



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYAHURURU

ELC CASE NO. 457 OF 2017 (OS)

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

AND

IN THE MATTER OF LR NYANDARUA/KAIMBAGA/480

WILLIAM ISABOKE ONSARE.....PLAINTIFF

VERSUS

BENJAMIN KAKITI KISILU.....DEFENDANT

AND

MARY WAMBUI NDUNGU.....PLAINTIFF

VERSUS

BENJAMIN KAKUTI KISILU1st DEFENDANT

WILLIAM ISABOKE ONSARE.....2nd DEFENDANT

BENEDICT ONYANCHA.....3rd DEFENDANT

JUDGEMENT

1. Vide an Originating Summons dated 26th June 2017, in ELC No 457 of 2017(OS) the Plaintiff herein, William Isaboke Onsare filed suit against Benjamin Kakuti Kisilu where he claimed to be entitled to be registered as the sole absolute Proprietor over LR No. Nyandarua/Kaimbaga/480 by adverse possession.

2. In a second Originating Summons dated 28th June 2017, in ELC No 458 of 2017(OS) the Plaintiff Mary Wambui Ndungu also filed suit against Benjamin Kakuti Kisilu, William Isaboke Onsare and Benedict Onyancha where she too claimed to be entitled to be registered as the sole absolute proprietor over the same parcel of land being LR No. Nyandarua/Kaimbaga/480 by adverse possession.

3. Both the Originating Summons were premised on the grounds stated on their face as well as on the Supporting Affidavits sworn on the 21st June 2017 and 28th June 2017 by William Isaboke Onsare and Mary Wambui Ndungu respectively.

4. Both Plaintiffs therefore sought for a determination that they were entitled by virtue of adverse possession to parcel No. Nyandarua/Kaimbaga/480 measuring 26 hectares. They also sought for the honorable court to authorize the execution of all the necessary documents to facilitate their registration as the sole proprietors of Nyandrua/ Kaimbaga/480.

5. On the 10th April 2018, the two matters were consolidated with ELC No 457 of 2017 being the lead file. Service was effected upon the Defendant Benjamin Kakuti Kisilu by way of substituted service through the Daily Nation newspaper wherein after no response was received, parties ought for a date for directions and compliance with the provisions of Order 11 the Civil Procedure Rules, which was granted.

6. Upon confirmation of compliance, with the said provisions of the law, the matter was certified ready for hearing on the 8th October 2018 wherein it proceeded with the evidence of William Isaboke Onsare, the Defendant Benjamin Kakuti Kisilu, having been served through substituted advertisement in the Daily Nation newspaper, and there having been no response to the pleadings.

7. William Isaboke Onsare's evidence in summary, was that in the year 1981, while he was attached at the Provincial Commissioners office in Nyahururu, he was allotted plot No. 480 vide an allotment letter dated 13th November 1981, herein produced as Pf xh 1, which plot was charged to the Settlement Fund Trustee as per Pf exh 2. That he was shown the boundaries of the land by a surveyor wherein he had accepted it and took possession immediately. However due to the nature of his job as a police officer, he was posted Manderu where he went to work and only returned after 6 months. That when he went to pay for the suit land in the year 1982, he was informed that someone else by the name of Benjamin Kakuti Kisilu, had paid for it.

8. Based on the advice from the Settlement Fund Trustee officers, he had built a structure on the suit land which comprised of a house, store toilet and cattle shed where he had installed a caretaker by the name of Grace Moraa Onyancha, who was still on the land, to take care of the land, where he also reared cattle and did some farming.

9. He testified that he had continued pursuing the issue of registration and transfer of the land and even paid for it. In the year 2015, the Settlement Fund Trustee personnel visited the suit land and wrote a ground report dated the 24th May 2015 herein produced as Pf exh 3. Thereafter, he had been referred to their office at the Headquarters in Nairobi.

10. That on the 14th June 2017, he had conducted a search on the suit and wherein he had discovered that the same had been registered in the name of Benjamin Kakuti Kisilu on the 12th April 1988 who had been issued with a title. He produced the search certificate as Pf exh 4.

11. He testified that he knew the Plaintiff Mary Wambui Ndungu in ELC No.458 of 2017 as a wife to the deceased Patrick Ndungu a neighbor, who had been allotted plot No. 489 and who had provided him with a place to put his building materials when he first visited the suit land.

