



REPUBLIC OF KENYA



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**Gachathi v Kanyingi & another (Enviromental and Land Originating Summons
E008 of 2023) [2025] KEELC 267 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 267 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023
LN GACHERU, J
JANUARY 29, 2025**

BETWEEN

GEOFFREY GACHUGU GACHATHI PLAINTIFF

AND

GABRIEL KARINA KANYINGI 1ST DEFENDANT

LUCY NYAMBURA WAMBU 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein Geoffrey Gachugu Gachathi, brought this Originating Summons (O.S.), date 17th March 2023, which is premised under Sections 17 and 38 of the *Limitation of Actions Act*, Section 7 (D) of the *Land Act* and Order 37, Rule 7 of the Civil Procedure Rules, and sought for these Orders:
 1. A declaration that the title of the said Gabriel Karina Kanyingi and Lucy Nyambura Wambu and that of their Geoffrey Gachugu Gachathi to land parcel no. Maragua/526 situated within Murang'a County has been extinguished by the adverse possession thereof by the Plaintiff and now belongs to the Plaintiff.
 2. A declaration that the Plaintiff has acquired title to the said land parcel no. Maragua/526 by his adverse possession thereof for a period of more than 12 years from July 2009 or thereabouts to date.
 3. A declaration that the Defendants hold the title to land parcel no. Maragua/526 in trust for the Plaintiff.
 4. An Order do issue requiring and directing the Land Registrar Murang'a to register the said land parcel no. Maragua/526 in the name of the Plaintiff Geoffrey Gachugu Gachathi in place of the Defendants.
 5. The Defendants be ordered to execute all necessary.



2. The said Originating Summons herein is premised on the grounds set out on its face, and on the Supporting Affidavit of the Plaintiff, Geoffrey Gachugu Gachathi, dated 17th March 2023. The Plaintiff averred that on 15th July 2009, he purchased land parcel No. Maragua/526 (the suit property), currently registered in the names of the 1st & 2nd Defendants jointly, from the then registered proprietor thereof namely, Charles Kanyingi Karina, the father to the 1st Defendant, and husband to the 2nd Defendant. He further alleged that the entire consideration was Kshs.750,000/=, which amount he paid in full before between August 2009, and 31st October 2009, whereupon he immediately assumed occupation of the said parcel of land.
3. Further, the Plaintiff averred that he has been in exclusive possession of the suit property since 31st October, 2009, during which period he has carried out extensive developments thereon, as attested to by the valuation report dated 18th January 2023, filed before the Court.
4. It was contended that the Plaintiff has been in open and exclusive possession of the suit property since 31st October 2009, until February 2023, when the Defendants sought to evict him from the suit land using the Provincial Administration. That during the period between October 2009, and February 2023, the Plaintiff has been in exclusive possession for more than 12 years.
5. That on 4th October 2022, Charles Kanyingi Karina transferred the suit property to the Defendants for no valuable consideration; however, the Plaintiff had been in occupation of the property for 13 years at the time; thereby, rendering the purported transfer insubstantial. That the Plaintiff's occupation of the suit land has been adverse to the title of Charles Kanyingi Karina, and all his successors-in-title.

The Defendants' Response

6. The 1st Defendant who is a son to the 2nd Defendant executed an "Authority to Prosecute Suit and Swear Affidavits" dated 14th July, 2023, wherein he authorized the 2nd Defendant herein Lucy Nyambura Wambu, to prosecute this suit and do all that is necessary in relation to the cause on his behalf.
7. The Defendants opposed the suit herein through the Replying Affidavit sworn by Lucy Nyambura Wambu (the 2nd Defendant herein) on 14th July, 2023. Further, the 2nd Defendant filed her Witness Statement dated 14th July 2023, together with Witness Statements of Charles Kanyingi Karina and Samuel Maina Karina.
8. The 2nd Defendant's Replying Affidavit also contains a Counterclaim, which sought for orders that:-
 - i. The Plaintiff be evicted from land parcel Maragua Ridge 526, with all his servants, agents, relatives, structures and livestock and failure to do so, I be granted permission to levy eviction process with the provision of security by the OCS – Maragua Police Station.
 - ii. The Plaintiff to pay for general damages for forcible trespass, refusal to vacate, waste and for restoration of the land.
 - iii. The costs of this Counterclaim.
 - iv. Interest.
9. It was the 2nd Defendant's contention that as at year 2009, her husband Charles Kanyingi Karina, was the registered proprietor of the suit land and he executed a Sale Agreement dated 15th July, 2009, disposing off the suit property to the Plaintiff herein. However, the Plaintiff failed to deliver the full agreed-upon purchase price, and her husband did not put the Plaintiff into possession of the suit land



- as clause 3 of the Sale Agreement dated 15th July 2009, provided that the purchaser (the Plaintiff herein) shall take possession of the property after transfer of the same, and no transfer was done.
10. That the Plaintiff was not put in occupation of the suit property from October 2009, as claimed, but his possession commenced only in July 2021, when he put up some iron-sheet structures thereon without the permission of the 2nd Defendant or her husband.
 11. Further, that even with the Sale Agreement dated 15th July 2009, the parties failed to obtain the consent of the relevant Land Control Board (LCB), thus, rendering the said sale agreement unenforceable. That the Plaintiff admitted to carrying out acts of waste by having a dam dug up on the suit land, something which the 2nd Defendant had not contemplated to do.
 12. She also averred that the 2nd Defendant's husband Charles Kanyingi Karina was summoned by the police to answer to a complaint lodged against him by the Plaintiff herein, concerning obtaining money by false pretence. However, no charges were brought against her husband despite appearing at the Police Station on numerous occasions over many months in relation to the Plaintiff's complaint.
 13. That the Plaintiff's complaint against the 2nd Defendant's husband Charles Kanyingi Karina, was meant to apply pressure on her husband to hive off, and transfer 1 Acre to the Plaintiff who, in turn, would transfer the same to the purchaser of land parcel No Maragua/Ridge 525, to assuage his complaint as against the Plaintiff for purporting convey the suit property to the said purchaser.
 14. Charles Kanyingi Karina filed a Witness Statement dated 14th July, 2023 in support of the Defendants' case, and admitted to having entered into an agreement dated 15th July 2009, with the Plaintiff for the disposal of the suit land for the total purchase of Kshs.750,000/=. He further affirmed receipt of Kshs.400,000/=, from the Plaintiff. However, he asserted that he was not paid the balance of Kshs.350,000/=, by the Plaintiff by 31st October 2009, as covenanted.
 15. The 2nd Defendant also averred that thereafter the Plaintiff paid the sum of Kshs.14,560/=, via Mpesa to Charles Kanyingi Karina on 24th July 2022, and withheld Kshs.335,440/=, out of the entire agreed-upon purchase price for the suit property. He refuted the Plaintiff's claim to the effect that he was put in possession of the suit land in year 2009. Citing page 3 of the sale Agreement dated 15th July 2009, he asserted that possession could only take place upon transfer and which transfer never occurred.
 16. It was Charles Kanyingi Karina's further averment that the Plaintiff forcibly and stealthily gained access to the suit property in July 2021, by relocating his temporary structures erected on the land parcel No. Maragua Ridge/525, onto the suit property. Further, a water pan was constructed on the suit property in February 2023, by the National Irrigation Board, not by the Plaintiff.
 17. Moreover, that at the time of the transfer of the suit land to the 1st and 2nd Defendants in year 2022, Charles Kanyingi Karina was fully aware that the agreement dated 15th July 2009, had become unenforceable.
 18. It was further averred that the Plaintiff had shown the suit land to the agent of the purchaser of land parcel No Maragua Ridge/525, because the suit property has a better layout than both Maragua Ridge/524 and Maragua Ridge/526, thus attracting a higher price, and which the said purchaser treated as deceitful conduct.
 19. Further, that the Plaintiff sent emissaries to persuade Charles Kanyingi Karina to subdivide the suit land which he declined, hence the charge of obtaining money through false pretence brought against him by the Plaintiff. He also alleged that the Plaintiff reneged on an oral promise to pay Kshs.2 million to Charles Kanyingi Karina's out of the proceeds from the sale of Maragua Ridge/524 and Maragua Ridge/525.



20. It was further contended that the Plaintiff has occupied the suit land for not more than 2 years having planted his very first crops thereon on November 2022, and which crop failed. He added that the Plaintiff re-planted on the suit land in April 2023 for the second time. Charles Kanyingi Karina stated that one Samuel Maina Karina used to cultivate and use the suit property, and also engaged in bee-keeping and charcoal burning on the said property.
21. The said Charles Kanyingi Karina, urged the Court to grant an order of eviction against the Plaintiff as prayed in the Defendant's Counterclaim on grounds that the Plaintiff never completed payment of the purchase price.
22. A further Witness Statement in support of the Defendants' cause was filed by Samuel Maina Karina (DW3), who stated that he is a brother to Charles Kanyingi Karina, and used to utilize the suit property for subsistence farming, charcoal burning and bee keeping. He further stated that in year 2021, he noticed that the structures constructed on land parcel No Maragua Ridge/525, were demolished and constructed on the suit land whereupon he confronted one Kamau who was occupying the suit property and presented him before the local Chief.
23. That, the Plaintiff lodged a complaint against Charles Kanyingi Karina at Maragua Police Station with the intention to compel Charles Kanyingi Karina to transfer 1 Acre out of the suit property to the Plaintiff. Further, that the Plaintiff was in occupation of the suit property for not more than 2 years and not 13 years as claimed.
24. The parties erected to canvass the Originating Summons, by way of viva voce evidence, wherein the Plaintiff gave evidence for himself, and called two more witnesses. The Defendants gave evidence for themselves and did not call evidence.

The Plaintiff's Case

25. PW1 Geoffrey Gachugu Gachathi, adopted his Supporting Affidavit and Witness Statement both dated 23rd March 2023, as part of his evidence. He also adopted a Further Witness Statement dated 10th August, 2023, and produced a list of documents dated 17th March, 2023, as his exhibits marked P Exhibits 1-4.
26. It was his evidence that he is in occupation of the suit property which he purchased from Charles Kanyingi Karina, the father to 1st Defendant, and husband to the 2nd Defendant. That he has known Charles Kanyingi Karina since year 1994, when he started to live in Murang'a.
27. He relied on the Sale Agreement appearing on page 23 of his bundle of documents, which indicates that Charles Kanyingi Karina sold the suit property to Stephen Ndegwa Gachathi, a brother to PW1. That PW1 had requested his brother Stephen Ndegwa Gachathi, to act as his agent in the transaction conveying the suit land, and PW1 provided the money delivered to Charles Kanyingi Karina, being the purchase price in respect of the suit property.
28. Upon cross-examination by Mr. Mbuthia for the Defendants, PW1 reiterated that his brother Stephen Ndegwa Gachathi acted as his agent in the Sale Agreement dated 15th July 2009. Further, that the said Stephen Ndegwa Gachathi was prudent enough to ensure that the mentioned Sale Agreement was prepared by an Advocate.
29. PW1 admitted that the payment of Ksh.350,000/=, which was delivered by his agent and brother to Charles Kanyingi Karina was not made before an Advocate, and there is no acknowledgment of receipt with regard to the said payment. Referring to the MPESA statements appearing on pages 17 to 19 of the Defendants trial bundle, PW1 stated that they indicate that he paid the sum Kshs.14,560/=.



30. Further, PW1 testified that he run an alcohol distribution business known as Kigwa together with Charles Kanyingi Karina. He affirmed being the author of the undated, hand-written document appearing on pages 44 (a) and (b) of his trial bundle, and bearing his name wherein Charles Kanyingi Karina acknowledged receipt of Kshs.105,000/=, from the Plaintiff.
31. He admitted that the said document which is written in the first person is not mentioned in PW1's Witness Statement nor in PW1's Further trial bundle. He denied having written the stated document while at SAWA Lodge, and admitted that the document combined issues relating to the suit property and the business of Kigwa, which is alcohol distribution business, run jointly with Charles Kanyingi Karina. He further disclaimed knowledge of the fact that Charles Kanyingi Karina is semi-illiterate.
32. Further, PW1 admitted that he did possess any acknowledgment to demonstrate that he completed making payments in respect of the purchase of the suit property as indicated in the document appearing on pages 44 (a) and (b) of his trial bundle. He also admitted that the said document does not mention land parcel No 526, being the suit property, but refers to land parcel No 256.
33. It was his evidence that there are structures and a dam on the suit land, and that he erected the structures thereon , which are found on the suit property in year 2008, and not year 2021, but he did not include that information in his Witness Statement.
34. He also reiterated that the PW1 is the owner of land parcel Nos 524 and 525, adjoining the suit land, and he denied having demolished the structures situated on his land parcel in year 2021. That the dam located on the suit property was dug between years 2021 and 2022, but not in the month of February 2022, and that the said dam was dug by the government, not by PW1.
35. He also testified that he undertook a valuation of the mentioned dam, as it is situated on his land, and admitted to not having indicated the dates when he erected the structures located on the suit property in his Witness Statement. That he disposed land parcel numbers 524 and 525, for the sum of Kshs.10 million.
36. He further denied putting up hastily the structures found on the suit property in an attempt to grab the property from Charles Kanyingi Karina, with a view to later selling the said land.
37. On re-examination, PW1 testified that at the execution of the document appearing on page 44(a) of his bundle of documents, he had already delivered Kshs.700,000/=, to Charles Kanyingi Karina, and that he rendered Kshs.350,000/- between August and October 2009, and cleared the balance owed to Charles Kanyingi Karina, who confirmed the said payment in the handwritten document appearing on page 44(a) of the Plaintiff's bundle of documents.
38. He reiterated that the payment of Ksh.105,000/=, was to be made in PW1's favour by Charles Kanyingi Karina, out of the proceeds of their joint venture namely Kigwa, being in repayment of a loan advanced by PW1 to Charles Kanyingi Karina.
39. It was his further testimony that Charles Kanyingi Karina , sold three (3) parcels of land to PW1, being land parcel numbers 524, 525 and 526 (the suit land). That land parcel numbers 524 and 525, were registered in the name of PW1's brother Stephen Ndegwa, who sold the said land on behalf of PW1 for the price of Kshs.10 million.
40. He further testified that the dam situated on the suit property was constructed by the Government in year 2022, on PW1's request, without any protest being raised by Charles Kanyingi Karina. Further, that neither the Defendants herein nor Charles Kanyingi Karina sought to evict PW1 from the suit land.



41. PW2 Stephen Ndegwa Gachathi, adopted his Witness Statement dated 21st March 2023, as his evidence in chief, and he affirmed that he signed the Sale Agreement dated 15th July 2009, appearing on page 22 of the Plaintiff's bundle of documents. He also testified that he was present when Charles Kanyingi Karina ,signed the said document and, to whom he delivered payment as stated in the mentioned document.
42. It was his evidence that his brother namely, PW1 gave him the money which, in turn, he delivered to Charles Kanyingi Karina, being the purchase price in respect of the instant suit property. That PW1 started utilizing the suit land in year 2009, and that in year 2023, Charles Kanyingi Karina tried to evict PW1 from the suit property.
43. On cross-examination by Mr. Mbuthia for the Defendants, PW2 stated that he purchased land parcel Nos 524 and 525, in his capacity as a trustee for PW1. That he delivered the sum of Kshs.400,000/- to Charles Kanyingi Karina ,for and behalf of the Plaintiff who is his biological brother, after the sale agreement dated 15th July, 2009 was executed.
44. He also testified that subsequently, he received the sum of Ksh.350,000/=, from the Plaintiff being the remaining balance from the entire agreed-upon purchase price in respect of the suit land, which amount he delivered to the Vendor Charles Kanyingi Karina, therein, rendering the full payment.
45. Further, PW2 admitted that he did not record any acknowledgment of receipt in respect of said the sum of Ksh. 350,000/=. It was his further testimony that his brother (the Plaintiff) drafted an acknowledgment of receipt in respect of the amount Ksh.105,000/=:, which document is title No 256 was mentioned.
46. He also testified that it was not within his knowledge why land parcel No. 526, was mentioned the said document. That he acted as the Plaintiff's agent and was not a witness to the Plaintiff's handwritten document containing the figure of Ksh.105,000/-.
47. Further, PW2 added that it was during year 2021, when the Plaintiff established structures on the suit property for the very first time. That Samuel Maina is well-known to him, and is the brother to Charles Kanyingi Karina. He denied that the Samuel Maina, was ever a care-taker of the suit land. That there were beehives and subsistence crops planted on the suit property. That the Plaintiff was utilizing the suit land and did not enter thereon in preparation for the suit before the Court.
48. PW3 Elijah John Kahiga, testified and adopted his Witness Statement dated 10th August 2023, as part of his evidence in chief, and testified that he recognized the handwritten document appearing on pages 44(a) and (b) of the Plaintiff's bundle of documents. That he signed the said document as a witness, which document was signed by the Plaintiff and Charles Kanyingi Karina in his presence, at the Plaintiff's office opposite SAWA Lodge.
49. On cross-examination by Mr. Mbuthia for the Defendants, PW3 admitted that the document appearing on pages 44(a) and (b) of the Plaintiff's bundle of documents is undated. He also confirmed that he previously worked as a banker and understands that the dating of documents is vital. That when he signed the referred document as a witness, he did realize that it was not dated.
50. It was his further testimony that he first came to Murang'a in 1980 and left in 1990, then returned in year 2012, and has since settled in Murang'a town, where he runs a shop. He also admitted that the Plaintiff is his Landlord., and that he did not sign the document dated year 2009, because he was not living in Murang'a at the time. He alleged that he signed the said document sometimes between years 2014 and 2015.



51. It was his further evidence that he witnessed the sum of Ksh.35,000/=, (thirty-five thousand) change hands between the Plaintiff and Charles Kanyingi Karina, but did not know for what purpose, and he also did not witness any handing over of the suit property. That he did not pay particular attention to title number 526, appearing in the Agreement dated year 2009. He confirmed that he found the said document already written, and it was not drafted in his (PW3's) presence. Further, that he did not recognize the hand-writing of the author of the foregoing document.
52. He also testified that the sale Agreement dated year 2009, was in respect of sums of money which the Plaintiff advanced to Charles Kanyingi Karina, as a loan. He denied making the claim that the said document was read out to Charles Kanyingi Karina. Further, he testified that he was only a witness to the exchange of Ksh.35,000/- (thirty-five thousand), he was not party to the aforesaid transaction and only wrote his name and signed the document in question. That the foregoing document was not brought to him for signature following the initiation of the present cause and the Plaintiff and Charles Kanyingi Karina, signed the document in his presence.
53. On re-examination, he reiterated that he was present when the parties signed the documents dated year 2009, and witnessed the exchange of Ksh.35,000/=.

The Defence Case

54. DW1 Lucy Nyambura Wambu, the 2nd Defendant adopted her Replying Affidavit dated 14th July, 2023, which contains a Counterclaim as her evidence in chief. In the said Counter- claim, he had sought for eviction of the Plaintiff from the suit property. She also adopted her Witness Statement as part of her evidence and also produced her List of Documents as exhibits, and were marked D Exhibits 1-8. The Further List of Documents dated 25th August, 2023 were produced and marked as D Exhibits 9-10.
55. On cross-examination by Mr. Waiganjo Gichuki for the Plaintiff, DW1 testified that she is well informed about the history of the suit property since the 1990s, and that she cultivates the said land once in a while. That the suit land adjoins two other parcels of land being land parcels Nos Maragua 524 & 525, which was initially owned by her husband Charles Kanyingi Karina.
56. She also testified that her husband later sold both parcels without her knowledge, and that the suit property is No 526. It was her further testimony that her husband sold the suit land in 2009, but the purchaser failed to render the full purchase price. Further, that she used to harvest green maize, beans, and charcoal from the said parcel of land between years 2011 and 2013.
57. Dw1, also testified that the Plaintiff is well known to her and in year 2021, she encountered one Kamau, who is known to be an employee of the Plaintiff on the suit property. That she used to see the Plaintiff's employees working on land parcel Nos Maragua 524 and 525, and in year 2022, her husband told her that he conveyed the suit property, but did not receive the entire purchase price. Further, that her husband never informed her about the amount which he sold the two parcels of land, Nos Maragua 524 and 525.
58. It was her evidence that she sent an emissary who demanded that Kamau (employee of the Plaintiff), leaves the suit land, and later, her husband and her brother-in-law Samuel Maina issued a demand to the Plaintiff to vacates the suit property, which demands were rebuffed by the Plaintiff herein.
59. She testified that the suit property was transferred to her name in year 2022, as a gift during which time KAMAU (employee of the Plaintiff), was cultivating the suit property measuring approximately 6 Acres. Further, her brother-in-law SAMUEL MAINA, previously cultivated a portion of the suit land in year 2009, not the Plaintiff. That the entire acreage of land parcel Nos 524, 525 & 526, was



- 16 Acres, and was transmitted to her husband by her father-in-law. Her husband later sub-divided the said land into three separate parcels.
60. Further, she testified that she witnessed the Plaintiff construct a dam on the said suit property, and fenced off the same in year 2022, and used to see the Plaintiff's workers cultivating the suit land in years 2021 and 2022, and that the Plaintiff has committed an act of wastage by constructing a dam on the said parcel of land, and he ought to be evicted therefrom.
 61. On re-examination by Mr. Mbuthia, DW1 reiterated that the Plaintiff did not enter the suit property in year 2009, that he built a cow shed therein in year 2021, and was not utilizing the property prior to year 2021.
 62. DW2 Charles Kanyingi Karina , adopted his Witness Statements dated 14th July, 2023 and 25th August,2023, as part of his evidence in chief, which statement reiterated what Dw1, had informed the court.
 63. On cross-examination by Mr. Waiganjo Gichuki, for the Plaintiff, he affirmed his ability to read and write. Further, he testified that the suit property which he inherited from his father was originally registered as No 31, prior to the sub-division, and that the said land to comprised of 16 Acres.
 64. Further, he testified that he sold the land parcels Nos 524, 525 and the suit property to the Plaintiff, and they executed an agreement for sale, disposing off the suit land, which he read, understood and appended his signature thereto. That he is conversant with the handwritten document appearing on page 44(a) of the Plaintiff's bundle of documents, and which document he recalled signing one night as they were promoting alcohol together with the Plaintiff.
 65. He also confirmed to having received Kshs.35,000/=, from the Plaintiff for the purpose of purchasing more alcohol for the joint venture, between the Plaintiff and himself. That Elijah Kahiga is well known to him being an employee of the bank, wherein DW2 was a customer.
 66. He also testified that the handwritten document appearing on page 44(a) of the Plaintiff's bundle of documents was not written at the Plaintiff's Office, but as SAWA Lodge. Further, that he never borrowed the sum of Kshs.70,000/=, from the Plaintiff, and that he sold the suit property to the Plaintiff for the sum of Kshs.750,000/=, but he did not deliver vacant possession of the said land to the Plaintiff.
 67. It was his further evidence that a dispute arose between the Plaintiff and himself ,which led him not to demand for the remaining balance of the purchase price. Further, that the Plaintiff filed a complaint at Maragua Police Station, that DW2 had obtained money from the Plaintiff using false pretences whereupon DW2 was summoned to answer to the said complaint.
 68. He also testified that he inherited the suit property from his father and planted Mango trees thereon, and he sold land parcel No 525 to the Plaintiff, who cultivates coffee therein and also utilized land parcel No 524, to grow cow feed. That he transferred the suit land in year 2022, because the Sale Agreement executed with the Plaintiff had expired thus unenforceable. He confirmed that he signed the document appearing on page 44(a) of the Plaintiff's bundle of documents sometimes in January 2015 or thereabout.
 69. It was his evidence that the hand-written document states that he sold 3 parcels of land to the Plaintiff who is is the maker of the said document which they signed at night, as they were promoting alcohol. That the Plaintiff was not utilizing the suit land.
 70. On re-examination, DW2 stated that he signed the document appearing on page 44(a) of the Plaintiff's bundle of documents in January 2015, while they were at SAWA Lodge. That the document was



written down by the Plaintiff, and was not read out to DW2, and that during the signing of the said document, they were promoting alcohol with the Plaintiff, and he did not discuss matters to do with land. That he signed the said document hurriedly, as he did not want people to see him receiving money from the Plaintiff.

71. DW3 Samuel Maina Karina, adopted his Witness Statement dated 14th July, 2023 as part of his evidence in chief, and reiterated what DW1& DW2 had said.
72. On cross-examination by Mr. Waiganjo Gichuki for the Plaintiff, DW3 testified that he inherited 17 Acres of land from his father while, DW2 inherited 16 Acres. That he has been cultivating the suit property since 1996, and that the Plaintiff entered the suit property for the first time in year 2021, and procured the construction of a dam thereon in year 2023, which dam was sunk by the Irrigation Board.
73. It was his further evidence that he planted maize and beans on the suit property, and upon harvesting the same, the Plaintiff entered unto the suit property, and start to utilise it. That he demanded to know from Kamau (an employee of the Plaintiff) why they had encroached on the suit property.
74. Further, that when he failed to get answers, he reported the Plaintiff's encroachment of the suit land to the area Chief, who summoned the Plaintiff to a meeting. That DW2, sub-divided his land and disposed land parcel Nos 524 and 525, without informing him (DW3). Further, that the Plaintiff's employee , one Kamau entered unto the suit land for the first time in or around April 2021, which previously used to be on land parcel Nos 524 and 525.
75. Dw1 testified that he asked Kamau why he had entered unto the suit land, and the said Kamau informed him that he was relying on what the Plaintiff had to him to do. He also testified that he lives in Murang'a Town, not on the suit land.
76. After the viva voce evidence, the court directed the parties to file and exchange written submissions, which directives were complied with. The said written submissions are summarized as below.

The Plaintiff's Submissions

77. The Plaintiff filed his written submissions dated 23rd May 2024, through Waiganjo Gichuki & Co Advocates, and relied on the document set out on page 44(1) of the Plaintiff's bundle of documents. The Plaintiff submitted that the said document constitutes sufficient evidence that DW2 acknowledged receipt of the entire purchase price and disposed the suit land to the Plaintiff. He urged the Court to infer that DW2 would not have signed the said document if Kshs.350,000/=, (three hundred and fifty thousand) remained unpaid by the Plaintiff.
78. On the issue of occupation of the suit land, the Plaintiff submitted that the he entered unto the suit land in or about 31st October 2009, upon delivery of the entire purchase price to DW2. Further, that it is not possible for one to enter into a parcel of land both stealthily and forcibly as contended in the Witness Statement of the 2nd Defendant dated 14th July 2023.
79. The Plaintiff while upholding that the contract disposing the suit property dated 15th July 2009, became statutorily-barred, void and unenforceable for want of the Land Control Board's consent, argued that he continued to possess the said land, which possession crystalized, and became adverse to the title of DW2, the registered proprietor. It was his further submissions that the evidence of DW1 reflected that she is a coached witness, hence unreliable. Further, the evidence of DW3 was shifty and not credible.
80. For this submissions, the Plaintiff relied on the holding of the Court in the case of *Alliaza V Saul* [2022] [KECA] 583 (KLR) to buttress the submission that the Court cannot rule in favour a Seller of land



who received the full purchase price, and later refused to apply for and/ or obtain the consent of the Land Control Board.

The Defendant's Submissions

81. The Defendants filed their written submissions dated 10th June 2024, through J.N. Mbuthia & Co Advocates, and submitted that the Plaintiff contradicted himself with respect to the date of entry into the suit land in that prayer 2 of his Plaintiff, he stated that he entered onto the suit property in July 2009, while the ground numbered (d) appearing on page 2 of his trial bundle gives the date of commencement of the Plaintiff's occupation as 31st October, 2009.
82. Further, that the Plaintiff's witness namely Stephen Ndegwa Gachathi, testified during the trial that the Plaintiff established structures on the suit property in year 2021 not in year 2009 as claimed by the Plaintiff.
83. Reliance was placed on the wording of paragraph 3 of the sale Agreement executed between the Plaintiff and DW2 which provides that: "the Purchaser shall take possession of the land transfer". It was argued that transfer was to take place on or before 31st October, 2009, and the aforesaid transfer never took place as the suit land was charged due to a loan.
84. Further, the Defendants relied on the holding of the Court in the cases of Joele Kipkoech V Rachel & 2 others [2018] eKLR; and, Wilson Kazungu Katana & Others V Salim Abdalla Bakshwein & Another [2015] eKLR to anchor the proposition that the Plaintiff failed to establish the elements of adverse possession.
85. The Defendants also submitted that the Plaintiff failed to establish that he paid fully the remainder of the purchase price amounting to Ksh.350,000/- to DW2. Further, that it was curious that the Plaintiff's agent and witness namely STEPHEN NDEGWA, found it prudent to utilize the services of Advocate for the purpose of drafting the Sale Agreement dated July 2009, and failed to record the delivery of Ksh.350,000/- to DW2, being the outstanding balance of the purchase price.
86. For the above submissions, the Defendants relied on the holding of the court in the case of Njeri Kimani (Suing in her capacity as the administratrix of the estate of Nasser Kimani Njoroge (Deceased) vs Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR, to support the argument that in a purchase scenario, adverse possession cannot crystalize until the outstanding balance is paid.
87. With regard the Defendant's Counterclaim, reliance was placed in the holding of the Court in the case of John Chumia V AG & Another [2019] eKLR; and, Stephen Makau Kanyia Vs Wilson Njeru Wega & 4 Others [2021] eKLR to support of the prayer for the sum of Kshs.2 million being General damages for trespass as the value of the suit property is Kshs.10 million.
88. Further, the Defendants distinguished the facts and claim in the case of Alliaza Vs Saul [2022] [KECA] 583 (KLR), which the Plaintiff had cited in his submissions, and argued that the Appellant in the above quoted case had rendered full payment and was given possession, and the Respondent sought to evict him from the land in contention only due to lack of a Land Control Board consent.
89. Further, the Defendants submitted that the contract relied upon by the Plaintiff was caught by limitation of actions, having been lodged 13 years following execution of the said contract, instead of the statutory period of 6 years, hence cannot anchor the Plaintiff's claim for a refund of the purchase price, which claim was raised for the first time in the Plaintiff's submissions. They referred to the determination of the Court in the case of Danson Muniu Njeru Vs William Kiptarbei Korir & 6 Others [2014] eKLR to underpin the said proposition.



90. The above are the pleadings, evidence adduced and this court has carefully considered the said Pleadings herein, the evidence adduced by the parties and the exhibits produced thereon and the rival written submissions, cited authorities and relevant provisions of law, and finds the issues for determination are as follows:-
- i. Whether the Plaintiff's suit is merited.
 - ii. Who shall bear the costs of the suit?
 - iii. Whether the Defendants' Counterclaim is merited.
 - iv. Who shall bear the costs of the Counterclaim?
 - i). Whether the Plaintiff's suit is merited.
91. The Plaintiff's suit is founded on the doctrine of adverse possession, wherein he contended and submitted that he has been in exclusive possession of the suit property since 31st October 2009, and that he had carried out extensive developments thereon as attested to by the valuation report dated 18th January 2023, which he produced as exhibit. Further, that the vendor of the suit land Charles Kanyingi Karina, transferred the suit property to the Defendants herein on 4th October, 2022 for no valuable consideration; The Plaintiff had also contended that he had been in occupation of the suit property for 13 years at the time; thereby, rendering the purported transfer insubstantial.
92. The law on adverse possession is provided for under the *Limitation of Actions Act*, Cap 22 Laws of Kenya. Section 7 of the said Act stipulates as follows:
- “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 “(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”.
93. In the case of Samuel Kihamba v Mary Mbaisi [2015] eKLR Kisumu Civil Appeal No. 27 of 2013, 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”.

94. Further, the Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:

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

95. Again, in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR, the Court of Appeal held that a person claiming for ownership through adverse possession, he needs to establish the following;

- (a) On what date he came into possession?
- (b) What was the nature of his possession?
- (c) Whether the fact of his possession was known to the other party?
- (d) For how long his possession has continued and
- (e) That the possession was open and undisturbed for the requisite 12 years.

96. Further, in the case of Regina Wanjiru Mwago & another v Lucy Wairimu Gichuhi & 2 others [2019] eKLR, the Court held as follows:

“For a party to succeed in summons for Adverse Possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an Adverse Possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in Court evidence to prove that the suit land where he/she is claiming Adverse Possession indeed belongs to the Defendant.”

97. The Plaintiff herein has claimed that he entered unto the suit property in year 2009, which allegation was disputed by the Defendants and their witness, DW3, who was the initial registered owner of the suit land. On their parts. The Defendants contended and submitted that the Plaintiff entered unto the suit land in year 2021. In his evidence, DW3 testified that the Plaintiff entered unto the suit property sometimes in April 2021, soon after DW3 had harvested maize and beans from the suit land.

98. During cross-examination, PW2 testified that the Plaintiff had established a Mabati (iron sheets) structure on the suit land, which served as a home, and this structure was constructed on land parcel No 525, as well as a cow-shed, chicken coup and chicken wire; which structures the Plaintiff later uprooted and migrated or transferred to parcel number 526 (the suit land).

99. It is noteworthy that PW2 was entrusted by the Plaintiff with the purchase of not only of the suit land from DW2, but also with the conveyance of land parcels Nos 524 and 525, which the Plaintiff, by his own admission, subsequently disposed them off for the sum of Kshs.10 million. In the premises, the Court finds and holds that the evidence of PW2 regarding the Plaintiff’s entry onto the suit property to be credible, because PW2 was a key participant in the (incomplete) process of acquiring of the same.

100. Further, there was no discernible motive or incentive for PW2 to corroborate the Defendants’ evidence to the effect that the Plaintiff entered unto the suit land in year 2021, and was not present therein as



from year 2009 as claimed. Consequently, the Court finds and holds that the Plaintiff has failed to demonstrate that he entered unto the suit property in year 2009.

101. The Court has carefully perused the undated, handwritten document which document appears on page 44(a) of the Plaintiff's bundle of documents, relied upon by the Plaintiff, and which the Plaintiff submitted that it constituted adequate evidence to prove that DW3 acknowledged receipt of full payment of the purchase price of the suit property, and the said document was allegedly crafted by the Plaintiff in his own hand. On the first half of the first page, DW2 acknowledges receipt of Kshs.35,000/=, on the material day in addition to Kshs.70,000/=, which had had allegedly previously received from the Plaintiff, which amount of money was expressed to be repaid from their Joint Venture business.
102. Further, in the remainder of the document, DW2 acknowledged receipt of full payment in respect of three parcels of land sold to the Plaintiff, and whose title numbers are not listed therein. The said document, therefore, presents two issues; these being the advancing of a sum of Ksh.105,000,- by the Plaintiff to DW2 for business purposes, and an acknowledgment by the DW2, that he sold three unnamed parcels of land to the Plaintiff, and had received the entire consideration due.
103. Upon a careful evaluation of the above referred undated document, this Court is satisfied that the suit land is not mentioned in the said document, and it is not clear that the money paid was paid towards payment of the purchase price for the three plots. The said document merely acknowledges the receipt of monies in respect of a transaction to dispose land, which transaction had occurred in the past, hence the court finds that the same cannot constitute a sale agreement as indicated on its title. In addition, the document is authored solely by the Plaintiff, who is an interested party in the transaction. Taking to account the multiple shortcomings of the above referred undated document, the Court is persuaded that the said document is incapable of conveying the suit land.
104. The Plaintiff's claim over the suit land is founded upon purchase of the same from DW2, and payment of the entire purchase price to the Vendor thereof being DW2. It is trite that in claims of adverse possession based on a purchase scenario, time begins to runs after payment of the final instalment to the seller. In the case of *Sospeter Wanyoike Vs Waithaka Kahiri (1979) K.L.R 236*, the Court held as follows:

“Dismissing the action, that as payment of the purchase price by instalments, after the date of the agreement recognized the defendant's title to the land the period of limitation for adverse possession did not begin to run until the last instalment was paid (10 March 1969) the plaintiff's action for declaration (commenced on 14th December 1977) was pre-mature; furthermore the action filed in 1974 had interrupted the period of adverse possession”.
105. Similarly, the Court in *Samson B. Khwatenge Vs Phillip W. Silungi (2018) e K.L.R* held as follows:

“It is trite law a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provision of an agreement of sale or lease or otherwise ...the above principles of law apply in this case since the entry was with the permission of the owner. Secondly, the full purchase price was not paid and consequently no time for adverse possession could run”.
106. The Court is equally satisfied that the document contained on page 44(a) of the Plaintiff's bundle of documents, fails to establish the Plaintiff's claim that he delivered and / or paid in full Kshs.350,000/- to DW2 being the outstanding balance of the purchase price. In the premises, time did not begin to run for purposes of adverse possession.



ii). Who shall bear the costs of the Plaintiff’s suit?

107. In light of the Court’s finding and holding as detailed hereinabove, the Defendants are the successful party in the suit and thus entitled to the costs of the suit pursuant to the provisions of Section 27 of the *Civil Procedure Act*. It is the holding of the Court that no special factors have arisen in the suit herein to warrant the denial of the deserved costs to the Defendants herein. Accordingly, the Defendants are entitled the costs of the suit.

iii). Whether the Defendant’s Counterclaim is merited

108. The Plaintiff admitted that he is in possession and occupation of the suit land and he cultivates the said land. Further, having acknowledged that he took possession of the suit property and that during his occupation of the said, the Plaintiff procured the construction of a dam thereon, and which construction, DW1 considered an act of wastage of her property, then the court finds that the said action amounts to trespass.

109. The Court has found and held that the Plaintiff has not established any ownership rights over the suit land. It is not in doubt that the Defendants herein are the registered proprietors of the suit property.

110. Section 24 (a) of the *Land Registration Act* stipulates as follows:

“Subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”

111. In the case of Joseph N.K. Arap Ng’ok V Moiyo Ole Keiwua & 4 Others [1997] eKLR, the Court of Appeal held that:

“Once one is registered as an owner of land, he has absolute and indefeasible title which can only be challenged on grounds of fraud or misrepresentation and such is the sanctity of the title bestowed upon the title holder.”

112. The Court having found and held that the Plaintiff lacked any lawful authority to enter unto, and occupy the suit property, accordingly finds and holds that his presence thereon translates to being a trespasser, and the Defendants are entitled to compensation due to the Plaintiff’s said trespass. In the case of Duncan Nderitu Ndegwa –vs- KPLC & Another [2013] eKLR, the Court reasoned as follows:

“...once a trespass to land is established, it is actionable perse and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of kshs. 100,000/= as compensation of the plaintiff’s denial of the right to use and enjoy the suit property occasioned by the 1st and 2nd defendants trespass.”

113. Consequently, this finds and holds that the Defendants Counter-claim and as contained in the Para 18 of Replying Affidavit is merited, and is the said Counter- claim is allowed in the terms of the prayers Nos (I) and (II) in the Defendants’ Counterclaim dated 14th July, 2023.

114. The Court is further persuaded that the Plaintiff procured the construction of a dam on the suit land without the permission of the registered owners, who have regarded the presence of the said dam as an act of wastage on their land.

115. The Court, taking cognizance of the value of the suit property as set out in the Valuation Report appearing on pages 20 to 40 of the Defendants’ bundle of documents which was prepared by Shukri



Osman Consulting Associates, awards the Defendants a sum of Kshs.2 million, as General damages for trespass, which damages are to be borne by the Plaintiff herein.

116. Having carefully considered and analyzed the available, this court finds and holds that the Plaintiff has failed to prove his case as against the Defendants herein on the required standard of balance of probabilities. For the above reasons, this court finds the Plaintiff's suit is not merited and is dismissed entirely with costs to the Defendants.
117. Further, this court finds that the Defendants have proved their Counter-claim on the required standard, and for the said reasons, the Defendants' Counter-claim is allowed in terms of prayers Nos I & ii, with costs to be borne by the Plaintiff.
118. Further, the Defendants are awarded General Damages of ksh 2000,000/= for trespass. This General damages is payable to the Defendants by the Plaintiff, together with interests at court's rate from the date of this Judgement until payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 29TH DAY OF JANUARY, 2025.

L. GACHERU

JUDGE

29/01/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant

N/A for the Plaintiff (though aware of this Judgement date)

Ms Wangui Wangai H/B for Mr J.N Mbuthia for 1st & 2nd Defendants

L. GACHERU

JUDGE

29/01/2025

