



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

**AT ELDORET**

**E & L CASE NO. 151 OF 2017**

**DAVID KIMALEL BIRIR.....PLAINTIFF**

**VERSUS**

**SAMMY KIPROTICH TANGUS.....1<sup>ST</sup> DEFENDANT**

**PETER MACHARIA NJERU.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. **David Kimalel Birir**, the Plaintiff, commenced this proceedings through the originating summons dated 4<sup>th</sup> April, 2017 and amended on the 19<sup>th</sup> June, 2018 against **Sammy Kiprotich Tangus** and **Peter Macharia Njeru**, the Defendants, seeking for the following orders;

- (a) That he has obtained title to ***Karuna/Sosiani Block 2 (Progressive)/332***, the suit land, through adverse possession, having been on uninterrupted possession of the same since 1983.
- (b) That the 2<sup>nd</sup> Defendant's title over the said land has been extinguished by dint of adverse possession and or **Limitation of Actions Act** prior to the transfer to the 1<sup>st</sup> Defendant and the land should be transferred to him.
- (c) That an order do issue vesting the suit land to him.
- (d) That in case the 1<sup>st</sup> Defendant fails to transfer the suit land to him, the Deputy Registrar to execute the necessary documents to effect the transfer to him.
- (e) That the Defendant do pay the costs of the suit to him.

The summons is supported by the affidavit sworn by the Plaintiff on the 19<sup>th</sup> June, 2018 in which he among others depones that he took possession of the suit land in 1983. That the land was then registered with 2<sup>nd</sup> Defendant who later transferred it to the 1<sup>st</sup> Defendant on the 2<sup>nd</sup> September, 2016. That by then the 2<sup>nd</sup> Defendant's title had been extinguished through adverse possession in 1998. That his occupation of the suit land as a trespasser has been uninterrupted for 35 years and the land should be transferred to his name.

2. The Plaintiff's claim is opposed by the 1<sup>st</sup> Defendant, **Sammy Tangus Kiprotich**, through his replying affidavit sworn on the 27<sup>th</sup> May, 2017. He avers among others that he got registered with the suit land on

the 2<sup>nd</sup> September, 2016. That the said land was vacant and he commenced fencing and ploughing. That the Plaintiff's claim under adverse possession is therefore misplaced and untenable. That the Plaintiff claim that he moved onto the suit land in 1983 could not be true as the land was registered in 2004. That after he fenced and developed the land, the Plaintiff commenced acts of destruction and malicious damage to property in a bid to unlawfully evict him but failed. That the Plaintiff's claim should be dismissed with costs.

3. The Plaintiff testified as PW1 and told the Court that he has used the suit land from 1983 to date. That the land was initially registered with 2<sup>nd</sup> Defendant who was member Number 69 with Progressive Farmers. That the land of 2<sup>nd</sup> Defendant was 30 acres and that he sold a portion of 5 acres to his mother on 14<sup>th</sup> April, 1983. That his mother **Taprandich Bagera** died in 2011. That the 2<sup>nd</sup> Defendant subdivided the land on the 16<sup>th</sup> October, 2002 into seven parcels and their 5-acre parcel became parcel 332. That the 2<sup>nd</sup> Defendant obtained the titles on the 8<sup>th</sup> February, 2004 and he transferred the suit land to the 1<sup>st</sup> Defendant on 2<sup>nd</sup> September, 2016. That he has all along used the whole parcel without 2<sup>nd</sup> defendant raising any complaints. During cross examination, PW1 stated that the price of the land was **Kshs.12,500**. That his mother gave him the land to use. That the land his mother bought a portion from was Number 61. That the 1<sup>st</sup> Defendant has constructed a house on the land. That the land is not fenced. That he has not done a succession cause for his late mother's estate. That his mother had told him to transfer the land to his nephew **Brian Kerich** who is an adult, and he intends to do it later. The Plaintiff then **called Ng'ang'a Gachui**, Tito Lelei and **Benjamin Kimeli Chesire** who testified as PW2 to DW4 respectively. **PW2** confirmed having rented the suit land that was farrow from the Plaintiff for three years from 1986 to 1989 for farming. That land was vacant and had no house at that time. PW3 testified that he used to see Plaintiff using the suit land after his mother bought it from the 2<sup>nd</sup> Defendant since 1983. That in 2017, he learnt the 2<sup>nd</sup> Defendant had sold the land a second time to 1<sup>st</sup> Defendant who put up a house. **PW4**, the Chief Karuna location, testified that the 2<sup>nd</sup> Defendant was residing on parcel No. 269 until 2009 when he left. That the mother to the Plaintiff had bought five (5) acres of Parcel 269 from 2<sup>nd</sup> Defendant in 1983 which after subdivision became parcel No. 332. That the Plaintiff has used that portion without any disputes until 2016 when people came and erected a fence around the land that the 1<sup>st</sup> Defendant claimed ownership of. During cross-examination, PW4 confirmed that the 2<sup>nd</sup> Defendant had a home on his land before the 2007 – 2008 post-election violence, but could not specify on which portion it fell after subdivision. That his office had lodged a restriction against parcel 332 on 24<sup>th</sup> September, 2014 after the Plaintiff claimed that the 2<sup>nd</sup> Defendant wanted to sell it to another person. That he was not notified when the restriction was lifted on the 5<sup>th</sup> August, 2016. That the Plaintiff had filed a caution against parcel 332 on the 2<sup>nd</sup> September, 2016 on behalf of one Brian Kerich, who does not stay on the land. That though the Plaintiff had erected a structure on parcel 332, he later removed it after disagreements in their family.

4. The 2<sup>nd</sup> and 1<sup>st</sup> Defendants testified as **DW1** and **DW2** respectively. DW1 testified that he went to Progressive Farm parcel No. 69 measuring 30 acres in 1967. That over time, he subdivided, sold and transferred portions of the land to five persons among them the 1<sup>st</sup> Defendant, who bought parcel No. 332, measuring five acres. That he had given the Plaintiff's mother a portion of land to farm from the 1980s to 1990 in repayment of a liquor debt he owed her. That he took over the portion from her in 1990 and used it until 2008 when he left for Kinangop. That when leaving for Kinangop, he asked the lady called Bagera to watch over the land. He told the Court that he had not sold the land to the Plaintiff or allowed him to use it. He denied doing any sale agreement in 1983 or writing a letter to Progressive Farmers over the same. During cross examination, DW1 confirmed that the lady called Bagera, who he had asked to keep watch over the suit land in 2008, is the mother to the Plaintiff. He denied selling the Plaintiff's mother five acres of land and writing the letter dated 4<sup>th</sup> April, 1983 stating that he had sold to her five acres for Kshs.12,000. That it was the Plaintiff who was using the suit land for the period he had given it to his mother. That he had not lodged a complaint over the land with the police until after he sold the parcel to 1<sup>st</sup> Defendant. That he had subdivided parcel No. 69 into six portions, transferred five to the buyers, and retained one which is 332 as his on the 29<sup>th</sup> June, 2004. That he later sold the parcel to 1<sup>st</sup> Defendant in 2014 and he established a house there. That the Plaintiff had used the land for six years in

the 1980s, and then from 2008 to 2014 when he asked police to stop him from using it. **DW2** confirmed buying parcel No. 332 from the 2<sup>nd</sup> Defendant in 2014 and said had fenced it and erected a house on it in 2016. That however, the Plaintiff destroyed it and was arrested, but could not tell the status of the criminal case. That before the land was transferred to his name on 2<sup>nd</sup> September 2016, the caution earlier filed against it had been lifted by the Land Registrar on the 5<sup>th</sup> August, 2016. That he took possession of the land after he became the registered proprietor.

5. The learned Counsel for the Plaintiff and the Defendants filed their written submissions dated the 20<sup>th</sup> May, 2020 and 12<sup>th</sup> June, 2020 respectively. That for the Plaintiff, Counsel submitted that the Plaintiff has adduced evidence to show he has been in possession of the suit land from 1983, when his late mother bought it from the 2<sup>nd</sup> Defendant. That the Plaintiff acquired title to the land in 1995 after expiry of twelve (12) years when the 2<sup>nd</sup> Defendant's title got extinguished under **Sections 17 of the Limitation of Actions Act Chapter 22 of Laws of Kenya**. That the 2<sup>nd</sup> Defendant did not have a good title to transfer to the 1<sup>st</sup> Defendant. That he has moved the Court appropriately under **Section 38 of the said Act**. That he has certified the conditions set by the various superior court's decisions to be registered as the owner of the said land. The learned Counsel cited the following superior Court's decisions; **Mbira Vs Gachuhi 2002 1EALR 137, Meru High Court Civil Case No. 80 of 2002, Maliamu Ncurubi M'ibiri Vs Francis M'imanyara M'ringera [2011] eKLR , Nyahururu ELC No. 239 of 2017 (OS), Paul Kamande Gicheha Vs Jacob Kinyua Kiragu [2018] eKLR - Thika ELC No. 279 of 2017 as consolidated with Thika ELC No. 212 of 2017, Simon Kibe Mwangi & 4 Others Vs Thika Garissa Road Developers Ltd & 5 Others [2019] eKLR, Nairobi Civil Case No. 413 of 1997 Trust Bank Limited Vs Portway Stores [1973] Ltd & 4 Others [2006] eKLR, Nairobi Civil Suit No. 193 of 2010, [Now ELC No. 276"a" of 2017 Thika], Alton Homes Ltd & another Vs Davis Nathan Chelogoi & 2 Others [2018] eKLR and Republic Vs Rosemary Wairimu Munene Exparte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd.**

6. The learned Counsel for the Defendants submitted that the Plaintiff's originating summons is incompetent and defective as no copy of the title to the suit land had been annexed to the supporting affidavit contrary to the provision of **Order 37 Rule 7 of the Civil Procedure Rules**. The Counsel cited the case of **Wilson Kazungu Katana & 101 Others Vs Salim Abdalla Bakshwein & Another [2015] eKLR** in support. The Counsel further submitted that by the Plaintiff stating in his evidence that the suit land will form part of the estate of his late mother, and that upon conclusion of the succession cause, it would be transferred to one Brian Kerich, then the Plaintiff was disputing the ownership of the suit land and his claim under adverse possession should be disallowed. The learned Counsel referred to the case of **Haro Yonda Juaje Vs Sadaka Dzenge Mbauro & Another [2014] eKLR**. That it was further submitted that the evidence adduced by the Plaintiff and 2<sup>nd</sup> Defendant show that the Plaintiff's use of the suit land was with permission, and therefore was not adverse to the title of the 2<sup>nd</sup> Defendant. The Counsel referred to the case of **Samuel Miki Waweru Vs Jane Njeri Richu Civil Appeal No. 122 of 2001 (UR)**. That from 1983 to 1990, the Plaintiff was utilizing the land on behalf of his mother, following the permission granted by the owner, the 2<sup>nd</sup> Defendant. That the Plaintiff used the land after the 2007-2008 post-election violence through permission given to his mother by the 2<sup>nd</sup> Defendant, who subsequently retook possession and sold it to 1<sup>st</sup> Defendant in 2014 and subsequently transferred it to him in 2016. That a claim of adverse possession cannot therefore succeed against 2<sup>nd</sup> Defendant as he is not the registered proprietor. That the claim cannot also succeed against 1<sup>st</sup> Defendant as a period of twelve years has not started running in favour of the Plaintiff as the 1<sup>st</sup> Defendant has been in open and exclusive occupation since acquiring it in 2014 while vacant. The Counsel cited the case of **John Mungai Karua Vs Muguga Farmers Co-operative Society & 4 Others [2015] eKLR**.

7. The following are the issues for the Court's determinations;

(a) *Whether the suit is defective.*

(b) *Whether the Plaintiff's possession of the suit land was with permission or was adverse to the*

*title of the registered proprietor.*

*(c) Whether the Plaintiff has established his claim for adverse possession over the suit land.*

*(d) Who pays the costs?*

8. The Court has carefully considered the pleadings in the Amended originating summons, the affidavit, oral and documentary evidence tendered by **PW1** to **PW4**, **DW1** to **DW2**, the written submissions, superior court's decisions therein, and come to the following determinations;

(a) That the originating summons and Amended originating summons dated the 4<sup>th</sup> April, 2017 and 19<sup>th</sup> June, 2018 respectively invokes the **"Limitation of Actions Act and Order 37 of the Civil Procedure Rules"**, at their headings. That as submitted by the learned Counsel for the Defendants, **Order 37 Rule 7 of the Civil Procedure Rules** that guides or provides for the procedure of moving the Court on adverse possession claims, at **sub-rule (2)** requires the originating summons to be supported by an affidavit to which a certified extract of the title to the land in question has been annexed. That indeed, the supporting affidavit to the originating summons dated 4<sup>th</sup> April, 2020 did not have an extract of the title annexed to it despite the contents of paragraph 10 that ***"a copy of the certified register and green card on the parcel of land"*** had been annexed. That the omission to annex the extract of the title was again repeated when filing the Amended originating summons dated the 19<sup>th</sup> June, 2018 and filed on the 28<sup>th</sup> June, 2018. That the Court agrees with the Defendants' learned Counsel's submissions on the finding of the Court of Appeal's decision in **Wilson Kazungu Katana & 101 Others Vs Salim Abdalla Bakshwein & Another [2015] eKLR** that the provision of **Order 37 Rule 7(2) of the Civil Procedure Rules** is ***"...couched in mandatory terms failing which it would render the originating summons incompetent..."*** That the omission to annex the extract of the title for the suit land made the Plaintiff's suit commenced through originating summons and amended originating summons, is fatal to the suit and it should be struck out with costs to the Defendants.

(b) That both the Plaintiff and Defendants are in agreement that the Plaintiff is a son to Taprandich Bagera, who passed on in 2011. That it is the Plaintiff's case that his late mother had through a sale agreement dated 14<sup>th</sup> April, 1983, produced as exhibit P2, bought five (5) acres of land from the 2<sup>nd</sup> Defendant. The sale agreement starts on the top right corner with the address of Progressive Farmers Society, followed by the date and the heading at the top centre of ***"LAND TRANSACTION"***. The one paragraph body in Kiswahili then follows and is reproduced hereinbelow;

***"MIMI PETER MACHARIA NJERU MEMBA WA PROGRESSIVE FARM – NIMEMUUZIA TAPRANDICH BARGERA EKARI TANO YA SHAMBA KWA THAMANA YA SHILLINGI ELFU KUMI NA MBILI MIA TANO (SHS.12,500) LEO TAREHE 14.4.1983. BAADA YA HII SHAMBA KUKAWANYWA NDIPO NITAMPATIA YEYE EKARI TANO. MASHAHIDI NI KAMA YAFUATAYO."***

Thereafter, follows names, signatures and thumbprint of what appears to be the witnesses, buyer and seller. That at the end is the following, ***"HIS TELEPHONE NO. 0708655776"***. That the 2<sup>nd</sup> Defendant denied entering into the said sale agreement with the Plaintiff's mother. That it is the 2<sup>nd</sup> Defendant's case that he had allowed the Plaintiff's mother to use a portion of his 30 acres land from 1983 – 1990 as repayment for a liquor debt that he owed her. That the agreement was verbal and not in writing. That further he allowed the Plaintiff's mother to use the suit land from 2008, when he relocated from the area due to post election violence, and retook possession in 2014, when he sold it to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant conceded that in both occasions when he allowed the Plaintiff's mother to use the land, it was indeed the Plaintiff who actually farmed on it. That whether the version given by the Plaintiff and 2<sup>nd</sup> Defendant is true or not, both sides are in agreement that the Plaintiff took possession of the suit land with permission of his mother, who had

the authority of the 2<sup>nd</sup> Defendant. That so long as the Plaintiff's possession of the land was based on the relationship between the Plaintiff's mother and 2<sup>nd</sup> Defendant, either based on sale agreement or repayment of a liquor debt, the Plaintiff's possession or occupation was incapable of being adverse to the title of the registered proprietor as it was with permission.

(c) That further to the finding in **(b)** above, the time from which the Plaintiff's occupation of the suit land could have become adverse to the title of the registered proprietor was probably after the death of Taprandich Bagera, his mother, in 2011. That the exact date and month of her death was not disclosed. That occupation and possession continued probably up to 2014, when the 2<sup>nd</sup> Defendant reportedly enlisted the assistance of the police to stop the Plaintiff from using the land, or up to 2017 when the 1<sup>st</sup> Defendant took possession by erecting a fence and building a house thereon. That the period from 1<sup>st</sup> January, 2011 assuming it was the date the Plaintiff's mother passed on to 31<sup>st</sup> December, 2017 when 1<sup>st</sup> Defendant became the registered proprietor is only seven (7) years, and therefore falls short of the twelve (12) years required under the law. That the Plaintiff has therefore failed to show or prove that he has continuously been in adverse possession of the suit land for twelve years. That he was therefore not entitled to sue either of the Defendants for the suit land, claiming under adverse possession.

(d) That the Plaintiff's possession of the suit land under the claim or interest of his mother, having been with her permission or licence was never adverse to her claim or interest to the suit land. That indeed, the Plaintiff has not put forward a claim that his possession of the suit land was adverse to the interest of his mother. That if anything, the Plaintiff at some point of his testimony appeared to indicate that he was pursuing the suit land for the benefit of the estate of his late mother, Bagera. That there is however, nothing in the originating summons, or the Amended originating summons to suggest that he had filed the suit as a personal or legal representative or administrator of the estate of late Bagera. That as the Plaintiff has not sought to pursue the rights of the late Taprandich Bagera Ekari, under the sale agreement dated 14<sup>th</sup> April, 1983, the Court finds no need to make any further pronouncement on the legality or validity of the said agreement.

(e) That the Plaintiff having failed to prove his entire claim under adverse possession against both Defendants, who have not only filed their pleadings and engaged Counsel to represent them in defending the suit, should pay their costs.

9. That in view of the foregoing, the Court finds that the Plaintiff has failed to prove his claim against both Defendants to the standard required of balance of probabilities. The plaintiff's case is therefore dismissed with costs.

Orders accordingly.

**Delivered virtually and signed at Eldoret this 7<sup>th</sup> day of October, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendants: Absent.

Counsel: Mr. Tororei for Defendants

Court Assistant: Christine

and the judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.