



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 614 OF 2013**

**JULIUS NGIGI MUNJUGA .....PLAINTIFF**

**VERSUS**

**THE CHAIRMAN, BOARD OF GOVERNORS MURANG'A COLLEGE OF**

**TECHNOLOGY PRIMARY SCHOOL .....DEFENDANT**

**JUDGMENT**

**JULIUS NGIGI MUNJUGA** the plaintiff herein has since 9th February 1990 been the registered owner of that leasehold property described as MURANGA MUNICIPALITY/BLOCK 11/257 (hereinafter the suit property) which is for a term of ninety nine (99) years. In the year 2011, he discovered that the defendant had encroached on the said property without any legal right or claim and so on 17th June 2013, he filed this suit seeking judgment in the following terms:

- (a) An order directed at the defendant to remove all fencing around or across the plaintiff's property and to forthwith cease from any or further encroachment upon the plaintiff's property being MURANGA MUNICIPALITY/BLOCK 11/257.***
- (b) A permanent injunction restraining the defendant by itself, its servants, agents or anyone acting through it from trespassing, encroaching, entering, taking possession, fencing, working therein, constructing, developing or in any other way interfering with the plaintiff's quiet possession and enjoyment of all that land being MURANGA MUNICIPALITY/BLOCK 11/257.***
- (c) General damages for trespass.***
- (d) Costs of this suit.***
- (e) Interest on (c) and (d) hereinabove.***
- (f) Any other or further relief that this Honourable Court may deem fit and just to grant.***

The defendant resisted the claim by its defence filed herein on 30th July 2013 in which it averred that while the plaintiff is the registered owner of the suit property, the real ownership vests in the defendant. That the plaintiff's title has infact been extinguished through adverse possession and this suit should therefore be dismissed.

Meanwhile, on 8th November 2013, the defendant herein (as plaintiff) moved to the Environment and Land Court at Nyeri and filed against the plaintiff herein (as defendant) Civil Case No. 223 of 2013 (O.S) in which it sought judgment in the following terms:

**1. That the defendant's title to land parcel No. MURANGA MUNICIPALITY/BLOCK 11/257 has been extinguished by way of adverse possession.**

**2. That the defendant's name be deleted from the title herein and in its place, the name of the plaintiff be inserted.**

**3. That the costs of this case be awarded to the plaintiff.**

That claim was premised on pleadings that the plaintiff has been in occupation of the suit property for a period in excess of twenty eight (28) years and the defendant has never had possession of the same which is fenced and is used by the school as a playing field.

The claim was resisted through a replying affidavit in which the defendant therein pleaded that the dispute was pending in this Court and therefore the Nyeri suit amounted to forum shopping and is an abuse of the process of this Court.

On 20th February 2015 **WAITHAKA J.** made an order transferring the Nyeri Environment and Land Court Suit No. 223 of 2013 to this Court and directing that it be consolidated with this suit for purposes of hearing and determination.

That consolidation was formally done in this case on 21st April 2015 with an order that this be the lead file. For purposes of this judgment therefore, the Originating Summons in the Nyeri Environment and Land Case No. 223 of 2013 shall be treated as the counter-claim.

The trial commenced before me on 22nd November 2016 when the plaintiff testified and produced the certificate of lease in respect to the suit property (Plaintiff's Exhibit 1) and said he had acquired the property in 1979 but was only issued with the certificate of lease in 1990. He said he has not put up any structure on the suit property but in 2009, he noticed that the defendant had fenced it off and upon investigations, he learnt that the then Muranga Municipal Council had allocated the suit property to the defendant. He therefore went to see the Town Clerk to the said Council but he could not get any explanation. So he filed this suit. He denied that the defendant have acquired the suit property through adverse possession adding that only a Court can make such a declaration.

The defendant called its Chairman **HARRISON MWANGI MWITHIGA** (DW1) and a former headmistress of the school **GRACE NJERU** (DW2) in support of its claim. **HARRISON MWANGI MUTHIGA** testified that the defendant has been in occupation of the suit property since 1985 and utilizes it as a playing field and he did not know that the plaintiff was the registered owner thereof. He added that in 1990, the Muranga Municipal Council informed the defendant that the suit property had been allocated to them. He produced a letter (Defence Exhibit 2) to that effect. The letter was offering the plaintiff another parcel of land but the witness was not sure if that was done. He therefore prayed that the defendant be awarded the suit property as per its counter-claim having been in un-interrupted occupation thereof since 1985.

On her part, **GRACE NJERU** (DW2) told the Court that she was the headmistress of the defendant school from 1989 upto 1995 and fenced off the suit property as part of the school compound to be used as a playing field. She however did not know the plaintiff.

Submissions were thereafter filed both by the firm of **KINYUA MWANIKI & WAINAINA** Advocates for the plaintiff and **J.N. MBUTHIA & CO.** Advocates for the defendant.

I have considered the parties oral and documentary evidence together with the submissions by counsel.

While the plaintiff seeks orders restraining the defendant from the suit property, the defendant seeks orders that it has infact acquired the said property by way of adverse possession having been in occupation thereof since 1985 without interruption.

The following are not really in dispute:

- 1. That the plaintiff is the registered proprietor of the suit property.**
- 2. That the defendant has been in occupation of the suit property since 1985.**

What this Court needs to determine is whether the plaintiff holds a valid title to the suit property and is therefore entitled to orders injunctioning the defendant from interfering with the same or if in fact the plaintiff's title thereto has been extinguished and the defendant is entitled to orders that it has acquired the suit property through adverse possession.

First however, I need to consider the submission raised by the defendant's advocate that in fact the plaintiff's claim is statute barred since the defendant took possession of the suit property in 1990 by fencing it and the plaintiff only filed this suit in 2013.

**Section 7 of the Limitation of Actions Act** provides as follows:

***“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”.***

It is clear from the plaintiff's oral testimony that it was not until the year 2009 that he discovered that the defendant had fenced off the suit property for use as a playing field. He said:

***“However, in 2009 the defendant fenced off the land. When I discovered this, I employed the services of Mr. Muraya a Land agent to investigate”***

When cross-examined by counsel for the defendant, he said:

***“I used to inspect it and it was intact until I discovered that the defendant had entered it in 2009”***

He reiterated that in his re-examination when he said:

***“It was only in 2009 that I realized the defendant had fenced my land. That is when I started making enquires to confirm who had fenced it. I then made several visits to the Municipal Council of Muranga to confirm the position”.***

That the plaintiff only knew about the occupation of the suit property in 2009 is not really in dispute because even the defendant's witnesses did not know about him until 2013 when he received the plaintiff's demand letter. During cross-examination, **HARRISON MWANGI MWITHIGA (DW2)** the defendant's Chairman said:

***“I was not aware that the plot in dispute was registered in the plaintiff's names until 2013 when his lawyer wrote to the defendant. I did not consult the plaintiff over this plot. We did not know about the plaintiff until February 2013 when we received this demand letter dated 18th February 2013 from his advocate”.***

The import of the above is that though the defendant had been using the suit property since 1985 and fenced it in 1990 after receiving a letter from the Muranga Municipal Council that the said property had been allocated to it, the plaintiff only knew about that occupation in 2009 and that is when the cause of action accrued. This suit was filed in 2013 and therefore it is not statute barred.

Having disposed off the issue of limitation, I can now consider the plaintiff's claim in its merit. As already indicated above, his registration as owner of the suit land is not in doubt and is confirmed by his certificate of lease dated 9th February 1990. By virtue of the provisions of **Sections 27 and 28 of the repealed Registered Land Act** under which the lease is issued, that certificate confers upon the plaintiff

the absolute ownership of the suit property together with all the rights and privileges belonging or appurtenant thereto subject only to any other restrictions and overriding interests recognized in law as well as any obligation to which he is subject as trustee. A similar provision exists in **Sections 24 and 25 of the new Land Registration Act 2012**. No evidence has been adduced before this Court to demonstrate that the plaintiff's title is subject to any of the restrictions recognized by law or was obtained fraudulently. Evidence was led by the defendant's Chairman (DW1) that the suit property had been allocated to it by the Municipal Council of Muranga. A letter dated 15th March 1990 and addressed to the plaintiff by the said Council was produced as proof of that – Defence Exhibit 3. That letter reads:

*“Dear Sir*

***EXCHANGE OF PLOT 11/257 (MURANGA MUNICIPALITY) WITH ANOTHER SITE FOR PURPOSES OF TECHNOLOGY PRIMARY SCHOOL EXTENSION***

***As you are probably aware, your above plot is adjacent to the above school. The above school does not have enough area for expansion.***

***In view of the above, it has been decided that the above plot No. 257 which was allocated to you in 1981 (and have not been developed) be acquired in order to provide expansion area for the above school.***

***However, we are ready to compensate you with another piece of land and you are therefore advised to call on the undersigned to show you the alternative site”***

The plaintiff was clear in his evidence that he was not given any alternative plot and indeed the above letter only makes an offer to him but does not identify the plot, if any, that he was to be given in exchange for the suit property. There may have been an intention to acquire the suit property from the plaintiff but no such acquisition was done as required by the ***Land acquisition Act***. Therefore, when the defendant subsequently took possession of the suit property and fenced it, that was in contravention of the plaintiff's rights to the same which are protected both by the land laws and the Constitution.

The defendant, on the other hand, lays a claim to the suit property by virtue of having been in occupation thereof since 1985. In **KASUVE VS MWAANI INVESTMENT LTD & OTHERS 2004 1 K.L.R 184**, the Court of Appeal re-stated that in order to prove such a claim, he must show:

***“... that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”***

Further, in **KIMANI RUCHIRE VS SWIFT RUTHERFORDS & CO. LTD 1980 K.L.R 10**, KNELLER J. held that in adverse possession:

***“The plaintiff must show that the Company had knowledge (or the means of knowing actual or constructive) of the possession or occupation...”***

That decision has been followed in many cases including in ***TITUS MUNYI VS PETER KIMANI C.A CIVIL APPEAL No. 28 of 2014 (NYERI)***. It is clear from the oral evidence herein including the correspondences, that Muranga Municipal Council had expressed an intention to acquire the suit property way back in 1990 and engaged the plaintiff in that regard. That intention was actualized when the defendant fenced off the suit property. The defendant's Chairman stated in his evidence that he did not know when the fencing was done. He said in cross-examination that:

***“The plot was within the school compound. I cannot tell when the fencing was done”.***

The plaintiff's evidence that the fencing was done in 2009 and that was when he discovered that the defendant had finally taken possession of the suit property was not really rebutted. Therefore, whereas

the defendant had expressed its intention to acquire the suit property earlier, it was not until 2009 that the plaintiff discovered that the defendant had fenced off the suit property. That is the time when the plaintiff had knowledge of the defendant's occupation of the suit property and that must be the time when the statutory period for adverse possession started to run. That means that by the time this suit was filed in 2013, the defendant's occupation of the suit property had only been within the knowledge of the plaintiff for four (4) years and not for the statutory period of twelve (12) years. Counsel for the defendant made the following submissions in support of its claim to the suit property by adverse possession:

***“My Lord, the minor discrepancy between DW1 and DW2 as to the commencement of possession whether in 1985, before 1985 or the year 1990 is in my humble view not material. Having levelled the ground in 1990 and fenced it, there is no dispute that the school made use of the suit land as a playground which is full possession as far as primary school is concerned (please see RAMCO INVESTMENT case)”.***

Counsel then adds in his submissions as follows:

***“Has the occupation lasted for the statutory period of 12 years since by the adverse possession began? Since 1990 to the time when this suit was filed, over 23 years had elapsed. Even by 2009 when the plaintiff first made enquiries, 12 years had long passed”.***

With respect, counsel misses the point. The defendant may have occupied the suit property as far back as 1985 or even 1990. However, it was not until 2009 that the plaintiff had knowledge of that occupation. That was clear from his evidence both in chief and during cross-examination. It was then that he started making enquiries culminating with a demand to the defendant in 2013. Infact the defendant's Chairman first met the plaintiff in February 2013 from his own testimony. Therefore time for purposes of adverse possession could only start running from 2009 and not before. Indeed the defendant did not even know that the plaintiff was the registered proprietor of the suit land until 2013. The defendant's counter-claim to the suit property by way of adverse possession cannot therefore be sustained from the evidence herein and must be rejected.

From the evidence herein, I am satisfied that the plaintiff has made out a case for the grant of an order directing the defendant to remove the fence from the suit property and also a permanent injunction restraining it, its servants, agents or anyone acting through it from trespassing, encroaching, entering, taking possession, fencing, working or constructing on the suit land. With regard to the claim for damages for trespass, the law is that the plaintiff would be entitled to nominal damages. However, in the circumstances of this case, the plaintiff does not appear to have had any immediate use of the suit property. Indeed after acquiring it in 1990, it took him almost twenty (20) years to discover that the defendant was occupying it. The defendant is itself a public institution and was using it for a good cause in public interest. I am not inclined to award the plaintiff any damage, nominal or otherwise for the trespass and in the same breath, I decline to award him costs. Since the plaintiff appeared amenable to surrendering the suit property if he was given other land and since the defendant needs the property for a just cause in public interest and not for personal gain, I would advise the parties to enter into negotiation in that regard.

Ultimately therefore, there will be judgment for the plaintiff against the defendant in the following terms:

- 1. The defendant's counter-claim is dismissed.***
- 2. Judgment is entered for the plaintiff against the defendant in terms of paragraphs (a) and (b) only of the plaint.***
- 3. There shall be no order as to costs.***

**B. N. OLAO**

**JUDGE**

**5<sup>TH</sup> MAY, 2017**

Judgment dated, signed and delivered in open Court this 5<sup>th</sup> day of May 2017

Mr. Ngigi for Mr. Mwaniki for Plaintiff present

Mr. Mbuthia for Defendant absent

Right of appeal explained.

**B. N. OLAO**

**JUDGE**

**5<sup>TH</sup> MAY, 2017**