**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT CHUKA**

**CHUKA ELC CAUSE NO 110 OF 2017**

**(FORMERLY MERU ELC NO. 40 OF 2004)**

M'MBAONI M'THAARA……...PLAINTIFF

VERSUS

JAMES MBAKA ….……..DEFENDANT

**JUDGMENT**

1. The Originating Summons in this matter, dated 26th April, 2004, reads as follows:

**"LET JAMES MBAKA KARUMBA** the proprietor of L.R. NO. **KARINGANI/MUGIRIRWA/907** and **KARINGANI/MUGIRIRWA/908** within Meru South District enter appearance within 15 days of service of these summons issued upon the application of **M'MBAONI M'ITHARA** who claims to have obtained by Adverse Possession since 1969 5.34 acres being the whole of **L.R. NO.KARINGANI/MUGIRIRWA/907** and **L.R. NO. KARINGANI MUGIRIRWA/908** which land is registered in the names of **JAMES MBAKA KARUMBA.**

**FOR THE DETERMINATION OF THE FOLLOWING QUESTIONS**

1. Is the Land KARINGANI/MUGIRIRWA/907 and L.R.No.KARINGANI/MUGIRIRWA/908 measuring 5.34 acres?

2. Is the plaintiff in possession of the whole of it?

3. Has the plaintiff obtained title to the suit land by Limitation of Actions Act and by the doctrine of adverse possession?

4. How can ownership be determined by the court?

5. Is the plaintiff entitled to costs of this suit?

2. The summons is supported by the affidavit of **M'MBAONI M'ITHARA**. It has also got the ground that the applicant has lived, worked and developed **L.R. NOs. KARINGANI/MUGIRIRWA/907** and **KARINGANI/MUGIRIRWA/908** since 1969 todate.

3. The plaintiff prays for judgment against the defendant for the following:-

(a) A declaration that the plaintiff has acquired title to Land Parcel Nos.

**KARINGANI/MUGIRIRWA/907** and **KARINGANI/MUGIRIRWA/908** by Limitation of Actions Act and by the doctrine of adverse possession and that, therefore, the defendant holds the said title in trust for the plaintiff.

(b) Costs of the suit.

4. In his evidence the plaintiff told the court that he bought the claimed land measuring 5.34 acres from the defendant in 1969. He says that the defendant gave him possession of the land in 1969 and he immediately began to develop it.

5. The plaintiff says that the original suit land was No.371 but the defendant subdivided it into Numbers 907 and 908. He told the court that he did not know when the subdivision was done.

6. The plaintiff averred that even after the land was subdivided the defendant did not enter the suit land, because, according to his evidence, he had already developed it. Interestingly, the plaintiff says that he also stopped the defendant from entering into the suit land. He told the court that by 28.3.2007 when he gave his evidence, he had stayed on the suit land for 38 years.

7. During cross-examination, the plaintiff told the court that before he bought the suit land, he lived on parcel **No.Karingani/Mugirirwa/269** where he got his children. He told the court that there was a written agreement which was in the custody of his advocate but which was not produced.

8. The plaintiff also told the court that the suit land was in the name of Mbaka Karumba, the defendant's father who was not alive when he bought the land from the defendant. The plaintiff was laconic that the defendant had not, at the time he purchased the land, filed a Succession Case in respect of his deceased father's estate. He also told the court that the defendant's father died in 1954, during the Emergency.

9. The plaintiff during cross-examination told the court that he paid Kshs.1,837.50 (Kshs. One thousand eight hundred thirty seven and fifty cents) for 5.34 acres which was the market price in 1969. He denied that he took possession of the land in the 1980's and that he had attempted to purchase the land in 1996.

10. PW2, Francis Mbandi, when giving evidence in support of the plaintiff's case said he witnessed the apposite agreement for sale. He told the court that the land was sold at the price of Kshs.350/= (Kshs. Three hundred and fifty) per acre. He was categorical that the plaintiff bought 5.34 acres and took possession of the land in 1969 and continued to live there.

11. PW2 was categorical that he was present when the plaintiff bought the suit land. He however, told the court that the suit land was sold to the plaintiff by the brothers of the defendant's deceased father in order to pay school fees for the defendant and his sister. He also told the court that the defendant was young when the land was sold to the plaintiff.

12. During cross-examination, PW2 was specific that the defendant was a minor when the suit land was sold to the plaintiff. He was also categorical that the land was sold to the plaintiff by one, Mbioki, the defendant's uncle.

13. PW2, told the court that he was a witness that there was an agreement for sale but added that he was not a signatory to the agreement.

14. PW3, in his evidence in support of the plaintiff's case, told the court that he was present when the suit land was being sold to the plaintiff. He was categorical that the plaintiff bought 5.34 acres in 1969 and took possession. He told the court that the defendant was about 18 years old in 1969 when he, himself was 28 years old.

15. PW3 told the court that the defendant was his relative. He, however, told the court, that Evangeline Ciokatiro, the plaintiff's mother and one Mbioki Imunde, are the people who sold the land. He averred that Mbioki Imunde was the defendant's uncle.

16. During cross-examination, PW3 clarified that Mbioki Imunde was not a brother to the defendant's father. He averred that Mbioki Imunde had only inherited the defendant's mother. He also seemed to have a change of mind and said that it was the defendant's mother, Evangeline, who sold the suit land to pay school fees for her daughter.

17. In further cross-examination, PW3 changed his mind and told the court that he was not present when an agreement for sale was made and when the agreed purchase price was paid.

18. PW3, also, during cross-examination, told the court that he had in the past been involved in a dispute with Evangeline, the plaintiff's mother, which dispute he won. He further told the court that the plaintiff had told him that the defendant had refused to transfer the suit land to him after he had obrained his identity card. He told the court that he did not know in whose name the land was registered.

19. The defendant was the only witness in support of his case. He asked the court to adopt his witness statement as his evidence in support of his case.

20. In his statement, the defendant avers that he is the registered owner of **L.R**. **Nos. KARINGANI/MUGIRIRWA/907** and **908** which are subdivisions of **L.R. No. KARINGANI/MUGIRIRWA/371**. He states that contrary to the plaintiff's allegations, he actually permitted the plaintiff to occupy portions of the suit land because the plaintiff needed cultivating space. He goes on to state that the plaintiff and his family entered the suit lands in the 1980's on condition that they would vacate the portions they occupied on demand. He avers that he was not in a position to sell the suit lands as alleged by the plaintiff.

21. The defendant in his statement tells the court that the suit land is currently occupied by the children of the plaintiff. He says that the plaintiff does not live on the suit land as he lives elsewhere with his second family. The defendant denies that the plaintiff has occupied the suit land continuously and without interruption as he claims. He also says that prior to the institution of this suit, he had attempted to repossess the suit lands but was repulsed by the plaintiff and his children.

22. The defendant prays that the suit be dismissed with costs.

23. In addition to the evidence tendered by the plaintiff and his two witnesses, and the defendant's evidence contained in his witness statement, the parties respective advocates filed written submissions.

24. The plaintiff's advocate has submitted that he has been in occupation of the suit land openly, freely and uninterrupted since 1969. He says that the defendant had always known that the plaintiff was in occupation and had never raised a finger to oppose or stop the plaintiff's occupation.

25. The plaintiff's advocate tells the court that the plaintiff's witnesses corroborated the plaintiff's testimony that he was in occupation of the contested property. He termed the plaintiff's evidence a mere denial. He, however, opines that even if the plaintiff entered the suit land in 1982 as alleged by the defendant, the plaintiff would, nevertheless, have occupied the suit property for over a period of 12 years which is the required time for a claim predicated upon adverse possession. He submits that the plaintiff has fulfilled all the conditions precedent to the grant of the orders sought in the apposite originating summons. He prays that the court declares that the plaintiff has acquired title to Land Parcel Nos. **KARINGANI/MUGIRIRWA/907** and **908** by adverse possession. He also prays for costs.

26. The defendant's advocate submitted that it was settled law that a claim for adverse possession cannot co-exist with a claim for a purchaser's interest. He claimed that this position rendered the plaintiff's case frivolous and untenable. He proffered the case of **MUCHANGA INVESTMENTS LTD VERSUS SAFARIS UNLIMITED (AFRICA) LTD & 2 OTHERS [2009]eKLR** as his authority for this proposition.

27. The advocate further proffered the case of **WAMBO VERSUS NJUGUNA**, **KLR 172,** as his authority for the proposition that occupation with leave and licence of an owner pursuant to a valid sale

agreement does not translate to adverse possession and that the concepts of adverse possession and a purchaser's interest cannot co-exist. He referred to the case of **SAMUEL MIKI WAWERU VERSUS JANE NJERI RICHU, C.A. NO.122 OF 2011 (UR**) which was quoted with approval in the case of **WAMBO VERSUS NJUGUNA (supra).** In the case, the Court opined as follows:

> "It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise. Further as the High Court correctly held in J**ANDU VERSUS KILIPAL [1975] EA 222** possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of **SISTO WAMBUGU VERSUS KAMAU NJUGUNA (1982 – 88) /KLR** 217 relied on by Mr Gitonga, Learned Counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of a licence or possession of such land only after the period of validity of the contract unless and until that contract of sale, has first been repudiated as required by the parties in which case adverse possession starts from the date of termination of the contract (sic)."

28. The defendant's advocate argues that since the plaintiff's case is that the defendant sold the disputed land to him in 1969, then he should not have predicated his claim upon the doctrine of adverse possession but should have based his claim on the alleged sale. He reiterated that the case of **MUCHANGA INVESTMENT LIMITED** (op.cit) had made it clear that a claim for a purchaser's interest and that one for adverse possession cannot co-exist.

29. The defendant's advocate postulated that courts of law had developed two pre-requisites as the necessary sine qua non in finding that requirements for the doctrine of adverse possession had been achieved. He laid them down as that:

> 1. An owner initially in possession has ceased to be in such possession, either after having been dispossessed or discontinued from the initial possession.
>
> 2. The land has subsequently been possessed by a person in whose favour the limitation period can run.

30. The defendant's advocate has submitted that the two conditions he has postulated have been widely adopted and discussed in the following authorities:-

> **a) NAIROBI CIVIL APPEAL NO. 64 OF 2004 – NGATI FARMERS COOPERATIVE SOCIETY LTD VERSUS CLLR JOHN LEDIDI & 15 OTHERS.**
>
> **b) MALINDI ELC NO.124 OF 2010 – RAVINDRANATH DAHYBHAI BHAGAT VERSUS HAMIS HAROD & OTHERS**
>
> **c) MALINDI ELC NO.106 OF 2007 – HAROD YONDA JUAJE VERSUS SADARA DZENGO MBAURO & ANOTHER.**

31. The defendant's advocate submits that as the plaintiff admits that the defendant has never been in possession of the suit property, then it was impossible for the defendant to have been dispossessed of the same or to have been discontinued from possession. He submits that he relies on the case of **RAVINDRANATH DAHYBHAI BHAGAT** (op. cit) in support of this proposition. The advocate submits that in the absence of possession by the defendant (1st condition), then dispossession or discontinuation in favour of the person claiming adverse possession (2nd condition) can not follow.

32. The defendant's advocate submits that the possession claimed by the plaintiff has not been continuous, exclusive, actual and uninterrupted. It is submitted that it is other persons, and not the plaintiff, who are in actual use and possession of the disputed property.

33. I have considered the pleadings, the evidence and the submissions proffered by the parties in support of their respective positions. I note that before me, this matter had been handled by four other judges. I also note that from

28th March, 2007 when the plaintiff's case was closed, there was a hiatus of 9 years before the defence case was heard. This is despite the fact that the defence evidence and cross-examination thereof took only about 30 minutes.

34. I deprecate the parties' casual attitude, indeed lethargy, towards the prosecution of this case.

35. Some of the issues raised in the submissions were not part of the evidence proffered by the parties. I acknowledge that the parties are perfectly in order to raise points of law and to restate established legal precedents in their written submissions. Nevertheless, a court's judgment must largely be guided by the evidence tendered by the parties before it.

36. I do not agree with the argument by the defendant's advocate that adverse possession cannot be found against a party who has never been in possession. If all the circumstances are right, a dissessor can obtain title through the doctrine of adverse possession against a party who has never occupied disputed land.

37. In their pleadings and in their evidence, the parties were pre-occupied with the period the plaintiff had stayed on the suit land. The plaintiff and his witnesses testified that the plaintiff had occupied the suit land since around 1969. The defendant was categorical that the plaintiff entered the disputed land in 1980s through his permission on condition that he would vacate it on demand.

38. The plaintiff testified that he bought the suit land from the defendant in 1969 and the defendant delivered possession to him the same year. On the other hand the defendant denied that he sold the disputed land to the defendant. His testimony was that he allowed the plaintiff to use the suit land on condition that he would vacate it on demand.

39. I note that even though the plaintiff testified that he had an agreement for sale which he said was in the custody of his advocate, he did not produce it.

40. It is pellucid that the plaintiff has not given evidence concerning when the sale agreement collapsed from which time the period necessary for adverse possession to accrue would start running.

41. PW2 contradicted PW1, the plaintiff, by saying that the suit land was sold to the plaintiff by the brothers of the deceased father of the defendant. He, however, said that the defendant was there when the land was sold. In cross-examination, PW2 admitted that at the time the disputed land was sold to the plaintiff, the defendant was a minor.

42. PW3 testified that the plaintiff has lived on the suit land since 1969. He told the court that the disputed land was sold to the plaintiff by the defendant's mother, Evangeline. He then changed his mind and said that the land had jointly been sold to the plaintiff by the defendant and his mother Evangeline. He also testified that he did not witness payment of the purchase price or the sale agreement being reduced into writing. PW3 further contradicted the plaintiff by telling the court that the plaintiff occupied the suit land between 1967 and 1969. He, however, admitted that he had been involved in a land dispute with the defendant's mother. He also told the court that he did not know in whose name the land was registered.

43. I opine that a long stay on the suit land is one of the important ingredients in the determination of whether or not a title can be obtained by way of adverse possession. Though a very important ingredient, apposite circumstances must also be favourable to a dissessor. In this case, the plaintiff has made it clear that the defendant had not filed succession proceedings in respect of his father's estate when he allegedly bought the disputed land from the defendant. PW2 and PW3 have contradicted the plaintiff by testifying that the suit land had been sold by parties other than the defendant. Even assuming that the plaintiff's claim was for a purchaser's interest, his claim would fail.

44. There was confusion spawned by the evidence tendered by the plaintiff and his 2 witnesses. They did not know when the land was registered in the name of the defendant. Except for a copy of the land register showing that Parcel No. 907 (a subdivision of parcel NO. 371) was registered in the name of the defendant on 1st March, 1989, there was no evidence tendered to show when the defendant became the registered owner of the suit land. I am unable to determine when the time applicable for counting the period necessary for adverse possession to accrue would start running. If the disputed land was sold to the plaintiff by the defendant's mother or by other parties and then the agreement for sale collapsed, then, perhaps, he should have filed a claim against the defendant's mother or the other parties.

45. In their evidence, the parties have over-relied on the period the defendant has occupied the suit land. As I have already noted, long stay alone, though an important ingredient in proving adverse possession, does not, ipso facto, entitle a plaintiff to acquire title through the doctrine of adverse possession.

46. I need not reinvent the wheel. In **KWEYU VERSUS OMUTUT [1990] KLR** 709, the Court of Appeal, Gicheru JA, as he then was, stated as follows:

> "By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously."

47. A priori, length of stay alone cannot entitle a claimant to acquisition of title by adverse possession. There can never be an entry under a colour of right claiming title hostile to a minor, as the defendant was at the time the plaintiff claims he started occupation of the apposite lands. This veritably debunks the notion that a putative dissessor can by a mere slight of hand, nay prestidigitation, predicated upon longevity of occupation, obtain title by way of adverse possession.

48. There can never be an entry under a colour of right, when the alleged agreement between the plaintiff and the defendant has not collapsed.

49. I agree with the defendant that there is need to bifurcate a claim for adverse possession from a claim predicated upon a purchaser's interest. The two should not be conflated.

50. No claim for adverse possession can be made against a minor. A minor has no capacity to be sued in a suit claiming ownership of property by adverse possession. The plaintiff has also not proved by way of evidence the time from when the period required for adverse possession to accrue started running.

51. The questions framed by the originating summons are answered as follows:

> 1. Land Parcel **Karingani/Mugirirwa/907** and Land Parcel No. **Karingani/Mugirirwa/908** jointly measure 5.34 acres. This fact is not controverted by the parties.
>
> 2. I am unable to find that the plaintiff is in possession of the whole of it.

3. The plaintiff having sued a person who was a minor at the time he claims he took possession of the land after the land had allegedly been sold to him by a minor and at a time when no succession cause had been instituted in respect of the estate of the defendant's deceased father and when the defendant has not given evidence regarding when the apposite agreement for sale between the plaintiff and the defendant collapsed so that time necessary for adverse possession to accrue would start running **HAS NOT** obtained title to the suit land through the doctrine of Adverse possession.

4. The court declares that the suit lands being Land Parcel Nos. **KARINGANI/MUGIRIRWA/907** AND **KARINGANI/MUGIRIRWA/908** belong to the defendant, the plaintiff's claim for ownership by way of adverse possession having been denied.

5. The plaintiff is not entitled to costs.

6. Costs are awarded to the defendant.

52. Taking cue from the Court of Appeal decision in **EDWIN G.K. THIONGO & ANOTHER (APPELLANTS) AND GICHURU KINUTHIA & 2 OTHERS (RESPONDENTS) CIVIL APPEAL 267 OF 2007**, Nairobi – [2015] eKLR, where the court ordered the claimant to vacate the suit land within 6 months of the date the said judgment was delivered, I will make a similar order.

53. For avoidance of doubt, it is ordered as follows:

1. This suit is dismissed.

2. It is declared that Land Parcel No. **KARINGANI/MUGIRIRWA/907** and Land Parcel No. **KARINGANI/MUGIRIRWA/908** belong to the defendant.

3. The plaintiff and any other person laying claim on Land Parcel No. **KARINGANI/MUGIRIRWA/907** and Land parcel No. **KARINGANI/MUGIRIRWA/908** should vacate the lands within 6 months of the date of delivery of this judgment failing which the OCS in charge of the area where the suit lands are situated shall facilitate the apposite eviction.

4. Costs are awarded to the defendant.

Delivered in open court at Chuka this **8th** day of **March**, **2017** in the presence of:

CA: Ndegwa

M'Mbaoni M'Thaara – plaintiff

Mark Muriithi for the defendant

**P.M. NJOROGE**

**JUDGE**