



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. 53 OF 2007**

**MERU CENTRAL FARMERS COOPERATIVE UNION.....PLAINTIFF**

**VS**

**RUTH IGOKI RINTARI.....1<sup>ST</sup> DEFENDANT**

**KAIRANYA INVESTMENTS LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By Originating Summons dated 6/6/07 the Plaintiff sued the Defendants claiming to have become entitled by adverse possession to ownership of NTIMA/IGOKI/1964 (0.56HA) and invited the Court to make a determination on the following questions;

- a. Whether the Plaintiff Meru Central Farmers Co-op Union Ltd has become entitled by adverse possession to NTIMA/IGOKI/1964.
- b. Whether the transfer of NTIMA/IGOKI/1964 from L.R KAIRANYA and F. RINTARI, after the lapse of over 12 years when the L. KAIRANYA and F. RINTARI title has been extinguished by operation of the law, was fraudulent, illegal and null and void.
- c. Whether the transfer of NTIMA/IGOKI/1964 from F. RINTARI after the death of L. KAIRANYA, to L. KAIRANYA Investments Ltd was legal in view of the joint registration of the property in the first instance as the sole proprietor of L.R. No. NTIMA/IGOKI/1964 in place of Defendants herein.
- d. Who is to pay the costs of the suit?

2. The summons are supported by the affidavit of David Gikunda the chairman of the Plaintiff. That the Plaintiff bought the suit land in the year 1978 or thereabouts at a price of Kshs. 60,000/= which was sold to them by the Defendants who were joint proprietors of the said land. That the society also bought various other properties neighboring the suit land. He claims that the Plaintiff took possession of the suit land and developed a maize mill and permanent structures now valued at approximately Kshs. 264M. That the Plaintiff did not manage to get consent from the relevant authority within the prescribed period to facilitate transfer into its names due to management challenges facing the Plaintiff Company. The transaction therefore remained pending for years as a result. That the Plaintiff continued to openly and notoriously to occupy and develop the suit property and has been in possession now for 30 years or so. That after the lapse of the period within which the consent was to be produced, the Plaintiff became a trespasser and after the lapse of 12 years the Defendants title was extinguished. That however after the demise of L. KARAINYA and F. RINTARI (the initial joint owners) the KARAINYA INVESTMENTS TD decided to transfer the subject matter into their names on 13/12/05. That the aforesaid transfer is of no legal effect as the title of L. KARAINYA and F. RINTARI, had been extinguished by the operation of law. That if the land is not transferred to the Plaintiff herein the Plaintiff and its members will lose assets worth over Kshs. 264 M. He annexed the following documents to his supporting affidavit; copy of minutes, cash payment entries, certified copies of the register (previous sale and present status) and photos of the complex.

3. The summons were opposed through the replying affidavit of F. Rintari the Managing Director of the 2<sup>nd</sup> Defendant. He claims that the suit land was initially registered in the names of L. Kairanya and F. Rintari which they intended to build a hotel. That in 1978 the Plaintiff approached them with intention to purchase the suit land, but claims that the sale was not completed as no payments were made to them. He confirms that the Plaintiff entered the suit land when negotiations were ongoing and confirms that the Plaintiff continued to remain thereon. He states that late in 2005 the administrator of the estate of L. Kairanya transferred half share of the late L. Kairanya to Kairanya Investments Ltd which transfer he contends was done lawfully. He admits that the Plaintiff has extensively developed the suit land. He questions the failure by the Plaintiff to obtain the consent for so many years. He contends that their titles were never extinguished, that the Plaintiff made developments at his own risk and has no option but to vacate the suit land.

4. The 1<sup>st</sup> Defendant died on 14/2/12 and was substituted by Ruth Igoki Rintari vide a ruling dated 19/5/14.

5. By consent of the parties recorded in Court through its counsels on record then, the Defendants was granted leave to file and serve an amended defence and counterclaim. The said consent was adopted on even date as the orders of the Court.

6. In furtherance of the said Court orders the Defendants filed a joint statement of defence and counterclaim on the 20/9/17. In it, the Defendants claim that the Plaintiff was allowed to occupy the suit land on set conditions (not specified) and deny that the occupation has been continuous and uninterrupted to warrant a claim of adverse possession. In the counter claim they claim that; the Defendants are the registered owners of the suit land with indefeasible titles; the Plaintiff breached the contract for purchase or exchange of the suit land; that the said agreement was oral and therefore contrary to law and is time barred; the Plaintiff's occupation of the suit land amounts to trespass and breach of the Defendants rights to private property; the Plaintiffs did not pay any consideration for the suit land to the Defendants nor their predecessors;

7. In the Counterclaim, the Defendants sought the following orders;

a. An order for eviction of the Plaintiff, its agents, or servants from the Defendants parcel No LR NO NTIMA/IGOKI/1964 or alternatively payment of the current value of the subject matter to the Defendants.

b. Permanent injunction against the Plaintiff's, its agents or servants to restrain them from entering or in any way interfering with the Defendant's parcel of land No LR NO NTIMA/IGOKI/1964.

c. Mesne profits for the use of the suit premises to be determined by the Court

d. Costs of the suit to be borne by the Plaintiffs.

8. The Counter claim was opposed through a Preliminary Objection dated 29/9/17 which was dismissed vide ruling dated 14/2/18.

9. The Plaintiff then filed a defence to the counter claim dated 7/4/18 which it contends that the counterclaim is bad in law and has been filed too late (after 10 years of the matter being in Court). That the issues of trespass are founded on occupation of land which has been ousted by the adverse possession of the Plaintiff and the limitation of Actions Act under section 7 thereof. That the issues of trespass cannot be jointly tried in a claim for adverse possession.

10. Still aggrieved the Plaintiff filed another Notice of Motion seeking to have the defence and counterclaim excluded from the pleadings as it should be tried separately. The Court disallowed the application in its ruling rendered on the 18/7/18.

11. At the hearing of the suit, PW1- Aaron M'Aburi testified that he was the chairman from 1971-1982. That currently he is a shareholder of the Plaintiff and an ordinary farmer. That he chaired the meeting of the Plaintiff on 12/1/78 which approved the purchase of the suit land alongside others for purposes of developing a milling factory at Kinoru. That the suit land was acquired from L. Kairanya and F. Rintari as per minutes dated 12/1/78. Immediately after purchase the Plaintiff took possession and constructed a milling factory in March 1978 that was launched in 1979. The payment was made in two tranches in the sum of Kshs 66,250/- and 31,250/-. That consent of the Land Board could not be obtained because F. Rintari was working in Western Kenya and Lawrence Kairanya later died. That the Plaintiff has been in possession since and no notice of eviction was ever given during his tenure. He clarified that the agreement between the parties was oral just like in relation to the acquisition of the other 3 plots owned and occupied by the Plaintiff.

12. On cross examination by the Counsel for the Defendant, the witness stated that the Plaintiff factory is now under the management of Meru Central Multipurpose Cooperative Society Ltd which is a related company to the Plaintiff. He stated that the owners of the suit land were not present in the meeting of the Plaintiff held on the 12/1/78 that resolved to acquire the land. That there is no acknowledgement of receipt of funds by the sellers of the land. He informed the Court that he was sure that the two were paid. That the Chief Accountant handled the finances as that was his role once it has been approved. He however clarified that though the names of the payees are not disclosed in the journal, the narration stated that it was for purchase of land. He believed that the land related to the suit land. He stated that Kairanya died in 1979 while Rintari died in 2012.

13. PW2- Simon Gitobu Ithiria who was the Accountant of the Plaintiff at the time when the suit land was purchased stated he was aware of the purchase and that the owners were fully paid as per the cash journal by cheque No.s 601 of Kshs. 66,250/= and number 602 of 31,250/=. He stated that during his tenure the Defendants never made any demand on the company for the purchase price because they had been paid. That narration in the journal does not state the names of the payee. That the details of the payee would be found in the vouchers. He confirmed that there was no agreement for sale in respect to the transaction. That the Plaintiff bought other plots in the same manner and there are no disputes.

14. PW3 – Judah Gikunda who worked as General Manager for the Plaintiff from 1985 – 2000 testified that during his tenure no demand/suit was filed against the Plaintiff to vacate the suit land.

15. PW4 – Justus Manyara M'Igweta who worked for Plaintiff from 1978 – 1982 as the Chief Accountant stated that he was aware of the purchase of the suit land. There were no demands from the sellers for purchase monies and he assumed it is because they had been paid. He however stated that he was involved with the transaction.

16. PW5 – The current chairman of Multipurpose Society testified and explained the relationship between the Plaintiff and the Society, which is that its s related company. That the suit land is still in the name of the sellers. That the Plaintiff acquired the suit land about 40 years ago from Kairanya and Rintari. He relied on the journals produced to show the Court that the purchase price was paid. He produced a valuation report which showed both the mortgage and forced sale value of the suit land. That upon assuming office in 2015 he visited Mr. Rintari at his home and requested him to transfer the suit land to the Plaintiff but he did not do it. In response to the Defendants' claim for eviction he stated that the Plaintiff's right to the land is in pursuance to a right of purchase. That the Defendants have all along known about

the peaceful exclusive and notorious occupation by the land by the Plaintiff without their permission nor consent.

17. DW1 John Kirimi Kairanya– who is a director of Karainya investment testified that the suit land was initially owned by F. Rintari and L. Kairanya who transferred it to Kairanya investment. He stated that they had been advised by the District Commissioner, Meru to negotiate so that they be paid but were not paid by the Plaintiff. He produced a green card for the suit land, a letter dated 3/1/07 addressed to the Director Afya Millers. He relied on their defence and counterclaim. He did not produce any document to support his averment that he is a director of the Kairanya investment nor any resolution by the said company authorizing him to testify on behalf of the company. He acknowledges that there was an oral agreement for purchase of the suit land but that only the payment for the structures (Kshs 30,000/-) and the fence (Kshs 15,000/) that were on the suit land at the time of the purchase was done while the payment of the land remains outstanding. He claims that they are entitled to compensation at current market rates for the value of the land. He confirms that the Plaintiff has been in occupation since 1978 and is still in occupation. That there was no land control board consent obtained in respect to the transaction.

18. Further the witness stated that the Plaintiff was to exchange the suit land with two plots in town but it failed to do so. That his father and the leadership of the Plaintiff Company were friends and trusted each other and that is why the plots were transferred before full payment was made. That in addition to the suit land the Plaintiff acquired three other plots on which the factory was built. That his father never sued the Plaintiff for land during his lifetime. That after the death of his father he transferred ½ share of the suit land to the 2<sup>nd</sup> Defendant with the full knowledge that the Plaintiff was in possession and occupation. When showed the entries relating to the purchase monies in the journal he retorted that the names of the payees are not disclosed and the payments could have been in relation to a loan or for payment of supplies made by the two sellers to the Plaintiff.

19. Parties elected to file Written Submissions but only the Plaintiff did by the time of writing this judgement.

20. The Plaintiff submits that its claim is centered on adverse possession based on Section 37 and 38 of the Limitation of Actions Act. The Plaintiff asserts that it has been in continuous, open and continuous occupation of the suit land since 1978 and has made extensive developments thereon valued at over Kshs. 300,000,000/=. That the Plaintiff entered into an agreement to purchase the suit land in 1978 from the joint owners and they paid a sum of kshs. 62,500/=. In form of cheques to the vendors for the land and some structures that had been erected thereon. They then entered the suit land and constructed a milling factory that has been in active operation since. The Plaintiff refuted Defendants' claim that they mere licensees and contend the oral agreement was acknowledged and performed coupled with payment made and received for the houses on the land interalia.

21. In the alternative the Plaintiffs urged the Court that in the event that it finds that the Plaintiffs were licensees, then the doctrine of estoppel or equity be applied in their aid because the possession was with knowledge of the Defendants and they have been in possession for 40 years and have made extensive developments thereon. That the conduct of the Defendants in respect to the suit land in the last 40 years in allowing the Plaintiff to extensively develop the land must give rise to the expectation that Plaintiffs occupation will not be disturbed.

22. They have also submitted on the legality of the transfer of the suit land to the 2<sup>nd</sup> Defendant whilst they were already in occupation and the legality of transfer of jointly owned land in line with section 60 of the Land Registration Act. They opined that the since the suit land was held under joint tenancy, upon the death of Kairanya, the entire land should have remained the property of the surviving joint owner, Mr. Rintari. That the partitioning of the property after the demise of Kairanya was illegal and against the provisions of 60 of the Land Registration Act.

23. They contend that the claim by the Defendants of trespass cannot be sustained after 40 years of open possession and occupation, it is therefore time barred as per the Limitation of Actions Act. They pray that the counterclaim be dismissed with costs.

24. Having considered the pleadings, the evidence of the parties and the submissions where applicable the two issues for determination are whether the Plaintiff has established title by way of adverse possession; whether the Plaintiffs are trespassers; what orders should the Court grant.

25. The object of Adverse Possession as enunciated in the case of **Adnam v Earl of Sandwich (1877) 2QB 485** are;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

26. 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.

27. In the words of Gicheru, JA in the case of ***Kweyu v Omuto, C A Civ Appeal 8 of 1990 (as yet unreported)***, the learned Appellate Judge observed thus;

“In deciding the issue of adverse possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of acts”

28. 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 Plaintiff 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.

29. In the case of ***Mbugua Njuguna v Elijah Mburu Wanyoike & Another, Civil Appeal No. 27 of 2002*** 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.

30. The Plaintiff has demonstrated that it has been in open possession, occupation and use of the suit premises from the year 1978 and had made massive developments thereon to the tune of hundreds of millions of Kenya shillings. All this happened at the glare and watch of the Defendants whilst they did nothing to dispossess the Plaintiff. It is common ground that there was an oral agreement for purchase of the suit land by the Plaintiffs and the Defendants acknowledge that indeed some payment was done at least for the structures and the fence thereon. And further that the LCB was never obtained. Never the less the Plaintiffs took possession and remained there on all this while.

31. It is on record that the Plaintiffs took possession of the suit land in 1978. Since then the Defendants have not dispossessed them neither have they relinquished their possession to the Defendants. The Plaintiff has shown the Court some accounting journal which indicated the two cheques drawn in the sum of KShs 62500/- and KShs 31500/- whose narration was disclosed to be for the purchase of land. It is commonly accepted that the said narration did not disclose that land in question to mean or refer to the suit land. Evidence has been led that the Plaintiff Company bought three other parcels in the same manner that is to say through oral contracts. The Plaintiff has explained that due to the number of years that have passed it was not able to obtain the documents. It must be noted that except for the Defendants insisting that the sellers were not paid, he did not lead evidence to show that he was present during the negotiations and throughout to affirm the averment. Save for stating that the monies on the journal could have been a loan or for payment of supplies, there is no documents that was tabled to challenge this evidence of payment. It could also have been for the purchase price for the land. The Defendants stated that the Plaintiff was to exchange 2 plots of its land in Meru town with the suit land. No documents were tabled to proof this allegation. By analogy, having confirmed that the structures and the fence were paid, there is high chance that the land was also paid. If indeed payments were not made then the sellers would have demanded the same. There is no evidence that Kairanya and Rintari demanded for payments during their lifetime. The Court is inclined to give the benefit of doubt to the Plaintiff that indeed it paid for the land.

32. The Defendants have averred in its defence that the agreement was wanting in form and substance because it was not reduced into writing and also that the land control board consent was not obtained. It is trite that an oral agreement is binding on the parties if the same is followed by due performance of the parties. In this case some payments were made and possession was handed over to the Plaintiff. In addition, the sellers never sought any eviction or dispossession of the Plaintiff and they are therefore now estopped from claiming back the land.

33. In this case time started running in favour of the Plaintiff from 1978 to 1990 when the full statutory period of 12 years lapsed. The Defendants' claim is therefore caught up with the doctrine of laches.

34. It is evident that the Defendants' slept on their rights over the suit land and the possession and occupation of the suit land by the Plaintiffs was for all purposes adverse to the Defendants' title. The transfer of the title document to the Kairanya investments after long years of the Plaintiff's occupation of the suit land did not save the Defendants' title either.

35. Having found that the Defendants' title was extinguished by operation of the law owing to prolonged possession and occupation of the suit land by the Plaintiff it follows that the Defendants' counterclaim cannot stand, the Plaintiff entered the suit land as purchasers and not licensees as alleged. The claim of trespass is not founded after extinguishment of the Defendants' title in favour of the Plaintiff.

36. In the upshot, the proper orders are as follows;

- a. The Plaintiffs claim succeeds.
- b. The Defendants counterclaim is dismissed.
- c. Meru Central Farmers Co-operative Union Ltd has become entitled to NTIMA/IGOKI/1964 by adverse possession.
- d. The Registrar of lands is mandated to register the Plaintiff as owner of the suit land in place of the Defendants and to dispense with the production of any documents ordinarily required.
- e. The Hon Deputy Registrar of this Court is mandated execute the requisite documents to effect the title in the name of the Plaintiff.
- f. The Defendants shall meet the costs of the suit.

**Orders accordingly.**

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

**J. G. KEMEI**

**JUDGE**

**In the presence of;**

C/A Mutwiri

Murango Mwenda for Plaintiff