



**Ndambuki v Mulinge (Environment & Land Case 55 of 2019)  
[2024] KEELC 13801 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13801 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 55 OF 2019  
TW MURIGI & JOYCE MURIGI, JJ  
DECEMBER 10, 2024**

**BETWEEN**

**DAVID PETER NDAMBUKI ..... PLAINTIFF**

**AND**

**NATHAN K. MULINGE ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit against the Defendant vide a Complaint dated 1<sup>st</sup> August, 2019 seeking the following orders: -
  - a. A declaration that Land Parcel Makueni/Nguu Ranch/812 is the sole property of the Plaintiff.
  - b. An eviction order against the Defendant from Land Parcel Makueni/Nguu Ranch/812 to be supervised by the OCS Emali Police Station.
  - c. Mesne profits from 30<sup>th</sup> October, 2016 to date at a rate of KShs. 10,000/= monthly.
  - d. An order directing the Defendant to repair the Plaintiff's fence at his own cost.
  - e. Costs and interest of the suit.
2. The Defendant filed an amended Defence and Counterclaim on 20<sup>th</sup> February, 2020 denying the Plaintiff's claim. In the counterclaim, the Defendant seeks the following orders: -
  - a. The title in respect of Parcel of land No. Nguu 812 be revoked.
  - b. The court be pleased to compel the Plaintiff to effect transfer to the Defendant for the parcel of land No. Nguu 812 which the Defendant swapped for PLOT NO. D1-213 KAYOLE in default the Deputy Registrar to execute the transfer documents in the Defendant's favour.



- c. The court be pleased to make a declaration order that the Defendant is the rightful owner of the Parcel of land No. Nguu 812 by adverse possession.
  - d. The Plaintiff whether by himself and/or his agents, servants or representatives be restrained by way of permanent injunction from interfering with parcel of land No. Nguu 812.
  - e. The Plaintiff's suit be dismissed in its entirety and judgment be entered for the Defendant against the Plaintiff for: -
    - i. Aggravated and General damages for disruption of business, loss of income and profits;
    - ii. Costs of this suit
 In the alternative
  - f. The Plaintiff be compelled to compensate the Defendant the market value for Plot No. D1-213 Kayole in the event that the Defendant is to be dispossessed of Nguu 812.
3. The Plaintiff filed a defence to the counterclaim on 10<sup>th</sup> March, 2021 urging the court to dismiss the counterclaim with costs.
  4. The Defendant filed a Reply to Defence to the counterclaim on 28<sup>th</sup> June, 2021 urging the court to enter judgment against the Plaintiff as prayed in the counterclaim.

#### **The Plaintiff's Case**

5. The Plaintiff David Peter Ndambuki testified as the sole witness in support of his case. He adopted his witness statement dated 1/8/2019 as his evidence in chief. He also produced the list of documents of even date as PEX 1–6 and the supplementary list of documents dated 25/10/2019 as PEX 7–9 in support of his case.
6. PW1 testified that he is the registered proprietor of Land Parcel No. Makueni/Nguu Ranch/812 (the suit property herein) while the Defendant is the registered proprietor of land parcel No. Makueni/Nguu Ranch/810. He testified that he used to work with the Defendant at the Nairobi City Council. He further testified that in the year 2010, he entered into an oral agreement with the Defendant in which he allowed the Defendant to graze his livestock in the suit property.
7. That, he wrote a letter dated 30<sup>th</sup> October 2016 to the Defendant demanding that he vacates the suit property. That instead of vacating the suit property, the Defendant started claiming ownership over the same where he still grazes his livestock to date. He denied having exchanged the suit property with plot No. D1-213 situated within Kayole and added that they did not reduce the exchange agreement into writing. It was his testimony that his wife Beatrice Minoos was allocated Plot No. D1-213 by the Town Clerk, City Council of Nairobi and later sold the same to Julius Nzioka Nguluu. In conclusion, he urged the court to grant the orders sought in the plaint.
8. On cross-examination by Mr. Munyasya, he denied the Defendant's allegations that he took possession of the suit property in the year 1997 or that he offered to purchase the same. He further denied the allegations that the Defendant facilitated the allocation of Plot No. D1-213 to Beatrice Minoos Ndambuki and insisted that she applied for the Plot just like any other Applicant.
9. He asserted that the Defendant did not give his wife Plot No. D1-213 Kayole in exchange for the suit property. He testified that the Defendant destroyed the sisal and thorny plants that he had planted around the boundary on the suit property. He further testified that the Defendant has been utilizing the suit property since the year 2010.



