



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E&L CASE NO.348 OF 2014 CONSOLIDATED WITH**

**E&L SUIT NO. 398 OF 2017(O.S)**

**JARED KIPROTICH BIWOTT.....1<sup>ST</sup> PLAINTIFF/ RESPONDENT**

**STEPHEN CHERUIYOT.....2<sup>ND</sup> PLAINTIFF/ RESPONDENT**

**- VERSUS -**

**JONATHAN KIBE.....DEFENDANT/APPLICANT**

**JUDGMENT**

By a plaint dated 18<sup>th</sup> November, 2014 the plaintiffs herein sued the defendant seeking for the following orders: -

- a. A declaration that the Defendant is a trespasser on **Parcel Number L.R.No.498/923**.
- b. An order of eviction of the Defendant from Parcel **L.R.No.498/923**.
- c. Permanent injunction be issued against the Defendant barring him from interfering or in any manner dealing with the said land or any portion thereof.
- d. Cost of this suit.
- e. Any other relief this court may deem fit to grant.

The Defendant/Applicant filed statement of defence and counterclaim dated 19<sup>th</sup> December, 201 seeking for the following orders:

- a. A declaration that the defendant is a rightful owner and has acquired interest in the suit property by way of adverse possession and is entitled to enjoy quiet and vacant possession thereof.
- b. A permanent injunction restraining the plaintiff's either by themselves, agents or assigns from encroaching, dealing with or interfering with the defendant's quiet possession, use and enjoyment of the suit property and to stop any act that is inconsistent to his interest in the suit property.

The defendant had filed another suit being Environment and Land Case No.398 of 2017 by way of Originating Summons against the Plaintiffs seeking for orders that the he had acquired the suit land by way of adverse possession having had an uninterrupted possession of the land since 1969. The two suits were consolidated and file No 348 of 2014 made the lead file.

**PLAINTIFFS' CASE**

PW1 Stephen Cheruiyot testified on behalf of the 1<sup>st</sup> plaintiff and stated that the 1<sup>st</sup> plaintiff is his son and a co -owner of the suit land. That in 1993 he applied for allocation of land in Eldama Ravine through the Commissioner of Lands whereb he was allocated the suit land and paid the government dues.

PW1 stated that he was subsequently issued with a receipt and was given a leasehold title of 99 years on LR NO 498/923. PW1 further stated that the government had issued a directive that anybody occupying road reserves all over the republic should move out. That the defendant

had occupied the road reserve and he upon the government directive he encroached onto the plaintiff's land in 2013.

PW1 further testified that he wrote a demand letter to the defendant to move out and reported the same to the Baringo sub county offices where he was told that there are many illegal occupations. PW1 produced a certified copy of the title LR 498/923 as pexb 1, demand notice as pexb 2 and a copy of a letter from Baringo County Government as pexb 3.

It was PW1's evidence that the defendant had put up a structure on the road reserve in 2013. He further testified that he did not develop the plot because he had commitments of paying school fees. He therefore prayed for judgement as prayed in the plaint.

On cross examination, he confirmed being the owner of the suit property since 1998 and that the defendant moved to his plot after the government directive to move out of the road reserve and that he is cultivating the suit land. He also stated that there is an old structure on the suit land but could not tell whether the defendant was occupying the mud walled houses. Further that when he applied for the plot, the plot was vacant.

PW1 also stated that he filed a complaint with the police and the defendant was arrested and charged with forceful detainer but the case was stayed pending the determination of this case.

On re-examination he stated that after getting the title he fenced the plot. The defendant encroached his plot in 2013 and this suit was filed in 2014.

### **DEFENCE CASE**

DW1 Jonathan Kibe testified that he has been staying on the suit land since 1969 and that he became aware that the plaintiff had a title when he was sued. It was his evidence that he built semi-permanent houses when the case was pending and has been using the land and has planted trees, maize and bananas. He further stated that has never received any notice to vacate from the county government and that his structures have never been demolished. He prayed that his counter claim be granted and he be registered as the owner of the suit land.

On cross examination he admitted not knowing the title number of the property he was claiming. He further stated that the title to the land was issued while he was on the suit land and had no authority to stay on the suit land. He also admitted that he neither bought nor applied for allotment from the government. He stated that he has never taken any step to apply for the title and also that he does not pay rates.

DW2 Pius Kiprop Kibet the area Assistant chief testified that he has known the defendant for many years who has been staying on the suit land since 1969. On cross examination he confirmed that the defendant does not have a title and that the defendant never applied to the town council because he is a squatter.

DW3 Abdul Rahiman Musa in his evidence stated that he has known the defendant since 2008 as they are neighbours. On cross examination he stated that the defendant built his structure in the 1960s.

DW4 Waiguru Mugure adopted his statement dated 9/12/2017 as his evidence and stated that the suit land is neither demarcated nor has a title deed.

DW5 Kiptoo Kandie testified that he has known the defendant since 1969 and that the defendant stays on the suit land but does not cultivate it. Further, that there has been no dispute between the plaintiff and the defendant.

On cross examination, he stated that there have been no titles in respect of the parcels of land and could not tell whether the defendant got authority to construct on the land.

DW6 David Kiprop Ngetich a valuer, testified that when he visited the suit property on 9/10/2017, Jonathan Kibe was in occupation together with his family. That the property is approximately ½ acre with mature trees, bananas and maize crops. He stated that the age of the structures is more than 20 years and that the value of the land plus the developments is approximately 4 million and produced the valuation report.

On cross estimation, he confirmed that Jonathan Kibe was in occupation as he went on the ground and that the old houses are within the property.

That was the close of the defence case

### **PLAINTIFFS'SUBMISSIONS**

Counsel for the plaintiff filed submission and listed 3 issues for determination as follows:

- a. Whether the Plaintiff/Respondents are the registered owners of all that parcel being L.R.No.498/923
- b. Whether the Plaintiff/respondents being the rightful registered owners, knew they had been ousted.
- c. Whether the Defendant/Applicant has met the conditions of adverse Possession

On the first issue counsel submitted that the plaintiffs are registered owners of parcel LR NO 498/923 having acquired it through joint purchase and therefore the defendant has no right or title in the suit land and that he is a trespasser who must be evicted.

Counsel relied on **Section 24(1) of the Land Registration Act** that states that:-

“All rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to the defeated except as provided in this act, and shall be held by the proprietor together with all privileges’ and appurtenances belonging thereto, free from all other interests and claims whatsoever....”

That the Plaintiff/Respondents further produced title issued to them jointly as the registered proprietors having acquired it legally and therefore the Defendant/applicant claim over the suit land is marred with illegality which must fail.

Counsel cited the case of **Gabriel Mbui v Mukindia Maranya[1993]eKLR** where the court held that:-

“The intruder must have with him some apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power. If he has no semblance or shadow of right to be on the land, he cannot rely on adverse possession.”

On the second issue as to whether the Plaintiff/respondents being the rightful registered owner, knew that their rights had been ousted, counsel submitted that the defendant never knew that they are the registered owners. Counsel relied on the case of **Ravindranath Dahybhaj Bhagat v Hamisi Herod & 5 others [2014]eKLR** where the court held that,;-

“For one to succeed in a claim of adverse possession, the land must have been in possession of the Plaintiff in the first place.....The defendant stated that the plaintiff or the original allottees never took possession of the suit property and could therefore not have been disposed or discontinued their possession”.

Counsel submitted that the land has always been vacant because the registered owners have never been aware of the Defendant/ applicant’s occupation until when he demolished the fence and got him arrested.

Further in the case of **Gabriel Mbui vs Mukindia Maranya[1993]eKLR** where the court stated that:-

“Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant..... The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable”

Ms Tum therefore submitted that the Defendant/applicant has failed to satisfy the requirement as the Plaintiffs/ respondents has never been in occupation and made aware of the Defendant/applicant’s claim and therefore the claim must fail. Further that for one to prove adverse possession he must demonstrate that he has been in quiet, peaceful, open and uninterrupted possession for a period of at least 12 years without permission of the title holder. The defendant cannot claim to have been in occupation of the suit land since 1969 and claim adverse possession over a public property.

Ms Tum submitted on the third issue that the plaintiffs were allocated property in 1998 while the applicant/defendant trespassed in the suit land in January 2014 hence twelve years have not lapsed to qualify the defendant to claim adverse possession.Counsel therefore urged the court to allow the plaintiff’s case and dismiss the defendant’s counterclaim with costs.

## **DEFENDANT’S SUBMISSIONS**

Counsel listed the following issues for determination;

- a. Whether the plaintiffs are the registered owners of the suit property.
- b. Whether the defendant is entitled to the parcel of land by operation of law and through adverse possession.
- c. whether adverse possession is applicable to parcels of land under the leasehold interest;
- d. Who should pay costs of this suit.

On the first issue, counsel submitted that the plaintiffs are the registered owners of the suit land as per the title produced in court.

On the second issue, counsel submitted that the defendant’s claim of adverse possession has its statutory basis on the provisions of **Section 7, 13, 17, 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.**

Section 7 of the limitation of actions Act Cap 22 provides that;-

“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 or if it first accrued to some persons through whom he claims to that person”.

Section 17 provides;-

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished”.

Counsel submitted that from the above provisions, it is clear that the plaintiff's right to recover the said land from the defendant is extinguished. The same is similarly extinguished under the provision of Section 17 of Cap 22 by virtue of the defendant's open and peaceful occupation of the land for a period exceeding 45 years from the year 1969 and 16 years since the plaintiffs became registered owners preceding to the presentation of this suit.

Section 38 equally stipulates that any person claiming entitlement by adverse possession to the land is at liberty to apply to the High Court for the order that he be registered as the proprietor of the land or lease in place of the person registered as proprietor of the land.

Mr. Kibii relied on the case of Mbira –vs- Gachuhi 2002 I EALR 137 and the case in Meru High Court Civil Case No. 80 Of 2002 Maliamu Ncurubi M'ibiri V Francis M'imanyara M'ringera [2011]eKLR while quoting the case of Mbira Vs. Gachuhi [2002] 1 EA set out the tenets to be followed to prove adverse possession as follows;-

- a) That there had been absence of possession by the true owner through abandonment.
- b) That the adverse possessor had been in actual possession of the piece of land;
- c) That the adverse possessor had no colour of right to be there other than his entry and occupation;
- d) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;
- e) That there was a sufficient animus to dispossess and an animus possidendi;
- f) That the statutory period, in this case twelve years, had elapsed.
- g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and
- h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.

Counsel submitted that the defendant through his pleadings and evidence in court ascertained that he acquired actual possession of the suit parcel in the year 1969 when he took possession and occupation of the same. Further that the plaintiffs confirmed that they became registered owners of the suit parcel in the year 1998.

cel of land as claimed. This is 16 years since their acquisition of title.

Mr. Kibii submitted that there is no evidence by the plaintiffs of interruption of the possession or of any disturbance or disruptions. Counsel cited the case of Environment And Land Court At Thika ,Elc 279 Of 2017 – Consolidated With Thika Elc 212/17 (Formerly Nairobi Elc 110/13 And Nairobi Elc 212/17), Simon Kibe Mwangi & 4 others v Thika Garissa Road Developers Ltd & 5 others [2019]eKLR which addresses the issue of occupation as follows;

“Occupation

Who is in occupation of the suit land? Going by the **Thika CMCC suit no 1291 of 2005**, the Gachagi group was in control and occupation of the suit land since the prayers therein was for their eviction. After the filing of that suit, there is no evidence to indicate that the Gachagi group ever left the suit land. Further, plaintiffs have availed photographs of the area showing the nature of occupation of the suit land. Plaintiffs have built their dwelling houses thereon. The place has an appearance of a slum settlement. The 1<sup>st</sup> defendant on the other hand has never taken over possession of the suit premises. In the circumstances, I do find that the Gachagi group is the one in control of the suit premises.

Animus possidendi

Sir **Robert Megarry and Sir William Wade (The Law of Real Property, 6<sup>th</sup> Ed)** have defined “Animus Possidendi” to mean “an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title”. The intention to possess must be manifestly clear, so that it is apparent that the squatter was not merely a persistent trespasser, but was seeking to dispossess the true owner of the land. In the present dispute, it is clear that the intention of the Gachagi group has always been to possess the suit land to the exclusion of the owners of the land.

*From the foregoing analysis, I am satisfied that the Gachagi group (plaintiffs in Thika ELC 279/17) have met the criteria required to succeed in a claim of adverse possession.”*

It was counsel’s submission that the suit was instituted on 18/11/2014 approximately forty five (45) years after the defendant had occupied the land and 16 years after the plaintiffs became the registered owners. During the pendency of these proceedings the plaintiffs herein instituted criminal proceedings vide Eldama Ravine criminal case no.742 of 2017 whereby the defendant was charged with the offence of forcible detainer which proceedings were subsequently stayed by this Honourable Court.

On the third issue on whether adverse possession is applicable to parcels of land under the leasehold interest, counsel submitted that Section 37 applies to land registered under the Government Land Act, Registration of titles Act and Registered land Act. **Section 37** stipulates as follows:-

“This Act applies to land registered under the Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except that -

(a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act.”

Mr. Kibii submitted that considering that the parcel of land in issue is one in respect of a leasehold interest on account of the fact that the grant issued to the plaintiffs was a leasehold of 99 years effective from the year 1998, the principle of adverse possession is applicable by dint of the same having changed from a public land to a private land.

Counsel relied on the case of **Eldoret ELC 259 of 2015, Salka Developers Limited vs Mary Aoko Omondi (2018)eKLR(supra)**, where the court had an occasion to address the issue of adverse possession in respect of leases and held that;

“.....in a nut shell, the limitation of actions Act applies to the land that was previously managed under the Government Lands Act cap 280 Laws of Kenya (repealed) and registered under the registered Lands Act cap 300 Laws of Kenya (repealed). The only exception is public land under section 41 of the act. The attorney General has no sufficient interest in this property in any manner whatsoever as the same is not public land due to the fact that it has already been alienated as private land and a lease issued to the plaintiff. When the lease expires, the same will revert to the state. The subject matter is a leasehold interest in which the defendant has already acquired prescriptive rights of the unexpired period....”

Counsel therefore urged the court to dismiss the plaintiffs ‘case and allow the defendant’s counterclaim with costs.

### **ANALYSIS AND DETERMINATION**

Two suits were consolidated and the issues for determination are as to whether the plaintiff is entitled to the orders of injunction against the defendant and whether the defendant has proved that he has acquired the suit land by way of adverse possession.

From the evidence on record it is not in dispute that the plaintiffs are the registered owners of the suit land.

Section 24(a) of the Land Registration Act provides as follows:

**“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

Section 26 (1) of the Land Registration Act states as follows:

**“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –**

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

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

Unless otherwise proven that the certificate was acquired fraudulently the court is obliged to treat such title as prima facie evidence that the person so registered is the absolute and indefeasible owner of land.

Section 25 (1) of the said Act provides that the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject to any lawful encumbrances, set out in this section.

In the case of **Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

This is not the situation in this case as there is no challenge to the manner of acquisition of the title. I find that the plaintiffs are the rightful owners of the suit land and are entitled to the protection of the law.

On the defendant's claim for adverse possession, the defendant has to prove that the ingredients of adverse possession in order to benefit from the operation of the law. This process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner. The occupation must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which states that: -

“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 or, if it first accrued to some person through whom he claims, to that person.”

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

**“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 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.**

**(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.**

**(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”**

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.

**Section 37** provides that: -

**“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”**

The Court of Appeal in the case of **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the Indian Supreme Court decision in the case of **Kamataka Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus:-

**“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”**

It is trite law that the possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner.

From the evidence on record, the plaintiffs were allocated the suit land in 1998 and issued with a title. That the defendant encroached on the suit property in 2013 prompting the plaintiff to report the matter to the Assistant chief and the filed the case in court in 2014. This leaves the defendants case bare as he has not proved that he has been in continuous occupation on the plaintiff's land for over 12 years.

In the case of **Wilson Kazungu Katana and 101 others =vs= Salim Bakshwei and another Malindi CA No. 11 of 2014**, where it was held that the Applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, and adverse to the title of the owner, adequate, continuous and exclusive. It is further trite that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent as was held in the case of **Francis Gitonga Macharia =vs= Muiruri Waithaka — Civil Appeal No. 110 of 1997, quoted in Titus Kigoro Munyi =vs= Peter Mburu Kirnani Nyeri Court of Appeal Civil Appeal No. 28 of 2014**. The defendant's claim for adverse possession therefore fails.

Having considered the evidence, the submissions and the relevant authorities I find that the plaintiff is entitled to the orders sought and therefore allowed as prayed with costs. The defendant's counterclaim is dismissed with costs. I make the following orders.

- a. A declaration is hereby issued that the Defendant is a trespasser on **Parcel Number L.R.No.498/923**.
- b. An order is hereby issued for the defendant to give vacant possession within 45 days failure to which eviction order to issue.
- c. Permanent injunction is hereby issued against the Defendant barring him from interfering or in any manner dealing with the said land or any portion thereof.
- d. Cost of this suit to the plaintiffs.

**DATED** and **DELIVERED** at *ELDORET* this 5<sup>TH</sup> **DAY OF AUGUST 2020**

**M. A. ODENY**

**JUDGE**