



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 12 OF 2018 (OS)**

**MARAO GITAHU.....PLAINTIFF**

**VERSUS**

**GERALD WAMBUI KIRAGU.....DEFENDANT**

**JUDGEMENT**

1. By an Originating Summons dated 10<sup>th</sup> February 2018, the Plaintiff herein who claims to be entitled to be registered as the sole absolute proprietor of **Title No. Nyandarua/Ndemi/930 by adverse possession** seeks for determination of the following questions:

**i. Whether the Plaintiff is entitled under Section and 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya to be the registered as the proprietor of the entire portion or parcel of land LR No. Nyandarua/Ndemi/930 measuring approximately five decimal four (5.4) hectares.**

**ii. Whether the Defendant is registered as Proprietor of LR No. Nyandarua/Ndemi/930 measuring approximately five decimal four(5.4) hectares in trust for the Defendant.(sic)**

**iii. Whether the Defendant should transfer LR No. Nyandarua/Ndemi/930 measuring approximately five decimal four (5.4) hectares to the Plaintiff failing which the Deputy Registrar of the High Court Nyahururu be authorized to execute the transfer documents on favour of the Plaintiff.**

**iv. Who pays the costs of the suit.**

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 20<sup>th</sup> February 2018 by Mararo Gitahi, the Plaintiff herein.

3. Vide an application dated and filed on the 3<sup>rd</sup> May 2018, the Plaintiff sought leave to serve his pleadings upon the Defendant through substituted service by advertisement in the local newspaper of National circulation since the Defendant's whereabouts was unknown to him.

4. Leave was granted on the 3<sup>rd</sup> July 2018 wherein the advertisement was placed in the Standard Newspaper of 22<sup>nd</sup> July 2018.

5. There having been no response to the advertisement notice by the Defendant, to enter appearance, judgment was entered against him. Counsel for the Plaintiff then took directions on the 6<sup>th</sup> November 2018 to the effect that the Originating Summons be treated as the Plaintiff's plaint whereas the supporting affidavit therein be treated as his statements. The matter was set down for formal proof through viva voice hearing.

**Plaintiff's case.**

6. The Plaintiff's testimony was to the effect that on the 22<sup>nd</sup> December 1983, he had purchased 5 acres of land from the Defendant herein at a cost of Ksh 20,000/=. That he had paid the whole sum of money to the Defendant wherein subsequently, parties had reduced the said transaction into an agreement, which was drawn by Ndungu Advocate, herein produced as Exh 1.

7. That he had taken possession of the said parcel of land where he had proceeded to build upon the same, cultivate subsistence food crops and kept cattle thereon.

8. That the land parcel was No Nyandarua/Ndemi/ 930. That prior to the sell, the Defendant had showed him the receipts proving payment of the loan to the Settlement Fund Trustees which receipts dated the 9<sup>th</sup> February 1982, he produced as Pf exhibit 2(a).

9. That further, the Defendant also gave him a list of beneficiaries of the parcels of land by the Settlement fund which list he produced as Pf Exhibit 2(b).
10. It was further the Plaintiff's testimony that since the Defendant at the time had not finished paying for the loan, there had been no transfer made to him.
11. That when he had conducted a search on the land on the 22<sup>nd</sup> January 2018, he had discovered that the same was still registered in the name of Settlement Fund Trustee. He produced the search certificate as Pf exhibit 3
12. He testified that he had lived on that the said parcel of land since the year 1983 wherein he had built on the same, put a cattle shed, cultivated on the same and planted trees thereon. He produced pictures showing his family members on the land, as Pf exhibit 4 (a-c)
13. His testimony was that since he had moved on the land in December 1983 with his family, nobody had attempted to evict or disturb him. That he had no title deed to the land because the same was still in the name of Settlement Fund Trustee who had written to him asking him to pay for the land. That he had refused to submitted to their demands for payments because the land was still in the name of the Defendant.
14. He also testified that on the 15<sup>th</sup> February 1985, there had been suit filed against the Defendant by a third party to whom he had sold the same parcel of land. The matter had been finalized after the Defendant refunded the money to the 3<sup>rd</sup> party. He produced a letter dated the 15<sup>th</sup> February 1985, from the Divisional CID headquarters and addressed to the Settlement Officer confirming the above status as his Pf Exhibit 5.
15. The Plaintiff testified, by producing letters of communication between him and the Settlement Fund Trustee as PF exhibit 6 (a-d), that he had tried to get title to the land from the Settlement Fund Trustee.
16. That officers from Settlement Fund Trustee had visited the land 3 times and even wrote reports to that effect. He produced one of the reports dated 18<sup>th</sup> March 2014 as Pf exhibit 7.
17. The Plaintiff sought to be registered as the proprietor of the land by the court having lived on the same from 1983 to date making it about 36 years. He also sought for an order from court so as to take it to Nairobi so that he could be registered as proprietor of the land.
18. At the close of the Plaintiff's case, his counsel filed his written submission on the 26<sup>th</sup> February 2019.

#### **Plaintiff's Submissions.**

19. It was the Plaintiff's submission, after summarizing the evidence adduced in court that he had obtained title to the parcel of land by virtue of the Limitation of Actions Act and by doctrine of adverse possession, having taken possession of the suit land in 1983 to date.
20. The Plaintiff's further submission was that upon entering into the agreement for sale of the suit land for Ksh 18,000/= between him and the Defendant, he had taken possession of the suit land on the 22<sup>nd</sup> December 1983 and had paid Ksh 12,000/= at the execution of the sale agreement .The rest of the money was to be paid on the 19<sup>th</sup> April 1984.
21. That further, the Plaintiff had proved the existence of prerequisite *sine qua non* conditions as contemplated in the Limitation of Action Act. Reliance was placed on the decided case of **Samwel Nyakengo vs Samwel Orucho Onyaru [2010] eKLR.**
22. That pursuant to the provisions of Section 13 of the Limitations of Actions Act, the two dates herein above mentioned being the 22<sup>nd</sup> December 1983 and 19<sup>th</sup> April 1984 proposed alternative timelines that could be used to compute when time began to run for the purpose of establishing the Plaintiff's claim for adverse possession which made it 34 and 35 years respectively.
23. That although the agreement herein produced did not specify when the Plaintiff took possession of the suit land, yet the evidence adduced in court confirmed that possession was on the 22<sup>nd</sup> December 1983 wherein the Plaintiff has remained to date, undertaking massive developments on the same.
24. That vide the provisions of Section 37 and 38 of the Limitations of Actions Act, upon expiration of twelve (12) years from when the right of action accrued to the adverse possessor, the Plaintiff herein , he had applied to the court to be registered as the indefeasible proprietor of the land in question. The suit land herein.
25. That the Plaintiff had been in open, continuous, uninterrupted possession and has continued using the suit land he claims as of right *nec vi' nec clam, nec precario* (no force, no secrecy, no persuasion) to date.
26. The Plaintiff's further submission was that the Defendant herein was the registered proprietor of the suit land No. Nyandarua/Ndemi/ 930, based on the evidence adduced in court by the Plaintiff. That he had bought the suit land from the Defendant who had received the money he had offered as consideration of the purchase price. Parties had thereafter deduced their oral agreement into a written agreement.
27. That further, the Plaintiff had produced a receipt showing that the suit land had been allotted to the Defendant who had also repaid part of the loan to the Settlement Fund Trustee. That alongside the said receipts the Plaintiff had also produced a list of the beneficiaries of the land issued by the Settlement Fund Trustee showing that the Defendant had been one of the persons who had benefited from the Ndemi scheme.

28. The Plaintiff submitted that he should be registered as the proprietor of the suit property against the Defendant. That the right of an adverse possessor is equitable in nature and as such a right that has an overriding interest on the subject land against the proprietor. The Plaintiff relied on the case of **Peter Mbiri Michuki vs Samwel Mugo Michuki [214] eKLR** to buttress their submission.

29. The Plaintiff's further submission was that from the evidence adduced in court more so through the supporting evidence produced as Pf exhibit 7, it was clear that the Settlement Fund Trustee had made efforts to have the Plaintiff registered as the proprietor of the suit land but owing to the absence of the Defendant, who could not be traced to execute the transfer so as to facilitate the said registration, it had become an uphill task for them.

30. That in the absence of the Defendant, the Plaintiff sought for orders from the court directing the land Registrar Nyandarua to register the whole land being LR No. **Nyandarua/Ndemi/930 in the name of the Plaintiff. That if the Defendant failed to execute the transfer documents, that the Deputy Registrar of the High Court Nyahururu be authorized to execute the transfer documents in favour of the Plaintiff. In so submitting and in furtherance of the prayers so sought, the Plaintiff relied on the decided case of Lawrence Muiruri Njuguna vs Charles Mwenga Mulwa [2017] eKLR.**

#### **Analysis and Determination.**

31. 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:

*“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 is first accrued to some person through whom he claims, to that person”.*

32. Section 13 of the Act is in these terms:

*“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”*

33. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

34. **The Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:**

*“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.”*

35. **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”*

36. 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.*

37. Finally Section 38 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, 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.”*

38. 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. These provisions lend credence to one conclusion; an order of adverse possession can only be made against a Respondent who is registered as an owner of land.

39. 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.

Has the Plaintiff herein demonstrated the said elements?

40. 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.**

41. This being a matter where the Plaintiff has sought for orders that he be registered as proprietor of parcel LR No. **Nyandarua/Ndemi/930** having acquired the title by virtue of the doctrine of adverse possession. It is against this background, the affidavits herein annexed and the submissions submitted, that I find the issues arising for my determination as being:

**i. Whether the Defendant herein is the proprietor of the suit property.**

**ii.** Whether or not the Plaintiff has acquired the suit property by way of adverse possession

**iii.** Whether the Defendant should be ordered to execute transfer of the suit land and in default the Executive officer of this Court to execute the transfer.

42. I have considered the evidence on record, as well as the applicable law on the doctrine of Adverse Possession. It is trite law that in order for a party to claim the relief of adverse possession, he/she must prove by evidence that the Defendant is the registered proprietor of the suit property. In the present matter, the Plaintiff herein relied on the agreement between him and the Defendant dated the 22<sup>nd</sup> December 1983, a list of beneficiaries to the Nyandarua Ndemi scheme as well as a receipt dated the 9<sup>th</sup> February 1982 showing a deposit by the Defendant, for the suit land, in the amount of Ksh 325/=, to prove ownership of the suit land by the Defendant.

43. With due respect, these are not the documents that need to be adduced as evidence to prove ownership of a parcel of land as envisaged by the Act. To prove such ownership, the court expected to be placed before it, a title document or a certified copy of the extract of the title to prove that the Defendant, whom the Plaintiff had sued, is the registered owner of the suit land.

44. The Plaintiff produced in evidence the official search dated the 24<sup>th</sup> January 2018 in respect to the suit property which document showed that the suit land had been and was still registered in the name of the Settlement Fund Trustee, registration having been effected on the 2<sup>nd</sup> April 1992.

45. There was however no evidence adduced to the effect that the suit land was ever transferred to the Defendant. In fact the evidence adduced by the Plaintiff was to the effect that he had not finished discharging the Settlement Fund Trustee loan. From the receipt produced as Pf Exhibit 2, the same is to the effect that the Defendant had only paid a deposit of Ksh 325/=. No transfer was effected.

46. In the instant case, the Plaintiff in his affidavit to support the O.S and in his oral evidence relied heavily on the agreement of sale dated 22<sup>nd</sup> December 1983 to show that the Defendant sold him LR No. **Nyandarua/Ndemi/930 measuring approximately five decimal four (5.4) hectares** with vacant possession. He also relied on other subsequent documents such as the receipt dated 9<sup>th</sup> February 1982 and a list of beneficiaries of the Ndemi scheme as evidence to prove that the suit land belonged to the Defendant.

47. His evidence was essentially that having bought the land and paid the full purchase price wherein the Defendant gave him vacant possession, but failed to transfer the land to him before subsequently disappearing, that he was now entitled to adverse possession of the said land.

48. The Plaintiff's evidence is pegged on the fact that his the claim for adverse possession could either have commenced on the 22<sup>nd</sup> December 1983, when he took possession of the suit land, or on the 19<sup>th</sup> April 1984 when the final monies in consideration of the purchase price was paid. That whichever way the court looked at it, he had enjoyed open, peaceful, continuous, and uninterrupted possession of the suit land for between 34 and 35 years respectively which was way beyond the required period of 12 years stipulated by law.

49. I find that although the Plaintiff was put in possession of the suit land in the year 1983, a look at the certificate of official search on the other hand speaks of a scenario whereby the contract entered between the Plaintiff and the Defendant was entered into at the time when the Defendant had no title to pass. The sale agreement was entered into in the year 1983, subsequently the suit land was registered to the Settlement Fund Trustee on the 2<sup>nd</sup> April 1992 where it remained registered as such even at the time of filing the suit herein.

50. It therefore means that by the time the Plaintiff and the Defendant entered into the sale agreement, the suit land was still government land.

51. The Settlement Fund Trustees was established by **Section 167** of the Agriculture Act (*now repealed*) as a body corporate which has power, *inter alia*, to purchase, hold, manage and dispose of immovable property so as to settle "settlers" on either an un-alienated Government land or on land purchased from private owners by the Settlement Fund Trustees. The Agriculture Act has now been repealed by the **Agriculture and Food Authority Act– No 13 of 2013.**

52. As **Section 41** of the Limitation of Actions Act stipulates as follows:

*This Act does not—*

*(a) enable a person to acquire any title to, or any easement over—*

*(i) Government land or land otherwise enjoyed by the Government;*

*(ii) mines or minerals as defined in the Mining Act (Cap. 306);*

*(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);*

*(iv) water vested in the Government by the Water Act (Cap. 372);*

*(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300));*  
*or*

*(vi) land vested in the trustees of the National Parks of Kenya; or*

*(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act*

53. As is seen from the provision of **Section 41** of the Act, adverse possession cannot accrue against land registered in the name of a Corporation/Government. This Act thus excludes public land from the application of the Act. In the present case, the Plaintiff claims to have been in possession of the suit land since the year 1983. However, it does seem that this land was Government land hence the registration of the Settlement Fund Trustee the year 1992. The Plaintiff thus could not have been in lawful possession of the Defendant's land before the registration of the Defendant as its proprietor.

54. The issue of adverse possession cannot therefore be raised where the land is still registered under the Settlement Fund Trustee and it follows that adverse possession against a title holder who holds such title after allotment by the Settlement Fund Trustee can only begin to run after he acquires title from the Settlement Fund Trustee.

55. In the present case, the suit land is still registered under the Settlement Fund Trustee and therefore time for adverse possession cannot be said to have started running against the Defendant. The long possession and occupation of the suit land by the Plaintiff, in my view therefore counts for nothing.

56. The 5 bench Court of Appeal in the case of **Samuel Ndungu Gitu v Danson Ndungu & 2 others [2001] eKLR** reiterated its earlier holding of *their decision in the case of Boniface Oredo vs Wabomba Mukile Civil Appeal No. 170 of 1989 (unreported)*, where they had held that the interest of Settlement Fund Trustee in the suit is not extinguishable under the *Limitation of Actions Act, CAP 22* of the Laws of Kenya in view of **Section 175** of the **Agriculture Act Cap 318** (now repealed) that provides that land held by Settlement Fund Trustee cannot be defeated by the defence of limitation. In the words of Gicheru, J.A. he stated:-

*"Concerning the interest of the Settlement Fund Trustees in the suit plot, Section 37 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya where relevant is in the following terms:*

*This Act applies to land registered under the Government Lands Act, the Registration of Titles Act, the Land Titles Act or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except that - (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act".*

*Evidently, the appellant was not the registered proprietor of the suit plot. That plot was and still is charged to the Settlement Fund Trustees on account of a 10 years development loan advanced to the appellant on acceptance of the plot on 9th November, 1965 which has not been repaid. Clearly they have an interest in this plot. That interest is taken care of by the provision of the section set out above since Section 175 of the Agriculture Act, Chapter 318 of the Laws of Kenya provides that: -*

*"Notwithstanding anything to the contrary contained in any law relating to limitation, no suit, application or proceeding by the Settlement Fund Trustees shall be rejected or dismissed on the ground only that the suit, application or proceeding is barred by limitation under any such law."*

*According to these provisions, the interest of the Settlement Fund Trustees in the suit plot is not extinguishable under the Limitations of Actions Act, Chapter 22 of the Laws of Kenya. It was not therefore necessary to join them in the proceedings before the superior court."*

57. I am bound by the said authority and cannot depart from the same. In essence therefore, the doctrine of limitation is not available to the Plaintiff herein and he cannot sustain a claim for adverse possession in regard to the disputed suit land.

58. I find that the Plaintiff has not proved his case on a balance of probabilities and proceed to dismiss his suit with no cost.

**Dated and delivered at Nyahururu this 7<sup>th</sup> day of May 2019**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**