



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 551 OF 2014**

**ALI NYASIRI JUMA (*suing in his capacity as the legal and personal representative of the estate of the late***

**JOHN JUMA MUSUNGU – DCD.)..... PLAINTIFF**

**VERSUS**

**GLADYS MUKA MANGO (*being sued as the legal and personal representative of the estate of the late***

**MANGO MUKA a.k.a. MUNITSIA (DCD)..... DEFENDANT**

**JUDGEMENT**

This is the application of Ali Juma Nyasiri who claims to be in adverse possession of 3 acres of land from land parcel number North Wanga/Mayoni/503 for the determination of the following questions;

1. That the applicant as an administrator of the estate of the late John Juma Musungu (deceased) together with the deceased's members of the family have been in continuous and peaceful occupation, possession and use of the said 3 acres of land at the exclusion of the respondent for a period of more than 12 years.
2. A declaration that the respondent's right as the administrator of the estate of the late Mango Muka Munitsia deceased over a portion of land measuring 3 acres from land parcel number North Wanga/Mayoni/503 with all the artificial and natural features thereon got extinguished by operation of the law of adverse possession upon expiry of twelve (12) years when the applicant and his deceased father together with his family members were in actual possession and use.
3. That even though the said land recently got registered in the name of the respondent herein together with one BMM (a minor) from the previous deceased owner which registration is by transmission then their title in a portion of land measuring 3 acres has been extinguished by the operation of section 7, 17, 37 and 38 of the Limitation of Actions Act Chapter 22 the Laws of Kenya.
4. That the applicant is entitled to be the registered owner as an administrator of the estate of the late John Juma Musungu deceased of the aforesaid portion of 3 acres by way of adverse possession instead of the respondent in accordance with section 37 and 38 of the said Act.
5. A declaration that the registration of the whole portion of land herein in the name of the applicant in her capacity as the administrator of the estate of the Late Mango Muka Munitsia (deceased) who had purchased the said portion was fraudulent.
6. A declaration that any purported sale of the plaintiff's portion comprised North Wanga/Mayoni/503 to 3<sup>rd</sup> parties was null and void and unconstitutional.
7. An order that the respondent do sign all the relevant documents including land control board forms, transfer forms, mutation forms, maps, partition forms, provide her pin number certificate, I/D. Card and coloured passport photographs and appear before the necessary land control board for the purposes of obtaining a letter of consent to transfer the said 3 acres to the applicant.
8. That in default of order 7 above this honourable court to order its Deputy Registrar to execute or sign the said documents to enable the Land Registrar and the District Surveyor to create, register and transfer a portion of land measuring 3 acres to the applicant.
9. An order condemning the respondent to pay costs of this summons.
10. Any other relief this honourable court deems fit and just to grant.

This originating summons is supported by the annexed affidavit of Ali Nyasiri Juma and grounds that the applicant is the administrator of the

estate of his later father John Juma Musungu (deceased). The applicant's deceased father aforesaid purchased from the respondent's father one Muka Mango Munitsia deceased 2 acres of land from the parcel of land herein. The respondent is the administrator of the estate of the late Muka Mango Munitsia deceased. The respondent is the registered owner of land parcel number North Wanga/Mayoni/503. The respondent though recognized the applicant's father's estate as beneficiaries in her father's estate she has refused to sign for and transfer the 2 acres the applicant's father bought from her father and a further 1 acre the applicant's father bought from Hudson Chitayi who had bought the same from the respondent's deceased father. That the applicant has been in peaceful occupation of the aforesaid portion since 1993 until recently when interference started. The applicant has equally been tilling using three acres of the said land. The applicant is bound to suffer irreparable loss and damage as it is feared that the respondent who enjoys registration of the said land has sold the same portion to 3<sup>rd</sup> parties. That it is imperative that this honourable court determines the questions and orders sought in the summons herein.

PW1 testified that after purchasing the land, they occupied the suit land from 1993 until 2013 when the defendants chased them away. He produced the said sale agreement PEx1 dated 1993. PW2, the plaintiff's worker confirmed that the plaintiff bought 2 acres in 1993 and added another 1 acre in 2008 from Hudson another buyer and they started using the land. Then the defendant came and cut the trees. PW3 corroborated the plaintiff's evidence. He states that the defendants chased them away in 2013. PW4 confirms that he witnessed the second agreement of 2008 where the seller was Hudson. The plaintiff stopped using the land in 2013. PW5, the area Chief produced letters confirming the plaintiff used the land and had an interest as a buyer.

The defendant submitted that the suit land known as N. Wanga/Mayoni/503 is jointly registered in her name and those of her younger brother BMM having obtained title of the same on 16<sup>th</sup> February, 2012 upon pursuing and obtaining Grants of Letters of administration intestate in Kakamega HC Succession Cause No. 403 of 2009 in respect of the estate of their late father Mango Muka who died on 9<sup>th</sup> May, 1999. That she is a stranger to the allegations made by the applicant regarding any land sale agreement between the late John Juma Musungu and her deceased father having disposed off a portion of land measuring 2.0 acres to the applicant's father vide any written agreement or the applicant's father purchased an additional one acre during his lifetime from one Hudson Chitayi. That she denies that the applicant took possession of the portion of land measuring 3 acres or thereabouts in or about 1993 or 2008 as alleged. That the applicant herein has never occupied a portion of the suit land for over a period of 12 years and he attempted to forcibly enter into a portion of the said land measuring less than 1 acre in 2013 but they stopped him. That they have been occupying and utilizing the said suit land since their father passed on exclusively without any objection from the applicant or any other person. That at no time has he ever been in actual occupation of the suit land that has been peaceful, continuous open and interrupted for over a period of 12 years since 2013 when he forcibly wanted to take possession of a portion of the suit land that its acreage is uncertain but they stopped him. That the applicant is like an uncle to her in the family and he stays ½ km away from the suit land. That the portion of land claimed by the applicant was sold to Juma Omoto Ibrahim, Abdullah Lubisia Ibrahim and Abubakar Abuti Ibrahim vide land sale agreement made on 9<sup>th</sup> September, 2013 and they have already taken possession of the same and have extensively developed the said portion of land in total exclusion of the applicant herein. That the said purchasers have not been enjoined to the suit herein and any order made may affect them and will thus be condemned unheard. DW2 and DW3 corroborated the plaintiff's evidence.

This court has carefully considered the evidence and submissions therein. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

*“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”*

It is not in dispute that the registered owner of land parcel LR No. East North Wanga/Mayoni/503 is the defendant and one BMM. The issue is whether or not they holds a good title by virtue of the plaintiff's claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu v Njuguna (1983) KLR

page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.

3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

The court was also guided by the case of Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 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 defendant 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. In applying these principles to the present case, the plaintiff submits that even though the said land recently got registered in the name of the respondent herein together with one BMM (a minor) from the previous deceased owner which registration is by transmission then their title in a portion of land measuring 3 acres has been extinguished by the operation of section 7, 17, 37 and 38 of the Limitation of Actions Act Chapter 22 the Laws of Kenya. The said BMM (a minor) is not a party to this suit. I find that this is a preliminary issue of law which this court has to determine before going into the merit and demerits of this case. Order 1 Rule 9 and 10 of the Civil Procedure Rules 2010 stipulate as follows: -

*Rule 9. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.*

*Rule 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.*

*(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.*

*(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.*

*(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.*

The Court of Appeal in *William Kiprono Towett & 1597 Others Vs Farmland Aviation Ltd & 2 Others (2016) eKLR* held that:

*"...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."*

This is further supported by Article 159(2)(d) of the Constitution which abhors procedural technicalities at the expense of substantive justice. The said article stipulates that:

*"In exercising judicial authority, the courts and tribunals shall be guided by the following principles .....(d) justice shall be administered without undue regard to procedural technicalities."*

In *Raila Odinga Vs IEBC & 4 Others Petition No. 5 OF 2013* by the **Supreme Court** comes to life on whether or not, in the prevailing circumstances of this case, we can apply Article 159 (2) (d) when it pronounced thus:

*“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome”*

Be that as it may, the above authorities must be distinguished as the plaintiff never amended the pleadings to enjoin the said BMM who is a joint owner of the suit land during the trial. The matter is now at judgement stage. The defendant and one BMM were registered as joint proprietors of the suit land way back on 16<sup>th</sup> February 2012 even before this suit was filed PEx12 the green card and PEx8 the search certificate show this. This court cannot consider and determine the matter in the absence of the participation of the said BMM who is a co-owner of the suit land. This court cannot also issue adverse orders if at all against a third party who has not been enjoined and/or heard in this matter. This procedural technicality goes to the substance of the case. Having found this there will be no need to go into the merit and demerits of this case. The plaintiff ought to file a suit against all the parties involved to enable the court *determine the real matter in dispute and/or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.* I find this suit is not merited by reason on non joinder of one of the proprietors of the suit land and I strike it out with no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> SEPTEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**