



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 151 OF 2012 (OS)**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF  
KENYA SECTION 37 AND 38**

**IN THE MATTER OF AN APPLICATION BY THE PLAINTIFF FOR THE DECLARATION  
AND ORDER THAT THE DEFENDANT HOLDS ONE ACRE ON THAT PIECE OF LAND L.R.  
NO. 4726/33, ORIGINAL NO. 4726/91 UNDER CERTIFICATE OF TITLE NO I.R. 38528  
KIAMBU DISTRICT EAST OF LIMURU TOWNSHIP IN TRUST FOR THE  
PLAINTIFF/APPLICANT UNDER SECTION 37 AND 38 OF THE LIMITATION OF ACTIONS  
ACT AND ORDER THAT HE TRANSFERS THE ONE ARCE PLOT OF THE LAND TO THE  
PLAINTIFF.**

**BETWEEN**

**HENRY NJOROGE KAMAU.....PLAINTFF/APPLICANT**

**AND**

**EDWARD KIMITI KAHIU.....DEFENDANT/RESPONDENT**

**JUDGMENT**

In an originating summons dated 21/3/2012, the Applicant prayed for orders that:

1. *That he has acquired title to one acre of Land Reference No. 4726/33, Original No. 4726/91 under certificate of title No I.R. 38528 measuring 2.024 Ha, situate at Kiambu District East of Limuru Township by adverse possession under Section 37 and 38 of the Limitation of Actions Act.*
2. *That the Defendant's title to that one acre on Land Reference No. 4726/33, Original No. 4726/91 under certificate of title No I.R. 38528 has been extinguished in favour of the Plaintiff/Applicant under Section 37 and 38 of the Limitation of Actions Act.*
3. *That the Defendant/Respondent do transfer the said plot to the Plaintiff forthwith or in the alternative, the Chief Land Registrar do enter in his register the said transfer and issue title.*
4. *That the Defendant by himself, servants and or agents or any other occupants do forthwith deliver and give vacant possession of one acre of Land Reference No. 4726/33, Original No. 4726/91 under certificate of title No I.R. 38528 to the Plaintiff/Applicant.*

5. *The Defendant/Respondent do bear costs of this application.*

The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Plaintiff. He deposes that the property is registered in the name of the Defendant which he acquired possession of 1 acre thereof under a sale agreement dated 7/8/1991 for a consideration of Kshs. 200,000/-. Thereafter, that the Defendant caused the sub-division of the property when he took possession of 1 acre in accordance with the agreement. It is deposed by the Plaintiff that the purchase price was for purposes of settling a loan at Agricultural Finance Corporation, which the Defendant finally paid and title documents released to him on 2/11/1998. The Plaintiff deposes that he has been in open and uninterrupted possession thereof for over a period of 20 years during which time the Defendant has declined to transfer the property to him. Thus, it is in the interest of justice that the order sought be granted as he has sufficient ground to acquire the title adversely having been in possession thereof for a period exceeding 12 years.

In support of the application, the Plaintiff annexed a copy of the certificate of title for the parcel Land Reference No. 4726/33, Original No. 4726/91 under certificate of title No I.R. 38528, a sale agreement between him and the Defendant executed on 7/8/1991, Official Loan Receipts from AFC, copies of receipts evidencing payment of the purchase price in instalments, notification of discharge from AFC, and copies of demand letters.

The Defendant swore a Replying Affidavit on 10/5/2012 in response to the application. He admitted to have entered into a sale agreement with the Plaintiff but deposes that he failed to make payments in accordance with the terms therein. Further that the Plaintiff was to take possession of the property on completion of the purchase price, which to date he has not completed. The Defendant deposed that the Plaintiff got to cultivate food crops on a portion of the parcel of land out of permission and therefore he was in possession thereof as a licensee. It was admitted by the Defendant that the Plaintiff kept cattle and erected a cattle pen without his knowledge and consent but that as soon as he found out and the Plaintiff failing to complete the purchase price, he expelled him from the premises. Subsequently, that the Plaintiff removed his cattle together with the cattle pen structures, and has never returned on the suit property. In opposing the application, the Defendant refuted the claim that his title became extinguished in the year 2003 or at all.

The Plaintiff swore a Supplementary Affidavit on 29/6/2012 wherein he deposed that the Defendant was selectively reading the sale agreement since whereas he denies to give possession under Clause C, the said clause is subject to Clause C (i) wherein the Defendant undertook to pay the outstanding loan at AFC and furnish him with the evidence of such payment and removal of charge, which was done 8 years after execution of the agreement. Further that the erratic payment were contributed by the Defendant who each time obtained payments from his shop as exhibited from the receipts. The Plaintiff denied that he was in possession of the property as a licensee, deposing that he was a purchaser for value having settled the purchase price in the year 1992.

In evidence, the Plaintiff, (PW1) reiterated the contents of his supporting affidavit and produced a copy of the title to the entire property registered in the name of the Defendant (P.Ex.1), the sale agreement (P.Ex.2), and a bundle of receipts evidencing payment of the instalments and receipt thereof (P.Ex.3). PW1 testified that the Defendant refused to transfer the property to him even after he had settled the outstanding loan with AFC when after he reported the matter to the Senior Chief. PW1 testified that the Senior Chief summoned the Defendant who stated that he was ready to commence the transfer process but on condition that he be assisted to pay Kshs. 23,000/- being transfer fees. PW1 produced a letter of acknowledgement of the said Ksh. 23,000/- dated 18/11/2005 (P.Ex.4) which payment was witnessed by Moses Mwaura Thara, David Njuguna Kagia, Fr. James Waruinge, and Senior Chief S.M. Karanja.

PW1 testified that the Defendant failed to transfer the property even after appearing and giving an undertaking before the Senior Chief. Thereafter, that the Senior Chief reported the matter to the District Officer (DO) in the year 2006 who ordered his arrest after he failed to honor the D.O's summons. It is PW1's evidence that the Defendant was arrested and was meant to be charged with obtaining by false pretenses but that the Defendant pleaded with the Police on the ground of ill-health and committed

himself in writing, on 27/3/2007 (P.Ex.5) that he would facilitate the issuance of title. This undertaking, PW1 stated, was also not honored and the Defendant told him to liaise with his advocate over the transfer. PW1 testifies that he paid a further Kshs. 64,000/- to the Defendant's advocate (receipt P.Ex.6) but the transfer was still not effected. It is PW1's evidence that his advocate wrote letters of demand (P.Ex.7 (a) & (b)) which letters went unanswered.

PW1 testified that all these time he has been in possession having constructed a farm house and structures, as well as rearing his cattle and cultivating crops including nappier grass. PW1 testified that sometime in 2010, the Defendant interfered with his portion when after he reported the matter to the Police under OB No. 57/29/12/2010 and in 2011, the Defendant continued to interfere which, for security purposes, caused to him to remove the structures on the portion and abandon the same. PW1 refuted the claim that he was expelled from the portion in 1995 as alleged, contending that he was in possession thereof from 1991 – 2012 when he instituted the suit.

On cross-examination, PW1 admitted that he was not in possession of the portion and that he demolished the structures that he had constructed thereon. PW1 also submitted that there was no formal survey or demarcation of the property but that he moved in after the Defendant pointed the portion to him. On re-examination, PW1 testified that they did put beacons on the portion awaiting a formal survey.

Stephen Mbugua Karanja (PW2) testified that he is a retired Senior Chief of banana area and familiar with the dispute between the parties. It was his evidence that PW1 made a report that the Defendant has refused to abide by the agreement. That he summoned the Defendant who became evasive on being questioned about the transfer. PW2 testified that he witnessed the Defendant receiving Kshs. 23,000/- from the PW1 on 18/11/2005 to facilitate the transfer. PW2 stated that the Defendant received the money in his office, in the presence of the local priest, Fr. Waruinge, Moses mwaura Thaara and David Njuguna Kagia. PW2 testified that the Defendant failed to honor the commitment and refused to honor summonses to a point where the District Officer ordered his arrest. It is PW2's evidence that he arrested the Defendant on 27/3/2007 who, together with his wife pleaded not to be jailed on grounds of ill-health. Once again the Defendant committed himself to facilitate the transfer but failed to do when after that the PW1 took it up with his lawyers.

