



REPUBLIC OF KENYA



**Thuo & another v Kimani & 2 others (Environment & Land Case  
E013 of 2022) [2023] KEELC 18447 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18447 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E013 OF 2022**

**LN GACHERU, J  
JUNE 29, 2023**

**BETWEEN**

**NAFTALI MACHARIA THUO ..... 1<sup>ST</sup> PLAINTIFF**

**SOLOMON MACHARIA KAMAU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FRANCIS NDUNG’U KIMANI ..... 1<sup>ST</sup> DEFENDANT**

**ISAAC KIMANI MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**DANIEL KANYI MWANGI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiffs moved this Court vide an Originating Summons dated August 8, 2022, and filed on August 11, 2022, against the Defendants herein for determination of the following
  1. Whether the Plaintiffs have been in exclusive, uninterrupted and peaceful possession of land parcel No Loc.8/ Matharite/329, for a period in excess of 12 years.
  2. Whether such possession has been to the exclusion of the Defendants herein
  3. Whether the Defendants’ title to the suit land should now be cancelled and a title be issued in the names of the Plaintiffs in the portion of one third to two thirds or 2.9 acres and 1 acre to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively.
  4. Whether the Defendants should bear the costs of this summons.
2. The summons are anchored on the Supporting Affidavits sworn by the Plaintiffs. The 1<sup>st</sup> Plaintiff deponed that he entered into the suit land in 1974, after his father Gilbert Thuo, bought the suit land from the sons of Ngabia Kimani, the original owner of the land. He contends that he entered into the suit land and has extensively developed thereon on the premise that the consideration was fully



paid. He also averred that his entry and occupation on the suit land has been open, and with the full knowledge of the Defendants. He added that the suit land has been subject to a succession cause in Murang'a CMCC Suc No 124 of 1985. It was his further disposition that on December 14, 2000, he received a demand letter barring him from stepping on the suit property. He also deponed that the surveyor's report as well as the Affidavit of the 1<sup>st</sup> Defendant herein in Murang'a CMC ELC No E061 of 2022, confirmed his occupation of the suit land. In the end, he contended that he has been in occupation of the suit land for over 50 years which extinguished the Defendants' title.

3. The 2<sup>nd</sup> Plaintiff deponed that he entered into the suit land in 1974, having entered into a sale agreement with Kimani Ngabia for 1/3 of the suit property. That he took immediate occupation of the suit property, which is being utilized by his relatives and agents. He deponed that the Defendants are the grandsons of Kimani Ngabia, and are aware of their nature of occupation and have never for the past 50 years since his occupation attempted to occupy the suit land. He added that he possesses an adverse title over the suit land as against the Defendants.
4. Peter Mwangi Macharia swore and Affidavit to corroborate the 2<sup>nd</sup> Plaintiff's disposition that 2<sup>nd</sup> Plaintiff's relatives are utilizing his portion. He further averred that he is occupying and utilizing the suit property with the permission of the 2<sup>nd</sup> Plaintiff.
5. The 1<sup>st</sup> Defendant swore a Replying Affidavit on his behalf and that of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The Defendants opposed the Plaintiffs claim that they bought the suit property and challenged the authenticity of the signatures in the sale agreements. He deponed that the proceedings in the Murang'a Succ' No 18 of 1972, were never executed and as such the land belonged to their deceased grandfather whom they took out letters of administration over in Murang'a Succ No 124 of 1985, and obtained land through transmission. He added that they reside in Rift Valley and the Plaintiffs' occupation of the suit land was without their knowledge. That they only got to know about the Plaintiffs in 2018, after the Plaintiffs had encroached into the suit land and cut down trees, causing them to report the matter to the area chief.
6. He further deponed that the Plaintiffs have not extensively developed the suit land since what was there as of 2018, were tea bushes and mature trees. He added that the 2<sup>nd</sup> Plaintiff's in retaliation of the eviction orders issued in Murang'a Civil Suit No E061 of 2022 moved to construct a semi-permanent house on the suit land. Further, he deponed that they are the registered proprietors of the suit land and the Plaintiffs have not made out a case for adverse possession.
7. The 1<sup>st</sup> Plaintiff swore a Further Affidavit wherein he stated that the sons of Kimani Ngabia sold their share after the conclusion of a succession cause in Murang'a Succ No 8 of 1972. He further deponed that the Defendants cannot feign knowledge of their occupation of the suit property since they often visited the suit land. He reiterated their occupation of the suit land and maintained that they have established a claim for adverse possession.
8. The matter was set down for hearing and the Plaintiffs called five witnesses while the Defendants called two.