10. In re-examination, he testified that Plot No. D1-213 was allocated to his wife on 15/6/1999 who later sold the same on 7/9/2005 to one John Nguluu who is the current registered owner. He reiterated that he allowed the Defendant to graze his livestock on the suit property from the year 2010 to 2016 and that he had refused to vacate therefrom.

### **The Defence Case**

11. The Defendant Nathan Kilungu Mulinge called five witnesses in support of his case.
12. The Defendant testified as DW1 and adopted his witness statement dated 5/2/2020 as his evidence in chief. He also produced the list of documents dated 7/2/2020 as DEX 1,3,4,5,6 and 7 in support of his case. He testified that both he and the Plaintiff were employed by the defunct City Council of Nairobi and became friends over time. It was his testimony that he discussed with the Plaintiff the possibility of selling the suit property which is adjacent to his land for an agreed purchase price of Kshs. 100,000/=. He further testified that their agreement was not reduced into writing.
13. That when an opportunity arose for him to acquire a plot in Kayole in the year 1999, he approached the Plaintiff with a proposal to exchange Plot No. D1-213 situated within Kayole with the suit property which the Plaintiff accepted. It was his testimony that the Plaintiff instructed him to register Plot No. D1-213 in the name of his wife Beatrice Minoo.
14. He went on to state that he took possession of the suit property in the year 1998 and removed the fence between Plot No. 810 and Plot No. 812. He further state that he took his letter of allotment for Plot No. D1-213 to the City Planning Department where his allocation was cancelled in favour of the Plaintiff's wife.
15. That upon delivery of the letter of allotment, he demanded for the ownership documents for the suit property but the Plaintiff refused to hand over the same. That in the year 2001 the Plaintiff went to the assistant Director's office to seek authority to pay for the same. That the Plaintiff and his wife took possession of Plot No. D1-213 which they later sold to John Nzioka Nguluu vide the sale agreement dated 13/9/2004.
16. He went on to state that he lost contact with the Plaintiff until sometimes in the year 2016 when the Chief Nguu location called him to collect a letter by the Plaintiff demanding that he vacates from the suit property. That in the year 2019, he received a letter from the Plaintiff's Advocates demanding that he vacates from the suit property. He further testified that he is in occupation of the suit property and has made developments thereon.
17. He urged the court to grant the orders sought in the counterclaim.
18. On cross-examination by Mr. Muthiani, he testified that he exchanged Plot No. D1-213 situated within Kayole with the suit property. He further testified that he has made developments on the suit property even though he did not have any evidence to demonstrate as much. He admitted that they did not reduce their agreement to exchange the suit property with Plot No. D1-213 into writing.
19. He further admitted that Plot No. D1-213 Kayole was not registered in his name at any point in time. He further testified that he did not complain to any authority after the Plaintiff refused to honour his side of the bargain because he was transacting with a friend. He admitted that the Plaintiff is the registered proprietor of the suit property.
20. In re-examination, he testified that he has built a shed for his goats and a house for his workers in the suit property. He further testified that he was initially allocated Plot No. D1-213 which eventually became Beatrice Minoo's property. He maintained that in the event that he fails to get ownership of



- the suit property, he should be compensated with Kshs. 3 Million which is the market value for Plot No. D1-213.
21. DW2, Joseph Ndichu Kahonge, adopted his witness statement dated 5/2/2020 as his evidence in chief. He informed the court that he was a former Assistant Director in charge of the Finance Division of the defunct Nairobi City Council. He testified that the Plaintiff presented an allotment letter for Plot No. D1-213 in the name of his wife, Beatrice Minoo requesting to make payment for the same. That ordinarily, the letter ought to have been presented by the allottee but since the Plaintiff was his colleague, he accepted to process the payment after the director who is the Defendant herein gave his authority and endorsed the same on the letter and instructed him to accept payment for allocation purposes. He further testified that the Defendant informed him that he was initially allocated Plot No. D1-213 which he surrendered to the Plaintiff. He further testified that the Defendant's name was cancelled in the letter of allotment for Plot No. D1-213 in favour of the Plaintiff's wife.
  22. On cross-examination, he testified that the Defendant's name was not amongst the names of the previous registered owners of Plot No. D1-213. It was his testimony that he was not aware if the transfer of Plot No. D1-213 to Beatrice Minoo was minuted.
  23. DW3, David Gatimu, adopted his witness statement dated 5/2/2020 as his evidence in chief. He told the court that he was a retired officer at the Physical Planning Division, Nairobi City Council and that both the Defendant and the Plaintiff were his colleagues. It was his testimony that after the Defendant presented his letter of allotment for Plot No. D1-213 dated 15/6/1999 for cancellation, his letter was cancelled and a new letter of allotment was issued in the name of Beatrice Minoo. He further testified that he did not know why the Defendant transferred his plot to Beatrice Minoo.
  24. In cross-examination, he testified that on 15/6/1999 the Defendant was registered the proprietor of Plot No. D1-213. He further testified that the changes were effected in the Plot file and that is where the cancelled letter of allotment can be found.
  25. DW4, Bonface Wambua, adopted his witness statement dated 5/2/2020 as his evidence in chief. He informed the court that the Defendant is his neighbor in Nguu for more than ten years and is in occupation of the suit property. He testified that he does not know Plaintiff and has never seen him in the suit property.
  26. In cross-examination, he testified that he is not aware of the land that is in dispute. He further testified that the Defendant took possession of the land in Nguu in the year 1996 but was not sure whether he was occupying Plot No. 810 or the suit property. He further testified that he was not aware whether the Defendant exchanged Plot No. D1-213 for the suit property or how the Plaintiff and the Defendant acquired the title deeds for their parcels of land in Nguu Ranch.
  27. DW5, Alexander Makau Muema, adopted his witness statement dated 5/2/2020 as his evidence in chief. He testified that the Defendant is his neighbour at Nguu Ranch since the 1990s and is in occupation of the suit property.
  28. In cross-examination, he testified that he is owner of Plot Nos. 811 and 809 while the Defendant is the owner of Plot Nos. 810 and 812. He further testified that he was not aware of any transaction involving the exchange of land between the Plaintiff and the Defendant and added that the Defendant has built a house for his workers in Parcel No. 812. He maintained that Parcel No. 812 belongs to the Defendant and added that he was not aware if the Defendant had leased the suit property from the Plaintiff.
  29. After the close of their respective cases, the parties agreed to file and exchange their written submissions.



## The Plaintiff's Submissions

30. The Plaintiff filed his submissions dated 25<sup>th</sup> April, 2024. On his behalf, Counsel identified the following issues for the court's determination: -
  - a. Whether or not the Plaintiff is the Bona fide legal/registered owner of land Parcel No. Makueni/Nguu Ranch/812;
  - b. Whether or not the Plaintiff exchanged the disputed Parcel No. Makueni/Nguu Ranch/812 with Plot No. D1-213 Kayole with the Defendant;
  - c. Whether or not the Defendant has been trespassing and/or encroaching on the disputed land Parcel No. Makueni/Nguu Ranch/812;
  - d. Whether or not the Defendant can claim adverse possession over the Plaintiff's land Parcel No. Makueni/Nguu Ranch/812; and
  - e. What are the appropriate remedies.
31. On the first issue, Counsel submitted that the Plaintiff is the registered proprietor of the suit property having been issued with a title deed on 8/11/2011. Counsel submitted that the Plaintiff's title has not been challenged on grounds of fraud, illegality and/or misrepresentation.
32. Counsel submitted that though the Defendant is claiming that he has been in occupation of the suit property since 1997, he had done nothing in terms of documentation to legally acquire the same. Counsel further submitted that the Defendant simply expressed his interest in the suit property during the El Nino rains but did not acquire the same. Counsel submitted that the Plaintiff gave the Defendant permission to graze his livestock on the suit property.
33. On the second issue, Counsel submitted that the Defendant has never owned Plot No. D1-213 Kayole and therefore he could not give what he did not have. To buttress this point, Counsel relied on the legal principle of *nemo dat quod non habet*. Counsel submitted that no evidence was adduced to show that there was an exchange of the two parcels of land. According to Counsel, the letter by Nairobi City County dated 31/1/2020 addressed to the firm of Munyasya & Co. Advocates shows that Alphonse Mushila Chibutza was the previous owner of Plot No. D1-213 from 1987 until the Plot was repossessed for no payment and was later allocated to Beatrice Minoo on 15/6/1999 who later sold and transferred the Plot to John Nzioka Nguluu.
34. Counsel further submitted that the Defendant did not adduce any written agreement between him and the Plaintiff to show the manner in which the suit property was exchanged with Plot No. D1-213. Counsel submitted that the Defendant's claim of having exchanged Plot No D1-213 with the suit property does not comply with the mandatory conditions of Section 3 (3) of the Law of Contract Act.
35. On the third issue, Counsel submitted that the Defendant trespassed on the suit property and has been cutting down trees and grazing his livestock without the Plaintiff's consent. Counsel further submitted that in addition to the Plaintiff's ownership documents, the Defendant was served with a demand notice to stop encroaching on the suit property and that the said evidence was not rebutted. Counsel submitted that where the evidence is not controverted, the Claimant shall have his way in court. To buttress this point, Counsel relied on case of *Githinga Kibutha v Caroline Nduku* [2018] eKLR,
36. On the fourth issue, Counsel submitted that the Plaintiff gave the Defendant permission to enter into the suit property as evidenced by the letter dated 30<sup>th</sup> October, 2016 demanding the Defendant to relocate from the suit property. Counsel submitted that one of the requirements in a claim for adverse



possession is that the occupation of land must be non-permissive. Counsel argued that the Defendant's claim for adverse possession cannot succeed because the Plaintiff had permitted him to occupy the suit property.

37. On the fifth issue, Counsel submitted that the Plaintiff has proved his case on a balance of probabilities and is therefore entitled to the orders sought in the Plaint whereas the Defendant has failed to prove his counterclaim and the same should be dismissed with costs. To buttress his submissions, Counsel relied on the list of authorities annexed to the submissions.

### **The defendant's submissions**

38. The Defendant filed his submissions dated 14<sup>th</sup> June, 2024. On his behalf, Counsel outlined the following issues for the court's determination: -
- a. Whether the Defendant exchanged his parcel of land number Plot No. D1-213 Kayole with the Plaintiff's parcel of land number Makueni/Nguu Ranch/812.
  - b. Whether the Defendant is the bona fide legal owner of land Parcel No. Makueni/Nguu Ranch/812 having exchanged the same with the Plaintiff over his parcel of land number Plot No. D1-213 Kayole.
  - c. Whether the Defendant is entitled to the prayers in his counterclaim.
  - d. Who should bear the costs of the suit.
39. On the first issue, Counsel submitted that the Plaintiff entered into a mutual agreement with the Defendant to exchange the suit property with Plot No. D1-213. That the Plaintiff directed the Defendant to register the plot in the name of his wife, Beatrice Minoo. Counsel submitted that after the exchange was done, each party exercised peaceful and quiet possession over their respective parcels of land.
40. On the second issue, Counsel submitted that the Plaintiff had chosen to dangle the instrument of title to the suit property in order to mislead the court over his allegation of ownership instead of showing how he acquired Plot No. D1-213 through his wife's name. Counsel contended that the Plaintiff ought to be estopped from going back on his words after mutually agreeing to exchange the two parcels of land with the Defendant.
41. On the third issue, Counsel submitted that the Defendant is entitled to a declaration that he is the rightful owner of the suit property by way of adverse possession since he has been in possession of the suit property from the year 1999 to date. Counsel argued that the Defendant's possession of the suit property is deemed to have been adverse after he caused Plot No. D1-213 to be registered in the name of Beatrice Minoo whilst he took possession of the suit property.
42. On costs, Counsel submitted that the Defendant has proved his counterclaim against the Plaintiff on a balance of probabilities and is therefore entitled to costs.
43. To buttress his submissions, Counsel relied on the list of authorities dated 14<sup>th</sup> June, 2024.

### **Analysis and determination**

44. Having considered the pleadings, the evidence on record and the submissions by the respective parties, the following issues fall for determination:-
- i. Whether there was an agreement between the parties herein to exchange the suit property with Plot No. D1-213.



- ii. Whether the Plaintiff is entitled to the orders sought in the Plaintiff.
  - iii. Whether the Defendant is entitled to the orders sought in the counterclaim.
45. From the pleadings and the evidence on record, the following facts are not disputed:-
- i. The suit property is registered in the name of the Plaintiff.
  - ii. The Defendant took possession of the suit property following a verbal agreement with the Plaintiff.
  - iii. The Plaintiff's wife, Beatrice Minoo, was allocated Plot No. D1-213 KAYOLE by the defunct Nairobi City Council on 15<sup>th</sup> June, 1999.
  - iv. The Defendant was served with a Notice to vacate the suit property dated 30<sup>th</sup> October, 2016 through the Chief, Nguu Area.

**Whether there was an agreement between the parties herein to exchange the suit property with the plot no. D1-213**

46. At the heart of this dispute is the ownership of the suit property. Both parties are claiming ownership over the suit property. The Defendant testified that when an opportunity arose for him to acquire a plot in Nairobi, he approached the Plaintiff to exchange the suit property with Plot No. D1-213 situated within Kayole which the Plaintiff accepted. That after the Plaintiff accepted his proposal he took his letter of allotment to the City Planning Department where his allocation was cancelled in favour of the Plaintiff's wife Beatrice Minoo. He produced a copy of the letter of allotment dated 15<sup>th</sup> June 1999 for plot No D1-213 (DEX-4). The letter is hand written on its face as follows "Cancelled on authority from N.K.Mulinge and allocated to Beatrice Minoo." He also produced a copy of the letter of allotment of Plot No. D1-213 in the name of Beatrice Minoo (DEX-5) The Defendant testified that the Plaintiff directed him to register the plot in the name of his wife. The Defendant insisted that he was issued with an allotment letter for Plot No. D1-213 which was cancelled in favour of the Beatrice Minoo. DW2 confirmed that he accepted to process the payment for the plot after the Defendant endorsed his authority on the letter of allotment in the name of Beatrice Minoo. He explained the procedure involved in cancelling letters of allotment. It was his testimony that the Defendant cancelled his letter of allotment in favour of the Plaintiff's wife. His evidence was corroborated by DW2 and DW3 who confirmed that his allocation was cancelled in favour of the Plaintiff's wife.
47. That after the exchange of the suit property with Plot No. D1-213, the Plaintiff and his wife took possession of the plot and later sold it to John Nguluu.
48. The Plaintiff on the other hand testified that in the year 2010, he permitted the Defendant to graze his livestock in the suit property. He denied having exchanged the suit property with Plot No D1-213 and insisted that his wife was allocated the plot just like any other person.
49. From the evidence on record, it is apparent that the agreement between the parties herein is founded on land.
50. Section 3(3) of the Law of Contract provides as follows;-
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- a. the contract upon which the suit is founded—
    - i. is in writing;



- ii. is signed by all the parties thereto; and
  - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
51. This provision is echoed in Section 38(1) of the Land Act, 2012 which stipulates that no interest in land can pass unless there is a valid contract of sale. It provides as follows: -
- i. Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land unless—
    - a. the contract upon which the suit is founded—
      - ii. is in writing;
      - iii. is signed by all the parties thereto; and
    - b. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
52. In *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, the Court of Appeal aptly held as follows: -
- “Section 3(3) of the Law of Contract Act provides that no suit based on a contract of disposition of interest in land can be entertained unless the contract is writing, executed by the parties and attested.
53. It is clear from the above provisions that all transactions touching on land must be in writing. In the matter at hand, the Defendant did not produce any agreement to show that they had agreed to exchange the suit property with Plot No. D1-213 in accordance with the provisions of Section 3(3) of the Law of Contract Act.
54. The Defendant alleged that the Plaintiff reneged on his part of the agreement. It was his testimony that after he delivered the letter of allotment in the year 1999, the Plaintiff refused to hand over the ownership documents for the suit property. In other words, the Defendant contended that the Plaintiff breached the agreement by failing to deliver the ownership documents for the suit property.
55. The letter of allotment dated 15/06/1999 clearly shows that the beneficiary of Plot No. D1-213 is Beatrice Minoo. The Defendant did not seek to enjoin Beatrice Minoo as an interested party in the suit herein for her to explain how she acquired Plot No. D1-213. The Plaintiff testified that he wrote a letter dated 30<sup>th</sup> October 2016 demanding the Defendant vacates the suit property. The Plaintiff also produced a demand letter dated 11/07/2017 by his Advocate addressed to the Defendant demanding that he vacates the suit property. The Defendant confirmed having received the demand letters from the Plaintiff and his Advocate. He did not explain what steps he took after the Plaintiff breached the agreement to remedy the wrong. In my view the Defendant ought to have filed a suit claiming breach of contract within 12 years.

### **Whether the plaintiff is entitled to the orders sought**

56. The Plaintiff sought for a declaration that the suit property belongs to him. He narrated to the court how he acquired the suit property. It was his testimony that he was allocated the suit property by the Ministry of Lands through the Settlement Fund Trustees and was thereafter issued with a title deed. In this regard, he produced a copy of the title deed for the suit property (PEX1), a copy of the letter of



acceptance for Plot No. 821 Nguu Ranch (PEX2) a copy of an official receipt dated 4/12/2010 for Plot No. Nguu Ranch (PEX3), a copy of the letter dated 04/01/2011 from the settlement Fund Trustees (PEX4), and a letter of allocation dated 2/08/2001 (PEX7).

57. The law is very clear on the position of a holder of a title in respect of the land. Section 24 (a) of the Land Registration Act provides for the interest conferred by registration. It provides as follows:-

“Subject to this Act the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all the rights and privileges belonging or appurtenant thereto.”

58. Section 25 of the Land Registration Act provides for the rights of a proprietor. It provides as follows:-

The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided by this Act and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject;...

59. From the foregoing, I find that the Plaintiff has demonstrated to the satisfaction of the court that he is the registered owner of the suit property.

60. The Plaintiff is also claiming for mesne profits. Section 2 of the Civil Procedure Act defines mesne profits as follows: -

“...in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”

61. The Court of Appeal in *Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees* [2020] eKLR aptly held that: -

“Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9<sup>th</sup> edition). Mesne Profits must be pleaded and proved. In the case *Peter Mwangi Msuitia & Another v Samow Edin Osman* [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

62. Mesne profits are in the nature of special damages. They must be specifically pleaded and proved. Although the Plaintiff pleaded mesne profits of Kshs 10,000/= he did adduce any evidence in support of the same.

63. The Plaintiff also sought for an order directing the Defendant to repair the fence at his own costs. The Plaintiff did not adduce any evidence to show that the Defendant damaged his fence so as to warrant the award of damages.

64. In his counter claim, the Defendant sought for revocation of the title for the suit property.



65. Section 26(1) of the Land Registration Act provides for instances when a title to land can be challenged as follows:-

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer shall be taken by all the courts as prima facie evidence that the person named as the proprietor of the land is absolute and indefeasible owner 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.”

66. It is clear from the above provisions that a title can only be revoked on the grounds of fraud or misrepresentation or where the title had been acquired illegally, unprocedurally or through a corrupt scheme.

