



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 238 OF 2014

JOSEPH MWANGI THEURI AND 37 OTHERS...PLAINTIFFS

VERSUS

DAVID GITONGA GITHINJIDEFENDANT

JUDGMENT

(Adverse possession; plaintiffs having been sued before the Land Disputes Tribunal and a decree for their eviction issued; argument that the decree is time barred after lapse of 12 years and plaintiffs seeking a declaration that the same cannot be executed; Section 34 of the Civil Procedure Act ; such declaration being a determination related to execution of decree ought to be made by the court seized with the application for execution of decree and not by a separate suit; this suit, being a separate suit is therefore improper and the declaration cannot issue herein; peaceful occupation; whether the engagement of legal instruments for eviction constitutes interruption; held that engagement of legal instruments is the same as engaging a physical confrontation and the same disrupts peaceful possession; without demonstrating peaceful possession for 12 years claim must fail; suit dismissed with costs).

PART A: INTRODUCTION AND PLEADINGS

1. This suit was commenced on 14th August 2014 by way of Originating Summons taken out pursuant to the provisions of Sections 4 and 38 of the Limitation of Actions Act, CAP 22, Laws of Kenya, and Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules. It is a case by 38 persons. As originally filed, the subject matter of the case was the land parcel Nyandarua/Ol ' Joro 'Orok/Salient/1635 measuring 1.8 hectares. While this matter was still pending, the defendant moved and subdivided the land parcel No. 1635 into 8 portions being the land parcels No. 26199, 26200, 26201, 26202, 26203, 26204, 26205 and 26206 and transferred the same to the person who held his power of attorney, David Gitonga Githinji. This necessitated an amendment of the Originating Summons which was duly effected, so that the defendant is David Gitonga Githinji on his own behalf, and the land parcels claimed being Nyandarua/Ol' Joro' Orok/ 26199 to 26206.

2. In the Amended Originating Summons, the applicant (whom I will refer to as the plaintiffs) have sought the following orders :-

(i) *A declaration that the defendant is not entitled to execute the decree/judgment given on 13 December 2000, in Nyahururu PMC Land Disputes Case No. 21 of 2000 on account of being*

statute barred by virtue of The Limitation of Actions Act.

(ii) A declaration that the plaintiffs have become entitled to be registered as proprietors of the respective occupied portions of Title Number Nyandarua/Ol' Joro'Orok Salient/1635 measuring 1.8 hectares now subdivided to create the titles No. Nyandarua/Ol' Joro ' Orok/Salient / 26199-26206 by virtue of the doctrine of adverse possession.

(iii) That the honourable court's Deputy Registrar be authorized to execute all necessary documents to facilitate subdivision and transfer of Title Number Nyandarua/Ol' Joro'Orok Salient/1635 now subdivided to create the titles No. Nyandarua/Ol' Joro ' Orok/Salient / 26199-26206 to vest ownership of various subdivisions thereof to the plaintiffs.

(iv) That costs of this suit be granted to the plaintiffs.

3. The case of the applicants (whom for ease of reference I will refer to as the plaintiffs) is that between the years 1998 and 2000 they each purchased various portions of land measuring 50 X 100 feet from the land parcel Nyandarua/Ol' Joro 'Orok Salient/1635 (hereinafter parcel No. 1635) from Gikaro Universal Agency which was selling the land on behalf of one George Gateru Kamau. They immediately settled on the land and built their respective homes and they aver that they have since enjoyed use and possession of the property without any interruption. At the time of the said purchase, it is said that the land parcel No. 1635 was registered in the name of the Settlement Fund Trustees (SFT) with George Gateru Kamau (Kamau) as the allottee. In June of the year 2000, the original defendant, John Nzioka Nzuki, whom they did not know, filed a case through David G. Githinji (the present defendant but then the duly authorized attorney of Mr. Nzuki), at the Nyandarua District Land Disputes Tribunal, being case No. 16 of 2000, and claimed that the plaintiffs are in illegal occupation of the suit land. The case was heard by the Tribunal and the decision was adopted as a judgement of the court on 13th December 2000, vide Nyahururu PMC Land Dispute Case No. 21 of 2000. On 28th February 2001, the plaintiffs applied for stay of execution of the decree which application was allowed on 11 April 2001. The stay order was to last "until all the cases pending in court over the same subject matter are disposed of." At that time, the only pending case was Nyahururu PMCC No. 253 of 2000 in which a ruling was delivered on 4th June 2000 dismissing the same. The plaintiffs aver that after this ruling the defendant was at liberty to apply for execution of the decree but he did not do so. It is also argued that the appeal Nakuru HCCA No. 18 of 2002, was not a bar to executing the decree as the same was not a pending case at the time the ruling of 4th June 2002 was delivered and therefore the order of stay could not extend to it. This appeal was dismissed on 5th June 2007. It is said that the defendant only applied for execution of the decree on 23rd April 2014 a period of 13 years after it was given. The court issued notices to show cause against the plaintiffs on 28th April 2014 and fixed the same for hearing on 16th July 2014. They instructed their advocate to appear in court on their behalf and object to the notices to show cause but owing to factors beyond his control, he failed to appear and the court ordered their eviction. On 18th July 2014, their advocate moved to court and obtained a stay pending hearing of their application to set aside the eviction order. It is their view that the defendant is not entitled to execute the decree given on 13th December 2000 for being statute barred and that they are entitled to the properties claimed through adverse possession.

4. The defendant in his replying affidavit, inter alia averred that judgment in Nyahururu PMC Land Dispute Case No. 21 of 2000, was passed on 13th December 2000, after adoption of the award of the Tribunal and a decree issued on 17th January 2001. Part of the decree was for eviction of the plaintiffs from the suit property. On 11 April 2001, the plaintiffs obtained a stay of execution of the decree and it was ordered that the matter be stood over generally until all cases pending in court over the subject matter are disposed of. It is deposed that the order of stay of execution stopped time from running with effect from 11 April 2001. At the time this order was given, there was pending the suit *Nyahururu PMCC No. 253 of 2000, George Gateru Kamau vs John Nzioka Nzuki & The Settlement Fund Trustees*. This suit was dismissed vide a ruling delivered on 4th June 2002. The plaintiff in the matter (Kamau), appealed this ruling vide Nakuru High Court Civil Appeal No. 108 of 2002. On 5th June 2007, this appeal was dismissed with costs. It is stated that the plaintiffs tied the hands of the defendant and stopped him from

executing and/or enforcing the judgment through the order of stay of execution, and cannot now be heard to say that the said judgment is time barred. It is his view that time started running from 5th June 2007, when the appeal was dismissed and that 12 years have not lapsed from that time to the time of filing of this suit. He has also argued that a substantial portion of the land is not occupied and is vacant and that he has already taken possession of this portion. It is said that some of the persons who purchased plots from Mr. Kamau (now deceased) did not take possession nor occupy the property. He has also deposed that the 3rd plaintiff has disowned the suit and he annexed an affidavit from the 3rd plaintiff stating that she is not a party to this suit.

5. The plaintiffs filed a supplementary affidavit sworn by the 1st plaintiff on 7th April 2015 and a further affidavit sworn on 28th August 2015. He stated that the 3rd plaintiff signed the authority authorizing him to institute this suit and has only denounced the case on account of pressure from her husband and the defendant. He reiterated that 12 years have lapsed since 13th December 2000, when the decree was passed. He has also annexed photographs showing how the 42 plots in issue are occupied and has asserted that the plaintiffs are in exclusive occupation of the same. He has averred that the defendant could not have sought their eviction if they were not in occupation. He also annexed copies of some proceedings in Nyahururu Case No. 21 of 2000. He has stated that the Nyahururu Court was on 16th March 2003 gutted by fire and the records he could obtain are those from 2010 when the file was reconstructed. He has annexed an application dated 13th September 2010 filed by the defendant seeking the eviction of the plaintiffs. Their advocate raised a preliminary objection on 19th February 2011 and a ruling on the preliminary objection made on 25th March 2011. The preliminary objection was allowed and the application dismissed. Another application for eviction was filed on 23rd April 2014 which is argued to have been filed 13 years after the decree issued on 13th December 2000. It was also argued that the award of the tribunal was an arbitral award and by dint of Section 4(1) (c) of the Limitation of Actions Act, it cannot be enforced after 6 years. It was also stated that the award was only against one person, David Kibui Muthama.

6. The defendant also filed a supplementary affidavit sworn on 18th September 2015. He stated that the original parcel No. 1635 was never owned by Mr. Kamau and he had no capacity to sell the same to the plaintiffs. He deposed that he filed an application dated 10th August 2012 in Nyahururu Case No. 21 of 2000 to enjoin all the plaintiffs herein which application was allowed by consent on 14th September 2012. It is averred that the tribunal award binds all the 38 plaintiffs in this suit and that the same has never been appealed against or quashed. It is also deposed that the plaintiffs cannot challenge the award of the tribunal through this suit.

7. Directions were taken that the suit be disposed of by way of the affidavit evidence on record and written submissions. I also allowed the counsels on record to make oral submissions to highlight what they had put down in writing.

PART B: SUBMISSIONS OF COUNSELS

8. In his written submissions, Mr. Gakuhi Chege for the plaintiffs, reviewed the facts and also reviewed all the decisions rendered in the earlier suits. He submitted that in the ruling of 25th March 2011, the subordinate court trashed the award of the tribunal and held that it could not be sustained against the 42 persons named. He pointed out that there is no appeal against this decision. Having failed to review this ruling, the defendant filed an application for execution against David Kibui Muthama and 38 Others. It is this application which prompted the plaintiffs to institute the instant suit. He submitted that the present suit is competent and that from the facts, the plaintiffs are entitled to the declarations that they have sought. He submitted that the ruling of 25th March 2014 held that the eviction could only be sustained against David Kibui Muthama. He submitted that the order of stay of execution given by the Magistrate on 11th April 2001, lapsed immediately upon determination of Nyahururu Case No. 253 of 2000. He submitted that the defendant has not explained his inaction since then. He also submitted that the award could not be enforced after 6 years following the provisions of Section 4(1) (c) of the Limitation of Actions Act, which provides for a 6 year time limit for the enforcement of arbitral awards. He submitted

that the defendant's application for execution against all the plaintiffs was filed on 23 April 2014 which is outside the limitation period. On this point, he relied on the case of *M'Rinkanya & Another vs M'Mbijiwe (2008) IEA 200*. He submitted that it cannot be allowed because it is time barred and because the plaintiffs herein are not named in that decree nor are they defendants in the said suit. He was of the view that the plaintiffs did not participate in the tribunal proceedings and cannot be bound by that judgment. He submitted that the named defendant in that matter had no authority to act for the plaintiffs in this suit. He had misgivings in the manner in which the tribunal proceedings were conducted and echoed the court ruling of 25th March 2011, which held as much. He submitted that the tribunal breached the rule of natural justice as the plaintiffs were not heard in the matter and could not therefore be condemned. On this point, he relied on the case of *Ndungu Mugoya & 473 Others vs Stephen Wangombe & 9 Others (2005) eKLR*. On the issue of occupation, he submitted that the plaintiffs have demonstrated occupation and have made developments on the land including houses, some of which are permanent. He was of the opinion that the ingredients for adverse possession have been met. He also added for good measure, relying on the case of *Githu v Ndeete (1984) KLR 776*, that change of proprietorship of the property did not affect the occupation by the plaintiffs. His view was that the 12 year limitation period expired on 12th January 2012 when calculated from the time David Nzioka Nzuki became registered as proprietor. Alternatively, if the time when the order of stay was in force is excluded, his view was that the limitation period expired on 3rd June 2014, calculated from 4th June 2002 when the suit was dismissed.

9. In his oral submissions, Mr. Chege dropped the argument that the award herein is an award of an arbitral tribunal and therefore captured by Section 4 (1) (c) of the Limitation of Actions Act. He conceded this point on the authority of the case of *Nakuru ELC Judicial Review No. 18th of 2013*. He however submitted that Section 4 (4) of the same statute was applicable, that is judgment could not be executed after 12 years. He also emphasized the point that the award could only be enforced against David Muthama.

10. On his part, Mr. Kinyua Njogu for the defendant, in his written submissions, after reviewing the pleadings and the affidavits filed, submitted that the plaintiffs' claim is basically one for a declaration that the judgment and decree passed on 13th December 2000, is time barred by virtue of the Limitation of Actions Act and that the plaintiffs are entitled to the suit property by way of adverse possession. He pointed out that the plaintiffs have gone a long way to attack the award of the Tribunal on grounds that they were not given an opportunity to be heard which breached the principles of natural justice. He submitted that the plaintiffs cannot challenge the said award in these proceedings. He pointed out that the award and subsequent decree have never been quashed and the plaintiffs cannot now state that they were never heard. He submitted that the role of the Magistrate was to enter judgment in accordance with the award and relied on the case of *Zedekiah M. Mwale vs Bikeke Farm Directors, Kitale High Court, Civil Appeal No. 25 of 1998*. He submitted that the plaintiffs cannot now rely on the pronouncements of the Magistrate against the Tribunal's award. He further submitted that the plaintiffs herein were parties to the tribunal award and the proceedings were not restricted to David Kibui Muthama. He submitted that not listing all the parties in the decree was an omission, which is what led to the filing of the application dated 10th August 2012, seeking to enjoin the plaintiffs herein in the matter. He submitted that the application was allowed and they cannot now be heard to say that they were not parties. He also pointed out that the suit herein does not have a prayer that the award of the Tribunal cannot be executed against the plaintiffs for the reason that they were not parties to the suit in the Magistrate's Court. On whether the tribunal award is time barred, counsel submitted that it was not. He further submitted that the judgment and decree issued by the Magistrates Court is not time barred. He submitted that the order of stay of execution stopped the running of time. His view was that time started running from 5th June 2007 when Nakuru Civil Appeal No. 108 of 2002 was dismissed. He relied on the cases of *Ngenia Farmers Co. Ltd vs Kiriko Farmes Co. Ltd (Nakuru HCCA No. 197 of 2007)*; *Kiriko Farmers Company Limited vs Ngenia Farmers Company Limited (Court of Appeal at Nakuru, Civil Application No. NAI 194 of 2010)*; and *Vijay Morjaria vs Harris Horn Junieur & Another (Nakuru, HCCC No. 285 of 2004)*. He submitted that 12 years had not lapsed to the time of filing suit. He also pointed out at the various photographs of the site annexed by the plaintiffs and submitted that the same show that some portions of the land are vacant and undeveloped. He further submitted that the plaintiffs could not hinge their suit on

the purchase from George Kamau as he had no title to pass. He asked that the suit be dismissed with costs.

PART C: DECISION

11. I have considered the matter and before addressing any issue, I observe that the 3rd plaintiff disowned this suit and this decision does not apply to her. I will consider her case as withdrawn with no orders as to costs.

12. It will be discerned that the issues raised in this suit are closely connected to the award of the Tribunal, the subsequent adoption of the award as a decree, and various rulings made in that suit after the decree. It is also connected to the suit Nyahururu PMCC No. 253 of 2000 and the appeal that followed, being Nakuru Civil Appeal No. 108 of 2002.

13. I wish to first evaluate the facts and the chronology of events for the same are critical to my determination herein.

14. Through a case filed before the Land Disputes Tribunal at Nyandarua one Mr. Nzuki through his appointed attorney, who happens to be the defendant herein, sued David Kibui Muthama and "all others" who in the proceedings are said to number 42. The Tribunal made an award which was forwarded to the Nyahururu Magistrates Court for adoption. It was filed in the suit registered as Nyahururu Land Dispute Case No. 21 of 2000. The award was adopted on **13th December 2000** and a decree subsequently issued. On 28th February 2001, it was raised that there are two other matters, being a criminal case No. 1369 of 2000 and a civil suit No. 253 of 2000. It was sought to have the decree stayed pending conclusion of these two cases. In a ruling delivered on **11th April 2001**, the Magistrate ordered a stay of execution of the award and stood over the matter generally until all the cases pending in court over the subject matter are disposed of. It is not clear when the criminal matter was finalized but all parties seem to be in agreement that at the time the ruling of 11th April 2001 was made, the only pending suit was Nyahururu PMCC NO. 253 of 2000. This suit was not between the plaintiffs herein and the defendant, but was a suit filed by one George Kamau against David Nzuki. There had of course been contention between the two, on who was rightfully entitled to the land parcel No. 1635. George Kamau was of the view that he owned the land and maybe that is why proceeded to sell the same to the plaintiffs herein. But he failed in his quest to have judgment in his favour, for his suit against Mr. Nzuki was dismissed on 4th June 2002. Aggrieved by this decision, he filed an appeal being Nakuru HCCA No. 108 of 2002. That appeal was dismissed on **5th June 2007**.

15. Upon dismissal of this suit, there followed a flurry of applications in the case Nyahururu LDT No. 21 of 2000. The first was an application dated 29th June 2010 to reconstruct the file, as the same had been destroyed in the fire that engulfed the Nyahururu Court in the year 2003. On 18th August 2010, the court ordered the file to be reconstructed. Then followed the application dated 13th September 2010. That application sought orders to have lifted, the orders of stay issued on 11th April 2001 and for eviction against 42 persons whom the plaintiff in the matter was convinced are defendants. A preliminary objection was raised that the only defendant in the matter was David Kibui Muthama. In a ruling delivered on 25th March 2011, this preliminary objection was upheld. There followed an application dated 17th June 2011, seeking to have reviewed this ruling. The review was denied through the ruling of 18th May 2011. Undeterred, the plaintiff in the matter filed an application dated 10th August 2012. That application sought the joinder of 42 persons as defendants, and it was allowed by consent on 14th September 2012. There then followed the application dated 1st November 2012 which sought similar orders to the application dated 13th September 2010 but now against 42 persons. A preliminary objection was raised that the same is res judicata as it was a replica of the application dated 13th September 2010. This preliminary objection was dismissed in a ruling delivered on 15th March 2013 and it was ordered that the application dated 1st November 2012 be fixed for hearing. It is not clear to me whether this application has been argued, but I presume that it has not, for the parties herein would have tendered the

ruling.

16. It is from the above facts that the plaintiffs want the orders that they have sought in this suit. The parties have gone to great lengths to justify or trash the decision of the Tribunal. It was stated by the plaintiffs that they were never heard and that the decision of the Tribunal is wrong. I think it is not in order for me to go into whether or not the Tribunal's decision was proper or not for I have no prayers seeking such declaration. This is not an appeal against the decision of the Tribunal and neither is it a suit seeking to quash that award and the subsequent decree. In my opinion, the issue of whether or not the Tribunal was right is not before me and I therefore cannot proceed to interrogate the award. The award has already been adopted as the judgment of court and a decree issued. If the plaintiffs were aggrieved by it, they ought to have filed the appropriate appeal or suit seeking to quash that award. I will not therefore go into the issue of how the proceedings were conducted, or whether the award is against all the plaintiffs herein or against one individual, for that is an issue that will be determined by the trial court.

17. The first prayer is for a declaration that the judgment and decree in Nyahururu Case No. 21 of 2000 cannot be executed because it has been overtaken by time. The plaintiffs have founded their argument on Section 4 (4) of the Limitation of Actions Act, which provides as follows :-

Section 4 (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

18. Before I go to whether or not the time given above has lapsed I think it is first necessary to address the point, whether such a declaration can be sought in these proceedings. It should be noted that there is already filed an application for eviction in the suit Nyahururu LDT Case No. 21 of 2000. That is the application dated 1st November 2012 and to my knowledge has not been canvassed. The question whether the decree is time barred, to me, is a question that ought to be determined within that application. That to me, is the import to be given to the provisions of Section 34 of the Civil Procedure Act, which provides as follows :-

34. Questions to be determined by court executing decree

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.

(2) The court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional court fees.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed, and a defendant against whom a suit has been dismissed, are parties to the suit.

19. The issue whether the decree in Nyahururu LDT Case No. 21 of 2000 can be executed is a question that is before that court, given the application dated 1st November 2012, and to me, it is a question that relates to the execution, discharge or satisfaction of the decree. Such matter is to be determined by the court executing the decree and not by a separate suit. This is a separate suit, and the plaintiffs, in my view, have done exactly what is sought to be prevented by Section 34 above. In my view, the provisions of Section 34 are aimed at ensuring that all issues in a suit are determined in the particular suit and not in a separate matter. This is of course without prejudice to any party's right of appeal to a higher court.

Given my stand, I think it will be wrong for me to interrogate the issue any further, for if I do so, I will be prejudicing the trial court, in the event that such issue is brought forth when arguing the application for eviction. But the long and short of it, is that I find that I have no jurisdiction to issue the declaration sought in the first prayer given the provisions of Section 34 of the Civil Procedure Act which order in my view ought to be given by the trial court.

20. The second prayer is for orders that the plaintiffs have acquired the suit property by way of adverse possession. They have of hinged their suit partly on the argument that the decree in Nyahururu LDT Case No. 21 of 2000 has lapsed and partly on the argument that they have been in quiet possession of the suit for a period in excess of 12 years. I have already held that I am unable to interrogate the question whether the decree therein has lapsed on the ground that the issue is to be determined by the trial court. I will therefore only look into whether the plaintiffs have been in open, peaceful and uninterrupted possession for a period in excess of 12 years so as to entitle them to the declaration that they are entitled to the suit properties by way of adverse possession.

21. I am prepared to hold that the plaintiffs have been in possession and/or occupation of their respective portions of the suit properties since they purchased the same from George Kamau. That purchase from George Kamau cannot be upheld because Mr. Kamau had no title to the land and could not pass a good title to the plaintiffs. But the plaintiffs can of course hinge their suit on the basis of occupation alone, whether or not the occupation was granted by a party who had no capacity to sell the suit property. The plaintiffs of course moved into the suit property with the intention of acquiring it for themselves and were therefore possessed with the requisite animus possidendi. From the receipts annexed, the properties were purchased between the years 1998 and 2001. Taking the year 2001 as the latest, it will be noted that it is in excess of 12 years of the time that this suit was filed. I am also prepared to hold that that possession on the ground has not changed for the duration of 12 years. I base my holding on the reasoning that as early as the year 2000, the defendant herein, as attorney of the registered proprietor, had sought orders of eviction against the plaintiffs. It means therefore that they were in possession. Through the applications of eviction filed in the LDT case, the defendant has again sought orders of eviction. Certainly, he cannot be seeking orders of eviction if the plaintiffs are not in occupation. There is no material tendered by the defendant that any of the plaintiffs have parted with possession from the time that they settled on the land. I have in fact seen the photographs annexed by the plaintiffs which to me demonstrate clearly that all the plaintiffs are occupying various plots within the suit properties. To me, it matters not whether there has been no development in some of the properties. Occupation is not the same thing as development. One can occupy land without making any developments on it. It is therefore immaterial that some of the plots have not been developed.

22. But was their possession quiet and peaceful ? I do not think so. In the year 2000, the defendant sought orders of eviction against the plaintiffs by filing suit at the Land Disputes Tribunal. Orders of eviction were granted but later stayed. On 13th October 2010, which by any stretch of imagination is not a period in excess of 12 years from the date of the decree, the defendant herein revived his application for execution against the plaintiffs. In my view, the award of the Tribunal was not only against David Muthama. It was against 42 persons who comprise partly of the plaintiffs in this suit. I say so because the Tribunal proceedings point at David Muthama and "all others". These "all others" were clarified in the letter dated 7th February 2002 written to the defendant herein and copied to the Nyahururu Magistrates Court. It provided the names of all persons affected by the award. In my view, the reason that the title of the court proceedings and the decree, bore only one name and cannot therefore have been against 42 persons, is a mere technicality brought about in the manner in which the Court registered the matter and drew the decree. I have no doubt in my mind that the award was against 42 persons and the decree also ought to be construed to be against the 42 persons.

23. It follows that when the defendant herein applied to execute the decree through his application dated 13th October 2010, he was in effect technically disrupting the possession of the plaintiffs of the suit property. In the face of an application to have them evicted, their possession cannot be said to be quiet possession. It is immaterial whether the application was dismissed. What is important is that the defendant herein was asserting his title and the right to occupy the subject property, and the same must be taken to be a disruption of any peaceful possession of property. It is not mandatory for a person to

forcefully remove another for it to be said that the occupation of the later is not peaceful. It is enough, and in fact advisable, for a person to apply the instruments provided by the law to have a person removed from property. The utility of such instrument is the same as if the person went personally to the suit property to remove the one in occupation. It may be that when the land owner goes to physically remove the occupants, he fails. But that does not mean that the possession of the occupant is peaceful. He may have prevailed in the physical struggle to have him removed, but that negates any claim that the occupation is quiet and peaceful. It is the same if the land owner uses the instruments of the law rather than physical forcible eviction. If he fails in the legal channel that he has put forth, his position is similar to the person who attempted a forcible removal and failed. The application of the legal instrument would still constitute an interruption of peaceful occupation, irrespective of whether the same is successful.

24. In our case, there was an attempt, through legal means, to have the plaintiffs removed from the suit property in the year 2010. That to me constituted an interruption of any peaceful occupation that the plaintiffs hitherto may have had. Even after that application was dismissed, for the reason that eviction could not be enforced against 42 persons but the only one person named in the decree, the defendant was relentless and to put his house in line with the ruling of the court, he filed an application to have the 42 persons enjoined, which was allowed by consent, and later proceeded to renew his application for eviction. That application was pending prior to the filing of this suit.

25. It will be absurd to state that a person is in quiet possession of land when he is battling in court to remain in occupation. As I have explained above, it is the same as if the person were physically battling on the ground, with the land owner, to remain in possession. Such possession cannot be said to be quiet and peaceful. That is precisely the situation that we have in this case and my holding is that the plaintiffs have not been in quiet and peaceful possession for a period of at least 12 years before filing this suit.

26. Having not been in peaceful occupation, the plaintiffs cannot sustain a case for adverse possession.

27. I have already held that it would be improper to interrogate whether or not the decree in the Nyahururu court is time barred. But it will be seen that even if I was to allow the first prayer, the same would not have helped the plaintiffs, for I have held that their occupation was not peaceful.

28. The long and short of the above is that I find no merit in the plaintiffs' suit and it is hereby dismissed with costs.

29. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 21st Day of January 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of -:

Mr Gakuhi Chege for applicants

Mr Kinyua Njogu for respondents

CA: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU