



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 5004 OF 1992 (OS)

SCOLASTICA WAIRIMU KIRAGU

(Suing as a legal representative of SCHOLAR

WAIRIMU KIRAGU, deceased)..... PLAINTIFF

VERSUS

FRANCIS NDICHU KIMWAKI

(Sued as a legal representative of

STEPHEN KIMWAKI KIRAGU, deceased).....DEFENDANT

JUDGMENT

This suit was commenced by Scholar Wairimu Kiragu, deceased (hereinafter referred to only as “the plaintiff”) against Stephen Kimwaki Kiragu, deceased (hereinafter referred to only as “the defendant”) by way of an Originating Summons dated 11th August, 1992 in which she sought the following orders:

- a) A declaration that the plaintiff has acquired L.R No. Githunguri/Gathangari/1113 and L.R No. Githunguri/Gathangari/1114 (hereinafter referred to as “the suit properties”) by adverse possession and that the defendant holds the same in trust for her.
- b) An order that the defendant does transfer the suit properties to the plaintiff forthwith.
- c) Costs of the suit.

In her supporting affidavit sworn on 21st September, 1992, the plaintiff stated that the defendant was the registered proprietor of the suit properties. She averred that together with her deceased husband they had been in adverse possession of the suit properties since 1974. The plaintiff stated that she had put up a three bedroomed semi-permanent house on the suit properties. She stated further that she had planted tea plants on the suit property and she was also rearing cattle thereon.

In his replying affidavit sworn on 22nd January, 1993, the defendant stated that he bought the suit properties in 1978 and 1979 and that it took him 3 years to prepare the two parcels of land for tea cultivation. The defendant stated that he planted tea plants on the suit properties and permitted the plaintiff’s late husband to take care of the same. The defendant stated that in consideration of the plaintiff’s husband’s services, he agreed to share with him the proceeds from the sale of tea. He stated that he allowed the plaintiff’s late husband to be buried on the suit properties on humanitarian grounds since he had worked for him and in addition, the road leading to his land where he was to be buried was impassable.

The Originating Summons was heard by way of *viva voce* evidence. The plaintiff (PW1) testified and called 3 witnesses. The plaintiff stated as follows in her evidence in chief. The defendant was an uncle to her late husband who passed away in 1991. She first occupied the suit properties in 1974. She erected a 3 roomed semi-permanent house on the suit properties and also planted trees thereon. She was also cultivating maize and potatoes on the suit properties. In addition, she had planted tea plants on a portion of the suit properties measuring about 5 acres. She was also rearing cattle on Plot No. Githunguri /Gathangari/1113.

The plaintiff stated further that the defendant purchased the suit properties from Koinange family at Kshs 240,000/- which he asked her late husband to refund to him. Pursuant to this arrangement, her deceased husband sold the parcel of land which he had in Kangema, Murang’a. Her deceased husband added to the proceeds of this sale their earnings from tea and deposited the same in the defendant’s bank account. They thereafter took possession of the suit properties. After taking possession of the suit properties, they planted thereon 21,000 tea plants.

The plaintiff produced as plaintiff's exhibit 12 a statement of a joint bank account that she held with her deceased husband at Family Finance Building Society showing that they transferred various amounts to an account which she claimed to belong to the defendant.

The plaintiff told the court further that, initially they were selling tea to Kambaa Tea Factory and her tea grower registration number was 0058. She produced as exhibits, tea collection receipts, tea payment advice slips and a share certificate for the shares her deceased husband held in the said tea factory. The plaintiff also produced as exhibits Kenya Tea Development Authority Tea Plantation Licence dated 16th July, 1993 and Tea Plantation Verification Certificate of the same date to show that her deceased husband was licensed to grow tea on the suit properties and that he indeed had tea plantation. The plaintiff also produced members produce records from Githunguri Dairy Farmers Co-op Society Ltd. to demonstrate that she was supplying milk to the said society. The plaintiff contended that she had lived on the suit properties for 30 years without interruption and that an attempt by the defendant to evict her from the suit properties through a case that he had filed at Githunguri Law Court namely, Githunguri RMCC No. 4 of 1992 was resisted.

In cross-examination, the plaintiff stated that her late husband moved into the suit properties in 1974 when the properties were still registered in the name of Mbiyu Koinange. She averred that the defendant allowed them to enter the suit properties after paying Kshs. 200,000/- to him which payment they made in installments. She stated that the payment was made in cash and that there was no written agreement between her deceased husband and the defendant. The plaintiff stated that her deceased husband paid the balance of the purchase price to the defendant through bank transfer. She stated that she could not recall the defendant's account number because it was her late husband who was operating their bank account. She stated further that they had completed making payment of the purchase price for the suit properties.

In her further evidence in cross-examination, the plaintiff stated that she could not remember the registration number of the land which they sold in Murang'a to raise the purchase price for the suit properties. She could also not tell how much it costed them to construct a semi-permanent house on the suit properties which she was occupying. She stated that her homestead occupied 3/4 of Plot No. Githunguri/Gathangari/1113 while the tea plants owned by them were on both properties. She could not recall the area occupied by the tea plants. She stated that the defendant gave her late husband tea grower's number which enabled him to collect and sell tea. She stated that she was present together with the defendant when her late husband paid Kshs. 100,000/- to Mbiyu Koinange for Plot No. Githunguri/Gathangari/1113. She stated that a further sum of Kshs. 130,000/- was paid for Plot No. Githunguri/Gathangari/1114 through a bank transfer to a brother of Mbiyu Koinange. The plaintiff died on 24th May, 2009 before the conclusion of the hearing of the suit but after giving evidence and was substituted with her legal representative, Scolastica Wairimu Kiragu.

The plaintiff's first witness was, Stanley Gitau Macharia (PW2). PW2 told the court that he was a retired civil servant and that he did casual work for the plaintiff's late husband. He stated that he worked for the defendant as a driver in 1974. He stated that the plaintiff's late husband occupied the suit properties in 1974 when he also planted tea plants thereon. PW2 stated that he participated in the construction of the plaintiff's house on the suit properties in 1974. He averred that the plaintiff had also sunk a well on the suit properties. He reiterated that it was the plaintiff's deceased husband who planted tea plants on the suit properties. He corroborated the plaintiff's evidence that the plaintiff was also rearing cattle and selling milk to Githunguri Dairy Farmers Co-operative Society Ltd. He stated that the plaintiff had lived continuously on the suit properties since 1974.

In cross examination, PW2 stated that he started working for the defendant in 1972 and that he worked in the civil service from 1982 to 1993. His stated that his home was about 3 to 4 Kilometers from the suit properties. He contended that neither the defendant nor his children use the suit properties.

The plaintiff's next witness was, Evanson Kariuki Kimani (PW3). PW3 stated that the plaintiff was his aunt. He averred the plaintiff entered the suit properties in 1974 and that in 1980, the plaintiff and her late husband planted about 21,000 tea plants on both properties. He stated that he used his vehicle Registration No. KTB 524 to transport tea seedlings to the suit properties. He stated that the plaintiff also reared dairy cattle and sold milk to Githunguri Dairy Co-operative Society. He averred that the plaintiff had also sunk 80 feet well on the suit properties. He contended that suit properties measured 9 acres each and averred that the plaintiff and her deceased husband entered the said properties in 1974 after purchasing the same from the defendant. He averred that the plaintiff had been in continuous possession of the suit properties since 1974 and that her semi-permanent house on the suit properties was built in 1977 by the plaintiff's late husband.

PW3 stated further that the total purchase price for the suit properties was Kshs. 300,000/- and that he was present and witnessed the plaintiff's husband making payments of the purchase price to the defendant in 1979. He averred that the plaintiff's deceased husband sold the land that he had at Murang'a for Kshs 120,000/- and that he witnessed him making payment of the said amount to the defendant. He stated that other payments were made to the defendant through bank transfers. He stated that the defendant had about 300 acres of land.

In cross examination, PW3 stated that the plaintiff took possession of the suit properties in 1974. He stated that he was present together with the defendant and the plaintiff's husband during the negotiations for the purchase of the suit properties by the plaintiff's husband from the defendant. He contended that the suit properties were bought at Kshs. 100,000/- each which amount was paid in installments. He stated that the sale agreement was not reduced into writing and that the first installment of Kshs 2,500/- was made in early March, 1974. He averred that the second installment of Kshs 100,000/- was paid around October, 1974 and the balance was paid before the plaintiff's husband died.

PW3 contended that Mbiyu Koinange sold the suit properties to the plaintiff's deceased husband through the defendant and that upon the demise of the plaintiff's husband, the suit properties were registered in the defendant's name. He conceded however that the suit properties were registered in the name of the defendant between 1978-1979 while the plaintiff's husband died in 1991.

The plaintiff's last witness was Scolastica Wairimu Kiragu (PW4). She told the court that she was the legal representative of the estate of the plaintiff who had died as at the time she was giving evidence. PW4 was the plaintiff's granddaughter. She stated that her mother was residing on the suit properties which were acquired by her grandparents. PW4 stated that her grandparents planted tea plants on a portion of the suit properties measuring 6 acres. She stated that the defendant neither planted nor picked tea from the suit properties. She stated that Plot No. Githunguri/Gathangari/1113 had 2 semi-permanent houses. She stated that her grandparents reared cattle on the suit properties and that her grandfather died on 12th August, 1991 and was buried on Plot No. Githunguri/Gathangari/1113. She averred that the defendant attended the burial and did not object to the same. PW4 stated that the plaintiff died 24th May, 2009 and was also buried on Plot No.

Githunguri/Gathangari/1113.

In cross-examination, PW4 stated that she was 37 years old and that her grandparents entered the suit properties before she was born. She stated that her grandfather passed away when she was 14 years old and that she did not participate in his burial preparations and as such could not tell whether the defendant objected to the burial or not. She contended that Plot No. Githunguri/Gathangari/1113 had 2 acres of tea plantation while Plot No. Githunguri/Gathangari/1114 had 4 acres of tea plantation. She stated that each plot had about 4 acres of tree coverage and that the houses on Plot No. Githunguri/Gathangari/1113 occupied about 2 acres. She stated that they were not cultivating Plot No. Githunguri/Gathangari/1114. She contended after the death of her grandfather, the wife of the defendant's son, one, Gitau, was utilising the trees on Plot No. Githunguri/Gathangari/1113 and Plot No. Githunguri/Gathangari/1114.

In re-examination, PW4 stated that they were not using the trees on the suit properties. She stated that they were only utilising a portion measuring 4 1/2 acres of Plot No. Githunguri/Gathangari/1113 without interference from Gitau and his wife. She contended that the plaintiff was using portions measuring 4 1/2 acres of each plot.

The defendant who was about 80 years old when this suit was filed was allowed to give evidence *de bene esse* on 8th May, 1996. He subsequently died on 13th February, 2002 and was substituted by his son and legal representative, Francis Ndichu Kimwaki. In his evidence, the defendant stated that he bought Plot No. Githunguri/Gathangari/1113 and Plot No. Githunguri/Gathangari/1114 from Mbiyu Koinange in 1978 and 1979 respectively. He produced the instrument of transfer and certificate of title in respect of Plot No. Githunguri/Gathangari/1113 and the letter of consent to transfer and certificate of title in respect of Plot No. Githunguri/Gathangari/1114 as exhibits. The defendant stated that after purchasing the two parcels of land, it took him 3 years to clear the same of trees and bushes before he planted tea plants thereon. He stated that he built a house for his workers on the suit properties. The defendant produced Tea Plantation Licence dated 3rd September, 1992 issued to him by Kenya Tea Development Authority as an exhibit. He stated that he did not sell tea from the suit properties prior to 1992.

The defendant stated that the plaintiff's husband was his nephew and that prior to his death, he lived on Plot No. Githunguri/Gathangari/1114 in the house that the defendant had built thereon. He stated that before moving to Plot No. Githunguri/Gathangari/1114, the plaintiff's husband lived in one of his other parcels of land where he was burning charcoal. He stated that he invited the plaintiff's husband to come and live on Plot No. Githunguri/Gathangari/1114 as his worker. He denied that the tea plants on the suit properties belonged to the plaintiff and her late husband.

The defendant admitted that the plaintiff had a tea grower's registration number that authorised her to sell tea. He contended that he was the one who gave the plaintiff the said registration number along with 3 of his children to enable them support themselves. He stated that he had an agreement with the plaintiff's husband and his said children that they would share all tea bonuses paid to them with him. He stated that he was still sharing the tea bonus payments with his sons but that the bonus sharing with the plaintiff stopped after her husband's death.

The defendant contended that before his death, the plaintiff's husband stated in the plaintiff's presence that the plaintiff was to inherit their land at Kiawaroga exclusively while the land at Kijabe was to be shared equally between the plaintiff and the plaintiff's deceased husband's sister. The defendant stated that he was present together with 8 other people when the oral Will was made by the plaintiff's deceased husband. He averred that when the plaintiff's husband died, he was buried on Plot No. Githunguri/Gathangari/1114 where he had lived on his invitation. He averred that the deceased was not buried at the place that was indicated in his funeral announcement because the place was steep and unsuitable and that the members of his clan pleaded with him to provide a burial site which he acceded. He denied that the plaintiff and her husband purchased the suit properties from him. He produced as exhibits pleadings in the case that he had filed at Githunguri against the plaintiff. He stated that the plaintiff occupied portions of the suit properties measuring 9 acres and that there was no dispute over the suit properties before the death of the plaintiff's husband.

In cross-examination, the defendant stated that the suit properties measured 18 acres in total. He averred that the plaintiff had tea plants and was also rearing cattle on both properties. He stated that the plaintiff was also growing subsistence crops on both parcels. He stated that the plaintiff was not occupying the entire parcels but only portions thereof measuring 8 acres. He averred that the deceased sold tea from the suit properties through tea growers number KAZ 00058. He denied that he invited the plaintiff's husband to the suit properties in 1974. He stated that he bought the suit properties in 1978 and that the plaintiff and her husband started living on the suit properties in 1982. He denied selling the suit properties to the plaintiff's husband. He maintained that he was the one who built the 3 roomed semi-permanent house on the suit properties and reiterated that the deceased was his employee. He averred that one can have a licence for tea that is not his. He stated that in the case that they had before the chief and village elders, the plaintiff was not awarded the suit properties but was allowed to pick tea. The defendant stated that their bonus sharing agreement was not reduced into writing.

The defendant's first witness was Francis Ndichu Kimwaki (DW2). He testified that he was the defendant's son and administrator of his estate. He adopted his witness statement dated 1st February, 2016 as his evidence in chief. He stated that the plaintiff was married to his cousin, Kiragu Kariuki (deceased). He denied that the plaintiff and her husband purchased the suit properties in 1974. He stated that the suit properties were bought by the defendant from Koinange family. He denied that the suit properties had been occupied by the plaintiff and her family before the purchase. He stated that after purchasing the suit properties, the defendant moved the plaintiff's husband, Kiragu Kariuki from Plot No. Githunguri/Gathangari/2007 to Plot No. Githunguri/Gathangari/1113. He stated that at the time, the defendant had put up a semi-permanent house on the suit properties and had planted tea plants thereon. He stated that the plaintiff's husband occupied half of each of the suit properties which measured 9 acres each. He stated that the defendant's family occupied the other half.

DW2 stated that the plaintiff's husband was buried on Plot No. Githunguri/Gathangari/1113 because his body could not be transported to his farm in Kiawaroga, Limuru because of the rains. He stated that clan elders prevailed on the defendant who acceded to his burial on Plot No. Githunguri/Gathangari/1113. DW2 maintained that it was the defendant who planted the tea plants on Plot No. Githunguri/Gathangari/1113 and that the plaintiff's husband picked the tea under an arrangement whereby he would keep the payments for the tea sold but would share with the defendant the subsequent payments or tea bonus.

In cross-examination, DW2 stated that he was born in 1947 and that the suit properties were transferred to his father in 1978. He stated that he was not staying on the suit properties. He reiterated that the defendant's family was utilising half of the suit properties. He averred that it

was only the plaintiff who was in occupation of the suit properties. He contended that Tea Plantation Licence and Tea Verification Certificate which were issued to the plaintiff were not proof that the plaintiff owned the suit properties. DW2 contended that the borehole on Plot No. Githunguri/Gathangari/1113 was sunk by the defendant.

In re-examination, DW2 stated that his father had been issued with a Tea Plantation Licence by the time the plaintiff was issued with a similar licence. He stated that one can be a tea farmer even if they do not own the land on which the tea is grown. He stated that his father gave all his sons tea plants to pick and made arrangement for Kenya Tea Development Authority to issue each one of them with a licence. He contended that that was how the plaintiff's husband was also issued with a licence to sell tea. He stated that his licence to sell tea was number KA 200052 while the plaintiff's husband's number was number KA 200058.

On further examination by the court, DW2 stated that Plot No. Githunguri/Gathangari/1113 had several trees and that the defendant moved the plaintiff's husband to the said parcel of land so that he could cut the trees and burn charcoal and in the process, clear the area for cultivation. He contended that the defendant did not give the plaintiff's husband the suit properties since the plaintiff's husband had his own parcels of land.

Submissions:

At the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed her submissions on 21st June, 2018 while the defendant filed his submissions in reply on 26th November, 2018. The plaintiff submitted that according to the evidence that she presented to court, her occupation of the suit property began in 1974 which was 18 years before this suit was filed. The plaintiff submitted that the defendant had contended that he bought the suit properties in 1978 which meant that he had owned the suit properties for 14 years before the suit was filed. The plaintiff cited section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya and the case of Kinguru v Gathengi (2008)1KLR (G&F) 1007 and submitted that she required only 12 years of open and continuous occupation of land to establish an adverse possession claim. The plaintiff submitted that she had established her adverse possession claim in respect of the suit properties and as such she was entitled to the reliefs sought.

In his submission in reply, the defendant reiterated the contents of the pleadings and the evidence adduced by the parties. The defendant cited the case of Ann Itumbi Kiseli v James Muriuki Muriithi [2013] eKLR for the definition of adverse possession and submitted that for one to acquire land by adverse possession, he must have had actual, open, hostile and continuous possession of the land to the exclusion of the owner for 12 years. The defendant argued that for the purposes of adverse possession, time begins to run when the true owner ceases to be in possession of his land. The defendant submitted that the evidence adduced by the defendant that he purchased the suit properties in 1978 and 1979 and that it took him 3 years to clear the land for cultivation was unchallenged. The defendant contended that the earliest one could have occupied the suit properties was in 1982 which is the year the defendant invited the plaintiff's husband to the suit properties. The defendant submitted that this suit was premature as 12 years had not lapsed from the time the plaintiff entered the suit properties by the time the same was filed.

The defendant submitted further that the defendant never ceased to be in possession of the suit properties. The defendant submitted that it was not disputed that the defendant had allowed the plaintiff's husband who was his nephew to enter the suit properties. The defendant cited the cases of Kweyu v Omutut [1990] KLR 709 and Edwin G. K Thiongo & another v Gichuru Kinuthia & 2 others [2015] eKLR cited in M'Mbaoni M'Thaara v James Mbaka [2017] eKLR as well as the case of Ramco Investments Ltd v Uni-Drive Theatre Ltd. [2018] eKLR in support of the submission that since the plaintiff's possession was with the defendant's permission and was not exclusive, the plaintiff's adverse possession claim had no basis.

The defendant submitted that the plaintiff had failed to prove her case on a balance of probabilities.

Determination:

I have considered the Originating Summons together with the supporting affidavit. I have also considered the affidavit in reply to the Originating Summons and the evidence tendered by the parties. The only issue arising for determination in this suit is whether the plaintiff had acquired the suit properties by way of adverse possession.

The law on adverse possession was set out by the Court of Appeal in Peter Kamau Njau v Emmanuel Charo Tinga [2016]eKLR as follows:

“A registered owner of land, may not, by the provisions of section 7 of the Limitation of Actions Act bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. At the expiration of that period the owner's title will be extinguished by operation of the law. Section 38 of the Act permits the person in peaceful possession, without the land owner's permission, for a continuous and uninterrupted period of 12 years, but who has also done acts on the land which are inconsistent with the registered owner's enjoyment of the soil for the purpose for which he intended to use it, to apply to be registered as its owner.”

In the case of Salim v Boyd and Another [1971] E.A 550, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has had exclusive uninterrupted possession of the land for 12 years. In the case of Kimani Ruchine & Another v Swift Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, nec plecario (no force, no secrecy, no evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

The plaintiff claimed that she had been in continuous and uninterrupted occupation of the suit properties since 1974 and as such she had

acquired title to the two parcels of land by adverse possession. The plaintiff had the burden of proving her claim. The defendant placed before the court uncontroverted evidence showing that he was the registered owner of the suit properties and that he acquired the suit properties in 1978 and 1979 from one, Mbiyu Koinange.

It was not disputed at the trial that the plaintiff was in occupation of the suit properties. In order to establish her adverse possession claim, it was incumbent upon the plaintiff to place evidence before the court to enable the court determine when she entered the suit properties and the circumstances under which she made that entry. I have found the evidence that was adduced by the plaintiff concerning the time and circumstances under which she entered the suit properties conflicting and unreliable. The plaintiff's case was that she entered the suit properties with her deceased husband after her deceased husband purchased the same from the defendant. It is difficult to pinpoint from the evidence on record as to when the plaintiff's deceased husband purchased the suit properties, the person from whom he purchased the properties and the consideration. In her evidence, the plaintiff claimed that together with her husband, they entered the suit properties in 1974 when the same were still registered in the name of Mbiyu Koinange. The plaintiff averred that the defendant told them that he had purchased the suit properties from the family of Koinange at Kshs. 240,000/- and asked her late husband to refund to him the said amount so that he could keep the properties. The plaintiff averred that her deceased husband sold a parcel of land he had in Muranga to raise the amount that the defendant had sought. The plaintiff claimed that her deceased husband added some money to the proceeds of that sale and paid the same to the defendant after which they were allowed to enter the suit properties.

In cross-examination, the plaintiff stated that the defendant allowed them to move into the suit properties after paying him Kshs. 200,000/- which amount they paid to the defendant in 1974. The plaintiff also claimed that the said amount was paid by instalments and that some payments were made through bank transfer. In further cross-examination, the plaintiff claimed that her husband made payment of the purchase price for the suit properties to Mbiyu Koinange and his brother and that they purchased the two parcels of land at Ksh. 230,000/-.

On his part, PW3 stated that the plaintiff and her deceased husband purchased the suit properties from the defendant in 1974 after which they entered the same. He claimed that the purchase price was Kshs. 300,000/- and that the said amount was paid to the defendant. PW3 stated that the plaintiff's husband sold his land in Muranga for Kshs. 120,000/- and that he witnessed him paying that amount to the defendant in 1979. He claimed that a sum of Kshs. 80,133/- was transferred from the plaintiff's husband's account to the defendant's account on 18th December, 1987. In cross-examination, PW3 stated that the two parcels of land were sold to the defendant by Mbiyu Koinange at Kshs. 200,000/-.

No documentary evidence was placed before the court to establish the alleged sale transaction between the plaintiff and the defendant or Mbiyu Koinange. There was also no documentary evidence showing that the plaintiff's husband made any payment to the defendant or Mbiyu Koinange on account of the purchase price for the suit properties. The bank statements that the plaintiff produced in evidence was of no assistance to the plaintiff's case. There was nothing in the said statements showing that any money was transferred from the plaintiff and her deceased husband's account to the defendant's account. I also find it difficult to believe that the defendant would have sold the suit properties to the plaintiff's husband in 1974 when the said properties were not owned by him or that Mbiyu Koinange would have transferred the suit properties to the defendant in 1978 and 1979 while the same had been purchased and paid for by the plaintiff's husband in 1974. No explanation was given as to why Mbiyu Koinange chose to transfer the suit properties to the defendant instead of the plaintiff's husband and why the plaintiff's husband did not pursue the transfer of the said properties to his name from the defendant. I also do not believe the plaintiff's and PW2's evidence that the plaintiff and her deceased husband planted tea plants on the suit properties in 1974. This allegation is inconsistent with paragraph 7 of the plaintiff's affidavit in support of the Originating Summons in which the plaintiff stated that they planted tea plants on the suit properties in 1980. I wonder how they could have planted tea plants in 1974 on land that neither belonged to them nor the defendant from whom they claimed to have acquired the same.

The plaintiff admitted in her evidence in cross examination that tea plants take 3 years to mature. That means that if they planted tea in 1974, the same would have been ready for picking in 1977. No evidence was placed before the court showing that the plaintiff and her deceased husband picked tea from the suit properties in 1977 or soon thereafter. In her evidence, the plaintiff claimed that she first picked and sold tea in 1980. There was however no evidence of such sale. From the payment slips and tea delivery records produced by the plaintiff in evidence, the earliest payment made to the plaintiff for tea delivery was in 1990 or there about which supports the defendant's contention that the tea was planted later. It is my finding that the plaintiff's deceased husband's alleged purchase of the suit properties from the defendant was not proved.

On the other hand, I find the evidence that was adduced by the defendant concerning the circumstances under which the plaintiff and her deceased husband entered the suit property consistent and credible. The defendant's case was that, the plaintiff's deceased husband was his nephew and that he had engaged him to burn charcoal for him. The defendant contended that when he purchased the suit properties, he invited the plaintiff's deceased husband to come and occupy the same in 1982 to assist him in tending the tea plants that he had planted thereon. The defendant's evidence on how he acquired the suit properties, planted tea plants thereon, built a house for workers and invited the plaintiff's husband to occupy the same was not shaken in cross-examination. The plaintiff admitted in her evidence that her deceased husband had been engaged by the defendant as a charcoal burner. A part from the allegation that her deceased husband purchased the suit properties which I have ruled out above, no other reason was advanced as to why the defendant would purchase and handover to his nephew whom from the evidence on record had land elsewhere two additional parcels of land measuring a total of 18 acres. I am not convinced that the fact that the defendant had land measuring 300 acres elsewhere as claimed by PW2 justified such gift that was disputed by the defendant. The plaintiff admitted in cross-examination that a part from herself, the defendant's sons had also been issued with tea growers number by the defendant that authorised them to pick and sell tea from the suit properties. She stated as follows "*When we bought title he told us he would give us numbers to enable us to pick the tea*". I wonder why the defendant would have given his sons tea growers numbers to pick and sell tea that was planted by the plaintiff and her deceased husband. Again, why would the defendant give the plaintiff and her husband tea growers number to pick and sell tea that belonged to them and which was grown on land that the defendant had sold to them? I have noted further that the Tea Plantation Licence and Tea Verification Certificate that were produced by the plaintiff in evidence in support of her claim to the tea plants on the suit properties were all issued on 16th July, 1993 after the filing this suit. The defendant also acquired similar License on 3rd September, 1992 a few days before the filing of this suit. It is my finding from the foregoing that that the plaintiff and her deceased husband entered the suit properties in 1982 on the defendant's invitation and that the tea plants on the suit properties were planted by the defendant and were being picked by the plaintiff and her deceased husband with the consent of the defendant.

In Mwinyi Hamisi Ali v The Attorney General & Another [1997]eKLR the courts stated that:

“It can be seen straight away that Mr. Hamisi Ali was not in adverse possession of the plots in question. He was in possession by virtue of Captain Townsend's consent and somewhat nebulous implied consent of the other three co-owners of plot No. 334.....In a court of law, sympathy takes a second stand. We are governed by statutes.”

In Wambugu v Njuguna [1983] KLR 172 it was held that:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.

According to the demand letter dated 18th November, 1991 that was produced in evidence by the plaintiff as plaintiff's exhibit 11, the defendant terminated the plaintiff's license to occupy the suit property on 18th November, 1991. It is from that date that the plaintiff's continued occupation of the suit property could become adverse to the defendant. This suit was filed on 21st September, 1992 before the lapse of 1 year from the time the plaintiff's license was terminated. It is my finding in the circumstances that the plaintiff had not acquired the suit property by adverse possession as at the time she brought this suit. All the activities that she and her husband were carrying out on the suit property prior to 18th November, 1991 were with the consent of the defendant and as such were not adverse to the defendant's interest in the suit property.

Conclusion:

In conclusion, it is my finding that the plaintiff has failed to prove her claim against the defendant. The plaintiff's suit is accordingly dismissed. Due to the relationship between the parties, each party shall bear its own costs of the suit.

Delivered and Dated at Nairobi this 12th day of April 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Gaturu h/b for Mr. Kinuthia for the Plaintiff

Mrs. Ndirangu for the Defendant

Catherine Nyokabi-Court Assistant