



REPUBLIC OF KENYA



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**Kanji & another v Gathigi & another (Environment & Land Case
E007 of 2022) [2023] KEELC 16384 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16384 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E007 OF 2022**

**LN GACHERU, J
MARCH 23, 2023**

BETWEEN

EVANS KIMONJO KANJI 1ST PLAINTIFF

TRUPHENA WANJIKU MAINA 2ND PLAINTIFF

AND

SUSAN NYAMBURA GATHIGI 1ST DEFENDANT

VIOLET WAMBUI MAINA 2ND DEFENDANT

JUDGMENT

1. By Originating Summons dated March 28, 2022, the Plaintiffs sought for determination of the following questions and/or prayers against the Defendants herein jointly and severally; -
 - a. That an order of injunction do issue to restrain the Defendants by themselves, agents, servants or whomsoever from evicting alienating disposing or in any manner interfering with the Plaintiffs' possession of all that parcel of land comprising in Land Parcel No No LCC.15/Gakuyu/789, measuring approximately 0.7 Acres pending the hearing and determination of the suit;
 - b. That a declaration that the title held by Susan Nyambura Gathigi and Violet Wambui Maina over all that land comprised in Land Parcel No LCC.15/Gakuyu/789, measuring approximately 0.7 Acres has been extinguished by adverse possession;
 - c. That a declaration that the 1st and 2nd Plaintiff/Applicants are entitles to be registered as the legal and beneficial owners of all that parcel of land comprised in Land Parcel No LCC.15/Gakuyu/789, measuring approximately 0.7 Acres in place of the 1st and 2nd Defendants;



- d. That the title, rights, and interests over the aforesaid Land Parcel No LCC.15/Gakuyu/789 are extinguished so that the 1st and 2nd Defendants/Respondents titles should be recalled and cancelled;
 - e. That the Land Registrar Murang'a do register the 1st and 2nd Plaintiff/Applicants as the proprietors of Land Parcel No comprised in Land Parcel No LCC.15/Gakuyu/789;
 - f. That the costs of this Originating Summons and/or suit be borne by the Defendants.
2. The Originating Summons was premised on the grounds stated thereon and supported by the Affidavit of Truphena Wanjiku Maina the 2nd Plaintiff herein, dated March 28, 2022. It is the 2nd Plaintiff's averment that the 1st Plaintiff took up occupation of Land Parcel No LCC.15/Gakuyu/789 (the suit property) in 1966, while she took up occupation of the suit property in 1969, by virtue of marriage. That jointly, the Plaintiffs have been in occupation and possession of the suit property for a period of 54 years. The 2nd Plaintiff avers that they have developed permanent houses and cultivated crops on the suit property. She further avers that the Defendants have not interfered or interrupted with the Plaintiffs' occupation of the suit property since the Plaintiffs took possession of the suit land. Further, that the Defendants' rights over the suit property has been extinguished by the operation of the law.
 3. Lastly, the Plaintiffs averred that the Defendants vide the Chief Magistrates Court ELC Suit No E012 of 2022, they filed a suit seeking to exhume the buried bodies of the Plaintiffs' deceased relatives from the suit property on August 6, 2020, which the Plaintiffs consider inhumane and inconsiderate. Further that the Defendants threatened to illegally evict the Plaintiffs from the suit property between February 2022 and March 2022. The Plaintiffs are apprehensive that should the orders not be granted, their families will be rendered homeless and they prayed that judgement be awarded in their favour.
 4. The Defendants opposed the Originating Summons through a Replying Affidavit sworn by Susan Nyambura Gathigi, the 1st Defendant herein, dated September 12, 2022. The 1st Defendant/Respondent averred that this suit is an abuse of the court process, with the issue of land ownership of the suit property having been heard and determined in the Defendant/Respondents' favour by Justice Kimondo on July 31, 2018, in Murang'a High Court Succession Cause No 1183 of 2013 and the subsequent appeal being Nyeri Civil Appeal No 179 of 2018. The Defendants/Respondents further averred that they are the registered owners of the suit property and alleged that the Plaintiffs is forum shopping in their quest to occupy the suit property. Lastly, the Respondents averred that they attempted to evict the Plaintiffs from the suit property on several occasions ending in altercations.
 5. The Defendants/Respondents concluded by stating that the Plaintiffs are breaching their proprietary rights by aggravating trespass and urged that the Court dismiss the Originating Summons and allow the Defendants/Respondents to enjoy the fruits of their judgements.
 6. The matter was set down for viva voce hearing and parties called their respective witnesses.

Plaintiffs' Case

7. PW1, Truphena Wanjiku Maina, gave sworn testimony in Kikuyu language and chose to adopt her statement as part of her evidence. It was her testimony that she was a wife to William Maina and a peasant farmer on the suit property. PW1 prayed that the Court allow her claim on the grounds that she has lived on the suit property since 1969, during which period no one asked her to leave the suit property.



8. On cross-examination, PW1 testified that the 1st Plaintiff was her brother in law. She further testified that there was a succession cause filed, which she was not a party to, and added that her advocate erroneously filed an Appeal, instead of pursuing an adverse possession claim on the suit property.
9. In re-examination, the 1st PW 1 testified that she entered the suit property with the permission of Njeri Wanjohi, who was the Defendants' mother. PW1 further testified that Njeri Wanjohi never attempted to evict the Plaintiffs from the suit property since 1966.
10. PW2, Phoebe Njambi Kimonjo, testified that she was the wife to the 1st Plaintiff and chose to adopt her witness statement as evidence in chief. She testified that she got married in October 1977 and that she has lived on the suit property for 46 years wherein no one has asked her to move out.
11. It was PW2's testimony that her husband was unwell and therefore he was unable to participate in the suit. She further stated that it was her husband who was involved in the succession cause. PW2 further testified that following the succession cause, the Plaintiffs' Advocates wrongly appealed the decision instead of pursuing an adverse possession claim against the Defendants/Respondents in whose name the suit property is registered. PW2 further testified that the suit property did not initially have a title deed but currently had one. She also testified that she wanted the title deed, of the suit property cancelled and the Plaintiffs be allowed to remain on the suit property where they have lived for long. Lastly, she stated that she had buried her daughter Susan on the suit property and that the Defendants had never lived on the property.
12. PW3, Stanley Maina Karanja, testified that he was a peasant farmer and retired a teacher residing in Gakuyu area and chose to adopt his witness statement as his evidence in chief. It was PW3's further testimony that he had known the 1st Plaintiff since childhood. PW3 testified that the 1st Plaintiff has been on the suit property since 1966, and that no one had attempted to evict him from the suit property.
13. On cross-examination, PW3 testified that Njeri Wanjohi was the initial occupant of the suit property as the second wife of Wanjohi. That the suit property was first registered in the name of Njeri Wanjohi.
14. PW3 testified that he knew Githioni Wanjohi and his wife Betha Githioni. He told this Court that the children of Njeri Wanjohi (deceased) were the Defendants herein. PW3 further testified that the 1st Plaintiff was like a son to Njeri Wanjohi (deceased).
15. In relation to the 1st Plaintiff, PW3 testified that the 1st Plaintiff's father was Githioni Kanji. That Kanji had two parcels of land in Mathioya and Gikarangu which he was supposed to give to his children. He further testified that Njeri Wanjohi was the step-mother to Kimonjo and had the power to give the land to her children.
16. PW4, Beth Muthoni Maina testified that she was a peasant farmer living in Gakuyu Village. She chose to adopt her witness statement as her evidence in chief. PW4 also testified that she was a daughter of the 2nd Plaintiff and that she was born and raised on the suit property. Lastly, she testified that she has resided on the suit property since 1970, and that she has four children and she has never been evicted from the said suit property.
17. In re-examination, PW4 testified that her parents entered onto the suit property with permission of their grandfather. She denied being evicted from the suit property.



Defence Case

18. DW1, Susan Nyambura Gathigi, adopted her witness statement as evidence in chief. DW1 further testified that her family had resided on the suit property for a long time. It was DW1's testimony that after the death of her mother, the 2nd Defendant and herself filed a succession cause and they inherited the land. She further testified that the 1st Plaintiff is her nephew and that the father to Githioni wa Wanjohi. That Wanjohi had 2 wives i.e Njeri Wanjohi and Wanjiku Wanjohi. That Wanjiku had a son called Githioni Kanji, who was a father to Kimonjo Kanji. That Githioni inherited his land from his mother's land. The other land was in Mathioya, Weru-ini and Gikarangu. Lastly she stated that the Plaintiffs should move to the land in Gikarangu, Weru-ini or Mathioya.
19. In cross-examination, DW1 testified that the Plaintiffs moved to the suit property in 1976, and that she would like them to move out. She testified that she used to live in Meru running a business. She admitted to have never lived on the suit property. She however stated that her sister the 2nd Defendant was cultivating on the land. She denied that her mother allowed the Plaintiffs to live on the suit property. DW1 further testified that the Plaintiffs had built houses on the suit property without permission. DW1 further testified that her mother died in 1981, and that her mother did not evict the Plaintiffs from the suit property. She also stated that they filed an application to evict the Plaintiffs. However, it has taken four years to try to evict them.
20. On re-examination, DW1 further testified that her mother attempted to evict the Plaintiffs from the suit property, but was unsuccessful.
21. DW2, Violet Wambui Maina, chose to adopt her witness statement as her evidence in chief. She testified that she came from Gatheri Village and that the 1st Defendant is her sister. She further testified that the suit property belonged to Njeri Wanjohi.
22. It was DW2's testimony that the Defendants inherited the suit property after a succession cause was filed. That the Defendants asked Kimonjo Kanyi to move out, which he refused and told the Defendants to go to court. DW2 refuted that the Plaintiffs were given the suit property by her mother.
23. On cross-examination, DW2 testified that the Plaintiffs had entered into the suit property a long time ago. She further testified that her mother was buried on the suit property which belonged to her. Lastly, DW2 testified that the Plaintiffs entered into the suit property by force and that her mother Njeri Wanjohi would often tell the Plaintiffs that the suit property was not theirs. Further that Njeri Wanjohi had requested the Plaintiffs to stop building on the suit property as they were supposed to build on the other available properties. DW2 admitted that the Plaintiffs have resided on the suit property since 1966, by force and that they have buried their relatives on the suit property without their consent. Lastly, she stated that she did not include the Plaintiffs as beneficiaries of her mother in the succession cause.
24. In re-examination, DW2 testified that she did not know who wrote the Chief's letter. She stated that she did not have a good relationship with the Plaintiffs since they had refused them to use the suit property.
25. After the viva voce evidence the parties filed their respective written submissions.
26. The Plaintiffs through the Law Firm of Gitau Wambui Associates, filed their written submissions in support of the suit on February 3, 2023. They raised three key issues for determination.
27. On the issue of whether the Plaintiffs had proved title by adverse possession, the Plaintiffs submitted that they had taken up possession of the suit property in the year 1966, and there had been no attempt



to evict them. The Plaintiffs placed reliance on the case of *Wambugu v Njuguna (1983) eKLR*, in which the Court held as follows.

'In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land whether by being dispossessed of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with the enjoyment of the soil for the purpose of which he intended to use it.

That the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether the claimant has proved that he has been in possession of the requisite amount of years.'

28. The Plaintiffs further submitted that they have built permanent structures, planted crops and buried their kinsmen on the suit property. They relied on the case of *James Maina Kinya v Gerald Kwendaka (2018) eKLR*, wherein the court held that:

'It is on record that the Plaintiff has been in continuous open and uninterrupted possession of the suit property. There is no evidence to suggest that the Defendant sought or retook possession or the Plaintiff relinquished possession to the Defendant. Given that time started running in 1983, it is clear that the Plaintiff has established that he has been in factual possession for 34 years. It is also on record that the Defendant has not challenged the possession leaving the Plaintiff to openly, publicly occupy the suit property uninterrupted. The fact that the Plaintiff has extensively developed the suit property is a demonstration of *animus possidendi* (intention to possess) to the exclusion of the Defendant. He is also using or occupying the land in contrast to the title (hostile) usage to the right of the title owner (Defendant). The open continuous and hostile occupation has not been broken from 1983, a period in excess of 12 years. It has been admitted by the Defendant that the Plaintiff collects rent from the property and has excluded him from possession. This demonstrates exclusive control of the suit property by the Plaintiff which is an essential ingredient in establishing adverse possession.'

29. On the issue whether the Plaintiffs are entitled to the orders sought, they submitted that their occupation of the suit property was non-permissive and non-consensual, actual, open, notorious, exclusive and adverse to the Defendants for a continuous period of 56 years. They placed reliance on the case of *Mbira v Gachubu (2002) 1 EALR 137* wherein the court held as follows:

'A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption.'

30. On the final issue as to who should bear the costs of the suit, the Plaintiffs submitted that successful parties are often awarded costs and prayed that costs be awarded to the Plaintiffs.

31. Lastly, the Plaintiffs submitted on the issue of the succession cause filed by the Defendants, and they stated that the filing of a succession cause did not amount to an assertion of rights that could stop time from running. They placed reliance on the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (suing in her capacity as the administrator of the estates of Kimingi Wariera (deceased) and of Mwangi Kimani (deceased) (2022) eKLR*, wherein the court held the above position.



32. The Defendants through the Law Firm of Kanyoko Lewis & Co Advocates, filed their submissions dated February 13, 2023, and opposed the adverse possession claim. The Defendants raised five issues for determination.

33. On the issue as to whether the Plaintiffs had locus to pursue the suit following the mental incapacity of the 1st Plaintiff, the Defendants submitted that the testimony of the 1st Plaintiff's wife Phoebe Njambi, who was not party to the proceedings ought to have been as a guardian of the 1st Plaintiff as required under Order 32 Rule 15 of the *Civil Procedure Rules*, which state that persons though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. The Defendants relied on the case of *Duvvuri Rami Reddi v Duvvudu Papi Reddi & Another (AIR 1963 AP 160)* where the court held as follows:

'When a person is adjudged as being of a lunatic or unsound mind irregularly and improperly, and notice was not served on him, and a guardian alone was allowed to appear and defend the suit and decree was passed owing to the guardian not putting up a proper defence, the alleged lunatic can treat the decree against him as an ex parte decree, and have it set aside under the provisions of the Civil Procedure'

34. On the issue of the family connection between the parties herein, the Defendants submitted that this suit was a matter of succession. That the issue of adverse possession would be gravely prejudicial to the Defendants/Respondents and it would amount to disinheriting them. The Defendants relied on the case of Nairobi Civ Case No 283 of 1990;- *Gabriel Mbuvi Vs Mukindia Maranya (1993) eKLR* where the court held that:

'The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession. Even if the mere possession has been for 12 years or more. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and occupation must be shown.'

35. The Defendants submitted that a person who initially claimed ownership of land as beneficiary and failed cannot make a u-turn and lay claim of the same through adverse possession. They relied on the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi (2020) eKLR*, where the Court held:-

'The appellant cannot find his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellants claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970.'

36. On the issue whether the Defendant/Respondents' title deed issued by a Court of similar jurisdiction and reversal or cancellation thereof shall be a review of the decision in a different matter, the Defendant relied on the case of Succession Cause No 1183 of 2013, wherein the Court held the above position as follows;

'There was no cogent evidence of adverse possession. In any case, the protestor or his brother has never moved the court for such a declaration. From both an evidential and legal standpoint, I find that he protestor or his brother failed to prove they are entitled to the suit land.'



37. On the final issue regarding the other properties that the Plaintiffs can settle on, the Defendants submitted that the court should take judicial notice of the fact that the Plaintiffs had three other properties to inherit from the 1st Plaintiff's father in Gikarangu, Weruini and Mathioya, while the Defendants/Respondents only had the suit property as their ancestral land.
38. The above being the pleadings evidence and rival submissions, the Court has considered the testimonies adduced in Court and the submissions and authorities cited by the parties. And the Court finds the issues for determination are:
- i. Whether the Plaintiffs have met the threshold for the grant of orders for adverse possession
 - ii. Who should bear costs.
39. It is important for this Court to point out that the Plaintiffs and the Defendants are related. What flows from the testimonies and pleadings is that the Defendants and the 1st Plaintiff's father were children of Wanjohi as testified by DW1. This Court gathers that Mr Wanjohi was married two wives Njeri Wanjohi and Wanjiku Wanjohi, and that the former was the mother of the Defendants while the latter was the mother to Githioni Kanji who was the father of the 1st Plaintiff.

Whether the Plaintiffs have met the threshold for the grant of orders for adverse possession?

40. It is the Plaintiffs' claim that they have lived on the suit property for a period of over 12 years having entered onto the suitland in 1966 and 1969 respectively and have done extensive developments thereon. The Respondents opposed the suit on the grounds that they inherited the suit property from their mother through a succession cause.
41. Adverse possession is one of the prescriptive rights recognizable under the *Land Registration Act* as one means of acquiring land. It is also one of the rights that can take away the indefeasibility of title held by a registered proprietor. As per the copy of title deed attached to the Originating Summons herein, the suit land is registered in the name of the Defendants. Although it is not clear, it appears that the Defendants were issued with title deed in October, 2018. It is clear from the evidence that the Defendant acquired ownership of the suit property through transmission.
42. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides

'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 first accrued to some person through whom he claims, to that person.'

Section 13 provides:-

- (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 sections 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'.

43. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand gives authority to the claimant to apply to Court for orders of adverse possession. It provides;

- (1) 'Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.'

44. The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

'In order to acquire by the statute of limitations 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.'

The Court further held:

'The proper way of assessing proof of adverse possession would then 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 has been in possession of the requisite number of years.'

45. This right is adverse to land and does not automatically accrue unless the person in whose this right has accrued takes action. The case of *Mtana Lewa vs Kabindi Ngala Mwagandi* [2015] eKLR held as follows;-

'Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the 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.'



46. Further, in the case *Mbira v Gachubi (2002) 1 EALR 137* the court stated as follows;

'A person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption'

47. Similarly, in Kisumu Civil Appeal No 27 of 2013 *Samuel Kihamba v Mary Mbaisi [2015] eKLR*, the court held:

'Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly; that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land'

48. Therefore, to determine whether the Plaintiffs' rights accrued the Court will seek to answer the following:-

- i. How did the Plaintiffs take possession of the suit property?
- ii. When did they take possession and occupation of the suit property?
- iii. What was the nature of their possession and occupation?
- iv. How long have the Plaintiffs been in possession?

49. It is evident from the testimonies and the Witness Statements recorded by the witnesses and adopted as evidence that the Plaintiffs gained entry into the suit property through the permission of Njeri Wanjohi, which this Court learnt was the original owner of the suit property. Permissive occupation negates a situation of a license and no claim for adverse possession can be sustained. The Court in *Gabriel Mbui v Mukindia Maranya [1993] eKLR*, supra, when considering the ingredients for a claim of adverse possession had this to say on permissive occupation:

'Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called 'adverse'.

The Court held further:

'It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner's will accompanied the occupier's possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence



of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession'

50. Taking cue from the above, the Plaintiffs' occupation was permissive and they cannot now claim to have been adverse to the registered owner's interest. It is not clear from evidence for how long had Njeri Wanjohi permitted the Plaintiffs to be in occupation of the land. Unless it is established through evidence that despite being permissive, their possession and occupation became hostile over time. In this case that permission to stay on the suit property terminated but the Plaintiffs' continued to occupy the land thus dispossessing the Defendants. The Plaintiffs had the burden of leading evidence in this Court as to when they became adverse to the title, noting that their entry in the year 1966 and 1969 was permissive.
51. DW1 testified that her mother moved out of the suit property in 1959, to live with her in Meru. There is no evidence that suggested that the said Njeri Wanjohi, moved out of the suit property because she was dispossessed of the said land by the Plaintiffs' occupation. If any she was still buried on the suit property. It was the Plaintiffs' testimony that Njeri Wanjohi, never attempted to evict the Plaintiffs from the suit property during her lifetime, even at the time of her death in 1981. But it should be remembered that a claim for adverse possession accrues on land and it matters not that the title might have changed hands.
52. The Defendants admitted that the Plaintiffs were in possession and occupation of the suit property. DW2 testified that she was farming and making use of the suit property, but was chased away by the Plaintiffs and she stopped farming. It is evident that the Defendants are keen to enter into the suit land by operation of the orders in the succession cause that gave them right over the suit property. This Court is alive to the uncontroverted evidence that most deceased members of the Plaintiffs family have been buried on the suit property.
53. Section 107 of the *Evidence Act* placed a duty on the Plaintiffs to demonstrate when they became adverse to the suit land. The Plaintiffs attached photographs of a permanent house, planted crops and have kept dairy animals which show that they are in possession of the land. This cannot be enough to demonstrate that their occupation at one point became non-permissive.
54. There is no doubt that the Plaintiffs' occupation of the suit property was continuous, uninterrupted and peaceful for a period of over 12 years. As a matter of evidence, this Court perused a photograph of a permanent house erected on the suit property. There is also uncontroverted evidence that the Plaintiffs were engaged in crop and dairy farming. This could not have been done in secrecy. The Defendants' claim is that the Plaintiffs put up permanent structures after the death of their mother. The filing of the succession case did not in any way hinder the Plaintiffs' occupation. It was not until 2022 when the Defendants moved to Court seeking exhumation orders.
55. Be that as it may, this Court has established from the testimony of the Plaintiffs that they were permitted to occupy the suit property. Therefore, having analysed the evidence adduced, read through the pleadings and the documents thereto and guided by the submissions and the authorities cited, this



Court finds and holds that the Plaintiffs' occupation of the suit land was permissive thus a claim for adverse possession cannot issue.

56. In the interest of justice and fairness and noting that the Plaintiffs occupation of the suit land was permissive, the Defendant ought to allow the Plaintiffs' time to vacate the suit property. It is also in the interest of justice that the bodies of persons already buried be allowed to remain therein. There was evidence adduced by the Defendants that the Plaintiffs inherited land in Gikarangu, Weru-ini and Mathioya. That evidence was not controverted by the Plaintiffs.
57. Given that the parties herein are related and thus they are relatives, maybe the Defendants can consider exchange of this parcel of land with the ones mentioned above, that is in - Gikarangu, Weru-ini or Mathioya. This can be attempted through exploring other peaceful methods of settling the issues of the Plaintiffs occupation of the suit land, which they did with the permission of the original owner - Njeri Wanjohi, the mother to the Defendants herein, whom the Defendants have inherited the suit land from, through transmission.
58. However, on a claim of adverse possession, the Plaintiffs have failed to establish it on the required standard.
59. Having carefully considered the available evidence and the relevant provisions of law, the Court finds and holds that the Plaintiffs herein have failed to establish on a balance of probability a claim for adverse possession. Consequently, the Court finds and holds that the Plaintiffs Originating Summons dated March 28, 2022, has not been proved on the required standard and the determinations and prayers sought thereon fail in totality, and the instant Originating Summons is hereby dismissed entirely with an order that each party to bear its own costs.
60. As a recommendation; Though the Judgement herein marks the final determination of this claim, given that the parties are related, they are encouraged to attempt an amicable settlement of the issue of occupation of the suit land by Plaintiffs, taking into account other considerations like the Defendants may consider being given an alternative land by the Plaintiffs for a peaceful co-existence.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 23RD DAY OF MARCH, 2023.

L. GACHERU

JUDGE

