



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC ORIGINATING SUMMONS No. 373 OF 2017

FORMERLY NAKURU (OS) No. 348 OF 2011

SALOME WANJIKU KIBUI.....PLAINTIFF

VERSUS

HELENA NDULU WAMBUADEFENDANT

JUDGEMENT

1. The present Originating Summons dated 30th November 2011 was originally filed in the Nakuru High Court as Civil Suit No.348 of 2011 wherein it was subsequently transferred to this court, upon its establishment, and registered by its current number.
2. In the said Originating Summons, the Plaintiff sought for the determination of the following;
 - i. Whether the Plaintiff has acquired title deed to by adverse possession over LR No. Nyandarua/Olkalou Salient/570 measuring approximately 2.2 hectares.
 - ii. Whether the land reference No. Nyandarua/Olkalou Salient/570 should forthwith be registered in the name of the Plaintiff and whether the Defendant should be ordered to sign up on necessary transfer documents in favour of the Plaintiff and in default the executive officer of the court to do the same.
 - iii. Whether the District Land Registrar Nyandarua should be ordered to remove all the cautions registered against Nyandarua/Olkalou Salient/570 and issue a title deed in favour of the Plaintiff.
 - iv. Who should pay the costs of the suit.
3. The Plaintiff further sought for orders that;
 - i. The Plaintiff has acquired title deed to Nyandarua/Olkalou Salient/570 by adverse possession and the Defendant be ordered to transfer the same to the Plaintiff and in default the court executive officer to do so.
 - ii. The cost of the suit plus interest be met by the Defendant.
4. The originating summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn by the Plaintiff on 30th November 2011.
5. Leave was granted to the Defendant to file his replying affidavit out of time wherein directions on how to proceed with the originating summons were issued by the court on the 16th January 2018. The matter proceeded for hearing on the 19th June 2018.

Plaintiff's Case

6. The Plaintiff testified that her deceased father in law James Gacheru Munga purchased the said suit land from its initial allottee one Peter Mutua Kituku wherein parties entered into a sale agreement on the 14th June 1982 herein produced as Pf exh 1. That her father in law and had paid the vendor Ksh 30,000/= for 5 acres of land but she did not know how much the land had cost.
7. That following the said agreement, she, her husband and family moved onto the suit land in 1982 and had proceeded to build upon it where they have lived to date.

8. That on the 24th February 2011, she had buried her daughter in law on the suit land upon obtaining a burial permit which she produced as Pf ex 2 wherein after, she had also buried her husband on the 26th June 2011 on the same suit land upon obtaining the relevant burial permit herein produced as Pf ex 3.

9. That it had been after the burial of these two relatives that village elders had been sent to inform her to await for a letter from the Chief's office to exhume the bodies she had buried on the suit land. She thus conducted a search on the land and also obtained a green card dated 29th November 2011 which she produced as Pf ex 4 indicating that the Defendant was registered as proprietor of the suit land. It was her testimony that by the time the Defendant was registered, she and her family were already in possession of the land. That indeed before her father in law had died, he had filed suit against Peter Mutua Kituku seeking for transfer of the parcel of land into his name.

10. It was further her evidence that the court, had at one time sought for a valuation report which was done on 25th July 1990 and which report she produced as Pf ex 5 which report was also clear that the valuer had found them on the suit land.

11. She also testified that unlike what the Defendant had claimed that she had buried her kin at night, the photographs produced as Pf ex 6 (a-d) proved otherwise to the effect that the burial ceremonies were all conducted during day time.

12. She testified that it was not true that the Defendant had ever tried to evict her from the suit land before the year 2011 and neither had the Defendant visited her at her home. She also denied ever seeing the Defendant either at the District officer's office, at the chief's office or at her home that in fact save for this case, she did not know the Defendant.

Defendant's case

13. The Defendant in her defence testified that she had met Peter Mutua Kituku and his mother in the year 1990 in Thika town. That they had struck conversation where she had come to learn that Peter had a piece of land in Ol Kalou. That because she had land in Muka Muku they had struck an agreement to exchange their parcels of land because Peter Mutua's mother had had an accident and wanted to settle in Muka Muku. That what followed next was that in the year 1990, she had gone to Ol Kalou where Peter had showed her the land which was bare at the time and only contained one house.

