



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYAHURURU

ELC NO. 120 OF 2017

(FORMERLY NAKURU 524 OF 2013)

JAMES MACHARIA MARIGA (suing as a legal

representative of the estate

of WILLIAM NJUGUNA MARIGA (deceased).....PLAINTIFF

VERSUS

RUTH KANINI NDUNGU.....DEFENDANT

JUDGEMENT

1. Before me for determination is an Originating Summons dated the 9th September 2013 and filed on the 13th September 2013 where the Plaintiff seeks for the following orders;

i. That the Plaintiff has become entitled by adverse possession, a portion of twelve (12) acres out of title No. Nyandarua/Malewa/957, 958, and 959 which were registered in the name of the Defendant

ii. That the Plaintiff be registered as the proprietor of a portion of twelve (12) acres to be excised from the occupied portions of title No. Nyandarua/Malewa/957, 958, and 959.

iii. **Spent**

2. The Originating Summons was supported on the grounds that were adduced at the hearing as well as by the supporting affidavit sworn on the 9th September 2013 and a further affidavit sworn by the Plaintiff on the 26th August 2016.

3. The Defendant's replying affidavit sworn on the 23rd September 2013 was to the effect that she was the registered proprietor of the suit lands No. Nyandarua/Malewa/958, and 959, the title deed having been issued to her on the 17th August 2004 after acquiring the land from her deceased husband.

4. That land parcel No. Nyandarua/Malewa/957 to which she was also the proprietor upon issuance of title deed on the 17th August 2004, ceased to exist upon its subdivision on the 16th July 2007 resulting into land parcels No. Nyandarua/Malewa/2106 and 2107.

5. That it was true that the Plaintiff had been in possession of twelve (12) acres out of title No. Nyandarua/Malewa/957, 958, and 959 but that there had been a long standing boundary dispute between herself and the Defendant, to which she had sought the services of the Land Registrar and even paid a sum of Ksh 12,000/= for the boundary to be fixed. Instead, the Plaintiff had rushed to Court and had filed the present suit to defeat the conclusion of the ongoing boundary determination exercise. She sought for the suit to be dismissed and parties referred back to the District Land Registrar for determination of the boundary dispute as per the provisions of the law.

6. Upon the death of the original Plaintiff and his substitution with his legal representative on the 3rd October 2017, directions were subsequently issued wherein the matter had proceeded for hearing on the 15th January 2019 and the substituted Plaintiff testified as PW1 to the effect that;

7. He was a son of the original Plaintiff William Njuguna Mariga the deceased who passed away on the 4th November 2016. He produced the letters of administration issued to him in P & A Cause No. 17 of 2017 at the Nyahururu High Court on the 21st June 2017 as Pf exhibit 1. He further testified that being conversant with the case, he had a copy of his father's title deed to parcel No. Nyandara/Malewa/632 herein

marked as PMFI 2.

8. Upon a request from his Counsel seeking to file further documents that had been left out, the witness was stood down.

9. The proceedings continued for further hearing on the 4th April 2019 wherein the second Plaintiff witness PW2 one James Macharia Kibethi a Government Surveyor within Nyandarua South testified that pursuant to a Court order, he had visited the suit land on the 27th February 2019 wherein both parties to dispute herein and the area chief were present. That after identification of the disputed portion, he had taken its Measurements by using the Registry Index Map (RIM) of the area. That his findings in regard to the total area that was surveyed was 4.856 hectares approximately 12 acres. That he had drawn a sketch plan showing the area in dispute.

10. That William Njuguna Mariga who was the proprietor of parcels No. 632, 633, 3204 and 3205 which were sub divisions of the original parcel No. 432, was the person who was in use of the 12 acres of land.

11. That at the time they had gone to the site, the 12 acres had been cultivated and there were a few trees thereon which tress he had identified from the photos presented to him and marked as WMM 11. He produced his report dated the 28th February 2018 as Pf exh 3 and further confirmed that there had been a fence demarcating parcels No. 433 and No. 432 although part of the land did not have a fence.

12. On cross examination, he testified that the portion in dispute measured 12 acres and was marked in red in his report which portion he had been informed by the Plaintiff, belonged to Wiliam Njuguna Mariga who was the proprietor of parcels No. 632, 633, 3204 and 3205.

