



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 239 OF 2017 (OS)

PAUL KAMANDE GICHEHA.....PLAINTIFF

VERSUS

JACOB KINYUA KIRAGU.....DEFENDANT

JUDGEMENT

1. By an originating summons dated 11th May 2016, and filed under Section 7 and 38(1) of the Limitation Act and under Order 37 Rule 7(1) & (2) of the Civil Procedure Rules and all other enabling provisions of the Law, the plaintiff herein who claimed to be entitled to be registered as the sole absolute Proprietor of **Title No. Nyandarua/Ndemi/75** by adverse possession seeks for the following:

- i. That there be a declaration that the Plaintiff has become entitled to be the registered proprietor of **Title No. Nyandarua/Ndemi/75** measuring 2.4 hectares by virtue of the doctrine of adverse possession.
- ii. That an order do issue authorizing the Deputy Registrar of the honorable Court to execute all necessary documents to facilitate registration of the plaintiff as the absolute proprietor of **Title No. Nyandarua/Ndemi/75**.
- iii. That Cost of the suit be awarded to the Plaintiff.

2. The Originating Summons is premised on the grounds stated on the face of it as well as the Supporting *Affidavit* sworn on the 11th May 2016 by Paul Kamande Gicheha, the Plaintiff herein.

3. On the 4th May 2017, Counsel for the parties took directions to the effect that the Originating Summons be treated as the Plaintiff's plaint whereas the affidavits therein be treated as witness statements. The matter was set down for viva voice hearing wherein only the Plaintiff and the Defendant testified.

4. In summary, on the 20th June 2017 the plaintiff testified which testimony can be summed up as follows.

5. That he purchased land that was then known as Plot No. 1075 (new No.75) on the 21st June 1986 from one M'mugambi M'mrinjau herein referred to as the Vendor for the purpose of this case, at a consideration of Ksh. 44,000/= wherein he paid the agreed consideration in full and took possession of the land.

6. That he moved into the suit land and started utilizing it after two years upon purchase.

7. That in the year 2000, he had conducted an official search on the same at the Land's registry when he found out that the land was registered in the Defendant's name.

8. That he had remained on the suit land (to date) because he had effected massive development thereon which included, putting up permanent residential houses, excavating a dam thereon and planting of exotic trees some of which he has harvested. That he also kept cattle as well as planted subsistence crops on the suit land.

9. It was his evidence that on the 1st February 2000 the said vendor had, without any regard to the Plaintiff's interest thereon, transferred the suit land to the Defendant wherein vide a letter dated the 20th July 2000, the Defendant had, demanded that the Plaintiff gives vacant possession of the suit land. The Plaintiff defied the said notice.

10. Apparently, the Defendant was the vendor's son and he knew that the Plaintiff was in occupation of the suit land.

11. The Plaintiff claimed that vide a letter dated the 2nd August 2000, he wrote to the Vendor demanding the transfer of the land in his favor wherein the vendor's response was to the effect that the Plaintiff was a trespasser on the suit land and was therefore liable for eviction.
12. That the Defendant never filed any suit against him to recover possession of the land.
13. The plaintiff testified that he had gone and instituted a land dispute case before the Nyandarua District Land Tribunal in the year 2003 before instituting the present suit.
14. That his prayer before the court was to issue him with title to the suit land.
15. The Plaintiff relied on the following documents;
 - i. A copy of the extract of the suit land register and produced as Pf Exh 1.
 - ii. A copy of demand notice from the Defendant dated the 20th July 2000 and produced as Pf Exh 2.
 - iii. A copy of a demand letter from the Plaintiff to the defendant dated 2nd August 2000 and produced as Pf Exh 3.
 - iv. A copy of the response letter from the defendant dated the 18th August 2000 and produced as Pf Exh 4.
 - v. 2 Photographs showing the houses on the suit land and produced as Pf Exh 5(a and b)
 - vi. Photograph of excavated dam and produced as Pf Exh 6.
 - vii. Photographs of exotic trees both harvested and planted on the suit land and produced as Pf Exh 7(a-c)
16. In cross examination, the Plaintiff conceded to not having produced the copy of the sale agreement dated the 21st June 1986 as an exhibit. He confirmed that the agreement was in regard to plot No.1075. He also conceded that he had no evidence proving that Plot No. 1075 was the same as plot No. 75. He confirmed that he was buying the whole unit of plot no. 1075 and that he did not know the acreage.
17. When he was referred to the proceedings before the Land Disputes tribunal, he stated that there had been a typographical error to the effect that he was in agreement that the acreage was 1 acre and reiterated that the agreement was not in regard to one (1) acre of land.
18. The Plaintiff testified that at first, the Vendor had showed him a wrong piece of land being No. 76 before he settled on the correct piece of land being plot No. 75 in the year 1993.
19. The Plaintiff testified that at the proceedings before the Nyandarua District Land Tribunal, he had been declared as the proprietor of the suit land wherein the defendant's title was to be cancelled. That Defendant having been dissatisfied with the decision at the District Land Tribunal, instituted an Appeal at the Provincial Appeals Tribunal who set aside the award by the District Land Tribunal. He did not appeal against the award as he was not aware of the results. That the award was subsequently adopted in the Nyahuru Principal Magistrate's Court in Land Dispute No. 10 of 2011.
20. He testified that he did not raise the issue of adverse possession before the tribunal. The plaintiff kept quiet when he was asked as to why he did not deem it fit to raise the said issue before the tribunal.
21. He proceeded to testify and confirm that he built the structures in photographs 5(a and b) in the year 2014 and confirmed that he had another piece of land adjacent to the suit land which he had bought in the year 2000 and upon which he had built a house for his son.
22. The photographs in exhibit 7 (a-c) were trees that were planted and felled by himself and sold to Kenya Electricity Transmission Company in the year 2015.
23. The plaintiff closed his case after re-examination wherein he reiterated that when he was buying the suit land, he did not know the acreage but was sure that the vendor was not selling to him 1 acre. Further that he has lived on the suit land since then.
24. The Defendant's evidence on the other hand was to the effect that while he was working in Nyahuru in the year 2000, he had met the vendor who was desperate to sell his piece of land stating that the Plaintiff herein had failed to honor their agreement after buying the same for 44,000/= wherein he had only paid Ksh 40,000/= and had refused to pay the balance of Ksh 4,000/=
25. The Defendant further testified that he visited the suit land, and had found upon it a semi-permanent house that had been constructed thereon by the Plaintiff herein. He was informed by the Vendor that the Plaintiff was residing in Thika town but used to utilize a mud house in the adjacent land at the time.
26. That he and the vendor had gone to visit the Plaintiff in Thika town so that the vendor could 'give the Plaintiff 1 acre of the suit land and sell the rest to the Defendant'.
27. That while in Thika, the Plaintiff had informed them that he was not interested in the present suit land as he had bought another land in

the plot adjacent to the suit land.

28. The defendant testified that upon his return to Nyahururu, he had conducted a search at the Lands Registry, of the suit land, wherein he had found that the same was registered in the name of the Vendor Mr. M'mugambi M'mrinjau upon allocation by the Settlement Fund Trustee.

29. That he had negotiated the price with the vendor wherein they had settled at the sell price of Ksh 60,000/= per acre. After further negotiations with the vendor's family, he bought the whole land measuring 6 acres for ksh. 350,000/=.

30. That after buying the suit land, they had processed the consent process at the Land Control Board where the land was subsequently transferred to him and he was registered as the sole proprietor of the land parcel No. **Title No. Nyandarua/Ndemi/75** in the year 2000.

31. That pursuant to his registration as the proprietor of the suit land, he gave notice to the Plaintiff to vacate the land and that is when the Plaintiff instituted a land dispute before the Nyandarua District Land Tribunal where he had claimed for cancellation of the Defendant's title and registration of the suit land in his name instead.

32. The verdict was delivered on the 17th February 2003 in the Plaintiff's favour wherein the Defendant having been dissatisfied with the decision at the District Land Tribunal, instituted an Appeal at the Provincial Appeals Tribunal who nullified the District Land Tribunal's finding on the 24th July 2008. The said finding was subsequently adopted on the 13th September 2011 in the Nyahururu Principal Magistrate's Court in Land Dispute No. 10 of 2011, as the award of the court, which award has never been appealed against.

33. The Defendant's evidence was to the effect that at the plaintiff's issue of ownership of the suit land was concluded on the 13th September 2011 when the Provincial Appeals Tribunal finding was adopted by the Magistrate's court.

34. The Defendant testified that the matter was laid to rest until the year 2013 when the Kenya Electricity Transmission Company Limited did a survey on the suit land and wanted permission for a way leaf wherein the Plaintiff subsequently registered himself as the proprietor of the suit land. That is when in fact he had started constructing the permanent house on the suit land.

35. The Defendant testified that at one time, he had sought to transfer to the Plaintiff his 1 acre of land or repay him but the Plaintiff had declined the offer thereby informing him that he was now a millionaire and did not want small money from the Defendant.

36. The Defendant further testified that the Plaintiff had begun constructing the permanent house which was completed in the year 2016, so that he could be compensated by the Kenya Electricity Transmission Company Limited.

37. The Defendant testified that the Plaintiff had only been utilizing the 1 acre of land that he had bought from the vendor because he had land adjacent to the suit land.

38. That the Plaintiff has not been in peaceful possession of the said land in because the Defendant had been writing to him demand notices for him to vacate the land. That in the circumstance the Plaintiff has not acquired the suit land by adverse possession as he claimed. The Defendant prayed for eviction orders to issue against the Plaintiff.

39. The Defendant relied on the following documents in his evidence:

i. A copy of the proceedings of the Nyandarua District Land Tribunal produced as Df Exhibi 1.

ii. A copy of the proceedings of the Provincial Appeals Tribunal produced as Df Exhibit 2.

iii. Application dated the 16th May 2011 for adoption of the award and order of the Magistrate's court dated the 13th September 2011 produced as Df Exhibit 3.

40. In cross examination, the Defendant reiterated that in his demand letter, he had asked the Plaintiff to vacate form the whole suit land and not just 1 acre. That when he acquired the suit land, the Plaintiff was not in possession of the same. He had known that the plaintiff wanted to buy the same but was unable. He know that the plaintiff ad bought 1 acre at Ksh. 44,000/= but had only paid 40,000/=

41. He confirmed to having neither lived on the suit land nor having planted any trees thereon but that at the time, he had bought the land, there had been tress planted thereon which were inclusive in the purchase price.

42. He confirmed that the Proceedings before the Nyandarua District Land Tribunal were on the issue of proprietorship and that when the award was adopted he did no institute eviction proceedings because he went back to school.

43. The Defence thus closed its case and Parties filed their written submissions and asked the court to deliver its judgment thereafter.

44. I have since considered the same. It is the Plaintiff's submission that he has been in open and uninterrupted possession of the suit land after having bought the same in the year 1986 for consideration of Ksh 44,000/= from one **Mr. M'mugambi M'mrinjau** the vendor herein.

45. The Plaintiff submitted that despite the actual knowledge of his occupation on the suit land, the vendor had sold it to the Defendant who had then acquired title in the year 2000 and had proceeded to issue the Plaintiff with an eviction notice.

46. That the Plaintiff had then filed a dispute before the District Land Dispute tribunal who had ruled in his favour but the ruling was overturned in an appeal by the Provincial Appeals Tribunal and the finding adopted as an award in the Nyahururu Principal Magistrate's Court in Land Dispute No. 10 of 2011.

47. The Plaintiff framed his issues for determination as being:

- i. Whether the Plaintiff's suit is competent and property before court.
- ii. Whether the Plaintiff has become entitled to be registered as proprietor of Title No. Nyandarua/Ndemi/75 measuring 2.4 hectares by doctrine of adverse possession.
- iii. Who should bear the costs of this case?

48. On the first issue, it was the Plaintiff's submission that by virtue of Section 13(7) (h) of the Environment and Land Court Act, Section 38(1) of the Limitation Of Actions Act and Section 107(1) of the Land Registration Act and Order Rule 7 of the Civil Procedure Rules, the Plaintiff's suit was competent and proper before the court.

49. On the second issue as to whether the Plaintiff has become entitled to be registered as proprietor of Title No. Nyandarua/Ndemi/75 measuring 2.4 hectares by doctrine of adverse possession, the Plaintiff relied on Section 7 and 17 of the Limitation of Action Act as well as the decided case of **Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR** where Ouko JA summarized the elements of adverse possession as;

In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.

50. The Plaintiff submitted that he had demonstrated that he had been in occupation of the suit land since 1993 when the same was still registered in the name of the Settlement Fund Trustee before it was registered in the name of the vendor, Mr. M'mugambi M'mrinjau in 1998. That two years later the land was transferred to the Defendant on the 1st February 2000. Throughout the said transactions, the Plaintiff was still in possession of the suit land and is still in possession to date. He relied on the Defendant's letters produced as Pf exhibit 2 and 3 respectively.

51. As to the question when the 12 years period starts running, it was the Plaintiff's submission that time started running on the 5th August 1998 when Mr. M'mugambi M'mrinjau became the registered owner of the suit land because prior to his registration, he had no capacity to transfer the land to the Plaintiff. That the subsequent refusal by Mr M'mugambi M'mrinjau to transfer the land into the Plaintiff's name and the Plaintiff's continuous stay therein was adverse to the interest of Mr. M'mugambi M'mrinjau.

52. The Plaintiff's Counsel referred to the decided case of **Githu vs Ndeete [1984] KLR 776** wherein it was held that:

The mere Change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.

53. That in the case of **Titus Kigoro Munyi vs. Peter Mburu Kimani [2015] eKLR**, the court of Appeal held as follows;

It is stated that any man who buys land without knowing who is in possession risks his title. Just as he does, if he fails to inspect his land for twelve years after having acquired it.

54. The Plaintiff further submitted that if by the reasoning of the second school of thought to the effect that the Plaintiff only become an adverse possessor when M'mugambi refused to transfer the and into his name and instead transferred it into the Defendant's name, then the time would start running on 1st February 2000 when the Defendant become the registered proprietor thus the Plaintiff would still benefit from this scenario a he would still have been in possession for more than 12 years either way. That the plaintiff had been on the suit land for 18 years before the suit was filed. His claim for adverse possession therefore remains unshaken.

55. The Plaintiff also looked at when time ceased running and submitted that in the case of **Githu vs Ndeete** (supra) it was held that;

"Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act."

56. The Plaintiff submitted that the Defendant in this matter had never taken any steps to enter onto the suit land or assert his right as the owner, the only action he took was to write two letters to the Plaintiff which action according to **Githu vs Ndeete (supra)**, was not an effective assertion. That the proceedings before the Land Disputes Tribunal were first instituted by the Plaintiff and did not constitute recovery of the land. The time therefore never stopped running for the Plaintiff.

57. The Plaintiff thus submitted that he had been in open and notorious possession of the suit land to the knowledge of the Defendant herein

who was now the owner as was evidenced by the Defendant's letter dated the 18th August 2000 and was produced as Pf exhibit 2. That an example of the Plaintiff's notorious use of the suit land was exhibited at the hearing when he testified that he had at one time cut and sold tress to KETRACO, a fact that did not please the Defendant.

58. The Plaintiff's submission further was to the effect that he occupied the present suit without the permission of the Defendant as was evidenced in the Demand letter dated the 18th August 2000 produced as Exhibit 2. The plaintiff took possession of the land prior to the Defendant becoming the owner and has continued occupying it without the Defendant's permission.

59. Lately, the Plaintiff submitted that he had asserted a hostile title and dispossessed the Defendant of the suit land by engaging in acts that were inconsistent with the enjoyment of the soil by the Defendant. He has planted trees, cultivated land, built houses and even dug a dam on the land which activities were paramount to prove dispossession of the Defendant.

60. The Plaintiff relied on the case of **Richard Mugo Kiambo vs. James Muriuki Kiambo [2014] eKLR** to buttress his submission.

61. The Plaintiff concluded by submitting that ordinarily, cost follow the event and prayed that the court finds that he had proved his case on a balance of probability and to grant the orders so prayed.

62. The Defendant's submission in opposition of the Plaintiff's submissions on his Originating Summons were to the effect that the Plaintiff had not established any plausible and justifiable ground that would entitle him to lay any claim on the suit land.

63. The Defendant Relied on the case of **Miriam Njoki Gitonga and Another vs. Musa Wambugu Nakuru ELCA 108 of 2011** to submit that the present matter was Res judicata by virtue of the fact that subsequent to a letter dated the 2nd August 2000 addressed to the Defendant by the Plaintiff and produced as Pf exh 3, the Plaintiff had claimed ownership of the suit land by virtue of adverse possession, the Plaintiff had subsequently instituted a Land Dispute Cause No. 49 of 2000 before the Nyandarua District Land Tribunal wherein he had prayed for the cancellation of the defendant's title.

64. The tribunal had consequently cancelled the Defendant's title and ordered for the transfer of the suit land in favor of the Plaintiff. That the relief the Plaintiff had sought in the Land Dispute Tribunal was the Cancellation of the Defendant's title deed to the suit land and thereafter registration of the same in the name of the Plaintiff.

65. The Defendant having been dissatisfied with the decision at the District Land Tribunal, instituted an Appeal at the Provincial Appeals Tribunal who declared that he was the proprietor of the suit land.

66. That the said award was subsequently adopted in the Nyahururu Principal Magistrate's Court in Land Dispute No. 10 of 2011 and has never been appealed against.

67. In short, the Defendant's submission was that the award is still valid and alive having gone through a judicial process that culminated into a valid judgment.

68. He further relied on Section 7 of the Civil Procedure Act and the decided case of **Miriam Njoki Gitonga and Another vs. Musa Wambugu, NKR ELCA 108 of 2011** to submit that Parties in the present suit were substantially the same in the tribunal and were litigating over the same title and the same subject matter herein. That the matter was decided by a competent court and determined in this respect. The matter before this court was therefore Res Judicata and should be dismissed.

69. The Defendant further submitted that this notwithstanding, the Plaintiff herein had not proved his claim for adverse possession, that although he testified that he took possession of the suit land two years after he had entered into a sale agreement with Mr. M'mugambi M'mrinjau, yet he had not produced any sale agreement to substantiate his claim, for the purpose of computing time when the adverse possession began to run.

70. The Defendants relied on the Cases of;

i. **M'Mbaoni M'thara vs. James Mbaka [2017] eKLR**

ii. **Gabriel Mbui vs Mukindia Maranya[1993]eKLR**

iii. **Samuel Katana Nzunga & 102 Others vs Salim Abdalla Bakshein & Another [2013]eKLR** to argue that fact that a purchaser cannot lay an adverse claim based on a sale agreement unless the sale agreement has been repudiated.

71. The defendant submitted that the Plaintiff was on the suit land pending the clearance of the balance to the vendor and finalization of the transaction therefore pending the repudiation of the sale transaction, the Plaintiff was on the suit and on the basis of the purchaser's interest, and as such the time for computing the period of adverse possession would not start to run.

72. That by the time the suit land was being sold to the Defendant herein, he was aware that the Plaintiff had defaulted in the payment of the purchase price of the 1 acre he had bought.

