



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT NYAHURURU**

**ELC NO 326 OF 2017**

**HUMBPREY MBUGUA NJACHE.....PLAINTIFF**

**VERSUS**

**SITONIK OLE LOTAPASH.....DEFENDANT**

**JUDGMENT**

1. The present Originating Summons dated the 10<sup>th</sup> March 2017 was filed in court on the 14<sup>th</sup> March 2017 where the Plaintiff sought for orders;

i. That the title to parcel No. Laikipia/Marmanet/4563 registered in the names of Sitonik Ole Lotapash to be declared to have been extinguished and that the Plaintiff be declared to have acquired title thereto by virtue of adverse possession having been in peaceful, open, uninterrupted and exclusive possession thereof for a period exceeding 13 years.

ii. That the Plaintiff be registered as proprietor of parcel No. No. Laikipia/Marmanet/4563 having acquired the title by virtue of the doctrine of adverse possession thereof since 10/7/2003.

iii. That the Defendant be ordered to apply for the requisite Land Board consent and execute the relevant transfer document in favour of the Plaintiff, and release to the Plaintiff a copy of his PIN, ID, and passport photograph within seven (7) days of the date of judgment which the Deputy Registrar of this honorable court be authorized to execute all relevant documents to effect the transfer.

iv. That the Defendant be ordered to release and/or return the original title deed to the Land Registrar Laikipia for the same to be cancelled and in its place the Land Registrar to issue a title in favour of the Plaintiff in respect of No. Laikipia/Marmanet/4563 and in default of production of the original title deed, the same to be dispensed with.

v. That costs of this suit be borne by the Defendant.

2. The Plaintiff's Originating Summons was supported by the Plaintiff's annexed affidavit dated the 10<sup>th</sup> March 2017 as well as the grounds that were adduced at the hearing.

3. The Defendant having been served with the Originating Summons wherein 3 months down the line he had not filed pleadings, the Plaintiff sought for an interlocutory judgment be entered against the Defendant and the matter be set down for formal proof hearing by way of viva voce evidence.

4. The matter was set down for hearing, on which day the Plaintiff sought to effect service again upon the Defendant who had relocated to Emali to seek medical assistance. Service was effected again upon the Defendant but there having been no response the matter proceeded for formal proof.

**Plaintiff's case.**

5. The Plaintiff herein testified that before the 10<sup>th</sup> July 2003 he had decided to look for land wherein he and his friend one Kariuki, who was a land broker went to Siron where they had found another broker called Karanja who knew where there was land for sale. He led them to one Olekis Ole Katero who was selling his deceased mother's land by the name of Saina Wanja Maari.

6. That he was taken around the land which he liked and they had settled for Kshs.80,000/- per acre for the 15 acres, land which was to be exercised from Laikipia/Marmanet/226B.

7. On the 10<sup>th</sup> July 2003, Olekis Ole Katero and his son Nickson Dabash took him to an Advocate by the name of Mr. Kamanga Advocate

where they had executed the sale agreement. That he was buying 15 acres, which was to be excised from the land that measured 30 acres, for a total of Ksh. 1,200,000/- That he had paid Ole Katero Kshs.400,000/- at the time wherein they had agreed that upon payment of the other installments, he could take possession.

8. That at Paragraph 2 of the agreement, the same was to the effect that he would take the land immediately on execution. That he had taken possession of the land on the same day, the 10<sup>th</sup> July 2003 and had conducted the survey thereafter. That he had fenced the land, planted trees and had started using it for farming.

9. That since Olekis Ole Katero was the only child to his mother, the Plaintiff had thought that he was the administrator to his mother's estate although he did not find any papers from court showing that he was the administrator. He conceded that on the 10<sup>th</sup> July 2003, he had been sold to land by somebody who was neither the proprietor nor the administrator, that he therefore took possession of the land without permission of the owner since Olekis Ole Katero had no title deed and had received Kshs.400,000/- out of the total of Kshs.1,200,000/-. That he had still not cleared the whole balance.

10. He produced the certified copy of the agreement dated the 10<sup>th</sup> July 2003 as Pf exh 1, the letter of acknowledgement of payment of Kshs.465,000/- to Olekis Ole Katero as Pf exhibit 2 and a second letter of acknowledgment where he had paid Olekis Ole Katero a further Kshs.45,000/- before Counsel Njuguna Kamanga on the 15<sup>th</sup> January 2009, as Pf exhibit 3.

11. The Plaintiff further testified that he had not paid any further money but had lived on the suit land for many years where nobody had gone to evict him from the same. That Olekis Ole Katero had passed away in February 2010 wherein in the year 2015, two persons by the name of Maina and Lotapash, the latter being the son of Ole Katero, had subdivided the land into two wherein Sitonik Ole Lotapash had taken the portion of land that the Plaintiff had bought, and had registered it as Laikipia/Marmanet/4563.

12. The Plaintiff produced the mutation map as Pf exh 4 showing that parcel No. Laikipia/Marmanet/226 had been subdivided into 3 pieces. That the land register had showed that the land he was buying at the time was No. Nanyuki/Marmanet/226. That vide a letter dated 2<sup>nd</sup> June 2016 herein produced as Pf exh 5, he had sought for the green card for parcel No. Laikipia/Marmanet/226 from the Land Registrar Nanyuki wherein after payments, he had gone to Nanyuki and had been issued with the green card. He produced the receipt dated the 8<sup>th</sup> June 2016 for the payment as well as the green card, as Pf exh 6(a) (b) respectively.

13. That the green card had showed that plot No. Laikipia/Marmanet/226 had been registered in the name of Lucy Wanja Kahariri on the 7<sup>th</sup> September 2004 wherein on the 16<sup>th</sup> October 2015, at entry No. 5, the title to Laikipia/Marmanet 226 had been closed on subdivision with the resultant numbers being No. 4563–4565.

14. That he had also conducted a search on parcel No 4563, land which he occupied where he had found that the same had been registered to the name of Sitonik Ole Lotapash on the 13<sup>th</sup> November 2015. That he had subsequently placed a caution on the said title deed. He produced the green card to parcel No. Laikipia/Marmanet/4563 Pf exhibit No. 7.

15. That he had never been refunded the money he had paid for the suit and the family of Lucy had neither removed him from the suit land nor taken him to the Land Control Board to transfer the land to him.

16. He testified that since taking possession of the suit land, he had never left it and that he had used the same as his land and not as though he had rented it. That from the 10<sup>th</sup> July 2003 to date it was more than 15 years since he took possession and lived on that land. That Sitonik Ole Topash who lived in Narok had never evicted him from the land and therefore he sought for the court to order that he be issued with the title deed as well as the prayers sought in his Originating Summons.

17. Upon the close of the Plaintiff's case, they filed their written submissions wherein they submitted as follows;

18. Adverse possession is mainly a common law concept encapsulating the legal maxim 'nec vi vec clam nec precario' which essentially means 'without force', 'without secrecy' and 'without permission'. That this maxim has its root in the provisions of Sections 7, 17 and 38 of the law of Limitation of Actions Act.

19. That for a litigant to succeed in a case of adverse possession he must establish;

- i. Entry into the land in question (physical possession)
- ii. That the entry must be hostile to the title
- iii. The entry must be open as (opposed to secret) exclusive and notorious
- iv. The entry should be continuous or uninterrupted for a minimum of 12 years.

20. That in the present case, the Plaintiff herein entered into a sale agreement with one Olekis Ole Katero who was neither the registered owner of the land or the legal administrator of the estate of Saina Wanja Mari (deceased) the registered owner as he stated in the agreement.

21. That the sale agreement dated 10<sup>th</sup> July 2003 was void ab initio because Olekis Ole Katero had no capacity to sell the land in question. The Plaintiff herein was a trespasser as at 10<sup>th</sup> July 2003 when time started running.

22. The Plaintiff took possession of 15 acres, on the same day of the agreement, as the owner of the land where he has continued to exercise ownership rights to date. His entry was hostile to the interest of the registered owner because he started developing and utilizing the land as his own where he planted trees and put up the perimeter fence.

23. That the Plaintiff's occupation of the 15 acres of land has been open visible, exclusive and the entry has been continuous and not intermittent for a period of more than 15 years ago wherein the Defendant has never sought a court action to evict the Plaintiff or vindicate his right of ownership.

24. That pursuant to the provisions of sections 7, 17 and 38 of the Limitation of Actions Act, the Plaintiff is entitled to a declaration that the Defendant's right has been extinguished by adverse possession and the Plaintiff is the owner thereof as sought in his Originating Summons dated 10<sup>th</sup> March 2017.

25. That as a result of the ineptitude or laxity on the refusal of the registered owner to take legal action against the Defendant, the Defendant has continued to exercise rights of ownership over the 15 acres of land for a period exceeding 12 years. The Plaintiff relied on the decided case in the Court of Appeal No. 73 of 1982 in the case of **Public Trustee and Beatrice Muthoni vs Kamau Wanduru** to support their case.

#### **Determination.**

26. 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'.**

27. 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.**

28. 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.

29. 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."**

30. 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.**

31. The Plaintiff has instituted the present Originating Summons in which he has asked the **Court** to declare him as the absolute owner of parcel of land known as LR No. Laikipia/Marmanet/4563 having taken possession of the same since the 2003.

32. 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".**

33. 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."*

34. It is against the background of the affidavit and the submission herein submitted, by the Plaintiff 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.

**35. 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."**

**36. 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 Plaintiff s 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"**

37. 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.

38. Has the Plaintiff herein demonstrated the said elements?

39. The facts upon which the claim for adverse possession is made is that and on the 10<sup>th</sup> July 2003 he entered into a sale agreement with the person called Olekis Ole Katero for the sale of 15 acres of land at Kshs.80,000/- per acre an amount which totaled to Ksh 1,200,000/=. The said land was to be excised from No. Laikipia/Marmanet/226.

40. That both the Plaintiff and the vendor had executed a sale agreement before an advocate of the high court where the Plaintiff had paid a down payment of 400,000/= upon signing the agreement. A further payment of Ksh, 420,000/= was made on the 28<sup>th</sup> August 2006 and a sum of 45,000/= was paid on the 15<sup>th</sup> of January 2009. All payments were made to Olekis Ole Katero who acknowledged receipt of the same.

41. That the Plaintiff had taken immediate possession of the 15 acres upon execution of the sale agreement wherein he proceeded to develop and use the land as his and even erected a perimeter fence, planted trees and has cultivated the 15 acres from the date of the sale agreement to date without any interruption. That in the year 2015, he had learnt that the Defendant herein who was a son of Ole Katero had subdivided the land No. Laikipia/Marmanet 226 into three resulting into Laikipia/Marmanet 4563, 4564 and 4565. That the Defendant was registered to parcel No. Laikipia/Marmanet 4563 on the 13<sup>th</sup> November 2015. That since, the Plaintiff was in occupation of that parcel being No. Laikipia/Marmanet 4563, he had lodged a caution upon the same to protect his interest.

42. It was the Plaintiff 's contention that since the execution of the agreement of sale on the 10<sup>th</sup> day July 2003, he had been in open, peaceful and uninterrupted occupation and nobody had ever taken any legal proceedings or any attempt to evict him from the suit land. That consequently and in accordance with the common law doctrine of adverse possession, that the Defendant's title to the land had been extinguished and that the Plaintiff should be registered as the owner of the subject matter of the suit land

43. I have looked at the green card herein produced as Pf exh 6(b) and find that at the time the Plaintiff entered into an agreement for sale with the late Olekis Ole Katero on the 10<sup>th</sup> July 2003, the parcel of land Ref No. Laikipia/Marmanet 226 was registered in the name of the Settlement Fund Trustee wherein it had been transferred to one Lucy Wanja Kananeri and a title deed issued on the 7<sup>th</sup> September 2004. On the 16<sup>th</sup> October 2005 the said parcel of land had been subdivided resulting into parcels No. Laikipia/Marmanet 4563-4565 wherein the Defendant, Sitonik Ole Lotapashi had been registered as proprietor of parcel No. Laikipia/Marmanet 4563 on 13<sup>th</sup> November 2015.

44. According to the rule on adverse possession, a party claiming must have been in possession for over 12 years. From the evidence adduced in court, the Plaintiff took possession of the suit land immediately upon purchase of the same in the year 2003, 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 2015 while the Plaintiff was still in occupation

45. The Defendant in this matter had never taken any steps to enter onto the suit land or assert his right as the owner. It was the Plaintiff's evidence that he 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 produced as Pf exh 7. An example of the Plaintiff's notorious use of the suit land was exhibited at the hearing when he testified that he had planted trees, put up a fence and cultivated the land. That the Defendant had neither 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

46. 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**. Save for when the land was still registered to the Settlement Fund Trustee, time 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 putting up a fence on the suit property, planting trees and cultivating thereon. There is nothing to suggest that that occupation was secret or that it was not known to the Defendant.

47. 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."*

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

49. In the circumstance herein the Plaintiff's Originating Summons dated, 10<sup>th</sup> March 2017 succeeds in its entirety as prayed with costs at a lower scale since the suit was undefended.

50. It is so ordered.

**Dated and delivered at Nyahururu this 19<sup>th</sup> day of November 2019.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**