



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**

**ELC NO. 164 OF 2014**

**PAUL MWANGI GACHURU**

**PLAINTIFF**

**VS**

**KAMANDE NGUKU**

**DEFENDANT**

**JUDGMENT**

1. The Applicant filed Originating Summons seeking orders to be declared entitled to one acre out of the Land Parcel No. LOC.17/KAMAHUHA/2634 currently registered in the name of the Respondent. The claim is based on adverse possession.
2. The application is supported by the Affidavit of Paul Mwangi Gacheru, the Applicant herein. In it, he depones that he has been in possession and occupation of the 1 acre portion of LR LOC.17/KAMAHUHA/2634 which was formally known as LR LOC 17/KAMAHUHA/2184 since 2002. That he has been in exclusive continuous open and uninterrupted possession and in addition has developed the piece of land.
3. It would appear that the genesis of the claim is based on a sale agreement between the parties entered in 2002 when the Applicant purchased 1 acre out of LR LOC.17/KAMAHUHA/2634 but the Respondent, he depones, failed to obtain Land Control Board consent within the prescribed period thus rendering the said transaction void. He attached a copy of the official search dated 28/5/15. That the original LR No was LOC.17/KAMAHUHA /2184 which title was closed on subdivision on the 8/12/2004 giving rise to LR No. LOC.17/KAMAHUHA/2633 and LOC.17/KAMAHUHA /2634. LR NO LOC.17/KAMAHUHA /2633 was registered in the name of Samuel Mwangi Muiyuro while LR LOC.17/KAMAHUHA/2634 remained in the name of the Respondent. He avers that his one acre portion is in the said LR LOC.17/KAMAHUHA/2634.
4. In support of his claim the Applicant has attached the Agreement for sale dated 12/9/2002 between himself and the Respondent wherein the Applicant purchased 0.7 acres of LR NO. LOC.17/KAMAHUHA /2184. Later the said agreement was varied when the parties entered into another agreement for a full 1 acre of land out of LR LOC 17/KAMAHUHA/2184.
5. The Respondent did not file any reply to the application notwithstanding personal service on the 8/8/15 as stated in the Affidavit of service dated 26/1/16 and filed in Court on 26/1/2016. On the 26/1/16 the Applicant filed a request of Judgement which request was entered against the Respondent and the matter being a land case was set down for formal proof. The evidence of the applicant is therefore uncontroverted.
6. At the hearing of the formal proof the Plaintiff testified and reiterated the contents of his evidence in the Supporting Affidavit as well as his witness statement. The evidence is as captured above. He called

one witness: Mr. Reuben Mwangi Nduati who testified that he is a neighbor of both parties and that he was a witness to the sale agreement entered into by the parties in 2002. That he knows that the Plaintiff bought 1 acre from the Defendant. That the original land was LR LOC 17/KAMAHUHA/2184 before it was sub-divided into 2633 and 2634. That the suit property is in LR LOC.17/KAMAHUHA/2634 which is registered in the name of the Defendant. He avered that the Plaintiff has been in continuous possession of the 1 acre since 2002 planting trees, maize and other subsistence crops.

7. The learned Counsel for the Plaintiff J K Ngaruiya submitted that the claim is not based on land purchase but on adverse possession. That though the parties entered into a sale agreement in 2002, no consent of the Land Control Board was obtained and therefore the transaction became null and void at the expiry of six months from the date of the agreement. He cited the Court of Appeal decision in **Public Trustee and Beatrice Muthoni Vs Kamau Wanduru CA 73 of 1982** that once an agreement of sale of an agricultural land becomes null and void on account of lack of land control board consent, adverse possession begins to mature and time starts running against the owner of the land.

8. Finally, he submitted that the Plaintiff having been in occupation and possession of the land with the full knowledge of the Defendant and has not been interrupted for a period of over 12 years, the Defendant's title therefore has been extinguished in favour of the Plaintiff.

### **Analysis and determination**

9. I have considered the pleadings, evidence adduced at the trial and the submissions by the applicant and the law. The respondent did not file any response to the originating summons and thus the evidence presented to Court is uncontroverted.

10. It is on record that the transaction commenced by way of a purchase vide an agreement of sale entered by the parties in 12/9/02 which agreement is understood to have been null and void on account of want of the Land Control Board consent within the stipulated period of 6 months. This fact has been admitted by the applicant in his submissions that the claim is based on adverse possession and not purchase. It is the applicant's case that having been put into possession by the respondent pursuant to a void agreement of sale, he has been in open exclusive and uninterrupted occupation and possession of the suit land for a period of over 12 years.

11. The applicant brought his application under Section 38 of the Limitation of Actions Act Cap 22 that states thus;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act,..... he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.

12. Further Section 7 of the Limitations of Actions Act Cap 22 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”. (Emphasis is mine).

Section 17 of the said Act states as thus;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

13. For adverse possession to be met, there are requirements that the applicant must satisfy, namely;- (a) the parcel of land must be registered in the name of a person other than the applicant. In the case of **Githu v Ndele [1984] KLR 776** it was held that the identification of the land is an important aspect of adverse

possession and it is for that reason that Order 37 Rule 7(2) of the Civil Procedure Rules specifically provides:

“The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”

It is on record that the original registration of the land LOC 17/Kamahuha/2634 is registered in the name of the respondent. A copy of the green card and issued on 8/2/15 as well as a copy of the certificate of official search dated 28/5/15 are enclosed.

(b) open continuous exclusive and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

Evidence available and as adduced by the applicant and corroborated by PW2 – Reuben Mwangi Nduati is that the applicant has been in possession of the suit land since 2002 planting nappier grass, maize and trees. It is however admitted that the applicant does not live on the suit land and has not constructed any house. In my view carrying out farming activities is one of the ways of actual possession of the suit land. That he has done that openly and without any secret. It is his evidence that he is using the suit land (1 acre) exclusively and to the exclusion of the registered owner who has been dispossessed of the suit land. This is the *animus possipendi* - intention to possess the suit land to the exclusion of everyone else, the paper title holder included.

The Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** in this regard held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed of, or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that that he or she has been in possession for the requisite number of years. In this case it is evident that the title holder has been dispossessed.

(c) Actual possession of the property – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The actions of the adverse party must change the state of the land, as by clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements. It is on record that the applicant is carrying out farming activities.

(d) Non-permissive, hostile or adverse use of the property – The adverse party entered or used the land without permission. The evidence on record shows that though the entry was permissive in the beginning the agreement became void after the six month statutory period and the registered owner has taken no steps to remove the applicant or to interrupt his possession of the land.

14. It is not in dispute that the Plaintiff is in possession of the suit land having been so put by the defendant pursuant to a sale agreement. It is also on record that the consent of the Land Control Board was not obtained thus the transaction became null and void on that account. In the case of **Samuel Miki Waweru v Jane Njeri Richu, Civ. Appeal No. 122 of 2001** the Court held that where a purchaser occupies land which is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of adverse possession, until the agreement is terminated. The Court held in the **Miki Waweru** case that, where the sale agreement being subject to the Land Control Act became void under section 6(1) of the Land Control Act, for lack of consent of the Land Control Board, time starts running from the moment the transaction becomes void. In this case the time started running six months after date of signing the agreement of sale which is to say March 2003. By the time the suit was filed in June 2015,

the Plaintiff would have been in occupation of the suit land for over 12 years. It is trite law that time stops running the moment a suit is filed anchored on adverse possession. No evidence has been tendered to show that the Respondent took any steps to interrupt the applicant by filing a suit to recover the land from the alleged trespasser. As stated by the Court of Appeal in the case of **Francis Gacharu Kariri v Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (UR)**:

“...the possession must not be broken, or any endeavours to interrupt it.”

15. In the absence of evidence to the contrary, I am satisfied that the requirements of adverse possession have been met by the applicant.

16. In conclusion, I find and hold that the Plaintiff has satisfied the requirements of adverse possession and I accordingly order as follows;

**a) The Plaintiff be and is hereby declared to have become entitled to one acre out of land parcel Loc17/Kamahuha/2634 through adverse possession of the said land for over twelve years.**

**b) The Defendant's title to the said land be and is hereby declared extinguished and/ or invalid and void and the Plaintiff be registered as proprietor of one acre out of the said land.**

**c) That the Defendant be and is hereby ordered to execute the necessary documents to effect the transfer of one acre out of land parcel no. 17/Kamahuha/2634 to the Plaintiff within the next 30 days from the date hereof.**

**d) In default, the Deputy Registrar of the Court to so execute all the documents necessary to effect the said transfer.**

**e) The costs for this application to be met by the Defendant.**

**DELIVERED, DATED AND SIGNED AT MURANG'A, THIS 16<sup>TH</sup> NOVEMBER 2017.**

**J. G. KEMEI**

**JUDGE**