



**Moki (Suing on her own behalf and on behalf of the Estate of Moki Ivui Nzei – Deceased) v Ivui (Environment & Land Case 103 of 2017) [2023] KEELC 17029 (KLR) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17029 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 103 OF 2017**

**TW MURIGI, J  
APRIL 19, 2023**

**BETWEEN**

**ESTHER KALUNDE MOKI (SUING ON HER OWN BEHALF AND ON  
BEHALF OF THE ESTATE OF MOKI IVUI NZEI – DECEASED) ..... PLAINTIFF**

**AND**

**REUBEN MUI IVUI ..... DEFENDANT**

**JUDGMENT**

1. By a Complaint dated 27<sup>th</sup> April, 1998 and further amended on 25<sup>th</sup> April, 2019 the Plaintiff herein seeks the following orders against the Defendant: -
  - a. A declaratory order that all the land now known as Land Parcel No. 2021, Kinyambu Settlement Scheme belongs to the deceased and the same should be registered in his name.
  - b. A permanent order of injunction restraining the Defendant from alienating or in any other way interfering with the Plaintiff's quiet possession, occupation and use of the said Land Parcel No. 2021, Kinyambu Settlement Scheme.
  - c. Alternatively, an order that the Plaintiff has acquired title to the said Land Parcel No. 2021, Kinyambu Settlement Scheme, by reason of adverse possession.
2. The Defendant opposed the suit by way of his defence dated 20<sup>th</sup> May, 1998.
3. The Defendant later filed a further amended Defence dated 3<sup>rd</sup> May, 2019, and denied the Plaintiff's claim. He urged the Court to dismiss the suit with costs.

**The Plaintiff's Case**

4. The Plaintiff called a total of four witnesses in support of her case.



5. The Plaintiff Esther Kalunde Moki, adopted her statements dated 29/03/2018 and 16/12/2020 as her evidence in chief and produced the list of documents dated 12/05/2003 as PEX Nos. 1-9 respectively and a further list of documents dated 16/12/2020 as PEX Nos. 10 -12.
6. The Plaintiff testified that she was amongst the pioneer settlers of Kinyambu Settlement Scheme having settled in Kinyambu in the year 1964. It was her testimony that she personally acquired a huge track of land in Kinyambu in the year 1964 where she established her home and settled thereon. She went on to state that the exercise was witnessed by the area Assistant Chief Nzau Musinga and his successor George Mutunga Ndambuki.
7. That in the year 1991 long before the area became a Settlement Scheme, she sued her neighbours Kaluki Mbusya and Tom Mbusya in Nairobi High Court Civil Suit No. 6419 of 1991 for trespassing onto her land. That they retreated back to their land after the Court issued an order of injunction against them. It was her testimony that the High Court referred the case to the Makueni District Land Adjudication and Settlement Officer who upon hearing the dispute established the boundaries on her land and filed his award as a judgment of the Court. She added that the Defendant did not lay any claim over the suit property when the High Court referred the matter to arbitration.
8. PW1 further testified that after Kinyambu was declared a Squatter Settlement Scheme in 1995, her land was recorded as parcel No. 1589 which she registered in the name of her late husband Moki Ivui. That shortly thereafter, the Defendant started claiming a portion of her late husband's land traversed by a stream, which land was the subject matter in the High Court Civil Suit No. 6419 of 1991. That she later realized that the Defendant had unlawfully registered the portion of land as Parcel No. 2021.
9. She went on to state that the Defendant has never settled on the suit property. She told the Court that the suit property is not family land as she personally acquired it in the year 1964. She further stated that at one time her deceased parents in law went to live with her on the suit property where she took care of them and even gave them a portion of her land to cultivate on. It was her testimony that the Defendant took advantage of a stream that traverses on the suit property to unlawfully register a portion of her land in his name notwithstanding the judgment in High Court Civil Suit No. 6419 of 1991.
10. On recall, the Plaintiff testified that her late husband's parents went to live with her in their sunset days. She stated that she did not transfer her land to her parents-in-law and that Mwende, her sister-in-law used to reside on her father's land which is across the road. She produced a copy of the Grant of Letters of Administration ad litem (PEX13). It was her testimony that Plot No. 2021 was unlawfully hived off from Plot No. 1589. She prayed for judgment to be entered against the Defendant as prayed in the Plaintiff.
11. In cross-examination, the Plaintiff stated that her two parcels of land in Utithi and Kinyambu are separated by a road.
12. She stated that she resides on the suit property but due to her advanced age she does not know the parcel number or the acreage. She went on to state that she did not sue the Defendant in the High Court case in Nairobi. She reiterated that she acquired the suit property in 1964 and later took in her father-in-law. It was her further testimony that she stated in the arbitration proceedings that the land belonged to her father-in-law because she had shown him a place where he could cultivate.
13. The Plaintiff testified that her deceased husband was alive when she registered the suit property in his name and that he did not sue the Defendant in the case before the High Court in Nairobi. She added that she was aware that the Defendant had taken over land parcel number 1589 in Kinyambu.



