



Isaiah (Suing on her Behalf and on Behalf of the Following other Persons:- Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndung’u Kibaara & Willy Owiso Okoth Holy Trinity Church in Africa Through its Registered Trustees) v Kimani (Sued as the Legal Representative and Administrator of the Estate of the Late Kimani Munga Ndonga) (Environment & Land Case 280 of 2018) [2023] KEELC 19921 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 280 OF 2018
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

MIRIAM MUTHINI ISAIAH (SUING ON HER BEHALF AND ON BEHALF OF THE FOLLOWING OTHER PERSONS:- REGINA KEMUNTO NYAKUNDI, SAMUEL KIMANI MATHU, JOHANA NDUNG’U KIBAARA & WILLY OWISO OKOTH HOLY TRINITY CHURCH IN AFRICA THROUGH ITS REGISTERED TRUSTEES) PLAINTIFF

AND

MONICA WARUGURU KIMANI (SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF THE LATE KIMANI MUNGA NDONGA) DEFENDANT

JUDGMENT

1. The plaintiffs through the Originating Summons dated 16/08/2018 and filed on the same date prays for judgement against the defendant for the determination of the following questions:
 1. Have the plaintiffs (Miriam Muthini Isaiah(suing on her behalf and on behalf of Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndung’u Kibaara, Willy Owiso Okoth and Holy Trinity Church in Africa (through its registered trustees) been in adverse, quiet, peaceful, open, exclusive, continuous and uninterrupted use, possession and occupation of all that parcel of land known as Nakuru Municipality Block 29/849-Ronda measuring 0.1823 Hectares for a period in excess of a period of twelve years as at the time of filing this suit in court?
 2. That if the answer to question No. 1 above is in the affirmative have those plaintiffs (Miriam Muthini Isaiah(suing on her behalf and on behalf of Regina Kemunto Nyakundi, Samuel



Kimani Mathu, Johana Ndung’u Kibaara, Willy Owiso Okoth and Holy Trinity Church in Africa (through its registered trustees) acquired prescriptive rights over land parcel No. Nakuru Municipality Block 29/849-Ronda measuring 0.1823 hectares?

3. That if the answers to question numbers 1 and 2 above are in the affirmative have these plaintiffs (Miriam Muthini Isaiah(suing on her behalf and on behalf of Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndung’u Kibaara, Willy Owiso Okoth and Holy Trinity Church in Africa (through its registered trustees) ultimately acquired proprietorship rights of all that parcel of land known as Nakuru Municipality Block 29/849-Ronda measuring 0.1823 Hectares by way of adverse possession as against the defendant (Monica Waruguru Kimani(Sued as the legal representative and administrator of the Estate of the late Kimani Munga Ndonga(deceased) as per grant of letters of administration intestate issued to Monicah Waruguru Kimani on 15th December 2014, a certificate of confirmation of Grant issued on 28th June 2018 in Kericho High Court Succession Cause No. 113 of 2014 in the matter of the Estate of the late Kimani Munga Ndoga)?
 4. That should the registration of Kimani Munga Ndonga (now deceased) or the defendant herein Monica Waruguru Kimani (Should she cause herself to be so registered following the confirmation and rectified certificate of confirmation already issued to her in Kericho High Court Succession Cause No. 113 of 2014) as the proprietor or lessee of all that parcel of land known as Nakuru Municipality Block 29/849 -Ronda measuring 0.1823 Hectares be cancelled and in its stead, a fresh and new certificate of title /title deed of the very same parcel of land known as Nakuru Municipality Block 29/849 – Ronda measuring 0.1823 Hectares be issued in the names of the plaintiffs (Miriam Muthini Isaiah(suing on her behalf and on behalf of Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndung’u Kibaara, Willy Owiso Okoth and Holy Trinity Church in Africa (through its registered trustees) either jointly or severally depending on the area occupied, possessed, used and openly, exclusively and continuous, quietly and peacefully used, possessed and occupied for over twelve years now as the sole proprietors thereof?
 5. Have the plaintiffs (Miriam Muthini Isaiah(suing on her behalf and on behalf of Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndung’u Kibaara, Willy Owiso Okoth and Holy Trinity Church in Africa (through its registered trustees) jointly and or severally dispossessed the defendant as a legal representative and administrator of the estate of the late Kimani Munga Ndonga exclusive, quiet, peaceful, uninterrupted, continuous and open possession and use of all that parcel of land known as Nakuru Municipality Block 29/849 measuring 0.1823 hectares for a continuous and uninterrupted period in excess of twelve years prior to the date of filing this suit in court?
 6. Who should bear the costs of this suit?
2. The originating summons was supported by the sworn affidavit of Miriam Muthini Isaiah sworn on 16/08/2018. She deposed that land parcel No. Nakuru Municipality Block 29/849-Rhonda was registered in the name of the late Kimani Munga Ndonga; that the suit property was listed in the rectified certificate of confirmation of the grant given on 28/6/2018 as among the properties distributed to the defendant herein to hold in trust for herself and the beneficiaries mentioned therein; that the plaintiffs have been in possession of the suit property from the year 2005 for a period of over twelve years; that neither the defendant nor her husband have been in occupation of the suit property and they seek that the court makes a finding in their favour.



3. In response to the originating summons, the defendant filed a replying affidavit sworn on 25/09/2018 and filed on 26/09/2018. She deposed that she was the wife of the late Kimani Munga Ndonga who died on 8/12/2013; that she instituted succession proceedings at the High Court of Kenya in Kericho in Succession Cause No. 113 of 2014 where she was issued with a grant of letters of administration intestate; that she was later issued with a certificate of confirmation of grant; that she holds the properties of the deceased in trust for herself and for her children; that the suit property was among the properties that belonged to her late husband that were listed as being part of his estate; that her deceased husband had been issued with the title of the suit property on 26/10/2005 and had been in occupation; that by the year 2005, none of the plaintiffs were in the suit property as alleged; that since she and her family were mostly domiciled in Kericho town, they had allowed one of their neighbors to cultivate the land; that the said neighbor informed them that some people had trespassed onto the suit property; that her late husband tried to have the said people vacate the suit property but they declined; that it was only after the death of her husband in the year 2013 that she begun to actively pursue the matter; that she sought the assistance of the Chief and the trespassers together with the plaintiffs were summoned on 17/05/2017 to appear before the chief on 22/05/2017; that on the same day she put out a notice to vacate directed at the trespassers; that at the meeting before the chief, the plaintiffs and the trespassers were informed that the suit property belonged to her late husband; that she was informed that the trespassers claimed to have bought portions of the suit property from a person known as King'ori; that the plaintiffs and the other trespassers refused to vacate the suit property which necessitated the area chief to call several other meetings which were still in vain as they declined to vacate; that the occupation of the plaintiffs was not peaceful as there were disruptions and so their suit should be dismissed with costs.

Plaintiff's Evidence

4. Miriam Muthini Isaiah testified as PW1. She adopted her affidavit sworn on 16/8/2018 as part of her evidence and the exhibits to the said affidavit were produced as PExh.1 to PExh.7.
5. She testified that she occupies land parcel No. Rhonda Nakuru Municipality Block 29/849 measuring approximately 0.1823 Ha; that the land was registered in the name of Kimani Munga Ndonga; that as per exhibit 1, 2 and 3, the defendant Monica was given the land; that that they have been in occupation of the suit property since February 2005 to date; that the 6th defendant has built a church on the suit property; that PExh.7 shows their houses and trees on the suit property; that no one has ever interrupted their occupation of the suit property; that they have lived on the suit property continuously and in open possession to date; that none of them knew Kimani Ndonga up to the time of his demise; that when they took possession of the suit property, they found it vacant and there was no one tilling it; that they were summoned by the chief in the year 2017; that they went to see the chief on 22/07/2017; that they were informed that the suit property belonged to Kimani Ndonga; that the chief advised them to go and negotiate with the defendant; that since then, they have never been served with any notice to vacate; that the court should make a declaration that the title deed issued to Kimani Munga Ndonga be cancelled and a fresh one be issued since they have been in occupation of the suit property for a period of over twelve years.
6. Upon cross-examination, she confirmed that when they entered the suit property, it was subdivided; that they had bought it through an agent known as Kuira Commercial Agencies; that Kuira Commercial Agencies were not the owners of the suit property; that the said agents had promised to help them process the title deeds; that after they bought the suit property, they wanted to know the real owner and so they went to Kalenjin Enterprises Ltd on 22/05/2017; that even though the agents had promised to process the titles, they did not; that Kalenjin Enterprises confirmed to them that the suit



- property belonged to Kimani Munga Ndonga; that they did not follow up with Kuira Commercial Agencies until the year 2017 because no one interrupted their occupation of the suit properties; that Kalenjin Enterprises offices are at the Chief's office; that Rhonda Estate had sold the land to Kalenjin Enterprises; that between February 2005 to June 2005, the entire plot was occupied without any vacant space; that she knew Rebecca Kamene Muchai who she had begun to see from the year 2017 as she lived a few metres from the suit property; that nobody had told them that the suit property belonged to someone else.
7. Upon re-examination, she stated that she bought the suit property without Kimani Ndonga's authority and consent; that each plot was sold at Kshs. 40,000/= by Kuira Commercial Agencies; that they were not issued with title deeds; that Rebecca Kamene Muchai was a witness in the present suit; that at the time they took possession of the suit property they did not know her; that the transaction was not successful as they did not have any agreement or authority from the owner.
 8. Upon cross-examination by the court, PW1 confirmed that they did not have any agreement for sale and that they had never seen Kimani Ndonga on the land. They only came to know about him after he had died. The Plaintiffs case was then marked as closed.
 9. Monica Kimani Waruguru testified as DW1. She adopted her replying affidavit sworn on 25/09/2015 as part of her evidence-in-chief. She testified that the suit property belonged to her late husband Kimani Ndonga; that there used to be a lady who was cultivating the land; that the suit property was not sold to the plaintiffs by the deceased but was instead sold by other persons; that her late husband had bought the land from another person a long time ago; that after her husband died, the said people went to Rebecca and requested her to look for Kimani's children so that they could talk; that she went to the chief where she produced a copy of her title deed which she issued to the plaintiffs; that they discussed with the plaintiffs who told her "nisiwatupe" (a loose translation for that slang term is that they should not be evicted); that the Chief told them to negotiate and agree with her; that five of them went to her home when she was unwell; that one of them known as 'Ojwang' told her that since the one who sold the suit property to them was not the owner, they had gone to discuss with her on how they would pay her; that she proposed the purchase price of Kshs.6,500,000/= and eventually they settled on Kshs.5,000,000/= which they promised to pay; that later in August she was informed that they had filed the present suit.
 10. While DW1 was giving evidence, her counsel realized that some documents that he had filed between the year 2020 and 2021 were not on the court record. He applied for DW1 to be stood down so that he could file the said documents. In light of the application by counsel for the defendant, the plaintiff's counsel sought to re-open the plaintiff's case limited to the documents that were to be filed by the defendant.
 11. The court allowed both applications and on 2/06/2022, the plaintiff was recalled. Upon being referred to DMFI-1(Letter of Allotment issued to John Ngugi Nganga by Kuira Commercial Agency), the plaintiff admitted that she knew John Ngugi Nganga who was her neighbor on the plot where she lived; that they have lived there since the year 1975; that a similar letter of allotment was issued to her by Kuira Commercial Agencies; that she knew Daniel Kiragu and Martha Njeri and that they had lived on the same plot since the year 1995 and that DMFI-2 (sale agreement dated 10/09/2018 between the defendant and Daniel Kiragu) was made thirteen years after they had entered the land; that DMFI-6 (Notice to vacate dated 17/5/2017) was taken to them on 17/5/2017 at the Chief's office.
 12. Upon cross-examination, she admitted that they were all issued with allotment letters between the year 2005 and 2006; that it was Kuira who sold the parcel to her; that the chief never went to the suit land



- and that they were the ones who went to the company's offices; that the notice issued by the defendant was not brought by the Chief but was brought by her neighbor John Ngugi.
13. DW1 was recalled to the stand on 19/01/2023 and she produced the documents in the bundle filed on 20/5/2022 by consent of the parties as DExh.1 – DExh.7.
 14. Upon cross-examination, she admitted that she did not know Miriam Muthini, Regina Kimondo, John Ngugi Nganga; that she knew Rebecca Kamene Mucai as she lived at Kwa Rhonda; that there were people living on her late husband's property who she did not know; that she did not know how long they have lived on her land; that after her husband had died, five of the said people went to her home and agreed to buy the land; that she proposed the price of Kshs.6,500,000/=; that she was unwell and so they did not write an agreement; that she had the title of the suit property with her; that before her late husband fell sick and died, he had tried to chase them from the suit property but he was not successful; that they had instructed Rebecca to take care of the land; that they had been told to sit down and negotiate instead of going to court; but instead the plaintiffs opted to go to court; that she could not remember when the Chief's meeting took place but she could remember that many people had attended; that John Ngugi lives on the suit property; that there is a mud walled Anglican church on the plot; that she could not tell how long both the church and John Ngugi have lived on the land; that she went to an advocates office together with her son to meet Ngugi and another young man; that they agreed to pay after one year; that they wrote down on how they were to pay; that the land had been sold to her husband by another man; that she used to pay the land rates but after she was sued, she has not paid; that she gave them a notice to vacate the land but she could not remember when that notice was issued; that she did not inform them that she had commenced succession proceedings but they went looking for her; that the persons in occupation of the suit property have paid some money; that after they sued her, she stopped them from paying her; that the records of the people who had paid part of the purchase price were at home and that whenever her late husband put a sign board on the land, it was removed.
 15. Upon re-examination, she confirmed that she received money from Ngugi but could not tell how much it was.
 16. Rebeccah Kamene Muchai testified as DW2 and adopted her witness statement dated 28/2/2020 as part of her evidence. She testified that she was farming the suit property with the permission of its owner Kimani Ndonga; that there was no one living on the land but later a quarrel broke out and so she stopped farming on it; that someone went to the land and put up a 'Shamba for sale' sign; that Kimani went to the land, removed the said sign before putting up his sign; that Kimani's sign was removed and the 'for sale' sign was reinstated; that just before the year 2007, ethnic clashes happened and one Ngugi went to the suit property and attempted to build something; that she informed him not to build as the land belonged to someone else but he continued to build; that Kimani emigrated to Kericho for his safety; that she showed the children of Kimani the suit property and that the purchasers ought to have known about Kimani because at the time of the sale, his sign post was on the land.
 17. In her witness statement she indicated that Ngugi was the first to construct on the suit property and when she told him that the suit property belonged to someone else, he did not listen to her. She also indicated that other people went and took occupation of the suit property and when she told them that the suit property belonged to the late Kimani Ndonga, they equally did not listen to her.
 18. Upon cross-examination, she admitted that she lives in Rhonda near the suit property but she did not know Miriam Muthini; that a church went and bought land and begun constructing; that she did not know how long the church had been on the land; counsel for the Plaintiff sought leave of the court to have DW2 identify Miriam Muthini physically in court. When the plaintiff Miriam Muthini stood



- up, DW2 confirmed that she had seen her on the suit property when they began to buy the land; that there were many houses on the suit property; that she saw the plaintiff before the 2007 – 2008 clashes; that she only knew of Ngugi and another person not in court who had built houses on the land.
19. John Ngugi Nganga testified as DW3. He adopted his witness statement dated 27/11/2020 as part of his evidence. He testified that he entered the suit property in the year 2013 after purchasing it in the year 2006 from Kuira Commercial Agencies; that he was told that the property belonged to one Kariuki King'ori; that Kuira Commercial Agencies were his agents; that later they came to learn that the property belonged to another person. He produced the letter of allotment as DExh.8 and the letter from the Chief dated 17/5/2020 as DExh.9; he stated that they were summoned by the Chief who told them that they needed to agree with the defendant; that when he wanted to build, a lady known as Wanjiku told him not to build; that she also told them about the real owner of the suit property; that they decided to go to home of the owner's wife; that they agreed with the wife on the amount of money they were to pay and they began to calculate how much each one of them would pay; that some people agreed to pay and so they entered into an agreement with the defendant which he produced as DExh.10. He testified that they acknowledge that the suit property belongs to the defendant.
20. In his witness statement, he stated that in the year 2005, he formed a group comprising of Nakuru Business people; that their mission was to buy land parcels within Nakuru County; that their chairperson was one John Kuira who was trading in the name and style of Kuira Commercial Agencies; that John Kuira through his agency purchased land parcel No. Nakuru Municipality Block 29/849 measuring approximately 0.1823 Ha from one Kariuki King'ori who posed as the owner of the land; that Kuira Commercial Agencies put up the suit property for sale and DW3 bought a portion of the land in the year 2006 and was issued with a certificate; that the buyers were promised that they would be given the other documents of ownership later; that in the year 2017, they were summoned by the area chief; that that is when they learnt that the said Kariuki King'ori was not the owner of the suit property; that they decided to follow up with the defendant and they agreed that they would pay the purchase price to her.
21. Upon cross-examination, he confirmed that he bought the land in the year 2006 but he took possession in the year 2013; that he has been neighbors with the 1st Plaintiff since the year 2013; that he found her on the plot; that almost all people on the land have built on it; that no notice of eviction has been placed on the land since he settled on it; that he paid the first installment in 2018 before the case began; that the 2nd plaintiff, Samuel Kimaru, Johana, Willy and the church are resident on the plot; that he found Regina on the land; that others found him on the land; that he could not recall any other meeting except for the meeting called by the Chief; that there is no farming on the suit property and everyone lives on their own portion. Upon re-examination, he stated that the chief's notice went to him and he informed the others about it.
22. Daniel Kiragu testified as DW4. It was his evidence that he lives on the land; that he took occupation in the year 2006; that someone had put up a "Land for sale" sign on the land; that the sign was put up by "Kuira Commercial Agencies." ; that he purchased a plot measuring 40 by 75 feet for Kshs.80,000/=; that he paid Kuira; that they were told to wait for the title; that he had an office which he closed; that they stayed on the land; that someone purporting to have title went and claimed the land; that they went to the County Council and found out that his name was "Kariuki Kingori"; that they also went to the Lands office; that they asked them for the title of the suit property; that the new owner wanted them to re-purchase the suit property from him; that they were summoned to the chief's office; that he sent his wife; that the report given by the chief was that they were illegally on someone's land; that Kimani Ndunga showed them his title; that they had a meeting with the other residents and agreed to go to Kericho; that they carried Kshs.100,000/= with them and found the defendant's daughter;



- that later they entered into the agreement dated 10/09/2023 which was produced as DExh.2; that he had not paid any money since then. He adopted his witness statement dated 27/11/2020 as part of his evidence.
23. Upon cross-examination, he confirmed that he is in occupation of the suit property; that he could not remember the land parcel number of the suit property; that Miriam Muthini was his neighbor; that he entered the land in the year 2006; that John Nanga went to the land earlier than him; that Holy Trinity Church was built in the year 2016; that from the year 2006 they have never been issued with a notice to vacate; that he did not know Regina Kemunto and that he did not also know all the plaintiffs; that he had seen the pastor of Holy Trinity who was present in court; that had seen Willy Owiso since the year 2017; that he had seen Regina Kemunto who was present in court; that he had seen Johana's wife there too; that his wife negotiated the purchase price of their portion of land; that there is a record of what she paid; that he was absent at negotiations and payment times; that they have never had a meeting at the plot; that they went to the Advocate; that they went to the defendant to know who owns title; that he had paid twice – to Kuira and to the defendant; that Muthini was not at the Advocates office when he paid; that by then he did not know of this case and that the residents have never been disturbed.
24. David Kiplimo Bor testified as DW5. It was his evidence that he knew Kimani Ndonga who was a member of Kalenjji Enterprises; that he was a director of the company from the year 2013; that some people entered the suit property; that the said people went to their offices and stated that they had purchased land from one of them; that the said seller had no documents; that the company advised them not to have anything to do with anyone who had no documents; that the plot was Block 29/849; that he told them that he knew the owner of the suit property who was Kimani Ndonga; that later Kimani Ndonga's family went to them and reported that some people were on their land; that they told them that they had parted ways once the shareholder received title; that the chief called him in the year 2017 and asked him who owned the suit property; that he informed them that the land belonged to Kimani Ndonga; that he never met the persons on the land. He adopted his witness statement dated 25/2/2022 as part of his evidence in chief.
25. On cross-examination he confirmed that he was a director/ treasurer and that Kimani bought the land from a shareholder and was issued with a title.
26. On re-examination, he stated that Mr. Kimani bought the suit property from one Some Arap Chumo. The Defence case was then closed.

Submissions

27. The plaintiff filed her submissions on 11/04/2023 while the defendant did not file any submissions.
28. The Plaintiff submitted on whether she had proved the grounds requisite under the principle of adverse possession. The plaintiff relied on Section 7 of the *Land Act*, Sections 7, 17, 18, 38 (1) & (2) of the *Limitation of Actions Act* and the case of *Wilson Njoroge Kamau vs Nganga Muceru Kamau* [2020] eKLR, *Kasuve vs Mwaani Inv. Ltd & Others* 1KLR 184.
29. The Plaintiffs submitted that the suit property belonged to the late Kimani Munga Ndonga and that they had attached a copy of the title deed extract as required by law under Order 37 Rule 7 of the *Civil Procedure Rules*. The Plaintiffs relied on the case of *Stephen Mwangi Gatunge 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 and submitted that during the hearing, they gave evidence that they have been in occupation of the suit property since the year 2005. The plaintiffs further submitted that they have been in occupation of the suit property openly and continuously and without interruption for over twelve years.



30. The Plaintiffs submitted that no evidence was availed by the defendant to contradict their averments. The plaintiffs further relied on the cases of *Kimani Ruchine vs Swift Rutherford & Co. Ltd* [1980] KLR, *Celina Muthoni Kithinji vs Safiya Binti Swaleh & 8 Others* [2018] eKLR and submitted that they have proved their case on a balance of probabilities and sought that their claim in the plaint be allowed as prayed.

Analysis and determination

31. After considering the pleadings, evidence and the submissions, the only issue that arises for termination is whether the plaintiff is entitled to the prayers sought in her originating summons.
32. The plaintiffs' case is that they have been in occupation of land parcel No. Nakuru Municipality Block 29/849 from the year 2005 to date. It was also their case that they had purchased a portion of the suit property from Kuira Commercial Agencies who had promised that they were going to process the title deed for them; that later, Kuira Commercial Agencies failed to procure titles for them so they went to Kalenjin Enterprises where they were informed that the suit property belonged to the late Kimani Munga Ndonga; that they were later called for a meeting by the chief where they were also informed that the suit property belonged to the late Kimani Munga Ndonga and that they have lived peacefully on the land without any interruptions from the year 2005 to date.
33. In support of their case, the plaintiffs produced the following documents; a grant of letters of administration intestate issued on 15/12/2014 by the High Court of Kenya at Kericho Succession Cause No. 113 of 2014 in the estate of Kimani Munga Ndonga to Monica Waruguru Kimani; a certificate of confirmation of grant issued in the said succession cause that listed the suit property among the properties of the deceased; a copy of the green card for land parcel No. Nakuru Municipality Block 29/849 (Ronda) which showed that Kimani Munga Ndonga was registered as the owner of the suit property on 26/10/2005 and a title deed issued on the same date; a certificate of search issued on 19/07/2018 that showed that the suit property was registered in the name of Kimani Munga Ndonga; an authority and consent to file suit filed under Order 1 Rule 8 of the *Civil Procedure Rules* that was signed by Miriam Muthini Isaiah, Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndung'u Kibaara, Willy Owiso Okoth and Edward Robert Oyoo on behalf of the Holy Trinity Church in Africa.
34. The defendant's case on the other hand was that she is the widow of Kimani Munga Ndonga who was the registered owner of land parcel No. Nakuru Municipality Block 29/849 (Ronda). It was also her case that after her husband had bought the suit property, he allowed his neighbor Rebecca to cultivate it. It was further the defendant's case that Kuira Commercial Agencies put up a sign on the suit property that it was for sale but it was removed by Kimani Ndonga(deceased) and replaced with another sign that the suit property was not for sale. Once the late Kimani Ndonga put up the sign that the suit property was not for sale, Kuira Commercial Agencies went to the property and removed the said sign and replaced it with another sign that the property was for sale. Soon after some people took possession of the suit property and when the late Kimani Ndonga tried to evict them they refused to vacate the suit property.
35. It was the defendant's case that once her late husband Kimani Ndong'a died she commenced succession proceedings with respect to his estate and she was therefore holding the suit property in trust for herself and for their children. The defendant thereafter reported the matter to the area chief and all the people in occupation of the suit property were summoned to a meeting where they were informed that they had bought the suit property from people who had no authority of the registered owner to sell and so they were encouraged to negotiate an agreement with the defendant. Some of the people residing on



the land such as John Ngugi Nganga held a meeting with the defendant and agreed to purchase their portions of the suit property from her and they executed an agreement to that effect. They paid some monies before the present matter was filed and later they stopped making payments.

36. In support of her case, the defendant produced the following documents; a letter of allotment issued by Kuira Commercial Agency to John Ngugi Nganga for Nakuru Municipality Block 29 for an approximate area measuring 40 x 45 dated 9/06/2006; a land sale agreement dated 10/09/2018 entered into by Monica Waruguru Kimani the defendant and Daniel Kiragu for the sale of a portion measuring 43 x 75 feet of LR No. Nakuru Municipality Block 29/849 (Rhonda) for Kshs.720,582/=; a land sale agreement entered into by Monica Waruguru Kimani the defendant and John Ngugi Nganga on 7/09/2018 for the sale of a portion of LR No. Nakuru Municipality Block 29/849 (Ronda) measuring 33 x 45 feet; a certificate of ordinary shares issued by Kalenjin Enterprises Limited issued to Kamau Munga for fifty shares; a letter dated 17/5/2017 written by the Chief Kaptembwo Location to the tenants on LR No. Nakuru Municipality Block 29/849 inviting them to a meeting on 22/5/2017; a letter dated 17/5/2017 which was a three months' notice to vacate LR No. Municipality Block 29/849 (Ronda); a letter dated 22/10/1990 written by A. A Kaluma District Commissioner Nakuru that was addressed to Kimani Munga(deceased) among other people that directed him to move to plot No. 682 (new 849), which is the suit land.
37. It is not disputed that land parcel No. Nakuru Municipality Block 29/849 (Ronda) is registered in the name of Kimani Munga Ndonga (deceased). It is also not disputed that the defendant Monica Waruguru Kimani is the administrator of the estate of the late Kimani Munga Ndonga. It is further not disputed that there are various people in occupation of the suit property and that includes the plaintiff and the people she is suing on behalf of who are seeking orders of adverse possession. It is not disputed that they took possession of the suit property without the permission of Kimani Ndonga and neither is it disputed that the late Kimani Ndonga was aware of the occupation of some people on the suit property that included the plaintiff. What is disputed is the period of time the said people have been in occupation of the suit property. The issue as to whether they had the requisite animus possidendi also arises.
38. Section 38(1) and (2) of the *Limitation of Actions Act* provides as follows:
- “(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 or lease in place of the person then registered as proprietor of the land.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
39. The Court of Appeal in the case of *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, stated as follows on what an applicant in a claim of adverse possession has to prove:
- “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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.



40. The Court of Appeal in the case of *Samuel Kihamba v Mary Mbaisi* [2015] eKLR stated as follows:
- “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”
41. The Court of Appeal in the case of Kisumu Civ App. No. 110 of 2016 *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR indicated that a person claiming adverse possession must establish the following: on what date he came into possession; what was the nature of his possession? whether the fact of his possession was known to the other party; for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years.
42. A person claiming adverse possession must demonstrate actual occupation of another person’s land, without the consent of the other and in such a manner as the occupation remains unbroken for a period of not less than twelve years.
43. The plaintiff Miriam Muthini Isaiah brought this suit on behalf of Regina Kemunto Nyakundi, Samuel Kimani Mathu, Johana Ndungu Kibaara, Willy Owiso Okoth and Holy Trinity Church in Africa. The Plaintiff alleged that she together with the people she has filed the suit on behalf of have been in occupation of the suit property since February 2005 to date. They took possession of the suit property upon purchasing it from Kuira Commercial Agencies. Other than alleging that they took possession in the year 2005, no evidence was produced in support of the said allegation.
44. Rebecca Kamene Muchai who testified as DW2 indicated that she had been allowed by the late Kimani Ndonga to cultivate the suit property. She stopped cultivating when a quarrel broke out and someone put up a ‘for sale’ sign that was removed by the late Kimani Ndonga. It was her evidence that in the year 2007, there were ethnic clashes and Kimani moved to Kericho and one Ngugi begun to construct on the property. It was her evidence that Ngugi was the first to commence construction. It is not clear whether the said Ngugi is John Ngugi Nganga who testified as DW3. John Ngugi Nganga testified that he bought the suit property in the year 2006 from Kuira Commercial Agencies but only took possession in the year 2013. It was also his evidence that he was informed that the suit property belonged to Kariuki Kingori but he took possession anyway before they were summoned by the area chief and he opted to purchase the portion he was occupying from the defendant.
45. Daniel Kiragu who testified as DW4 indicated that he entered the suit property in the year 2006 while the Holy Trinity Church was built in the year 2016. He also testified that he found John Nanga on the property while Willy Owiso entered the suit property in the year 2017. From the totality of the evidence adduced by both the plaintiff and the defendant, it is quite clear that the plaintiffs entered the suit property on diverse dates.
46. One other reason why the plaintiffs cannot be deemed to have satisfied the requirements of adverse possession is that the plaintiffs have failed to prove animus possidendi. They cannot be said to have established that they had animus possidendi while they did not know who the registered proprietor of the suit land was.



47. In the case of *Haro Yonda Juaie v Sadaka Dzengo Mbauro & another* [2014] eKLR the court held as follows:

“The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession.”

48. Knowing, the plaintiffs admit that they took up the land while they did not know the registered owner and purported to purchase the same from a person who had no documents whatsoever; when they went to ascertain who the owner was they were informed that the land belonged to Kimani Ndonga. Evidence of PW1 states that it was about the year 2013 when they learnt who the registered owner was. Perchance the animus can be presumed to have begun to exist, it must be from that year, and therefore up to 2018 when the suit was filed, a period of 12 years had not lapsed and adverse possession can not therefore accrue. As per the further evidence of their own witness, they were also warned by the directors of Kalenjin Enterprises Ltd against the proposed purchase when they visited the company office. From the evidence on record, I am not satisfied that the plaintiffs have been in occupation of the suit land for the requisite minimum of 12 years to warrant the grant of the orders sought in the originating motion. As they have failed to establish possession nec per vim, nec clam nec precario for a minimum of 12 years and also animus possidendi the plaintiffs have not proved their claim for adverse possession to the required standard and their claim ought to fail. Consequently, their originating summons dated 16/08/2018 is hereby dismissed with costs to the defendant. The plaintiffs shall remove themselves and their property from the land known as Nakuru Municipality Block 29/849 (Rhonda) within 90 days from the date of this judgment and in default they shall be forcibly evicted therefrom by or at the instance of the estate of the deceased Kimani Munga Ndonga which owns the land. The costs of the present proceedings shall be borne by the plaintiffs.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22ND DAY OF SEPTEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

