



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 103 OF 2012**

**JOYCE WANJIRU NYANJUI AND SERAH WAMBUI NYANJUI**

**(Suing on their own behalf and as the legal representatives of**

**ARTHUR NYANJUI GICHUHI).....PLAINTIFFS**

**VERSUS**

**JOSEPH CHEGE GITAU.....DEFENDANT**

**JUDGMENT**

1. The plaintiffs commenced proceedings herein on 12<sup>th</sup> July 2010 through plaint filed in the High Court. The matter was later transferred to this court. The plaintiffs sue as the legal representatives of the estate of Arthur Nyanjui Gichuhi (deceased). They aver that the deceased was a shareholder of Arash Farmers Co-operative Society Limited (hereinafter "Arash") and was on that basis allocated land parcel numbers 105, 106, 108 and 114 by Arash. That he and his family took possession of the parcels, extensively developed them and were in quiet occupation until 1990 when Arash tried to create new parcels known as numbers 371 and 372 from the deceased's said parcels.

2. There followed some civil and criminal litigation which involved the deceased, one Peter Karega Kariuki and others. The plaintiffs further aver that in the year 2005, acting on the strength of an alleged sale agreement between himself and the said Peter Karega Kariuki and after fraudulently obtaining title to Subukia/Subukia Block 12/372 (Arash) (hereinafter "the suit property") in the year 2003, the defendant filed Mbogoini Land Dispute Case No. 1/2005 seeking eviction of the plaintiffs from the said parcel. The tribunal ruled in the defendant's favour but the High Court later held that the tribunal did not have jurisdiction. The plaintiffs further aver that the defendant obtained his title fraudulently and that they have been in continuous occupation of the suit property both before and after it was hived off for a period in excess of 12 years from the date of issuance of title. They also stated that there was another case concerning the suit property pending being **Nakuru CMCC No. 345 of 2009** but added that the Chief Magistrate's Court did not have jurisdiction in the matter.

3. They therefore prayed judgment against the defendant for:

*A. A declaration that the plaintiffs are the lawful owner of Title No. Subukia/Subukia Block 12/372 (Arash).*

*B. In the alternative this court be pleased to order that the plaintiffs are entitled to be registered as the owner of Title No. Subukia/Subukia Block 12/372 (Arash) having been in adverse possession thereof for the requisite period of years.*

*C. An order that the defendant's title to parcel No. Subukia/Subukia Block 12/372 (Arash) be cancelled.*

*D. A permanent injunction restraining the defendant by himself/employees/servants from interfering with the plaintiff's quiet possession and occupation of the suit land.*

*E. Cost and interest at court rates.*

4. The defendant responded through a defence and counterclaim in which he denied the plaintiffs' allegations and stated that he acquired the suit property in good faith. He averred that he purchased the suit property from Peter Kariuki Karega in 1990 and that he was registered as proprietor and issued with title on 7<sup>th</sup> April 2003. He added that the plaintiffs have since 1990 been illegally occupying the suit property. The defendant also confirmed the existence of **Nakuru CMCC No. 345 of 2009**. He therefore prayed for judgment against the plaintiffs for a declaration that he is the lawful owner of the suit property; a permanent injunction restraining the plaintiffs as well as their children, agents and servants from entering into, remaining on, cultivating, leasing or in any other way interfering with the suit property; eviction of the plaintiffs, their children, agents and servants from the suit property; and for costs and interest.

5. When the matter came up for directions before my brother Munyao J on 16<sup>th</sup> April 2015, the parties informed the court that **Nakuru CMCC No. 345 of 2009** had been transferred to the High Court and became **Nakuru HCCC No. 137 of 2014**. Upon perusing **Nakuru HCCC No. 137 of 2014** the court noted that the issues raised in the said case are addressed in this matter. The court therefore stayed the said case.

6. At the hearing Joyce Nyanjui testified as PW1 and stated that she is a farmer resident at Subukia and the widow of Arthur Nyanjui Gichuhi (deceased), to whom she got married in 1960. She added that she obtained grant of letters of administration in respect of the deceased's estate on 23<sup>rd</sup> February 2010 (PExb 1). The deceased was a member of Arash with two shares, one under share certificate dated 9<sup>th</sup> January 1978 (PExb 2A) and the other under share certificate dated 7<sup>th</sup> February 1978 (PExb 2B). Pursuant to the shares, Arash allocated to him two plots in Subukia, each measuring 3 acres. The plots were plot number 106 and plot number 108. The deceased participated in balloting for the plots whereby he picked ballots with the said numbers (PExb 3). The witness further produced a copy of a map (PExb 4) which according to her existed in 1978 when she and the deceased took possession and which shows the two plots. She added that in the map the two plots have rectangular shapes and they touch the river whereas their initial shapes were squares and they did not touch the river. She also stated that there is a new map in which there is a plot number 372 which was not in the original map. According to her, plot number 372 has been curved out of plot numbers 106 and 108 which belonged to the deceased. She further testified that was in occupation of both plot numbers 106 and 108 as at the date of her testimony and that she had been in occupation since 1978.

7. PW1 further stated that she filed this case against the defendant because he is claiming her plot. She added that she knew Peter Kariuki Karega who claimed that she was occupying his plot leading to her prosecution in Nakuru CM Criminal Case No. 614 of 1997 in which judgment (PExb 5) was delivered on 17<sup>th</sup> August 2001. She concluded her evidence in chief by stating that she did not know how the defendant obtained a title for the suit property and urging the court to enter judgment in her favour as prayed in the plaint.

8. Under cross-examination, she stated that the deceased was the chairman of Arash in 1978 when the plots were subdivided and allocated. That the first survey of the plots was done in 1978 by a surveyor known as Mr Muya while a second survey was done by a surveyor known as Mr Nyandika. That Mr Nyandika only surveyed the deceased's plots and plots neighbouring the deceased's plots. As a result of his survey, plot number Subukia/Subukia Block 12/372 (Arash) which is the suit property and plot number 371 were created. She denied that the deceased as chairman allocated to himself 5 acres per plot leading to other members of Arash not getting plots.

9. Charles Ruo Njoga testified next as PW2. He stated that he is a farmer living at Arash Farmers' Co-operative Society farm in Subukia and that he owns number 210 within the said farm. That he is a founder member of Arash and that he was a member of its committee. That to become a member, one had to buy at least 1 share. He had 1 share. He added that he knew the deceased who was chairman of Arash from 1977 to 1990 when he passed away. The deceased had 2 shares. He further stated that Arash land was subdivided according to quality of the land. Where the land was of good quality 1 share was equivalent to 3 acres while where the land was poor by being for example stony or swampy 1 share was equivalent to between 4 to 6 acres. That balloting for the plots was done only once, on 30<sup>th</sup> April 1978. The deceased led the members in balloting and picked his ballot before everyone else. The deceased picked ballot numbers 108 and 106. After balloting members were shown their plots by the surveyor known as Mr Muhia. The members including the deceased and his widow Joyce Nyanjui immediately took possession and started construction.

10. PW2 further stated that Peter Karega Kariuki and the defendant were never members of Arash. He added that there are two maps for Arash, one genuine and the other not. He was then shown a copy of a Registry Index Map (RIM) for Subukia/Subukia Block 12 (Arash) which the defence later produced as DExb 11. He stated that it was not genuine since the shapes of plot numbers 106, 108, 372 and 371 in it are rectangular while in the genuine map they were all square. He added that Arash had only 371 members and that there was no plot number 372 in the original map. That the second survey was done to widen the roads from 5 metres to 10 metres by taking 2.5 metres from the plots on either side of the road and that save for that, nothing was changed in the position of any plot. He further stated that after the deceased passed away there was a new chairman by the name of Mr Macharia and in whose committee he was a member. He concluded his evidence in chief by stating that the balloting conducted on 12<sup>th</sup> May 1990 was not genuine since it was done behind members' backs and was not based on any resolution of the committee. Under cross-examination, he denied that Njuguna Karugu and Peter Karega did not get plots during the first survey or that the committee members reserved for themselves an extra 5 acres during the said first survey.

11. The plaintiff's case was then closed.

12. Joseph Chege Gitau, the defendant, testified next as DW1. He stated that he is a businessman residing in Nakuru. He added that he is the registered owner of the suit property plot number Subukia/Subukia Block 12/372 (Arash) and that a title deed (DExb 1) was issued to him on 7<sup>th</sup> April 2003. That he purchased it from Kariuki Karega at a purchase price of KShs 125, 000 through sale agreement dated 24<sup>th</sup> July 1990 (DExb 2). That prior to selling and transferring it to him, Kariuki Karega was himself issued with a title deed (DExb 3) in respect of the suit property on 20<sup>th</sup> February 1996. That Kariuki Karega gave him a copy of a ballot paper dated 12<sup>th</sup> May 1990 (DExb 4) and a receipt for KShs 1,510 dated 27<sup>th</sup> September 1972 (DExb 5) issued by Nyagacho Chisaro Chikunorwe Co-operative Society. He stated that Kariuki Karega explained to him that Nyagacho Chisaro Chikunorwe Co-operative Society was the original society before Arash came into being. He added that he took possession and fenced the plot after it was transferred to him. The next day after fencing, he found the fence demolished and beacons destroyed. He reported the incident to the police at Subukia and the deceased was arrested and charged in court. The deceased passed away before the case was concluded.

13. DW1 further stated that he instituted a land dispute being Mbogoini Land Dispute No. 1 of 2005. That the tribunal delivered its decision on 20<sup>th</sup> April 2005 and found that the suit property belonged to him. He produced a copy of the proceedings and award of the tribunal as DExb 6. He added that an appeal was filed to the Rift Valley Appeals Committee and that the Appeals Committee affirmed the decision of Mbogoini Land Dispute Tribunal. He produced a copy of the proceedings and award of the Appeals Committee as DExb 7. Being dissatisfied with the outcome, Joyce Nyanjui filed an appeal being Nakuru High Court Civil Appeal No. 77 of 2007. The High Court delivered judgment dated 26<sup>th</sup> March 2009 (DExb 8) after which Joyce Nyanjui filed this case. DW1 added that Arash had a dispute with Kariuki Karega at Commissioner of Cooperative and that the dispute was determined by an arbitrator Ms Elizabeth Wangari Thuo in an award dated 22<sup>nd</sup> January 1983 (DExb 9). The arbitrator's award was registered in court as Nakuru High Court Misc. Civil Application No.

16 of 1983 and was adopted pursuant to an order of the said court dated 5<sup>th</sup> May 1987 (DExb 10). He added that he bought Registry Index Map (RIM) for Subukia/Subukia Block 12 (Arash) from survey of Kenya. He produced a copy of the RIM as DExb 11. He concluded by urging the court to dismiss the plaintiff's case and to enter judgment as per his counterclaim. Under cross-examination he stated that Kariuki Karega never used the plot prior to selling it to him in 1990 and that although Kariuki Karega became owner on 20<sup>th</sup> February 1996, he did not transfer to him until 7<sup>th</sup> April 2003 since they had agreed with Karega that he would only transfer once a title was issued to him. When asked whether consent of the Land Control Board was obtained in respect of the transaction between him and Karega, he stated that he did not remember the date when it was issued.

14. Next on the stand was Karuga Mugiria Thuku, DW2. He stated that he has been a member of Arash since 1978 and owns plot number 121 within Arash. That when the society's land was surveyed in 1978, each member was to get 2.5 acres but after the survey, some two members did not get plots. That the leader of Arash at that time was the deceased. He further stated that the problem of the two members without land was solved by a subsequent committee led by Mr Jeremiah Macharia and in which he was a member. He added that Jessie Wachira who was a member of the deceased's committee went to the new committee and informed it that there was a plot existing between his plot which was number 114 and the deceased's plot. That Jessie Wachira wanted the plot subdivided between himself and the deceased. The deceased did not agree to the subdivision and Jessie Wachira therefore suggested that the plot be returned to the society. Upon informing members it was decided that the plot be given to members who did not get plots. The surveyor Mr Nyandika was therefore engaged to survey the whole area covered by plot numbers 114 to number 98. The survey uncovered 5 extra acres of land from which plot number 371 and plot number 372 each measuring 2.5 acres were created. Plot number 371 was allocated to Njuguna Karugu while plot number 372 was allocated to Peter Karega. After the exercise the deceased's plots 106 and 108 were measuring 2.5 each.

15. The last defence witness was John Ngatia Gicheha (DW3). He stated that he owns plot number 347 within Arash. He adopted his witness statement filed on 7<sup>th</sup> March 2013 which is a replica of DW2's testimony. Defence case was then closed.

16. Parties filed and exchanged written submissions. It is submitted on behalf of the plaintiffs that from the evidence tendered by the defence witnesses, it is manifest that no consent of the land control board was obtained in respect of the subdivision that resulted in the suit property and that the transaction as well as the defendant's resultant title are therefore illegal, null and void in view of the provisions of **Section 6 (1) of the Land Control Act**. Additionally, it is argued that the title is illegal for being issued in contravention of an order made in **Nakuru CMCC No. 591 of 1990**. Further, it is argued that the defendant did not tender any evidence to prove that the deceased's plots number 106 and 108 measured more than 2.5 acres. Regarding the limb of adverse possession, it is argued that the defendant and his witnesses confirmed that the plaintiffs have been in possession of the suit property from 1978 and that adverse possession has therefore been established. The cases of **Esther Ndegi Njiru & another v Leonard Gatei [2014] eKLR** and **Sisto Wambugu v Kamau Njuguna [1983] eKLR** are cited in support of those contentions. Accordingly, the plaintiffs urge the court to enter judgment as prayed in the plaint.

17. In response, it is argued on behalf of the defendant that the plaintiffs have failed to prove their contention that the defendant obtained title to the suit property fraudulently or illegally. In particular, it is contended that the plaintiffs have failed to establish fraud and illegality to the required standard of proof. The cases of **Elizabeth Kamene Ndolo v George Matata Ndolo [1996] eKLR** and **Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR** are relied on in that regard. On the issue of adverse possession, it is argued that in view of the litigation in the tribunal and before the High Court, the plaintiffs have not been in occupation for an uninterrupted period of 12 years and that adverse possession has consequently not been established. Reliance is placed on the cases of **Githu v Ndeete [1984] KLR 776** and **Harrison Oyari & 588 others v Mareo Oriambu & 22 others [2016] eKLR** to buttress those arguments. Regarding the counterclaim, it is argued that the defendant has demonstrated that he is the registered proprietor of the suit property and that his title is impeccable. The defendant has therefore urged the court to dismiss the plaintiffs' case with costs and to enter judgment in his favour as prayed in the counterclaim.

18. I have considered the parties' pleadings, evidence and submissions. The issues that arise for determination are firstly, whether the defendant's title to the parcel of land known as Subukia/Subukia Block 12/372 (Arash) (the suit property) was fraudulently or illegally obtained; secondly, whether the plaintiffs have acquired title to the suit property by adverse possession; thirdly, whether the defendant is the lawful proprietor of the suit property and lastly, whether the parties are entitled to the reliefs sought.

19. There is no dispute that the plaintiffs are legal representatives of the estate of Arthur Nyanjui Gichuhi (deceased) pursuant to limited grant *ad litem* issued to them on 23<sup>rd</sup> February 2010 in **Nakuru High Court Probate and Administration Cause No. 130 of 2009** and limited "for the purpose of protecting and defending the foregoing claim as beneficiaries". It is however not clear which claim is referred to in the grant. Since no issue was raised by any of the parties regarding the capacity in which the plaintiffs have brought this suit, I leave the matter at that. There is equally no dispute that the deceased was a shareholder of Arash and was on that basis allocated land parcel numbers 106 and 108 by the said society. Further, there is no dispute that the defendant is the registered proprietor of the suit property. According to the plaintiffs, the suit property was irregularly carved out of plot numbers 106 and 108 which belonged to the deceased and a title issued fraudulently and illegally to the defendant. It is for that reason that they seek cancellation of the defendant's title.

20. A registered proprietor of land is by law accorded privileges and benefits under **Section 24** of the **Land Registration Act**. Further, **Section 26** of the Act obligates the court to accept the certificate of title of such a proprietor as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are established. The said sections provide as follows:

**24. Interest conferred by registration**

*Subject to this Act—*

*(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; ....*

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

*(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

*(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or*

*(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. ...*

21. Fraud is a serious allegation. It is for that reason that the law requires that such an allegations be pleaded, particularised and strictly proven. This was restated by the Court of Appeal in **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR** as follows:

*It is trite law that any allegations of fraud must be pleaded and strictly proved. See **Ndolo v Ndolo (2008) 1 KLR (G&F) 742** wherein the Court stated that:*

*“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...” ... In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. ...*

22. Whenever a litigant seeks to nullify another’s title on account of alleged fraud, **Section 26 (1) (a) of the Land Registration Act** requires that the person alleging proves that the registered proprietor was a party to the fraud. The plaintiffs have sought to support their contention that the suit property was irregularly curved out of plot numbers 106 and 108 by relying on a map (PExb 4) which they claim is the original map of Subukia/Subukia Block 12 which they say existed in 1978 when the deceased took possession and which they further maintain shows the original sizes and shapes of the two plots numbers 106 and 108. A perusal of the said map however shows that it is titled “Proposed Sub-division of L.R No. 3336/2, 9294/2 and 2852/4 – Arash Farm”. It has neither the signature of the Director of Surveys nor a reference number issued by the Director of Surveys. It is simply a proposal which is not authenticated by the Director of Surveys in terms of **Sections 32 and 41 of the Survey Act**. Consequently, it is not a valid survey plan. Even assuming one were to accept PExb 4 as a valid plan, it will be noted that it does not support the plaintiffs’ claims that plot numbers 106 and 108 were initially square in shape and did not abut the river. It instead shows the shapes as rectangular and the plots abut the river. This in fact is the same position as that in the defendant’s plan which was produced as DExb 11. The mere fact that the plaintiffs are in occupation of the suit property does not demonstrate that it was excised from plot numbers 106 and 108. On the contrary, it supports the defendant’s contention that the deceased and the plaintiffs occupied a portion that did not belong to them.

23. The plaintiffs also argued that the defendant’s title is illegal for being issued in contravention of an order made in **Nakuru CMCC No. 591 of 1990**. They however did not produce a copy of the said order. In view of the allegations of fraud and even illegality, the plaintiffs were aware that the standard of proof required of them was higher than proof upon a balance of probabilities but not beyond a reasonable doubt. They have failed to satisfy this test. Even if they would have established fraud, they needed to demonstrate that the defendant was party to the fraud. This too they have failed to do. Regarding the plaintiffs’ argument that no consent of the land control board was obtained in respect of the subdivision that resulted in the suit property, I note that they did not plead such a case in their plaint. A party is bound by his pleadings. In the circumstances I find no valid reason to disturb the defendant’s proprietorship. Thus, the answer to the first issue for determination is that the defendant’s title to the suit property was not fraudulently or illegally obtained.

24. The second issue for determination is whether the plaintiffs have acquired title to the suit property by adverse possession. The law and principles relating to adverse possession are well settled and are founded on **Sections 7, 13, 17 and 38 of Limitation of Actions Act**. In the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi [2018] eKLR**, the Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

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

*“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....” (Emphasis added)*

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

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

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

*“(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”*

*[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse*

*possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)*

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

25. From the material on record, it is apparent that the defendant became the registered proprietor of the suit property on 7<sup>th</sup> April 2003. Prior to that, Peter Kariuki Karega was the registered proprietor from 20<sup>th</sup> February 1996. Regarding possession, the defendant does not dispute that the plaintiffs are in possession. It is for that reason that he seeks their eviction in his counterclaim. Had the plaintiffs been in uninterrupted possession of the suit property for 12 years as at 12<sup>th</sup> July 2010 when this suit was filed? The answer is a firm no. There is ample material on record showing that in the year 2005 the defendant instituted Mbogoini Land Dispute No. 1 of 2005 seeking to recover possession from the first plaintiff. When the tribunal delivered its decision on 20<sup>th</sup> April 2005 the first plaintiff filed Appeal No. 14 of 2005 to the Rift Valley Appeals Committee. The Appeals Committee delivered its decision and the first plaintiff filed an appeal against it being Nakuru High Court Civil Appeal No. 77 of 2007. The High Court delivered judgment on 26<sup>th</sup> March 2009. The first plaintiff categorically admitted the existence of those proceedings in her testimony.

26. It is settled law that the filing of a claim for recovery of possession interrupts the running of time. In Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR the Court of Appeal stated:

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

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

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

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

27. The tribunal proceedings, though declared void for want of jurisdiction in Nakuru High Court Civil Appeal No. 77 of 2007, constitute a valid interruption of the running of time. Time did not therefore run from the year 2005 to 26<sup>th</sup> March 2009. Time started to run afresh from 27<sup>th</sup> March 2009. This suit was filed on 12<sup>th</sup> July 2010, slightly over one year and three months from 27<sup>th</sup> March 2009. That certainly is way below the requisite 12 years of uninterrupted possession. A claim or suit doesn't have to be valid or successful to constitute an interruption of the running of time. It is enough that the proprietor has signalled assertion of his rights through such proceedings. Indeed this was clarified by the Court of Appeal in Wambui Gikwa v Paul Kimani Muraba [2016] eKLR as follows:

*In that regard the trial court held that since the tribunal proceedings had been quashed by the High Court they had no effect on the respondent's possession. We, however, are of a different view. We understand the law to be that time stops running in favour of an adverse possessor either when the title holder asserts his right to the land in question or when the adverse possessor admits the title holder's right. As set out in Kirutu -vs- Kabura (supra) assertion of a title holder's right can be through the institution of legal proceedings to regain possession. Whether or not the title holder succeeds in such proceedings is another matter altogether. The fact that such proceedings are instituted and prosecuted is in our view, a clear indication of the title holder exerting his right to the land interrupting possession of the adverse possessor. In this case the respondent attained the age of majority in the year 1996 hence time begun to run in his favour then. However, his possession was interrupted in 1999 when the appellant instituted the tribunal proceedings. ...*

28. In view of the foregoing, the answer to the second issue for determination is that the plaintiffs have not acquired title to the suit property by adverse possession.

29. As pointed out earlier in this judgment, there is no dispute that the defendant is the registered proprietor of the suit property. That reality coupled with the answers to the first and second issues for determination yields an affirmative answer to the third issue for determination: the defendant is indeed the lawful proprietor of the suit property.

30. The plaintiffs sought judgment against the defendant for a declaration that they are the lawful owners of the suit property, an order that they are entitled to be registered as owners of the suit property, cancellation of the defendant's title and a permanent injunction restraining the defendant from interfering with the property. Having failed to prove their case, these reliefs are not available to the plaintiffs. On the other hand, the defendant as the registered proprietor of the suit property is entitled to his full rights in respect thereof under **Article 40** of the **Constitution** and the privileges and benefits under **Section 24** of the **Land Registration Act**. I am therefore satisfied that the reliefs sought by the defendant should issue.

31. In the result, I make the following orders:

a) The plaintiff's suit is dismissed.

b) It is hereby declared that as between himself and the plaintiffs, the defendant is the proprietor of the parcel of land known as Subukia/Subukia Block 12/372 (Arash).

c) The plaintiffs, their children, agents and servants to vacate the parcel of land known as Subukia/Subukia Block 12/372 (Arash) within 45 (forty five) days from the date of delivery of this judgment. In default, the defendant to evict them.

d) A permanent injunction is hereby issued restraining the plaintiffs by themselves, their children, agents or servants from entering into, remaining in, cultivating, leasing or in any other way interfering with the parcel of land known as Subukia/Subukia Block 12/372 (Arash). The injunction shall become operational on the 46<sup>th</sup> (forty sixth) day from the date of delivery of this judgment or upon the plaintiffs vacating the property, whichever is earlier.

e) The defendant shall have costs and interest thereon in respect of both the suit and the counterclaim.

Dated, signed and delivered at Nakuru this 24<sup>th</sup> day of September 2020.

**D. O. OHUNGO**

JUDGE