On cross-examination, PW2 stated that the property in dispute was within his jurisdiction and he was thus had the capacity to hear the preliminary dispute between the parties. PW2 admitted to have learnt of the transaction between the parties in 2005 and did not know what transpired prior to 2005 but when he visited the land in 2005, the Plaintiff's portion had beacons and he was in possession thereof. PW2 denied that he harassed or threatened the Defendant in favour of the Plaintiff. It was his evidence that the Defendant was arrested on the order of the District Officer.

David Njuguna Kagia (PW3) testified that he is familiar with the dispute having been aware of the transaction from the onset. PW3 testified that he witnessed PW1 selecting a portion near the road and the negotiation of the purchase price which was to be paid in instalments. It is PW3's evidence that he dug up and put beacons on the boundaries after they were marked by one Francis N. Manguru who had worked in the surveyor's office at Kiambu. Subsequently that the parties went to Nairobi and executed a sale agreement when after PW1 took possession of the portion. However that the Defendant has not been forthcoming with the transfer and that he had to accompany PW1 to the Defendant's home each time being given empty promises. PW3 testified that this went on until PW1 involved the local administration, and that in 2005, he accompanied PW1 to the office of the Senior Chief, who summoned the Defendant who never denied the transaction but always tried to buy time. PW3 states that he witnessed the Defendant receiving Kshs. 23,000/- for purposes of transfer. PW3 testified that on three occasions, PW1 sent him to the Defendant's lawyers to deliver transfer and survey fees which were acknowledged but that the Defendant still refused to execute the transfer culminating to this suit.

On cross-examination, PW3 stated that he lives 2 Kms away from the disputed property and was involved in the transaction from the beginning. PW3 stated that the land was not divided into paddocks, neither was there a cattle grazing area before PW1 took possession. Further that PW1 took possession prior to 1998. PW3 stated that PW1 did pay the full purchase price but did so in installments. It was his evidence

that he was witnessed the Defendant receiving Kshs. 23,000/- being transfer fees at the chief as well as his arrest by the Chief (PW2) after failing to honor his commitment.

Edward Kimiti Kahi (DW1) a retired teacher, testified that he sold one acre to PW1 and allowed him to take possession of one of the paddocks pending completion of the purchase price and sub-division. DW1 testified that PW1 took possession and cultivated food crops but later constructed a cattle shade, a worker's house, and a toilet and started to rear cattle. Thereafter, that he expelled PW1 from the property in 1999 when after he removed the cattle and all the structures. Therefore, that PW1 has not been in occupation of the portion continuously, as alleged. DW1 in response to the Chief's (PW2) evidence testified that property did not fall within his jurisdiction. Further that PW1 had used the Chief, District Officer and the Police to harass him and his family.

On cross-examination, DW1 admitted to entering into a sale agreement in 1991 and purchase price was paid but that there was a balance of Kshs. 33,000/-. DW1 denied ever signing the letter dated 18/11/2005 he also refuted the schedule of payments produced by PW1. He further denied that his lawyer received any money on his behalf. DW1 admitted that he received Kshs. 23,000/- and wrote the letter dated 27/3/2007 while at the Police Station. He however admitted that he did not indicate in the said letter and neither in his Replying Affidavit that PW1 had left a balance of the purchase price.

George Chege Njeri (DW2) testified that at in 1991, he was living with his mother in a rented house on DW1's property and where he worked as a casual laborer. It was his evidence that DW1's land was paddocked and he had planted nappier grass, maize and beans. However that in 1998, some people encroached DW1's property and constructed cattle sheds and brought cows thereon. Further that the said people employed a Mukorino worker to tend to the cows that they lived together as neighbours. Thereafter that one day in 1999 he came to work only to find no cows, the cattle sheds as well as the Mukorino worker. Additionally that he cultivated the area that had been occupied by the cows until the year 2004 under the instruction of DW1. DW2 testified that since then the said people have never returned to the property and that DW1 has been cultivating it exclusively. On cross-examination, DW2 stated that DW1's property is about 5 acres was sub-divided into ½ an acre paddocks. DW2 reiterated that he lived and did casual work at DW1's property but moved out in 2004.

Paul Kariuki Kiragu (DW3) testified that he and DW1 are childhood friends and in 1983, DW1 showed him the suit property which contained paddocks and that DW1 mentioned that he purchased the property already paddocked. Thereafter, in 1985, he bought a parcel of land neighboring that of DW1 where he has been cultivating. It was DW3's evidence that in 1998, he saw cattle on DW1's property together with a cattle shed and a worker's house erected in a corner of the land, but in 1999, the cows were removed and the structures demolished. DW3 states that since then DW1 has been in exclusive possession and occupation of the land.

On cross-examination, DW3 stated that he did not know his land parcel number but maintained that he is DW1's neighbor. DW3 stated that he does not know PW1 neither was he aware of any sale agreement between the PW1 and DW1. However that DW1 later informed him that he had sold one acre to PW1 and allowed him to take possession thereof. DW3 stated that he was aware that DW1 had not transferred the portion as PW1 had not settled the purchase price.

Peris Wangari Kimiti (DW4) DW1's wife testified that she and DW1 purchased the property in 1982 which was divided into paddocks by the previous owners. DW4 testified that in 1991 she and DW1 agreed to sell 1 acre to PW1 and upon execution of the sale agreement, PW1 was allowed to take possession and cultivate one paddocked area next to the road such that the fence of the paddock became temporary boundary pending completion. DW4 stated that PW1 continued to cultivate the land until 1998 when he brought in cattle and constructed a cattle shade as well as a worker's house, without their knowledge. Consequently, that in 1999 DW1 expelled him from the portion as he had not completed payment of the purchase price. Thus, PW1 vacated the portion and removed the cattle together with the structures thereon. DW4 disputed PW1's schedule of payments stating that the same was incorrect and produced a schedule of payments dated 26/4/1992 executed by both PW1 and DW1. DW4 testified that after PW1 vacated the portion, they resumed cultivating it and have been in possession since then. It was

DW4's evidence that PW1 has been using the local administration to harass and intimidate them to transfer the one acre to him.

On cross-examination, DW4 admitted that the parties entered into a sale agreement for one acre of land for a consideration of Kshs. 210,000/- However that PW1 did not honor his agreement as the payments were not finalized since he left a balance of Kshs. 30,000/- DW4 admitted that she signed the letter dated 27/3/2007, which was drafted by her husband. It was her evidence that she appended her signature because of fear and intimidation by the police and also because she wanted her husband to be released. DW4 also admitted that she did not mention that PW1 had an outstanding balance.

Parties filed submissions in further support of their arguments. Mbichire & Co. Advocates for the Plaintiff filed submissions dated 27/1/2014. Counsel submitted that the Plaintiff has established that he completed payment of the purchase which include Kshs. 40,000/- on signing the agreement on 7/8/1991 and Kshs. 60,000/- on 11/9/1991. Counsel pointed out that DW4's schedule of payment (annexure "PWK1") contradicts that of the Defendant's (DW1) (annexure "EKK2") as the former acknowledged the Ksh. 100,000/- and a further Kshs. 20,000/- deposited in the Defendant's Personal Account at KCB. Further that the Defendant failed to make any averments in his pleadings about an outstanding amount owed by the Plaintiff.

It was submitted for the Plaintiff that the year 1999 mentioned by the Defendant as when the Plaintiff's possession was interrupted is not supported by any evidence at all. It was further submitted that removing the cattle pen structures by the Plaintiff did not amount to vacating the suit portion. Counsel submitted further that the issue has never been one of occupation and possession but one of transfer of title. In urging the court to find in favour of the Plaintiff, counsel submitted that the ingredients of adverse possession had been fulfilled coupled with the entry by way of sale which disqualifies the notion that the Plaintiff was a licensee.

Mungai & Gakuru Advocates for the Defendant filed submissions dated 11/3/2014. Counsel cited a string of authorities including **Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau ELC Nyeri Civil Case No. 66 of 2011 (2013) eKLR** where the Court observed that,

**Adverse Possession required a minimum of five basic conditions to me to perfect the title of the adverse party:**

- a. **Open and notorious use of the property;**
- b. **Continuous use of the property;**
- c. **Exclusive use of the property;**
- d. **Actual Possession of the property; and**
- e. **Non-Permissive, hostile or adverse use of the property.**

Counsel submitted that the Plaintiff's situation fell short of the five requirements for reasons that his occupation was not continuous as he was expelled from therefrom in 1999 never to return. Counsel urged the court to dismiss the suit with costs.

Having now considered the evidence on record and the submissions, the Court finds that the undisputed facts of the case are that the Defendant had a debt with Agricultural Finance Corporation (AFC) and to pay off the said debt, entered into an agreement with the Plaintiff for the sale of a portion of the property, measuring one acre for a consideration of Kshs. 210,000 payable in instalments as follows: Kshs. 40,000/- on 7/8/1991; Kshs. 40,000/- 31/8/1991; Kshs. 30,000/- on 30/9/1991 and Kshs. 100,000/- on 31/12/1991. It is also not in dispute that the Plaintiff took possession soon after execution of the sale agreement.

On perusal of the pleadings, affidavits and annexures thereto as well as careful consideration of the evidence adduced by both parties and their witnesses, it is my finding that the only question to be determined is whether the Plaintiff has satisfied the requirements of adverse possession following an agreement of sale. Adverse possession in such a case would start immediately after the date of last payment. See **Public Trustee v Kamau Wamdiri (1982-88) 1 K.A.R. 498 at page 505** where Kneller,

J.A. (as he then was) said;

**The limitation period will begin to run from the date of payment of the purchase price in full or last instalment of it. See Herman, J. in Bridges v Mees [1975] 2 ALL ER 577; and Simpson, J. (as he then was) in Hoses v Njiru (1974) EA. 526 (K). Sisto Wambugu v Kamau Njuguna, Civil Appeal No. 10 of 1982 (1983) KLR 172**

**...where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.**

The Plaintiff's claim is that he is entitled to ownership of the one acre portion having completed payment of the purchase price. In any event, he submits, he may very well be entitled to the said portion by way of adverse possession having been in exclusive and continuous possession thereon for a period of over 20 years. The Plaintiff produced evidence to show payment of the purchase price. The original sale agreement executed by both parties on 7/8/1991 indicates that Defendant acknowledged receipt of Kshs. 40,000/- upon execution of the agreement and a further Kshs. 60,000/- on 11/9/1991 as is evident in an original KCB Bank receipt produced by the Plaintiff showing a cash deposit of the said amount in the Defendant's account at KCB. There is another original KCB Bank receipt evidencing a cash deposit in the Defendant's account dated 5/2/1992 for the amount of Ksh. 20,000/-. There are also two receipts from AFC dated 3/11/1992 for the amounts of Kshs. 12,000/- and Kshs. 3,000/- by paid by Alexander & Kinyanjui Advocates on the Defendant's loan Account. The Plaintiff belabored to demonstrate payment of the purchase price by producing a schedule of payment detailing the subsequent payments as well as numerous pieces of paper and petty cash vouchers containing the dates and amounts as little as Kshs. 1,000/- paid to the Defendant, all of which contain the Defendant's signatures as a show of acknowledging receipt thereof.

This form of payment is what is disputed by the Defendant who claims that the Plaintiff did not observe the terms of payment stipulated in the agreement. The Defendant also claimed that the Plaintiff failed to complete the purchase price leaving a balance of about Kshs. 33,000/-. DW4, the Defendant's wife annexed a schedule of payment (marked PWK1) indicating that a total of Kshs. 156, 600/- had been received with a remaining balance of Kshs. 54,000/-. The Defendant also annexed a schedule of payment which indicates payment from 3/11/1992 to 17/7/2007. In response to the Defendant's averments the Plaintiff averred that the erratic payments were as a result of the Defendant's habit of collecting money from his shop. Secondly, that the allegation that there is balance of the purchase was not pleaded from the very beginning and the schedule of payment provided by DW1 contradicts that which was produced by DW2.

I have meticulously gone through the receipts, payment vouchers and pieces of paper produced by the Plaintiff as evidence to show payment of the purchase price, as well as the schedule of payment. I have also considered the evidence of DW1 and DW4. I find the Defendant's claim that there is an outstanding balance of the purchase price an afterthought as neither himself, nor DW4 raised the issue at the Chief's Office, the Police Station or in the Replying Affidavit. The issue came up at the defence hearing for the very first time. I am therefore satisfied, and I do so find, that the Plaintiff did complete the payment of the purchase price. In that regard, the Plaintiff's possession following the last payment was adverse to the Defendant's title.

From the payment vouchers produced by the Plaintiff, the last payment toward the purchase price was made in November of 1992. The Plaintiff's evidence that some money was paid to the Defendant's lawyer was denied. However, there are receipts from AFC acknowledging receipt of money toward settling the Defendant's loan. There was a payment of Ksh. 23,000/- made to the Defendant in 2005. It is evident that the said payment was in respect to transfer fees as recorded in the letter dated 18/11/2005. The said letter was drafted under the Local Administration letter head and in the presence of witnesses including PW2. Notably, the Defendant denies being party to this letter stating that he did not sign it. He

however admits to have been summoned by the Chief but states that such summonses were nothing but harassment to coerce him to transfer the property. Though this payment is disputed, the same is in respect to transfer fees and not the purchase price. It is my conviction from the evidence before me that the purchase price was finally completed in November of 1992.

It follows therefore that time started to run from November 1992. Consequently, a claim of adverse possession in the circumstances would be ripe in November 2004. The question therefore is whether the Plaintiff was in exclusive, continuous and uninterrupted possession of the one acre portion for a period of 12 years. The Plaintiff testified that he took possession from 1991 upon execution of the sale agreement and was in occupation until the Defendant began trespassing and interfering with his property in 2010 and 2011 when he made a report to the Police and subsequently filing of the suit in 2012. This evidence was corroborated by that of PW3 who testified that he was familiar with the dispute having been involved from the onset. It was also supported by the evidence of PW2 who was then the area chief and who testified that he visited the portion in dispute in 2005 and found the Plaintiff in possession.

The Defendant on his part testified that he expelled the Defendant out of the property sometime in 1999 on grounds that he had not completed payment of the purchase price and had brought cattle and constructed structures thereon without his consent. His evidence was supported by that of DW4, his wife and DW2 the Defendant's casual labourer and DW3 the Defendant's neighbor. It was their evidence that the Plaintiff was expelled from the property in 1999 never to return and that the Defendant had always been in exclusive possession thereafter.

On careful consideration of the evidence before me, it is my considered my view that the Defendant's evidence and that of his witnesses is not credible. DW2, the Defendant's casual labourer testified that he lived in a rented house within the Defendant's property measuring 5 acres from 1991. It was his evidence that the Plaintiff commenced occupation from 1998, which evidence contradicts that of the Defendant himself who stated that the Plaintiff moved into his one acre portion in 1991. DW3 on his part claims to be the Defendant's neighbor. However on cross-examination, he was not able to tell the court his land parcel number despite asserting that his parcel is adjacent to that of the Defendant's.

I do find that the Plaintiff has established on a balance of probabilities that he was in exclusive continuous and uninterrupted possession of the one acre of the Defendant's property. In that regard, I enter judgment in favour of the Plaintiff and make the following findings and orders as follows:

- 1. That Plaintiff has acquired title to one acre of Land Reference No. 4726/33, Original No. 4726/91 under certificate of title No I.R. 38528 measuring 2.024 Ha, situate at Kiambu District East of Limuru Township by way of adverse possession.***
- 2. That the Defendant's title to the said one acre has been extinguished in favour of the Plaintiff.***
- 3. That the Deputy Registrar of this Court shall execute the transfer forms and all forms incidental thereto to facilitate the transfer of the said one acre to the Plaintiff forthwith.***
- 4. That the Defendant by himself, servants and or agents or any other occupants do forthwith deliver and give vacant possession of the said one to the Plaintiff.***
- 5. The Defendant shall bear the costs of the suit.***

It is so ordered.

Dated, signed and delivered this **21<sup>st</sup>** day of **November** 2014

28 days Right of Appeal

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk

**L.N. GACHERU**

**JUDGE**