REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC. CASE NO. 115 OF 2017

MAKUYU CLUB ***(Suing through Joel Wanyoike,***

Irungu Ndirangu, S.K. Kirubi as trustees of the Club)**.....PLAINTIFF**

VERSUS

KAKUZI LIMITED .....DEFENDANT

JUDGMENT

Introduction:

1. The Trustees of Makuyu Club, the Plaintiff, sued the Defendant by way of an Originating Summons dated 18th September, 2002. In the said Originating Summons, the Plaintiff prayed for the determination of the following questions:

a. Whether the Defendant's title in a portion of land seventy (70) acres or thereabouts out of their land L.R. No. 11674 I.R. 20386/2 has been extinguished by the Plaintiff's adverse possession thereof for a period of more than twelve (12) years in terms of Section 38 of the Limitation of Actions Act.

b. Whether the Plaintiff has acquired title to the said land by its adverse possession thereof for a period of more than twelve (12) years from 1934 to date.

c. Whether the Plaintiff ought to be registered as absolute owner of the said land.

d. Whether the Registrar of Titles, Nairobi should now be ordered to register the said land in the name of the Plaintiff as absolute proprietor.

e. Whether the Defendant should not be condemned with costs of this suit.

f. In all the circumstances of the case which other orders are just and expedient to make.

2. The Originating Summons is supported by the Affidavit of one of the Trustees of Makuyu Club who has deponed that Makuyu Club was started in the year 1934 by White settlers and that the Club landscaped the suit land, made tee boxes on the land, constructed a make shift bar and sunk a pit latrine and a borehole on the suit property.

3. The Plaintiff's Trustee deponed that since the year 1934, the Plaintiff has used the land comprising of the golf course exclusively as its property without any interference from the Defendant or its agents and that the Plaintiff has a membership of members who have always used the facility as their own since 1934.

4. The Plaintiff's Trustee finally deponed that the Plaintiff's occupation of the portion of land known as Land Reference No. 11674 I.R. No. 20386/2 registered in the name of the Defendant and delineated as a golf course has exclusively been used by the Plaintiff's members openly and without force or interference from the Defendant; that the Defendant's title over the suit land has been extinguished and that the Defendant is holding the title in respect of the suit land in trust for the Plaintiff.

5. The Defendant filed Grounds of Opposition in which it averred that the Plaintiff has never had exclusive use or possession of any part of its land and that the Defendant has made use of the portion of its property used by the Plaintiff as a golf course for its agricultural activities, including grazing of cattle, cutting grass for hay and use of the track through the property without the consent of the Plaintiff or any hindrance from the Plaintiffs.

6. According to the Defendant, since the Plaintiff's Club was established until the year 1999, it used to contribute towards the maintenance of the golf course by supplying it with manpower, fuel for the tractors and other financial support towards the running of the Club. The Defendant finally averred that in any case, the Plaintiff has no capacity to hold immovable property and cannot in law maintain the suit.

7. In the Replying Affidavit, the Defendant's Managing Director adopted the Defendant's Grounds of Opposition. The Defendant's Managing Director deponed that Sisal Limited was granted a title to parcel of land known as L.R. 11674, Grant No. I.R. 21211 for a term of 941 years from 1st June, 1966; that the suit land was transferred to Kakuzi Fibrelands Limited on 8th December, 1967 and that on 29th July, 1971, the Certificate of Change of Name of Kakuzi Fibrelands Limited to Kakuzi Limited was registered.

8. The Defendant's Managing Director deponed that the Plaintiff's Club House sits on 4 acres of land and the members of the Club own the land; that the said land is distinct from the land upon which the golf course is situated and that the golf course sits on approximately 72 acres of land which is part of land known as L.R. No. 11674.

9. The Managing Director deponed that the Plaintiff's members have been using the 72 acres of the suit land as a golf course with the express consent and knowledge of the Defendant and the Defendant's predecessors in title; that the Defendant has always supported the Club and helped it with the maintenance of the golf course, including supplying it with diesel oil, lending it tractors and lawn mowers, payment of wages for the Club House Watchmen and the golf course employees and provision of building and maintenance materials and that the Defendant terminated these services in March, 1996.

10. The Managing Director of the Defendant deponed that the Defendant supplied water to the Plaintiff's Club from its Kiboko Dam until 1999; that the Defendant mowed the golf course until the year 1998; that the Defendant uses the golf course to graze its livestock; that the Defendant routinely collects hay from the golf course; that the Defendant's tractors and lorries routinely use the golf course to haul its forestry products and that the Defendant's title to the 72 acres of land upon which the golf course is situated has not been extinguished.

11. The Defendant's Managing Director finally deponed that the Defendant has at all times taken steps to assert its title; that it was always accepted that the land upon which the golf course is situated belonged to the Defendant and that from May, 2001, the Plaintiff and the Defendant agreed to formalize the Plaintiff's use of a portion of L.R. 11674 comprising the golf course by way of a licence Agreement and that the Plaintiff filed this case before the negotiations were complete.

The Plaintiff's case:

12. One of the members of Makuyu Club, PW1, informed the court that he became a member of the Club in 1998. According to PW1, he was appointed the Secretary of the Club in the year 2002; that the golf course which is situated on L.R No. 11674 was donated by the White farmers to the Plaintiff in 1934 and that since then, the Plaintiff's members have exclusively used the golf course to play golf.

13. PW1 informed the court that all developments on the 72 acres of land on which the golf course is situated, including landscaping, creation of tees and greens were done by the members of the Club and that the members of the Club also caused a 300 meters' borehole to be sunk on the suit land.

14. PW1 stated that initially, the Club used to pay rent to Makuyu Sisal; that Makuyu Sisal sold its interests in the suit land to the Defendant and that after the Defendant took over the land in 1967, the Plaintiffs have never paid any rent to the Defendant for using the golf course which is situated on the Defendant's land. According to PW1, it was not until the year 1998 that the Defendant started interfering with the day to day management of the golf course.

15. PW1 informed the court that other than the golf course that the Plaintiff's members have been using since 1934, there are also permanent buildings on the golf course housing a borehole with a pump, a bar and a store; that they also have a tractor which grounded on the golf course; that they also have a motor cross; that they have used the 72 acres of L.R. No. 11674 since 1934 and that they have acquired a portion of L.R. No. 11674 measuring 72 acres by adverse possession.

16. In cross-examination, PW1 denied that the Defendant used to assist them in running and maintaining the golf course. It was his evidence that some of the White settlers who owned the land were members of the Club and that the fence around the golf course was put up by the Defendant.

17. According to PW1, although some of the Plaintiff's members were willing to have a licence between the Club and the Defendant for the use of the suit property signed, other members declined to accede to the proposal. Consequently, the licence was never signed. It was the evidence of PW1 that they stopped using the Club house in 1999 when the dispute between the Plaintiff and the Defendant arose and that they have been borrowing mowers to cut the grass on the golf course. PW1 produced a bundle of documents as exhibits.

The Defence case:

18. The Senior Estate Manager, Forestry Division, of the Defendant, DW1, informed the court that the Defendant is the registered owner of land known as L.R. No. 11674 which it acquired in the year 1967; that the land was initially owned by an entity known as Sisal Limited which it transferred to Kakuzi Fibrelands Limited on 8th December, 1967 and that Kakuzi Fibrelands Limited changed its name to Kakuzi Limited.

19. DW1 informed the court that the Plaintiff own a parcel of land which has a Club house and that the said land is distinct from the golf course measuring 72 acres and situated on L.R. No. 11674.

20. The evidence of DW1 was that the Defendant and its predecessors in title consented to the use of the golf course by the Plaintiff's

members and that the Defendant always supported the Club and helped it maintain the golf course by lending it with tractors and mowers, paying of wages of the golf course employees and maintenance of buildings and materials.

21. According to DW1, the Defendant discontinued to maintain the golf course in March, 1996 vide a letter dated 26th March, 1996 and that in 1999, the Defendant stopped supplying to the golf course water from its Kiboko Dam.

22. DW1 stated that the Defendant has continuously taken various steps to assert its title and that when the Plaintiff attempted to connect electricity to the golf course, the Defendant objected by writing to the Kenya Power and Lighting Company notifying it that the land belonged to the Defendant.

23. DW1 informed the court that the negotiations to have a licence between the Plaintiff and the Defendant failed; that the golf course is barely used, having been neglected and that the Club house is dilapidated and not fit for habitation.

Submissions:

24. The Plaintiff's advocate submitted that the suit property herein was donated to the Plaintiff by White settlers in 1934 for use as a golf course by the Plaintiff's members; that the Defendant's predecessor in title, Sisal Limited, acknowledged that the Plaintiff was entitled to ownership of the subject land and that the Defendant also acknowledged that position vide its letter dated 6th August, 1997.

25. The Plaintiff's counsel submitted that for purposes of computation of time, the same started running in 1934 when the Plaintiff took over possession and control of the suit land and that the use of the said land by the Plaintiff as a golf course has been uninterrupted for a period exceeding sixty (60) years.

26. The Defendant's advocate submitted that the Plaintiff is not entitled to be registered as the proprietor of the suit property by virtue of adverse possession; that the Plaintiff has not occupied or used the golf course exclusively and that the Defendant and its predecessors in tittle have since the grant of the title supported the Club and helped with the maintenance of the golf course.

Analysis and findings:

27. It is not in dispute that the Defendant is the registered proprietor of land known as L.R. No. 11674 measuring 12,705 acres. According to the Grant, the said land was initially registered in favour of Sisal Limited on 5th July, 1966 as I.R 21211/1.

28. The title produced in evidence shows that the land was transferred to Kakuzi Fibrelands Limited on 8th December, 1967, which changed its name to Kakuzi Limited *(the Defendant).* The Certificate of Change of Name of Kakuzi Fibrelands Limited to Kakuzi Limited was registered against the title on 29th July, 1971.

29. The Plaintiff's case in this matter is that in 1934, a portion of the suit land measuring approximately 72 acres was donated to the Plaintiff by the then White settlers for the purpose of a golf course; that the Plaintiff has been utilizing a portion of land measuring 72 acres of L.R. No. 11674 *(the suit property)* since 1934 exclusively, openly, quietly and without the permission of the Defendant and that the suit property should be transferred to it by virtue of long use as prescribed by Sections 7 and 38 of the Limitation of Actions Act.

30. The Defendant has not disputed the Plaintiffs' averments that indeed the Plaintiff's members have been utilizing the suit property as a golf course since 1934. However, it is the Defendant's position that the Plaintiff's members have always utilized the suit land with its permission. Furthermore, it is the Defendant's assertion that the Plaintiff's use of the suit property as a golf course was not exclusive, and therefore does not meet the threshold for a claim of land by way of adverse possession.

31. The law on adverse possession is now settled. The Limitation of Actions Act is the primary statute providing for claims of adverse possession, and in particular Sections 7 and 38. Section 7 of the 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 or, if it first accrued to some person through whom he claims, to that person."***

32. Section 38(1) of the same Act provides as follows:

> ***"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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."***

33. The courts have given a purposive interpretation of the above two provisions of the law. In the case of ***Wambugu vs. Njuguna (1983) KLR 172***, the Court of Appeal held as follows:

> ***"In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost right to the land either by being disposed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his tittle are acts which are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it…"***

34. In ***Mbira vs. Gachuhi (2002) 1 EALR 137,*** the court held as follows:

"...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption …."

35. In the case of ***Celina Muthoni Kithinji vs. Safiya Binti Swaleh & 8 others (2018) eKLR, the*** Court stated as follows:

"It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was "nec vi, nec clam, nec precario," that is, peaceful, open and continuous. The Possession should not have been through force, not in secrecy and without the authority or permission of the owner."

36. For the Plaintiff's suit to succeed, the questions that must be answered in the affirmative are therefore as follows:

a. Has the Plaintiff's use of the suit property, that is the golf course, been continuous for twelve (12) years and exclusively?

b. Has the Plaintiff's use of the suit property been without the permission of the Defendant?

c. Has the Plaintiff's use of the suit property been open, adverse and notorious to the interest of the Defendant?

37. As I have stated above, the Defendant has not contested the fact that the Plaintiff's members have been using the suit property as a golf course since 1934. The Defendant's Director also admitted in evidence that the Plaintiff has never paid to the Defendant rent for using its land since 1967. Indeed, the Plaintiff produced in evidence the Minutes of the Plaintiff's Club dating back to 1934. The Plaintiff's Minutes of 1955 shows that the Plaintiff's members contributed money towards the development and maintenance of the golf course.

38. That being the case, the question of whether the Plaintiff's members have used the suit property for more than twelve (12) years is answered in the affirmative.

39. The Defendant's witness, DW1, informed the court that the Plaintiff's members have been utilizing the golf course with the express consent and knowledge of the Defendant and its predecessor, and that the use of the suit land by the Plaintiff's members was not exclusive.

40. According to DW1, it is the Defendant, whose senior officers were also members of the Plaintiff's Club, that maintained the golf course in all respects, and that it would not be logical for the Defendant to support a party who has occupied its land adversely. The Defendant's argument that the Plaintiff's use of the suit land since 1934 was with its permission should be contextualized.

41. The evidence before this court shows that the Defendant acquired L.R. No. 11674 from Sisal Limited on 8th December, 1966. On the other hand, the suit land had been registered in favour of Sisal Limited as the first allotee on 5th July, 1966. From the exhibited Grant, the original number of the suit land was L.R. Numbers 10721 and part of L.R. No. 3592, whose ownership is not known.

42. Suffice it to say that by the time the tittle of L.R. No. 11674 was issued to Sisal Limited in 1966, the Plaintiff's members were already using a portion of the land measuring approximately 72 acres since 1934. When the Defendant acquired the suit land in 1967, the Plaintiff's members continued using the land. Indeed, some of the officials of the Defendant also joined the Plaintiff's Club and used the golf course.

43. Although the Defendant's senior officials used the golf course, there is no evidence before me to show that they used the said golf course as Directors or Senior Managers of the Defendant. Indeed, all the Senior Managers of the Defendant, some of whom were the officials of the Plaintiff's Club, used the golf course as members of the Plaintiff.

44. The allegation by the Defendant that the Plaintiff was not in exclusive use of the golf course is captured in the letter dated 26th March, 1998, which culminated in the filing of this suit. The letter of 26th March, 1996 by the Defendant's Managing Director, and addressed to the Plaintiff's Chairman, read as follows:

"I have been given figures by our General Manager Finance and Administration demonstrating some of the ways in which Makuyu Club was supported by Kakuzi Limited in recent years. I did not know that support of this nature was being undertaken. I really do not think it is a good idea, either for Kakuzi Limited or for the Makuyu Club, that support of this nature should be allowed to continue. The Directors of Kakuzi Limited have a right to know the full extent of the support being given by the company to the Makuyu Club, and equally I think it is important that the members of the Club should understand the extent to which its various sections are profitable or unprofitable. I therefore propose the following:

1. ***With immediate effect I am stopping all support of Makuyu Club by Kakuzi Limited to include such items as:***

- ***The supply of diesel oil, petrol, lubricants, etc***
- ***The lending of tractors, lawnmowers etc***
- ***The payment of wages for Club House watchmen***
- ***The payment of wages for Golf Course employees***

- ***The provision of items to watchmen such as coats, torches, etc***

- ***The provision of building and maintenance materials.***

2. ***I would like you to agree with our General Manager Finance and Administration the value of all such items provided by Kakuzi Limited in support of the Makuyu Club to date in 1996.***

3. ***Within the Makuyu Club accounts for 1996, I would like all the costs as in (2) above to be shown as though borne by the Club itself. Correspondingly, I would like the total value of these items to be shown explicitly as a single donation to the Club given by Kakuzi Limited. In due course, I will discuss with you the size of a further donation to be given by Kakuzi Limited in relation to the balance of the 1996 year.***

4. ***Before discussing any further donation by Kakuzi Limited, I would like to have a better understanding of the profitability and viability of the various sections of the Club. The Club accounts which I have seen are inadequate for this purpose as certain items of cost and revenue are not allocated between the sections. Thus for example:***

- ***Subscriptions are shown as a lump sum item credited to the Club House. It would be more meaningful to credit non-playing membership fees to the Club House, gold fees to golf section revenue, tennis fees to tennis section revenue, etc***

- ***Maintenance, which is a significant cost item, is shown as a lump sum figure. This should be allocated between golf section, tennis section, Club House, etc***

- ***Other important items should be allocated amongst the sections wherever possible.***

I would like to see the accounts for 1994 and 1995 amended on this basis. I realize it may now be difficult for you to do this accurately, but please do the best you can, clearly stating any assumptions which you need to make.

5. ***Given the changes which I have requested in (1) and (3) above, and under the accounting treatment I have suggested in (4) above, please prepare an estimate profit and loss statement and cash flow for the Club for 1996, clearly stating the key assumptions which you are making for the rest of the year.***

I confirm that when I have received the accounts as per items (4) and (5) above, we will review the basis of on-going support of the Makuyu Club by Kakuzi Limited."

45. The letter of 26th March, 1996 clearly shows that the Defendant was not in occupation or possession of the golf course, but was only *"supporting"* the Plaintiff by supplying it with diesel oil, the lending of tractors, lawn mowers, the payment of wages for the golf employees and maintenance of the buildings.

46. Indeed, in the said letter, the Defendant informed the Plaintiff *"to agree with our General Manager Finance and Administration the value of all such items provided by Kakuzi Limited in support of the Makuyu Club to date"* and show in their accounts for 1996 *"as a single donation to the Club given by Kakuzi Limited."*

47. Although there was no proof to show that the Defendant supported the Plaintiff with the amenities indicated in the letter of 26th March, 1996, and when the said support, if at all, commenced, the Defendant acknowledged that the purported support was in the form of a donation to the Plaintiff, as opposed to the use of the land by the Defendant.

48. If indeed the Defendant was using the 72 acres' piece of land side by side with the Plaintiff, then it was incumbent upon the Defendant to produce its books of accounts to reflect how it was using the suit property.

49. In his letter dated 6th August, 1997, the Defendant's Managing Director acknowledged that the suit land was donated to the Plaintiff way before it purchased the land in 1967. After the Defendant purchased the land in 1966, it did not bother to take possession of the golf course. Indeed, the Defendant went ahead to donate another portion of land within L.R. No. 11674 measuring 4 acres to the Plaintiff for a Club house. The said land has been used exclusively by the Plaintiff as a golf course, and the Defendant, like any other philanthropic member of the society, or as part of its social corporate responsibility mandate, made some donation towards the running of the Club.

50. Considering the evidence before me, I am satisfied that the Plaintiff's use of approximately 72 acres of L.R No. 11674 as a golf course has been continuous, exclusive and without the permission of the Defendant for a period of twelve (12) years. The Defendant's title in respect of the said land has therefore being extinguished by effluxion of time.

51. For those reasons, I allow the Plaintiff's Originating Summons dated 18th September, 2002 as follows:

a. The Defendant's title in a portion of land measuring approximately seventy (70) acres or thereabouts out of their land L.R. No. 11674 I.R. 20386/2 has been extinguished by the Plaintiff's adverse possession thereof for a period of more than twelve (12) years in terms of Section 38 of the Limitation of Actions Act.

b. The Plaintiff has acquired title to the said land by its adverse possession thereof for a period of more than twelve (12) years from 1934 to date.

c. ***The Plaintiff to be registered as absolute owner of 70 acres, being a portion of L.R. No. 11674 I.R 20386/2.***

d. ***The Defendant to pay the costs of the suit.***

DATED AND **SIGNED** AT **MACHAKOS** THIS **19TH** DAY OF **SEPTEMBER, 2019.**

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND **SIGNED** AT **THIKA** THIS **18TH DAY** OF **OCTOBER, 2019.**

L. GACHERU

JUDGE