



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT
ELC CASE NO. 544 OF 2009

CHRISTOPHER KIOI

NANCY WAMBUI WAWERU

(Suing on behalf of the Estate of

MWANGI KIOI (Deceased).....PLAINTIFFS

=VERSUS=

WINNIE MUKOLWE

JULIA KIRIRA

HOPE MUTUA (sued as the administrators of the Estate of

DAVID N. JONATHAN KITURI (Deceased).....DEFENDANTS

AND

LUCY WANJIKU T/A

BELLAVINN INVESTMENTS.....INTERESTED PARTY

JUDGEMENT

By way of Originating Summons dated **23rd October 2009**, the Plaintiffs herein have come to Court seeking for various declarations. The Plaintiffs are suing on behalf of the Estate of **Mwangi Kioi and** the Originating Summons is against the Defendants who have been sued as the administrators of the Estate of **David Nyambu Jonathan Kituri**. The Plaintiffs have sought for the following declarations.

a. A Declaration that the title held by David Nyambu Jonathan Kituri (deceased) over all that parcel of land comprised in the title number I.R 23758 being LR No.10090/24 measuring approximately 20.12 hectares has been extinguished by adverse possession.

b. A Declaration that the Plaintiffs are entitled to be registered as the legal and beneficial owners of all that parcel of land comprised in title number I.R 23758 being L R No.10090/24 measuring approximately 20-12 hectares in place of the Defendants.

c. An order of injunction to restrain the Defendants by themselves, ,agents, servants, or whomsoever from alienating ,disposing or in any manner interfering with the Plaintiffs possession of all that parcel of land comprised in title number I.R 23755 being L R No.10090/24 measuring approximately 20.12 hectares pending the hearing and determination of the suit.

d. Costs of the suit be borne by the Defendants.

The Originating Summon was supported by the grounds stated on the face of the application and the affidavit of **Christopher Kioi** sworn on **23rd October 2009**.

These grounds are:-

i. Pursuant to a sale agreement made in 1969, Mwangi Kioi (deceased) purchased the suit property for consideration of Kshs.25,000/= from David Nyambu Jonathan Kituri (deceased) which he paid in full.

ii. That the Land Control Board Consent to the sale transaction was obtained on 13th December 1969.

iii. That David Nyambu, Jonathan Kituri did not have a grant in respect of the suit property and a transfer could not be made in 1969 despite the payment of the purchase price and issuance of the Land Control Board Consent .

iv. That in 1970 ,Mwangi Kioi (Deceased) moved into the suit property ,dispossessed David Nyambu Jonathan Kituri of the suit property and David Nyambu ,Jonathan Kituri discontinued possession of the suit property todate.

v. That since 1970 , Mwangi Kioi (Deceased) has physically and as of right been in possession of the suit property and has exercised all acts of the owner without any objection from David Nyambu Jonathan Kituri.

vi. That the administrators of David Nyambu Jonathan Kituri in the probate and administration cause did not include the suit property as an asset of the deceased in acknowledgement that any right to the property had been extinguished by adverse possession. That belatedly, the administrators have sought to claim ownership of the suit property for the purpose of sale to 3rd party.

vii. Further that Mwangi Kioi accrues right to the suit property did survive upon his death and the Plaintiffs seek the property as part of the deceased's estate and for the behalf of the estate.

In his Supporting Affidavit, **Christopher Kioi** one of the administrator of the Estate of **Mwangi Kioi** averred that the deceased died on **5th September 2008**, as evidenced by the Death certificate **CK 1**. He also averred that he was appointed together with **Nancy Wambui Waweru** , as the administrator and administratrix of the estate via the **Limited Grant** issued on **20th November 2008**, marked **CK 2 A & B** . He further averred that prior to his death, the deceased had instituted **HCCC No. 199 of 2008**, seeking a permanent injunction against the Defendants, to bar them from alienating for sale , or in any manner interfering or dealing with the property known as **L R No. 10090/24 (Title No. I.R 23758)** and/or an order compelling the Defendants to execute all necessary papers to facilitate a transfer in the deceased's favour of the said **LR No.10090/24** as evidenced by **CK 3**. The deponent further averred that the deceased died before the Suit could be heard and hence the Limited Grant of Letters of Administration and eventual substitution of the deceased which order for substitution was done on **27th February 2009**.

Thereafter an amended Plaintiff was filed now marked **CK 5**. It was his contention that the deceased, **Mwangi Kioi** had purchased **plot No.22.V**

(a portion of LR No. 10090 comprising 20.12 Hectares)which later became LR No. 10090/24 from one David Nyambu Jonathan Kituri (Deceased) for a consideration of Kshs.25,000/= . He also contended that the said David Nyambu Jonathan Kituri (Deceased) had bought the suit property from G.Critocs & Co Ltd and that was before issuance of a Grant thereto .

He also averred that both transactions were handled by the Law Firm of **Daly & Figgis Advocates and he further** contended that **Mwangi Kioi** paid the full purchase price of Kshs. 25,000/= to the seller, in the offices of **Daly & Figgis Advocates** who then applied for the consent from the Land Control Board for both transactions. He also contended that the Land Control Board Consents to both transactions were granted through *letters of consent* dated **18th September (1969** and **13th December 1969** respectively.) Further that the purchaser **Mwangi Kioi** moved into the suit property in **1970**, dispossessed the seller of the property and completely discontinued any possessions that the seller had prior thereto executed.

He also contended that the deceased (**Mwangi Kioi**) occupied and worked on the land by engaging in various farming and mining activities and has been in exclusive uninterrupted possession of the suit land from 1970 to date. It was his allegation that the seller (Late **David Nyambu Kituri**) died on **9th December 1982**, and did not during his life time demand possession of the suit property from the deceased.

The Plaintiffs further contended that the Defendants sought to evict the Plaintiffs from the suit property in **March 2008**, on the basis that they hold legal title and in fact purported to enter into an agreement for sale of the suit land with one **Lucy Wanjiku Muchai (t/a Bellavinn Investments)** for a sum of **Kshs.20,000,000/=**. Further that the Defendants having failed to grant possession to the purported purchaser, filed **HCCC No.190 of 2008**,seeking an injunction and/or eviction orders against the Plaintiffs as evident from annexures **CK7**. He averred that it was evident from the pleadings and affidavits filed by the Defendants that they did not know of the existence of the suit property until on or about **December 2005**, when they filed an application for rectification of Grant of Letters of Administration that had been issued in **1994** and confirmed in **1996**. The Defendants had prayed for inclusion of the newly discovered suit property in the assets of the deceased (late **David Nyambu Jonathan Kituri**). That the Defendants applied for Provisional Certificate of title in 2007 so that they could be able to sell the suit property.

He deposed that he had been advised by his advocate that the seller (Late **David Nyambu Jonathan Kituri's**) title was extinguished at the expiry of 12 years from **1970** when (**Mwangi Kioi**) the deceased dispossessed the seller of the suit property and the seller discontinued his possession of the same .

Further, that on advice of his Advocate, the Plaintiffs withdrew **HCCC No. 199 of 2008** as the facts herein discloses a claim for title through adverse possession. He produced a certified extract of title marked **CK II**.

On **9th June 2010**, one **Lucy Wanjiku Muchai T/ABellavinn Investments** filed an application dated **31st May 2010**, to be enjoined as an Interested Party and on **18th July 2011**, the said application was allowed by consent and thus **Lucy Wanjiku Muchai**, is now an interested party and she filed her Replying Affidavit on **12th July 2010**.

The Defendants have opposed the Originating Summons and **Julia Kirira** swore a Replying Affidavit on **18th June 2010**, and averred that she is a co-administratrix of the estate of **David Nyambu Jonathan Kituri**. She further averred that the property **LR No. 10090/24** constitutes part of the estate of **David Nyambu Jonathan Kituri** and that her late father acquired the said interests on **10th August 1970**, and was issued with certificate of title on the same date. She also averred that there is no sale agreement to show that there was a transaction of sale of the suit property by their late father to one **Mwangi Kioi** (Deceased). Further that the purported Land Control Board Consent is of no consequential value as it relates to a period prior to her father's ownership of the suit property. It was her contention that her father bought the piece of land in question from **G.Critcos & Co.Ltd** and did not give the Land to her husband **Mr Kirira** as alleged by **Mr Mwangi Kioi**. She alleged that she was privy to her father having bought and taken possession of the suit property.

She further alleged that to the best of her knowledge, **Mwangi Kioi** was never in possession of the suit property. Further that if at all **Mwangi Kioi** had purchased the suit property from her late father, there was no reason at all why the title was not transferred to him. To her, such an allegation is hollow and unsubstantiated and an attempt to irregularly acquire her late father's property. She has also averred that the issuance of the Provisional Certificate of Title was subject to public Notice under advertisement in the Kenya Gazette and if the Plaintiffs and/or their father had an interest in the parcel of land, nothing restrained them from contesting the said issuance. Further that **Mwangi Kioi**, would have staked his claim to the parcel of land against her late father during the proceedings in Succession Cause **No. 753 of 1994**, and there is no reason at all advanced for failure to so participate. It was her contention that she was not initially a co-administrator of her father's estate and when she took keen interest, she noted the absence of Juja property (suit property) and commenced her enquiries thus resulting in its inclusion in the Succession Cause. She also stated that she visited the suit property with her Co-Defendants sometimes in the **year 2005** and that is when she noted recent invasion of the same. Further that the Plaintiffs present action is an afterthought only provoked by the Defendants suit against the Plaintiffs. She also alleged that if **Mwangi Kioi** had taken possession of the suit property in 1970 as alleged and which is denied, there is no explanation at all why the Plaintiffs had to wait until when the Defendants sought restraining orders for them to present the current suit.

She also alleged that she was aware that **Christopher Kioi** had invaded into the suit property and is cultivating a portion thereof measuring 3.4 acres approximately and further such occupation is intermittent and as recent as the year 2005 and is not occupational possession of the entire vast parcel of land.

Further that neither the Plaintiff nor their father have ever claimed to have taken possession of the entire parcel of land. The deponent further deposed that she has been advised by her advocate that the suit title is not extinguished and is a good title and the property of her late father's estate. Further that the Plaintiffs claim is riddled with uncertainties, doubts, lack of clarity and contradictions. That the Plaintiffs have been unable to positively demonstrate their allegations and therefore the Defendants should not be denied what rightly belongs to their father's estate.

Lucy Wanjiru Muchai, the interested party also swore her Replying Affidavit on **9th July 2010**. She averred that she had a purchaser's interest in the suit property **LR No. 10090/24** and that she spotted the suit land way back in 1995 and thought it was ideal for development and she started to investigate who was the owner thereof. She further averred that during her investigations, she visited the land and found people cultivating near the River Bank and upon inquiry, they confirmed that they were trespassers and did not know who the owner was. Further that she discovered the people cultivating along the River Bank were people from the neighborhood and were doing so for the entire stretch of the farms bordering the suit land. It was her contention that this cultivation was subsistence farming for vegetables and it was clear that these people who were farming knew that they were trespassers and had no claim to the land. She further averred that She eventually found out that the owner of the property was one **David Nyambu Kituri** who had passed on many years back and the property was being administered by his children. That she approached them and they agreed to sell the said land to her and a sale agreement was signed and she paid the deposit. It was her further contention that she visited the land on numerous times to identify the boundaries and the beacons and no one raised any complaint. Further that while she was in the process of subdividing the land, one **Christopher Kioi**, one of the plaintiffs herein appeared and started claiming ownership. She also alleged that when they challenged him to prove that he was the owner, he did not have any evidence, and they then filed **ELC No. 190 of 2008** seeking orders to evict him. It was her further allegation that all that time she had been going to the suit land, she has never met the said **Christopher Kioi** doing any farming on the land. She also alleged that it is not true that the plaintiffs have possession of the land as claimed by them. That the kind of farming being undertaken long the River bank is seasonal and not consistent with the claim of ownership of the property. Therefore it is evident that the plaintiffs claim is an afterthought and only brought out as a defence to this suit for eviction which is still pending.

The matter proceeded for hearing by calling of **viva voce** evidence. The hearing commenced on **16th July, 2013** and the plaintiffs called four witnesses, who adopted their witness statements together with

annextures thereto.

PW1 Christopher Kioi adopted his witness statement dated **22nd July, 2011** and further reiterated the contents of his supporting affidavit as his evidence. He testified that his claim was one of adverse possession and was claiming it on behalf of the Estate of his late father, **Mwangi Kioi**. It was his testimony that his father was a businessman in Nairobi with their family home being in Kasarani. He also testified that the land is in Juja comprising of **50 acres** and he came to know of his father's interest in the land in 1970s and his father used to graze cattle in the suit land. Further that his father had constructed a cattle dip and water tank and had planted nappier grass. He also testified that his family was in control of the land over the years. That he started to cultivate on the land in the year **2003 – 2004** while his father was still alive. It was his testimony that he did not know of any claim by anyone else. However, he was later informed by his workers that some people had invaded the land and started to uproot the sisals. This was in the year 2005 during the lifetime of their late father. That when his father went to **Daly & Figgis Advocates** to obtain correspondences over the sale of this land to him, the said Law Firm informed him that the records were destroyed in the year 1982. That his father was advised on what to do and when they informed the administrators of the Estate of the Late **David Nyambu**, the said administrators applied to have their grant rectified to include the suit property. That this land had been transferred to his father by the late **David Nyambu Kituri**. He also testified that in the first Grant, the family of late **David Nyambu Kituri** had not included the suit land but only did so after the plaintiffs father inquired about it from the administrators. Then his father filed a suit and the defendants also filed their claim and the two suits were consolidated. It was his testimony that the late **David Nyambu Kituri** did not have a stake on the land all that time that his father was using the land. Further that Kiambu Land Control Board had given consent to transfer the land on **13th December, 1969**.

PW2 Michael Ireri Kaini also adopted his witness statement and stated that he went to live in Juja in 1986 and was employed as a butcher. He later started cultivating on **Mwangi Kioi's** farm in the year 1998. That **Mwangi Kioi** allocated them pieces of land to cultivate and he was shown his position by the said **Mwangi Kioi** which he leased from him. That after leasing his position of the land, he used to pay **Mwangi Kioi**, through one **Machagua** who was collecting the lease rent on behalf of **Mwangi Kioi**. That **Mwangi Kioi** used to go to the farm and supervise how the land was being cultivated. That there were cattle dips in the farm and a quarry. There were also other structures like cattle sheds and residential houses for **Mwangi Kioi's** employees. That when the son of **Mwangi Kioi** said he wanted to cultivate the land, **PW2** and the rest stopped leasing it. Further that **Mwangi Kioi** requested them to vacate the land in the year **2003**, but **PW2** was left behind as a supervisor and he is still on the suit property to date. He testified that he is now under the authority of **Christopher Kioi** and no one has taken control of the said land. However that a farmer by the name of Kimani had invaded the land in the year **2005** and started to clear the vegetation. He was however asked to vacate by **Christopher Kioi** which he did and since then **PW2** has not seen any other activities.

PW3 Lucy Wanjiru Machagua also adopted her witness statement and stated that she got married to one **Machagua** who was a friend of **Mwangi Kioi** in the year 1978. That the suit land was used by **Mwangi Kioi** who used to rear cattle but they died between the years 1995 – 1998 when there was prolonged drought.

That **Mwangi** had planted nappier grass and employed people to take care of the farms. Further that one of **Mwangi's** sons started to cultivate the land. Before that, **Mwangi** had leased the land to several people and her husband, **Machagua** used to collect the money on behalf of **Mwangi Kioi**. It was her testimony that **Mwangi Kioi** had control of this farm even in the year 1978 and she has not seen any other person having control of this farm. That **Mwangi Kioi's** son now cultivate the land and the person taking care of the farm is employed by **Mwangi Kioi's** family. It was her testimony that the farm is for **Mwangi Kioi** and not any other person.

PW4 Anne Wangui Njoroge also adopted her witness statement and testified that she lives on **LR No. 10090/95** which she purchased from **Job Kirera Kahage** in 1984. That when she purchased the land from Kirira he told them that their neighbour was **Mwangi Kioi**. That she has never seen other people laying claim over the suit land and she does not know **Winnie Mukolwe**, but she knew **Julia Kirira**.

The Defendants called three witnesses to support their claim. **DW1 Julia Changore Kirira** reiterated the contents of her Replying Affidavit. She stated that the late **David Nyambu Kituri** was her Father who owned land parcel **No. LR. No. 10090/24** but it is now owned by his daughters. She testified that her father bought this parcel of land from one **Criticos**. That she had also bought the land next to this one owned by her father but she later sold it to one **Baba Njoroge**. She also testified that her father's land was not fenced and there was no one grazing on it. Further that there was no one living in the house or occupying the land. She further testified that she did not know the **Kioi's** family. It was her testimony that the suit land belongs to them and not the **Kioi's**. She urged the court to allow them use and own the suit land.

DW 2 Winfred Mularia Mukolwe also testified and adopted the witness statement. She stated that the land belonged to her father and there was no commercial activity that was taking place on it. Further that no development was on the land except that it was being cultivated at the River Bank and she had no idea as to who was doing it. She further testified that she was not aware of any sale between the Plaintiffs and the father. It was her testimony that the provisional title was obtained on **7th February, 2008** through the help of one Joseph and she thereafter instructed Joseph to look for a buyer. It was her further testimony that they sold the land for **Ksh.25,000,000/-** and drew a sale agreement to that effect. She also testified that she went to the land in the **February, 2009** and that before her father died, he had not leased the land to anyone nor had he employed anyone to look after the land. However, he had title to the land and was in possession and control of the same.

DW 3 Edwin Mureithi Njoroge also adopted his witness statement and produced a valuation report for the property in court. His evidence was that he did not find the person who is claiming ownership of the land, but instead he found a caretaker. He valued the land at **Ksh.52,000,000/-** and in the year 2012, he valued it at **Ksh.150,000,000/-** and the variance was due to expansion of Thika Super Highway and demand for land which has gone up. He further testified that he did not establish the true nature of the boundaries.

The Interested Party also gave the evidence and called one more witness.

I. P. Lucy Wanjiku Muchai adopted her witness statement and further stated that she trades as **Bellavin Investments**. That she visited the suit property in the year 2008, when she heard about the suit land. She went to the land and met the owners. There was a sign board that the owners were selling the land. The owners were the **Kituri's**. She was shown a copy of the provisional title and there was no caveat. That she did not find anyone in occupation of the suit property nor any activity being undertaken nor development on it. She purchased the suit property for **Ksh.25,000,000/-** and signed the sale agreement. She paid a deposit of **Ksh.5,000,000/-** she produced the sale agreement as exhibit in court. She also testified that she purchased the property, with vacant possession. That after she purchased the property she started to clear the bush but someone appeared and said the land was his. It was her further testimony that she had not met the **Kioi's**. She urged the court to allow her occupy the land so that she can recoup her investment.

PW 2 Joseph Kimani Mbugua testified that he is an Estate Agent trading as **Kimson Holding Ltd**. It was his testimony that he knew the **Kituri's** through **Winnie, DW 2**. That he had sold land to her in the year 2005 and later she told him they wanted to sell another land. He was shown the land and he advertised it. After advertisement, **Lucy Wanjiku** got interested and bought it. That there was no activity on the land apart from subsistence farming along the River Bank. That the owner sold the land to **Lucy Wanjiku Muchai** for **Ksh.25,000,000/-** and he had done all due diligence and there was no caveat on the land. That when he started to clear the bush for subdivisions, the Plaintiffs appeared and claimed the land belonged to them and put a sign board that **"Not for Sale"**.

After the Viva Voce evidence the partes filed their written submissions. The Law Firm of **Kaplana & Stratton Advocates** for the plaintiffs filed their submissions on **20th July, 2015**. The Law Firm of **Macharia Mwangi Njeru & Co. Advocates** for the Defendants filed their written Submission on **23rd October, 2015**, whereas the Law Firm of **Kinyanjui Njuguna & Co. Advocates** for the interested party filed their written submissions on **25th September 2015**. The Plaintiffs filed a reply to the Interested Party

and Defendants written submissions on **28th October, 2015**.

The Court has now carefully considered the pleadings herein, the evidence adduced in court and to exhibits thereto. The Court has also considered all the written submissions and the relevant provisions of law and the Court makes the following findings;-

This is a case of adverse possession and I note that the parties did not file any agreed issues. However the Court finds that the issue for determination herein is;

i. Did the Plaintiffs specifically Mwangi Kioi (Deceased) and /or the administrators of his estate enter into the suit property and dispossessed the late David Nyambu Jonathan Kituri and/or his administrators for a period of over 12 years to entitle them (Plaintiffs) to be registered as the owner of the suit property?

ii. Were the rights of the registered owner David Nyambu Jonathan Kituri extinguished by virtue of the plaintiffs possession of the suit property.

iii. Should the Defendants be enjoined from interfering with the suit property?.

iv. Did the Defendant have a right to sell the suit land to the interested party.

v. Who should bear the costs of this suit .

The Law governing a claim for adverse possessions is found under Section 7 of the **Limitation of Actions Act Cap 22 Laws of Kenya** which states that;-

“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.”.

Further a claim for adverse possession is also governed by Section 38 of the same **Limitations of Actions Act** which also 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 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 proprietor of that land or lease in place of the person then entered as a proprietor of the land”.

The Plaintiffs herein have brought a claim against the Defendants asking this court do declare that the title held by **David Nyambu Jonathan Kituri** (Deceased) being **L.R No. 10090/24** measuring about **20.12 hectares** has being extinguished by adverse possession . The Defendants have opposed that claim and averred that the plaintiffs have not acquired any title over the suit property by virtue of adverse possession and that the title held by **David Nyambu Jonathan Kituri** (Deceased) has not been extinguished.

The Black’s Law Dictionary 9th Edition defines Adverse possession as;-

“ The enjoyment of real property with a claim of right when that enjoyment is opposed to another person’s claim and is continuous exclusive ,hostile ,open and notorious”.

Courts in Kenya have also had occasions to deal with cases of adverse possession. In the various decisions issued by the Courts, general guiding principles have been laid out. In the case of **Wambugu Vs Njuguna(1983) KLR 172** . The Court set out the principles to be considered in a case of adverse possession. The court held that;-

“ In order to acquire by statute of limitations title to land which has a known owner , the owner must have lost his right to the land either by being dispossessed if it or by having discontinued

his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it...

Further the ***Limitation of Actions Act***, on adverse possession contemplates two concepts ‘***dispossession*** and ***discontinuance of possession***’. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

Taking into account the description of adverse possession as stated by the Black’s Law Dictionary, that it has to be ***continuous, exclusive, hostile, open*** and ***notorious*** and also taking into account the above guiding principles, have the plaintiffs herein proved that they have dispossessed the registered owner of the suit property or that ***David Nyambu Jonathan Kituri*** discontinued his possession of the suit land and that the possession by the plaintiffs was ***open, exclusive*** and ***notorious***. Before answering the above question, I will also take into account the decision of the Court of Appeal in the case of ***Teresa Wachuka Gachira Vs Joseph Mwangi Gachira (2009) eKLR*** where the Court restated the law on adverse possession and stated as follows;-

“While citing the decisions in the case of ***Kimani Ruchine Vs Swift, Rutherford & Co.Ltd 1980 KLR*** as follows;-“***Whatever the procedure, the onus is on the person claiming adverse possession to prove in the words of Kneller J (as he then was that:-***

“ The plaintiffs have to prove that they have used this land which they claim of right Nec Vi, Nec Claim, Nec Precario (no force , no secrecy , no evasion) so the plaintiffs must show that the company had knowledge or means of knowing, actual or constructive of 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”.

The court in the above case further stated that;-

“There is no proof of exclusive continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing, or cultivating depending on the nature, situation or other characteristics of land. Periodic use of the land is not inconsistent with enjoyment of the land by the proprietor”.

From the available evidence, there is no doubt that the suit property herein is registered in the name of the Defendants through transmission from a ***Succession Cause no. 753 of 1994***. There is also no doubt that initially, the land was registered in the name of ***David Nyambu Jonathan Kituri*** as per the provision certificate of title ***I.R 23758/1*** attached to the plaintiffs list of documents. The said parcel of land was registered in the names of ***Winnie Mukolwe*** and ***Hope Mutua*** as administrators of the Estate ***of David Nyambu Jonathan Kituri*** on ***31st August 2007***, and Provisional Certificate of title was issued on ***7th February 2008***.

The certificate of title to this parcel of land was issued under the ***Registration of Titles Act, Cap 281 Laws of Kenya***. In the said Act ***Cap 281*** (now repealed) ***Section 23(1)*** states that;-

“ The certificate of title issued by the registrar to a purchaser of land upon transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as a proprietor of the land is the absolute and indefeasible owner thereof subject to the encumbrances , easements, restrictions and conditions contained thereon , or endorsed thereon and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party”.

The above possession emphasizes on the sanctity of the title. The Defendants herein being the registered proprietors of the suit property by virtues of transmission, then prima facie as provided by ***Section 23(1)*** of ***Cap 281***(now repealed) are the held to be the ***absolute*** and ***indefeasible*** owners of the suit

property.

However, **Section 38(1)** of the **Limitation of Actions Act** grants leave to a person who claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of that Act that he may apply to the High Court for an order that he be registered as the proprietor of that land in place of the person then registered as the proprietor of the land. **Cap 281** is one of the Acts referred to in **Section 37 of Cap 22**.

Though the Defendants are the registered proprietors of **LR No. 10094/24** through transmission, the plaintiffs have applied to Court to have the said parcel of and registered in their names by virtue of adverse possession.

The Plaintiffs in their evidence adduced by various witnesses had testified that one **Mwangi Kioi** purchased the suit property from the late **David Nyambu Jonathan Kituri** for **Kshs. 25,000/=** through the Law Firm of **Dalys & Figgs Advocates**. However the same was never transferred to **Mwangi Kioi** but he took possession of the same in the year **1970**. It was the evidence of the Plaintiffs witnesses that they have been in continuous and exclusive possession and use of the suit land since then. However, in the year **2005**, **Mwangi Kioi** discovered that he did not have title to the land and when he approached the Ministry of Lands, he was advised to liaise with administrators of the Estate of **David Nyambu Jonathan Kituri**. The plaintiffs further testified that when they contacted the said administrators, the said administrators acquired, Provisional Certificate of title but refused to transfer the said Land to the Plaintiffs who are now the administrators of the Estate of **Mwangi kioi**.

However, the Defendants have vehemently denied that their father, the late **David Nyambu Jonathan Kituri** ever sold the suit land to **Mwangi Kioi**. They also testified that they have never discontinued the use of the land and if at all the Plaintiffs were using the land, it was not done openly but secretly and so their use was not hostile to the Defendants.

The Defendants testified that they rightly sold the suit land to the interested party and the court should dismiss the plaintiffs' suit and allow the Defendants to continue with their transaction.

The Deputy Registrar of this Court visited the suit land and noted that there were no demarcations or fencing done on the suit land apart from the live fence on the side of the white house. Further that the structure on the suit land was recent one which was a newly constructed iron sheet structure. The Deputy Registrar concluded that it was clear that the suit property has not been occupied in a very long time as was demonstrated by thick bushes, numerous damp sites and assumed footpaths by members of the public.

Having now analyzed the definition of adverse possession and the facts of this case, the court will now attempt to answer the issue for determination.

The first issue is whether **Mwangi Kioi** and or his administrator entered into the suit property and dispossessed the late **David Nyambu Jonathan Kituri** and/or the administrators of his estate. **Pw1 Christopher Kioi** told the Court that **Mwangi Kioi** purchased the suit property from **David Nyambu Kituri** for **Kshs.25,000/=** on or around the year **1969**. That after the purchase, **Mwangi Kioi** took possession and started using the land. However, the land was never registered in the name of **Mwangi Kioi**. If **Mwangi Kioi** had purchased the suit land from **David Nyambu**, then he entered into the said land with permission. If **Mwangi Kioi** had entered into the suit land with permission of **David Nyambu Kituri**, then the said possession was not adverse. As was held in the case of **Wambugu Vs Njuguna (Supra)**

“ The occupation can only be either with permission or adverse ; the two concepts cannot co-exist” .

However, the Defendants have denied that their father ever sold the suit land to the **Mwangi Kioi**. The plaintiffs had alleged that the transaction was done by the Law Firm of **Daly & Figgis** . Though the plaintiffs witnesses further alleged that when they conducted the Law Firm of **Daly & Figgs Advocates**

they were informed that the file could not be traced, that was evidence from a third party. There was no witness called from the law Firm of Daly & Figgis to confirm that indeed in the year 1969, **Mr Mwangi Kioi** purchased the suit property from **David Nyambu Jonathan Kituri** but the file could not be availed as it was destroyed in the year 1982. There was also no sale agreements produced by the plaintiffs to confirm that indeed **Mwangi Kioi** and **David Nyambu Jonathan Kituri** entered into any sale of the suit land to **Mwangi Kioi** for **Kshs. 25,000/=** . The Plaintiffs witnesses also alleged that the suit land has been in possession of **Mwangi Kioi** and he continuously used it without any interruption and thus dispossessing the Defendants. However in the case of **Kimani Ruchine Vs Swift Rutherford & Co. ltd 1980 KLR 10**, the Court held that :-

“ Whatever the procedure , the onus is on the person claiming adverse possession to prove that...the plaintiffs have to prove that they have used this land which they claim of right Nec Vi, Nec Claim, Nec Precario,(No force ,no secrecy ,no evasion).

The Defendants herein claimed that they were not aware that the plaintiffs were utilizing their father’s suit land. It was not clear from the plaintiffs evidence that they openly used the suit land with the knowledge of the Defendants. Having analyzed the evidence of the plaintiffs and the Defendants, the court finds that even if **Mwangi Kioi** used **David Kituri’s** parcel of land, that usage and possession was not open and it was in secrecy. The plaintiffs did not show that the Defendants had knowledge that they were in possession of the suit land and that the said possession was continuous and that the Defendants had been dispossessed of the said land and they knew it.

It was also evident that when **Mwangi Kioi** died, he was not buried on this parcel of land but the witnesses adduced evidence that he was buried in another parcel of land in Muranga . It was also admitted that **Mwangi Kioi** lived in Kasarani area of Nairobi where he carried out various businesses. The witnesses further testified that **Mwangi Kioi** was a wealthy person and had other parcels of land within the Rift Valley.

Though the plaintiffs’ witnesses, PW2 and PW3 also alleged that **Mwangi Kioi** leased out the suit land to them, there was no record of such leases. Further the suit land herein was not listed as part of the Assets of **Mwangi Kioki** in his Succession Cause. Further **PW1** had also admitted in his evidence that he did not know the Defendants and therefore he did not hold the land adverse to the Defendants and he did not therefore dispossess them.

When the **Deputy Registrar Hon. Mwayuli** visited the suit property, she found it not demarcated or fenced. As was held in the case of **Teresa Wachuka Gachira Vs Joseph Mwangi Gachira (2009) eKLR:-**

“ There is no proof of exclusive continuous and uninterrupted possession of the land for twelve years or more before the suit against he was filed. Possession could have been by way off fencing or cultivation depending on the nature, situation on other characteristics of land. Period use of the land is not inconsistent with the enjoyment of the land by the proprietor”.

The Defendants in their evidence testified that they had not included the suit property in their Succession Cause at first because the title had been misplaced. They were not even aware that the plaintiffs had trespassed on the suit land. Then if the Defendants were not aware of the possession of the suit land by the plaintiffs, that possession by plaintiffs was therefore secret and as was held by **Leonaola J** (as he then was) in the case of **Matheka Vs Haco Industries Ltd (2008) eKLR:-**

“ If possession was stealthy , secret and evasive, then no adverse possession can attach .”

From the available evidence **Mwangi Kioi** brought the attention of his possession of the suit land to the administrators of the Estate of **David Nyambu Jonathan Kituri** in the year 2003. This suit was filed in the year 2009 and certainly **12 years** had not lapsed.

Having now carefully considered and analyzed the available evidence, the court finds that the plaintiffs

did not demonstrate on the required standard that they had dispossessed the Defendants the use and enjoyment of the suit property for a period of over **12 years** and that the said plaintiffs were in exclusive and uninterrupted possession of the said suit land to warrant them obtain registration by adverse possession.

On the second issue, having found that the plaintiffs have not acquired title to the suit land by virtue of adverse possession and having found that the suit land is now registered in the names of administrators of **David Nyambu Jonathan Kituri**, the Court finds that the Defendants are the **absolute** and **indefeasible** owners of the suit property by virtues of **Section 23(1) of Cap 281 (now repealed)** and the said right has not been extinguished. This was the finding in the case of **John Mwatela Shede Vs Vitahhbhai Bhulabhai Patel (2010) eKLR** where the court held that:-

“ In the absence of evidence to the contrary , the owner of the land with the paper title is deemed to be in possession of the land”.

On the third issue having found that the Defendants are the absolute and indefeasible owner of the suit property as provided by **Section 23(1) of Cap 281 (now repealed)** and later replicated by **Section 26(1) of the Land Registration Act 2012**, and the fact that the Plaintiffs have not acquired title to the suit land by adverse possession, the court finds that it cannot injunct the Defendants from dealing with the suit land as they so wish since they are the absolute owner of the suit property and their rights cannot be defeated through an order of injunction.

The Court cannot issue an order of injunction against the title holder unless the said title is challenged if the same was alleged acquired through fraud or unjust means. See the case of **Macharia Mwangi Maina & 87 others Vs. Davidson Mwangi Kagiri Civil Appeal No. 6, 26 & 27 of 2011**

“This is a court of law and of equity; equity shall suffer no wrong without a remedy. No man shall benefit from his own wrong doings and equity detest unjust enrichment....”.

On the fourth issue of whether the Defendants had the right to sell the suit property to the interested party, **Section 24(1) of the Land Registration Act** stated that:-

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto”.

Therefore the Defendants being the **absolute** and **indefeasible** owners of the suit property have all the rights and privileges appurtenant thereto. Therefore the Defendants being the absolute owners of the suit property have all the rights and privileges appurtenant thereto and such rights include but not limited to dealing with the property as they so wish such as disposing and/or alienating the same. Further **Section 25(1)** of the said Land Registration Act grants the Defendants as proprietors of the suit land further rights. The said section states as follows:-

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

The Defendants rights are not liable to be defeated except by operation of law. The Defendants therefore are at liberty to exercise their rights as absolute and indefeasible owners of the suit property and such rights include selling, *disposing*, charging and alienating the suit land to whoever they so wish to deal with and in this case the interested party who allegedly did all due diligence and paid part of the purchase price to the tune of **Kshs.5000,000/=** has a right to purchase the suit land as per the earlier sale agreement between her and the Defendants.

The final issue is who should bear the costs of this suit. Ordinarily, costs follow the event. However, considering the circumstances of this case the Court directs that each party to bear its own costs.

It is so ordered.

Dated, Signed and Delivered this **27th** day of **January 2017**.

L.GACHERU

JUDGE

In the presence of :-

Mr Muthui for the Plaintiff

Mr Kimani holding brief for Mr Mwangi for the Defendants

Mr Kinyanjui for interested party

Court Clerk : Hilda

L.GACHERU

JUDGE

Court :

Judgement Read in open Court in the presence of the above stated advocates.

L.GACHERU

JUDGE

Immediately, after the Judgement

Muthui: I have an application to make arising from the judgement. We have instructions to file an Appeal for the Plaintiffs to pursue the right of the appeal; we seek for preservation of the suit property. If the Appeal is successful, and the suit property is disposed off, the appeal will be rendered nugatory.

There are a number of legal issues and it is in the interest of justice that the legal issues are canvassed in the Court of Appeal. I will rely on the case of **Madhupaper Vs Kerr**, the court held that it is no contradictory for the High Court to dismiss a prayer of injunction and issues an injunction pending appeal. The reason is not to protect the Court of Appeal but to ensure that the Appeal if successful is not rendered nugatory. It is not the interest of justice that an order of injunction be issued from either alienating or interfering with the title property pending the hearing of the intended appeal.

Lastly, we have had an order of **status quo**. We can file a formal application but we seek for **interim orders** to be maintained .I will put my application within **14 days**. In the Interim, I seek for maintenance of **status quo**.

L GACHERU

JUDGE.

Mr Kimani: I oppose an application for stay. The order was negative Order. It would be prejudicial to the Defendants for the Plaintiffs to be granted an injunction. The case quoted **Madhupaper Vs Kerr**, this is a case where injunction would be harmful than would cause good to the parties. If **Mr Muthui** wants to file an application for stay let there be a formal application.

L GACHERU

JUDGE

Mr kinyanjui : The interested party is equally opposed. *Mr Muthui* has not cited any law that gives him grounds for the order he seeks. The Court is *functus official*. It cannot deal with stay pending appeal. The jurisdiction is on the appellate Court.

That jurisdiction is available once a Notice of Appeal is filed. It is not automatic. You have not been addressed to that. The Court has no jurisdiction to grant the orders granted.

L.GACHERU

JUDGE

Mr Muthui: The issue that has to occupy the mind of the Court is what would be the greater harm. What is the harm to the Defendants?. What is the harm to the Plaintiff? .The Plaintiffs will be dispossessed off the land and the appeal will be rendered nugatory.

That was the position in the case of Madhupaper Vs Kerr. The jurisdiction to issue injunctions pending appeal is available to the High Court. The jurisdiction arises from **Order 42 Rule 6(2)** of the Civil Procedure Rules. You have the jurisdiction. In the interest of justice, may the Court issue the orders sought.

L.GACHERU

JUDGE

Court:

Having considered the arguments advanced by all the advocates herein and the circumstances of the case, the Court issue stay of the judgement for a period of **30 days** pending the filing of a formal application by the plaintiffs herein at the Court of Appeal. Let the Plaintiffs/Applicants file the application for **stay** at the Court of Appeal.

L.GACHERU

JUDGE

27/1/2017