13. He confirmed that although the area was under cultivation, yet he did not have information for how long it had been under cultivation because at the time they had been concerned with the area under dispute and not the part that was under cultivation.

14. When referred to Pf exhibit 3, he testified that the boundary on plot No. 632 was not marked on the ground although it was present on the RIM. That further, it had been hard to identify a furrow on the same but that in some places one could find furrows that had been dug in the 1960's although in the present case, he could not recall seeing such furrows.

15. PW1 was recalled wherein he continued with his evidence in chief to the effect that he had been unable to trace the original title to Nyandarua/Malewa/632. He thus sought to produce a copy instead which application was not objected to by the Defence Counsel and therefore a copy of the title to parcel No. Nyandarua/Malewa/632 which had been marked as PMFI 2 was produced as Pf exhibit 2.

16. He further testified that he was born in 1963, that Parcel No. 632 was a sub division of plot No 432 Malewa Scheme whose owner had been William Njuguna Mariga his father who was now deceased.

17. That he grew up on land parcel No. 432 which had distinct boundaries with the neighboring parcels of land. That there was a clear boundary and fence between parcel No. 432 and 433 since the year 1963 when the two pieces of land were allocated by the Settlement Fund Trustee and which boundary consisting of a fence constricted with barbed wire and posts was there to date.

18. That the barbed wire fence and post had been placed there by William and the Defendant's husband who was also deceased. That they had also planted eucalyptus trees also known as blue gum trees along the boundary and that the two gentlemen had never had an issue touching on the boundary during their life time.

19. That his father's land No. 432 had been sub-divided into 3 portions creating parcels No. 632, 633 and 634 and that the current dispute was on parcel No. 632. That Parcel No. 433 had also been subdivided to create parcels No. 957-961. He produced the green card to show the sub division of the parcels of land as Pf exhibit 4.

20. That as per the details in the Green card for plot No. 957, he testified that the same had been registered to Joseph Ndungu Macharia but had also been sub divided into parcels No. 2106-2107. He produced the Green card as Pf exhibit 5.

21. The witness further testified that the Green card for parcel No. 958 showed that the land was registered to the Defendant Ruth Ndungu and produced it as PF Exhibit 6. He also produced the Green card for No. 959 also registered to the Defendant Ruth Ndungu, as Pf exhibit 7.

22. PW1 further produced the Green card to parcel No.2106 registered to the Defendant Ruth Ndungu as Pf exhibit 8 and the Green card to parcel No. 2107 in the name of African Inland Church of Kenya Trustees Registered, as Pf exhibit 9 wherein he testified that there was no dispute with the church.

23. He confirmed the fact that on the 25th September 2008, there had been a boundary dispute lodged at the District Land Registrar Nyandarua in reference to Nyandarua/Malewa plot 632 as per a letter dated 25th September 2008 herein produced as Pf exhibit 10, where the complainant had been the Defendant herein.

24. That the disputed land had been visited on the 14th November 2008 at 10:00 am by a Land Registrar known as Birundu. That the dispute had been the genesis of the suit before the Court where the Defendant had claimed that the Plaintiff had taken her land and she had claimed parcel No. 632.

25. That at the time, his father was still alive where the claim had been against him. That his father had tried to establish how they were living on the land wherein he had invited a private surveyor Mr. Njuguna on the land to measure its acreage. That the surveyor had taken the measurements and compared them with the RIM wherein he had established that the portion claimed by the Defendant had been about 12 acres.

26. That they had obtained the RIM of the area which did not show the original boundaries as occupied on the ground and was responsible for creating the boundary dispute as it did not show the ground occupation.
27. His evidence was that if the map was used, they stood to lose 12 acres which they had all along occupied and used and had even planted trees and had been cultivating since 1963. That there had never been any dispute between his father and the late Ndungu and that both men have harvested trees on their respective side of land.
28. That the dispute had begun after the death of Joseph Kanini Ndungu. He referred to Photograph No. 1 to which he identified the posts and wires which marked the boundary stating that the big trees in the background were on his father's land which was plot No. 632.
29. The witness then referred to other photographs to which he testified that photograph No. 2, showed a big post which was the original post that marked the boundary at the beginning of the land and that it was on plot No. 632.
30. That Photograph No. 3, showed the fence and trees at the background while photograph No. 4 showed trees that had been cut down and had regenerated as evidenced in Photograph No. 5. That Photograph No. 6 showed growing maize on land No. 632 which was the disputed parcel of land. Photographs 7 and 8 depicted big trees. He produced the photographs as Pf exhibit 11 (a – h)
31. His testimony was that they had been utilizing the 12 acres as a matter of right and that the Defendant had never sued his father in any Court claiming a portion of the land. That they had come to Court claiming that portion of land through operation of law because they had used it for about 65 years without interruption.
32. That the land had been identified to his father originally through an old map being Malewa/Nyandarua when the land had not been sub divided. That the map showed the original land No. 432 and 433 and the demarcation of Settlement Fund Trustee upon allocation. That as per the boundaries on the land, the plots mapped as No. 1819 belonged to William while No. 1820 was Ndungu Macharia's land.
33. He testified that he was the one currently utilizing the disputed land and that he supported the findings of the surveyor and the claim by their deceased father that the land should be made part of their land. He sought for costs of the suit.
34. On cross examination, the Plaintiff reaffirmed the fact that his father acquired parcel No. 432 in Malewa Scheme in 1963 which was approximately 90.7 acres and that his neighbor was Joseph Ndungu whose land was No. 433. That both his father and Mr. Ndungu erected the boundary fence together and repaired it together. That although he could not remember when and why parcel No. 432 was sub-divided, yet its sub-division resulted into parcel No. 632 -634 which were still registered in his father's name.
35. When referred to Pf exhibit 2, he testified that the sub-division could have been in the year 1987 at which time he had left home. That before sub-division of parcel No. 432, his father had been utilizing the 12 acres and that he did not know the acreage of Parcel No. 632, although the same was not the acreage on the ground.
36. He denied having moved the fence from its original position into the Defendant's land, that his father had entered into Joseph's land in the year 2002 and that the trees, which were not young, had been planted on the 12 acres piece of land by Joseph and Ruth.
37. That both his father and their neighbor used to cut and sell their own trees and that it had been them and not the Settlement Fund Trustee, who had dug the furrow on the boundary inside their land No. 632, to let the water flow. He refuted that his father had moved the fence from the furrow in 2006, or that they had started cultivating on the land in the year 2013.
38. He confirmed the fact that before Joseph died, there had been no dispute on the 12 acres of land and further that before his father died, the Defendant had filed a boundary dispute with the Registrar and that his father had received summons from the Land Registrar and further that before filing of the present suit, the boundary dispute had not been solved but that before Joseph died, there had been no dispute on the 12 acres of land. The Plaintiff closed its case after reaffirmation of his evidence in chief.
39. The Defendant's case on the other hand was Joseph Ndungu Macharia her deceased husband, who passed away in the year 2002 was the proprietor of and parcel No. 1820 measuring about 90 acres, having procured the same in 1965.
40. That pursuant to procuring the land they had been shown the boundaries by the person who had been in charge, wherein they had fenced the whole parcel of land. That she knew William Njuguna Mariga as their neighbor with whom they shared a boundary and that they had found him already in occupation of his land. She also confirmed that here was a trench that marked the boundary between them which trench they had found having already been dug.
41. That during the life time of her husband, there had been no dispute with William but after her husband's death, she had lodged a complaint in the Land Dispute Tribunal for reasons that William had claimed that the boundary was part of his land. That thereafter William had filed a case in Nakuru High Court.
42. When referred to a letter dated the 28th May 2009, she confirmed that it emanated from the Land Disputes Tribunal Kipipiri Division where they had been heard and the boundary re-instated. That it was from the Kipipiri Tribunal that she had been informed that the land was hers and had been referred to the Land Registrar vide the said letter which she produced as Df Exhibit 1.
43. That thereafter there had been several summons issued to the Land Registrar who never went to measure the piece of land and fix the boundary, despite her payment of Ksh 1,250/=. She produced the summons as:

- i. Summons dated 25/09/2009 as Df Exhibit 2 (a)

- ii. Summons dated 05/08/2009 Df Exhibit 2 (b)
- iii. Summons dated 22/05/2012 Df Exhibit 2 (c)
- iv. Summons dated 31/05/2013 Df Exhibit 2 (d)
- v. Summons dated 23/07/2013 Df Exhibit 2 (e)

44. She also produced the receipt dated the 26th January 2006 showing the payment of Ksh 1,250/- to the land Registrar as Df Exhibit 3.
45. That after Registrar refused to fix the boundary she had gone to the District Commissioner and thereafter engaged an advocate to compel the Registrar to go and settle the boundary dispute wherein Counsel had filed a case in Court in Nyahururu PMCC No. 34 of 2011 to compel him. She produced the pleadings in the said case as Df Exhibit 4.
46. That she had made a further payment of Ksh. 12,000/- to the Land Registrar to fix the boundary as evidenced by the receipt dated the 11th July 2013 herein produced as Df Exhibit 5. That although the surveyor had showed them the boundary, the Land Registrar had never gone to the suit land.
47. That upon the demise of her husband, she had filed a Succession Cause in Nakuru and subsequently became the proprietor of the parcel No. Nyandarua/Malewa/958 and 959 as per the titles she produced as Df exhibit 6 (a) (b).
48. That she had then transferred part of her land No. 2107 to African Inland Church Kenya Trustees as per the Certificate of search dated 2009 herein produced as Df exhibit 7. She confirmed that Williams' son by the name of James Macharia was in occupation of his father's land wherein he resided while she resided on her husband's land where she paid land rates.
49. She denied the fact that William's family was in occupation of 12 acres on her piece of land and went on to testify that the trees and maize depicted in the photographs were hers and further that she was in occupation of the disputed 12 acres of land.
50. When cross-examined, the Defendant confirmed that her deceased husband's parcel of land was plot No. 1820. That Plot No. 633 was not hers. That plot No. 433 was also hers and that it had belonged to her husband before it was subdivided. That the two parcels of land were neighboring each other and that she had settled on her land in the year 1965. She confirmed that there was a fence between her land and Mariga's land and that when she took Mariga to the tribunal, she had wanted to be shown where the boundary was.
51. When referred to photographs produced as Pf exhibit 11(a) the Defendant testified that she could see the trees that she had planted in the background as well as the far ground. In regard to Photograph 11 (b) she testified that the corner post was not hers and that the portion of land belonged to Mariga but that the boundary was hers. In regard to photograph No. 11 (c) she testified that the trees in the background were hers and so was the land where the maize had been planted in photograph No. 11 (f).
52. She reiterated that she had taken the original Plaintiff, now deceased to Kipipiri Land Dispute Tribunal because he had claimed ownership of the portion of land. That the boundary had never changed since 1965 and that the portion of land measuring 12 acres was hers and that she had been using it since 1965 and paying land rates. That by an order of the Court, a surveyor had gone to the suit site where he had showed her, her piece of land. She testified that the Plaintiff used her land for some time after disposing her in the year 2009.
53. At this juncture Counsel for the Plaintiff sought to continue his cross-examination in locus in quo for reason that the Defendant had become difficult to cross-examine, was evasive and did not answer the questions put to her in a straight manner so as to enable the Court to visualize the locus and the issues in dispute. The Court obliged wherein the locus was visited on the 25th February 2020
54. While on site, the Court noted that between the original post and the subsequent post, on the land in dispute that the same was not habited and had a few maize plantations and trees growing therein. That the area was fenced with blue gum trees and barbed wire. That there was a repaired perimeter fence bordering the road and a new barbed wire to reinforce the old wire. The court also noted that the land was neglected and had tall grass and bushes growing thereon. The Court also counted about 7 trenches/furrows on the land.
55. The Defendant, upon being reminded that she was still on oath proceeded to testify that where she was seated beside the 1st trench/furrow, was the boundary between her land and the Plaintiff's land. That she had been the one who had planted the trees in the vicinity. That there had been a fence in the trench which was depicted in the map but which fence somebody had removed after the death of her husband. She pointed out that the Plaintiffs were the ones who had planted the maize
56. The Court moved to the lower side of the farm where the Defendant confirmed that the 2nd trench had been dug by the government and not the Plaintiffs, to let out water and that it showed the end of her land. That the 3rd -6th trench had all been dug by the government to let the water pass and that the trenches went all the way to other parcels of land. When the Court reached the 1st boundary the Defendant confirmed that she had put the fence which ran along the land to the other end. The Court observed that the fence had been reinforced with branches.
57. The Defendant testified that she had put up the fence to prevent William's maize from being eaten. That there had been an agreement that while she fenced the portion from the road to the post, William was to fence from the post downwards and that she had been maintaining that boundary. She also confirmed that the trees that had been cut down by the Plaintiffs were her trees, having been planted thereon in 1955 by her husband and that it was not true that the trees had been cut by her husband and William.
58. She also testified that the fence towards the road had been put up by Njuguna who had fenced all around so that the trees could not be

destroyed. The Court walked along the fence from the land that had trees planted to where the Defendant had first sat and noticed that there had been a clear cut boundary. The defence then closed its case wherein parties filed their respective written submissions.

Plaintiff's submission.

59. Upon summarizing the matter before Court, the Plaintiff submitted that there was no dispute but he and his family members were in occupation and use of the portion of land in dispute since 1963 when his late father had been allocated plot No. 432 by the Settlement Fund Trustee.

60. That the Plaintiff had been growing trees and food crops on the portion in dispute without any interruption by the Defendant or her late husband who was the predecessor of the title to the suit land and who had been issued title after the subdivision of the original parcel of land No. Nyandarua/Malewa/433, on the 23rd November 1992. That upon his death, the Defendant had become registered by transmission on 10th August 2004 and was issued with title deeds on 17th August 2004.

61. That the Defendant's submission that the 12 years period required for a claim in adverse possession had not lapsed from the date when she was first registered as proprietor was resolved by the Court's ruling of 14th November 2014 from which no appeal was preferred and therefore the issue was therefore *Res judicata* and could not be revisited.

62. The Plaintiff submitted that he had met the requisite threshold for a claim in adverse possession and relied on the decided cases in;

i. **Njuguna Ndatho vs Masai Itumo & 2 Others [2002] eKLR**

ii. **Peter Mbiru Michuki vs Samuel Mugo Michuki [2014] eKLR.**

iii. **Eunice Karimi Kibunja vs Mwirigi M'ringera Kibunja [2013] eKLR.**

iv. **Titus Kigoro Munyi vs Peter Mburu Kimani [2015] eKLR.**

v. **William Isaboke Onsare & Another vs Benjamin Kakiti Kisilu & Another [2019] eKLR** to buttress his submission that the Plaintiff's case had met the test laid out in the cited decisions and to urge the Court to grant the reliefs sought.

63. The Plaintiff's further submission was that that the genesis of the dispute was the Registry Index Map (RIM) which had showed a different position of the boundary between the two land parcels as opposed to the ground occupation. That given the size of portion of land in dispute, the claim constituted a land claim which could not be resolved by the Land Registrar who also had no jurisdiction to deal with a claim for adverse possession.

64. The Plaintiff sought that their suit be allowed and pursuant to the provisions of section 27 of the Civil Procedure Act, that they be awarded costs.

Defendant's Submission

65. The Defendant's submission in opposition of the Plaintiff's suit was that for the Plaintiff to succeed in a claim of this nature, he had to prove that the occupation of the entire 12 acres of land had been exclusive, continuous, open and uninterrupted for a period of 12 years.

66. That the fact that there had been no dispute during the lifetime of both the original Plaintiff and the Defendants' husband and that trouble had started after the demise of the Defendant's husband in the year 2002 had corroborated the fact that the Plaintiffs had not been in occupation of the 12 acres of land since the time of its allocation in 1963, that the boundary of the suit land had been interfered with at that time and lastly that the Plaintiff could therefore not claim that he had been in occupation for 12 years as at the time of filing the suit in the year 2013.

67. The Defendant's further submission was that although the Plaintiff claimed to have been in occupation of the suit land since the year 1963, yet a claim for adverse possession would not have accrued on the Defendant's title for land parcel No. Nyandarua/Malewa/957, 958 and 959 before the 23rd November 1992 when the said title deeds were first registered to the deceased's husband.

68. That the deceased's title over the suit property could not be extinguished by adverse possession as at the time of his demise in the year 2002 as 12 years had not lapsed.

69. That the Court in the case of **Titus Kigoro Munyi** (supra) had held that the limitation period for the purpose of adverse possession only started running after registration of the land in the name of the Respondents. That the Defendant was not sued in her capacity as the administrator of the estate of the deceased husband and the original owner of parcels No. 957, 958 and 959.

70. That the Defendant had been registered as the proprietor of the three parcels of land on the 10th August 2004 when time started to run. That that notwithstanding, it was not in contention that a suit had been filed in the year 2008 which had automatically stopped time from running as was held in the case of **Joseph Gahumi Kiritu vs Lawrence Munyambu Kabura [1996] eKLR**

71. That the Plaintiff had been unable to prove exclusive occupation of the 12 acre piece of land. From the scene visit of 25th February 2020, the Defendant had been able to identify the trench that formed the boundary between parcel 432 and 433 wherein the Court had been shown a

fence made of barbed wire and fencing posts which run parallel to the position which had earlier on been pointed out by the Defendant as the boundary.

72. That the disputed portion was also viewed and there had been no evidence of exclusive occupation of the entire 12 acres of land as the Plaintiff had claimed. That the only activity that had been visible therein had been a maize crop which was sitting on about an $\frac{1}{8}$ of an acre and a small tree plantation at the far end of the land which the Plaintiff claimed had belonged to his father. The rest of the land had been full of overgrown bushes and thicket with no farming activity.

73. That the presence of fences marking the boundaries since 1963 was not conclusive evidence of exclusive occupation as the Court was able to observe many other fences erected on the disputed portion of land and the explanation given by both parties of their presence was to regulate livestock. There had been no structures erected on the disputed portion of land.

74. That although the Plaintiff had not sought title over the specific portion of land where there was maize crop and trees but for the entire 12 acres, yet it was the Defendant's submission that there had been no evidence of exclusive possession of the entire 12 acres as there had been no activities on the said land which was therefore inconsistent with the rights of the Defendant and amounted to dispossession of her title as per the law. Reliance was placed on the decided case of **Alfred Welimo vs Mulaa Sumba Barasa CA No 186 of 2011**

75. The Defendant while relying on the decided case of **Loise Nduta Itotia vs Aziza Said Hamisi [2020] eKLR** submitted that had the suit land been utilized since the year 1963 as claimed, the site visit would have disclosed more activity than what had been seen on the 25th February 2020 and which supported the Defendant's evidence that interference of the claimed portion started after her husband's demise.

76. The Defendant urged the Court to dismiss the claim by the Plaintiff but should the Court find it otherwise, than the Defendant be spared the burden of paying costs of the suit to the Plaintiff who stood to benefit from a whopping 12 acres of her land, noting that no demand notice had been issued prior to filing of the suit by the Plaintiff.

Determination.

77. I have carefully considered the Plaintiff's claim against Defendant, the evidence, submissions as well as the applicable law and the authorities herein cited. I find the matters arising for determination thereto as being;

- i. Whether the Plaintiff is entitled to the possession and legal ownership of the suit land a portion of twelve (12) acres out of title No. Nyandarua/Malewa/957, 958, and 959 which were registered in the name of the Defendant
- ii. Whether the Plaintiff should be registered as the proprietor of a portion of twelve (12) acres to be excised from the occupied portions of title No. Nyandarua/Malewa/957, 958, and 959
- iii. Who will bear the costs of the suit?

78. To begin with, the doctrine of Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

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

79. Section 13 of the Limitation of Actions Act aforesaid further provides that:

*A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under **Sections 9, 10, 11 and 12 (of the 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.*

80. Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court Order vesting the land in him.

81. The Plaintiff has instituted the present suit seeking for a declaration that he has become entitled to a portion of twelve (12) acres out of titles No. Nyandarua/Malewa/957, 958 and 959 by adverse possession to which he seeks to be registered as proprietor of the said portion.

82. The law in respect to Adverse Possession is now settled. For one to succeed in a claim of Adverse Possession, (s)he must satisfy the following criteria stated in the case of **Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430** where the Court held;

"Thus, to prove title by Adverse Possession, it was not sufficient to show that some acts of Adverse Possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances".

83. The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996** held that:

“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.”

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”

84. 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.

85. Has the Plaintiff herein demonstrated the said elements?

86. The facts upon which the Plaintiff’s claim for Adverse Possession is made is that he has been in quiet possession and enjoyment of the said portion of twelve (12) acres since 1963 to date without any interruption whatsoever after learning through a boundary dispute lodged with the District Land Registrar, Nyandarua by the Defendant that the portion of the twelve (12) acres had formed part of the Defendant’s land.

87. The facts that are not in dispute are that the Plaintiff’s father and original Plaintiff, was allotted plot No. 432 by the Settlement Fund Trustees in 1963 where he and his family members took possession and occupation of the said piece of land.

88. It is also not in contestation the Defendant’s deceased husband one Joseph Ndungu Macharia had also been allocated the neighboring plot No. 433, Malewa Settlement Scheme which had been registered to his name on 18th March 1974 and where he had settled his family.

89. Evidence was also adduced that these plots had a common boundary and that both the original proprietors lived on their respective parcels of land in harmony where they had engaged in farming which included planting crops and trees wherein each person harvested their respective trees.

90. That subsequently parcel No. 432 had been sub-divided into 3 portions creating parcels No. 632, 633 and 634 whereas Parcel No. 433 had also been subdivided to create parcels No. 957–961.

91. Parcel No. 957 had been registered to Joseph Ndungu Macharia on the 23rd November 1992 and later to the Defendant on the 10th August 2004. On the 17th August 2004 this title had been closed on sub-division giving rise to parcels No. 2106–2107. The Defendant was registered as proprietor of parcel No 2106 on the 16th July 2007.

92. In regard to parcel No. 958 and 959 the Defendant had been registered as proprietor of the same on the 10th August 2004 respectively.

93. Our main focus is on parcels No. Nyandarua/Malewa/957, 958 and 959 to which the Plaintiff has sued the Defendant in her capacity as proprietor of the said parcels seeking a declaration that he had become entitled to a portion of twelve (12) acres by adverse possession to be excised out of the said parcels of land.

94. **It is clear that the effect of the provisions of Section 7, 13, and 17 of the Limitation of Actions Act is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of the 12 years of that possession. But** in order to be entitled to land by Adverse Possession, the claimant must prove that (s)he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner of his volition.

95. In the case of **Mwinyi Hamisi Ali vs The Attorney General & Another [1997]eKLR**, the Court of Appeal held that:

Having come to the conclusion we have reached we can only say that Mr. Hamisi Ali was not properly advised on how to go about his claim on adverse possession. Adverse possession can only be claimed against a properly registered owner, that is to say the possession must be adverse to that of the registered proprietor.

96. Equally in **Chevron (K) Ltd v Harrison Chato wa Shutu [2016] eKLR** the Court of Appeal stated that:

*It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. See **Sophie Wanjiku John v Jane Mwhaki Kimani** Nairobi ELC Civil Suit No. 490 of 2010.*

*Until 1994 the property was Government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See **Wambugu v. Njuguna** [1983] KLR 172. The relevant period would therefore be between 1994, the date of registration of the appellant as the proprietor and 2008 when the suit was filed. That period, in aggregate translates to 14 years which is the period the Respondent can legitimately base his claim.*

97. In the present case the Defendant became the registered proprietor of the suit properties herein being No Nyandarua/Malewa/957, 958 and 959 on the 10th August 2004 wherein the present suit had been filed on the 9th September 2013 which was 9 years later and before the expiry of 12 years.

98. I find and hold that the Plaintiff has not 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.

99. In the circumstance therefore, I dismiss the Plaintiff's Originating Summons dated 9th September 2013 in its entirety with costs to the Defendant

Dated and Delivered at Nyahururu this 6th day of August 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE