



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 81 OF 1999 (OS)

IN THE MATTER OF TITLE NOS. LOC 16 NDAKAINI/707 -713

FORMERLY TITLE NO LOC 16 NDAKAINI/402

1. JOHNSON MAINA MUKUNA
2. ERASTUS MARENYE MUKUNA
3. WILSON MBOGO MUKUNA
4. WILSON WAIRIA MUKUNA
5. JOHN MUKUNA WAIRIA.....PLAINTIFFS

=VERSUS=

1. MATHU WAIRIA
2. JOSEPH D KIMURA
3. MWANGI ELIJAH
4. JULIUS GACHAU KANYIRI
5. SAMUEL MUGO MWANGI
6. PETER KARANJA B. CHEGE
7. JOHN NJOROGE NGUCHITA.....DEFENDANTS

JUDGEMENT

1. By an originating summons dated 15th January 1999 and amended on 16th June 2008, the plaintiffs seeks judgment against the defendants;

LET, Mathu Wairia, Joseph D. Kimura, Mwangi Elijah, Julius Gachau Kanyiri, Samuel Mugo Mwangi, Peter Karanja B Chege and John Njoroge Nguchita all of P. O. Box 360 Thika in the Republic of Kenya within fifteen (15) days after service of this summons on them enter appearance to this summons which is issued on the application of Johnson Mukuna, Erastus Marenye Mukuna, Wilson Mbogo Mukuna, Wilson Wairia Mukuna and John Mukuna Wairia who claim have acquired part of Parcels Nos Loc 16/Ndakaini/707-713 formerly Title No Loc 16/Ndakaini/402 adversely after living on the said parcels of land for more than 12 years for the determination of the following questions;

1. Whether the removal of the caution registered in favour of the plaintiff against Title NO. Loc 16/Ndakaini/402 on 13th August 1987 was obtained by the defendants fraudulently and unlawfully.

2. Whether the sub-division of Title No. Loc 16/Ndakaini/402 into title Nos Loc 16/Ndakaini/707-713 by the 1st defendant and the subsequent transfers of the said title Nos Loc 16/Ndakaini/7-7 – 713 by the 1st defendant to the other defendants was lawful.

3. If the above two questions are in the affirmative why wouldn't the said Title Nos Loc 16/Ndakaini/707 – 713 be removed?

4. Whether the plaintiff has acquired the said Title No. Loc 16/Ndakaini/402 adversely.

5. Who should be condemned to pay costs of these proceedings.

They now seeks orders that:-

(1) A declaration be made that the defendants herein holds land parcel nos Loc.16/Ndakaini/707 – 713 formerly Title No. Loc.16/Ndakaini/402 on trust for the plaintiffs.

(2) A declaration be made that the plaintiffs have acquired the portions which they occupy in parcel nos. Loc. 16/Ndakaini/707-713 formerly Loc. 16/Ndakaini/402 by adverse possession having occupied the said portion uninterrupted, openly and as of right for more than 12 years.

(3) That the defendants do transfer to the plaintiffs the portions of land they do occupy in parcel Nos Loc. 16/Ndakaini/707-713 formerly Loc.16/Ndakaini/402.

(4) That costs of these proceedings be paid by the defendants.

2. The originating summons is supported by the affidavit of Johnson Maina Mukuna one of the plaintiffs herein sworn on the 3rd July 2009. He has also filed a witness statement dated 21st October 2011. The other plaintiffs have also filed witness statements.

3. In response, the 4th defendant Julius Gacau Kanyiri has sworn a replying affidavit dated 6th November 2009. There are also witness statements filled by the defenants respectively dated 24th May 2011.

4. The originating summons was heard by viva voce evidence.

5. PW1, Johnson Maina Mukuna, the 1st plaintiff testified on 27th March 2012. He told the court that the 1st defendant is his late father's step brother. That he grew up in Ndakaini. When he got married in 1970, his father showed him where to build a home and land to cultivate. That the said portion is about four (4) acres. He further stated that his father was the registered owner of Loc.16/Ndakaini/67. The 1st defendant sued his father vide HCCC 280 of 1978 in which judgment was delivered in favour of the 1st defendant in 1985. The 1st defendant was awarded about 16 acres out of Loc 16/Ndakaini/67. The said acres were hived of the original title and Loc 16/Ndakaini/67 ceased to exist.

6. The 1st defendant became the registered owner of Loc.16/Ndakaini/402 that from then the 1st defendant never entered the land or taken possession. That by 1985 he had lived on the portion for fifteen years. He has constructed thereon, planted trees and has been cultivating. He produced extract of title for Loc 16/Ndakaini/402 as exhibit P1 and photographs showing the developments on the land as exhibit P2. That by 1986 he had 3500 tea bushes as shown by a license and permit for Kenya Tea Development Authority (KTDA) as exhibit P3. He delivers his tea to Ndakaini-Nguru tea buying center.

7. He further stated that the 1st defendant has never asked him to leave the land. He had a caution registered against the title on 13th August 1987. He produced the proceedings in Thika CMCC No. 1192 of 1997 as exhibit P4 in this case. That the 2nd -7th defendants were the plaintiffs in that suit and the 1st defendant herein was the defendant. That by a consent judgment in Thika CMCC 1192 of 1997 Loc 16/Ndakaini/402 was further subdivided into 707-7013 and transferred to the 2nd -7th defendants. He produced the order as exhibit p7. This was after the caution he had placed had been removed by an order of court. He produced the application as exhibit P8. He denied that the signed any letter authorizing the removal of the caution as he was not a party to Thika CMCC 1192 of 1997. He produced the order as exhibit P9.

8. He further stated that he was not a party in HCCC NO. 2435 of 1994 yet he was still on the land by then. He produced the plaint in HCCC 2435 of 1994 as exhibit P10. That the 1st defendant, did attempt to join him as a defendant in that suit in 2010 but he (1st plaintiff had already filed this suit). He further stated that 1st defendant first attempted to evict him in 2001. He produced the application dated 20th September 2001 as exhibit p11. He prays that he be declared the owner of the portion he is occupying as he has been there for more than twelve (12) years. He also stated that at one time he saw people getting on his land. They attempted to subdivide the land but they had no orders to evict him. He also states that the 1st defendant has not filed any counterclaim.

9. PW2, Erastus Marenye Mukuna, the 2nd plaintiff adopted his witness statement and confirmed what PW1 told the court. He told the court that in 1998 some youth and surveyors went to the land claiming they wanted to sub-divide the same. He chased them away as they did not have any order. He further stated that he came to learn that the land had been subdivided into seven plots and given titles without beacons. He also stated that in 1998 the defendants filed a case with a view to remove him from the land. He has undertaken many developments on the land. He referred to the photographs produced as exhibits and confirmed that as true picture the developments on the ground. He stated that he occupies four (4) acres which he claims he is entitled by adverse possession.

10. PW3, Wilson Mbogo Mukuna, the 3rd plaintiff also adopted his witness statement. He told the court that when he got married in 1971, his father Dedan Mukuna Wairia showed him a portion to plough and where to construct a house. This was on Land Parcel No Loc 16/Ndakaini/67. He also planted tea on the said portion. He also relied on the list of documents and the supplementary list of documents. He

referred to photograph marked "B" on the photographs as showing his home and tea bushes. He produced the photographs exhibit p13 and the licence from Kenya Tea Development Authority as exhibit p14.

11. He also confirmed what PW1 and PW2 told the court that Loc 16/Ndakaini/67 no longer exists following a judgment in HCCC 280 of 1978 where by the 1st defendant Mathu Wairia was given 16.04 acres and became the registered owner of Loc 16/Ndakaini/402. He further stated that his portion of 4 acres fell on Loc 16/Ndakaini/402. That the 1st defendant never asked him to leave or vacate the said portion. Further that in 1998 the said land was further subdivided and transferred to the 2nd -7th defendants who have never asked him to vacate. He prays that he be declared the owner by adverse possession.

12. PW4, Hanna Muthoni Mukuna, told the court she is the wife of John Mukuna "Wairia the 5th plaintiff, who passed on, in 2016. She adopted her witness statement dated 26th February 2020. She confirmed what PW1 told the court. She told the court that she got married to John Mukuna in 1995. She told the court that she resides in the suit property. She refers to photograph marked "D" in the plaintiff's supplementary list of documents dated 11th June 2013 and stated that the house in the photograph were hers and tea farm belonged to her as well. That they also planed avocados, vegetables and other food crops on the said portion. She also confirmed that her brother in law Wilson Mukuna resides on the said property, that the photograph marked "C" in the plaintiffs' supplementary list of documents dated 11th June 2013 shows his house and farm. She prays that she be declared as the owner of the portion she is occupying.

13. DW1, Jane Kaburu Mathu told the court that Mathu Wairia, the 1st defendant was her husband. He is deceased. She obtained Grant of Letters of Administration intestate. She adopted her witness statement dated 24th May 2011. She relied on the defendant's list of documents dated 12th March 2008 and the supplementary list dated 30th April 2013. She produced the documents as exhibits in this case. She told the court that her late husband Mathu Wairia filed a suit against his brother Dedan Mukuna Wairia, and Gerishon Wairia. The court decided that Mathu Wairia ought to get 16 acres from Loc 16/Ndakaini/67. Mathu Wairia was then registered as the owner of Loc 16/Ndakaini/402. She further stated that the said brothers refused to vacate the suit property. She prays that the plaintiff's suit be dismissed.

14. Later in Thika CMCC 1172 of 1997, the suit property Loc 16/Ndakaini/402 was further subdivided into six portion being 708-713. This subdivision was not challenged and a surveyor went into the land and undertook the survey but the plaintiffs became violent and stopped the process. She told the court that it is because of this that they were not able to occupy the suit land. That the plaintiffs have their own portion Loc 16/Ndakaini 401. She further stated that her husband filed HCCC 2435 of 1994 seeking to evict the plaintiffs from the suit property. She also told the court that the plaintiffs are still on the land and undertaking further construction. She confirmed that her late husband sold the suit property to six people but the plaintiffs have refused to vacate.

15. DW2. Peter Karanja Ben Chege, the 6th defendant in this case, adopted his witness statement. He told the court that he bought land from Mathu Wairia, the 1st defendant. That it took long for him to get the title. So together with other buyers they filed Thika CMCC NO 1192 of 1997. The court granted judgment in favour of the buyers and they got titles out of Loc 16/Ndakaini/402. He told the court that he is unable to take possession of his portion owing to the pendency of this suit. He further told the court that 1st defendant does not dispute that they bought the said portions. He prays that the plaintiffs' suit be dismissed.

16. At the close of the oral testimonies parties tendered final submissions.

The plaintiffs' submissions

17. They are dated 24th June 2020. Counsel for the Plaintiffs filed submissions dated 24th July 2020. He explained the Plaintiffs' were given portions of land when they were newly married as per Kikuyu customs where they cultivated tea and other crops and built houses where they have lived to date. The 1st – 3rd Plaintiffs were portioned 4 acres each while the 4th and 5th Plaintiffs were given 2 acres each, being sons of the deceased sister (who also had 4 acres) of the 1st – 3rd Plaintiffs who are step brothers. How PW1 and his co Plaintiffs settled in their respective parcels. How their uncle, DW1 successfully sued their late father in HCCC 280 of 1978 over a portion of Title no. LOC.16/NDAKAINI/67 and was awarded 16 acres out of it which was later excised and became Title no. LOC.16/NDAKAINI/402 and how unfortunately all the Plaintiffs' portions fell within the 1st Defendant's subdivision. Counsel Gichachi submitted that PW1 also testified that in fear of being evicted by the 1st Defendant he registered a Caution on the land registered on 13th August 1987 and that despite the fact that the 1st Defendant evicted others from his property, (HCCC no. 2435 of 1994) he never evicted or enjoined the Plaintiffs in the suit and allowed them to continue living on the disputed land. This was the state until Plaintiffs found out in December 1998 that the 1st Defendant had clandestinely and fraudulently managed to subdivide Title no. LOC.16/NDAKAINI/402 and that he intended to evict the Plaintiffs. PW1 confirmed at Thika Lands Office that the 1st Defendant had a court order removing the Caution subject to CMCC 1192 of 1997 at Thika Magistrate Court and that Title no. LOC.16/NDAKAINI/402 was closed and new titles created Title no. LOC.16/NDAKAINI/707-713 for each of the Defendants herein. The Plaintiffs claim their portions by adverse possession since the 1st Defendant had never asserted his rights for over 12 years.

18. Mr. Gichachi submitted two issues for the Court to determine namely:

1. Whether the Plaintiffs have proven possession and/or occupation of the disputed land.

2. Is the Plaintiff's possession or occupation of the disputed land adverse to the title and/or titles of these Defendants?

19. On the first issue Mr. Gichachi submitted that all the Plaintiffs with the exception of the 4th gave evidence proving that they have been in occupation of the disputed portions of land where they built their homes, cultivated crops and produced photographs showing the developments carried out in each of the portions as well as tea planting licenses. That PW1 also produced a Tea Verification Certificate. Counsel contended that the Defendants have not produced evidence to discount the occupation of the Plaintiffs and that DW1 confirmed that

when she married the 1st Defendant the Plaintiffs were already in occupation. Thus the Plaintiffs have proved that they have been in occupation of the suit properties since before the 1st Defendant acquired the land and thereafter up to the filing of this suit.

20. On the second issue Counsel submitted that uncontroverted evidence was adduced by the Plaintiffs that the 1st Defendant was registered as the owner of Title no. LOC.16/NDAKAINI/402 on 8th October 1986 and that he did not assert his ownership of the land, allowing the Plaintiffs to continue with their occupation and possession of the suit premises. Mr. Gichachi contended that from 8th October 1986 to 15th January 1999 when this case was filed a period of more than 12 years had lapsed and therefore the 1st Defendant had been dispossessed of the suit premises for the statutory period of 12 years. He referred the court to **Wambugu v Njuguna [1983] KLR 173**. Counsel further submitted that even by the time the 1st Defendant fraudulently subdivided Title no. LOC.16/NDAKAINI/402 creating Title no. LOC.16/NDAKAINI/707-713 the period of 12 years had already lapsed as it ended on 8th October 1998 and the new subdivisions were registered on 23rd November that year.

Further, he contended that by the time the rest of the Defendants became owners of the suit land, the adverse possession of the Plaintiffs had already crystallized because under **section 28(h) Land Registration Act** adverse possession is an overriding interest on land and as such the new owners of the suit property were affected by the same. Reliance was placed on **Mbira v Gachuhi (2002) EALB 137** and Counsel argued that in this case the parties have demonstrated that the occupation of the Plaintiffs of the suit premises is non permissive and not consented by the Defendants and that their occupation has been open and within the knowledge of the Defendants, and therefore open and notorious and they used the premises exclusive of the Defendants.

21. Mr. Gichachi referred the Court to **Mtana Lewa v Kahindi Ngala Mwangandi [2005] eKLR** and submitted that the components similarly happened in the current case. Moreover, he argued that although the Plaintiffs had occupied the land with the permission of their father, their permissive occupation stopped and they became trespassers when the 1st Defendant was registered and he never took action to evict them. Furthermore, that in HCCC 2435 of 1994 wherein the 1st Defendant sought to evict three people from the suit premises he never found it fit to enjoin the Plaintiffs as Defendants. That later the 1st Defendant sought to enjoin the 1st and 5th Plaintiffs but that application never succeeded and even if it had, the whole case itself was abandoned and never heard. Further, the said application was overtaken by events as it was filed on 22nd October 2001, almost three years after this case was filed.

The defendants' submissions

22. They are dated 7th August 2020. Counsel for the 1st Defendant raised 3 issues for determination:-

a) Whether the Defendants hold Land Parcel Title no. LOC.16/NDAKAINI/707-713 in trust for the Plaintiffs.

b) Whether the Plaintiffs have acquired the portions they occupy by way of adverse possession;

c) Who should bear the costs of the suit.

On the 1st issue Counsel for the 1st Defendant contended that the Defendants' evidence that the suit land was registered in the 1st Defendant's name consequent to his suit against his father where he proved that his father held it in trust for him and the land was subject to several unsuccessful appeals. He argued that it is trite law that a question of how a trust is created is a question of fact to be proved by evidence. **Njenga Chogera v Maria Wanjira of Muthuita & 2 others [1982-88] 1 KLR 42**. He further argued that the circumstances surrounding the registration of the suit land was as a result of successful litigation; That as per the holding in **Peter Gitonga v Francis Maingi M'Ikiara HCCC 146/2000** the circumstances surrounding registrations must be looked at to determine the purpose of the registration.

23. Counsel contended that under Kikuyu customary law, customary trusts are created when first born sons are registered as a trustee for their siblings **Kanyi v Muthora [1984] KLR 712**. Yet in this case the 1st Defendant was not the first born son in the family, he was the last born. Counsel further contended that during the registration of the land some of the Plaintiffs were of age and others who are claiming land on account of their mother's portion and that there were no intervening circumstances that would have stopped them from having the land registered in their names. He argued further that it defeats logic how the suit land would have then be registered in the 1st Defendant's name only if there was a trust created. **Njenga Kimani & 2 others v Kimani Nganga K. Wainaina [2017] eKLR**. And **JKN-A & 2 others v TMN (suing as the next friend of SNK alias NK – person of unsound mind) & 2 others [2019] eKLR**.

Counsel submitted that the claim the Defendants held the land in trust for the Plaintiffs is baseless and lacks any material proof and should be dismissed.

24. On the second issue, on the law relating to adverse possession, Counsel for the 1st Defendant drew the Court's attention to **section 7, section 38 of the Limitation of Action Act** and the cases of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** and **Samuel Kihamba v Mary Mbaisi [2015] eKLR**.

Counsel contended that the element of absence of permission or license was not proven by the Plaintiffs, and in fact that in their testimony and statements they stated that when their allocated portions fell on Title no. LOC.16/NDAKAINI/402 after the land was demarcated, that the 1st Defendant allowed them to live on the land. Counsel relied on **Samuel Miki v Jane Njeri Richu CA no. 122 of 2001** and **Mwinyi Hamis Ali v Attorney General and Philemon Mwaisaka Wanaka civil appeal no. 125 of 1997**.

25. On when time starts to run in claims of adverse possession Counsel referred the Court to **Gabriel Mbui v Mukindia Maranya (supra)** and contended that time started running when the 1st Defendant indirectly withdrew his permission by filing an eviction suit against the Defendants in HCCC 2435 of 1994, one of the Defendants in that suit being Nyambura Mukuna who was the mother of the 4th and 5th

Plaintiff in this case and that in 2002 he made an application to amend the plaint by including some of the Plaintiffs in this suit and therefore the Plaintiffs had not lived on the disputed portions of land for a continuous 12 years.

26. On the element of *animus possidendi* Counsel relied on the cases of **Wambugu v Njuguna (1983)KLR** and **Mwatando Mwagambo Wasanga v Ngaruko Mwangombe & 10 others [2014] eKLR**. Counsel submitted that the Plaintiffs have failed to prove the element of *animus possidendi*. Reason is that the circumstances leading to the Plaintiffs occupation of the suit land were consequential of the decision of the case instituted by the 1st Defendant and that they were in possession long before when it was allocated to them noting that their father Dedan Mukuna had also unsuccessfully appealed the decision.

27. On the issue of costs, Counsel submitted that it is trite law that costs follow the event and that as demonstrated in these submissions the Plaintiffs have not proved their claims and prayed that the suit be dismissed in terms of the prayers set out in the defence and for costs to be borne by the Plaintiffs. **Ethics and Anti- Corruption Commission v Nderitu Wachira & 2 others [2016] eKLR**.

28. I have considered the originating summons and the affidavits in response. I have considered the evidence on record, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination are:-

(i) Whether the defendants hold parcel Nos Loc 16/Ndakaini/ 707 -113 in trust for the plaintiffs.

(ii) Whether the plaintiffs have acquired the portions they occupy by way of adverse possession.

(iii) Who should bear costs of the suit?

29. It is not in dispute that the plaintiffs occupied portions of the original Land Parcel Loc 16/Ndakaini/67. They claim they were given the portions by their father and grand father respectively. Dedan Mukuna Wairia. It is also not in dispute that in the year 1978, the 1st defendant Mathu Wairia sued the said Dedan Mukuna Wairia vide HCCC No. 280 of 1978. He was successful and the court awarded him 16 acres out of Loc 16/Ndakaini/67. The 1st defendant was then registered as the owner of Loc 16/Ndakaini 402 in 1986 after unsuccessful appeals. The plaintiffs have produced an extract of title as exhibit p1.

30. That following the registration of the 1st defendant as the owner of the land in which he was occupying PW1 the 1st plaintiff registered a caution against the said title. That all this time the 1st defendant never asked him to vacate the portion he was occupying. That it is further the 1st plaintiff's case that this caution was removed fraudulently in order for the 1st defendant to subdivide the said land into resultant parcels.

31. PW1 further stated that he was not aware of the Thika CMCC 1192 of 1997. He only realized existence of this case when he did a search at the Thika Land Registry. He immediately instituted this instant suit.

32. It is the 1st defendant case that he filed a suit being HCCC 2435 of 1994 seeking eviction of the people who were on the suit land then. DW1 Jane Kabura Mathu said the plaintiffs have always been violent and she has not been able to utilize the suit land. I agree with the 1st defendant's counsel submissions that the question of how a trust is created is a question of fact. He put forward the case of **Njenga Chogera vs Maina Wanjiru Kimani & 2 Others [2005] eKLR** which quoted with approval the holding in the case of **Muthuita vs Muthuita [1982 – 88] ICLR 42** where the Court of Appeal held that Customary Law Trust is proved by leading evidence on the history of the suit property and the relevant customary law on which the trust is founded. In the case of **Peter Gitonga vs Francis Maingi M' Ikiara HCCC NO. 146 of 2000** it was held:

“A trust can be created under customary law and the circumstances surrounding registration must be looked at to determine the purpose of the registration. This was what led Muli J to say that ‘Registration of titles are a creation of law and one must look into the consideration surrounding the registration of titles to determine whether a trust was envisaged’.

33. In the instant scenario, the 1st defendant Mathu Wairia was registered as the owner of Land Parcel No Loc 16/Ndakaini/402 after he was successful in HCCC 280 of 1978 where the court allowed him 16 acres out of Loc 16/Ndakaini 67. At this time some of the plaintiffs were adults especially the 1st to 3rd plaintiffs. They have not stated what stopped them from being registered as the owner of the suit property. In the case of **Njenga Kimanu & 2 Others vs Kimani Nganga K. Wainaina [2017] eKLR**, Munyao Sila J stated thus:-

“There are instances where a person is registered a trustee, but usually you would be given a reason why this is so. Sometimes it is because the person registered in the first born, or more educated than the rest, as happened in the case of Gatimu Kingara vs Muya Gathangi [1976 – 80] KLR 317. In that case the land in dispute was registered in the name of the plaintiff, who filed suit for trespass against the defendant who was his younger brother. The defendant argued that the land was family land but registered in the name of the plaintiff when he (the defendant) was in detention and was therefore land held in trust. The court held inter alia that the defendant was entitled to succeed in his claim under trust given the circumstances of the case. In our case, I am afraid that the plaintiffs have not been able to rebut the presumption in equity that the property herein was gifted to the defendant when he was a child. In this case no reason was given to me as to what was so special about the defendant so that the three brothers would decline to register the share in their own names or in the name of a person who was older than the defendant. I have evidence that Kamau Kimani had a child who was much older than the defendant, and no reason was given to me why it was thought that the defendant was a better candidate.”

34. In the instant suit, the plaintiffs have failed to adduce evidence that the 1st defendant held Loc 16/Ndakaini/402 in trust for themselves. I find that they have failed to demonstrate how the trust was created. They have also failed to show that the 2nd – 7th defendants hold the resultant titles 708 -713 in trust for them (plaintiffs). I find that this claim must fail.

35. Section 7 of the Limitation of Action Act 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 person through whom he claims, to that person”.

36. Section 38 (1) of the said Act:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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”.

37. Adverse possession is defined as:

“When a party claims ownership of a property they have been in for more than 12 years. It can also be claimed on abandoned property or it can go unchallenged by the actual owner”.

38. It is the plaintiffs' case that they have been on the land for more than twelve (12) years and pray that the 1st defendant be found to have been dispossessed of the suit property. It is further their case that by the time the 2nd – 7th defendants were registered as owners of the resultant titles 707 -713 adverse possession had crystallised. They have relied on the case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2005] eKLR**, the Court of Appeal held that ***“.....Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person with the title to it omits or neglects to take action against such in assertion of his title for a certain period, in Kenya 12 years.....”.***

39. In the instant suit the occupation of the plaintiffs on the suit property has not been peaceful. They themselves told the court that they have refused any attempts for survey to be undertaken in favor of the defendants herein. This confirms what DW1 told the court that the plaintiffs have been violent and have refused any attempts by the defendants to utilize the suit property. The circumstances in the instant suit are distinguishable from the above cited case.

40. In the case of **Samuel Kihamba vs Mary Mbeuse [2015] eKLR** the Court of Appeal stated thus:-

“Strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin phraseology, nec vi nec clam, nec precario. The additional requirement is that of animus possedendi, or intention to have the land see Elwa Nyongesa Lusenaka & Another vs Nathan Wekesa Omacha Kisumu Civil Appeal No 134 of 1993 (UR). These prerequisites are required of any claimant irrespective of whether the claimant and the respondent are related or whether the claim relates to family/ancestral land”.

41. It is in evidence that that the 1st to 3rd plaintiffs occupy the suit land as their father had allocated a portion of Loc 16/Ndakaini/67. The 4th and 5th plaintiffs are sons of Virginia Munene Mukuna how was a sister to 1st -3rd plaintiffs. This was before the decision in HCCC 280 OF 1978 which directed the suit property Loc 16/Ndakaini/67 to be subdivided into equal shares with one share to the 1st defendant.

42. The plaintiffs claim is that the 1st defendant allowed them to remain on the land. In the case of **Mwinyi Hassan Ali vs Attorney General & Another Civil Appeal No. 135 of 1997** where it was held that:-

“Adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the court is governed by statutes”.

I find that the plaintiffs have failed to prove that they occupy the suit land without permission from the 1st defendant.

43. It is on record that the 1st defendant instituted HCCC 2435 of 1994 seeking eviction orders against the occupants in the suit land. I agree with the 1st defendant's counsel submissions that the plaintiffs have not lived on the land for a continuous period of twelve (12) years.

44. The circumstances leading to the plaintiffs' occupation of the suit land were consequential of the decision of the decision by the court in HCCC No 280 of 1978 instituted by the 1st defendant against the 1st – 3rd plaintiffs' father Bedan Mukuna Wairia. They were in possession of the land since their father had allocated them the same long before the 1st defendant was awarded that parcel in the courts judgment. I find that the plaintiff's claim for adverse possession fails.

45. The upshot of the matter is that the plaintiffs have failed to prove their case against the defendants in a balance of probabilities. This suit is dismissed with costs to the defendants.

It is so ordered.

Dated, signed and delivered in Nairobi on this 17th day of December 2020

.....

L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the plaintiffs

Mr. Mucheri for Gachoka for the 1st defendant

No appearance for the 2nd defendant

Kajuju - Court Assistant