



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE No. 459 OF 2017(O.S)**

**STEPHEN MWANGI WAWERU.....PLAINTIFF**

**VERSUS**

**OMARI ABDULLAH MUCHIRI.....RESPONDENT**

**JUDGEMENT**

1. By an originating summons dated 23<sup>rd</sup> June 2017, and filed under Section 7 and 38(1) of the Limitation of Actions Act and under Order 37 Rule 7(1) & (2) of the Civil Procedure Rules and all other enabling provisions of the Law, the Plaintiff herein who claimed to be entitled to be registered as the sole absolute Proprietor of **Title No. Nyandarua/Lesirko /2537 measuring 0.0283 hectares or thereabouts 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 L.R Nyandarua/Lesirko /2537 measuring 0.0283 hectares or thereabouts.**

**ii. An order that the Deputy Registrar of this honorable Court be authorized to execute all the necessary documents to facilitate the registration of the Plaintiff as the sole and absolute proprietor of L.R Nyandarua/Lesirko /2537**

**iii. The Cost of the suit be awarded to the Plaintiff.**

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 23<sup>rd</sup> June 2017 by Stephen Mwangi Waweru, the Plaintiff herein.

3. Pursuant to the filing of the said suit by way of Originating Summons, the court was informed through a filed application dated the 7<sup>th</sup> August 2017, that efforts to serve the Defendant had been futile. The Plaintiff therefore sought leave to serve him through substituted advertisement in the daily paper, a prayer which was granted on the 13<sup>th</sup> November 2017 with an extension of the order on the 31<sup>st</sup> January 2018 after the Plaintiff failed to raise the funds to place the said advertisement.

4. Pursuant to the placement of the advertisement in the daily Nation and on the court's notice board, and there having been no response by the Defendant, the Plaintiff took directions on the 11<sup>th</sup> April 2018 to the effect that the Originating Summons dated the 23<sup>rd</sup> June 2017 as well as the supporting affidavit herein be confirmed as the plaint and witness statements respectively. The applicant was then granted 21 days to comply

5. 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 wherein the Plaintiff and his witness testified.

6. The Plaintiff's case was that in the year 1993, he bought a piece of land in Oljoro orok West at a place called Lersirko from the Defendant, one Omari Abdulah Muchri.

7. That prior to buying the said land, he had sent out information that he was looking for land to buy and only came to know the Defendant during the said transaction.

8. That later, he had received information that the Defendant, the vendor herein, was selling  $\frac{3}{4}$  acre of land at ksh 45,000/=, which land was to be exercised from plot No 776.

9. That they had met and the vendor had showed him plot No 776 which he had already subdivided into 2 portions. His portion had been one of the two parcels, exercised from the mother portion No 776.

10. That thereafter, on the 15<sup>th</sup> September 1993, they had reduced their negotiations into a written agreement wherein the District officer of Ol Joro Orok had signed the same. He had produced the agreement as Pf exh 1.

11. The Plaintiff further testified that the second portion had been sold to one Moses Miugo. After the agreement, he had taken possession of his piece of land to which he and Moses have been utilizing their respective parcels of land to date.

12. That subsequently, a register to his parcel of land was opened on the 19<sup>th</sup> December 1997 wherein he was issued with the number to his plot being No. 2537 to which he produced its green card as Pf exhibit 2.

13. He further testified that in the year 1993, there had been no registers to the land.

14. He proceeded to testify that after he had purchased the land, he had left it to his sister. The Defendant did not transfer it to him because he was not nearby and although he had tried to look for him, it was in vain.

15. That they still utilize the land with his sister, land upon which they had buried their big brother, Samuel Ndirangu, in April 1994 and there had been no resistance from anybody.

16. The witness testified that after he had searched for the Defendant in vain, he had placed a caution on the land on the 13<sup>th</sup> November 1998 claiming purchaser's interest. That it was because the Defendant could not be traced, that he had sought orders from the court to assist him obtain title to the land.

17. That he was aware that the Defendant's sister and brothers lived on their own portion of land and nobody had filed suit against him.

18. PW 2 -Silas Mwangi Karuri testified that he was a farmer who lived on plot No 3069, at Lesirko scheme within Oljoro orok where he had lived since the year 1969 on a land that had been given to his parents by the Settlement Fund Trustee in the year 1964.

19. That the said Plot had been No.174 which had been allocated to his mother but which plot had later been sub-divided and he had been given Plot No 3069.

20. That he knew the family of Mariam Mumbi who used to live in the same area as they did. That the family had consisted of many children but he had known only Musa Abdullah and Muchiri. That Mumbi had lived there with her children although he could not remember the number of the plot. That he had gone to the same school with Musa Abdullah.

21. He testified that Mumbi had sub divided her land for her children wherein Muchiri had sold his share to Stephen Mwangi Waweru the Plaintiff herein and one Moses after sub dividing the same into two portions.

22. He also confirmed the fact that the Plaintiff herein had bought his portion of the land in the year 1993 wherein the vendor, the Defendant herein had disappeared after selling the land and has not been seen to date.

