



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuguna v Josenga Company Ltd (Land Case E026 of 2023)  
[2025] KEELC 732 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 732 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
LAND CASE E026 OF 2023  
YM ANGIMA, J  
FEBRUARY 20, 2025**

**BETWEEN**

**ROBERTSON NJOROGE NJUGUNA ..... PLAINTIFF**

**AND**

**JOSENGA COMPANY LTD ..... DEFENDANT**

**JUDGMENT**

**A. Introduction**

1. This judgment is in respect of 2 consolidated suits. The first is the defendant's suit seeking, inter alia, recovery of Title No. Nyandarua/Ndemi/2021 (parcel 2021) from the Plaintiff's son, an injunction, and mesne profits. This claim was initially filed as Nyahururu ELC No. 311 of 2017- Josenga Company Limited vs Kahungura Njoroge. The second is the plaintiff's originating summons dated 01.08.2019 seeking, inter alia, adverse possession of parcel 2021 and a declaration that the defendant had acquired the same through fraudulent means. The originating summons was instituted as Nyahuru ELC No. 10 of 2019 (OS).
2. The record shows that vide a consent recorded on 15.05.2019 the parties agreed to have the 2 suits consolidated for hearing together. The civil suit was to be considered as the main suit whereas the originating summons was to be treated as a counter- claim. However, it would appear that all the proceedings were recorded in the originating summons file which was treated as the main suit whereas the civil suit was treated as a counter-claim. The record also shows that the claim by Plaintiff was prosecuted first whereas Josenga Company Limited was heard last.

**B. Defendant's claim**

3. By a plaint dated 16.11.2017 the defendant sued the plaintiff seeking the following reliefs;
  - a. A declaration that the property belongs to the plaintiff.



- b. The Honourable Court be pleased to issue an order restraining the defendant, his servants and/or agents from trespassing, alienating, sub-dividing, selling, constructing and/or further constructing and/or erecting or further erecting any building and/or structures on the property known as LR. Nyandarua/Ndemi/2021.
  - c. An eviction order directing the defendant by himself, his family members, servants, employees, agents and other persons claiming under him to vacate the parcel of land known as L.R. Nyandarua/Ndemi/2012 forthwith failing which they be forcefully evicted.
  - d. Mesne profits, costs of the suit at court rates and any other or further relief as the Honourable Court may deem expedient to grant.
4. The defendant company pleaded that it was the absolute owner of parcel 2021 and the sometime in 2017 the plaintiff's son had wrongfully trespassed upon it and commenced construction of a house thereon without any lawful justification or excuse. It was further pleaded that in spite of issuance of a demand and notice of intention to sue, the plaintiff had failed to vacate the land thereby necessitating the filing of the suit.

### **C. Plaintiff's response**

5. The plaintiff's son (Kahungura) filed a defence dated 12.02.2018 denying liability for the defendant's claim. He pleaded that his father, Robert Njoroge Njuguna was the original allottee of plot No.1389/ Ndemi settlement scheme (plot 1389) which was allocated to him in 1982 and that parcel 2021 was a sub-division thereof. He further pleaded that plot 1389 was fraudulently sub-divided and part thereof allocated to a third who transferred it to Paul Mburu Wanyeki who ultimately transferred it to the defendant company.
6. He further pleaded that he and his family members had at all material times been in actual use and occupation of the entire plot 1389 and that no sub-division was ever carried out on the ground. He further pleaded that the defendant's claim for recovery of parcel 2021 was time-barred under the [Limitation of Actions Act](#) (Cap 22). As a result, he prayed for dismissal of the defendant's case with costs.

### **D. Defendant's rejoinder**

7. By a reply to defence dated 05.09.2018 the defendant joined issue upon the defence and reiterated the contents of the plaint. It denied the allegations of fraud and impropriety in its acquisition of parcel 2021 and sought strict proof thereof. It denied that its claim was time-barred and stated that the [Limitation of Actions Act](#) (Cap 22) was not applicable.

### **E. Plaintiff's claim**

8. Vide an originating summons dated 01.02.2019 filed pursuant to Section 26 (1) of the [Land Registration Act](#), 2012 and Section 38 (1) of the Limitation of Action Act (Cap 22) the plaintiff sought the following reliefs
- a. A declaration that the defendant was registered as proprietor of Title No. Nyandarua/ Ndemi/2021 in furtherance of a fraud perpetrated by its predecessors in title and as such, the title ought to be cancelled and reverted back to the plaintiff.
  - b. Alternatively, and without prejudice to the foregoing, the plaintiff prays for a declaration that he has acquired ownership of Land Parcel No. Nyandarua/ Ndemi/2021 by adverse possession and ought to be registered as absolute proprietor thereof.



- c. Costs of this suit plus interest thereon at court's rate.
  - d. Any other or better relief deemed fit by the Honourable court.
9. The originating summons was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Robertson Njoroge Njuguna on 01.05.2019. The Plaintiff contended that he was the legitimate allottee of Plot No. 1389 (New No. 1480) and that the same was fraudulently sub-divided into parcel Nos. 2021 and 2022 and reallocated to third parties one of whom fraudulently transferred parcel 2021 to the defendant. It was pleaded that the defendant could not in those circumstances have obtained a good title to parcel 2021 hence its title should be cancelled.
  10. In the alternative, the plaintiff pleaded that he and his family had been in open, continuous, and exclusive occupation of parcel 2021 for over 12 years without any interruption by the defendant or its predecessors in title. It was pleaded that neither the defendant nor its predecessors in title have ever entered, used or occupied any portion of the disputed property. As a result, the plaintiff contended that he had acquired adverse possession of parcel 2021 under the doctrine of adverse possession.

#### **F. Defendant's response**

11. The defendant filed a replying affidavit sworn on 14.03.2019 by Isabel Wanjiru Ngugi who was a director of the company. She pleaded that she was a stranger to the plaintiff's claim of allocation of plot 1389 (New No.1480) and the allegations of fraudulent sub-division and re-allocation thereof. It was pleaded that the company had lawfully purchased parcel 2021 from one, Paul Wanyeki Mburu in 2011 while it was vacant and unoccupied. The defendant pleaded that it only discovered that the plaintiff's son had entered parcel 2021 and commenced construction thereon in 2017 and that all other developments were on the plaintiff's own parcel No. 2022.
12. The defendant also filed another replying affidavit sworn by Paul Mburu Wanyeki on 15.03.2019. He pleaded that parcel 2021 was allocated to her late mother Esther Wanjiru Wanyeki (Esther) by the SFT in 1995 and that it was a sub-division of Plot 1389. He stated that his late mother was the one who transferred the land to him during her lifetime and that he later on lawfully sold and transferred it to the defendant. He denied knowledge of any fraud in the allocation of the property to his mother or its subsequent transfer to the defendant.
13. The said deponent denied that the plaintiff was in occupation of parcel 2021 in 2011 and deposed that the plaintiff was only in occupation of an adjacent parcel of land number 2022. It was pleaded that the plaintiff had filed a claim before the land disputes tribunal over the dispute but lost and that his suit before the High Court at Nakuru (HCCC No. 220 by 2024) against Esther was dismissed.

#### **G. Trial of the suit**

14. At the trial of the suit the plaintiff called 4 witness before closing his case whereas the defendant called 2 witnesses. Upon conclusion of the hearing, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiff's submissions were filed on 23.10.2024 whereas the defendant's submissions were filed on 12.11.2024.

#### **H. Issues for determination**

15. It is evident from the material on record that the parties did not file an agreed statement of issues for determination. The record shows that the plaintiff filed a list of 3 issues for determination whereas the defendant filed a list of 5 issues. As such, the court shall frame the issues for determination as provided



for under Order 15 rule 2 of the Civil Procedure Rules. Under the said rule, the court may frame issues for determination from any of the following;

- a. The allegation contained in the pleadings or answers to interrogatories.
  - b. The allegations contained in statements sworn by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
16. The court has considered the pleadings, evidence and documents in this matter. The court is of the view that the following are the key issues for determination in the suit:
- a. Whether the defendant's title to parcel 2021 is tainted with fraud and liable to be cancelled.
  - b. Whether the plaintiff has demonstrated his claim for adverse possession of parcel 2021.
  - c. Whether the plaintiff is entitled to the reliefs sought in the originating summons
  - d. Whether the defendant is entitled to the reliefs sought in the suit.
  - e. Who shall bear costs of the proceedings.

## **I. Analysis and determination**

### **a. Whether the defendant's title to parcel 2021 is tainted with fraud hence liable to be cancelled**

17. The court has considered the evidence and submissions on record on the issue. The plaintiff's case was that the defendant did not obtain a good title to parcel 2021 because the sub-division of the original plot 1389 and subsequent reallocation were tainted with fraud. It was the plaintiff's evidence that he was in occupation and use of the entire plot 1389 at all material times hence there was no justification for the purported repossession, subdivision and re-allocation to third parties by the Settlement Fund Trustees (SFT).
18. It is interesting that even though the material on record reveals that the plaintiff's allocation was done by the SFT the plaintiff did not deem it fit to join the allocating authority as a party to the suit. The court is of the view that the SFT or its successor ought to have been joined in the suit because the plaintiff pleaded that the subdivision and re-allocation was done fraudulently.
19. The sub-division and re-allocation were actions taken by SFT and not Esther or Paul Wanyeki. The court is thus of the view that the plaintiff could not effectively prove any fraud or fraudulent activities without joining the SFT and the personal representative of Esther as parties to the proceedings.
20. In the originating summons, the plaintiff relied upon Section 26 (1) of the [Land Registration Act 2012](#) which stipulated as follows-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except”—

- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
21. The evidence on record shows that the prime actors in the sub-division and reallocation of the original plot 1389 were the SFT and Wanyeki. However, they were not joined in the proceedings by the plaintiff. The court finds that there was no evidence of fraud or misrepresentation on the part of the defendant company. No particulars of fraud or misrepresentation were pleaded or proved against it. In fact, the framing of the originating summons makes it clear that the plaintiff was laying blame upon the defendants' "predecessors in title" and not the defendant company.
22. Section 26 (1) of the *Land Registration Act* makes it clear that a certificate of title is only impeachable where the title holder is shown to have participated or been privy to fraud or misrepresentation. The evidence on record only shows that the defendant was a purchaser for value of parcel 2021. If the plaintiff was unable to find any fraud on the part of the title holder, then it cannot legally transfer the alleged fraud on the part of the previous owner to the company. It is evident from the proceedings on record that the grounds stipulated under Section 26 (1) (b) were not pleaded or relied upon. The court is thus not satisfied that the defendant's title is liable to be cancelled on account of fraud or misrepresentation to which it was privy.

**b) Whether the plaintiff has demonstrated his claim for adverse possession of parcel 2021**

23. The plaintiff contended that he was entitled to be registered as proprietor of parcel 2021 on account of the doctrine of adverse possession. He stated that he and his family have been in actual use and occupation of parcel 2021 since 1982 and had developed the property by constructing houses, digging a well, cultivating crops and rearing livestock. The plaintiff's evidence was that he had been in open, continuous and exclusive occupation of the land since 1982 without any interruption from any quarters. It was further the plaintiff's case that the sub-division of the original parcel was never undertaken on the ground and his family had continued utilizing the entire land even upon sub-division. The plaintiff maintained that his family was in occupation even as parcel 2021 was being transferred and re-transferred.
24. The defendant company disputed the plaintiff's claim for adverse possession. It denied that the plaintiff was in actual occupation of parcel 2021 when it purchased the property. It was their case that the plaintiff was only in occupation of parcel 2022 which was developed at the time and that the encroachment into parcel 2021 only took place in 2017.
25. The elements of adverse possession were summarized in the case of *Kasuve –vs- Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:
- “...and in order to be entitled to land by adverse possession, the claimant must prove 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”
26. Similarly, in the case of *Chevron (K) Limited –vs- Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:
- “At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to



the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

27. The court is satisfied that the plaintiff was at all times prior to 1995 in possession of the original plot No.1389 even though his developments were mainly confined to the sub-division which ultimately became parcel 2021. The ground status reports of at least 2 land adjudication and settlement officers demonstrate as much. It is further evident from the material on record that upon the failure by the plaintiff to vacate the portions which was designated as parcel 2021 Esther sued him in Tribunal Case No. 2 of 1997 and succeeded. It would appear that the plaintiff's appeal to the Provincial Land Disputes Appeals Committee was unsuccessful since it was dismissed in 2003. The material on record further shows that the award of the tribunal was ultimately adopted as a judgment by the Magistrate's Court at Nyahururu on 11.02.2004.
28. It would further appear that upon the plaintiff failing to vacate Esther applied for an eviction order which was issued by the subordinate court on 05.04.2006. The court is satisfied that as at 05.04.2006 the plaintiff was still in possession of parcel 2021. There is no credible evidence on record to demonstrate that he was ever evicted therefrom.
29. The material on record further shows that in 2004 the plaintiff filed Nakuru HCCC No. 220 of 2004 against Esther Wanjiru Wanyeki and Paul Mburu Wanyeki seeking, inter alia, cancellation of their title to parcel 2021 on account of alleged fraud as well as an injunction restraining them from entering or in any manner interfering with the entire plot No. 1389. The record shows that the said suit remained dormant for several years until it was ultimately dismissed for want of prosecution on 30.07.2008.
30. There is no material on record to demonstrate that the Plaintiff or Kahungura was ever evicted from parcel 2021 by either the Wanyeki's or the company at any given time. There is no evidence to demonstrate that the company ever took possession of parcel 2021 in 2011 as claimed by the defendant's witnesses at the trial. There was no evidence to demonstrate that the company had utilized or undertaken any activities on the land since it became registered as proprietor.
31. The court is thus satisfied that the plaintiff has been in open, continuous and exclusive possession of parcel 2021 and that he has never been dispossessed by either the defendant or the Wanyekis. The only legal aspect which needs to be considered is whether or not his possession was ever legally interrupted on account of the various proceedings which took place before the tribunal and the courts.
32. The plaintiff submitted that those proceedings were of no consequence for at least 3 reasons. First, that the tribunal had no jurisdiction to entertain the claim before it. Second, that the resultant judgment and decree was time-barred under Section 4(4) of the *Limitation of Actions Act* (Cap. 22) because it was more than 13 years old by the time the defendant's suit for recovery of the property was filed. Third, that the suit in Nakuru HCCC on 220 of 2004 was never determined on merit since it was dismissed for want of prosecution.
33. The court is of the opinion that the issue of the jurisdiction of the tribunal cannot be belatedly questioned in the instant suit since the resultant award was ultimately adopted as a judgment by the subordinate court way back on 11.08.2004 and was never challenged on appeal. However, the court



agrees with the plaintiff's submissions that the resultant award ultimately became time-barred on or before 11.08.2016 before the defendant's suit was filed. The court is of the opinion that time is to be reckoned from the date of adoption of the award and not 05.04.2006 when an eviction order was issued by the subordinate court.

34. The court is further of the view that nothing really turns on the dismissal of Nakuru HCCC No. 220 of 2004 since it was not a suit filed by the Wanyeki's for recovery of parcel 2021. It was a suit by the plaintiff challenging their title and seeking its cancellation. As was held in the case of *Githu vs Ndeete* [1984] KLR 776 the applicant's possession is deemed to have been interrupted where either the land owner makes a peaceable and effective entry into the land or where he institutes legal proceedings for recovery of the land.
35. If, as submitted by the plaintiff, the decree resulting from the award of the tribunal expired upon the lapse of 12 years then it would mean that it expired on or about 10.08.2016, that is, 12 years from the date judgement was passed by the subordinate court at Nyahururu. Upon such expiry, time would start running afresh under the Limitations of Actions Act (Cap 22). That means that the plaintiff would have to continue with open, exclusive and continuous occupation for another 12 years before his claim for adverse possession would mature.
36. The court is thus of the view that by the time the plaintiff filed his claim for adverse possession on 01.03.2019 only a period of 2 years and 6 months had lapsed since effluxion of the limitation period for execution of the decree under Section 4 (4) of the *Limitation of Actions Act* (Cap 22). It is, therefore, the finding of the court that decree of the Magistrate's Court dated 11.08.2004 effectively interrupted the running of time and that the Plaintiff's originating summons for adverse possession was prematurely filed since the limitation period started running afresh with effect from 11.08.2016. As a result, the court is not satisfied that the plaintiff has satisfied all the elements of adverse possession as required by law.

**c. Whether the plaintiff is entitled to the reliefs sought in the originating summons**

37. The court has found and held that the plaintiff has failed to prove the allegation of fraud against the plaintiff. The court has further found that the plaintiff has failed to demonstrate his claim for adverse possession of parcel 2021 since the decree passed by the subordinate court in Nyahururu Land Case No. 4 of 2004 effectively interrupted the plaintiff's possession until 10.08.2016. As a result, the court is of the view that the plaintiff is not entitled to any of the reliefs sought in the summons.

**d. Whether the defendant is entitled to the reliefs sought in the suit.**

38. The court has already vindicated the defendant by finding that there was no evidence to demonstrate that it was privy to any fraud in its acquisition of parcel 2021. The persons against whom the fraud was directed were not even made parties to the proceedings. The court has further found that the plaintiff has failed to prove all the requisite ingredients of adverse possession since his possession was interrupted by previous litigation. As a result, the court is of the view that the defendant is entitled to the reliefs sought in the suit. However, no mesne profits shall be awarded since the defendant did not lead evidence on the same.

**e. Who shall bear costs of the suit**

39. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967]



EA 287. The court finds no good reason to depart from the general rule. As such, costs of both the suit and counter-claim shall be awarded to the defendant company

## **J. Conclusion and disposal orders**

40. The upshot of the foregoing is that the court finds and holds that the plaintiff has failed to prove his claim whereas the defendant has proved its claim on a balance of probabilities as required by law. As a consequence, the court shall make the following orders for disposal of the consolidated suits;
- a. The plaintiff's originating summons dated 01.03.2019 be and is hereby dismissed in its entirety.
  - b. Judgment be and is hereby entered in favour of the defendant company as follows: -
    - i. An eviction order is hereby made directing the plaintiff, Robertson Njoroge Njuguna, and his son Kahungura Njoroge, their family members, servants, agents and any persons claiming under them to vacate Title No. Nyandarua/Ndemi/2021 forthwith in default of which they shall be forcibly evicted.
    - ii. An injunction is hereby made restraining the Plaintiff and his son Kahungura Njoroge from undertaking any further construction or undertaking any other activities on Title No. Nyandarua/Ndemi/2021.
  - c. The defendant Josenga Company Ltd is hereby awarded costs of the consolidated suits.

It is so decided.

**JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

In the presence of:

Mr. Gakuhi Chege for the Plaintiff

Mrs. Susan Ndirangu for the Defendant

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**Y. M. ANGIMA**

**JUDGE**