12. That after the death of Patrick Ndungu, he had realized that they been in occupation of the same parcel of land herein where they lived opposite each other. That whereas he cultivated about 40-45 acres of land, Mary Wambui Ndungu utilized about 20 acres of the same land.

13. Parties had continued living in harmony until Mary Wambui Ndungu started burning charcoal on the suit land, which prompted him to lodge a complaint with the area chief as evidenced by a complaint letter dated the 20th July 2009 herein produced as Pf exh 5.

14. That he had thus conducted a search on parcel No 489 on the 31st July 2017 when he discovered that it was still registered to the name of the Settlement Fund Trustee. He produced the search certificate to parcel No 489 as Pf exh 6. It was his evidence that Benjamin Kakuti Kisilu had never been on the suit land.

15. He also testified that he had started putting a fence on the suit land, which measured about 62 acres, in phases in 1992. That he had embarked on utilizing a bigger portion of the land, unlike what had been depicted in the ground status report of 24th May 2015, after his retirement in the year 2016.

16. The Plaintiff's case to the effect that he had been in possession of the suit land which he also shared with Patrick Ndungu, was supported by PW2 PW3 and PW4 persons whom the 1st Plaintiff used to contract to carry out some manual work for him on the suit land. These witnesses however did not state the exact period of time when the Plaintiff took possession of the suit land or whether he actually lived on the land.

17. Mary Wambui Ndungu's testimony on the other hand was that her deceased husband Patrick Ndungu had balloted for and had been issued with land parcel No. Kaimbaga 489 in the year 1982. However he had been shown parcel No. 480 measuring 64 acres, by the Settlement Fund Trustee personnel. That at the time the said Patrick used to reside in Nairobi but in the year 1983 he had built a farm house, fenced the suit land and had kept cattle wherein he and his family had subsequently moved on the suit land, in the year 1984. That they had lived there peacefully until the year 2006 when the Plaintiff had informed them that they were on his land.

18. That the matter was reported to the Settlement Fund Trustee wherein vide a letter dated the 22nd April 2009 herein produced as Df exh 1 they had been informed that they were on parcel land No 480. It was her evidence that the Plaintiff herein only took possession of the suit land in the year 2017 wherein he had built a small house.

19. That prior to that, in year 2016, the Plaintiff had taken one Onyancha on (the 3rd Defendant) on the land, wherein he had built for himself a small house upon informing them that he had bought the land from the Plaintiff.

20. That vide a letter from the Settlement Fund Trustee dated the 7th February 2017 herein produced as Df exh 2, and another dated the 13th February 2017 by their area chief herein produced as Df exh 3, it was acknowledged that she had been living on that land.

21. The witness further testified that her husband died in the year 1997 and was buried on the suit land. There was no objections from William Isaboke Onsare.

22. She disputed the evidence adduced that William Isaboke Onsare had entered upon the suit land in the year 1992 and testified that indeed, when Onyancha (the 3rd Defendant) had started clearing the bush on the suit land in the year 2016, she had reported the matter to the chief who vide his letter dated the 21st November 2011, herein produced as Df exh 4, had summoned him in vain.

23. That subsequently parties had forwarded their dispute before the District Commissioner who had referred them instead to the District to officer. The Settlement Fund Trustee officer was summoned wherein he had confirmed that the land was not William Isaboke Onsare's land.

24. The witness also produced a search certificate dated the 12th June 2017 as Df exh 6 to the suit land which indicated that the same was registered in the name of Benjamin Kakuti Kisilu whom she had never seen on the suit land. She further produced photographs as Df exh 6(a-c) which depicted her house, her worker's house as well as her late husband's grave.

25. She disputed the fact that the officer from the Settlement Fund Trustee by the name of John Welangai had ever visited the suit land, but confirmed that she had seen a surveyor by the name of Mwangi who was in the company of somebody called Njoroge pass by.

26. She also testified that the Plaintiff had destroyed a fence that they had put around the suit land, and a criminal case was pending in court in Cr case No 379 of 2017 where she had sued him.

27. She was candid enough and informed the court that at the moment, all the three of them were utilizing the land wherein she was utilizing 45 acres of the same and had also planted trees thereon.

28. Her evidence was supported by her neighbor DW2 who confirmed that the witness' husband had been allotted the land by the Settlement Fund Trustee in the year 1982. He testified that the witness' husband Patrick had then employed a workman to work on the land in the year 1983 wherein he had built 3 houses including one for the workman, a kitchen and his house where they had ploughed about 45 acres of land. That although Patrick lived in Nairobi, yet he used to frequent the suit with his family.

29. The Registry Index Map of the area was produced as Df exh 7 wherein the witness pointed out the position of the suit land as well as the position of his father's land parcel No. 322 and testified that the two parcels of land were 600 meters apart.

30. He also confirmed that the Defendant and her husband had fenced off part of the land in stages and whilst they cultivated on one part, and kept cattle on the other part. That in the year 2016, Onyancha (the 3rd defendant) had gone on the land claiming that the Plaintiff herein had sold it to him. That he had then built a small house and had started cultivating on the land. That the Plaintiff also went on the land in the year 2017 wherein he had also built a small house had started cultivating on about 1 acre He confirmed that the Plaintiff did not reside on the land and had no animals there as he had a permanent house at a place called Kihorore.

31. The defence closed their case wherein parties filed their written submissions as herein under.

Plaintiff Submissions.

32. The Plaintiff's submissions was to the effect that there was no contestation that by the time the Plaintiff went on the suit land he had found the Defendant's husband living on the edge of the land mistakenly thinking that it was land parcel No 489, which he had been allotted.

33. That evidence was corroborated by the Plaintiff's witnesses who testified that in the year 1994 they had been given various assignments by the Plaintiff to work on the land. It was also not in contention that the Plaintiff was not in exclusive occupation of the entire suit land.

34. That the evidence of DW2 was to be treated with caution as he had not told the truth on the proprietorship of parcel No 322 to the effect that during the examination in chief he had testified that he was the proprietor which evidence was retracted on cross examination and therefore nothing would stop him from lying as to the actual status of the suit land.

35. That it was not in dispute that various parts of the suit land were in occupation by the parties to the suit herein, what was however in contention was the time of the respective occupation and acreage thereof.

36. That the ground status report made in the year 2015 had confirmed, unlike the evidence of DW1, that the Plaintiff took possession of the suit land in 1981 wherein he had put a caretaker thereon in the year 1994. That the Plaintiff had therefore proved his claim of adverse possession which was limited to the acreage that he had stated in his evidence.

37. They also conceded that the defendant had proved adverse possession to 5 acres and not the entire land. They prayed for judgment in favour of the Plaintiff for adverse possession of 45 acres and 15 acres for the Defendant.

Defendant's submission.

38. It was the Defendant's submission that direction were taken on 10th April 2018 to the effect that ELC No 457 of 2017 be the lead file whereas ELC No. 458 of 2017 be treated as the counterclaim. That in the ELC 457 of 2017, the 1st Defendant was served by way of substituted service while the other defendants were served personally. That the 1st and 3rd Defendants did not enter appearance or file any papers.

39. That after consolidation of the matters they were subjected to pre-trial that or the purpose of compliance before they matter was set down for hearing.

40. The Defendant summarized the evidence that was adduced in court wherein after, submitted that the main issue for determination was whether William Isaboke Onsare and Mary Wambui Ndungu had proved their claim for adverse possession.

41. The Defendant poked holes in the Plaintiff's case to the effect that although he had testified that he had placed a care taker on the land in the year 1982 and that she was still on the said suit land, the said care taker was not called to testify and confirm the Plaintiff's evidence, further no pictures were produced in evidence to show that he had actually settled on the land. His evidence that after his retirement in the year 2016, he had built a house on the suit land was not supported by any of his witnesses as to the exact time he had built the house or what acreage of the land he was in possession of.

42. That further the ground status report dated the 24th May 2015 herein produced as Pf exh 3 neither stated when the suit land was visited or where the maker got the information of the ground details from. It also contradicted the Plaintiff's evidence that he got onto the ground in the year between 2015 and 2016 and before then his caretaker was in occupation. That it was worth noting that the maker of the said ground report was not called to authenticate his report which contradicted the area chief's report of 13th February 2017, a letter which confirmed that Patrick Ndungu's family was in possession of the land.

43. The Defendant' submission was that if indeed the Plaintiff got on the land in the year between 2015 and 2016, which was not the case herein, and the suit having been filed the year 2017, the claim for adverse possession was pre mature in the circumstance.

44. It was their submission that they had exhibited evidence to the effect that although her husband had been allotted land parcel No 489 by the Settlement Fund Trustee, he had in avertedly settled on parcel No 480 in the year 1984, (after having been shown the same by the surveyor) up to date.

45. That evidence of their possession was confirmed by the Plaintiff and his witnesses as well as a letter dated the 22nd April 2009 herein produced as Df exh 1, a letter dated the 7th February 2017 herein produced as Df exh 2, and a letter dated the 13th February 2017 from their area chief herein produced as Df exh 3. That at no time had she ever lost possession of the land which she had been in continuous and un interrupted possession thereof from the year 1984 to date.

46. That the Plaintiff herein had visited he suit land in the year 2009 wherein he had lay claim to the same. In the year 2016, the 3rd Defendant had also entered the suit land claiming that he had bought the land from the Plaintiff. That despite personal service to Onyancha (the said 3rd Defendant) he had failed to file any papers That since both the Plaintiff and DW3 were not the proprietors of the suit land herein her claim of adverse possession had no legal effect as against them.

47. The Defendant relied on the case of **Githu v Ndeete [1984] KLR 776** to submit that time ceased to run under the limitation of Actions At either when the owner took or asserted his right or when his right is admitted by the adverse possessor a holding which was also followed by this court in the Case of **Paul Kamande Gicheha v Jacob Kinyua Kiragu [2018] eKLR**.

48. That indeed the Defendant had produced pictures as evidence to prove the developments she had made on the parcel of land as well as to prove the fact that that she had been in possession of the suit land for a long period of time.

49. That according to the official search certificate, it was clear that Benjamin Kakitu Kisilu was the registered proprietor of the suit land wherein he had procured a title deed to the same but at which time the Defendant was already in occupation and therefore the said Benjamin Kakitu Kisilu must have had knowledge of her possession. They relied on the case of **Titus Kigoro Munyi vs Peter Mburu Kimanui [2015] eKLR**, to buttress their submission that Benjamin Kakitu Kisilu having failed to inspect his land for 12 years after having acquired it risked its title.

50. It was their submission that the Defendant having proved her claim over the suit land that the court grants the prayers sought in her suit being ELC 458 of 2017.

Analyses and Determination

51. This is a matter where there are two competing claims in relation to LR No. **Nyandarua/Kaimbaga/480**, by William Isaboke Onsare and Mary Wambui Ndungu against its registered proprietor, Benjamin Kakuti Kisilu for reason that they had acquired the 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:

52. **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...”

53. *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.

54. *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.

55. 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.

56. 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.

57. Having laid down the above provisions of the law, I shall briefly consider the evidence adduced in the present case so as to confirm whether the competing parties have discharged the onus placed on them.

58. It must not be lost that the competing parties herein instituted their separate suits by way of originating summons more or less around the same time, being ELC 457 and 458 of 2017 respectively claiming that they had acquired adverse possession to parcel LR No. **Nyandarua/Kaimbaga/480. That in view of the fact that the parties were the similar and so was the subject suit, by consent, these matters were consolidated on the 10th April 2018 with file No. ELC 457 being the lead file for the purpose of filing any further pleadings and/or recording of proceedings.**

59. It is also imperative to note that in ELC 458 of 2017 the Applicant therein Mary Wambui Ndungu had sought for a declaration of orders of adverse possession against the Plaintiff in ELC 457 of 2017, as well as against Benedict Onyancha. It is clear from the Official search documents herein produced as Pf exh 4 and Def Exh 5 that the suit land herein was registered to Benjamin Kakuti Kisilu and therefore by virtue of the provisions of Section 38 of the Limitation of Actions Act, an order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the said respondent is the currently registered proprietor of the land which the applicant seeks to have registered in his name. In this case, ELC No. 458 of 2017 the order for the relief of adverse possession cannot be made against the Plaintiff in No. ELC 457 of 2017 and Benedict Onyancha as they are not the registered proprietors of the suit land herein. I find that there was therefore a mis-joinder of parties in ELC 458 of 2017 and the suit against them must fail.

60. **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. I 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”.

61. In view of the above, I shall proceed to decide the case and the issues in controversy in relation to LR No. **Nyandarua/Kaimbaga/480** between the Plaintiffs in ELC 457 and the Plaintiff in ELC 458 as consolidated, against the Defendant Benjamin Kakuti Kisilu as the mis-joinder of the parties does not make the whole suit fatal. It therefore follows that there were two competing Plaintiffs for adverse possession on parcel No. **Nyandarua/Kaimbaga/480 as against its proprietor Benjamin Kakuti Kisilu.**

62. The only issue that avails itself for my determination therefore is whether the Plaintiffs in both cases have established title by adverse possession on LR No. **Nyandarua/Kaimbaga/480**

63. In the decided case of **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184**, the Court of Appeal restated what a Plaintiff in a claim for adverse possession had to prove in the following terms;

“ In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

64. I have considered the evidence adduced in ELC 457 of 2017, indeed the Plaintiff in this matter, Mr William Isaboke Onsare, whom for ease of the judgment shall be referred to as the 1st Plaintiff, stated that he had been allotted the suit land by the Settlement Fund Trustee in the year 1981 but took possession of the same in the year 1982 where he built a house and employed a care taker by the name of Grace Moraa to live thereon and take care of the suit land. He however did not call the said caretaker to confirm or rebut this piece of evidence. The 1st Plaintiff however called PW2, PW3 and PW4 who confirmed that indeed they had done some manual work for the 1st Plaintiff in the year 1994-1995 but did not testify as to when if at all, the 1st Plaintiff took possession of the land nor whether he had been in exclusive possession of the land openly and as of right without interruption for a period of 12 years. The evidence on record is that after the year 1995 or thereafter, the 1st Plaintiff resurfaced on the suit land in the year between 2015 and 2016

65. In the case of **Mtana Lewa –vs- Kahindi Ngala Mwamgandi (2005) eKLR**, the Court of Appeal observed that:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of the title for a certain period, in Kenya 12 years.”

66. Arising from the foregoing, it was incumbent upon the Applicant to demonstrate that he had been in continuous possession of the suit property for 12 years or more; that such possession has been notorious to the knowledge of the owner and that he had asserted a hostile title to the owner of the property.

67. Indeed by the 1st Plaintiff's own admission, he had testified that he started living on the suit land between the years of 2015 and 2016. He attempted to adduce evidence through a status report dated the 24th May 2015, confirming that he had been on the suit land long enough to

secure the orders of Adverse possession.

68. A look at the said letter, herein produced as Pf exh 3 the same is to the effect that the 1st Plaintiff had taken possession of the suit land in the year 1994 herein he had cultivated 2 ½ acres of the land, there was a small compound measuring 50 x 100 ft with a semi-permanent mud walled house with iron sheet, a small incomplete pit latrine, a small ramshackle mabati bathroom, and a small mud walled cubicle occupied by one of his sons.

69. In my humble opinion, this report contradicted the evidence adduced in court by the 1st Plaintiff who had testified that he had taken possession of the suit land in 1981, wherein in the year 1992 he had built his house wherein he had started staying on the same in the year 2015 while utilizing 40 -45 acres of the land.

70. 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.**

71. In this case, I find the said ingredients lacking. Indeed the relevant period herein would therefore be between 2015 when the 1st Plaintiff is said to have started living on the suit land, and the year 2017 when this suit was filed. That period, in aggregate translates to 2 years.

72. Pursuant to the provisions of Sections 107 and 108 of the Evidence Act, that the person who alleges is under a duty to prove all allegations as contained his claim against the respondent on a balance of probability. As was held in the case of **Kirugi & Another – Vs – Kabiya & 3 Others [1987] KLR 347**, where the Court of Appeal held thus:

“The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof.”

73. Taking all factors into consideration, I find that the 1st Plaintiff in EIC No.457 of 2017 has not proved his case on a balance of probability and therefore proceed to dismiss his case henceforth.

74. Having dismissed the 1st Plaintiff's application in EIC No.457 of 2017 I now turn on the Plaintiff's claim in ELC 458 of 2017 who testified as the Defendant in a mistaken counter claim but again who for ease of reference in this judgment, shall be rightly referred to as the 2nd Plaintiff. This is pursuant to the provisions of Section 1A and 3A of the Civil procedure Act as well as Article 159 (1)(d) of the Constitution.

75. Indeed the uncontroverted evidence adduced in court was that in 1982, the Plaintiff's husband, one Patrick Ndungu had been allotted parcel No 489 which he never took possession. That instead, he had taken possession of the suit land No. 480 after a surveyor mistakenly identified it for him.

76. It was further not controverted that the said Patrick and his family, the 2nd Plaintiff in this matter being his wife, have lived on the said suit land from the year 1984 to date.

77. To prove her case, the 2nd Plaintiff produced a letter dated the 22nd April 2009 wherein they had been informed by the settlement fund Trustee that they were in possession of parcel land No 480

78. She also produced a letter dated the 7th February 2017 by the Settlement Fund Trustee, and another dated the 13th February 2017 by their area chief, which letters had acknowledged she had settled on the land and had developed the same wherein she had also buried her husband thereon.

79. Indeed the status report produced by the 1st Plaintiff confirmed her evidence and even stated that the 2nd Plaintiff's husband was buried on the suit land in the year 1999. She also produced photographs that showed different homesteads built on the suit property as well as a picture of the said grave.

80. Her evidence was supported by her witness who testified as DW2 and who confirmed that the 2nd Plaintiff had moved onto the suit land in the year 1983 after her husband having acquired the same in the year 1982, and had developed the same and put a fence thereon in stages. That in the year 2016, a man by the name of Onyanha, who had been wrongly enjoined in the suit, had appeared on the land claiming to have bought the land from the 1st plaintiff. That he had built a small house on the land wherein in the year 2017, the 1st Plaintiff had also arrived on the suit land claiming ownership before he proceeded to cultivate on about ½ to 1 acre. That the 1st Plaintiff did not live on the suit land as he had a home at a place known as Kihorore.

81. She further confirmed that she utilized whole land was as he had ploughed about 45 acres, her homestead stood on another section of the land while her animals were kept in another section.

82. The 2nd Plaintiff's case was that she had been in uninterrupted occupation of the suit property since 1983 and had become entitled to be registered as the legal owner thereof in place of the Defendant, whom she admits is the title holder of the suit property.

83. The issue of the 2nd Plaintiff and her family having been in occupation and possession of the suit land was also confirmed by the 1st Plaintiff herein.

84. I am satisfied from the 2nd Plaintiff's testimony in (ELC 458 of 2017 just to be sure) and the documents she produced in evidence that she had discharged the burden of proof that she had been in open, continuous and uninterrupted occupation of the suit property since 1983.

85. At the end of the trial, the 2nd Plaintiff placed before the court a search document to prove that the Defendant was the registered owner of the suit land.

86. The Defendant did not defend the suit and as such placed no material before the court to contradict the 2nd Plaintiff's evidence. It is therefore my finding that the 2nd Plaintiff has proved her case on a balance of probability. I enter judgment for her against the Defendant as follows;

i. The 2nd Plaintiff Mary Wambui Ndungu has acquired title deed by adverse possession over L.R No. **Nyandarua/Kaimbaga/480 measuring 26 hectares.**

ii. The County Land Registrar Nyandarua is further ordered to cancel the title to LR No. **Nyandarua/Kaimbaga/480 in the name of Benjamin Kakuti Kisilu** and to dispense with the production of the original title deed for the suit land while transferring the land to the 2nd Plaintiff.

*iii. An order be and is hereby issued that the 2nd plaintiff be registered by the Nyandarua Land Registrar as the proprietor of all that land known as LR No. **Nyandarua/Kaimbaga/480** in place of Benjamin Kakuti Kisilu the Defendant herein.*

iv. The 1st Plaintiff William Isaboke Onsare is herein restrained permanently from remaining, using, possessing and occupying the said parcel of land **Nyandarua/Kaimbaga/480**

v. The 2nd Plaintiff shall have the cost of this suit.

87. It is so ordered.

Dated and delivered at Nyahururu this 22nd day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE