



**Kamunge & 2 others v Waweru & another (Sued as the Administrators  
of the Estate of Mary Wanja Waweru) (Environment & Land Case  
E001 of 2020) [2023] KEELC 19009 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19009 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E001 OF 2020**

**YM ANGIMA, J**

**JULY 27, 2023**

**BETWEEN**

**JOHN WAWERU KAMUNGE ..... 1<sup>ST</sup> PLAINTIFF**

**BENARD NJOROGE CHEGE ..... 2<sup>ND</sup> PLAINTIFF**

**JACOB NDEGWA KIMANI ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PHILIP NGUITIKA WAWERU ..... 1<sup>ST</sup> DEFENDANT**

**MOSES MUKUNDI WAWERU ..... 2<sup>ND</sup> DEFENDANT**

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF MARY WANJA  
WAWERU**

**JUDGMENT**

**A. The Plaintiff's Claim**

1. By a plaint dated 07.10.2020 the Plaintiff sought the following reliefs against the Defendants who were administration of the estate of their late mother, Mary Waweru (the deceased) seeking the following reliefs:
  - a. A declaration that the Defendants' interest as administrators of the estate of Mary Wanja Waweru in title No. Nyandrua/Karati/1834 extinguished in law and the said property is not available for distribution as part of the estate of Mary Wanja Waweru by the Defendants.



- b. A declaration that the Defendants herein cannot recover title No. Nyandarua/Karati/1834 from the Plaintiffs under Sections 7 and 17 of the [Limitation of Actions Act](#).
  - c. A declaration that the Plaintiffs are entitled to be registered as proprietors of the individual portions of Nyandarua/Karati/1834 occupied by each of them individually.
  - d. Costs of suit.
2. The basis of the suit was that on diverse dates between 1987 and 1995 the Plaintiffs entered and occupied various portions of the Title No. Nyandarua/Karati/1834 (the suit property) and that they had continued in uninterrupted possession thereof for periods exceeding 12 years in consequence whereof the Defendants' right of recovery thereof had become extinguished by operation of law under the [Limitation of Actions Act](#) (LAA) (Cap. 22). The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs claimed to have occupied 1.5 acres, 0.7 acres and 0.5 acres respectively of the suit property without any interruption or eviction by the deceased who was the registered proprietor thereof with effect from 04.10.2004.

#### **B. The Defendants' Defence and Counterclaim**

3. The Defendants filed a defence and counterclaim dated 17.04.2021 in response to the suit. By their defence, the Defendants denied the Plaintiffs' claim in its entirety and put them to strict proof thereof. It was denied that the Plaintiffs had been in occupation of any portions of the suit property for a period in excess of 12 years and it was denied that the right of the estate of the deceased to recover the said land had been extinguished under the law of limitation of actions. It was contended that the Plaintiffs took occupation of the disputed land in 2012.
4. By their counterclaim, the Defendants reiterated the contents of their defence and stated that the Plaintiffs had previously filed Naivasha SPMCC No. 188 of 1998 (the Naivasha Case) against their father, Geoffrey Nguituka Waweru, seeking acquisition of the said portions of land and obtained a decree in their favour on 27.03.2000. It was pleaded that the Plaintiffs having failed to enforce the decree for a period of at least 12 years from the date it was passed the same had become statute-barred under the [Limitation of Actions Act](#).
5. The Defendants further pleaded that during her lifetime the deceased had sued the Plaintiffs in Nakuru CMCC No. 853 of 2008 (the Nakuru Case) seeking their eviction from the suit property. It was asserted that, unfortunately, the deceased died before her suit could be concluded and it consequently abated on 30.07.2014.
6. The Defendants also pleaded that they had since obtained a grant in Naivasha High Court Succession Cause No. 155 of 2015 (the Succession Cause) for distribution of the assets of the deceased amongst the beneficiaries and the Plaintiffs' protest and objection to confirmation was rejected by the court in that cause.
7. It was the Defendants' contention that the Plaintiffs had unlawfully caused a restriction to be registered against the suit property on 04.11.2004 pending the hearing and determination of the Naivasha Case. They contended that since the Naivasha Case was concluded a long time ago then the restriction ought to be removed. The Defendants further considered the Plaintiffs to be trespassers on the suit property hence they sought mesne profits against them at the rate of Kshs. 10,000/= per acre per year.



8. As a consequence, the Defendants sought the following reliefs against the Plaintiffs in their counterclaim:
  - a. A declaration that the Plaintiffs (now Defendants) are trespassers in Title Number Nyandarua/Karati/1834.
  - b. An order of eviction do issue to evict the Plaintiffs (now Defendants) from Title Number Nyandarua/Karati/1834.
  - c. Mesne profits.
  - d. The restriction registered on Title Number Nyandarua/Karati/1834 be removed.
  - e. Costs of this suit.

### **C. The Plaintiff's Reply and Defence to Counterclaim**

9. The Plaintiffs filed a reply to defence and defence to counterclaim dated 03.05.2021. By their reply to defence, the Plaintiffs joined issue upon the Defendants' defence and reiterated the contents of the plaint.
10. By their defence to counterclaim, they denied the contents of the counterclaim and reiterated the contents of their defence. It was contended that the deceased and her husband, Geoffrey Waweru, had hatched a scheme to defeat execution of the decree in the Naivasha Case by having the suit property registered in the name of the deceased.
11. The Plaintiffs admitted the filing of the Nakuru Case by the deceased and contended that since the suit had abated and the deceased had failed to evict them from the suit property even upon obtaining registration then they had acquired legal rights under Sections 7 and 17 of the LAA. The Plaintiffs further pleaded that the instant counterclaim for recovery of the suit property on behalf of the estate of the deceased was time-barred. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs further denied that they took possession of the portions of land claimed in 2012 and asserted that they took possession in 1987, 1995 and 1992 respectively. The Plaintiffs consequently prayed for dismissal of the counterclaim with costs.

### **D. Summary of Evidence at the Trial**

#### **a. The Plaintiffs' Evidence**

12. At the hearing hereof, each of the 3 Plaintiffs testified at the trial on their own behalf. They all adopted their respective witness statements dated 07.10.2020 as their evidence in-chief. They also called 2 additional witnesses (PW4 & PW5) who testified on their behalf to the effect that they had acquired their respective portions of land through purchase from the deceased's husband and that they had been in occupation for a long time.
13. The gist of the Plaintiffs' case was that they had been in continuous and exclusive occupation of their respective portions of land for over 12 years without any interruption by the deceased who was the registered proprietor with effect from 2004. It was contended that although the deceased had filed the Nakuru Case seeking their eviction the said suit was never prosecuted by the administrators of her estate as a result of which it was declared as having abated.



## **b. The Defendants' Evidence**

14. The 1<sup>st</sup> Defendant testified at the trial on his own behalf and on behalf of the 2<sup>nd</sup> Defendant who was his co-administrator of the estate of the deceased. He adopted the contents of his witness statement dated 17.04.2021 as his evidence in-chief. He also produced the documents listed in the Defendants' list of documents as exhibits. During cross-examination, he conceded that the Plaintiffs were still in occupation as at the time of trial but stated that he did not know when they took possession.

## **E. Directions on Submissions**

15. Upon conclusion of the trial, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on 03.05.2023 whereas the Defendants' submissions were filed on 30.05.2023.

## **F. Issues for Determination**

16. The court has noted from the record that the parties did not file an agreed statement of issues. They filed separate issues. In the premises, the court shall frame the issues for determination as provided for under the Civil Procedure Rules. Under Order 15 rule 2 of the Civil Procedure Rules, 2010, the court may frame issues from any of the following:
- a. The allegations contained in the pleadings or in answers to interrogatories.
  - b. The allegations contained in sworn statements made by or on behalf of the parties.
  - c. The contents of documents produced by the parties.
17. The court has considered the pleadings, evidence and documents on record in this matter. The court is of the opinion that the following questions arise for determination herein:
- a. Whether the Plaintiffs have proved their claim to the required standard.
  - b. Whether the Defendants have proved their counterclaim to the required standard.
  - c. Whether the Plaintiffs are entitled to the reliefs sought in the suit.
  - d. Whether the Defendants are entitled to the reliefs sought in the counterclaim.
  - e. Who shall bear costs of the suit and the counterclaim.

## **G. Analysis and Determination**

### **a. Whether the Plaintiffs have proved their claim to the required standard**

18. The court has considered the material and submissions on record on this issue. It is evident from the material on record that the Plaintiffs were not seeking to enforce the land sale agreements they entered into with the deceased's husband. They were also not seeking enforcement of the decree they obtained in their favour in the Naivasha case. The pleadings and evidence on record shows that the Plaintiffs were seeking adverse possession of their portions of land because they pleaded that the Defendants' right to recovery was statute-barred under Sections 7 and 17 of the LAA. The Plaintiffs were also seeking a declaration to the effect that they were entitled to be registered as proprietors of the respective portions of land they were occupying. The court is not aware of any other claim based upon Sections 7 and



- 17 of LAA which is not a claim for adverse possession. The equitable remedy of trust is not usually founded on the LAA.
19. Be that as it may, the Plaintiffs relied upon the Court of Appeal decision of *Macharia Mwangi Maina & 87 Others -vs- Davidson Mwangi Kagiri* [2014] eKLR in support of their claim. It must be remembered that the said decision concerned the application of the doctrine of trust to give effect to sale agreements which the High Court had declared null, void and unenforceable for lack of consent of the Land Control Board (LCB). The said decision also recognized the rights of persons in actual possession of land as overriding interests.
20. The elements of adverse possession were summarized in the case of *Kasuve –vs- Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:
- “...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land....”
21. Similarly, in the case of *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:
- “At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* [1900]1 Ch.19, 21.”
22. There was no serious dispute at the trial that the Plaintiffs have been in possession and occupation of the claimed portions of land for a very long period of time. The Plaintiffs claimed to have taken possession between 1987 and 1995 whereas the Defendants contended that they took possession in 2012. The court has noted that in paragraph 4 of the plaint which the deceased filed in the Nakuru Case, she pleaded that the Plaintiffs had entered the suit property in 1998. The court has further noted that although DW1 stated in cross-examination that he did not know when the Plaintiffs took possession he conceded that they had been in possession since the year the deceased was issued with a title deed in 2004.
23. The court is satisfied on the basis of the evidence on record that the Plaintiffs have been in occupation of the claimed portions of land since at least 1998 when the deceased claimed that they entered the suit property illegally and without lawful justification. However, since the deceased obtained registration of the suit property in 2004 the limitation period shall be reckoned from the date of registration. The fact that the decree in the Naivasha Case became time-barred has really no bearing on the instant suit since the Plaintiffs have no claim against the husband of the deceased who was said to have sold the claimed portions of land to them.



24. There is no doubt that both the deceased and the Defendants considered the Plaintiffs to be trespassers on the suit property. That should be a clear indication that the Plaintiffs' possession has been without the consent or permission of the true owner. The evidence on record also shows that the Plaintiffs have constructed houses and settled on the claimed portions of land. They have simply been utilizing the claimed portions as their own land in disregard of the proprietary rights of the registered owner.
25. The only issue which is in dispute among the parties is whether the Plaintiffs' possession and occupation was ever interrupted in the legal sense. The Defendants submitted that the Plaintiffs' possession was interrupted when the deceased filed the Nakuru Case in 2008 until 2014 when the claim abated. The Defendants cited the case of *Kuria Kiarie & 2 Others -vs- Sammy Mugeru* [2018] eKLR and *Githu -vs- Ndeete* [1980] eKLR in support of the submission.
26. The Plaintiffs on their part contended that there was no interruption of possession and there was no stoppage of the limitation period by the filing of the Nakuru Case since that suit abated by operation of law upon the demise of the deceased. It was contended that upon abatement the parties were placed in the same position they were in before the filing of the suit. The Plaintiffs cited the case of *Lilian Njeri Muranja Mahinda v Virginia Nyambura Ndiba & Another* [2014] eKLR and the case of *Donald Osewe Oluoch v Kenya Airways Limited* [2017] eKLR in support of their submissions.
27. The court is of the opinion that the Donald Osewe Oluoch Case is distinguishable from the facts and circumstances obtaining in the instant suit. The respondent in that case had filed a suit against the appellant before the wrong court (High Court) and by the time it eventually filed the suit before the right court (ELRC) the claim was already time barred under the LAA. The Court of Appeal rightly held that the limitation period did not stop running while the Respondent was pursuing its claim before the wrong court hence it could not be excused for filing its claim before the right court out of time.
28. The court is, however, persuaded by the decision of the High Court in the Lilian Njeri Muranja Mahinda Case (supra) whereby it was held that a suit which is withdrawn, discontinued or dismissed for want of prosecution cannot stop time from running under the LAA. It was further held that it is only a suit which is prosecuted which can stop time from running under the LAA. Justice L. Onguto held, inter alia, that:

“For two reasons, I would not uphold that contention. Firstly, it would be stretching the law of limitation for one to argue that once a suit is filed time ceases to run. The only rider to a Plaintiff being allowed to file another suit if the original suit is dismissed for want of prosecution is if the action is still within the limitation period. Certainly, if this were not so then any suit filed would mean time begun to run on the filing of the suit. Effectively, time would never stop. Secondly, I hold the view that merely bringing a suit does not stop statutory periods from running. If the suit is prosecuted of course time stops to run as the action is complete. If the suit is withdrawn or discontinued then, a fortiori, the parties revert to the same position as if the suit had never been filed. The same position would obtain where a suit is dismissed for want of prosecution. That means that time never stops running by the mere filing of the suit. It was counting.”
29. This court also takes the view that a suit which can effectively stop time from running is one which has been or is being prosecuted. A suit which has been discontinued or dismissed for want of prosecution cannot do. By analogy of reasoning, a suit which has been abandoned or which has abated cannot stop time from running. The reason why the filing and prosecution of a suit is deemed to stop the running of the limitation period is because the owner of the land is deemed to have woken up to enforce his



proprietary right by seeking recovery of his land. So, if he afterwards withdraws or abandons the suit, he cannot be said to be still enforcing his right of seeking recovery. Similarly, if he dies during the pendency of the suit and his legal representatives neglect to pursue the claim by seeking substitution and revival of the suit then the claim would simply abate. A claim which has abated cannot seek the enforcement of the rights of the owner.

30. The court is thus of the opinion that the filing of the Nakuru Case which ultimately abated could not stop the running of time under the LAA and it could not be said to have interrupted the Plaintiffs' possession of the claimed portions of land. The court is of the view that upon abatement the parties were simply taken back to the positions they were in before the filing of the suit by the deceased. In the premises, the court finds and holds that the Plaintiffs' claim for adverse possession crystallized in 2016, that is, 12 years after the deceased because the registered owner of the suit property.
31. In the circumstances, the court is satisfied that the Plaintiffs have demonstrated their claim for adverse possession of the claimed portions of land to the required standard. The court is satisfied that the Defendants as legal representatives of the deceased are time-barred under Sections 7 and Section 17 of the LAA from seeking recovery of the suit property.
32. The court has considered the material on record against the Plaintiffs' claim for an equitable remedy in the nature of trust. The court agrees with the Plaintiffs' submissions that doctrines of equity are applicable by virtue of Articles 10 and 159 of *the Constitution* of Kenya, 2010 as was applied in the Macharia Mwangi Maina & 87 Others Case. The doctrine of constructive trust was also applied in the more recent case of *Aliaza v Saul* (Civil Appeal 134 of 2017) [2022] KECA 583 (KLR) (24 June, 2022) (Judgment) where the Court of Appeal stated that:

“Contrary to the submission by the respondent, in the face of these constitutional provisions, the fact that the appellant had not pleaded a constructive trust in his counterclaim does not preclude this court from inferring such a trust...”
33. The court is further of the opinion that a claim for adverse possession is not inconsistent with proceedings for confirmation of grant in the succession cause. A claim for adverse possession can be an overriding interest within the meaning of Section 28(h) of the *Land Registration Act*, 2012 and rights acquired or in the process of acquisition under any law relating to limitation of actions. It is a right which runs with the land and which need not be noted in the land register. Any subsequent owner, including a beneficiary by virtue of success proceedings, takes such land subject to the overriding interest.
34. The above notwithstanding, the court is of the opinion that there was no claim by the Plaintiffs against the deceased's husband who was the vendor. The suit herein is solely directed at the deceased hence the court is not at liberty to adjudicate a claim against a person who is not a party to the proceedings.

#### **b. Whether the Defendants have proved their counterclaim to the required standard**

35. The Defendants sought recovery of the suit property as administrators of the estate of the deceased. They also sought mesne profits and a declaration that the Plaintiffs were trespassers on the suit property. The Plaintiffs submitted that the counterclaim was time-barred under Sections 7 and 17 of the LAA. The Defendants contended that although the deceased was registered as proprietor of the suit property on 04.10.2004 time stopped running when she filed the Nakuru Case in 2008. It was further submitted that time started running again on 10.08.2014 when the said suit abated. It was thus contended that none of the periods above constituted 12 years in order to bar recovery of the suit property.



36. The court has already found earlier in the judgment that the Defendants' claim for recovery of the suit property is time-barred on account of Section 7 of the LAA. The court has further found and held that the filing of the Nakuru case which ultimately abated could not stop time from running since it was never prosecuted to conclusion. If abortive proceedings were to be accepted as effective in stopping the running of time then nothing would stop a mischievous land owner from filing and withdrawing a suit for recovery of his land every 11 years just to prevent its occupiers from ever succeeding in a claim for adverse possession.
37. The court does not accept the Defendants' submissions that their counterclaim is not a fresh suit within the meaning of Order 24 rule 7 of the Civil Procedure Rules. The court is of the view that a counterclaim is a suit to all intents and purposes save that it is usually filed by a Defendant who has been sued. It is in the nature of a cross-suit or cross-claim. The distinction the Defendants are trying to create between a suit and counterclaim is merely pedantic.
38. The court has considered the Defendants' claim that the Plaintiffs' claim was a challenge to the issue of distribution of the estate of the deceased in the Succession Cause. It was submitted that the Plaintiffs' claim was res judicata because their protest in confirmation proceedings was dismissed. The court is of the view that the Plaintiffs' claim for adverse possession in the instant suit is independent of any claim they may have had before the Succession Court. Their protest in the succession cause was not based upon Sections 7 and 17 of the LAA. The court is of the opinion that a person who fails to prove his claim as a beneficiary or creditor of an estate in succession proceedings is not precluded from bringing a claim for adverse possession under the LAA. Consequently, the issue of res judicata cannot arise in the circumstances.
39. As indicated before, nothing really arises out of the judgment and decree issued in the Naivasha Case between the Plaintiffs and the deceased's husband. That decree died a natural death upon expiration of 12 years from the date it was passed. The Plaintiffs have not sought its enforcement in the instant suit and the judgment debtor in that suit is not a party to the instant suit.

#### **c. Whether the Plaintiffs are entitled to the reliefs sought in the suit**

40. The court has already found that the Plaintiffs have proved their suit for adverse possession of the claimed portions of the suit property. The court has also found that the Defendants' counterclaim for recovery of the suit property is time-barred under the LAA. It would, therefore, follow that the Plaintiffs are entitled to the reliefs sought in the suit.

#### **a. Whether the Defendants are entitled to the reliefs sought in the counterclaim**

41. The court has found and held that the Defendants' counterclaim for recovery of the suit property is time-barred under the LAA. It would, therefore, follow that the Defendants are not entitled to the reliefs sought in their counterclaim, or any one of them. The court is, however, inclined to order removal of the restriction on the suit property not for the benefit of the Defendants but for the purpose of registration of the claimed portions of land in favor of the Plaintiffs.

#### **b. Who shall bear costs of the suit and the counterclaim**

42. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA



287. The court finds no good reason why the Plaintiffs, as the successful parties, should be deprived of the costs of the action. Accordingly, the Plaintiffs shall be awarded costs of the suit and counterclaim.

#### **H. Conclusion and Disposal Orders**

43. The upshot of the foregoing is that the court finds that the Plaintiffs have proved their suit against the Defendants to the required standard. The court also finds that the Defendants have failed to prove their counterclaim to the required standard. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

- a. A declaration be and is hereby made that the Defendants' interest as administrators of the estate of Mary Waweru in the 3 portions occupied by the Plaintiffs in Title No. Nyandarua/Karati/1834 has been extinguished in law under Sections 7 and 17 of the [Limitation of Actions Act](#).
- b. A declaration be and is hereby made that the Defendants cannot recover the 3 portions occupied by the Plaintiffs in Title No. Nyandarua/Karati/1834 on account of Sections 7 and 17 of the [Limitation of Actions Act](#).
- c. A declaration be and is hereby made that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are entitled to be registered as proprietors of the portions of 1.5 acres, 0.7 acres and 0.5 acres respectively which they occupy in Title No. Nyandarua/Karati/1834.
- d. The Land Registrar – Nyandarua shall lift the restriction entered against such property only for the purpose of registering the declared interest of the Plaintiffs.
- e. The Defendants' counterclaim be and is hereby dismissed.
- f. The Plaintiffs are hereby awarded costs of the suit and the counterclaim.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 27TH DAY OF JULY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

**Ms. Wangare for the Plaintiffs**

**Mr. Mutonyi for the Defendants**

**C/A - Carol**

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**Y. M. ANGIMA**

**JUDGE**