14. She further testified that she does not know under whose name the suit property is registered and denied that it was acquired by her father-in-law and subdivided between her late husband and the Defendant. It was her testimony that she filed an objection on parcel No. 2021.
15. In re-examination, she reiterated that she personally acquired the suit property. It was her testimony that she stated in the arbitration proceedings that the land belongs to her father-in-law because the Defendants in the matter wanted to grab her land. She went on to inform the Court that her father in law was not a party to the case before the High Court which was eventually determined in her favour.
16. It was her testimony that her parents-in-law together with her sister-in-law moved from their ancestral land in Mukuyuni and went to live with her in Kinyambu.
17. She added that she took over the portion of the land where her father-in-law used to cultivate which was the same portion the Mbusya family had encroached on. Lastly, she stated that the suit property is the same land which she sued the Mbusia family.
18. PW1, Eliud Moki, adopted his statements dated 29/03/2018 and 16/12/2020 together with the Plaintiff's statement as his evidence in chief. He stated that the Plaintiff is his mother while the Defendant is his uncle. He went on to state that although the suit property is registered in the name of the Defendant, it has always been part of the larger parcel of land acquired by the Plaintiff in the 1960s. He told the Court that the suit property was adjudicated in 1995 while the Mikuyuni property where the Defendant resides is ancestral land.
19. It was his testimony that the letters from the Land and Settlement Officer dated 30/09/2005 clearly demonstrate that land parcel Nos. 575 and 557 belongs to the Defendant while land parcel No. 574 is recorded in the name of his late father, Moki Ivui. He told the Court that the land in Kinyambu Settlement Scheme is not family land but a Squatter Settlement which the Plaintiff acquired long before demarcation.
20. In cross-examination, he stated that he did not testify nor was he a party in the case before the High Court, Nairobi. He went on to state that he was not aware of how his mother acquired the suit property since the document she produced indicates that the land belongs to his grandfather.
21. Again, he stated that the suit property was recorded as part of land parcel No.1589 and that the two parcels of land border each other and are divided by a stream.
22. It was his testimony that land parcel No. 1589 and land No. 948 in Thange Settlement Scheme are registered in the name of Moki Ivui. PW1 stated that he was not aware of any objection proceedings related to land parcel No. 2021 or how the entire land was acquired and subdivided into the current two parcels of land.
23. In re-examination, PW1 stated that Kinyambu Settlement Scheme is a Squatter Settlement Scheme while Mukuyuni is a land Adjudication Section governed by the *Land Adjudication Act*. PW1 stated that land parcel No. 574 is ancestral land is registered in the name of his father while parcel Nos. 575 and 557 is the Defendant's share of the ancestral land.
24. He further testified that the Defendant has neither settled nor utilized any portion of the suit property. According to him, he does not know how land parcel No. 2021 came into being or whether there is a pending objection related to the said property.
25. PW2, Hannah Njoki Chege, an Assistant Land Adjudication and Settlement Officer with the Ministry of Lands Kibwezi, testified that Kinyambu Settlement Scheme was created by the Government in the year 1980. It was her testimony that Plot No. 1589 is registered in the name of Moki Ivui Nzei,



- while Plot No. 2021 is registered in the name of Reuben Mui Ivui though the acreage and the date of registration is not indicated for both parcels of land.
26. That according to the register, plot numbers 1590, 1591, 1592 and others follow each other in sequence while Plot No. 2021 does not follow Plot No. 1589 in sequence. It was her testimony that there are a thousand plots between Plot No. 1589 and 2021.
  27. She stated that according to the register, there is no indication to show that the owner of Plot No. 1589 requested for subdivision of the same. She produced extracts of the register for Plot Nos. 1589, 1601 and 2021 Kinyambu Settlement Scheme as PEX Nos. 14 (a), (b) and (c) respectively.
  28. In cross-examination, PW3 stated that when plotting of land is being carried out, the people who are found on the land are recorded as the owners of the land. She added that she could not tell how Plot No. 2021 was registered in the name of the Defendant.
  29. It was her testimony that their office would entertain disputes and added that the dispute register for the area was not available. According to her, the letter of allotment, the receipt and the letter from the District Land Adjudication and Settlement Officer confirming that the Defendant is the owner of the suit property were from her Ministry. She further testified that a parcel of land cannot be subdivided without the knowledge of the owner.
  30. On re-examination PW1 testified that there must have been a sub division of Plot No. 1589 if it borders Plot No. 2021 though the register does not indicate the basis of the sub division. That there is no existence of a dispute and outcome with regards to Plot No. 1589. She further testified that the allottees of the plots would ordinarily sign the register though there are instances where some of the allottees never signed and gave an example of the register for Plot No. 2021, the suit property herein.
  31. PW3, George Mutunga Ndambuki, a retired Assistant Chief from Thange Sub-location adopted his statement dated 29/03/2018 as his sworn evidence in chief.
  32. It was his testimony that he knew the Plaintiff for over 50 years. He informed the Court that the Plaintiff is the owner of land in Kinyambu Settlement Scheme.
  33. He went on to state that in the year 1975/1976 long before Kinyambu was declared a Settlement Scheme, he resolved a boundary dispute between the Plaintiff and Mitunga Manthi on the one hand and the Plaintiff and Mbusya Muthenya on the other hand. He further testified that in the year 1996, Kinyambu was declared a Settlement Scheme and that part of the Plaintiff's land was registered in the name of another person which should be restored back to the Plaintiff.
  34. In cross-examination, he stated that he used to be the Assistant Chief of Thange Sub-location and reiterated that the suit property belongs to the Plaintiff. He added that titles for Kinyambu Settlement Scheme have not been issued and that he does not know the registration number of the Plaintiff's or the Defendant's parcels of land. He told the Court that he did not issue letters to people indicating that particular parcels of land belonged to them.
  35. In re-examination, he testified that the Plaintiff's land is situated within Kinyambu Settlement Scheme. He testified that the Plaintiff did not report to him her dispute with the Defendant over the suit property.
  36. PW4, Hillary Ranymoi, the Officer in charge of Kibwezi District Survey Office testified that according to the Registry Index Maps (RIM) for Kinyambu Settlement Scheme, Plot Nos. 1589 and 2021 fall under map sheet number 90. He went on to state that he could not tell the acreage or the ownership of the two parcels of land.



37. According to him, a line has been drawn mark the boundary between Plot Nos. 2021 and 1589. He produced certified copies of the aerial photographs and the RIM (PEX Nos. 15 (a), (b) and (c) respectively, the RIM for Thange Settlement Scheme and the aerial photographs (PEX Nos. 16 (a) and 16 (b) respectively. Lastly, he produced the RIM No. 83 for Kinyambu Settlement Scheme with regards to Plot No. 1601 (PEX No. 17).
38. In cross-examination, PW5 stated that it is normal in demarcation of plots to have plot numbers that do not follow each in sequence. He told the Court that Plot Nos. 2021 and 1589 are distinct from each other.

### **The Defence Case**

39. The Defendant testified and called one witness in support of his case. The Defendant, Reuben Mui Ivui adopted his statement filed in Court on 19/01/2021 as his evidence in chief and produced the list of documents of even date. It was his testimony that he is the owner of the property known as Plot No. 2021 Ngwata Settlement Scheme having acquired the same in the 1960s. That during the same period, his father acquired parcels No. 948 and 1589 Ngwata Settlement Scheme. He went on to state that after his late father decided to divide the properties amongst his sons, he decided to retain the suit property to avoid fighting with his brother over the third property.
40. That in the year 1970s he built a temporary structure on the suit property and allowed a relative to stay and graze while watching over the property. It was his further evidence that when the Government started the process of registering land in the year 2002, he received an invitation of offer from the Ministry of Lands and after he paid for the suit property he was issued with an official receipt.
41. It was his testimony that the Land and Settlement Officer could not allocate or give an invitation of offer to people who were not using or residing on their land. Finally, he stated that the Plaintiff she did not sue him in the High Court case in Nairobi.
42. In cross-examination, he stated that he built a small house on Plot No. 2021. He stated that he was in Kibwezi when Plot No. 2021 was surveyed though he could not remember when the survey was done. It was his testimony that he last visited Kinyambu in the year 2021 and denied that the Plaintiff and her family cultivate on the suit property.
43. DW2, Ruth Mui Ivui told the Court that she is the wife to the Defendant.. She stated that the Defendant is the owner of Plot No. 2021 while the Plaintiff is the owner of Plot No. 1589. It was her testimony that her husband acquired the suit property in 1960s and that they have been utilizing the land since 1967.
44. In cross-examination, DW2 stated that the dispute over the suit property was heard and determined by the clan in 1996 which declared that the Defendant is the owner of the suit property. It was her evidence that her father in law had two parcels of land which included the suit property. She testified that she was aware that the Plaintiff had sued the Mbusya family for encroaching the suit property. It was her testimony that the Plaintiff does not cultivate on the suit property.
45. In re-examination, DW2 reiterated that the Defendant was not involved in the case between the Plaintiff and the Mbusya family. She further testified that her father in law divided his properties between his two sons and gave the Defendant the suit property while the Plaintiff's husband was given Plot No. 1589.
46. After the trial the parties tendered their written submissions.



## Plaintiff's Submissions

47. The Plaintiff's submissions were filed in Court on 28<sup>th</sup> July, 2022.
48. Counsel for the Plaintiff raised the following issues for the Court's determination.
  - i. Whether land parcel number 2021 Kinyambu Settlement Scheme belongs to the deceased.
  - ii. Whether the Defendant should be restrained from interfering with the Plaintiff's quiet possession, occupation and use of the said parcel number 2021 Kinyambu Settlement Scheme.
  - iii. Whether the Plaintiff has acquired title to land parcel number 2021 Kinyambu Settlement Scheme by virtue of adverse possession.
49. Counsel submitted that the Plaintiff was amongst the pioneer settlers/occupiers of Kinyambu Settlement Scheme having settled in the year 1965. Counsel further submitted that it is trite law that prior to the enactment of the *Land Act*, there was no specific legislation dealing with the creation of Settlement Schemes though many Settlement Schemes had been established.
50. Counsel reiterated the evidence on record and submitted that the Plaintiff was the first in time to acquire Land Parcel No. 1589 Kinyambu Settlement Scheme and allowed the Defendant's father to reside thereon. Counsel further submitted that the Defendant has failed to prove on a balance of probabilities his entitlement over land parcel number 2021.
51. That the Plaintiff allowed the Defendant's parents to live within a portion of land Parcel No. 1589 which portion came to be known as land parcel No. 2021 as it arose from the sub division of the Land Parcel No. 1589. Counsel urged the Court to make a declaration that Land Parcel No. 2021 belongs to the Estate of Moki Ivui.
52. With regards to the issue of whether the Defendant should be restrained from interfering with the Plaintiff's quiet possession of land Parcel No. 2021, Counsel submitted that the Plaintiff has established a prima facie case as she has demonstrated that she acquired the land which was later recorded as Parcel No. 1589 in the name of her deceased husband.
53. Counsel further submitted that land parcel number 2021 was a sub division from Land Parcel No. 1589 which was done without the Plaintiff's consent or authority or that of her deceased husband. That as a consequence of the sub division, the Plaintiff continues to suffer irreparable harm.
54. It was submitted that the balance of convenience tilts in favour of the Plaintiff as the Defendant's account on how he acquired the property does not add up.
55. With regards to the issue of whether the Plaintiff has acquired the suit property by way of adverse possession, Counsel submitted that the Plaintiff has been in open, continuous possession of land Parcel No. 2021 which is within 1589 since the year 1965.
56. In addition, Counsel submitted the Defendant has never attempted to evict the Plaintiff from the suit property notwithstanding his purported allocation which he had failed to assert from the time it accrued to him.
57. Lastly, Counsel submitted that the Plaintiff has acquired title by operation of law as she has demonstrated that land Parcel No. 2021 exists within land Parcel No. 1589.



### **The Defendant's Submissions**

58. The Defendant's submissions were filed in Court on 22<sup>nd</sup> of July, 2022.
59. Counsel for the Defendant submitted that the Plaintiff did not make a claim for adverse possession in her pleadings and that it only came out during the hearing of the suit. Counsel submitted that the Plaintiff's witnesses especially PW3 added more value to the Defendant's case.
60. Counsel further submitted that the Plaintiff's case was not valid as she had initially filed suit before the High Court in which the Defendant was not a party. Finally, Counsel contended that the Defendant has demonstrated that he is the lawful owner of the suit property.

### **Analysis And Determination**

61. Having considered the pleadings, the evidence on record and the rival submissions, the following issues arise for determination:-
  - a. Who is the lawful owner of the suit property.
  - b. Whether the Plaintiff is entitled to the orders sought.
  - c. Who shall bear the costs of the suit.

### **Who Is The Lawful Owner of The Suit Property**

62. The Plaintiff has sought for a declaratory order that the suit property belongs to the Estate of Moki Ivui Nzei her deceased husband and thus it should be registered in his name. The Plaintiff instituted this suit on her own behalf and on behalf of the Estate of Moki Ivui Nzei.
63. In this regard she produced a grant of letters of administration ad litem (PEX13). This Court finds and holds that the Plaintiff has the requisite capacity to institute the present suit.
64. It is not in dispute that the suit property is recorded/registered in the name of the Defendant as confirmed by the extract of register for Plot No. 2021 Kinyambu Settlement Scheme (PEX14C). According to the letters dated 30<sup>th</sup> September, 2005(PEX10 and 12), it is not in dispute that the parcels numbers 575 and 557 are recorded in the name of the Defendant while land parcel No 574 Mukuyuni Adjudication Section is recorded in the name of the Moki Ivui Nzei.
65. The Plaintiff testified that in the year 1964, she personally acquired a huge track of land in Kiyambu. That when Kinyambu was declared a Settlement Scheme, her land was recorded as land Parcel No. 1589 which she registered in the name of her late husband. That shortly thereafter, the Defendant unlawfully registered a portion of her land in his name as land Parcel No. 2021 notwithstanding the judgment in High Court in Civil Suit No. 6419 of 1991.
66. On the other hand, the Defendant testified that his late father divided his property between his late brother Moki Ivui and himself. It was his testimony that he acquired the suit property in 1960s. He stated that his late brother was given two parcels of land while he accepted to remain with the suit property. It was his testimony that when the Government started the process of registering land, he received an invitation of offer and that upon payment of the requisite fees he was allocated the suit property. In this regard he produced a letter of offer dated 31<sup>st</sup> July, 2002 for the suit property (DEX5) and a payment receipt (DEX6)



67. He further produced a letter dated 16/11/2012 by the District Adjudication and Settlement Officer Kibwezi (DEX8) and the decision by the Auani-Mbaa Muli Clan Committee (DEX1) confirming that he is the owner of the suit property.
68. It is the Plaintiff's case that the suit property is the same property that she had successfully litigated with the Mbusya family in which the High Court declared that she is the lawful owner.
69. At this juncture, this Court is called upon to determine whether the suit property is the same property the Plaintiff litigated in Nairobi High Court Civil Suit No. 6419 of 1991. The Plaintiff produced the Plaintiff in Civil Suit No. 6419 of 1991 (PEX3) where she had sued Kaluki Mbusya and Tom Mbusya and sought for the following orders:-
- i. A declaration that she is the lawful owner of the disputed portion of land approximately 4 acres in Kinyambu village, Kinyambu Sub Location, Ngwata Location, Kibwezi division in Machakos District.
  - ii. An injunction restraining the defendants either by themselves, their servants and/or agents from trespassing, interfering or in any manner dealing with the said portion of 4 acres approximately in Kinyambu Village, Kinyambu sub Location, Machakos District.
  - iii. An order restoring the 1968 boundary.
  - iv. Costs of this suit and interest.
70. Pursuant to the application dated 3<sup>rd</sup> November 1991, the Defendants were restrained either by themselves, their servants/agents from trespassing or interfering or in any way dealing with the Plaintiff's land measuring approximately 4 acres or thereabout in Kinyambu village, Kinyambu Sub Division Ngwata Sub Location Kibwezi Division Machakos District.
71. Thereafter, the Court by consent of the parties referred the dispute to Machakos District Land Adjudication and Settlement Officer for determination and fixing of boundaries within six months from the date thereof.
72. The matter was heard and determined vide the ruling delivered on 29 June, 1992 where the Divisional Land Adjudication/Settlement Officer Kibwezi held that the boundary established by the Kinyambu elders under the Chairmanship of Kavyati Kola in 1967 and later confirmed by the area Chief Ngwata Location in his first hearing in 1982 should stand. The award was adopted as the judgment of the Court on 26<sup>th</sup> of May, 1993.
73. According to the Plaintiff in Nairobi High Court Civil Suit No. 6419 of 1991, the Plaintiff sought for a declaration that she is the lawful owner of the disputed portion of land measuring 4 acres in Kinyambu village Kinyambu Sub Location Ngwata Location Kibwezi Division in Machakos District.
74. In the present suit, the Plaintiff is seeking for a declaration that land parcel No. 2021 Kinyambu Settlement Scheme belongs to the Estate of Moki Ivui Nzei and the same should be registered in his name. The restraining order issued in High Court Civil Suit No. 6419 of 1991 did not specify the land parcel number. It only stated the acreage of the disputed portion of land.
75. From the record it is clear that the matter was referred to the Machakos District Land Adjudication officer for hearing and determination of the boundaries.



76. The High Court did not declare that the Plaintiff is the owner of the disputed portion of land as the dispute was determined by the Divisional Land Adjudication and Settlement Officer. According to the Plaintiff in Nairobi High Court Civil Suit NO. 6419 of 1991, the disputed portion of land measures approximately 4 acres. In the instant suit the Plaintiff stated that she does not know the acreage of the suit property. Similarly, the Land Adjudication and Settlement Officer (PW2) testified that the acreage of land Parcel No. 1589 and land Parcel No. 2021 was not recorded.
77. In the absence of the above specification, I find that the Plaintiff has failed to demonstrate that the suit property is the same property she litigated with the Mbusya family in Nairobi High Court Civil Suit No. 6419 of 1991.
78. The Plaintiff testified that she was amongst the pioneer settlers of Kinyambu having settled in the year 1964. The question that begs for answers is when did the Plaintiff acquire land Parcel No. 1589. It was the Plaintiff's evidence that she acquired a huge track of land in Kinyambu in the year 1964 which was later recorded as Plot No. 1589 after Kinyambu was declared a Settlement Scheme. It was her testimony that the suit property is not ancestral land as she personally acquired and registered the same in the name of her deceased husband.
79. The Defendant on the other hand averred that he acquired the suit property in 1960s. That during the same period his father acquired land Parcel No. 1589 and No. 948 Ngwata Settlement Scheme. That after his late father divided his properties amongst his two sons, he retained the suit property while his brother retained land Parcel No. 1589 and 948.
80. According to paragraph 3 of the Plaintiff in Nairobi High Court Civil Suit No. 6419 of 1991, the Plaintiff averred that she is the lawful proprietor of a parcel of land in Kinyambu village Kinyambu Sub Location Kibwezi Division in Machakos District. She went on to state that the land originally belonged to one Ivui Nzei the father of her deceased husband.
81. The Plaintiff produced proceedings before the Divisional Land Adjudication/Settlement Officer (PEX NO. 8). During the hearing of the dispute, the Plaintiff stated on oath as follows:-
- “ the disputed piece of land belongs to my late father in law Ivui Nzei. When he was awarded the land by the elders in 1963 he cleared two portions to cultivate, one portion where I have my homestead and the other one where his buildings are now near the disputed portion.”
82. On cross examination the Plaintiff stated that she informed the arbitration board that the land belongs to her father in law because the Defendants in the matter wanted to grab it from her. It is trite law that parties are bound by their pleadings.
83. In the case of IEBC v Stephen Mutinda Mule & 3 Others [2014] eKLR, the Court of Appeal made reference to the case of Adetoun Oladeji (NIG) LTD Vs Nigeria Breweries PLC S.C 91/2002 where the judge stated that;
- “ It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way which is at variance with the averments of the pleadings goes on to issue and must be disregarded.”
84. In the present case it is clear from paragraph 3 of the Plaintiff in Nairobi High Court Civil Suit No. 6419 of 1991 and the arbitration proceedings that the land was initially acquired by Ivui Nzei, the Plaintiff's



- deceased father in law. I find that the Plaintiff has failed to prove that she personally acquired land parcel No. 1589 Kinyambu Settlement Scheme.
85. It is the Plaintiff's testimony that the suit property is a sub division of land Parcel No. 1589. The Plaintiff's stated that the Defendant fraudulently caused the suit property to be hived off from land Parcel No. 1589 without her knowledge and/or consent or that of her deceased husband.
86. She pleaded and particularized the grounds of fraud as follows:-
- The Defendant acted fraudulently in that he;
- a. caused the Plaintiff's deceased land to be demarcated/hived off and registered in his name while knowing very well that the suit land did not belong to hi but to the Plaintiff/Deceased.
  - b. knowingly obtaining a letter of allotment in respect of the suit land, which was not his and did so even after the Plaintiff had moved to this court to challenge the said demarcation/hiving off and unlawful registration.
  - c. caused the Plaintiff's/deceased said land to be registered in his name while knowing the land belonged to the Plaintiff/Deceased, and that the High Court had earlier on awarded the land to her (the Plaintiff).
87. The Court of Appeal in *Kinyanjui Kamau v George Kamau* [2015] eKLR held that;-
- “...it is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in *Criminal Cases*...”
88. This Court is called upon to determine whether the Defendant fraudulently caused the suit property to be hived off from land Parcel No. 1589.
89. The Plaintiff and PW1 testified that the suit property is part of land parcel No. 1589. It was their testimony that the suit property is a sub division from land Parcel No. 1589. It was their further testimony that the suit property borders land Parcel No. 1589. In her evidence in chief, PW2 testified that the suit property is a subdivision of land Parcel No. 1589 if it borders the said parcel of land. It was her testimony that the suit property does not follow Plot No. 1589 in sequence.
90. Her evidence was contradicted by PW4 who testified that it was normal for plots not to follow each other in sequence. It was his testimony that there were several plots that do not follow each other in sequence. PW2 testified that subdivision of a parcel of land cannot be carried out without the knowledge of the owner of the land.
91. She went on to state that there was no evidence to show that the suit property was a sub division from land Parcel No. 1589. There was no evidence on the register for Kinyambu Settlement Scheme to demonstrate that a subdivision was carried out on land Parcel No. 1589 or that land Parcel No. 2021 was a sub division of thereof.
92. On the issue of ownership it is clear from the evidence of PW2, PW4 and the Defendant that when plotting was being carried out, the owners of the land are the people are the people who are found on the ground. It is also clear that plots need not follow each other in sequence.



93. In Civil cases, the standard of proof is on a balance of probabilities. Section 107 (1) and (2) of the Evidence Act provides as follows:-
- 107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
94. It is clear from the above provisions that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe.
95. The Plaintiff is challenging the registration of the suit property in the name of the Defendant on the grounds that it was fraudulently hived off from land Parcel No. 1589. The Defendant produced documents of ownership from the Ministry of Lands. PW3 admitted that the documents are from the Ministry of Lands. PW4 testified that according to the map there is a line marking the boundaries between the two parcels of land.
96. It was his testimony that the two parcels are distinct from each other. The Plaintiff did not call any evidence to demonstrate that the Defendant obtained registration by fraudulent means or the suit property was fraudulently hived from Parcel No. 1589. The Plaintiff, in my view, has failed to prove the alleged fraud against the Defendant. The Plaintiff did not discharge the burden of proving that the suit property was fraudulently hived off from land Parcel No. 1589.
97. No evidence was presented to demonstrate that the Defendant was not allocated the property. In the absence of contrary documents from the office of the Land Adjudication, this Court finds that the documents held by the Defendant are authentic and not fraudulent as alleged. In this case, the Plaintiff has not tendered sufficient evidence that prove the particulars of fraud against the Defendant to the satisfaction of the Court.
98. From the evidence tendered by the parties herein, I find that the Defendant and not Moki Ivui Nzei deceased is the lawful owner of the suit property.

### **Whether The Plaintiff is Entitled to The Orders Sought**

99. The Plaintiff sought for a permanent order of injunction restraining the Defendant from alienating or in any other way interfering with the Plaintiff's quiet possession, occupation and use of Land Parcel No. 2021 Kinyambu Settlement Scheme.
100. Having established that the deceased is not the lawful owner of the suit property it is the finding of this Court that the Plaintiff is not entitled to an order of permanent injunction. The Plaintiff is also seeking for a declaration that she has acquired title by adverse possession.
101. The doctrine of adverse possession is embodied in Section 7 of the Limitation of Actions Act which stipulates that:-
- “An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.”
102. Further Section 13 provides that:-



1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this act referred to as adverse possession), and, where under Section 9, 10, 11 and 12 of this act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
  2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
  3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.
103. Section 38 gives guidelines on the procedure to be followed by a person claiming adverse possession.
104. The ingredients of the doctrine of adverse possession were discussed in the case of *Wambugu v Njuguna* [1983] KLR 173 where the Court of Appeal stated that: -
- “Adverse possession contemplates two concepts; Possession and discontinuance of possession. It further held that the proper way of assessing proof of Adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”
105. The ingredients were recently discussed by the Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2005] eKLR where it was held that: -
- “Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period in Kenya 12 years. The process springs into action essentially by default or inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
106. This being a claim for adverse possession the Plaintiff's must show that she has been in open, peaceful and continuous possession of the suit property for 12 years.
107. The issue for determination is whether the Plaintiff has proved that she has acquired the suit property by virtue of adverse possession. The Plaintiff stated that she has been in possession and occupation of the suit property since 1964.
108. It was her testimony that the Defendant does not reside or utilise the suit property. The Defendant on the other hand testified that after he acquired the suit property he built a small house. It was his testimony and that of DW2 that the Plaintiff does not cultivate on the suit property.



109. The Court has seen the Auani-Mbaa Muli clan decision dated 30<sup>th</sup> March, 1996 which confirms that there was a dispute between the Plaintiff and the Defendant over the suit property. In its decision, the clan stated as follows;

“It has been resolved that the Kinyambu Plot remains the property of Reuben Muli Ivui. The big Plot No. 948 to remain the property of Mr. Moki Ivui even though it is a family plot.”

110. The Court has also seen a letter by the District Land Adjudication Officer dated 29<sup>th</sup> May, 1995 titled dispute for Parcel No. 2021 Kinyambu Settlement Scheme. In his findings, the District Land Adjudication/Settlement Officer held that the Defendant is the owner of the suit property while Moki Ivui should remain with Parcel No. 1589.

111. It is therefore not in doubt that the Plaintiff’s possession if at all was not peaceful nor uninterrupted. It was not clear from the Plaintiff’s evidence whether she was residing on the suit property or land Parcel No. 1589. The Plaintiff testified that she has been in occupation of the land since 1964. Being in occupation in itself is not dispossession.

112. For the Plaintiff to succeed in her claim for adverse possession she must prove possession, dispossession and discontinuance of possession by the Defendant for a continuance period of 12 years and the same was done without interruption.

113. In the case of Mombasa Teacher Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others [2018] eKLR the Court stated as follows;

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

114. In the case of Samuel Kihamba v Mary Mbaisi [2015] eKLR the Court held that;

“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 licence 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.”

115. The Plaintiff needed to prove that she has been in the suit property continuously without interruption and without force or secrecy which the Court holds she has failed to. The Plaintiff did not present evidence to demonstrate the that she has acquired the title by adverse possession. I find that the Plaintiff has not met the threshold for the grant of orders of ownership of the suit property by virtue of adverse possession.

116. In the end, this Court finds and holds that the Plaintiff has failed to prove her case on a balance of probabilities. Consequently, the Plaintiff suit is dismissed. Owing to age of this matter and the fact that the parties herein are related I make no order as to costs. Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**



**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF APRIL, 2023.**

In the presence of: -

Court Assistant – Mr. Mohammed

Ms Nzei for the Plaintiff.

Ms Macharia holding brief for Makau for the Defendant.