14. That upon conducting due diligence they had embarked on the process of transfer wherein she had been informed to wait for three months. That subsequently she had procured a title deed but upon her return to the suit land two years later, she had found the Plaintiff residing thereon.

15. That she had gone to visit the Plaintiff to tell her to move out of her land where the Plaintiff who looked sick, and who had informed her that she had just been released from prison asked for time so that she could move out. That on two occasions the plaintiff had been summoned to the Chief's office in the years 2013 and 2017 wherein she had sought for time to move out of the suit land. Instead, she filed the present suit.

16. DW2 testified that she was the Mother to Peter Mutua. That the Defendant herein had been a proprietor of a land in Mka Mkuu whereas Pater Mutua had land in Nyandarua. That both these parties had exchanged their parcels of land wherein the Defendant had taken the land in Nyandarua while her son had taken the land in Mka Mkuu in Ukambani, where she now lived. She also confirmed that at the time the parcels of land were exchanged, she had been sick and that she did not know where the land in Nyandarua was situated at.

17. DW3 the Defendant's husband confirmed that indeed he knew Peter (now deceased) who used to work in Thika Town, as a casual laborer. That Peter had informed him of a land in Nyandarua which he wanted to sell. He had in turn informed DW1 of the issue and since she had land in Mka Mkuu she had agreed to exchange it with Peter's land. That he had then introduced the Defendant to Peter in the 1984 wherein they had proceeded with the transaction but since the land in Nyandarua was of a slightly higher value, they had topped up with Ksh 14,000/=

18. That when they visited the suit land herein in 1983, it was vacant wherein he had decided to fence it in the year 1985. Later he had been informed by the village elders that the fence had been removed by the Plaintiff who had started living on the land. The matter had been reported to the chief wherein the Plaintiff had sought for time to move. That his efforts to try and evict her had been in vain as her sons had been hostile towards him.

19. At the close of the Defendant's case, parties filed their respective written submissions.

Plaintiff's Submission.

20. The Plaintiff summarized her case to the effect that she had moved on to the suit property with her husband and children in the year 1983 after having acquired the same from her father in law, one James Gacheru Munga who had purchased it to from the then registered owner Peter Mutua Kitka. That upon taking possession of the land they had developed it and had lived there to date.

21. That the land was registered to the Defendant on the 30th May 1990 while the Plaintiff was still in occupation where the Defendant did not make any attempt to evict her. That it was only upon the death and burial of her husband and daughter in law on the suit land on the 2nd July 2011 and 5th March 2011 respectively that the Defendant sent village Elders to instruct her to exhume the bodies. That was when she had decided to file the present suit seeking for adverse possession.

22. That the Defendant had not denied that the Plaintiff was in occupation of the suit land and that the same is developed. And although the Defendant claimed that she had acquired the parcel of land from one Peter Mutua Kitaka and that she had found the Plaintiff on the property

in the year 1990, yet her evidence was contradicted by the production of the sale agreement dated the 16th April 1990 as well as the testimony of her husband, DW3 to the effect that indeed the Plaintiff had entered into the parcel of land between the year 1985 and 1986.

23. It was the Plaintiff's submission that she had acquired title over the suit land by way of adverse possession by dint of her continuous, exclusive and uninterrupted possession since the year 1983. The Defendant failed to prove that the Plaintiff's occupation did not distinguish her rights as the registered owner under section 38 of the Limitation of Actions Act. The mere reference of a dispute to the area chief and village Elders did not affect the adverse possession and neither did it stop time from running. In so submitting the Plaintiff relied on the decided case of the Court of Appeal being **Nakuru Njuguna Ndatho vs Masai Itumo & 2 Others Civil Appeal No. 231 of 1990**.

24. That further, the Defendant did not assert her rights over the suit property by taking legal proceedings against the Plaintiff or making an effective entry onto the land which actions would have stopped time from running.

25. The Plaintiff further submitted that she had presented the present suit in her own capacity as a person who had entered onto the suit property in the year 1983 and proceeded to settle down uninterrupted to date. It was therefore a misconceived position by the Defendant to state that the Plaintiff lacked capacity to present the present suit.

26. The Plaintiff relied on the case in the court of appeal at Nairobi being **Public Trustee vs Wanduru Ndegwa Civil Appeal No. 73 of 1982** where a wife had entered land with her deceased husband and children and thereafter had sought for adverse possession. The court had held that she had acquired indefeasible title to the land by adverse possession at the end of 12 years.

Defendant's Submission.

27. In opposing the Plaintiff's Originating Summons, the Defendant submitted that she was the registered proprietor of the suit property having purchased the same from one Peter Mutua Kitaka vide a land sale agreement dated 16th April 1990.

28. That it was a settled principle of the law that a party claiming adverse possession ought to prove that this position was *nec vi nec clam, nec precario* that is, peaceful, open and continuous. The possession should not have been through force, nor secrecy and should be without the authority or permission of the owner.

29. That the Plaintiff must show that she had been in continuous possession of the suit land for 12 years or more, which possession had to be open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property which requirements were out in the case of **Mbira vs Gachuhi [2002] 1EALR 137**.

30. The Defendant's submission was that according to the Plaintiff, the suit herein bordered on the assertion of the Plaintiffs right based on a written agreement as per the supporting affidavit sworn by the Plaintiff and in particular at paragraph 4 which stipulates as follows:

'That James Gacheru Munga who was the father to my deceased husband purchased land from its initial allottee Peter Mutua Kituka vide a written agreement dated 14 June 1982'

31. The Plaintiff had therefore failed to satisfy the condition that she had no color of right to be on the suit land other than her entry and occupation. But it was therefore from her supporting affidavit and testimony under oath that the Defendant adduced the following

- i. That the Plaintiff asserts a right from a written contract for sale of land.
- ii. The Plaintiff lacks the locus standi to bring any action on behalf of the estate of James Gacheru Munga (deceased) as she did not take out a grant ad litem hence this suit is generally bad in law .
- iii. The Plaintiff's claim is for breach of contract and had been brought beyond the six year time prescribed under the Limitation of Actions Act.
- iv. The Plaintiff is non-suited against the Defendant for breach of contract.

32. The Defendant had testified and explained how she lawfully acquired the rights and interests over the suit land as well as the eventual issuance of a title deed in her name absolutely. That she had on various locations tried to remove the Plaintiff from the suit land with the intervention of the local administration but the Plaintiff had remained adamant in blatant violation of the Defendant's proprietary rights over the suit land.

33. The Defendant submitted that the present suit fell short of the threshold for adverse possession and the same be dismissed with costs. The Defendant also prayed that the Plaintiff be ordered to surrender vacant possession of the suit land to the Defendant and there be a permanent injunction restraining the Plaintiff from interfering with possession, occupation or use of the suit land by the Defendant.

Determination.

34. The doctrine of adverse possession in Kenya 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 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person'.

35. 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.

36. 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.

37. 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."

38. 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.

39. The Plaintiff has instituted the present Originating Summons in which she has asked the **Court** to declare her as the absolute owner of parcel of lands known as LR No. Nyandarua/Olkalou Salient/570 having taken possession of the same since the 1983.

40. The originating summons has been opposed by the Defendant herein for reasons that she was the registered proprietor of the suit land having purchased the same in the year 1990 and having been registered as proprietor in the same year.

41. Secondly, the Defendant has opposed the Originating Summons for reasons that the Plaintiff lacks the locus standi to bring any action on behalf of the estate of James Gacheru Munga (deceased) as she did not take out a grant ad litem hence this suit is generally bad in law and third that the Plaintiff's claim is for breach of contract and had been brought beyond the six year time prescribed under the Limitation of Actions Act.

42. The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

"Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

43. 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."

44. It is against the background of the affidavit and the submission herein submitted, by both parties 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.

45. 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."

46. 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”

47. 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.

48. Has the Plaintiff herein demonstrated the said elements?

49. The facts upon which the claim for adverse possession is made is that the Plaintiff settled on the suit land together with her family in the year 1982 pursuant to a sale agreement of 14th June 1982 between her father in law James Gachuru Munga (deceased) and one Peter Mutua Kitaka, wherein she had developed the same by planting trees, building their houses an generally conducting farming and rearing animals thereon.

50. That she had buried some of her kin members thereon in year 2011. That even at the time the Defendant was registered as the proprietor of the suit land in the year 1990, the Plaintiff and her family were in possession. That no efforts had been made by the Defendant to evict her from the suit land save for when the Defendant sent elders to inform her that she had buried her Kin on land that was not hers, that she had decided to file the present suit having established that the Defendant was the registered proprietor of the suit land.

51. The Defendant's case on the other hand had been that in the year 1990 after she had bought the suit land and had paid a visit thereon, she had found the Plaintiff already settled thereon. The evidence of DW3 was to the effect that the Plaintiff herein started living on the suit land in the year 1985 after pulling down a fence that he had erected around it.

52. I have looked at the green card herein produced as Pf exh 4 and find that the parcel of land Ref No. Nyandarua/Olkalou Salient/570 was registered in the name of the Defendant Hellen Ndulu Wambua on the 30th May 1990 and a title issued.

53. 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

54. From the evidence adduced in court, the Plaintiff took possession of the suit land immediately upon purchase of the same in the year 1982, at the time, the land was registered in the name of the Settlement Fund Trustee. That subsequently the Defendant was registered as its proprietor in the year 1990 while the Plaintiff was still in occupation

55. The Defendant in this matter had never taken any steps to enter onto the suit land or assert her right as the owner, the only action she took was to report to the administration officers namely the area chief and village elders, which action according to the Plaintiff was not an effective assertion and the time therefore never stopped running for the Plaintiff.

56. It was the Plaintiff's evidence that she had been in open and notorious possession of the suit land to the knowledge of the Defendant herein who was now the owner as was evidenced by the green card. An example of the Plaintiff's notorious use of the suit land was exhibited at the hearing when she testified that she had planted trees, built 5 houses thereon, cultivated the land and kept animals.

57. The Defendant has also never occupied nor lived on the suit property. Based on the aforementioned facts, the Plaintiff claims title to the suit land by way of adverse possession

58. It is trite law that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession. **See Githu v Ndeete [1984] KLR 776**. Time therefore began to run against the Defendant in favour of the Plaintiff from the time the latter occupied the suit property and was engaged in acts that were inconsistent with the Defendant's title, for instance building houses on the suit property, planting trees and rearing animals and even burying her kin thereon. There is nothing to suggest that that occupation was secret or that it was not known to the Defendant.

59. When would time stop running" **In Joseph Gahumi Kiritu v Lawrence Munyambu Kabura Civil Appeal No.20 of 1993**, the court of Appeal held that;

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The

old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land.”

60. I find and hold that the Plaintiff has proved on a balance of probabilities that her 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 her possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

61. In the circumstance herein the Plaintiff's Originating Summons dated, 30th November 2011 succeeds in its entirety in the following terms;

i. That the Plaintiff has become entitled to be the registered proprietor of No. Nyandarua/Olkalou Salient/570 measuring 2.2 hectares by virtue of the doctrine of Adverse Possession.

ii. The Defendant shall execute all necessary transfer documents in favour of the Plaintiff and in default, Deputy Registrar of the honorable Court do execute all necessary documents to facilitate registration of the Plaintiff as the absolute proprietor of No. Nyandarua/Olkalou Salient/570

iii. The District Land Registrar Nyandarua should remove all the cautions registered against Nyandarua/Olkalou Salient/570 and issue a title deed in favour of the Plaintiff.

iv. That Cost of the suit be awarded to the Plaintiff.

62. It is so ordered.

Dated and delivered at Nyahururu this 29th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE