquire a title from Ardhi House. That further when the Plaintiff sold to him the 3 acres, the surveyor and his team had visited the land to have it sub-divided into parcels measuring 5 acres each so that they could allocate the resultant parcels to other persons. It was his testimony that the Defendant got title to the land somewhere around the year 1997 although he was not sure.

14. He was referred to an abstract of title to plot No. 34 wherein he responded that he had never seen it before. He read its contents and confirmed that it related to plot No. 34 where the 1st entry was to the effect that the land had been registered to the Settlement Fund Trustee on the 1st October 1987 wherein the 2nd entry showed that the land had subsequently been registered to the Defendant on the 22nd November 2001. He produced the abstract as Pf exhibit 3.

15. He testified that at the time the Defendant was issued with the title, he was already in possession of the land and that even after issuance of the title, nothing changed. That in the year 2010, the land had been sub-divided resulting into about 4 titles being No. 1342 – 1346. That his land had now become No. 1345 as per what Mama Julia had informed him.

16. He testified that Plot No. 1345 measured 5 ½ acres but that he had not seen the beacons to the said plot 1345 and that at the time of subdivision, his land had been left intact. He produced the search for land parcel No. Nyandarua/Kaimbaga/1345 as Pf exhibit 4.

17. It was his testimony that after the subdivision, he did not know why the Defendant had still refused to give him his title and yet it was the 6th year that Mama Julia was in occupation of his land.

18. He testified that he remembered that by the time the Defendant had sold the land to Mama Julia, he had planted avocados, blue gum, tree tomatoes to which the said Mama Julia had removed his fence (which was barbed wired) and had cut down some avocados and some trees.

19. That in the year 2015 when he had tried to build on the 2 ¼ acres of land, he had been chased away and had been asked to confine himself to the 3 acre land where he lived and cultivated on only 1 acre of land. That 2 ¼ acre land was the land upon which 1 acre had been sold to Mama Julia and out of which the remaining 1 ½ acre was vacant but was his.

20. He testified that all he sought from the Court was title to his 5 ¼ acre of land which the Defendant wanted to grab from him keeping in mind that he did not owe him anything in as far as the 3 acre land was concerned. That in as far as the 2 ¼ plot was concerned, he acknowledged that he owed the Defendant a debt of Ksh 34,670/- which he had refused to take.

21. That further he had neither been served with a demand notice or any notice of eviction. He thus produced the mutation form and RIM as his Pf exhibit No. 5 (a) (b).

22. When cross examined on his amended originating summons, the Plaintiff stated that what he had sought for were orders of adverse possession, but what he wanted was his title as a purchaser of land and reiterated his evidence in chief adding that for the 2 ¼ acre of land he had paid in installments and had a balance of 34,170/= there had been no time limit but that he used to pay according to how he got money because they had agreed that he would pay the money slowly and when he subsequently went to pay the remaining balance, the Defendant had refused to take the money. That the parties had then gone before the chief in the years 2013 and 2014 where the Defendant had still refused to take the money because he had overstayed with the re-payment.

23. He testified that should the Defendant seek to refund him his money that it should be at the current cost. He also confirmed that they did not record the monies he had paid in installments but that he had got onto the land as a purchaser where he had got permission to take occupation thereto but had not received any demand notice to vacate the same.

24. In re-examination, he corrected himself by stating that in his prayer, he had sought for 8 ½ acres from the main land whereby ¼ land had included the road and further that the Defendant had refused to receive the money in the year 2013 – 2017.

25. He also confirmed that he had lived on the 2 ¼ acre of land for 14 years and that in all the agreements, parties had not gone before the Land control Board to which there had been no consents obtained in both the agreements. The Plaintiff then closed his case.

Defence case.

26. The Defendant, Duncan Kimani Njoroge testified that he too was a farmer who lived in Kaimbaga and that he wished to adopt his Replying Affidavit dated the 14th September 2018 as his evidence.

27. He confirmed that he knew the Plaintiff to whom he had on the 4th January 1992 sold to 3 acres of land at Ksh. 22,000/- per acre making it 66,000/- because he had wanted to offset his loan at the Settlement Fund Trustee. That the Plaintiff had given him Ksh. 24,000/- promising to pay the balance after 2 weeks. That he however did not pay the balance as promised but paid in the month of November 1993. That he was to pay Ksh 30,000/- at Settlement Fund Trustee but ended up paying Ksh 69,000/- as a penalty. He wondered as to who would pay that cost.

28. He proceeded to testify that the Plaintiff had approached him again in the year 2004 asking for more land and since he had school fee issues, parties had agreed to sell and purchase land measuring 2 ¼ acres at Kshs.125,000/-. That the Plaintiff did not pay anything.

29. In the year 2013 the parties calculated all the expenses owed which totaled to Ksh 80,000/- and the Plaintiff left yet again but returned in the year 2017 and reported a dispute before the chief. When he was asked to pay monies owed which totaled to Ksh 500,000/-, he filed the present suit.

30. The Defendant testified that although the Plaintiff had not finished paying him the purchase price, when he bought the land, he had allowed him to take possession thereof to which he took possession on the 4th January 1992 but his son was the one who had been living on the land. That when the Plaintiff had been summoned to the Land Control Board, he had refused to attend.

31. He stated that he was not agreeable to the Plaintiff getting the land by adverse possession because he had purchased the land and owed him Kshs. 500,000/- and that the land could not be valued at the old rate. He sought for the Plaintiff's case to be dismissed and for costs of the suit.

32. He produced the following documents:

- i. The title deed to parcel No. 1345 measuring 2.225 hectares and registered on 23rd September 2014 as Df exhibit 1
- ii. A copy of mutation form for plot No. 34 dated the 14th May 2005 as Df exhibit 2
- iii. A copy of letter from Settlement Fund Trustee dated 22nd January 1996 as DF Exhibit 3.
- iv. A letter dated 23rd January 1996 from Settlement Fund Trustee showing the monies he owed being Ksh 66,860.60cts as DF exhibit 4.

33. When cross- examined, the Defendant confirmed that he had been allotted Plot No. 34 Kaimbaga in 1992, by the Settlement Fund Trustee.

34. He also confirmed that there was no debt pending on the 3 acre piece of land as he had been paid later.

35. He also confirmed that after the Plaintiff had bought the land in 1992, he had left it vacant only to return in the year 2002 with his family where he had then taken possession and/or occupation of the same.

36. The Defendant further confirmed that in their agreement, it had not been stipulated when the Plaintiff got onto the land. That further it was true that the Plaintiff had ploughed the land. He also confirmed that he lived on his land and not on the 5 ¼ acres to which he had neither ploughed, fenced, or planted trees.

37. That the Plaintiff had been using the land on his own free will and he had never given him notice to vacate the land but that the land measuring 5 ¼ acres could only be transferred to the Plaintiff after payment.

38. When referred to Pf exhibit 2(a) (b) he acknowledged that it was the agreement dated 2004 for the sale of 2 ¼ wherein the whole land was for Kshs. 125,750/-. That the Plaintiff had paid Kshs. 69,550/- leaving a balance of Ksh 34,000/- He testified that he had not refused to take the money and instead demanded for 500,000/- when they had gone before the Chief.

39. He also confirmed that the Plaintiff took possession of the 3 acres of land in December 1993 but did not plough the same. That for the 2

¼ acre land, the Plaintiff took possession on the 30th December 2004 and by the time he filed suit, 12 years after the time he had purchased the same, had lapsed.

40. He also confirmed that they neither went to the Land Control Board in 1993 or 6 months after the year 2004.

41. He confirmed that in the year 2005 he had subdivided the land into 4 pieces. The 1st parcel measuring 16 acres was registered in his name. That it had been at this time that the Plaintiff was to get 5 ¼ acres in Parcel No 1345. That he however did not give the Plaintiff title to parcel No. 1345 because he still owed him money to which he was to pay the current rate of Kshs. 500,000/-for the 2 ¼ acre of land.

42. He confirmed that there was no penalty clause in their agreement to the effect that should the Plaintiff default in the payment that he would be penalized Kshs. 500,000/-. He confirmed that should the Court order him to give the Plaintiff the 5 ¼ acres of land he would agree but that the Plaintiff had overstayed with his money for many years. The defence closed its case and parties filed their respective written submissions.

Plaintiff's submissions.

43. After summarizing both the Plaintiff's and Defendant's case, the Plaintiff summarized their issues for determination as follows;

- i. Whether the Defendant is the registered proprietor of the suit land.
- ii. Whether the Plaintiff obtained title of the suit land by Limitation of Actions Act and by the doctrine of adverse possession.
- iii. Whether the Plaintiff by virtue of such adverse possession of the suit property is entitled to be registered as the proprietor of the property against the Defendant.
- iv. Whether the Deputy Registrar be ordered to execute all the appropriate documents to effect the transfer to the Plaintiff in the event the Defendant defaults.
- v. Who pays the cost of this suit.

44. On the first issue for determination it was the Plaintiff's submission that there was no dispute that the Defendants was the registered proprietor of LR No. Nyandarua/Kaimbaga/34 a fact which was corroborated by the abstract of the title to the said parcel herein produced as Pf exh 3.

45. On the second issue for determination, as to whether the Plaintiff had obtained title of the suit land by Limitation of Actions Act and the doctrine of adverse possession, the Plaintiff submitted that the answer was in the affirmative keeping in mind that the suit parcel was first registered to the Settlement Fund Trustee in 1987, and that subsequently the Defendant had registered as the absolute proprietor on the 22nd November 2001. That pursuant to two consecutive sale agreements, the Plaintiff had taken possession of first parcel of land measuring approximately 3 acres on or about 1993 prior to the registration of the Defendant as proprietor of the suit land, while he took possession of the second parcel of land measuring 2 ¼ acres in 2004 after the Defendant had been registered as proprietor of the suit land.

46. While placing reliance on the decided case in **Samwel Nykenogo vs Samwel Orucho Onyaru[2010] eKLR** as well as Section 13 of the Limitation of actions Act, the Plaintiff submitted that he, being the purchaser in possession of the land, was the person in whose favour the period of limitation should run.

47. That the position of a vendor and purchaser was that the vendor as the registered owner retained the legal estate and became the trustee of it for the purchaser once the purchaser paid a deposit for it, as was clearly elucidated by the Court of Appeal in the case of **Public Trustee vs Wanduru Ndegwa [1984] eKLR**. That the Plaintiff was in possession of the two parcels of land pursuant to their agreements. That upon the lapse of six months without seeking for consents from the land control board the said agreements became null and void by operation of the law where the Plaintiff could not bring any equitable action for specific performance on the void contract.

48. That the proprietary rights of the Defendant were never extinguished and he never exercised his rights to repossess the suit property before the lapse of 12 years such that he now held the land measuring 5¼ in trust for the Plaintiff by virtue of the Limitation of Actions Act.

49. That the Plaintiff had been in open, continuous and uninterrupted possession of the suit land since 1993 and 2004 respectively making it 27 years and 16 years respectively, and where he still remains in possession, as at the time of filing the suit.

50. On the third issue for determination it was the Plaintiff's submission that he ought to be registered as the proprietor of the suit property against the Defendant. That the right of an adverse possessor was equitable in nature and had an overriding interest on the subject land against the proprietor.

51. The Plaintiff further submitted that having persuaded the Court and he had acquired title to the suit property as an adverse possessor, then it was incumbent upon the Court to issue an order to the Land Registrar Nyandarua District to register the whole of the land parcel No. LR Nyandarua/Kaimbaga/1345 to be registered in the name of the Plaintiff and in the event that the Defendant defaulted to execute the transfer documents, that the Deputy Registrar of the Court to execute all the necessary and appropriate documents to effect transfer to the Plaintiff. Reliance was placed on the decided case in **Lawrence Muiruri Njuguna vs Charles Mwenga Mulwa [2017] eKLR**.

52. That since Section 27 of the Civil Procedure Act was pertinent on the issue of costs to the effect that it followed the event, the Plaintiff

prayed for costs of the suit plus interests.

Defendant's submission.

53. The Defendant's submission was that the law under Section 107 of the Evidence Act was very clear on the onus of proof to the effect that he who alleges must prove.

54. That the Plaintiff's prayer had been that he be declared the proprietor of the suit land by way of adverse possession where parties had supplied the Court with material to support the narrative that the Plaintiff was a purchaser for value, hence his occupation was not adverse. Counsel submitted that the parties were bound by their pleadings and buttressed his submission by relying on the decided cases in the **Malawi Supreme Court of Appeal in Malawi Railways Limited vs Nyasulu [1998]MWSC 3** and a Ugandan Court of Appeal case in **Libyan Arab Uganda Bank For Foreign Trade and Development & Another vs Adam Vassiliadis [1986] UG CA 6** cited with approval the dictum of Lord Denning in **Jones vs. National Coal Board [1957] 2QB 55**.

55. The Defendant sought for the Court to hold the Plaintiff as a person claiming adverse possession premised on the alleged purchase of the suit land from the Defendant.

56. That adverse possession had been enumerated in several cases wherein for a claim of adverse possession to succeed the Applicant must prove that he had had non-permissive or non-consensual actual, open, notorious exclusive and adverse use of the land in question for the statutory prescribed period without interruption as was held in the decided cases in **Mbira vs Gachuhi [2002] IEALR 137** and **Jandu vs Kirplal & Another [1975] EA 225**.

57. That for the Plaintiff to lay claim of adverse possession to the suit land, he ought to have proved three important facts to which:

- i. That entry to the land in question was adverse and non-permissive but none the less without use of force.
- ii. That the Defendant did not issue a notice to the Plaintiff to vacate.
- iii. That the possession was real and open for an uninterrupted period of twelve years

58. The Defendant submitted that a purchaser for value or an alleged purchaser of a suit land could not claim that the entry and possession of a suit land was adverse since the same had been precedent by a contract of sale that permitted or consented to the use and possession of the suit land by the Defendant. The Plaintiff herein had obtained possession and use of the suit land through a contract of sale and there had been no prove of non-permissive use of the land. He relied on the decided case in **Samuel Miki Waweru vs Jane Njeri Richu CA No 122 of 2011** to buttress his submission and to further submit that adverse possession could only be invoked once the permission or license was revoked.

59. That the Plaintiff could not claim or predicate his case on adverse possession while pleading that he had come into possession of the suit land as a purchaser since the same was contradictory. That the Plaintiff could either plead on a claim for adverse possession or a purchaser for value. That the long stay on the suit land could not entitle him to acquire the same through adverse possession as was held in the case of **M'mbaoni M'thaara vs James Mbaka[2017] eKLR**.

Determination.

60. I have carefully considered the Plaintiff's claim against Defendant, the evidence, submissions as well as the law applicable and the authorities herein cited. I find the matters arising for determination thereto as being;

- i. Whether the Defendant is registered as proprietor of Title No. LR Nyandarua/Kaimbaga/1345.
- ii. Whether the Plaintiff is entitled to the possession and legal ownership of the suit land No. LR Nyandarua/Kaimbaga/1345 measuring 5 ¼ acres vide the principle or claim of Land through Adverse Possession.
- iii. Whether the Defendant should transfer approximately 5 ¼ acres being LR Nyandarua/Kaimbaga/1345, which was to be excised from parcel of land title No. Nyandarua/Kaimbaga/34, to the Plaintiff.
- iv. Whether there be a cancellation of the Defendant's registration as proprietor of Title No. LR Nyandarua/Kaimbaga/1345 and substitution therefore with the name of the Plaintiff.
- v. Who will bear the costs of the suit?

61. To begin with, the doctrine of Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

‘An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person’.

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

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.

63. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court Order vesting the land in him.

64. The Plaintiff has instituted the present suit seeking for a declaration that since the Defendant is registered as proprietor of the suit land No. Nyandarua/Kaimbaga/34 that he (Plaintiff) had acquired approximately 5 ¼ acres of the said land by adverse possession, land which was to be excised from the Defendant's parcel of land.

65. The law in respect to Adverse Possession is now settled. For one to succeed in a claim of Adverse Possession, (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

“Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

66. 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 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.”

67. 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: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiff s 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”

68. The main the elements of Adverse Possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

69. Has the Plaintiff herein demonstrated the said elements?

70. The facts upon which the Plaintiff's claim for Adverse Possession is made and which facts are not denied by the Defendant are that on the 4th January 1992 vide a sale agreement, he bought 3 acres of land (which shall for the purpose if this case be referred to as the 1st plot) from the Defendant herein at Ksh 22,000/- per acre totaling to Ksh. 66,000/=, land which was to be exercised from plot No. 34 Kaimbaga Scheme. That thereafter, he embarked on cultivating on 1 ½ acres wherein he had planted blue gum trees. That the other 1 ½ acres of land, he had left fallow. He confirmed that they never went to the Land Control Board. That on the 30th December 2004 he had bought a second piece of land (herein referred to as the 2nd plot for the purpose of this case) measuring 2 ¼ acres for Ksh 55,000/- per acre totaling to Ksh.125,750/- and which land was also to be exercised from the same plot No. 34 Kaimbaga Scheme, thus making the total acreage of 5 ¼ acres.

71. Other facts are that for the first Plot, the Plaintiff had paid the Defendant in full and final settlement but for the 2nd plot he had paid the Defendant in instalments and still owed him a balance of Ksh. 34,670/-.

72. The Plaintiff's evidence was that from the year 1992–2004 when he got the additional 2 ¼ acres, he had utilized the whole land, but later in the year 2014, the Defendant had sold 1 acre out of his 5 ¼ acres to a certain woman known as Mama Julia who had proceeded remove his barbed wire fence and cut down some avocados and some trees which he had planted thereon. That in the year 2015 when he tried to construct on the 2nd piece of land, he had been chased away and asked to confine himself on the 3 acre land where lived and cultivated on only 1 acre of land. The Plaintiff further confirmed that 2nd piece of land comprising of the 2 ¼ acre land was the land upon which 1 acre had been sold to Mama Julia and the remaining 1 ½ acre was vacant but was his.

73. It was also not in contention that after the Defendant had sold land to the Plaintiff that he (Defendant) had subsequently got his title on 22nd November 2001 wherein in the year 2010, he had proceeded to sub-divide LR No. Nyandarua/Kaimbaga/34 resulting into about 4 titles being No. 1342–1346 wherein the Plaintiff's claim of 5 ¼ acres fell within land parcel No. Nyandarua/Kaimbaga/1345. LR No.

Nyandarua/Kaimbaga/34 was therefore closed upon its subdivision.

74. On the Court's assessment of the evidence herein it is clear that there are 2 parcels of land acquired on diverse dates to which the Plaintiff now seeks title against the Defendant by virtue of being in adverse possession.

75. On the 1st piece of land measuring 3 acres, I find that from the evidence adduced herein, by the time the Defendant was selling this piece of land to the Plaintiff on the 4th January 1992, he had no title to pass as the land was still registered to the Settlement Fund Trustee and therefore the sale agreement was void ab initio. From the extract produced as Pf exhibit 3 the land being LR No. Nyandarua/Kaimbaga/34 was registered to the Defendant on the 27th November 2001 and that is the date he was vested with authority to pass title. It follows that the sale agreement dated the 4th January 1992 produced as Pf exh 1 (b) cannot help the Plaintiff in anyway. Further that agreement has been faulted by the fact that consent was never acquired.

76. Secondly the Plaintiff could not claim adverse possession against the Settlement Fund Trustee from the time he took possession on the 4th January 1992 because a look at the green card produced as Pf exhibit 3 the same confirms that prior to 1992 the land had been registered in the name of Settlement Fund Trustees. Section 41 (a) (i) of Limitation of Actions Act states that Government Land or land otherwise enjoyed by the Government is not subject to Adverse Possession. The Settlement Fund Trustee is a Government agency and land registered under it is deemed as Government land for purposes of the Limitations of Actions Act.

77. In **Benson Mukuwa Wachira –vs- Assumption Sisters of Nairobi Registered Trustees [2016] eKLR** the Court of Appeal held that if the land was registered in favour of the Government of a County Government, the doctrine of Adverse Possession would not apply to it and the claim would fail. The Court held that Adverse Possession did not attach when the Applicant took possession since it was still Government land. That Adverse Possession only attached when the Government allocated the land to the Respondent at a later date.

78. Having found prior that the sale agreement between the parties was null and void ab initio, then adverse possession in regard to the 1st parcel of land would thus accrue as against the Defendant upon his registration as proprietor of parcel No LR No. Nyandarua/Kaimbaga/34 which was on the 27th November 2001.

79. The present Originating Summons having been filed on the 11th April 2018 and amended on the 28th June 2019, and there having been evidence which was not contradicted to the effect that the Plaintiff had been in actual, open, exclusive and hostile possession of the 3 acres of land to which he had developed by planting trees and building thereon, time for adverse possession then started running from the 27th November 2001 and stopped on the 11th April 2018 making it a period of about 17 years and therefore within the ambit of Section 7 of the Limitation of Actions Act.

80. On the 2nd piece of land measuring 2¹/₄ acres, I find that although the parties agreement had been executed on the 30th December 2004 after the Defendant had been registered as proprietor of land parcel No LR Nyandarua/Kaimbaga/34, land from which 2¹/₄ acres was to be excised, the said agreement found itself in the same predicament as the first agreement in that it was faulted by the fact that consent was never acquired.

81. Secondly from the facts of the case it cannot be said that the Plaintiff herein had been in actual, open, exclusive and hostile possession of the 2¹/₄ acres for reason that according to the evidence of the Plaintiff, he had testified that;

“later in the year 2014, the Defendant had sold 1 acre out of his 5 ¹/₄ acres to a certain woman known as Mama Julia who had proceeded remove his barbed wire fence and cut down some avocados and some trees which he had planted thereon. That in the year 2015 when he tried to build on the 2nd piece of land, he had been chased away and asked to confine himself on the 3 acre land where lived and cultivated on only 1 acre of land. **The 2nd piece of land comprising of the 2 ¹/₄ acre land was the land upon 1 acre had been sold to Mama Julia and the remaining 1 ¹/₂ acre was vacant**”.

82. I find that the Plaintiff's possession of the 2¹/₄ acres of land **was not** continuous, uninterrupted and exclusive and I therefore find his claim of adverse possession of the 2¹/₄ acres fails and I proceed to reject the same. In totality therefore, I hold as follows:

i. An order is made that the Plaintiff has become entitled to three (3) acres out of the land parcel Nyandarua/Kaimbaga/1345, a subdivision of the original LR No. Nyandarua/Kaimbaga/34 by way of adverse possession.

ii. The Defendant to execute all the relevant documents to facilitate the transfer of three (3) acres out of land parcel Nyandarua/Kaimbaga/1345, a subdivision of the original LR No. Nyandarua/Kaimbaga/34, to the Plaintiff within 45 days of the delivery of this judgment.

iii. In default of (ii) above, the Deputy Registrar of this Court shall be at liberty to execute all relevant documents on behalf of the Defendant to facilitate such transfer.

iv. The claim of adverse possession of the additional 2¹/₄ acres against the Defendant is dismissed.

v. Each party shall meet their own cost.

It is so ordered.

Dated and Delivered at Nyahururu this 21st day of July 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE