



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC CASE NO 427 OF 2017

SIMON KANYERA NJAHL.....PLAINTIFF

VERSUS

IBRAHIM KIMANI KABURA alias

IBRAHIM KIMANI MURUGAMI.....DEFENDANT

**JUDGEMENT**

1. By an originating summons dated 10<sup>th</sup> February 2015, and filed pursuant to the provisions of Section 7 and 38 of the Limitation of Actions Act and under Order 37 Rule 7 of the Civil Procedure Rules, the Plaintiff herein who claimed to be entitled to be registered as the sole absolute proprietor of one acre of land comprising part of the parcel of land Known as **Nyandarua/Mukungi/401 by adverse possession** seeks for the following:

i. A declaration that the Plaintiff is entitled **by virtue of the doctrine of adverse possession** to be the registered as the sole and absolute proprietor of one acre of land comprising part of the parcel of land Known as **Nyandarua/Mukungi/401**.

ii. That the court do make an order that the register in respect of the parcel of land Known as **Nyandarua/Mukungi/401** be rectified to enable the excision of a portion of one acre therefrom which shall then be transferred to the Plaintiff herein.

iii. An order that the Defendant be permanently restrained and enjoined by himself, his agents, servants, employees, or by persons claiming through or in trust for him, from entering into cutting down trees, cultivating, pitting up or removing fences or in any in any other manner howsoever interfering with the quiet use, possession and enjoyment by the Plaintiff of one acre of land comprising part of the parcel of land known as **Nyandarua/Mukungi/401**.

iv. That the honorable court do make an order that the Defendant be permanently restrained and enjoined by himself, his agents, servants, employees, or by persons claiming through or in trust for him from selling, leasing, disposing or alienating, charging or in any manner howsoever interfering with the title to one acre of land comprising part of the parcel of land known as **Nyandarua/Mukungi/401** claimed by the Plaintiff.

v. **The** cost hereof be paid by the Defendant.

2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting *Affidavit* sworn on the 10<sup>th</sup> February 2015 by Simon Kanyeria Njathi, the Plaintiff herein.

3. Upon compliance with the provisions of Order 11 of the Civil Procedure Rules, the matter was certified ready for hearing and was set down for viva voice hearing that took off on the 4<sup>th</sup> December 2017 with the testimony of the Plaintiff.

**Plaintiff's Evidence.**

4. PW 1, the Plaintiff herein, Simon Kanyeria Njathi testified to that he had sued Ibrahim Kimani the Defendant herein on the basis that he had sold him a piece of land on the 28<sup>th</sup> June 1994 and thereafter had refused to give him the title to the same.

5. That after they had agreed on  $\frac{3}{4}$  of an acre , the Defendant had later added him  $\frac{1}{4}$  acres making it 1 acre, land which was to be exercised from Nyandarua/Mkungi/401.

6. That parties had signed an agreement of the  $\frac{3}{4}$  acre of land which agreement had been written in Kikuyu language but was subsequently translated in English Language by M/S Mburu F.I advocate.
7. The agreement, dated 28<sup>th</sup> June 1994 was to the effect that the defendant had sold him  $\frac{3}{4}$  acre of land for a consideration of ksh 56,250/= to which the Plaintiff had paid him a down payment of Ksh 53,000/= and was left with a balance of ksh 3,250/=. That the parties did not sign the agreement but the Defendant's son, one Murugami signed on behalf of the vendor. The Plaintiff confirmed that he had written the agreement because the Defendant was illiterate. He produced the original agreement as Pf exhibit 1 (a) and the translated copy as exhibit 1 (b).
8. The Plaintiff continued with his evidence, that after a few days, the Defendant had gone to his home and informed him that he was willing to add him  $\frac{1}{4}$  acres of land to make it 1 acre wherein he had agreed to his proposal and they settled on an additional Ksh 18,750/= for the  $\frac{1}{4}$  acre making the total value of 1 acre at Ksh 75,000/=
9. That he had paid the whole sum in instalments although he had no record because the Defendant would go to him whenever he needed money and he would give him. That there was ksh 5,000/= which they had agreed would be paid for the Land Control Board but the Defendant had taken it as well.
10. The Plaintiff confirmed that they had not recorded the payments anywhere as it had been a gentlemen's agreement. That they had agreed that upon completion of payment they would call a surveyor to sub divide the 1 acre.
11. That the surveyor came after 1 or 2 weeks upon completion of payment wherein he put up the beacons after subdividing his 1 acre and was to be paid Ksh 2,200/= for which parties were to share equally. That wherein the Plaintiff paid his share, the Defendant refused to pay his share and the surveyor refused to give them a receipt.
12. That he had taken possession of the land, and started ploughing, dug a dam and bore hole and kept cattle there, he also fenced the land and because the Defendant's trees were on the farm, he had paid him ksh 10,000/= which he had demanded.
13. That the Defendant had also transferred the two toilets that he had dug on the suit land, to be used by the church, to another location.
14. He confirmed that at the moment, there were trees on the farm which he had planted from 1994 up to the year 2000. That when he had gone to see the Defendant so that they could go to the board to transfer the land into his name, the Defendant had become very hostile and had asked him why he had gone to see him when he was sick, a fact he was not aware of. The Defendant then told him that he could not talk to him about the land in the absence of his son Murugami.
15. It was the Plaintiff's evidence that the Defendant had initially told him to vacate form the land so that he could sell it. To make him understand that he had bought the land, the Plaintiff had decided to plant trees thereon.
16. His testimony was that he did not understand why the Defendant had suddenly changed his mind as they had not quarreled.
17. The Plaintiff confirmed that he had planted the trees in 2003 and a perimeter fence in 2005. That the trees were a mixture of Cyprus and pine trees. In the year 2008, he had planted eucalyptus trees. That the trees were still on the land although he had harvested the eucalyptus trees.
18. The Plaintiff testified that he had applied for the search for the parcel of land in February 2015 herein produced the same as Pf exh 2. The he had also drawn the sketch map of the piece of land he had bought but the same was not to scale. He produced the sketch as Pf exhibit 3 (a). He also produced the goggle maps which indicated the portion of land that he utilized, as Pf exhibit 3(b)(c.) and (d).
19. The Plaintiff testified that he had used his portion of land for about 24 years from 1994 to 2018. That up to the year 2000 there had been no dispute with the Defendant. The dispute had started in the year 2000 up to when he had filed the present case.
20. He confirmed that the Defendant had not filed any case against him. That in the year 1994, the Defendant had sent his the wife to inform the Plaintiff's wife that his son wanted to wed and that they needed money which was to be used for dowry, for the wedding. That the money he had paid them for the purchase of the land was the money that they had used for the wedding.
21. The Plaintiff produced photographs to show the developments he had carried out on the suit land as Pf Exh 4(a-i) He prayed that the court do issue orders for the Defendant to process a title deed for the 1 acre of land he had purchased for a sum of Ksh. 75,000/= in 1994 and also to pay the cost of the case
22. In Cross examination, the Plaintiff confirmed that he was the one who wrote the agreement wherein the Defendant's son one Elijah Murugami, now deceased, had signed the same on behalf of the Defendant wherein one Prisillah Wanjiru, the Defendant's wife, had signed the same agreement as a witness. The witness identified Prisillah who was sitting in court.
23. He confirmed that Elijah's parents had allowed him to sign the agreement on behalf of the Defendant. That parties did not append their thumb prints on the agreement because there was no ink and that there was no independent person who witnessed the signing of the agreement.
24. He also confirmed that the agreement indicated that he had bought  $\frac{3}{4}$  acre of land, but that after 1(one) week, the Defendant had added him another  $\frac{1}{4}$  acre thus making it 1 acre. That there was no second agreement because this was a mutual agreement that parties deal with 1 acre

25. That the Government surveyor called Musyoka, who had a private office in Ndunyu within Njeru market went onto the land in August, as per the agreement with the Defendant, wherein upon completion of his work, the Plaintiff had paid him his share of ksh 1,100/= but was not given a receipt.
26. He further confirmed that the Defendant had never refunded his money and therefore the sale was valid. That he had filed a complaint with the area chief in the year 2014 because he had wanted the Defendant to issue him with the title.
27. That prior to the year 2014, he had not engaged the Defendant before any other authority. That from 1994 to 2014 there was a period of 20 years. He also confirmed that before filing the suit, Counsel for the defendant had written to him informing him that 20 years for which he had leased the land was over and he needed to vacate from the same. That the Defendant had refused to him the title in the year 2000.
28. That he had tried to discuss with the Defendant over whether he could facilitate the processing of the title to which the Defendant had refused. He informed the court that the Defendant's son, Elijah had passed on in the year 2014 wherein as a good neighbor he had assisted in the funeral arrangements
29. He also confirmed that he knew Esther Wanjiku, the daughter of the Defendant who had been married into their family at the time. That there was therefore a family relationship between their families. He corrected himself and stated that he had dug a well and not a bore hole.
30. He refuted the fact that the Defendant had leased the land to him and confirmed that they did not go to the land board and neither was a mutation done. He also confirmed to having harvested some Eucalyptus trees (blue gun) in the year 2016.
31. In re-examination, the Plaintiff stated that when they drew the agreement, there were no independent witnesses. That the Defendant had told him that the people who were present at the time were sufficient enough because he did not want their issues known by anybody. That at the time they had a lot of trust between them. That the mutation was also not done because there was a balance to be paid to the surveyor.
32. He also confirmed that the Defendant's daughter had been married to the Plaintiff's nephew and that at the beginning, both families lived cordially but after Elijah passed away, the Defendant had sent for him and his wife wherein he had informed them that Elijah had left a curse that the land should not be sold.
33. That after his nephew died in the year 2005, they had given the Defendant's daughter land to cultivate but her parents had taken her away. That for now, there was no relationship between the parties. He stressed that he had not leased out land from the Defendant.
34. The next witness PW2 confirmed that she knew both the parties herein as they lived in the same village where they helped each other with issues concerning the community. She testified that the Plaintiff had bought 3 acres of land near her place and had developed it. Subsequently he had bought another piece of land from the Defendant in the year 1994, a fact which was a well-known in the community.
35. That upon purchasing the land, the Plaintiff had fenced it, and had started cultivating various crops thereon. She confirmed that he had also dug a well. That later the Plaintiff's nephew had married the Defendant's daughter but upon his death, the Defendant's daughter had returned to her father's home.
36. She testified that in the year 2015 they had been summoned by the chief wherein the Defendant had informed them that the Plaintiff had leased the land for 20 years and that he now wanted it back. The villagers had been taken aback.
37. She confirmed that the Plaintiff still uses he land wherein he has lived since he bought it in 1994.
38. In Cross examination, PW2 testified that after cultivating the trees, the Plaintiff had planted maize on the land. That there were a few trees still on that land that remained. That she got information from the Plaintiff's wife who was her friend.
39. That the initial 3 acres of land had been bought from one Ben Ndirangu but she could not remember the amount the Plaintiff had bought it for although the suit land had been purchased at Ksh 75,000/=.She confirmed that at first, the Plaintiff had bought the land which measured  $\frac{3}{4}$  acres but had later bought another  $\frac{1}{4}$  acre thus making the whole acreage 1 acre.
40. She also confirmed that she was not there when parties were signing the agreement and did not witness the payment of the said money.
41. The next witness, PW3, testified that that he knew both parties as the Plaintiff was his teacher while the Defendant was his friend. That both parties were his friends and neighbors. He went on to testify that he knew that the Plaintiff had bought 1 acre of land from the Defendant in the year 1994 wherein he had taken possession.
42. That the Plaintiff had thereafter invited him to go and witness the Defendant subdivide the land for him and confirmed that the surveyor, whose name was Musyoka was the one who had subdivided the land wherein he had asked for Ksh 2,200/= That he witnessed the Plaintiff pay his share of Ksh. 1,100/= but no receipt was given. The Defendant did not pay.
43. The witness confirmed that the Plaintiff had made developments on the land upon which he was still in possession and carried out farming activities. That he knew the suit land well as the parties were his neighbors.
44. He confirmed that there had been a case before the chief wherein the Plaintiff had complained that whereas he had bought the land the Defendant had defended himself stating that he had leased out the same to the Plaintiff.

45. It was further his evidence that he knew that the Plaintiff's nephew had married the Defendant's daughter called Esther Wanjiku but that the relationship no longer existed after her husband died wherein she went back to her father's home

46. On cross examination, he testified that at the moment, the suit land had trees and potatoes growing there. That the previous year, the Plaintiff had planted maize. That the surveyor called Musyoka was known to him. That when the parties were negotiating and entering into the sale agreement, he was not present.

47. He confirmed that the first time he heard about the lease issue was before the chief and further that said surveyor was now deceased having died many years ago but on a date he could not remember.

48. The Plaintiff thus closed his case.

### **Defendant's Evidence**

49. The Defendant in his defence testified that he was born in 1929. That he was given his land in 1963 by the late President, Mzee Jomo Kenyatta through the Settlement Fund Trustee through the ballot system. That his land had initially measured 18 acres wherein he had sold 7 acres to one Kianduma Muchema so that he could repay the settlement loan. Kianduma Muchema was issued with his title deed.

50. He testified that he knew the Plaintiff herein to whom he had leased out a piece of his land for 20 years. That after 20 years, when the Plaintiff had gone to the chief and lodged a complaint against him, he had asked him to vacate his land.

51. He confirmed having received monies for the leased land but that the parties had not written any agreement. He explained that he had wanted to pay the land rates and that was why he had leased the land to the Plaintiff.

52. That after the Plaintiff had leased the land, he had planted maize, potatoes and trees which trees he had harvested after 20 years.

53. That when the matter was before the chief, the Plaintiff had been told to remove the trees which he did. That after harvesting the trees, there was nothing on that suit land.

54. That it had been after 20 years when he had asked the Plaintiff to vacate from the land that he had gone to report to the Chief. He confirmed that prior to the expiry of 20 years, there had been no dispute between the Plaintiff and himself.

55. He also confirmed that he was illiterate and only fixed his thumb print on documents. He denied any knowledge of the agreement stating that his son did not have any land to sell and that if he had signed the agreement, his thumb print would have appeared on the same.

56. He denied the presence of any surveyor on his land but stated that they had measured the land using their feet wherein he had leased the suit land measuring 1 acre and had been paid Ksh 75,000/=.

57. That after he had leased the land, the Plaintiff had put up a fence. He sought for the Plaintiff to leave his land and also to pay mense profit. He also confirmed that he had written a demand letter dated 28<sup>th</sup> January 2015 which he produced as Df Exhibit 1.

58. In Cross examination, the Defendant confirmed that he had a son called Murugami, who was his youngest son and who had passed away.

59. He confirmed that he had a copy of his title deed, the original which he had left at home, and which copy he could only give the court. The court received the said copy of the title as Df exh 2.

60. He testified that he could not remember when he first met the Plaintiff who did not live far from him. That there was no day that their wives had talked about the suit land. That it had been the Plaintiff who had sought to lease his land to which he has obliged and leased it to him in a year he could not remember.

61. That at the time, his son Murugami was still alive, they had talked about leasing the land with the Plaintiff, in a year he could not remember, while at his house where they had been just the two of them. That they had finalized the deal and he had been paid at that single sitting. Only his wife was present

62. He stated that the agreement produced in court was not known to him and that he did not know where it was written. That he had only seen it at the Chief's office where they had gone before they came to court. That after they had left the chief's office, he had gone to his advocate who wrote a demand letter to the Plaintiff.

63. That it had been after 20 years when his children had informed him that the Plaintiff had stayed for 20 years that he had asked him to vacate from his land. He confirmed that even before the matter was reported to the chief, he had already asked the Plaintiff to vacate from the land.

64. He further testified that he attended the Akorino church. The church of God which was built on his land. That he had not told the court lies for he had indeed leased his land to the Plaintiff.

65. That his son Murugami did not have land because he was the proprietor. He denied that he had chased the Plaintiff away stating that he

was sick.

66. He confirmed that although his wife had been present when he was leasing the land, she had not recorded her statement because at the time she was sick.

67. That they had used their feet and counted steps at the time he was leasing the land but could not remember how many steps they had counted. He also confirmed that at the time, with Khs 75,000/= one could purchase one acre of land.

68. He stated that the trees had been harvested even as the case was ongoing. That there was no dam, but just a hole which the Plaintiff had sought for permission to dig so that he could use the same to store water to irrigate the flowers.

69. He remained steadfast that he did not sell the land to the Plaintiff and further still that he could not have sold it without telling his children. With the end of his testimony, the defence closed its case.

70. Pursuant to the closing of the Defendant's case, parties sought to file their written submissions to which only the Defendant filed his submissions.

### **The Defendant's submissions**

71. The defendant's submissions filed on the 30<sup>th</sup> April 2018 and while giving a brief history on what had transpired was that in the year 1994, the Defendant leased one acre of his land to the Plaintiff for 20 years so that he could get some money to pay school fees for his children. That he had also allowed the Plaintiff to plant and harvest eucalyptus trees so that in 20 years they would have matured, so that the Plaintiff could harvest them and thereafter relinquish the land back to him.

72. It was the Defendant's submission that this agreement was not reduced into writing because it was made out of trust as the parties were related through marriage of their children.

73. The Defendant's further submission was that he was shocked at the end of the 20 years when he had asked the Plaintiff for his land that in disregard to their oral agreement, the Plaintiff had reported him to the area chief claiming that he had bought the land.

74. The Defendant submitted that the sale agreement produced by the plaintiff was invalid as it did not conform to the provisos of Section 3(3) of the law of contract that required that all agreements in respect to disposition of land to be executed by the parties and attested therein.

75. Further, that the Agreement produced by the Plaintiff was signed by the Defendant's son (deceased) on behalf of the Defendant but was not signed or thumb printed by the Defendant.

76. That there was no evidence adduced by the surveyor who allegedly subdivided the suit land and neither was the mutation map or consent from the Land Control Board produced as evidence in court, therefore the said sale was not true as it was an afterthought.

77. That the Defendant's case to the effect that he had leased the land to the Plaintiff was confirmed by the Plaintiff's admission that he had harvested the eucalyptus trees after 20 years and that before the year 2015, the Defendant had not demanded back his land.

78. That although the Plaintiff's claim was based on adverse possession, yet he had not discharged the onus of proving that indeed he was entitled **by virtue of the doctrine of adverse possession** to be the registered as the sole and absolute proprietor of one acre of land for reasons that;

i. He entered the land not as a trespasser but as a buyer with permission from the Defendant. There was therefore nothing adverse in his entry onto the land. He ought to have sued for specific performance which he did not.

ii. Secondly that the defendant who was the proprietor of the suit land was aware of the Plaintiff's entry onto the land to which he had leased him for 20 years. That whether the Plaintiff entered the land through sale or lease it could not be said that he entered the same without title.

iii. On the third issue, it was the Defendant's submission that the Plaintiff had not demonstrated that he had been on the land for 12 years so that the adverse period could be ascertained, all that he claimed was that the Defendant had refused to transfer the land to him.

79. It was the Defendant's submission that the Plaintiff was on the land not as a trespasser but as a buyer to which effect his case against the Defendant for adverse possession ought to be dismissed and he be evicted from the Defendant's land. The defendant relied on the decided cases of **Chevron (k) Kenya Ltd vs Harrison Charo Wa Shutu [2016] eKLR** and **Ann Itumbi Kiseli vs James Muriuki Muriithi [2013] eKLR**.

### **Analyses and Determination.**

80. This being a matter where the Plaintiff has sought for orders that he be registered as proprietor of as the sole and absolute proprietor of one acre of land comprising part of the parcel of land Known as **Nyandarua/Mukungi/401** having acquired title by virtue of the doctrine of adverse possession, the court is mindful of the legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

81. Section 7 of the Limitation of Actions Act provides as follows:

*“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...”*

82. Section 13 of the Limitation of Actions Act aforesaid further provides that:

*A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.*

83. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

84. Section 37 of the Limitation of Actions Act provides that:

*Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement 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.”*

85. In terms of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land, (s)he must apply to the High Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the High Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:

- i. An application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons.
- ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

86. As stated herein above, the critical period for the determination as to 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 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 vs Liverpool College (1900)1 Ch.19, 21**, where it was held that;

*“In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it .... the next question, therefore, is what constitutes dispossession of the proprietor” ....acts must be done which are inconsistent with his (the owner’s) enjoyment of the soil for the purpose for which he intended to use it.”*

87. It is against the background of the affidavit and the submission herein submitted, that I find the issues arising for my determination as being:

- i. Whether there was violation of the provisions of the *Law of Contract Act*.
- ii. Whether or not the Plaintiff has acquired the suit property by way of adverse possession.
- iii. Whether there can be a claim for adverse possession when entry is by consent

88. As was stated by the Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996**:

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

89. The onus is on the person or persons claiming adverse possession:

*“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”*

90. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,

ii. open,

iii. exclusive

iv. and hostile possession of the land claimed.

91. Has the Plaintiff herein demonstrated the said elements?

92. The facts upon which the claim for adverse possession is made is that the Plaintiff herein bought  $\frac{3}{4}$  acre of the suit land on the 28<sup>th</sup> June 1994 from the Defendant, one Ibrahim Kimani which was to be excised from the Nyandarua/Mukungi/401. That later he had added another  $\frac{1}{4}$  acre making the total acreage 1 (one). That he moved into the suit land in 1994, had a surveyor place beacons on his portion of land and started utilizing it wherein he dug a bore hole and a dam, planted trees and started cultivating on the same and he even put up a fence.

93. The Plaintiff's claim is that he entered onto the suit land pursuant to a sale agreement dated the 28<sup>th</sup> June 1994 which agreement was produced as Pf Exh 1(a). According to the Plaintiff the failure to obtain the requisite consent of the Land Control Board was occasioned by the Defendant who refused to execute the requisite forms The said agreement which has been disputed by the Defendant as being invalid by virtue for not, complying with the provisions of the Law of Contract Act which require an agreement for sale of land to be evidenced in writing and signed by all the parties. Counsel submitted that the sale agreement between the parties hereto was not in writing and was not signed by all the parties. (See **Morgan – v- Stubenitisky, 1977) KLR 188; Wagichiengo – v- Gerald (1988) KLR 406.**

94. Section 3(3) of the Law of Contract Act provides

*No suit shall be brought upon a contract for the disposition of an interest in land unless—*

*(a) the contract upon which the suit is founded—*

*(i) is in writing;*

*(ii) is signed by all the parties thereto; and*

*(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

95. Section 3(7) of the Law of Contract Act excludes the application of Section 3(3) of the said Act to contracts made before the commencement of the subsection. Section 3(3) of the Law of Contract Act, came into effect on 1<sup>st</sup> June, 2003. The sale agreement between the parties was made in 1994 wherein the Plaintiff took possession of the suit land in 1994 and has been in open, uninterrupted and continuous possession up to when he filed the Originating Summons in the year 2015.

96. I find that the agreement made between the parties in the year 1994, for sale of the suit land whether oral or otherwise, did not violate or offend the provisions of the *Law of Contract Act*.

97. The evidence on record was to the effect that in the year 2000 the Plaintiff had approached the Defendant seeking that he transfers the land to him wherein the Defendant had become very hostile to him prompting him to file the present case. It is also not in dispute that the Defendant had subsequently asked him to leave his land.

98. In the case of **Wambugu – v- Njuguna, (1983) KLR 172 at holding 4**, the Court of Appeal held:

*“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”.*

99. As to whether there can be a claim for adverse possession when entry is by consent, I find from the evidence on record as well as the Defendant's submissions that the Plaintiff herein entered the suit property not as a trespasser, but pursuant to a sale agreement in 1994 as a bona fide purchaser for value. The entry in 1994 was with permission of the Defendant *qua* vendor.

100. In the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319** Madan, J.A. stated that

*‘adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.*

101. The evidence on record is that the Plaintiff took possession of the suit land in the year 1994 wherein he had exercised thereon all acts of an owner without any hindrance or any form of objection from the Defendant. That among the acts of ownership that the Plaintiff exercised on the suit property included farming, keeping cattle, planting trees, growing food crops, and even digging a well on the suit property.

102. However in the year 2000 when he sought for a transfer of the title in his name, the Defendant became hostile. It is therefore at this point that the Plaintiff acquired adverse possession to the portion of land so claimed. For the purpose of adverse possession, the time started running in two stages in the year 1994 when the whole purchase price was paid and the year 2000 when the license was determined, up to the 11<sup>th</sup> February 2015 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, which makes it about 21 and 15 years respectively. Either way I am satisfied that the Plaintiff's claim for open and uninterrupted possession of the suit land for a period exceeding 12 years was proved to the required standard when the Originating Summons was filed on 11<sup>th</sup> February 2015.

103. The Defendant put up a spirited fight that he had only leased the suit land to the Plaintiff, however the evidence adduced in court was clear that the transaction that transpired between the two parties more of a sale agreement where the monies had been paid at once and not a lease as the Defendant would like the court to believe. I find the Defendant's claim that he had leased the land to the Plaintiff untenable and reject the same.

104. In the circumstance herein I find that the Plaintiff has proved his case on a balance of probability to which I enter judgment for the Plaintiff with costs.

**Dated and delivered at Nyahururu this 9<sup>th</sup> day of April 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**