23. That the Plaintiff and Moses still use their portion of land to date. He also confirmed that the Plaintiff's brother had been buried on the suit land in the year 1998 in a funeral where he had been one of the committee members. That nobody had stopped the Plaintiff from burying his brother on the land.

24. The witness testified that the some of the Defendant's family members were still living on portions of land which their mother had given them and no one from the said family was using the Plaintiff's portion of land.

25. He also confirmed that at no time had the Plaintiff left his portion of land and neither had anybody tried to evict him from thereon. He produced his statement dated the 8<sup>th</sup> May 2018 as Pf Exhibit 3.

26. The Plaintiff closed his case and filed his submissions on the 12<sup>th</sup> February 2019.

#### **Plaintiff's submission**

27. The Plaintiff's written submission was based on the fact that not only were his pleadings unopposed and unchallenged but his evidence was also uncontroverted and hence the court should rely on it fully.

28. While relying on the evidence adduced in court, the Plaintiff submitted that pursuant to the sale agreement between him and the Defendant, and upon payment of the consideration of the purchase price in full, he had taken possession of the suit land herein from the 15<sup>th</sup> September 1993 wherein he had stayed to date.

29. That for the purpose of the claim of adverse possession, time started running as from the said date to date which was over 35 years during which period he had disposed the Defendant from the said land. That the Defendant had never filed any suit against him seeking to regain possession of the suit land.

30. The Plaintiff relied on the decided cases of **Nyaka Kuna Company Limited vs Bernado Vicezo De Masi (the Administrator of the Estate of Domenico De Masi (the Deceased) [2018] eKLR** and **James Maina Kinya vs Gerald Kwendaka [2018] eKLR** to submit that he had satisfied all the ingredients of sustaining an adverse possession claim.

31. This being a matter where the Plaintiff has sought for orders that he be registered as proprietor of parcel No. L.R **Nyandarua/Lesirko /2537 measuring 0.0283 hectares**, 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:

32. 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...”*

33. 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.*

34. 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.

35. 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.”*

36. 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.

37. 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.”*

38. 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 or not the Plaintiff has acquired the suit property by way of adverse possession.

39. 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.”*

40. 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”*

41. 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.

42. Has the Plaintiff herein demonstrated the said elements?

43. The facts upon which the claim for adverse possession is made is that the Plaintiff herein bought the suit land on the 15<sup>th</sup> September 1993 from the Defendant, one Omari Abdullah Muchiri. That he moved into the suit land and started utilizing it in the same year of purchase that is in the year 1993.

44. That subsequently the said Omari Abdullah Muchiri had been registered as its proprietor on the 19<sup>th</sup> December 1997 while the Plaintiff was still in occupation.

45. I have looked at the green card herein produced as Pf exh 2 and find that the parcel of land Ref No. Nyandarua/Lesirko/2537, which was a sub-division of parcel No. 776, was registered in the name of the Defendant Mr. Omari Abdullah Muchiri on the 19<sup>th</sup> December 1997 and a title issued. That the Plaintiff had lodged a Caution on the same on the 13<sup>th</sup> November 1998 claiming purchaser's interest, wherein after, he had instituted this suit on the 29<sup>th</sup> June 2017.

46. According to the rule on adverse possession, a party claiming must have been in possession for over 12 years and that the period starts running a fresh whenever there are changes in the title. Indeed in the case of *Kimani Ruchine & Anor -vs- Swift Rutherford & Co.Ltd and Another(1980) KLR 10*, it was held for example that where cultivation of land is advanced to support the claim to adverse possession, the evidence of the cultivation must be definite as to the area and time

47. From the evidence adduced in court, the Plaintiff took possession of the suit land immediately upon purchase of the same in the year 1993 and thereafter had left it to his sister to cultivate on it. That in the year 1994 they had even buried his elder brother on the said parcel of land.

48. Although it is not clear when the sale contract was entered into, yet I find that for the purposes of adverse possession, that time started to run from the date when the Plaintiff was granted possession of the suit land after the completion of the payment of the purchase which he claims to be the year 1993. Since there is no evidence to rebut this piece of evidence in regard to the said year, the court will take judicial notice that the Plaintiff had registered a caution on the said land on the 13<sup>th</sup> November 1998 meaning that he had taken possession earlier than the said date or thereabout. This being the scenario, I shall calculate, for the purpose of adverse possession, that the time started running from the 13<sup>th</sup> November 1998 up to the 29<sup>th</sup> June 2017 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, which makes it about 19 years.

49. I find and hold that the Plaintiff has proved on a balance of probabilities that his right of action as against the Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

50. In the circumstance herein the Plaintiff's Originating Summons dated 29<sup>th</sup> June 2017, succeeds in its entirety in the following terms;

i. That the Plaintiff has become entitled to be the registered proprietor of L.R **Nyandarua/Lesirko /2537** measuring 0.0283 hectares or thereabouts by virtue of the doctrine of adverse possession.

ii. That the Deputy Registrar of the honorable Court do execute all necessary documents to facilitate registration of the plaintiff as the absolute proprietor of L.R **Nyandarua/Lesirko /2537**.

iii. That Cost of the suit be awarded to the Plaintiff at a lower scale since the same undefended.

**Dated and delivered at Nyahururu this 4<sup>th</sup> day of April 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**