



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISII**

**ELC CASE NO. 448 OF 2013**

**KEGUNCHURURU MAKORI GESENGI.....PLAINTIFF**

**VERSUS**

**KENNEDY TIRIMBA.....1<sup>ST</sup> DEFENDANT**

**OCHOKI TIRIMBA.....2<sup>ND</sup> DEFENDANT**

**JOHN ORORA.....3<sup>RD</sup> DEFENDANT**

**YUNES OBIRWA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. This Judgment relates to the Plaintiff's suit instituted by way of Plaint filed on 11<sup>th</sup> November 2013. In it the Plaintiff claims that he is the registered proprietor of all that parcel of land known as **LR. NO. NYARIBARI CHACHE/KEUMBU/721** measuring approximately 1.6 Hectare (herein after referred to as the suit land). It is the Plaintiff's claim that the property was registered in his name on the 13<sup>th</sup> day of August 1974.

2. The Plaintiff alleges that the Defendants herein have trespassed on the suit land and consequently denied him his proprietary rights.

In view of the foregoing the Plaintiff seeks the following reliefs against the Defendants:

- a) A Declaration that the Plaintiff is the registered proprietor and/or lawful owner of **LR. NO. NYARIBARI CHACHE/KEUMBU/721**.
- b) An order of eviction directed against the Defendants, either by themselves, agents, servants and/or any one claiming under the Defendants from entering upon, re-entering, trespassing onto, cultivating, building structures, interfering with and/or in any other manner dealing with the suit land that is **LR. NO. NYARIBARI CHACHE/KEUMBU/721**.
- c) General damages for trespass.
- d) Costs and interest.

3. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants responded to the Plaint vide a Statement of Defence and Counterclaim dated 11<sup>th</sup> December 2013. The Defendants aver that their occupation of their respective portions of the suit land was with the consent and/or permission of the Plaintiff following an agreement for sale of the land. The Defendants Counter-claimed seeking the dismissal of the Plaintiff's suit and further prayed for the following:

- a) A declaration that the Plaintiff's title to land parcel No. KISII/NYARIBARI CHACHE/KEUMBU/721 has been extinguished by operation of the law.
- b) A declaration that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have acquired adverse possession to the land parcel No. KISII/NYARIBARI CHACHE/KEUMBU/721 and the said Defendants be registered as proprietors thereof in place of the Plaintiff.
- c) Costs of this suit.

d) Any other relief this court deems fit to grant

#### **PLAINTIFF'S CASE**

4. The Plaintiff's claim is primarily premised on the claim that Defendants have trespassed on his property known as **LR. NO. NYARIBARI CHACHE/KEUMBU/721**.

He admitted that he knows the Defendants and further explained that 1<sup>st</sup> and 2<sup>nd</sup> Defendants are his nephews, the 3<sup>rd</sup> Defendant is his cousin and stated that the 4<sup>th</sup> Defendant is not his relative.

5. The Plaintiff stated that a relative of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, one Nyangoto Mogaka (Deceased) alleged to have entered into a verbal sale of land agreement with the Plaintiff sometimes in the early sixties; a time when the Plaintiff claims he was too young to enter into a valid contract.

6. The Plaintiff went on to state that sometime in 1975 the clan elders resolved that the said sale of land agreement was revoked and additionally Nyangoto Mogaka (Deceased) was allowed to possess the suit land for a period of 10 years (1975-1985).

7. It is the Plaintiff's claim that upon the expiry of the 10 year period Nyangoto Mogaka (Deceased) refused to vacate the property. He goes on to state that thereafter he had several land disputes with the deceased before the clan elders and local administration where Nyangoto Mogaka (deceased) was condemned to surrender and/or vacate the suit property.

8. The Plaintiff stated that Nyangoto Mogaka (deceased) neglected and/or refused to do so and that consequently upon his demise, his son one Tirimba Orora (deceased); the father of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and a brother to the 3<sup>rd</sup> Defendant took possession on the suit property.

9. He additionally stated that the 4<sup>th</sup> Defendant who is the widow of one Barnabas Obirwa (deceased) purported to have purchased from the Plaintiff, the portion of land currently occupied by the 4<sup>th</sup> Defendant. The Plaintiff states that the alleged agreement between himself and the 4<sup>th</sup> Defendant's late husband was similarly revoked and that the late Obirwa was ordered to occupy the parcel of land for a period of 8 years (ending in 17/6/1983). He states that similarly Obirwa (deceased) never surrendered and/or vacated the parcel as ordered.

10. The Plaintiff's claim is therefore founded on the aforementioned acts and transactions and he states that the Defendants occupation of the suit property is unlawful and/or without his authority or consent.

11. He stated that he was the registered owner of **LR. NO. NYARIBARI CHACHE/KEUMBU/721** and he produced the title to the property as Plaintiff's Exhibit 1.

12. He told the court that he was registered as the owner of the suit property on 13<sup>th</sup> August 1974 and produced a certificate of official search dated 4<sup>th</sup> October 2013 as Plaintiff's Exhibit 2.

During his examination in chief, the Plaintiff stated that when he found the Defendants on his land, he issued them with a demand letter dated 3<sup>rd</sup> October 2013 and produced the demand letter as Plaintiff's Exhibit 3. The Plaintiff prayed that the court issue an eviction order against the Defendants and additionally prayed for general damages for trespass.

13. In cross examination the Plaintiff denied ever entering any sale agreement with the 1<sup>st</sup> Defendant or the 3<sup>rd</sup> Defendant. The Plaintiff admitted that he knew the 4<sup>th</sup> Defendant and found her tilling his land. He admitted that he doesn't stay on the suit property anymore. He stated that he moved after his father was killed on the suit property when he was young but couldn't recollect the exact date. He stated that the last time he used the suit property was in 1975. He reiterated the fact that the Defendants have occupied the suit land since 1975 but stated that they entered into the property illegally.

14. The Plaintiff clarified that he doesn't have any houses on the property and claimed that he had constructed some houses on the suit land but the same were demolished. He admitted that the Defendants have constructed houses on the property and testified that he had reported the same to the District Officer of Keumbu and later to the Chief of the area in 1975. He stated that the Defendants have been carrying on farming activities on the suit land. He admitted that he had never reported the Defendants to the police in regards to the dispute over the suit property. The Plaintiff stated that he currently stays in his mother's natal home.

#### **DEFENDANT'S CASE**

15. The 1<sup>st</sup> Defendant testified as DW1 and admitted knowing the Plaintiff and the 3<sup>rd</sup> Defendant who he stated was his uncle (John Orora). He testified that he was born on the suit land in 1966 and further explained that he is the son of Paul Tirimba Orora (deceased) and that the parcel of land belonged to his late grandmother who bought the land from the Plaintiff.

16. DW 1 testified that his father who passed away in 2013 was reported by the Plaintiff to the District Officer and the Chief of their area. He stated that the suit property is divided into 3 portions; one portion belongs to Paul Tirimba, the second one to Nchoka Orora and the third one to John Orora.

17. He testified that there are several houses (4) on Paul Tirimba's portion of the suit land and further that there are tea bushes and other crops planted on the parcel of land. He admitted that the suit land is registered in the Plaintiff's name.

18. He stated that John Orora had planted trees on his portion of the land while Nchoka Orora's portion of the land has no houses. He went on to state that the 4<sup>th</sup> Defendant stays on the lower part of the suit land where she has built a storeyed house and planted some trees and further that he found the 4<sup>th</sup> Defendant living on her parcel of land when he was born. It was DW 1's testimony that since he was born on that parcel of land and he has nowhere else to go, it was his prayer that the property be registered in his name.

19. In cross examination, DW1 reiterated that his grandmother purchased the suit property in 1963 however, he admitted that he did not have any agreement to show that his grandmother bought the land. He admitted that his grandmother did not have the property transferred to her. He stated that the case before the District Officer involved the Plaintiff and his grandmother and claimed that the Plaintiff wanted to be paid the full purchase price.

20. DW 1 elaborated that John Orora is his uncle and stated that he did not know Edward Ochoki. He stated that he doesn't know where the Plaintiff lives but further confirmed that the land where they lived belonged to the Plaintiff.

21. The 4<sup>th</sup> Defendant testified as DW 2. She stated that she lives in Nyaribari Chache location in Kisii County and went on to state that she did not know the Plaintiff. She stated that she was married to Barnabas Obirwa (deceased) in 1975 and that he passed away in 2004.

22. DW 2 testified that together with her late husband, they established their matrimonial home on the Plaintiff's land. She stated that the Plaintiff never filed a suit against her late husband. DW 2 told the court that she had planted tea bushes, trees and developed a storeyed house and kitchen on the suit property. She stated that her late husband entered into a sale agreement with the Plaintiff sometime in 1968 at which point the Plaintiff gave exclusive possession of the portion sold to his late husband and family. She produced the Sale Agreement as Defence Exhibit 1.

23. In cross examination she admitted that she did not know the date of the sale agreement but reiterated that the agreement between the Plaintiff and her late husband was in relation to the suit property. She admitted that she did not know the size of the land that was sold but stated that her late husband informed her that the purchase price of Kshs. 14,200/- was paid in full.

24. In re-examination she stated that even though her late husband never informed her of the size of the parcel of land that he bought, the vendor/Plaintiff does not occupy any portion of the land since he moved away. She reiterated that she got married in 1975 and settled on the suit property and that is where she had been staying all along to this day.

#### **PLAINTIFF'S SUBMISSIONS**

25. In the submissions, learned counsel for the Plaintiff recapitulated the Plaintiff and the Statement of Defence, highlighted the background of the case and outlined three issues for determination:

1. Whether or not the Plaintiff is entitled to his prayers outlined in the Plaintiff.
2. Whether the Defendants are entitled to the prayers outlined in the Statement of Defence and counter-claim.
3. Who bears costs of the suit.

26. On the 1<sup>st</sup> issue learned counsel for the Plaintiff submitted that the Plaintiff is the sole registered proprietor of **LR. NO. NYARIBARI CHACHE/KEUMBE/721** as he produced copies of the title deed and a certificate of official search as exhibits during the hearing. He submitted that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants failed to produce the alleged land sale agreement to confirm that there was such a transaction between the Plaintiff and their deceased father.

27. Counsel submitted that the 4<sup>th</sup> Defendant testified that the portion of suit land occupied by her was bought by her late husband from the Plaintiff sometime in 1968. It was submitted that the sale agreement produced by the 4<sup>th</sup> Defendant as an exhibit did not show the acreage of land purchased and whether the agreed consideration was fully paid up.

28. The Plaintiff submitted that in accordance with orders issued by this Honourable court, the Chief's Report dated 31<sup>st</sup> October 2017 and filed in court on 6<sup>th</sup> November 2017 was adopted to form part of the court record. In the submissions learned counsel stated that contrary to the testimony of the 1<sup>st</sup> Defendant, the Chief (in the report) states that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants portion of the suit land was sold by the Plaintiff to one Kerebi Orora (deceased) in 1963. Counsel submitted that the Plaintiff had proved on a balance of probabilities that he is the registered owner of the suit land.

29. On the 2<sup>nd</sup> issue, it was submitted that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants lack *locus standi* to file the counter-claim against the Plaintiff. It is argued that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants counter-claim is premised on property they claim belongs to their deceased father and husband respectively without the Defendants producing any evidence to demonstrate that they have obtained letters of Administration ad litem on behalf of the deceased's estate.

30. It is further submitted that the Defendants have failed to demonstrate clearly how their respective father and husband (deceased) purchased the suit land from the Plaintiff and/or why the consent of the Land Control Board had not been obtained in compliance with section 8 of the Land Control Act.

31. On the 3<sup>rd</sup> issue it was submitted that the Defendant's right or interest over the suit land is illegal and/or constitutes unjustifiable intrusion upon the Plaintiff's suit land as the entire process is a nullity. Learned counsel for the Plaintiff submitted that it is in the interest of justice and

fairness that this Honourable court allows the Plaintiff's suit as prayed.

## **DEFENDANTS' SUBMISSIONS**

32. In their submissions, learned counsel for the Defendants set out 2 issues for determination:

1. Whether or not the Defendants herein have trespassed on the suit land as alleged by the Plaintiff.
2. Whether or not the Defendants have proved that their claim for adverse possession as pleaded in the counter-claim.

33. On the 1<sup>st</sup> issue, learned counsel for the Defendants submitted that the Plaintiff has not proved his case for trespass. In support of this the Defendants argued that between 1983 and 2013 (the period which the Plaintiff claims that the Defendants were in unlawful occupation of the suit land) the Plaintiff took no action to protect his interest or rights.

34. Counsel for the Defendants further argued that the report by the local Chief shows that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants and their families have been in occupation of the suit land for a period of over 54 years and have made various developments on the suit land. He submitted that in view of the above the alleged trespass by the Plaintiff falls below the required threshold and that his claim should be dismissed with costs to the 1<sup>st</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

35. On the 2<sup>nd</sup> issue it was the Defendants learned counsel's submission that the Defendants have been in open and uninterrupted occupation of the suit land for more than 12 years which is the period the law requires one to acquire land by adverse possession. It was counsel's argument that even if the court was to go by the Plaintiff's own testimony, the period which the Defendants have been in occupation of the suit land without his consent is as follows:

1<sup>st</sup> and 3<sup>rd</sup> Defendants and their respective families from 1985 to date.

4<sup>th</sup> Defendant and her family from 1983 to date.

36. He argued that the length of time that the Defendants have been in occupation of the suit land is more than enough to prove the claim of adverse possession. He submitted that a claim for adverse possession under Order 37 of the Civil Procedure Rules should be commenced by way of Originating Summons.

37. Learned counsel argued that the above procedural requirement of commencing such a suit notwithstanding, the law and practice has allowed adverse possession proceedings to be commenced by way of a counter-claim.

The court's attention was drawn to the case of **Gulam Miriam Noordin vs Julius Charo Karisa (2015) eKLR** where the Court of Appeal held:

*“That position is no longer tenable... Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.*

*The Court has in Teresa Wachika Gachira v Joseph Mwangi, CA 325 of 2003 expressly stated that irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario*. It is clear that the change in the court's approach to this question has, by and by been dictated by the need to do substantive justice.”*

38. It was submitted that from the above, the Defendants option of commencing the claim by way of counter-claim and not by way of Originating Summons is not fatal to their case since the evidence in support of their claim is more than overwhelming.

39. Counsel for the Defendants submitted that the Defendants have proved their case on a balance of probabilities in the counter-claim and the same should be granted as prayed with costs against the Plaintiff.

## **ISSUES FOR DETERMINATION**

40. Having scrutinized the pleadings by the parties, the evidence the adduced and the submissions presented before the court, the following issues emerge for determination:

- i. Whether the Defendants have trespassed on **LR. NO. NYARIBARI CHACHE/KEUMBU/721**.
- ii. Whether the Plaintiff is entitled to the prayers sought in the Plaintiff.
- iii. Whether the Defendants entitled to the prayers sought in the Statement of Defence and Counter-claim.

## ANALYSIS AND DETERMINATION

41. The matter of whether the Plaintiff previously entered into land sale agreements involving the suit property is in my view inconsequential to this matter. The fact remains that the Defendants have been in possession and occupation of the suit land for over 40 years with the knowledge of the Plaintiff; consent and lack thereof notwithstanding.

42. The pleadings and evidence adduced in court all attest to 2 facts; it is incontrovertible that the Plaintiff herein is the registered proprietor of **LR. NO. NYARIBARI CHACHE/KEUMBU/721** and the Defendants have occupied and lived on the suit since the 1980's. These facts establish the foundation of how the first two issues in this suit shall be tackled.

43. In order for me to address the first issue, I must first turn my attention to the definition of trespass. **Section 3 (1) of the Trespass Act, Cap 294** provides that:

**1) "Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.**

**2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or consent of the occupier shall lie upon him."**

44. In the plaint dated 11<sup>th</sup> November 2013, the Plaintiff avers that the Defendants herein have trespassed on the suit land and commenced doing developments thereon. He contends that such actions/activities have been undertaken without permission of the Plaintiff and/or without any colour of right whatsoever. It is as a result of these averments in the Plaint that the Plaintiff prays for *inter alia* an eviction order and a permanent injunction against the Defendants, their agents and/or servants from the suit land.

It is clear that there are 2 incontrovertible facts:

1. The Plaintiff is the registered proprietor of the suit land
2. The Defendants have occupied and lived on the suit since the 1980's

45. These 2 factors form the crux of the dispute over this property. Analysis of the facts and evidence adduced in this matter elucidates the fact that all the issues for determination are intertwined and the same have to be addressed concurrently.

46. Having briefly addressed the first two issues, I shift my attention to the third issue for determination. In their counter-claim, the Defendants' primary argument is that they have been in occupation of the suit for a period long enough to warrant acquisition of the suit land by way of adverse possession.

Asike-Makhandia, JA described '**adverse possession**' in **MtanaLewa v Kahindi Ngala Mwagandi [2015] eKLR** as follows:

**"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The 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 licence of the owner. It 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 is in these terms:-**

**"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."**

47. The critical period for the determination whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that their possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See **Littledale v Liverpool College(1900)1 Ch.19, 21.**

48. A thorough scrutiny of the pleadings, testimonies and submissions presented before the court establishes that the last time the Plaintiff used the suit land was in 1975 and it was also the last time when he made any complaints in regards to the occupants of his property. The onus was therefore on the Defendants to adduce evidence to support the assertion that they had been in possession of the suit land and had subsequently erected structures and planted crops thereon.

49. By the Plaintiff's own admission during the hearing, he stated that indeed the Defendants herein have been in occupation of the suit land since 1975 and have erected structures on their parcels and planted crops and trees.

50. Proof of the Defendant's occupancy of the suit land was further buttressed by the Chief's report dated 31<sup>st</sup> October 2017 and filed in court on 8<sup>th</sup> November 2017. The Chief's report indicates that the Defendants have planted crops, trees and the 4<sup>th</sup> Defendant has a storey building built in the early 1970's and one permanent house & kitchen.

51. Without a doubt the Defendants have been in possession and occupation of the suit land for a period of more than 12 years; the statutory limit to acquire property by way of adverse possession. It is a settled principle that a claim for adverse possession can only be maintained against a registered owner who in this case has been established to be the Plaintiff herein who was registered as the owner of the suit land on 13<sup>th</sup> August 1974.

52. I am equally satisfied from the evidence that, by building structures on the suit premises and planting crops and trees on their respective parcels in the suit property without obtaining permission from the Plaintiff, the Defendants manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the Plaintiff's rights.

53. The Plaintiff was consequently dispossessed of the suit premises by those acts. The Defendant's acts were *nec vi, nec clam, nec precario* (that is, neither by force, nor secretly and without permission).

54. The rationale of this method of acquiring land by adverse possession was elucidated in **Adnamv Earl of Sandwich** (1877) 2QB 485 thus:

***“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties “***

55. It follows therefore that by the time the Plaintiff instituted the suit on 11<sup>th</sup> November 2013 the ship had long since departed from the dock; his title to the suit property had been extinguished. Time began to run from the time the Defendants occupied the suit property and engaged in acts that were inconsistent with the Plaintiff's title.

56. In the instant suit, as was in the case of **Gulam Miriam Noordin v Julius Charo Karisa [2015]** eKLR, there is nothing to suggest that that occupation by the Defendants was secret or that it was not known to the Plaintiff.

57. Up until 2013 the Plaintiff failed to take any steps or measures that would interrupt time from running and halting the adverse possession by the Defendants; he essentially missed the boat.

58. In **Gulam Miriam (Supra)** the court established that case law and practice has evolved to allow adverse possession to be claimed by way of Statement of Defence and Counter-claim (which is the method opted for in the instant case).

59. Consequently I am inclined to determine the previously amalgamated issues as follows:

1. The Defendants are not trespassers on **LR. NO. NYARIBARI CHACHE/KEUMBU/721**.
2. The Plaintiff is not entitled to any of the reliefs sought in the Plaintiff.
3. The Defendants are entitled to the reliefs sought in their Statement of Defence and Counter-claim.

60. In view of the foregoing and having found that occupation of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants occupation of the suit land was adverse I hereby order as follows:

1. I hereby dismiss the Plaintiff's claim against the Defendants.
2. I enter judgment for the Defendants against the Plaintiff on the counter claim dated 11<sup>th</sup> December 2013 in terms of prayer a) and b).
3. The Plaintiff do transfer the suit property to the Defendants at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar, High Court, Kisii will execute on behalf of the Plaintiff all the necessary transfer documents.
4. In the interest of justice each party shall bear their own costs.

It is so ordered.

**Dated, signed and delivered, at Kisii this 5<sup>th</sup> Day of October, 2020.**

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**J. M. ONYANGO**

**JUDGE**