



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO. 180 of 2013 (OS)

STEPHEN KATHUNKUMI MARETE.....APPLICANT

VS

FLORENCE KAUTHU MWITHIRWA.....1ST RESPONDENT

MWORIA MORRIS MWITHIRWA.....2ND RESPONDENT

STANLEY GATURU M'NABEA.....3RD RESPONDENT

JUDGMENT

1. Through Originating Summons dated 3/7/2013 and later amended on 1/3/2018, the Applicant sued the 1st, 2nd and 3rd Defendants for orders that;
 - a. A declaration be issued that Stephen Kathunkumi Marete the Applicant herein has become entitled to ownership by way of adverse possession of parcel No. NYAKI/MUNITHU/2027 measuring 0.405 Ha or thereabouts herein referred to as the suit land.
 - b. An order that the Land Registrar Meru Central District do cancel the registration of the 3rd Respondent Stanley Gataru M'Nabea and in its place put the names of the Applicant (Stephen Kathukikumi Marete) as the sole proprietor.
 - c. Costs of this suit be borne by the Defendants.
2. The summons is based on the grounds that the Applicant has been in exclusive open and uninterrupted occupation of the suit land for a period of more than 12 years and has substantially developed the same. That the registration of the 2nd Respondent and subsequent transfer to the 3rd Respondent as the owner of the suit land is against the proprietary interest of the Applicant by way of Adverse Possession.
3. The Applicant has framed the issues for determination by this Court as follows; -
 - a. Whether the Applicant has occupied the suit land for over 12 years.
 - b. Whether the Plaintiff's occupation has been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years.
 - c. Whether the Plaintiff's occupation of the suit land has been since the year 2001
 - d. Has the subsequent transfers of title to the 2nd and 3rd Defendants affected the plaintiff's claim?
 - e. Has the Applicant become entitled to the suit land by way of Adverse Possession?
4. The summons is opposed through the affidavits of 1st, 2nd and 3rd Respondent. The 1st Respondent deposes that the suit land was the property of her late husband which was inherited by her son (the 2nd Respondent) who later sold it to the 3rd Respondent. She denies that the Applicant has been in occupation of the suit land for a period of over 12 years and claims that the Applicant only entered the suit land recently as a trespasser however in her oral testimony she admitted that the Applicant entered the suit land in the year 2001. She admits that the Applicant entered into an agreement for purchase of the suit land but breached the contract for failing to pay the full purchase price and contends that the said sale agreement became void. She therefore believes that the Applicant is a mere trespasser on the suit land. She claims to have made some developments on the suit land by planting trees. The 2nd Respondent states that he acquired title to the suit land from his mother after succeeding his late father's estate after which he sold the suit land to the

3rd Respondent in vacant possession. He claims that the 3rd Respondent recently (without specifying the year) entered the suit land as a trespasser and prevented the 3rd Respondent from fencing it.

5. The 3rd Respondent deposes that he is an innocent purchaser for value having purchased the suit land from the 2nd Respondent vide a sale agreement dated 31/5/2013. He claims the Applicant is a stranger and has not made any developments on the suit land. He testified that at the time he purchased the suit land there was a house built thereon which the 2nd Respondent informed him that it belonged to him.

6. The suit was initially filed against the 1st and 2nd Respondents and the 3rd Respondent thereafter applied to be enjoined in the suit after he became the registered owner of the suit land.

7. The Plaintiff's case was that he purchased the suit land from the 1st Respondent in the year 2001 vide a sale agreement dated 25/1/2001 for a purchase price of Ksh.110,000/=. That he paid a down payment of Kshs.70,000/= and the balance of Kshs.40,000/= was to be paid upon obtaining of the Land Control Board consent. That the subject land was initially known as NYAKI/MUNITHU/897 from which several parcels were excised being 2025-2028 with that of the Applicant is NYAKI/MUNITHI/2027 measuring 1 acre. The Applicant claims to have immediately taken possession of the suit land upon payment of the down payment in March 2001 and proceeded to make developments thereon to wit; constructed a house and pit latrine, planted numerous gravellier trees and has started subsistence farming. That he has continued to remain in occupation and use of the suit land to date and that occupation has been uninterrupted, notorious, open and exclusiv

8. In evidence the Applicant produced a green card for the parcel 897, a sale agreement dated 25/1/2001 a green card for parcel no. 2027. He explained that the 1st Respondent transferred the title to the suit land on 13/11/2009 and the 2nd Respondent sold the suit land and transferred title to 3rd Respondent on 9/7/2013 whilst he was still in occupation of the suit land and had obtained inhibition orders on 10/7/2013. That though the suit land is registered in the name of the 3rd Respondent he does not live on it, he lives in Gakere location. That he has never been dispossessed of the suit land but the 3rd Respondent had attempted to remove him from the suit land in 2014 by filing a criminal case against him.

9. PW2 who witnessed the execution of the sale agreement in 2001 testified that he lives in the neighboring shamba to the suit land and was aware that the Applicant had been in continuous occupation of the suit land since 2001 and had built a house thereon.

10. Having considered the pleadings, the evidence of the parties, the written submissions where applicable and all the material placed before the Court, the issues for determination are;

- a. Whether the Applicant has established title by way of Adverse Possession.
- b. Whether or not the 3rd Respondent is a bonafide purchaser for value without notice
- c. Who meets the costs of the suit?

11. It is not in dispute that the Applicant and the 1st Respondent entered into an agreement for sale on the 25/1/2001 in respect to a portion of one acre of the original land Ref; NYAKI/MUNITHI/897. The purchase price was agreed as Kshs 110,000/- out of which Kshs 70,000/- was paid and the balance of Kshs 40,000/- was payable after the consent for the transfer is approved by the land control board consent. Other terms of the agreement were that the Applicant was to be put in possession in the month of March 2001. From the evidence of the Applicant he indeed took possession of the suit land in March 2001. He also led uncontroverted evidence that the original land was subdivided into Nos. 2025-2028 in 2009 and the specific parcel that fell on his area of occupation is NYAKI/MUNITHI/2027 for which he is claiming title by way of Adverse Possession. According to him instead of effecting the transfer of the land to him the 1st Respondent transferred to the 2nd Respondent who in turn transferred to the 3rd Respondent while he is in occupation since 2001.

12. I will highlight the key sections of the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012 that anchors Adverse Possession.

Section 7 states that

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”

Further in Section 13

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 this 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.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession , the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

Finally, Section 38(1) and (2) states;

“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The combined effect of the sections above is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years in Adverse Possession of the suit land.

Section 28(h) of the Land Registration Act, 2012 recognizes overriding interest on land such of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the said Act prescription is one of the ways of acquisition of land.

13. In the case of **Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B**, where Kneller J. held that:

“The Plaintiffs have 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 persuasion). So, the Applicant 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 purposes or any endeavours to interrupt it by way of recurrent consideration”.one must show that they are in long exclusive, uninterrupted possession, possession is hostile to the rights of the registered owner and the registered owner is aware; possession has as much publicity as not to be missed by the registered owner.

14. The doctrine of Adverse Possession is now settled. A claim for Adverse Possession is supported by the following factors;

- a. Whether entry and continued occupation of the suit land is adverse to the person in respect of whom Adverse Possession is alleged.
- b. Whether the occupation is open, continuous, peaceful and uninterrupted.
- c. Whether entry and or occupation has not been disrupted in at least 12 years.
- d. Whether entry is permissive.

15. In the case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Applicant in a claim for Adverse Possession has to prove in the following terms;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

16. In the instant case evidence has been led that the Applicant took possession in March 2001 and commenced the construction of his house, planted trees bananas, fenced and settled his family on the land. He averred that the 1st Respondent uprooted her own trees and bananas upon his taking possession. This evidence was supported by PW2 who stated that he is a neighbour to the Applicant and led evidence that the Applicant has lived on the land since 2001 continuously. The 1st Respondent confirmed that she sold the land to the Applicant upon which he took possession and has lived there since 2001. She admitted that at the time of the hearing of the case the Applicant would have lived there for 17 years. The Court finds that the Applicant has occupied and had possession of the suit land continuously uninterrupted and exclusively for a period of 12 years from March 2001 to the time of filing suit in July 2013.

17. The fact of cultivation, fencing, and settling his family on the suit land is evidence of *animus possidendi* that is the say intention to possess and utilize the land as of right.

18. The 1st Respondent has alluded to the fact that Adverse Possession does not arise because the Applicant breached the agreement of sale. The Applicant is asserting a right as a purchaser pursuant to the agreement of sale which is not denied. That right is adverse to the 1st Respondent and the other Defendants as well. At the time of the sale agreement, the interest of the seller shifted to the Applicant as a

purchaser. The 1st Respondent retains the right to recover the balance of the purchase price subject to the law of limitations.

19. There is no evidence that has been placed before this Court to show that the Applicant relinquished possession of the suit land nor that the Defendants retook possession from him. His nature of possession and occupation has been *nec vi, nec clam, nec precario* that is to say with no force, no secrecy, no persuasion.

20. The question as to when time for purposes of calculating Adverse Possession becomes more clearer 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. I agree with the decision of the Court of Appeal in the case of **Mbugua Njuguna v Elijah Mburu Wanyoike & Another, Civil Appeal No. 27 of 2002** where it was held that where the transaction for sale of land terminates by reason of failure to acquire the consent of the Land Control Board, then for purposes of Adverse possessory rights, time starts running on the day the claimant is put in Possession of the land, and not on the last day when the application for the Board's consent ought to have been made.

21. Guided by the above decisions of the Court of Appeal time started running from the March 2001 when the Applicant was put in possession in pursuance to the agreement for sale. The 3rd Respondent stated that he filed a criminal charge against the Applicant in 2014 when he tried to enter the land accusing him of destroying a fence that he attempted to put up. This criminal case did nothing to stop time from running. In any event Adverse Possession had accrued and vested in the month of March of 2013 before this suit was filed.

22. The Court answers the 1st issue in the affirmative.

23. As to whether the the 3rd Respondent is a bonafide purchaser for value without notice, the Court heard evidence from the 3rd Respondent that he bought the land from the 2nd Respondent on 31/5/13. Upon purchase he visited that suit land and found the Applicant on the suit land. He attempted to take possession and fence the land but was repulsed by the Plaintiff. He admitted that on the land were trees bananas and a house which he was informed by the 2nd Respondent that they belonged to him. He also stated that he knew the 1st Respondent as the mother of the 2nd Defendant.

24. In the case of **Mweu v. Kiu Ranching & Farming Co-operative Society Ltd.** [1985] KLR 430:

“Adverse Possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

25. Similarly, in the case of **Samuel Kamere Vs Land Registrar (2015) EKLR** the Court of Appeal held that;

“ in order to be considered a bonafide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.” (emphasis is mine).

26. Had the 3rd Respondent carried out due diligence on the suit land he would have found out that the Applicant had occupied the land since 2001. It is the finding of the Court that by the time the 3rd Respondent is entering into the agreement for sale in the month of May of 2013, title by way of Adverse Possession had crystalized and vested in the Applicant as at the month of March 2013. He therefore acquired no interest in the title and if any title is registered in his name then he is holding it in trust for the Applicant who has proved title by Adverse Possession.

27. The upshot of the case is that the Plaintiff's case succeeds and the Court makes orders as follows;

- a. A declaration that Stephen Kathunkumi Marete, the Applicant herein has become entitled by way of Adverse Possession of parcel No. NYAKI/MUNITHU/2027 measuring 0.405 Ha or thereabouts.
- b. An order that the Land Registrar, Meru Central District do cancel the registration of Respondent Stanley Gaturu M'Nabea and in its place register Stephen Kathunkumi Marete as the Sole proprietor.
- c. The Deputy Registrar of this Court is mandated to execute and sign all the necessary documents required to effect b) above.
- d. Costs of this suit be borne by the Defendants jointly and severally.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Ms. Mbijiwe holding brief for Mwanzia for plaintiff