### **Plaintiffs' Case**

9. PW1 Naftali Macharia Thuo, adopted his Supporting Affidavit sworn on the 5<sup>th</sup> August 2022, as evidence together with the documents attached thereto as evidence in chief. On cross-examination he testified that he was not present when the sale agreement was drawn, but he confirmed that Gilbert Thuo was his father and he entered into the suit land in 1974. It was his testimony that his father bought the 3.94 acres, from the sons of Kimani Ngabia. He also testified that his father died in 2011, but he gave him the suit land and has been in occupation since 1974, where they planted tea bushes



and blue gums. He told the Court that he lives on property no Matharite / 650, which is a walking distance from the suit property.

10. PW2 Solomon Macharia Kamau, adopted his Supporting Affidavit sworn on the August 8, 2022, as evidence and relied on the documents attached thereto as evidence in Chief. On cross-exam he told this Court that he is utilizing 1 acre of the suit land, which land he bought from the sons of Kimani Ngabia. He also testified that Kimani Ngabia was his step-brother and further informed the Court that the suit land was 4 acres. He also testified that he entered into the suit land in 1974, before entering into sale agreement in 1984, and thereafter he planted coffee and eucalyptus trees. He confirmed that he built a house in July 2022, after his wife died.
11. PW3 Peter Mwangi Macharia, adopted his Supporting Affidavit dated 8<sup>th</sup> August 2022, as evidence. He told the Court on cross-exam that the 2<sup>nd</sup> Plaintiff gave him the land in the year 2000, and has been in occupation to date.
12. PW4 Janet Njoroge ,also testified and informed this Court that she is utilizing the suit property and has been on it since the year 2005, having been allowed by her father-in-law, the 2<sup>nd</sup> Plaintiff.
13. PW5 Francis T Odhiambo, testified that he is a Land Surveyor working at Geomatic Services. He confirmed having prepared a Report, which he produced as exhibit before this Court. He confirmed that the suit land is being utilized.

#### **Defence Case**

14. DW1 Francis Ndungu Kimani, adopted his witness statement dated February 20, 2023, and the Supporting Affidavit sworn on the October 13, 2022, as evidence in chief and relied on the documents therein. He told the Court on cross-examination that the suit land belonged to his grandfather who although lived in Kiambu originated from Murang'a. He also testified that the Plaintiffs have never lived on the suit property, and raised doubts on the sale agreement. He testified that the signatures are not authentic and one of the witness was already dead as at the time of the agreement. He confirmed that his father filed a succession cause in 1972, and in 1974, a judgment was issued where his father and his brother were given the suit land, but they failed to execute the orders of Court.
15. It was his further testimony that when his father filed the Succession Cause, the Plaintiffs were using the land, and have planted tea bushes and eucalyptus trees, which was within the knowledge of his grandfather and father. He also testified that he got to know about the Plaintiffs in 2018, after he found out that trees had been cut on the suit land and even though he reported to the Chief, he never knew who planted the trees. It was his testimony that he has never attempted to evict the Plaintiffs and he is not aware of any letter alluded to by the Plaintiffs. In re-exam, he testified that he came to know about the land in 2006.
16. DW2 Stanley Maina Kamau, adopted his witness statement as his evidence. Further he testified that Ngabia Kimani never lived on the suit land or planted any crops thereon, and the 2<sup>nd</sup> Plaintiff who is his real brother never planted any tea bushes. He also testified that the 2<sup>nd</sup> Plaintiff lives in Bungoma, but the land is utilized by PW3 and PW4. He informed this Court that he knew the three sons of Ngabia Kimani, who were his cousins, but he knew nothing about the transactions. It was his testimony that the tree bushes grew on their own, but he never knew who planted the tea bushes. He reiterated in re-exam that he did not know whether the 2<sup>nd</sup> Plaintiff had bought the land or not. He confirmed that he lives near the land and PW4 has been utilizing the same.
17. At the close of their testimonies, parties were directed to file and exchange their written submissions.



18. The Plaintiffs filed their submissions through the Law Firm of J. N Mbutia & Co. Advocates, and raised four issues for determination by this Court.
19. On the issue of whether the Plaintiffs purchased the suit property, it was their submissions that they entered into sale agreements with the sons of Ngabia Kimani and it matters not in whose name the land was registered in. They further submitted that having paid the full purchase price, and no transfer was effected, the sale became void and their stay on the suit property beyond 6 months became adverse. Reliance was placed on the case of *Stephen Mwangi Gatunge vs Edwin Onsesmus Wanjau* (2022)eKLR.
20. On whether they have been in possession of the suit property for over 12 years, they submitted that they have established through evidence and testimonies that they have been in occupation thereof for over 12 years. They maintained that the letter dated December 14, 2000, was authentic and should guide this Court as it shows clearly the Defendants were aware of the Plaintiffs' occupation of the suit land. They relied on the case of *Kimani Ruchire vs Swift Rutherfords & Co. Advocates* {1980} as quoted in *William Kimani Gichira vs Edith Njeri Chege* {2018} eKLR, where the Court expressed what a claimant must establish for a claim of adverse possession to issue.
21. They further submitted that their entry into the suit land was immediately after entering into their diverse sale agreements. That if at all there was any permission, the same was vitiated by the expiry of the agreements. Reliance was placed on the case of *Samuel Miki Waweru vs Jane Njeri Richu* {2007} eKLR, where the Court observed that a sale agreement becomes void where consent from LCB has not been issued, and the continued possession becomes adverse from the time the transaction becomes void.
22. The Defendants filed their submissions through the Law Firm of Mwaniki Warima & Co. Advocates, and raised two issues for determination.
23. On whether the Plaintiffs entered into their sale agreements, it was their submissions that the agreements were null and void for want of consent. That at the time of the alleged sale, the vendors did not have the capacity to sale, since the land did not belong to them. That their occupation was permissive by dint of the sale agreement and does not meet the tenets of adverse possession as elaborated in the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Muhambi Katana & 5 Others* {2018} EKLK, where the Court observed that a claim for adverse possession cannot pass where the entry was permissive.
24. The Defendants further submitted that the Plaintiffs had failed to establish the principles for grant of the orders sought. That the Plaintiffs started utilizing the land in 2018, wherein they encroached and fell trees acts which amounted to trespass. It was their submissions that the surveyor's report indicated that some plantations were done in 2018, and also that his report was not credible especially on the coverage of trees and this Court ought not to rely on the report.
25. The Plaintiffs' claim for adverse possession arises from an alleged sale agreements. The Plaintiffs' claim that they bought the suit land from the sons of Ngabia Kimani while the grandsons of the said Ngabia Kimani dispute the fact that their fathers ever sold the land. This Court notes that the suit property was subject to a Succession Cause in Murang'a Succ' No 18 of 1972, where the property was divided among the dependants of the Estate of Ngabia Kimani.
26. As per the green card adduced in this Court as evidence, it is evident that the suit property was first registered in the name of Ngabia Kimani on 11<sup>th</sup> April, 1960. It is also evident that the Defendants herein registered a restriction over the suit property pending determination of Succ' Cause No 124 of 1985. The Defendants were subsequently and by dint of transmission, registered as the proprietors of the suit property as per the sharing evident in entry five of the Green Card.



27. The essence of the foregoing is that the Defendants have a proprietary right that ought to be protected. As per entry 6, it is evident that title deed was issued and the effect of this is that the registered proprietor was conferred with absolute and indefeasible rights over the suit property as contemplated under Section 24(1)(a) of the [Land Registration Act](#). Section 26 of the said [Land Registration Act](#) confers indefeasible rights over land and it provides:

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except –

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

28. However, this right of a registered proprietor is subject to overriding interests as enumerated in Section 28 of the [Land Registration Act](#) which makes provisions that:

29. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) .....
- .....
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- .....

30. The Plaintiffs want to defeat the Defendants’ title by dint of operation of Limitation of actions. Additionally, it is important at this stage to point out that a claim for adverse possession is attached to land and not to the title and it matters not in whose name the title was registered in, unless if it was owned by the Government. This position was held in the case of [Maweu vs Liu Ranching & Farming Cooperative Society](#) [1985] eKLR as quoted in Civil Appeal No 164 of 2011:- [Gachuma Gacheru VS Maina Kabuchwa](#) [2016] eKLR, where the Court held that:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

31. Having perused the pleadings and the annexures thereto, analyzed the evidenced adduced and considered the rival submissions and the authorities cited, the issues for consideration by this Court are;

- i. Whether Plaintiffs claim for adverse possession can issue ?
- ii. Who should bear the costs for the suit?

### **I. Whether Plaintiffs claim for adverse possession can issue?**

32. As already established hereinabove, Limitation of actions is one of the overriding interest over land, and which can take away the proprietors right over the land. Additionally, Section 7 of the [Land Act](#), contemplates that land can be acquired by *inter alia* prescription and any other manner prescribed by



an Act of Parliament. The law on Adverse Possession is provided for under the [Limitation of Actions Act](#). Section 7 of the [Act](#) provides

33. 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 on the other hand 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”.

33. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand 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.”

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.”

And 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 or not the claimant has proved that he has been in possession of the requisite number of years.”

34. This right is adverse to land and does not automatically accrue unless the person in who’s this right has accrued takes action. Section 38 of the Act gives authority to the claimant to apply to Court for



orders of adverse possession. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the Court 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.”

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...”

35. 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”

Therefore, to determine whether the claimants’ rights accrued the Court will seek to answer the following:-

- i. How did the Applicants take possession of the suit property?
  - ii. When did they take possession and occupation of the suit property?
  - iii. What was the nature of her possession and occupation?
  - iv. How long have the Applicants been in possession?
36. The Plaintiffs claim arises from sale agreements and as is the case entry into the suit land was permissive. The Plaintiffs were allowed to be on the suit property by operation of a sale and transfer. It is thus right to conclude that a claim for adverse possession cannot issue. However, the Court in case of *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR held:
- A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”
37. Similarly, in the case of *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, the Court held that once payment of the last installment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.



38. Further in the case of *Titus Ong'ang'a Nyachico v Martin Okioma Nyauma & 3 others* [2017] eKLR the Court observed that

This Court has severally held that when a purchaser of land in a controlled transaction is permitted to be in possession of the land by the vendor pending completion of the transaction, the intended sale becomes void, and the permission to occupy the land is terminated by operation of the law. Any continued occupation becomes adverse from the time the transaction becomes void”

39. Presently, the Plaintiffs contend that they entered into Sale agreements with the sons of Ngabia Kimani. As per the translation availed before this Court and produced as “Pex4” it is evident that the Gilbert Thuo, bought land for a consideration of Kshs. 4,200/= with each acre costing Kshs. 1,100/=. In “Pex12” it is evident that the 2<sup>nd</sup> Plaintiff bought the suit land and made the final installment on December 8, 1990. The Plaintiffs reiterated this in their testimonies and testified that the purchase price was duly paid and they took possession of the property after purchase. That while the 1<sup>st</sup> Plaintiff is entitled to 2.9 acres the 2<sup>nd</sup> Plaintiff is entitled to 1 acre of the suit property.
40. The Defendants on the other hand disputed the sale agreement and doubted their authenticity. It is not disputed that the Defendants have never been in occupation of the suit land, and they acquired ownership of the land by transmission. Section 107-108 of the *Evidence Act* places the burden of proof on the person who asserts the existence of certain facts. Herein, the Plaintiff contended that they acquired possession and occupation of the suit land by a sale agreement and availed the said Sale Agreements for this Court to peruse. Their production was not objected to by the Defendants. The Defendants having challenged the authenticity of these Sale Agreement were legally bound to avail evidence to rebut the Plaintiffs’. The Court in *Mbutia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR explained the circumstances when the evidential burden may shift. The Court held:
- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?”
41. This position was reiterated by the Supreme Court in Presidential Election Petition No 1 of 2017, between *Raila Amolo Odinga & Another vs. IEBC & 2 Others* (2017) eKLR where the Court held:
- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”
42. This Court finds no reason to doubt the authenticity of the Sale Agreements. The Defendants claim that the sale agreement was executed by a dead person. Respectfully, this Court has perused the translation for December 8, 1990, which was executed by Mwangi Ngabia and who as per the death certificate died on May 17, 1999. It is in the agreement of 1972, where both sons signed. It is apparent that the similarity in names is what is causing the confusion herein. It is the findings of this Court that both the Plaintiffs’ entered into Sale Agreements between themselves and the sons of Ngabia Kimani.



43. The next issue is to determine when time begun running for each party for the claim of adverse possession to issue or not. This Court perused the translations for the sale agreements. According to the 1<sup>st</sup> Plaintiff, his father entered into the Sale Agreement in 1972 and took immediate possession. Even though the Sale Agreement does not indicate when the consideration was paid, PW1 testified before this Court that his father acquired immediate possession of the land. PW5 told this Court on cross-exam that the blue gums were about the age of 40 years. While this Court is not certain of the same DW1 testified that the trees on the suit property were old, but could not tell the age and he was also not aware who planted them. Justice Kuloba J, as he then was, in Nairobi Civ No 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR held:

Time does not begin to run unless there is some person in adverse possession of the land. It does not run merely because the land is vacant..... The rule that his entry must be followed by possession and appropriation to his use is founded on the reason that a right of action cannot accrue unless there is somebody against whom it is enforceable”

44. PW1 testified that his father took immediate possession and planted trees thereon thus corroborating the testimony that there were old trees on the farm. This Court lends the 1<sup>st</sup> Plaintiff some benefit of doubt and finds that his father paid the consideration at the execution of the sale agreement and took possession. He gained entry into the suit land in 1972. As for the 2<sup>nd</sup> Plaintiff, his entry on the suit land for purposes of computing time is well set out. As per *Hose Njiru* Case, *supra*, the 2<sup>nd</sup> Plaintiff gained entry into the suit land on December 8, 1990, which is the day of the last instalment.

45. As to the nature of occupation, the Plaintiffs maintained that they have been in open, continuous and uninterrupted possession and occupation. (see the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR). The Plaintiffs have led evidence of their occupation of the suit land by production of photographs which shows agricultural activities and which the Defendants confirmed. PW5 in his report confirms that there is some use of the suit land. The Defendants did not adduce any evidence as to their ownership of the cultivation and structures on the suit property.

46. There is no evidence that the Defendants ever filed a suit to challenge the Plaintiffs’ occupation and use of the suit property. The act of planting crops, trees and putting up structures cannot be done in secrecy and the Defendants cannot feign lack of knowledge by dint of living out of the jurisdiction of the suit property. They undertook succession proceedings over the suit property. What then made it hard to assert any right on the suit property up until 2022? In the case of *Kipketer Togom v Isaac Cipriano Shingore* [2012] eKLR, the Court held:

The Respondent must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property. Alternatively, the Respondent should have proceeded to institute legal proceedings in a court of law against the trespasser asserting his rights against the trespasser with prayers for his eviction and ejection from the property. Then only is there interruption to occupation and possession and then only does time stop running.”

47. This Court has perused an Affidavit attached to the Plaintiffs’ bundles of documents which shows that the Defendants filed a suit against the Plaintiffs in 2022. This suit was filled way after the Limitation of actions had already accrued. As at the filing of the suit, the 1<sup>st</sup> Plaintiff was in occupation and use of the suit property for 50 years, while the Defendants were in occupation and use of the suit property for a period of 32 Years. Undoubtedly, time had already lapsed and the law suit could not aid the Defendants.



48. In finding that the Plaintiffs have been in open, continuous, uninterrupted and notorious occupation of the suit property, this Court is guided by the pronouncement of the Court in the case of [Loise Nduta Itotia v Aziza Said Hamisi](#) [2020] eKLR where the majority held:

My analysis of the evidence points, to the open existence of structures and developments on the disputed property, all of which the respondent claims belonged to her. Since, the appellant did not claim ownership of the structures or provide any explanation of how the structures came into existence, it can be concluded that the structures belonged to the Respondent.”

The Court further held;

More importantly however, even after the structures were found to be in existence, nothing in the evidence is suggestive of any steps having been taken or effort made by the appellant to take up physical occupation or to utilize the land.”

To this end, this Court finds and holds that the Plaintiffs have on a standard of probability established the tenets of grants of orders of adverse possession and proceeds to grant the same.

## **ii. What are the entitlements of the Plaintiffs to the suit property?**

49. The suit property measures 3.9 acres. Even though the Sale Agreements adduced by the Plaintiffs were confusing as to the exact entitlement, the 2<sup>nd</sup> Plaintiff in his Supporting Affidavit in paragraph 4, explained that there was a confusion. This Court has no reason to doubt the same. After all, the parties in their Summons have sought claim over specific shares as demonstrated in prayer No 3.
50. It is a requirement under Order 37 Rule 7 of the [Civil Procedure Rules](#) that a title deed extract be availed at the filing of the Summons for purposes of identification. The Plaintiffs attached a copy of a search Certificate which clearly shows the measurements of the land. The land can clearly be identified. It is not clear whether there are demarcations on the parcel of land, but as per the Surveyor’s report, it is evident that each party identifies with their land. The report indicates that there is a clear demarcation on the suit property and this Court is sufficiently guided. Therefore, it is clear that while the 1<sup>st</sup> Plaintiff is entitled to 2.9 acres of the suit property, the 2<sup>nd</sup> Plaintiff is entitled to 1 acre. The effect of the foregoing is that the Defendants title over the suit property be and is hereby defeated by application of the [Limitation of Actions Act](#).

## **ii. Who should bear costs of the suit ?**

51. It is trite law that costs shall follow the events and a successful party is entitled to costs. However, this Court has the discretion to make such orders as to costs. This Court finds no reason not to award the Plaintiffs costs of the suit and proceed to allow the Summons with costs to the Plaintiffs against the Defendants jointly and severally.
52. Having carefully considered the available evidence, the Court finds and holds that the Plaintiffs have proved their case against the Defendants herein on the required standard of balance of probabilities. Consequently, Judgement is entered for the Plaintiffs against the Defendants Jointly and Severally in the following terms;
- a. That the Plaintiffs have on the standard of balance of probability established their claim for adverse possession over L.R No LOC.8/ Matharite/ 329.



- b. That the 1<sup>st</sup> Plaintiff and the 2<sup>nd</sup> Plaintiffs are entitled to 2.9 acres and 1 acre of the LR. No LOC.8/Matharite/329 respectively
- c. That Land Registrar Murang'a, be and is hereby directed to issue title in the name of the Plaintiffs as per prayer (b).
- d. The Plaintiffs are entitled to costs of the suit against the Defendants jointly and severally.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29<sup>TH</sup> DAY OF JUNE, 2023.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of; -

Mr J N Mbuthia for the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs

N/A - 1<sup>st</sup> Defendant

N/A - 2<sup>nd</sup> Defendant

N/A - 3<sup>rd</sup> Defendant

Joel Njonjo – Court Assistant

**L. GACHERU**

**JUDGE**

