



**REPUBLIC OF KENYA**

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

**CASE No. 225 OF 2016 (O.S)**

**PAUL KINYUMO NJOROGE.....PLAINTIFF**

**VERSUS**

**MAINGI WAMUTI MBIRI.....DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit through Originating Summons (OS) dated 13<sup>th</sup> June 2016 claiming to have acquired the parcel of land known as Subukia/Subukia West Block 1/961 by adverse possession. He therefore seeks judgment against the defendant as follows:

*1. The Plaintiff be declared to have become the legal owner entitled by adverse possession having occupied, cultivated and developed the said Parcel of Land continuously and uninterrupted for over forty (40) years since 1972 and as the sole proprietor of ALL THAT parcel of land comprised in SUBUKIA/SUBUKIA WEST BLOCK 1/961 situated in Nakuru.*

*2. The Honourable Court do direct that NAKURU DISTRICT LAND REGISTRAR rectify the Land Register accordingly and the Plaintiff be registered as the sole proprietor of the said parcel of land namely SUBUKIA/SUBUKIA WEST BLOCK 1 / 961 in place of the above named Defendant in whose favor the land is currently registered.*

*3. The last original Title Deed in respect of SUBUKIA/SUBUKIA WEST BLOCK 1 / 961 which is with the Defendant be dispensed with.*

*4. Costs of this application be provided for.*

2. The OS is supported by an affidavit sworn by the plaintiff and opposed through a replying affidavit sworn by the defendant. By consent of parties, directions were given that the OS be heard by way of viva voce evidence, that the OS be treated as plaint, the replying affidavit be treated as defence and witness statement of the defendant and that the affidavit in support of the OS be deemed as plaintiff's witness statement. Additionally, parties were given liberty to file additional witness statements, list of witnesses, and list of documents. In that regard, the defendant filed witness statement dated 12<sup>th</sup> January 2018 which he relied on at the trial as well as List of Documents dated 12<sup>th</sup> January 2018.

3. The plaintiff deposed as follows in the supporting affidavit:

*1. THAT I am the plaintiff herein hence competent to swear this affidavit.*

*2. THAT I have been living on all that parcel of land known as SUBUKIA/SUBUKIA WEST 1/961 herein after referred as the suit land, situated at Subukia together with my family since the year 1977 to date as confirmed by the copy of the chief's letter attached herein and marked as 'PNK I'.*

*3. THAT I acquired possession of the suit land as a bequeath (sic) from my father who was a member of a land buying company and was subsequently issued with a title deed in the year 1984. I was holding the suit parcel of land as a trustee for my parents and other siblings due (sic) old age of my father. Attached hereto and marked as 'PNK II' is a copy of the title deed.*

*4. THAT sometimes in the year 1988 I entered into an agreement to jointly buy a tractor with the defendant herein and one Karanja Gitu. The agreement did not materialize and the defendant demanded a refund of his share of contribution which I was agreeable to refund. Attached herein and marked as 'PNK IIIa' and 'PNK IIIb' are copies of the said agreements.*

*5. THAT prior to the aforementioned sale agreement and in the foregoing right my father and my siblings developed residential*

houses on all that parcel of land known as SUBUKIA/SUBUKIA WEST 1/961 which developments consisted of our matrimonial home. That I later on equally constructed my matrimonial home on the suit parcel of land. (Attached and marked as 'PNK IV' is a bundle of photographs to prove the fact).

6. THAT the defendant later on instituted a civil suit in Nakuru CMCC no. 406 of 1988 seeking the following prayers;

- a. Specific performance of the agreement made on 14.4.88 or the refund of the agreed purchase price.
- b. Damages costs and interest at court rates.
- c. Any other or further relief.

I subsequently filed an appearance and a statement of defence in the matter. (Attached herein and marked as 'PNK Va' and 'PNK Vb' are copies of the plaint dated 18<sup>th</sup> July, 1988 and statement of defence dated 2<sup>nd</sup> September, 1988.)

7. THAT judgement was entered in favor of the defendant herein in Nakuru CMCC No. 406 of 1988 and the defence therein dismissed as judgement entered as prayed as demonstrated by a copy of judgement in Nakuru CMCC No. 406 of 1988 attached herein and marked as 'PNK VI'.