67. The registration of the Plaintiff on the suit property was through allocation by the Settlement Fund Trustees. The Defendant has not adduced any evidence to show that he is the registered proprietor of the suit property. No evidence was adduced to show that the Plaintiff obtained the title through fraud or misrepresentation, illegally, unprocedurally or through a corrupt scheme to warrant the revocation of the title for the suit property.

68. The Defendant also sought for a declaration that he has acquired ownership of the suit property by way of adverse possession. The doctrine of adverse possession is embodied in Section 7 of the Limitation of Actions Act which stipulates that:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.”

69. Further Section 13 provides that: -

1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under Section 9, 10, 11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

70. Section 38 gives guidelines on the procedure to be followed by a person claiming adverse possession.

71. The law on adverse possession is well settled.



72. The ingredients of the doctrine of adverse possession were discussed in the case of Wambugu Vs Njuguna (1983) KLR 173 where the Court of Appeal stated that: -

“Adverse possession contemplates two concepts; Possession and discontinuance of possession. It further held that the proper way of assessing proof of Adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

73. The ingredients were recently discussed by the Court of Appeal in the case of Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) eKLR where it was held that: -

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years. The process springs into action essentially by default or inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

74. In Mombasa Teachers Co-operative Savings and Credit Society Limited Vs Robert Muhambi Katana & 15 Others [2018] eKLR the Court of Appeal stated that: -

“Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non permissive or non-consensual, actual, open, notorious, exclusive and adverse use/ occupation of the land in question for an interrupted period of 12 years as espoused in the latin maxim nec vi nec clam nec precario.”

75. It is well settled that a party claiming adverse possession ought to prove that his possession was peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner.

76. The Defendant testified that he became entitled to the suit property by way of adverse possession in the year 1999 after he caused Plot No. D1-213 to be registered in the name of Beatrice Minoos whilst he took possession of the suit property. DW4 and DW5 confirmed in their evidence that the Defendant has been in occupation of the suit property for more than eleven years. Possession can only be said to be adverse to the title of the registered owner if it is without his consent.

77. In the case of Patrick Magu Mwangi Kimuyu v Joreth Limited (2015) eKLR the court of appeal held that:-

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.”

78. It is not in dispute that the Plaintiff entered the suit property with the consent or permission of the Defendant. The possession is therefore with permission and is not hostile. In my view, that ground alone disqualifies the Defendant from the claim of adverse possession. Having so found, this court will not delve into the other ingredients of adverse possession.



79. The Defendant is seeking for an order compelling the Plaintiff to compensate him with the market value for Plot No. D1-213 in the event that he is dispossessed of the suit property. It is the Plaintiff's case that Plot NO. D1-213 is worth Kshs 3million. The Plaintiff testified that his wife applied for the plot and was allocated the same just like any other person. It is the Plaintiff's case that the Defendant is not amongst the previous owners of No. D1-213 Plot. As earlier stated, Plot No. D1-213 was allocated to Beatrice Minoo who has since sold the same to Julius who is the current owner. The Defendant ought to have enjoined Beatrice Minoo as an Interested Party to the suit herein for her to shed light on how she acquired the plot.
80. Having found that the Plaintiff is the registered owner of the suit property this court finds and holds that he is entitled to all the rights and privileges appurtenant thereto. I find that the Plaintiff has proved his case against the Defendant on a balance of probabilities.
81. I also find that the Defendant has not proved his counterclaim to the required standard. Accordingly, the counterclaim is hereby dismissed. In the end, I enter judgment for the Plaintiff against the Defendant in the following terms;
- a. A declaration is hereby issued that the Land Parcel Makueni/Nguu Ranch/812 is the sole property of the Plaintiff.
  - b. An eviction order is hereby issued against the Defendant from Land Parcel Makueni/Nguu Ranch/812 to be supervised by the OCS Emali Police Station.
82. Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 10<sup>TH</sup> DAY OF DECEMBER, 2024.**

In the presence of:

Muthiani for the Plaintiff

Munyasya for the Defendant.

Court assistant Alfred