73. That the Plaintiff's claim over the suit land was based on a void transaction and that is why he had decided to lay claim for adverse possession.

74. That further, in the year 2000 when the Plaintiff realized that the suit land had been registered in the Defendant's name, he started the legal battle by instituting the tribunal case which was determined in the year 2011 when the award was adopted in the Nyahururu Chief Magistrate's Court.

75. That the time, from the year 2000 to 2011, was not therefore time sufficient enough to conclude that the time for adverse possession was running and further that the issue of ownership was still under consideration by a judicial process. The defendant relied on the case of **Gabriel Mbui vs Mukindia Maranya [1993] eKLR** to buttress the fact that during the pendency of the judicial process the Plaintiff was not in peaceful, open and exclusive possession of the suit land as of right without interruption.

76. The Defendant also submitted that from the documentary evidence in the form of the proceedings before the Land Disputes Tribunal at page 11, the Plaintiff conceded to having bought 1 acre of land out of the Plot 75, the subject suit land herein. The vendor at page 4 of the proceedings of the District tribunal corroborated this fact when he testified that indeed he has sold 1 acre of land from the suit land to the Plaintiff at Ksh. 44,000/=. This piece of land, according to the Defendant's evidence, was the one that the Plaintiff had built upon a semi-permanent house and therefore the area around which he was utilizing at the time the Defendant had visited the suit land. The Plaintiff could not therefore be said to have been in possession of the whole suit land. That he had even failed to point out to the court the exact portion he lay claim to which was fatal in this instance.

77. Further submission was that since matter was submitted before a Land Dispute Tribunal over the ownership of the suit land, the Defendant was under legal impediment to institute a parallel suit to evict the Plaintiff from thereon. Time therefore did not run during the pendency of the judicial process. He relied on the decided case of **Gabriel Mbui vs Mukindia** (supra) to submit that it was on the basis of the determination of the said proceedings that he could not have had the platform to institute eviction proceedings against the Plaintiff because the 12 years had not elapsed.

78. That from the date of judgment on the 13th September 2011, the period of 12 years had not lapsed by the time this suit was instituted. It was therefore a misconception for the Plaintiff to claim that the Defendant had not instituted any suit to evict him. That time for computing adverse possession began running from 14th September 2011. By the time this suit was instituted in the year 2016, the 12 years period had not lapsed and the Plaintiff thus lacked basis upon which to lay claim for adverse possession. The Defendant urged that this suit be dismissed.

79. From the evidence before this court, I find that it is not in contention that the plaintiff purchased land then known as Plot No. 1075 (new No.75) on the 21st June 1986 from one M'mugambi M'mrinjau at a consideration of Ksh. 44,000/

80. It is also not in dispute that he took possession of the land two years after the purchase that is in the year 1988.

81. That subsequently the defendant bought the suit land from the same vendor and at a consideration of Ksh 60,000/= per acre but after further negotiations, he had bought the whole land comprising of 6 acres for ksh 350,000/= wherein, consent had been obtained from the Land Control Board and the transfer was processed wherein he had been registered as the sole proprietor of the suit land in the year 2000.

82. It is also not in contention that pursuant to his registration as the proprietor, during the same year in 2000, the Defendant had given notice to the Plaintiff to vacate the land wherein the Plaintiff instituted a land dispute before the Nyandarua District Land Tribunal seeking for cancellation of the Defendant's title and instead be registered as the proprietor of the suit land.

83. The matter was decided in the Plaintiff's favour but was appealed by the Defendant at the Provincial Appeals Tribunal who declared that he was the proprietor of the suit land. The award was subsequently adopted in the Nyahururu Principal Magistrate's Court in Land Dispute No. 10 of 2011 and an order issued to that effect on the 13th September 2011. There has been no appeal filed against it to date.

84. It is also not disputed that after the said order was issued the Plaintiff herein filed the present suit seeking for a declaration that he had become entitled to be the registered proprietor of **Title No. Nyandarua/Ndemi/75** by virtue of the doctrine of adverse possession. The Defendant now submits that the matter before this court is Res judicata by virtue of the proceedings before the Tribunal and the subsequent adoption of the same as an award in the Magistrate's court.