8. THAT in the exercise of his right to enjoy the fruits of the judgement and seeking the payment of the decretal sum of Ksh.77,860/= as tabulated therein the defendant herein caused my committal to civil jail for a period of thirty (30) days as demonstrated in a copy of notice show cause why execution should not issue dated 3<sup>rd</sup> July, 1989 in Nakuru Cmcc no. 406 of 1988 attached herein and marked as 'PN K VII'.

9. THAT upon release from civil jail I rejoined my nuclear family and resumed enjoyment of my proprietary rights on the suit parcel of land in terms of possession, use and title to land until sometimes in May, 2014 when the defendant herein commenced claiming beneficial interest over the suit parcel of land.

10. THAT the defendant reported the matter to the area chief Lari Location, Subukia and claimed to be the registered owner of the suit parcel of land. I was baffled by the allegations as I was still holding an original title deed of the suit parcel of land as the registered owner thereof. I conducted an official search thereof and I was puzzled by the finding that the defendant had actually been a registered owner since the year 1997. Attached herein and marked as 'PNK VIII' is a copy of the official search certificate.

11. THAT the foregoing instigated the filing of Nakuru Cmcc No. 815 of 2014 wherein sued the defendant herein seeking the following prayers against him;

- a. A declaration that the Plaintiff is the legal and lawful owner and proprietor of title no. SUBUKIA/SUBUKIA BLOCK 1/961
- b. The title deed issued to the Defendant be rightfully cancelled and the same be issued in favour of the plaintiff
- c. An order of permanent injunction restraining the defendant by himself, his agents, servants and/ or employees from dealing, trespassing, cultivating, and/or interfering with the Plaintiff's peaceful occupation and enjoyment of title number SUBUKIA/SUBUKIA BLOCK 1 /961.
- d. Any other relief that this honorable court may deem fit to grant.

(Attached herein and marked as 'PNK IX' is a copy of the plaint in Nakuru Cmcc No.815 of 2014).

12. THAT the defendant subsequently entered appearance and filed his statement of defence, notice of preliminary objection, list of witnesses and list of documents. The said Nakuru Cmcc No. 815 of 2014 is still pending hearing and determination. (Attached herein and marked as 'PNK X' is a copy of the defence in Nakuru Cmcc No. 815 of 2014)

13. THAT I was baffled to learn from the defendant's list of documents in aforementioned Nakuru Cmcc No. 815 of 2014 that the suit parcel of land was registered in his favor in the year 1997 through a vesting order issued in Nakuru Cmcc no. 406 of 1988. (Attached herein and marked as 'PNK XIa' and 'PNK XIb' are copies of duly executed transfer of land instruments and a copy of title deed in the name of the defendant dated 4<sup>th</sup> April, 1997 respectively).

14. THAT the defendant never assumed possession and or use of the suit parcel of land and I have a homestead comprising a dwelling house and other developments on the suit land.

15. THAT I have never received any formal notice to vacate or any communication from the Defendant herein demanding vacant vacation (sic) from the suit land for the period of more than thirty two (32) years that I have been in occupation of the suit land.

16. THAT in addition to paying all the land rates and rent I have continuously maintained the dwelling house, the grounds, the boundary fence and all other facilities on the premises to a reasonable habitable standard all at my own cost. Attached and marked as 'PNK XII' is a bundle of rate paying receipts.

17. THAT consequently, my family and I have enjoyed uninterrupted continual possession of the said property since 1977.

18. THAT I have lived on the suit land without surreptitiousness, and with the knowledge of the defendant without paying him rent, license fee or any other consideration and in a manner totally adverse to his interest on the suit property but he has never interfered with my occupation of the suit land.

19. THAT I pray that this Honourable Court to declare me the legal owner entitled by adverse possession of over thirty two (32) years since 1977.

20. THAT I have invested colossal amounts of money in making substantive improvements to the existing dwelling house on the property and marinated (sic) it to a habitable standard continuously ever since 1977. In addition I have kept the grounds in excellent condition and maintained a boundary fence around the property at all times since 1977.

21. THAT I am advised by M / s Munene, Chege & Co Advocates, which advice I verily believe to be correct that I have a right of ownership by adverse possession in respect of the suit land which right accrued to me by virtue of my uninterrupted, continual, exclusive possession of the suit property for more than twelve years from 1977.

4. On his part, the defendant stated as follows in his witness statement dated 12<sup>th</sup> January 2018:

*I am the legal owner of the parcel of land known as SUBUKIAISUBUKIA WEST BLOCK 1/961. Sometimes in or around 1988 the plaintiff invited me into a partnership to buy the TRACTOR registration No. KLX615 whereby I contributed Kshs 60,000/= and gave it to the plaintiff for purposes of purchasing the said tractor. The plaintiff and I agreed that once we purchase to (sic) tractor, it would be registered into both our names (I and the plaintiff's names). The plaintiff bought the tractor registration no. KLX 615 but dishonestly registered it in his names in an effort to defraud me. Upon discovery I confronted the plaintiff and he promised to transfer 6 Acres which is now the suit land and the I (sic) had bought 8 Acres from the plaintiff independently but later sold to third party to ensure that I don't get the land or my money. I moved the court vide NAKURU RMCC NO. 406 of 1988 where the court ruled in my favour and after the plaintiff refused to sign the documents, the court made a vesting order and transferred the said land into my names in 1997. The plaintiff moved from the subject land and brought down his house. I took the occupation from that day to date and I have been cultivating on my land peacefully.*

*In the year 2012, the plaintiff's brother ONE MUCHIRI NJOROGE trespassed onto my land and I went to my advocate Chuma Mburu & Co. Advocates who wrote a demand letter for the brother to vacate my land and after failing to move, I filed for an eviction order through the firm of Munene & Company Advocates who are now acting the plaintiff in NAKURU CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 612 of 2014 (MAINGI WAMUTI MBIRI VS MUCHIRI NJOROGE) which was withdrawn without my consent and they filed this originating summons against me. The plaintiff is not in occupation of my land but his brother and the plaintiff cannot occupy on behalf of another.*

*The plaintiff had instituted a suit against me in NAKURU CHIEF MAGISTRATE'S COURT CIVIL SUIT NO. 815 OF 2014 (PAUL KINYUMO NJOROGE vs MAINGI WAMUTI MBIRI) seeking to have the court declare him as the legal owner, my title deed to be cancelled and a permanent injunction against me and the case is still in court. The plaintiff has not brought this suit in good faith and is meant to go round and ensure that I don't enjoy my sweat in peace and also he never appealed the judgment given in the 1988 case. Litigation has to come to a close and the court cannot litigate over the same issue over and over again. In the first instance the Application is not available for the Plaintiff because the procedure has been flouted with impunity in that the plaintiff should have appealed but never did and I wish to state that the plaintiff has not been in possession of the subject land for 40 years as the plaintiff want the court to believe. The plaintiff is merely playing lottery with the court process in that he is claiming that they have been in possession of the subject land but no evidence has been tendered to prove the same. The photographs that had been attached by the plaintiff are my crops that I have cultivated and he rushed to the county to pay rates but does not confer ownership. There is no judicial substance in the plaintiff's application which ought that (sic) to be dismissed with costs. The plaintiff has not developed the land in any way.*

*That is all I wish to state for now.*

5. At the hearing, the plaintiff and the defendant testified as the sole witnesses in respect of their respective cases. The plaintiff adopted his supporting affidavit as his evidence in chief. He further stated that he purchased the suit property from a society known as Lari Wendani in 1975 and that he has a title deed in respect of it which was issued to him in 1986. He added that he took possession and has lived on the plot for 32 years. He still lives on the plot with his family. He also stated that he has sued the defendant since the defendant has a title deed for the suit property. The defendant is his neighbour with whom they live in the same village. He added that he has known the defendant for 20 years and that he does not know how the defendant got title to the suit property. He produced the documents annexed to his supporting affidavit as PExb 1 to PExb 12.

6. Under cross examination, the plaintiff stated that he lives on the suit property which measures a total of 13 acres with his brother named David Muchiri Njoroge. He farms on 7 acres while Muchiri farms on 3 acres. The remaining 3 acres is idle. He further stated that the defendant, one Karanja Gitu and he had a group in which they had a tractor which cost Kshs.120, 000. The amount was divided into 3 parts but none of them paid their share. The tractor was repossessed and sold. He denied that there has ever been any case between him and the defendant over the tractor. He further denied that he sold to the defendant 6 acres. Regarding Nakuru PMCC No. 406 of 1988, he stated that his mother withdrew the case and that the defendant herein was the plaintiff while he was the defendant. He added that the land did not belong to him but to the family, that judgement was entered against him in Nakuru PMCC No. 406 of 1988, that he did not pay the amount awarded in the judgment and that he was sentenced to serve civil jail in the case in 1993. He further admitted that there is another case being CMCC No. 815 of 2014 and that his brother David Muchiri had also been sued by the defendant seeking David Muchiri's eviction from the suit property. He also stated that as mentioned in PExb1, he lives on the suit property with his brother David Muchiri but that the land does not belong to David Muchiri.

7. Under re-examination he stated that the suit property belongs to the family and that he holds it in trust. The family comprises him and his 8 dependants and David Muchiri and his 6 dependants. The plaintiff's case was then closed.

8. For the defence case, the defendant adopted his witness statement dated 12<sup>th</sup> January 2018 which is reproduced at paragraph 4 above as his evidence in chief. He also produced the documents listed as items 1 to 6 in his List of Documents dated 12<sup>th</sup> January 2018 as DExb1 to 6 respectively.

9. Under cross examination, the defendant stated that he resides on plot No. 1080 which is near the suit property and that he grazes his cattle on the suit property. He has not constructed anything on the suit property. He added that he obtained a vesting order in case 406 of 89 in 1991, that the plot was registered in his name on 4<sup>th</sup> April 1997 and that he was aware of Nakuru CMCC 612 of 2014 in which he was the plaintiff while the plaintiff herein was the defendant. Under re-examination, he stated that the suit property measures 14 acres in total, that he was given 6 acres by the court and that the other 8 acres also belong to him since they were sold to him pursuant to a sale agreement produced as DExb3. The two parcels were then consolidated. The defence case was thus closed.

10. Parties filed and exchanged written submissions. The plaintiff argued that he has been living on the suit property since 1972 and that he has therefore become entitled to it through adverse possession and that this suit is not *res judicata* since CMCC No. 815 of 2014 is based on injunction and fraud which is not the same cause of action as that in this suit. He relied on the cases of Maweu v Liu Ranching and Farming Cooperative Society 1985 KLR 430, Samuel Miki Waweru v Jane Njeri Richu Civil Appeal 122 of 2001 and M'Ikiara M'Rinkanya & Another v Gilbert Kabeere M'Mbijiwe [2007] eKLR.

11. In response, the defendant submitted that the plaintiff had not annexed a copy of the title of the suit property and that this case ought therefore to be struck out, that possession by a stranger does not suffice and that the plaintiff had not satisfied the principles applicable to a claim in the nature of adverse possession. The defendant relied on the cases of John Wambura & another v Anakletus Wambura [2017] eKLR, Gabriel Mbui v Mukindia Maranya [1993] eKLR and Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR.

12. I have considered the pleadings, the evidence and the submissions of the parties herein. The issues that arise for determination are firstly, whether this matter is *res judicata*; secondly, whether the plaintiff has exhibited an extract of title and if not, whether the claim is for striking out; and lastly, whether the plaintiff is entitled to the reliefs sought.

13. Is this matter *res judicata*? The Court of Appeal discussed the essence of *res judicata* in Maithehe Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR as follows:

**30. The essence of the doctrine of *res judicata* was aptly set out by this Court in William Koross vs. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR-**

***“The philosophy behind the principle of *res judicata* is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***

...

***The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.***

...

***... one of the fundamental tenets of the doctrine as espoused by wigram VC in Henderson vs. Henderson [1843] Hare 100, 115 [is] that-***

***“The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”***

14. Parties herein are in agreement that besides this suit, there have been three other suits being NAKURU RMCC N0. 406 of 1988, NAKURU CMCC N0. 612 of 2014 and NAKURU CMCC N0. 815 of 2014. The first two cases are concluded while the last is pending. In NAKURU RMCC N0. 406 of 1988 the defendant herein was the plaintiff while the plaintiff herein was the defendant. The prayers in the plaint were specific performance of an agreement dated 14<sup>th</sup> April 1988, damages, costs and interest. It was averred in the plaint that in the agreement dated 14<sup>th</sup> April 1988 it was agreed that the defendant in the said case would refund the plaintiff therein KShs 60,000 or in lieu thereof he would transfer 6 acres of the property known as Subukia/Subukia West Block 1/961 to the plaintiff in the said case. The matter was concluded through judgment delivered on 25<sup>th</sup> May 1989 whereby judgment was entered in favour of the plaintiff as prayed in the plaint. Although the suit property herein was part of the subject matter in NAKURU RMCC N0. 406 of 1988, it is clear that the question of acquiring it by adverse possession was never raised in the said case. Thus, *res judicata* does not apply as between this case and NAKURU RMCC N0. 406 of 1988.

15. The other case is NAKURU CMCC N0. 612 of 2014 in which the defendant herein was the plaintiff while the defendant was one

Muchiri Njoroge, a brother to the plaintiff herein. The plaintiff wasn't himself party to NAKURU CMCC NO. 612 of 2014. According to the defendant, the case was withdrawn. There was no determination on the merits. Once again, *res judicata* is not applicable. Thus, the answer to the first issue for determination is that this matter is not *res judicata*.

16. The second issue for determination is whether the plaintiff has exhibited an extract of title. A perusal of the supporting affidavit filed alongside the OS herein reveals that the plaintiff annexed a copy of the title for Subukia/Subukia West Block 1/961 in the defendant's name as annexure "PNK II". Thus the second issue for determination is answered in the affirmative.

17. The last issue for determination is whether the plaintiff is entitled to the reliefs sought. The main relief sought is that the plaintiff be declared to have become the legal owner of Subukia/Subukia West Block 1/961 by adverse possession.

18. The law on adverse possession is well settled and is founded on **Sections 7, 13, 17 and 38 of Limitation of Actions Act**. The Court Of Appeal discussed the circumstances under which the cause of action accrues as follows in **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**:

*So when does the cause of action accrue? Section 13 provides that:*

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

*Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of Benjamin Kamau Murima & Others vs. Gladys Njeri, C A No. 213 of 1996 where it was held that:*

*"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."*

*Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; which provides that:-*

*"(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."*

*[13] Having the above pre-requisites in mind, it therefore follows that 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. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1<sup>st</sup> appellant 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 endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)*

*[14] Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...*

19. To succeed, the plaintiff must prove that he has been in exclusive possession of the suit property openly and as of right and without interruption for 12 years. From the copy of title annexed, the defendant became registered proprietor on 4<sup>th</sup> April 1997. Consequently, time can only run against him from that date.

20. The plaintiff deposed at paragraph 2 of the supporting affidavit that he has been living on the suit property together with his family "since the year 1977 to date as confirmed by the copy of the chief's letter" which he annexed and marked as 'PNK I'. A perusal of the said chief's letter shows that the chief states therein: "... To the best of my knowledge ... David Muchiri Njoroge a brother to Paul Kinyumu Njoroge has been residing in the mentioned piece of land with his family members since 1977". It is noteworthy that the chief does not mention the plaintiff. He mentions the plaintiff's brother instead.

21. One of the ways in which running of time can be interrupted is through the filing of a claim for recovery of possession. In **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR** the Court of Appeal stated:

*... If there was any time running in their favour towards adverse possession, it was interrupted when the suit was filed in March 2002. As this Court stated in Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura [1996] eKLR:*

*"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."*

***24. We have said enough on the first issue to satisfy ourselves that the claim for adverse possession was not proved and therefore no orders could be made in favour of the appellants. ...***

22. The plaintiff also deposed at paragraphs 11 and 12 of the supporting affidavit that he filed Nakuru CMCC No. 815 of 2014 against the defendant herein seeking a declaration that he is the owner of the suit property. The suit is still pending. Among the documents the plaintiff annexed as PNK X is a defence and counterclaim filed on 10<sup>th</sup> September 2014 wherein the defendant sought “judgment against the plaintiff for an eviction order from the suit land, ...”. It follows therefore that the filing of the claim for eviction of the defendant from the suit property on 10<sup>th</sup> September 2014 has had the effect of interrupting the running of time prior to the filing of this suit. As at 24<sup>th</sup> June 2016 when this suit was filed, time had stopped running way back on 10<sup>th</sup> September 2014. In short, the claim for adverse possession is not proved. Thus, the answer to the last issue for determination is that the plaintiff is not entitled to the reliefs sought.

23. In view of the foregoing discussion, I find no merit in this suit. It is dismissed with costs to the defendant.

**Dated, signed and delivered in open court at Nakuru this 28<sup>th</sup> day of November 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff

No appearance for the defendant