



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 233 OF 2016

JOHN GAKUHI GITAHU.....PLAINTIFF

-VERSUS -

MICHAEL KIBOI KARIUKI.....1st DEFENDANT

JULIUS MUGO GACHAGUA.....2nd DEFENDANT

JUDGEMENT

1. The present amended Originating Summons amended on the 25th June 2018 and filed in court by the Plaintiff sought for the determination of the following issues;

- i. Whether the Plaintiff has been in continuous, uninterrupted, peaceful and exclusive possession and occupation of land parcel No. Nyanyuki Marura Block III/4154 (Sweetwaters) for a period and the exceeding 12 years.
- ii. Whether the Plaintiff is entitled to land parcel No. Nyanyuki Marura Block III/4154 (Sweetwaters) by way of adverse possession.
- iii. Whether the transfer of No. Nyanyuki Marura Block III/4154 (Sweetwaters) by the 2nd Defendant in favour of the 1st Defendant was subject to the overriding interest of the Plaintiff to the suit land by way of adverse possession.
- iv. Whether the Plaintiff is entitled to an order that he be registered as the owner of land parcel No. Nyanyuki Marura Block III/4154 (Sweetwaters) in place of the 1st Defendant, and in the alternative the Plaintiff be compensated with an amount of money equivalent to the market value of the suit land.
- v. Who should meet the costs of this suit.

2. The said Originating Summons was supported by the supporting affidavit sworn by the Plaintiff and the evidence adduced at the hearing.

3. The 1st Defendant filed his Replying affidavit, sworn on the 11th January, 2017 on the 13th January 2017 denying the averments of the Plaintiff to the effect that he had been in possession of the suit land since 1996.

4. The 2nd Defendant did not enter his appearance or file any defence herein the Plaintiff vide his application dated the 28th October 2019 sought for interlocutory judgment entered against him.

Plaintiff's Case

5. The Plaintiff John Gakuhi Gitahi testified as PW1 to the effect that his claim for the parcel of land being Nanyuki Marura Block III/4154 sweet waters was based on the fact that he bought the parcel of land between the years 1996- 1998 from Maki Commercial Agency whose secretary was one Maina and its chairman was one Gachagua Kibiru. That the 2nd Defendant was a son to Mr. Kibiru.

6. He produced the original ballot paper dated 5th November, 1998 as Pf exh 1 and the receipt dated 9th November, 1998 for Kshs.20,800/= which was the final payment for the land as Pf exh 2.

7. He testified that after he had completed the payment, he had been issued with a clearance certificate which he produced as Pf exh 3 after which he had been taken to the suit land by a surveyor wherein he took possession and started utilizing it in the years from 1998 – 2016.

Where he used to cultivate maize, wheat, potatoes and beans.

8. That in the year 2016 he had noted that some people had trespassed on the land, when 4 men approached him and informed him that they were Joskaki Taxi drivers and that the land upon which he had been farming was theirs.
9. That he had gone to the chief's office in Marura location and reported the matter to the Chief after which he had been given a letter by the Chief dated the 6th June, 2016 and advised to make a report to the Land Registrar. He produced the said letter as Pf exh 4.
10. That he had subsequently applied for a search certificate at the lands registry wherein he had discovered that the property was registered in the name of Michael Kibui Kariuki the 1st Defendant. He produced the search certificate as Pf exh 5.
11. That on realization that the property was registered in the 1st Respondent's name, he had registered a caution on the land which he produced as Pf exh 6 and subsequently filed the present suit in court.
12. He testified that his claim was for adverse possession having lived on the land from the year 1998 to the present date. That he had not been issued with a sale agreement of the purchase.
13. He testified that the 1st Defendant had now sold the suit land to somebody else who had built a house thereon and had taken possession of $\frac{1}{8}$ of the land leaving the rest vacant.
14. In cross examination, the Plaintiff testified that he lived in Gitathini in Nyeri and not on the suit land which he had never lived on, but that he only did farming on the same.
15. That he had been issued with 4 ballots being No. 151 – 154 wherein the suit land had been from ballot No. 154.
16. That he had also sued the 2nd Defendant in ELC 234 of 2016 for which the suit in that matter had emanated from ballot No. 151 – 154 which pieces of land were not separate.
17. That from ballots 151 -154 resulted parcels No. Marua Block III/4165, 4166, 4180 and 4181. Wherein there had been an extra plot No. 5 which was not in the ballot. That he had bought the 6 plots on different dates, wherein after finalizing the payments, two plots were combined into one plot being No. 154 whose title deed was No. 4154.
18. That he had bought 4 plots at Kshs.15,000/= per plot wherein he paid in installments and therefore the receipt of Kshs.20,800/- had been the amounts paid for all the plots. He confirmed that although Pf exh 3, the clearance certificate, did not indicate the plot number, yet it was in regard to plot No. 4154. He also confirmed that he had bought all the plots from the same company wherein he had taken to the plot by a surveyor and that they were just the two of them.
19. When referred to paragraph 5 of his supporting affidavit which was read to him, he responded that he did not make his own private arrangements, but was shown the beacons by the surveyor who had the map although the parcels of land were not in the Registry Index Map (RIM) at the time.
20. That he had not been living on the land and that it had been only in the year 2016, that he had discovered that the 1st Defendant had trespassed on his land wherein he had placed the caution.
21. That he had never built on the suit land No. 4154 but that there had been a building that had demolished which building was not on the suit land.
22. That Joskaki Taxi Drivers had lay claim to parcel No. 4166. He admitted to having disputes with other people about his parcel of land but that it was not true that he did not know the location of his land. He blamed the director Mr. Mugo whom he alleged sold the same parcels of land to multiple people, one of whom was Michael Kiboi. He denied the suggestion out to him that the 1st Defendant had fenced the suit land after having bought it and stated that the 1st Defendant had never been on the land.
23. He also stated that although there had been status quo orders, a building had been put up on the land wherein he had informed his Counsel who in turn had written a letter to 1st Defendant who had told them that he had not sold the land and the building was not theirs. The witness testified that he was sure of the location of his piece of land, and that the building was on the same.
24. On cross examination by the 2nd Defendant, it was the Plaintiff's response that the ballot No. 154 was in regard to the suit land. He was referred to Pf exh 1 and exh 3 wherein he confirmed that although the certificate was signed the ballot Pf exh 1 had no signature but that the 2nd Defendant who owns the company was in a better position to tell why the signature was missing.
25. He confirmed that Pf exh 1 had been issued on the 5th November, 1998 and that he had paid his last instalment on 9th November, 1998. That he had been issued with a ballot card before he paid. That the ballot was not signed and that one plot sold for Kshs.15,000/-. That he did not have the receipts because they got lost.
26. The next witness PW 2 was declared a hostile witness by Counsel for the Plaintiff who then proceeded to cross examine him wherein he started that he had lived on his father's land in Baraka since the year 2010. That he knew John Gakuhi the Plaintiff who had built a small

dam in Baraka next to his land, ploughed and gone away.

27. He testified that they had a case against the 2nd Defendant Julius Mugo where members sought titles from him. That his father had bought the property from a member wherein he had been given a ballot, by Maki Commercial Agencies but that the title had been withheld by the 2nd Defendant.

28. On cross examination by the 1st Defendant's counsel, Pw2 confirmed that he had come to Baraka in the year 2010. That the Plaintiff did not live in the village. That he had built a little site house inside the dam at the time when there was no water in the dam.

29. That he neither knew how many plots the Plaintiffs had nor from whom he had bought the plots from, but that the 2nd Defendant would know how many plots the Plaintiff had because they were his plots. He also confirmed that the Plaintiff's little house had been demolished by the 2nd Defendant but that it had not been true that where the little house stood was the same place as where the storied building had been built. That what separated the place where the little house and the storied building was put up was a foot path.

30. When cross examined by the 2nd Defendant, PW2 disowned his witness statement but confirmed that the Plaintiff built a small house at the dam. That the 2nd Defendant was the person who had paid a visit at the dam and had fenced the area that later he has seen the 2nd Defendant in the company of 3 people break and carry away the little house in his double cabin car. That the 2nd Defendant was armed with a panga at the time.

31. He confirmed that there were many people who had seen the 2nd Defendant break the little house and carry it away but that he did not call the police because the 2nd Defendant owned the land.

32. PW 2 then went ahead to lay accusations on the 2nd Defendant whom he described as a bad man wherein the court had to interject and ask him to focus on the matter before it.

33. He testified that the Plaintiff had neither cultivated nor harvested his crops because he only ploughed the land once. That the distance between his father's land and Plaintiff's alleged land was only 40 meters apart. The Plaintiff thus closed its case.

The 1st Defendants Case.

34. The 1st Defendant, Michael Kiboi Kariuki testified that he lived in Baraka dam Marua sub-location and that he was retired from the civil service having been a chief for more than 20 years.

35. He adopted his replying affidavit sworn on 11th January, 2017 as his evidence and proceeded to testify that he had sought to buy land in the year 2010 after seeing the land being measured in the block which was known as 1373 which parcel was situated on the path he used to use on his way to his office.

36. That he had looked for the owner of the land who was the 2nd Defendant who confirmed that the land was his and showed him a transfer document transferring the land from Mirriam Nyawira Mwaniki. They then agreed on the value of $\frac{1}{8}$ acre of the land at Kshs.255,000/= He also inquired from one Kagendo who knew that area well on the ownership of the land who confirmed that the land was Nyawira's but that she had sold to Maki Commercial. He then carried out investigation/due diligence wherein he found that the land was registered to Maki Commercial Limited.

37. That on the 8th November, 2011 he had visited Maki Commercial Agencies wherein he had paid Kshs.50,000/=. He was shown the mutation form by Julius – 2nd Defendant who agreed to sell to him plot No. 1 which was Nyanyuki Marura Block III/1373. When he was taken to the ground by the 2nd Defendant, he found that the land was in a dam and had been fenced off for security reasons because somebody had once fall inside.

38. Since he wanted to build, he had sought for an alternative piece of land for which he bought and built upon it. That he was yet to build on the plot in the dam. That although the 1st plot was in the dam, he still liked it and informed the 2nd Defendant that he would wait until the water dried. That he paid Kshs.205,000/-. That the 1st deposit of Kshs.50,000/- made on the 8th November, 2011 had been the payment for the land in the dam. He produced the receipt for payment of Ksh. 50,000/= as Df exh 1. That thereafter he had looked for money and on 9th December, 2011, he had completed paying for his parcel of land in the dam.

39. That they had entered into an agreement on the 9th November, 2011 which was signed by the 2nd Defendant on behalf of Maki Commercial Agencies and which agreement he produced as Df exh 2(a).

40. It was his testimony that at the time he bought the suit land, he did not see beacons as the place was full of water. He had waited until the water had subsided when he saw the beacons. That they had gone to the Land Control Board for transfer of the same in his name wherein the same was transferred on the 15th December, 2011 and he was issued with a title which he produced as Df exh 3.

41. He confirmed that by the time he bought the suit land which was a section of the dam, there was nothing thereon apart from water. That when the water subsided he had put his own fence.

42. That contrary to the Plaintiff's evidence, between the years 1994-1995, there had been a construction company building a road at that

area where they had dug murrum for two (2) years from where the suit land is situated and left. That it was therefore not true that the Plaintiff used to farm on the area.

43. That since buying the land in the year 2011, he had not disposed it off and it was situate on his way to work. That he had taken photographs of the physical area of the suit land.

44. He proceeded to introduce the photos as follows:

i. 1st photo showed the dam, wherein people had tried to fill it up.

ii. 2nd photo showed a cow grazing near the dam. There was a lot of water. There were people building around the dam but on plot 4156.

iii. 3rd photo, showed where the Plaintiff had built on plot 5154 upon which nobody had built as it had a lot of water.

45. He produced the photographs as Df exh 4 (a-e).

46. The 1st Defendant proceeded to testify that on the 4th June 2016 the Plaintiff had built 10 x 10 house on plot No. 4169 that belonged to Joskaki Taxi drivers and that it was not he who had destroyed the house.

47. That plot No 4154 was still flooded and nothing had been built thereon. He also produced a map to the area and pointed out that Plots No. 4165, 4166 and 4180 and 4181 are not adjacent to plot No. 4154 and that they were all sub-merged in water. He testified that the Plaintiff had no idea where his plots were and that he had told false hoods to the court. He denied having built on the Plaintiff's parcel of land. He sought for the Plaintiff's case to be dismissed.

48. On cross examination, the 1st Defendant confirmed that he had bought the land from Maki Commercial Limited and was given receipts. That the said company was not the same as Maki Commercial Agencies.

49. That although the agreement depicted that he had bought $\frac{1}{4}$ acre yet the truth of the matter was that the land measured $\frac{1}{8}$ acre which acreage was depicted on the title deed.

50. That between the years 1994-1995, he had been a youth leader. In 1998, he had not been aware that there was the sale of the plot because he knew the owner of the land and at that time she was not selling the land, as the Company had started subdividing them in the 2010 when he was the area chief.

51. The 2nd defence witness, Phylis Wangari Wamoge, a village elder at Baraka dam, having recorded her statement on 22nd February, 2017 adopted the same and testified that she was the one who was charged with taking care of plot No. 4154, the place where the 1st Defendant had fenced off.

52. That at the time she and some laborers had put up the fence, there were no developments there as it had been the path used by pedestrians. She confirmed that she had come to know the Plaintiff after he had filed a complaint on a boundary dispute with the chief in another case and confirmed that he never used to live or plough on the suit land. That at the time when there was a boundary dispute pertaining another land, the Plaintiff had mentioned that he had two other plots but that she did not know which plots he was referring to.

53. That later he had reported to their office that his plots had been had been taken. He took her to the site of the plots and showed her some plots stating that they had been sold. He then informed her that he wanted to build a small house thereon to which she could either look after it as a caretaker or get somebody to live there. That subsequently, he had built a small structure opposite plot No.5154 which house had been removed the following day.

54. On cross examination, the witness confirmed that plot No. 5154 had been bought by the 1st Defendant. That the land in that area had been sold around the year 1998 by Maki Commercial.

55. That at the time the Plaintiff went to their office to complain, he had not built a house. There was nothing on the land and the land was not ploughed. The 1st Defendant then closed its case.

2nd Defendants' case.

56. The 2nd Defendant, Julius Mugo Gachagua, testified that he was the directing manager with Maki Commercial Company Limited in the Nanyuki office. That their company was a land buying and selling company. That they also managed houses.

57. That part of the company was an Agency with two directors, his father John Gachagua and the partner Joseph Maina Githuku. That as an agency, it had offices everywhere with the Company's office based in Nanyuki.

58. That as per the evidence adduced by the Plaintiff, that he had been sold to the land by the 2nd Defendant's father in 1998, the same could not be possible as his father had died on 29th April 1997, his partner having died earlier in the year 1996 which then explained why there were no signatures on the ballot cards produced in court.

59. That the Plaintiff could not purport to have bought 6 plots at Kshs.20,800/= or even Kshs.100,000/=. That the Plaintiff did not produce any receipt of payments and there were no records of him having been to their offices. That they had perused at all the duplicate receipts in their office from the 1998 and there were no records of the Plaintiff.

60. That the clearance certificate from their office contained serial numbers. The Plaintiff's certificate Pf ex 3 had no serial number, no plot number and was not even dated. That it was not possible that the signatures thereon belonged to his father and his partner because both those persons were long dead.

61. That the Company had bought the whole suit land measuring 15.3 hectares from one Miriam Nyawira Mwaniki in the year 2009 after which a transfer had been effected on the 20th April 2009.

62. That the sub-divisions were done on 30th April, 2009 by a surveyor called John Karuga. That the cards produced as Pf Exh 1, 2 and 3 did not contain the subdivisions.

63. That after the demise of their father, many people took advantage of his absence and came up with their own documents, that explained why the Plaintiff did not produce his papers in their office. He concluded his testimony by stating that the Plaintiff did not have any land in Baraka.

64. On cross examination, the 2nd Defendant testified that he had been served with summons showing that had been enjoined by the 1st Defendant and that he did not file any papers.

65. That Maki Commercial Company came into being in 1994 wherein he became the manager from the year 1998. That the agency was a subsidiary of the company which was run by his father and his partner. That the suit land was a sub-division of parcel No.1373 which measured about 13 hectares with about 200 plots. That Baraka dam village was very big. That the agency was helping the company to sell land.

66. That people would ballot for the land in the following process;

- i. One paid for the plot at Maki Agency anywhere.
- ii. Then followed the balloting which ballot paper would contain the land, upon the payment of Kshs.500/= to the company
- iii. After paying for a plot one would then be issued with a register number, plot number, ballot number.

67. That Pf ex 3 contained the register number, the number of shares, but the rubber stamp on the receipt was not the company rubber stamp. That Maki agency was not the same as the company.

68. He also confirmed that the 1st Defendant's receipt was also not stamped, but that the 1st Defendant bought the property on outright purchase and therefore did not go through the normal shares.

69. That his father and his partner had no written agreements to sell to shareholders. That after the deaths of his father and his partner, the business had kind of closed down so that they could get the files to know who was claiming what.

70. He confirmed that the 1st Defendant's property's was not $\frac{1}{4}$ acres but measured 50 x 100 which was an $\frac{1}{8}$ of an acre. That they had not sold plots in block 1373 prior to the subdivisions. The 2nd Defendant closed his case wherein parties filed their respective written submissions.

Plaintiff's submission

71. After summarizing the evidence adduced in court, the Plaintiff framed their issues for determination as follows ;

- i. Is the Plaintiff entitled to the suit property by way of adverse possession?
- ii. Was the transfer of the suit property by the 2nd Defendant in favour of the 1st Defendant subject to the overriding interest of the Plaintiff by way of adverse possession?
- iii. Is the Plaintiff entitled it to an order that he be registered as the owner of the suit property or in the alternative to compensation at market value.
- iv. Who should meet the costs of the suit.

72. On the first issue for determination are our it was the Plaintiffs submission that although he had testified that he had purchased the suit property his claim was one for adverse possession. They relied on the case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR**.

73. The Plaintiff further submitted that he had bought suit property in the year between 1996 and 1998 wherein he had made the last payment on 9th November 1998 as per the receipt produced as Pf ex 2. That as per the finding in the case of **Wambugu vs Njuguna [1983] KLR**

172 times began running on 9th November 1998 for purposes of the Plaintiff's claim for adverse possession.

74. That as per his evidence, upon the completion of payment in 1998 he had taken possession of the suit land where he had utilized it by farming a variety of agricultural produce up to the year 2016 a period of over 17 years, when he found out that the property had been transferred and registered to the 1st Defendant.

75. That in the decided case of **Paul Mwangi Gachuru vs Kamande Nguku [2017] eKLR**, the court had discussed the requirement of an open, continuous, exclusive and notorious use of property in a claim for adverse possession. That the farming on the suit property by the Plaintiff indeed was open, continuous, exclusive and notorious use of the said land which use was adverse to the vendor. His claim for adverse possession thus materialized on the 9th November 2010 which marked 12 years from the date of the final payment and possession of the suit property.

76. That the 1st Defendant had only become the registered owner of the suit property on 15th December 2011 a period of 13 years after the Plaintiff had completed payment for the purchase of the suit property and had utilized the same for gain. Prior to this, the 2nd Defendant had neither instituted any proceedings for the recovery of the suit property nor had he interfered in any way with the Plaintiff's continuous and exclusive possession of the suit property well over 12 years.

77. On the second issue for determination, the Plaintiff relied on the provisions of Section 28 of the Land Registration Act which provided for overriding interests as was the decided case in **Peter Mbiru Michiki vs Samwel Mugo Michuki [2014] eKLR** to submit that and it was unquestionable that the right acquired by virtue of adverse possession was an overriding interest, binding on the land, and any transaction affecting the land thereafter was subject to the stated overriding interests. That in the present case, the Plaintiff's right to the by virtue of adverse possession accrued on the 9th November 2010, one year prior to the transfer of the suit property by the 2nd Defendant to the 1st Defendant. The said transfer was subject to the Plaintiff's overriding interest to the suit property and the transfer thereof was voidable.

78. On the issue for determination as to whether the Plaintiff was entitled to an order that he be registered as the owner of the suit property or in the alternative to compensation at market value, the Plaintiffs submission was that since the Plaintiff had acquired the suit property by way of adverse possession, he had extinguished the title of the registered owner as was held in the decided case of **Rahab Wanja Mica vs Jonah Muchoki Kariuki [2018] eKLR**.

79. That in the case of **Githu vs Ndeete [1984] KLR 776**, the court had held that that change of ownership of land which was occupied by another person under adverse possession did not interrupt such person's adverse possession. In their situation the registration of the 1st Defendant did not interrupt the Plaintiff's adverse possession and consequently the Plaintiff was entitled to an order that he be registered as the owner of the suit property in place of the 1st Defendant. That in the alternative the court could deem it appropriate that the Plaintiff be compensated with an amount of money equivalent to the value of the suit property equivalent to the market value together with interest at courts rate from the date of filing suit to account for income lost after he was deprived use of the suit property.

80. On the last issue for determination as to who should meet the cost of the suit, it was the Plaintiff's submission that since he had proved his case against the Defendants, then consequently costs ought to be awarded to him.

1st Defendant's submission

81. The 1st Defendant's submission was that the doctrine of adverse possession applies where a person, for a period of 12, years or more occupied the land of a registered owner and carried on activities that are not consistent with the rights and interests of the real owner. That the person in possession as it were uses the land as though it solely belonged to him and in so doing exercises rights consistent with the ownership. The actions of an adverse possessor are hostile as against the interest of the real owner.

82. The 1st Defendant relied on the decided case in the supreme court of India in **Karnataka Board of Wakf vs Government of India & Others [2004] 10 SCC 779** as well as the case in **Kimani Ruchine vs Swift Rutherford & Co Ltd [1980] KLR** which discussed the essentials of adverse possession. The Defendant submitted that in a claim for adverse possession two concepts are contemplated the first being disposition and the second being discontinuation.

83. That in the present scenario, there was no doubt that the Plaintiff herein was not in possession of the suit land and that the only time he took possession/occupation was when he had built a small structure thereon but which structure had lasted for only one day. That further it was not clear as to when the Plaintiff had started occupying the 1st Defendant's land if at all for the purpose of adverse possession.

84. That it was clear that the 1st Defendant bought the suit land from the 2nd Defendant in the year 2011 and took possession. That it was under five (5) years before the Plaintiff filed the present claim against him whereby the limitation, for all intent and purposes had not run out.

85. That the certificate of title to the suit land was issued to the 1st Defendant on the 15th December 2011 and therefore the Plaintiff was estopped from laying a claim of adverse possession as against the 1st Defendant where time ran earlier than that. That it was obvious that the 1st Defendant was not the owner of the land and did not have title to the same before the 15th December 2011.

86. That the evidence adduced in court by the 1st Defendant who had been a chief to the area for more than 20 years and DW2 the village elder who had also lived in the area for more than 21 years was to the effect that they had not known or seen the Plaintiff in the area save for the year 2016 when he had a land disputes claim to another parcel of land.

87. The 1st Defendant's submission was that the claim for adverse possession and the claim for proprietorship could not co-exist as one could

not claim adverse possession against his own title which he alleged to have been fraudulently divested off by the 1st and 2nd Defendants. In essence therefore he prayed for the Plaintiff's claim to be dismissed.

The 2nd Defendant's submission.

88. The 2nd Defendant's submission was that the Plaintiff's claim did not hold any water for reason that he had not been in possession of the suit land let alone for a period of more than 12 years.

89. Secondly that the persons he claimed to have bought the suit land from had long been deceased before the time of the alleged sale. And third that the documents he produced in court had been issued to him by a company known as Maki Commercial Agency which was not the same as Maaki Commercial Company Ltd who were in charge of selling the suit parcel of land.

90. Lastly it was the 2nd Defendant's submission that from the evidence adduced in court that the Plaintiff was unsure of his parcel of land and where it was situated.

Analyses and Determination.

91. Having considered the material placed before this court together with rival submissions, I must point out on the onset that the 2nd Defendant did not file his defence in an action which required the filing of a defence and therefore had no right to be heard in defence although he still retained the right to participate in the cross-examination of witnesses and the right to file and present final submissions.

92. The issue that the 2nd Defendant had not filed his defence was raised way into the testimony of the 2nd Defendant to which objection was rejected for reason that the same came late in the day. The court notes that despite the 2nd Defendant having been allowed to testify, his evidence amounted to an ambush on the Plaintiff and as such his evidence has not been considered in the final determination of this judgment.

93. 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'.

94. 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.

95. 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".

96. 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."

97. It is against the background of the affidavit and the submission herein submitted, by both parties that I find the issues arising for my determination as being:

i. Whether or not the Plaintiff has acquired the suit property by way of adverse possession.

98. 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.”

99. The onus is on the person or persons claiming adverse possession:

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

100. 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.

101. Has the Plaintiff herein demonstrated the said elements?

102. It is clear from the evidence adduced in court that the Plaintiff herein allegedly bought the suit land between the years 1996 and 1998 wherein he proceeded to utilize the same by cultivating agricultural produce and it was only in the year 2016 that he had discovered that the 1st Defendant had interfered with his parcel of land. Upon conducting a search, he had discovered that the 2nd Defendant had sold the said suit land to the 1st Defendant who had then secured title to the same.

103. It is interesting to note that the witnesses called to testify in this matter including the Plaintiff himself testified that he had never been in possession of the suit land. The testimony of the defence and its witnesses was that the only attempt the Plaintiff had made to take possession of the suit land had been when he had built a little structure in the dam, which according to the testimony of the Defendants and DW2, the village elder, the same had not been constructed on the 1st Defendant's land but on the opposite parcel of land. In the case of ***Githu v Ndeete (1984) KLR 777***. The Court of Appeal held that it was permissible for a person to claim adverse possession to an identifiable portion of the land. In this case, I find that the Plaintiff did not show that he was in possession of an identifiable portion. Without such evidence, an order of adverse possession cannot issue in respect of an undefined portion.

104. The Plaintiff's own testimony was that when he went to the land he had been accosted by persons from Joskaki Taxi Association who informed him that he was on their parcel of land. It was thereafter that he had built the little structure but again, not on the 1st Defendant's parcel of land. It is clear from the above narrative that the Plaintiff was not sure on the location of his land and had never occupied the 1st Defendant's land.

105. I have also considered the photographs adduced by the 1st Defendant as Df exh 4 (a-e) and it is clear that the parcel of land has not been cultivated on, the same is a swampy place which corroborated the evidence of the defence that the Plaintiff had never cultivated on the same.

106. At no time did the 1st Defendant or his witness testify that he had been disposed of his land which was fenced and submerged in water. It is trite law that in order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it.

107. The Plaintiff was therefore under an obligation to prove that he dispossessed the 1st Defendant of the suit land and was using the same in a manner that was inconsistent with the enjoyment of the soil by the 1st Defendant for the purposes for which he had a right to use it. This is a cardinal element that he ought to have proved for a claim of adverse possession to succeed.

108. I find that in the present case, that the Plaintiff has not proved that he dispossessed the 1st Defendant in the year 2011 after the 1st Defendant having been registered as the proprietor of the suit land, or that he discontinued the possession of the 1st Defendant off his land in 2011 wherein he had proceeded to cause some developments on the same.

109. In the circumstance herein I dismiss both the Plaintiff's application to be compensated with an amount of money equivalent to the market value of the suit land suit land No Nyanyuki Marura Block III/4154 (Sweetwaters) as well as his Originating Summons amended on the 25th June 2018 in its entirety with costs to the 1st Defendant.

Dated and delivered at Nyahururu this 17th Day of December 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE