



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MERU**

**ELC 275 OF 2013 (OS)**

**DANIEL GIKUNDI M'IMPWI.....1<sup>ST</sup> PLAINTIFF**  
**JOSEPH MUCHEKE M'IMPWI.....2<sup>ND</sup> PLAINTIFF**  
**JOHN KIRIMI M'IMPWI.....3<sup>RD</sup> PLAINTIFF**  
**ROSE MUKOMAU M'IMPWI.....4<sup>TH</sup> PLAINTIFF**  
**HENRY MUTEMBEI M'IMPWI.....5<sup>TH</sup> PLAINTIFF**  
**SIMION MUGAMBI M'IMPWI.....6<sup>TH</sup> PLAINTIFF**  
**MARY KAGWIRIA M'IMPWI.....7<sup>TH</sup> PLAINTIFF**  
**SILAS MUNENE M'IMPWI.....8<sup>TH</sup> PLAINTIFF**

**VS**

**CHARLES MUTURA NJAU.....DEFENDANT**

**JUDGMENT**

1. By Originating Summons dated, 11.10.2013 the 1<sup>st</sup> to 8<sup>th</sup> Plaintiffs sued the Defendant claiming to have become entitled by Adverse Possession to ownership of Land Reference number AMUNGENTI B ADJUDICATION SECTION PARCEL NO. 117 (hereafter referred to as the suit land) and invited the Court to make a determination of the following questions;

- a. Whether the Plaintiffs have been in occupation of the suit land openly, continuously, uninterruptedly for a period in excess of 12 years.
- b. Whether the said possession by the Plaintiffs is adverse to the Defendant.
- c. Whether the Defendant 's rights and title to the suit land has been extinguished by dint of sections 37 and 38 of cap 22 laws of Kenya and whether the Defendant / Respondent is only a trustee for the Plaintiffs/applicants.
- d. Whether the Plaintiffs are now entitles to be registered as owners of the said land in place of the Defendant.
- e. An order that the Plaintiffs be registered as proprietors of the suit land
- f. Cost of the suit.

2. The summons is supported by the affidavit of the 1<sup>st</sup> Plaintiff sworn on his own behalf and on behalf of the other Plaintiffs. He deposes that the suit land is currently registered in the name of the Defendant/ Respondent and was originally registered in the name of one Josphat M'Ipwi who was the father of the Plaintiffs. He states that in the year 1991 some six individuals whom he has listed as Onesmus Miriti Ethai, M'Ntongi M'Ithai, Kobia Nkubitu, M'Ikiamba M'Mukiri, Wilson Kobia and Salesio Kirema lodged an objection before the Land adjudication committee against their late father in respect to the suit land and their father was assured that the suit land which was registered in his name was not affected. He therefore went back home. He contends that the Plaintiffs moved into the suit land in the year 1991 and openly occupied the same and developed the same by planting a miraa plantation, bananas, mango trees, orange trees and grevilia trees. That

after a period of 22 years of the said open and continued occupation and use the Defendant came to the suit land and demanded that they vacate the suit land and destroyed some of their properties, burnt down some houses which matter was reported to the police and the Defendant was summoned. He contends that the Defendant knew even of the Plaintiffs' occupation of the suit land at the time he purchased the land. They therefore believe that the Defendant holds the title to the suit land in trust for them.

3. The Defendant in opposition to the summons swore a replying affidavit dated 26.03.2014 in which he states that the suit land belongs to him exclusively and it is registered in his name at the land adjudication office. He claims to have purchased it from one Peter Kobia Nkubitu who was the then registered owner in the year 2010 and the land was transferred to him accordingly. He claims that he is an innocent and bona-fide purchaser for value and also the owner in possession of the suit land. He accuses the Plaintiffs of lying to the Court by claiming that they are in possession whilst he is the only one in occupation of the suit land since 2010. He avers that any developments done on the suit land have only been done by himself and the previous owner. He takes cognizance of the complaint lodged with the police by the Plaintiffs but claims that the police stopped pursuing the matter when they learnt that he was the registered owner of the land.

#### **The Plaintiffs' evidence**

4. PW1- the 1<sup>st</sup> Plaintiff testified that he was the second born child of his father Josphat M'Ipwi and was born in the year 1974. That he was born and brought up on the suit land. That while he and his parents lived on the suit land which they had inherited from his grandparents. That he has lived on the land with his family peacefully and all his other siblings who had made various developments on the suit land by constructing homes and carrying out farming until 2013 when the Defendant forcefully entered the suit land and burnt down their homes, fell down trees, destroyed their vegetation with hired goons with dangerous weapons who stayed on the suit land to keep them off. That they reported the incident to the police and the sub-chief of the area but did not get help. He produced an undated documents titled requisition to compel attendance under section 22 of the Police Act addressed to one MUCOKA NJAU. The summons required the said MUCOKA NJAU to report to the station on the 2/8/13 to answer to inquiries into an alleged offence of creating a disturbance. He explained that by then he did not know the real names of the Defendant. That they also sought help from the land adjudication office but were not assisted because the chairman is the cousin of the Defendant. He added that he did not know Kobia Nkubito whom the Defendant claims to have sold him the land. That his family was subjected to great suffering and loss as their properties were damaged, their children dropped out of school and they are now without a source of income. That some of her siblings moved to a 20-point parcel of land that their father owned while others rented houses elsewhere.

5. While being cross examined by Ms. Nyaga he stated that he did not have any documents to support the claim that the land belonged to his father. He claimed the documents got burned in 2013 and he has not sought duplicates of the same. He told the Court that his father died in 2005 and are yet to petition for the letters of grant of administration for his estate. He added that they cultivated the suit land with the permission of the parents. Further he informed the Court that he has no documents to show that they occupied the suit land and or cultivated the same.

6. PW2- the 2<sup>nd</sup> Plaintiff and the first born in the family in his testimony he reiterated the averments made by the PW1 in his testimony and added that the miraa plantations they had planted on the suit land was their only source of livelihood which they used to educate their children and fend for their family. That they have been rendered destitute after the eviction. He added that in 2013 the Defendant cut down the crops on the farm and burnt down houses, fenced effectively blocking access to the land. That he reported the matter to the police chief and lands offices but got no help. He charged that the Defendant fraudulently colluded with the officials of the lands offices to cancel their father's names from the title and replaced it with that of the Defendant. And prays for compensation for the proceed the Defendant has made from then miraa trees since the year 2013.

7. Further the witness informed the Court that his father owned the land since 1973 utilizing it as family land with the permission of his late father. Challenged by Ms Nyaga for the Defendant, the witness stated that he has not documentary evidence to show that there were crops growing on the suit land, neither did he present to the Court nay report to show that he reported the damage and forceful eviction from the land by the Defendant. He clarified that the summons referred to MUCOKA NJAU while the Defendant is Charles Mutura Njau. While stating that the Defendant disobeyed a Court order issued in the suit, he maintained that he did not take out contempt proceedings against him.

8. PW3, the 3<sup>rd</sup> Plaintiff who is also a sibling to PW1 and PW2 also stated that the suit land belonged to their father and they all lived there with their families before the forceful eviction in 2013 by the Defendant. He narrated how he was beaten while picking Miraa by the Defendant and taken to TumTum police station and warned him not to set foot on the land. The witness stated that the Defendant used hired goons to beat them up when going to look for casual labour on other people's lands. He stated that they received no help from the police, chief and the lands office. On being cross examined by Ms. Nyaga, he asserted that he cannot remember the exact date when the Defendant invaded the suit land and evicted them. That he made no report to the police about the incident and only sought help from his Advocates on record. He stated that he does not know the names of the goons who evicted them nor filed any evidence that they indeed were evicted.

9. PW4 John Mwangi Gabriel who is a neighbor to the suit land testified that the Plaintiffs' father had lived on the suit land as his neighbor since the year 1952. That he always knew the Plaintiffs' father was the owner of the suit land. That the Plaintiffs' father had even allowed him to stay on the suit land sometimes in the year 1968. That the Plaintiffs planted the miraa trees on the suit land as a source of income. He claims that before the death of the Plaintiffs' father he had instructed him to subdivide the suit land among his children after his death and he was therefore aware their father never sold the land. He accused the Defendant of unfairly grabbing the suit land and confirms that indeed the Defendant destroyed the properties of the Plaintiffs.

10. PW5 Nathan Baituri testified that he had lived with the Plaintiffs' family on the suit land since 1970 until when they were forcefully evicted. He confirms that the Plaintiffs had made developments on the suit land and were carrying out farming there on.

#### **The Defendant's case.**

11. DW1 - The Defendant testified and adopted the contents of his Replying affidavits dated the 26/3/14. That he purchased the suit land

from one Joseph Kobia which was transferred to him upon which he took possession. He produced a letter dated the 5/11/13 by the DLASO - Igembe North confirming that he is the registered owner of the suit land, letter dated the 13/11/13 by assistant chief Kianda confirming the contents of the letter form the DLASO and that the Defendant purchased the land from Kobia Nkubitu. He claimed that the Plaintiffs were not known to him and that they were never in occupation of the suit land. He denied that he evicted the Plaintiffs from the suit land forcefully. He claims to have built a house on the suit land and planted trees. He confirmed to have found miraa trees already planted on the suit land at the time of purchase. He did not produce the sale agreement in support of the alleged sale and no document to show that the alleged vendor was the previous registered owner to the suit land.

12. The witness informed the Court that when he bought the land he found miraa trees which Kobia informed him belonged to him. He stated that he cut some trees on the land for purposes of constructing his houses. He could not produce any documents to show that the said Kobia was the owner of the land but maintained the lands is still under adjudication.

13. DW2 – one Joyce Nchoro who averred that that she is the mother of Kobia Nkubitu (deceased) the alleged previous owner and vendor of the suit land. She testified that her late son had gathered the suit land and sometimes back he informed her that he has sold the suit land to one Mr. Mutura. She was not aware the price the land was sold for. That she lives on a parcel of land that neighbors the suit land. She denied any knowledge of the Plaintiffs and also denied that they were ever in occupation of the suit land. She claims that her son was in actual occupation of the suit land before the sale and he used to farm on the suit land and had planted miraa trees thereon. That the Defendant took possession of the suit land after purchase.

14. DW3- James Ndumba stated in his statement that the land belonged to Kobia and he used to lease the miraa on the land from Kobia and ceased picking the miraa when the land was sold. That he is aware that the Defendant bought the land from Kobia

15. The Plaintiffs' in their submissions took issue with the failure on the part of the Defendant to produce a sale agreement as required in law in respect to transactions dealing with sale of land. That the area where the suit land is situated is still under demarcation hence there is no title to the suit land yet. They question the procedure that was followed to change names in the adjudication register in respect to the suit land. They fault the Defendant for making a false statement on oath in respect to the time when he entered the suit land which they claim was in 2013 and not 2010 as stated by the Defendant. Further that the Defendant disobeyed the restraining Court orders issued against him by this honourable Court. That the Plaintiff adduced evidence that their family has been in occupation of the suit land for ages before they were forcefully evicted in 2013 thus, they had been in possession for way over the prescribed 12 years. That the Defendant therefore holds the suit land in trust for them in line with the law. That since the land is still under adjudication hence no titles issued as yet, the extinction of title orders may not issue but invites the Court to find that the Defendant holds the suit land in trust for the Plaintiffs.

16. The Defendant s submitted that the Plaintiffs' claim could not be sustained which sought Adverse Possession order against unregistered land with no title for failing to comply with the mandatory requirement under order 37 rule 7(2) and invited the Court to be guided by the finding of the Court in the **Malindi ELC no. 41 of 2016 (os) – Washe Mwalimu Majengo & 2 Others vs. Mwalimu Mangoto Nguyetel[2017] Eklr** where the Court held that it lacked jurisdiction in respect to an Adverse Possession claim in respect to unregistered land. The Defendant also submits that the declaration of a statutory trust over the unregistered parcels of land cannot be ventilated through and Adverse Possession claim. They contend that based on the above the time for Adverse Possession in respect to the instant claim could not run. That the Plaintiffs have failed to prove the ingredients for and Adverse Possession claim in relation to actual possession, open and continuous use for the prescribed period of time and with the knowledge of the registered user. That the Plaintiffs' have failed to prove their claim for Adverse Possession on a balance of probabilities.

### **Determination**

17. Having considered the pleadings, the evidence and the written submissions the issues that fall for determination are as follows;

- a. Who owns the suit land?
- b. Whether the Plaintiffs occupied the suit land?
- c. If the answer to b is in the affirmative, whether their possession and occupation if any was adverse to the title of the Defendant?
- d. Whether the Plaintiff's rights if any have been extinguished by dint of section 37 and 38 of the Limitations of Actions Act and whether the Defendant is only a trustee for the Plaintiffs?
- e. Whether the Plaintiffs are entitled to the prayers sought in the Originating Summons?

18. The Plaintiffs have claimed in their evidence that the suit land was ancestral or family land having been inherited from their grandfather and passed down to their father who occupied the suit land from 1973 till his death in 2005. PW1-PW3 claimed that they were born on the suit land married there and carried out farming of miraa, bananas, avocados and lived settled on the suit land with their families before they were forcefully evicted by the Defendant in 2013. The Defendant on the other hand claims that he bought the suit land from one Kobia Nkubitu in 2010 and took possession in 2013. He claims not to know the Plaintiffs and states that the land upon purchase had miraa and other crops and trees growing therein which he was informed by the seller that they belonged to him. In support of his claim he tendered a letter authored by the DLASO dated the 5/11/13 stating that the land is now recorded in the name of the Defendant. The said letter further stated that the Amungenti B adjudication section is at the stage of demarcation and surveying in accordance with the Land Adjudication Act cap 284 and finally that the adjudication register is not yet complete/published. He also produced another letter undated allegedly written by Kobia Nkubitu addressed to the DLASO requesting the land be transferred to the Defendant. This letter did not state the reason for the transfer nor the purchase price etc. There is also a third letter dated the 13-11-2013 written by Samuel Mwika the assistant chief, Kianda stating the Defendant bought the land from Kobia before his death. It does not say when the said seller died. None of the documents presented by the Defendant give details of the sale if any, the terms and conditions, the purchase price etc.

19. Section 3(3) of the Law of contract states as follows;

“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”

20. In the absence of a contract of land the question is whether the Defendant’s claim to have purchased the land is valid.

21. The Plaintiffs have alluded under para 3 of the Affidavit in support that the land was originally registered in the name of their father Josephat M’Impwi and in 1991 a number of 6 persons filed objection proceedings before the land committee. They claim that their father was told that the suit land was not affected and he went home. I have perused the said objection proceedings held on the 9/8/91 involving interalia parcel No 117 amongst several other plots numbering over 45. The Plaintiffs’ father is listed as one of the Defendant s while Kobia Nkubito is listed as one of the Plaintiffs. According to the proceedings the Plaintiffs and the Defendant s are related. They belong to the same clan/family. It is stated that the land was demarcated by some relatives in exclusion of others thus the conflict. The committee concluded their finds as follows;

“the committee members gave the Plaintiffs some pieces of land with no developments.

The committee members have passed the resolution that plot No.s 115, 124,162,167,140, 165, 117, 192, 133, 108, 110, 112 , 194 , 195 , 189 and 116 be awarded to the Plaintiffs and the remaining pieces of land to remain with the Defendant .”

22. Be that as it may, there are no documents that have been tabled before the Court to show who among the 6 Plaintiffs in the AR objection proceedings got which plot. None of the parties has tabled any document to show that the land 117 was allocated to Kobia Nkubito as alleged by the Defendant. In the absence of evidence emanating from the land committee or the Land adjudication officer that the land belonged to Kobia Nkubito, it is difficult for the Court to state who owned the suit land.

23. As to whether the Plaintiffs occupied the suit land, the PW1-PW2 have stated that the land was family land occupied by their grandfather and their father. They assert that they were born there and grew up on the land. Variously they state that they occupied the land from 1991 to 2013 when they were allegedly forcefully evicted by the Defendant. Their witnesses have reiterated their evidence as well. They claim to have built houses, planted miraa bananas, ovacadoes etc as part of their developments on the suit land.

24. The Defendant averred that he bought the land from Kobia and did not know the Plaintiffs. Kobia’s mother explained that Kobia was the owner of the land and she was aware that he sold the land to the Defendant. It is the Defendant’s evidence that he was put in possession of land that had miraa plantation, trees belonging to Kobia. The Defendant denied evicting the Plaintiffs from the suit land.

25. I have evaluated the evidence of the Plaintiffs and find that it is shallow and unbelievable. They claim to have built houses and developed the land by Plaintiff miraa plantation, etc but there is no evidence of any of these things. They claim that they were forcefully evicted, their houses burnt, beaten by hired goons, lost documents relating to the suit land however, they did not file any report with the police or raise a complaint against the Defendant for property destruction. Weighing this evidence on a balance of probability it is found wanting. They would have tabled photographs or a scene report showing the destruction on the property. The Defendant stated that the trees on the picture that were cut were done by himself for purposes of building his house.

26. Order 37 rule 7 of the Civil Procedure Rules provides as follows;

“An application under section 38 of the Limitation of Actions Act shall be made by Originating Summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

The wording of the said law is mandatory and in the case of **Washé Mwalimu Majengo & others Vs Mwalimu Mwangoto Nguyeté ELC 41 of 2016**, Angote J when confronted by the similar case observed that a party seeking to be declared as the owner of the land under the doctrine of Adverse Possession must annex an extract of tile to this application. The Plaintiffs have neither attached an extract nor a title to the suit land to show that the land is registered under the name of the Defendant. As stated elsewhere the letter from the DLASO stated that the land is recorded in the name of the Defendant and added that the adjudication register is not complete. The import of this statement is that the process of ascertaining rights and interested in land is still ongoing. The land therefore is unregistered land.

27. For Adverse Possession, to mature into title to land the following conditions must be fulfilled:

a. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;

- b. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- c. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- d. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.
- e. The possession has to be *exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

28. For a party to succeed in summons for Adverse Possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in Court evidence to prove that the suit land where he/she is claiming Adverse Possession indeed belongs to the Defendant.

29. According to Section 37 and 38 of the Limitations of Actions Act, land must be registered in the name of another for whom the claimant is claiming adverse position. The rationale for registration is to be found under section 41 which provides for exemptions of the Limitations of Actions Act in certain cases such as land owned by the Government of Kenya, Settlement Fund Trustee, trust land. In the case of **Erick Chepkwony Aengwo Vs Jonathan Rutto Kibiesang ELC 743 OF 2012**, the Court held that Adverse Possession does not begin to run for land that is unregistered.

30. According to the objection proceedings the Plaintiffs were awarded land that had no developments. It then follows that parcel 117 as at 1991 had no developments and therefore was not occupied. If the Plaintiffs in the AR proceedings were given the land and not the Plaintiffs' father why did not the Plaintiffs father appeal the land committee's decision if indeed he had settled on the land. The conclusion is that it is doubtful if the Plaintiffs occupied this land nor that they were evicted in 2013.

31. The answer to issue No c & d is that time did not run for purposes of Adverse Possession.

32. In conclusion, the Plaintiffs' claim fails and is dismissed.

33. Each party to meet their own costs of the suit.

#### **Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MERU THIS 8<sup>TH</sup> DAY OF APRIL, 2019.**

**J G KEMEI**

**JUDGE**

In presence of;

C/A Mutwiri

Mr. Muchiri for Plaintiffs

Ms. Mbijiwe for Defendant