85. What however is disputed, apart from whether or not the Plaintiff acquired rights by adverse possession, is whether the Plaintiff bought the whole suit land or 1 acre out of the suit land only.

86. The parties filed their respective submissions for and against granting of the orders so sought by the Plaintiff.

87. What comes out clearly in this case as matters for determination is;

- i. Whether this case is Res judicata by virtue of the decision Land Dispute Tribunal and adoption of the award thereafter.
- ii. Whether the plaintiff has acquired prescriptive rights over the suit land by adverse possession.
- iii. Who should claim costs?

88. The Defendant in his submission submitted that the matter was Res judicata by virtue of the same having been heard and determined by the District Land Disputes Tribunal and the Provincial Land Appeals Tribunal whose award was adopted as a decree of the Court on the 13th September 2011 in the Nyahururu Principal Magistrate's Court in Land Dispute No. 10 of 2011.

89. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

90. The doctrine of *res judicata* is important in adjudication of case and serves two important purposes;

i. it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit and

ii. it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment in the art of pleadings.

91. In order therefore to decide as to whether this case is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;

i. what issues were really determined in the previous case;

ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.

iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.

92. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

i. The matter in issue is identical in both suits;

ii. The parties in the suit are the same;

iii. Sameness of the title/claim;

iv. Concurrence of jurisdiction; and

v. Finality of the previous decision.

93. It is not in dispute that both the Plaintiff and the Defendant participated in litigating this matter both at the Nyandarua District Land dispute Tribunal and the Provincial Appeals Land Tribunal where the same subject matter was decided. It is also not in dispute that the land in issue was registered in the name of the Defendant herein. Further, it is not in dispute that the Plaintiff instituted a land dispute before the Nyandarua District Land Tribunal seeking to be registered as the proprietor of the suit land.

94. The provisions of Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) conferred to the land dispute tribunal the jurisdiction to deal with boundary disputes, subdivision, claim to occupy or work on land and trespass to land. It did not however confer to it jurisdiction to determine disputes over title or ownership of land.

95. In the case of **Sir Ali Bin Salim vs. Shariff Mohamed Shatry Civil Appeal No. 29 1940** the court held as follows; -

“If a Court has no jurisdiction over the subject matter of the litigation, its judgments and orders however precisely certain and technically correct are mere nullities and not only voidable; they are void and have no effect either as estoppel or otherwise and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack or defect of jurisdiction”.

95. Based on the above decision, it is clear that the District Land Dispute Tribunal as well as the Provincial Land Appeals Tribunal had no jurisdiction in determining ownership and title of **No. Nyandarua/Ndemi/75 and by the said determination therefore the same were a nullity**. The adoption of the said award/decisions of the two tribunals by the Chief Magistrates Court Nyahururu did not lend it legitimacy either. They remain equally null and void.

96. A further look at the provisions of Section 7 of the Civil Procedure Act Cap 21 clearly stipulates that;

‘.....or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit... (My emphasis).

97. The above provision is clear that for matter to be declared Res judicata, the court that tried the previous suit must have been a competent

court to try the subsequent suit. I find that by virtue of Section 3 (1) of the Land Disputes Tribunals Act Cap 303A (now repealed) the tribunal had no jurisdiction to try matters involving ownership and title of parcel No. **Nyandarua/Ndemi/75** and as such it did not constitute 'a competent court' within the meaning of section 7 of the Civil Procedure Act.

98. In this regard therefore I find that this matter is not Res judicata and that it is it properly before this court.

99. On the second issue as to whether **the plaintiff has acquired prescriptive rights over the suit land by adverse possession**, the law is settled as anchored under Sections 7, 13, 17 and 38 of the Limitation of Actions Act.

100. Section 7 provides inter alia:

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

101. Section 13 is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

102. Section 17 is to the effect that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

103. Finally Section 38 states:

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

104. As was stated by the Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:**

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

105. The onus is on the person or persons claiming adverse possession:

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

106. The main the elements of adverse possession that a claimant has to prove include :

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

Has the Plaintiff herein demonstrated the said elements?

107. The facts upon which the claim for adverse possession is made is that the Plaintiff herein bought the suit land on the 21st June 1986 from one M'mugambi M'mrinjau. That at the time, the suit land was registered in the name of the settlement Fund Trustee. That he moved into the suit land and started utilizing it in the year 1988 two years after purchase. That subsequently the said M'mrinjau registered the land in his name and sold it to the Defendant who registered it in his name (Defendant's) in the year 2000 while the Plaintiff was still in occupation.

108. In essence therefore the occupation of the land by the Plaintiff was exclusive and without permission from the Defendant who was the registered owner of the land occupied.

109. When the suit property was registered in the Defendant's name, the Plaintiff was still living on it and had never seen the Defendant thereon. That he had been cultivating on the suit land and has made extensive developments thereon. He had built houses, planted trees, cultivated land, and even dug a dam on the land which activities were paramount to prove dispossession of the Defendant.

110. That the Defendant has never occupied nor lived on the suit property. Based on the aforementioned facts, the Plaintiff claims title to the suit land by way of adverse possession

111. It is trite that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person's adverse possession. **See Githu v Ndeete [1984] KLR 776.**

112. Time therefore began to run against the Defendant in favour of the Plaintiff from the time the latter occupied the suit property and was engaged in acts that were inconsistent with the Defendant's title, for instance building houses on the suit property, planting trees and the digging of a dam. There is nothing to suggest that that occupation was secret or that it was not known to the Defendant.

113. When would time stop running" **In Joseph Gahumi Kiritu v Lawrence Munyambu Kabura Civil Appeal No.20 of 1993**, the court of Appeal held that;

"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. ...He must therefore make a peaceable and effective entry, or sue for recovery of land."

114. Neither the Defendant nor his predecessor Mr. M'mugambi M'mrinjau took any steps throughout the time that the Plaintiff was in possession of the suit property that would interrupt time from running. Reference is made to the years from 1988-2000 and the years from 2000 to 2016 when the present suit was filed.

115. In the case of **Littledale v Liverpool College (1900) I ch.19, 21** it was held that;

"In order to acquire by the statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it the next question, therefore, is what constitutes dispossession of the proprietor"acts must be done which are inconsistent with his (the owner's) enjoyment of the soil for the purpose for which he intended to use it."

116. Indeed in the case of **Githu vs Ndeete** (supra) it was held that;

"Time ceases to run under the Limitations of Actions act either when the owner takes or asserts his right or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into land, giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act."

117. The actual knowledge on the part of the registered proprietor being the Defendant herein that the Plaintiff was in possession of the suit property was established to exist from the year 2000 up to when the present suit was filed in the year 2016.

118. No evidence has been adduced that indeed the Defendant herein took legal proceedings or made effective entry into land. What is on record is that the Defendant only wrote Demand notices to the Plaintiff in the year 2000 to quit which in the case of Githu vs Ndeete (supra) did not constitute effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.

119. I find and hold that the Plaintiff has proved on a balance of probabilities that his right of action as against the Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

120. In the circumstance herein the Plaintiff's Originating Summons dated 11th May 2016, succeeds in its entirety in the following terms;

i. That the Plaintiff has become entitled to be the registered proprietor of **Title No. Nyandarua/Ndemi/75** measuring 2.4 hectares by virtue of the doctrine of adverse possession.

ii. That the Deputy Registrar of the honorable Court do execute all necessary documents to facilitate registration of the plaintiff as the absolute proprietor of **Title No. Nyandarua/Ndemi/75.**

iii. That Cost of the suit be awarded to the Plaintiff.

Dated and delivered at Nyahururu this 31st Day of May 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE