



**Mbuthi v Muthui & another (Sued as the administrators of the Estate of Muthui Mwinzi - Deceased) (Environment and Land Miscellaneous Application 15 of 2021) [2023] KEELC 20051 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20051 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 15 OF 2021  
LG KIMANI, J  
SEPTEMBER 21, 2023**

**IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF ACTIONS  
ACT AND ORDER 37 RULES 7 AND 13 OF THE CIVIL PROCEDURE RULES**

**-AND-**

**IN THE MATTER OF: ACQUISITION OF TITLE BY ADVERSE POSSESSION**

**-AND-**

**IN THE MATTER OF: LAND PARCEL NUMBER MATINYANI/MUTULU/716**

**BETWEEN**

**ONESMUS KASAKI MBUTHI ..... APPLICANT**

**AND**

**PAUL SAITI MUTHUI ..... 1<sup>ST</sup> RESPONDENT**

**FRANCIS MUSYOKA MUTHUI ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF MUTHUI MWINZI -  
DECEASED**

**JUDGMENT**

1. This suit was commenced through the Originating Summons dated 26<sup>th</sup> July 2019 where the Applicant seeks the following orders:
  1. That the Applicant be declared to have become entitled to ownership by virtue of his adverse possession for over twelve (12) years and that the Respondents be ordered to transfer to the Applicant the portion of land measuring 1.5 acres from Land Parcel Number Matinyani/



Mutulu/716 and the same be registered in the name of the Applicant in place of the above named Muthui Mwinzi (Deceased) in whose name the said parcel of land is registered.

2. That in the Alternative Land Parcel number Matinyani/Mutulu/716 be declared a family-held land under inter-generational customary trust by Muthui Mwinzi-(Deceased) in whose name the said parcel of land is registered.
3. That the Respondents do bear the costs of this suit.
2. The application is supported by the affidavit of the Applicant, Onesimus Kasaki Mbuthi sworn on 26<sup>th</sup> July 2019 deposing that his father settled on the suit land parcel number Matinyani/Mutulu/716 before he was born and when he grew up, he built his home on the land and buried his father upon his demise. That he got married, worked as a chief till retirement while occupying a portion of 1.5 acres out of the said land.
3. It is his averment that he has been in conspicuous exclusive and uninterrupted occupation of the suit land where he has settled and erected a home, fenced the land, kept livestock, drilled boreholes and constructed water reservoirs. The Applicant further states that he has carried out commercial and subsistence farming such as tree planting, livestock keeping and crop cultivation and has buried his deceased relatives on the land.
4. He stated that by his actions of adverse possession, the title to the suit land in the name of Muthui Mwinzi (Deceased) has been extinguished and that the administrators of his estate, the Respondents herein ought to satisfy his claim and transfer the land to him.
5. The Applicant lays an alternative claim to the land stating that Muthui Mwinzi (deceased) was registered as owner of the suit land for himself and in trust for his brothers who included the Applicant's father Mbuthi Mwinzi. He gave the history of the land stating that the land belonged to their grandfather Mwinzi Nguma and Muthui Mwinzi was registered as the firstborn of the family in trust. The Applicant relied on the judgement of the court in the Kitui High Court Civil Appeal 36 of 2016 an appeal from the judgement of the lower court in the succession cause in the estate of Muthui Mwinzi where the Judge held that issues of inter-generational customary trust can only be settled by the Environment and Land Court and not through succession proceedings.
6. The Applicant states that the Respondents as joint administrators of the estate of Muthui Mwinzi are threatening to evict him from the home he has known since he was born and prays that the 1.5 acres where his father occupied be carved out of the land parcel number Matinyani/Mutulu/716.

### **The Respondents' Case**

7. The Respondents opposed the application and Saiti Muthui Paul, the 1<sup>st</sup> Respondent swore a Replying Affidavit and deposed that this dispute has been running in courts of law since 19<sup>th</sup> October 2004 when they applied for and were granted Letters of Administration to the estate of their father Muthui Mwinzi (Deceased) at the Kitui Chief Magistrate's Court on 11<sup>th</sup> January 2005. The Applicant along with others filed objections to the confirmation of the grant but the Applicant's objection was dismissed. An appeal in High Court Civil Appeal No.36 of 2016 was also dismissed with costs.
8. The Respondents denied the Applicant's claim and especially the averment by the Applicant that had drilled boreholes and built any water reservoirs on the land. They stated that the Applicant dug a big hole which was later filled to give way to an access road. They also deny that the Applicant has had peaceful, uninterrupted use and occupation of the suit land because he received letters requiring him to stop developments and vacate the land. The Respondents however do acknowledge that the Applicant was born and brought up and still lives on that portion of the suit land.



9. Further, the Respondents state that the Applicant lived on the portion of land in dispute with his seven brothers who after adjudication of the Matinyani/Mutulu area, voluntarily moved to other parcels. They aver that the Applicant should have moved out and settled on one of the two parcels of land which he claims to have inherited from his father. They pointed out that no one objected to the registration of Muthui Mwinzi as the sole proprietor of Parcel No. Matinyani/Mutulu/716 during the land adjudication process.
10. The 1<sup>st</sup> Respondent avers that on 29<sup>th</sup> June 2011, Martin M. Muithya & Company Advocates on instructions from the Respondents wrote a letter to the Applicants demanding that he stop constructing a permanent structure on the suit property.
11. The Respondents' case is that their father Muthui Mwinzi was registered as the absolute owner of the land and urged the Court to take note of the history of the matter and not entertain further delays and attempts by the Applicant to frustrate their attempts to enforce the judgement of the trial court in the succession cause directing the Applicant to vacate the suit land. They term the suit as *res judicata* and urged the court to dismiss the application herein.

### **Evidence at the hearing**

12. PW 1 Onesmus Kasaki Mbuthi, the Applicant testified and called four witnesses. He adopted his witness statement dated 5<sup>th</sup> February, 2022 and produced as exhibits the bundle of documents filed in court. He stated that he is a retired assistant chief and was born, brought up, married and worked until retirement while occupying a portion of approximately 1.5 acres of Matinyani/Mutulu/716. That at no time for a period spanning over 50 years has his peaceful use and enjoyment of the suit land been interrupted, and he thus applied to be registered as the proprietor of the portion of land he occupies.
13. On cross-examination, the Applicant confirmed that his father and the Respondent's father were brothers and that during adjudication four parcels of land were registered in the name of the Respondent's father but he was only interested in the subject portion of land and not the others. He testified that when their fathers were alive, there was no dispute over the land and that both his parents are buried on the portion of the suit land that he occupies.
14. The Applicant acknowledged not having surveyed the land to confirm that the land he 1.5 acres and that the title deed did not show that the suit land was held in trust for the deceased's brothers. He only stated that according to Kamba customs the 1<sup>st</sup> born holds land on behalf of his younger siblings. He further stated that the other parcels of land registered in his father's name had been purchased and not inherited.
15. PW 2, Stephen Kivati Kitili adopted his witness statement dated 5.2.2022, where he stated that he was the neighbour to the Applicant and that they have held several meetings over the ownership of the family land, including one held on 1.4.2019. In the said meetings it was decided that the four sons of Mwinzi Nguma namely Muthui Mwinzi (the registered owner on the title), Kyendwa Mwinzi, Mbuthi Mwinzi and Iloo Mwinzi would share the land parcel Matinyani/Mutulu/716. He stated that as a clan they have tried to resolve the matter amicably to no success and that the District Officer acknowledged the Applicant's claim as a genuine one.
16. PW 3, Stephen Kilonzo Mbuthi adopted his witness statement stating that he is the elder brother to the Applicant and a cousin to the Respondents and that their grandfather owned the suit land. That it was agreed that during adjudication the land would be registered in the name of the firstborn Muthui Mwinzi, the Respondents' father in trust for his brothers since they all lived on the land.



17. The witness stated that all was well until the death of their father when out of greed, the Respondents moved the court to succeed the estate of their father while threatening to evict their cousins from the suit land.
18. On cross-examination, he stated that he was not present during land adjudication meetings and does not live on the Land Parcel 716. He however confirmed that the Applicant lives on the suit land.
19. PW 4, Thomas Mutundu Mbuti adopted his witness statement and stated that he is the elder brother of the Applicant and that they are also neighbours. They had resolved that the suit land being family land should be shared amongst all brothers.
20. During cross-examination, PW 4 stated that his grandfather had four sons who were adults during land adjudication. He also stated that he had never seen any agreement that Muthui Mwinzi held the suit land in trust for his brothers and that he does not live on the suit land. Upon re-examination, he stated that he moved to live on land that he had bought when his father was still living on the suit land.
21. PW 5 Thomas Musyoka Malusi was the last of the Applicant's witnesses and he adopted his witness statement as evidence. He stated that he is the Clan Chairman of the Akitondo Clan to which the parties to the suit belong. He had called the parties for a meeting which only James Mitau Muthui attended and they confirmed how the suit land would be distributed. He did not know why the same was not done. He confirmed that he lives near the suit land and has known the parties for many years. He confirmed that the Applicant has lived on the land parcel number Matinyani/Mutulu/716 from his childhood as a matter of right since it is family land. On cross-examination, PW 5 noted that there are four other parcels of land in the name of Muthui Mwinzi and the 4<sup>th</sup> is the suit land.
22. The defence case proceeded on 21<sup>st</sup> February, 2023 where DW 1 Francis Musyoka Muthui the 2<sup>nd</sup> Respondent gave evidence and adopted his witness statement dated 25<sup>th</sup> April 2023, the 1<sup>st</sup> Respondent's Replying Affidavit and bundle of documents as his evidence in chief. He testified that he is a subsistence farmer and that land parcel Title No. Matinyani/Mulutu/716 was solely registered in the name of Muthui Mwinzi without any encumbrance or restriction. He stated the other brothers of Muthui Mwinzi were allocated family land elsewhere after they agreed between themselves.
23. According to Respondent, it was only Fredrick Mwangangi Mbuti, a brother to the Applicant who settled on the land by agreeing to buy the portions where they are settled as evidenced by Agreement dated 17<sup>th</sup> August, 2021. He insisted that they communicated through letters to the Applicant that the applicant did not have a right to settle on the land but for his reasons, refused to move out. He testified that during the land adjudication process his father and the Applicant's father fully participated in the process and that the clan did not have the authority to determine rights in a land where a title deed had already been issued. He stated that he did not attend the clan meeting and was not summoned to it.
24. During cross-examination the 2<sup>nd</sup> Respondent testified that his father and brothers lived on the suit land with their families. He further stated that the other brothers' families no longer live on the land. The Defence closed their case.

### **The Applicants' written submissions**

25. Counsel for the Applicant submitted that all parties agree that the Applicant was born on the suit land where he buried his father with no objection from anyone and has been living there for over 50 years and did not seek permission from the Respondents or their late father.



26. He submitted that the Applicant has occupied the suit land peacefully, openly and in a continuous manner over the statutory period of 12 years, stating that he has proved his case and established that he is entitled to the prayers sought in the originating summons.

### **Respondent's written submissions**

27. The Respondents submitted that the Applicant's suit is res judicata as provided for in Section 7 of the Civil Procedure Act since the Applicant had filed an objection in Kitui Chief Magistrates' Succession Cause No. 84 of 2016 in respect of the estate of Muthui and the suit property and the said objection was dismissed even after an Appeal to the High Court in Kitui Civil Appeal No.36 of 2016. They relied on the case of Kennedy Mokuia Ongiri v. John Nyasende Mosioma & Florence Nyamoita Nyasende (2022) eKLR.
28. Counsel quoted Sections 25 and 26 of the Land Registration Act No.3 of 2012 for the submission that a Certificate of Title is prima facie evidence of title. Counsel relied on the holding by the Court of Appeal in Munyu Maina v Hiram Gatiha Maina (2013) eKLR. It is their submission that the Title is registered absolutely and not in trust and that when adjudication was done, any aggrieved persons were invited to submit their complaints within 60 days but no one objected. It is the Respondents' submission that the Title as a first registration is not subject to rectification since there has been no omission, fraud or mistake.
29. On the claim of adverse possession, the Respondents relied on the case of Joseph Macharia Kairu v Kenneth Kimani Muiruri (2021) eKLR, Richard Wefwafwa Songoi (2020) eKLR and Samuel Kihamba v Mary Mbaisi (2015) eKLR, submitting that the Applicant had been warned to stop several developments on the suit land through various letters.
30. Submitting that a claim of adverse possession must be proven, they relied on the holding in the case of Gabriel Mbui v. Mukindia Maranya (1993) eKLR stating that no evidence has been adduced that they were ripped off their right over the suit property by dispossession or discontinuance. Their position is that the Applicant began construction in 2001 where he was warned by the Respondents and that his occupation on the suit land has been anything but peaceful, quiet and uninterrupted.
31. It is the Respondent's final submission that the Applicant has not come to court with clean hands while stating that he has already unsuccessfully claimed the suit land and is clinging on to a multiplicity of suits and urged the Court to dismiss his claim.

### **Analysis and Determination**

32. The Court has carefully considered the Originating Summons, supporting affidavit, replying affidavit, oral evidence adduced and submissions made by Counsel for the parties. The Court considers the issues for determination as follows;
- A. Whether this suit is res judicata
  - B. Whether the Applicant is entitled to a declaration of ownership by way of adverse possession of a portion measuring 1.5 acres out of the suit land parcel Matinyani/Mutululu/716.
  - C. In the alternative, whether the deceased Muthui Mwinzi held the suit land Matinyani/Mutululu/716 under an inter-generational customary trust for his brothers including the Applicant's father or he held the same as the absolute proprietor.
  - D. Who will bear the costs of this suit?



## A. Is the suit res judicata?

33. The Respondents claim that the suit offends the doctrine of res-judicata citing an objection filed by the Applicant in Kitui Chief Magistrates' court Succession Cause No. 84 of 2016 in respect of the estate of Muthui Mwinzi claiming 1.5 acres out of the suit property land parcel Matinyani/Mulutu/716. The objection was dismissed as well as the Appeal to the High Court in Kitui Civil Appeal No. 36 of 2016.
34. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the [Civil Procedure Act](#). It provides as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
35. In *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court of Kenya while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
- (a) The suit or issue was directly and substantially in issue in the former suit.
  - (b) That former suit was between the same parties or parties under whom they or any of them claim.
  - (c) Those parties were litigating under the same title.
  - (d) The issue was heard and finally determined in the former suit.
  - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
36. In the case of *E.T. v Attorney General & another* [2012] eKLR it was held that;
- “The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Applicant in the second suit is trying to bring before the court in another way and in the form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi NBK & Others* (2001) EA 177, the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”
37. In the present case, it is noted that what is described by the Respondents as the “former suit” is a succession cause under the [Law of Succession Act](#), Cap 160 Laws of Kenya. The said Act is described as an Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons.
38. It is recognized that the filing of a suit asserting rights over land stops time from running in adverse possession claims. However, it is trite law that the purpose of instituting a Succession Cause is the administration and distribution of the property of the deceased owner to the persons entitled. Adverse possession on the other hand is about the occupation and use of land belonging to another, extinguishing the rights of the true owner and asserting a right to the title to the land arising out of prolonged occupation of the said land.



39. In the instant case, there was no evidence that filing of the Succession Cause was to evict the Applicant from the suit property or was meant to assert rights over the land. Indeed, there is no evidence that the Respondents initiated any action against the Applicant that would have led to cessation of his occupation of the land. It is the Applicant who filed a protest to the distribution of the estate of the deceased by laying a claim to a portion of the suit land by way of an inter-generational customary trust. Adverse possession accrues to land and not title and unless the Respondent took steps to evict the Applicant from the suit land the mere act of claiming ownership could not stop time from running.
40. This Court agrees with the holding in the case of Eldoret Civil Appeal No. 212 of 2012;- Isaac Cypriano Shingore v Kipketer Togom [2016] eKLR where the Court held that objection proceedings in the succession cause did not have the effect of interrupting the respondent's possession of the property. The Court stated that;

“By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in *Githu Vs. Ndeete* [1984]KLR 776 "Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire's Modern Law of Real Property*, 11th edition at p 894").

41. The filing of the succession case by the Respondents in this case did not amount to an assertion of rights that could stop time from running. Indeed, in the judgement of Mutende J. in Kitui High Court Civil Appeal No. 36 of 2016 in the matter of the estate of Muthui Mwinzi (deceased), the Court observed that “Evidence adduced showed that the Appellant lived on the property and is still in possession of the same. He has made substantial development thereon. However, at the point of registration, the deceased was the sole owner. It is not indicated that he was to hold it in trust for his other relatives. Therefore, whether the land was an intergenerational trust would have to be resolved by the Land and Environment Court.”
42. It is this court's finding that the question of whether the Applicant was entitled to a portion of the suit land by way of adverse possession or through inter-generational customary trust has not been heard and determined by any former suit and the issues in question in this suit are thus not *res judicata*. The Respondents' objection is found to have no merit and the objection is dismissed.

**B. Whether the Applicant is entitled to a declaration of ownership of a portion measuring 1.5 acres out of the suit land parcel Matinyani/Mutulu/716 by way of adverse possession.**

43. The Applicant claims that he was born, brought up and even retired from employment while still in occupation of a portion of the suit land. He claims that his occupation has been exclusive, open and uninterrupted. The Respondents on the other hand contend that this occupation has not been peaceful or uninterrupted and that he ought to have moved out as his brothers did.



44. Section 7 of the *Limitation of Actions Act* (Cap. 22) stipulates that:

“An action may not be brought by any person to recover the 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.”

45. The Court of Appeal pronounced itself on the elements to be considered in an adverse possession application in *Mate Gitabi Vs. Jane Kabubu Muga & Others* (Nyeri Civil Appeal No. 43 of 2015 (unreported) as follows;

“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 secrecy, without force, and license or permission of the land owner, intending to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*. See also *Eliva Nyogesa Lusenaka & Another Vs. Nathan Wekesa Omacha – Kisumu Civil Appeal No. 134 of 1993* and *Kasuve Vs. Mwaani Investments Ltd & 4 Others* [2004] KLR 184 at page 188 where this Court stated as follows;

“In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’ See also *Wanje v Saikwa* [1984] KLR 284.”

46. The Respondents have submitted that the burden of proving the claim lies on the Applicant to prove the extinction of the deceased's right to property. They rely on the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR where the Court of Appeal held that;

“A person who claims adverse possession must inter alia show:

- (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.”

47. In the present case, the Applicant states that his father settled on the suit land before he was born and after growing up he built his home and settlement on the land. He stated that he was born, married, worked as chief and retired while still living on the suit land. He further stated that the developments he has made on the land and activities include fencing, keeping livestock, drilling boreholes and constructing water reservoirs, and carrying out commercial and subsistence farming such as tree planting and crop cultivation. He has also buried his dead family members on the land. The Respondents admit that the Applicant was born and brought up on the land. He married and worked as assistant chief till he retired while occupying part of the suit land and he still occupies it. However, they deny the extent of his occupation and use of the land.

48. The Court has sought to be guided by the Court of Appeal in the case of *Richard Wefwafwa Songoi* (supra) on the elements that a person claiming adverse possession must show. The court has established



that the date on which the Applicant came into possession of the land is not in dispute since he has been on the land since he was born. He claims that none of his family members were ever evicted from the land by the deceased owner of the land or the Respondents herein. The Respondents argue that before the year 2001, the Applicant occupied a very small portion of the portion he now occupies and he only had a temporary structure as a home. That in the same year when his brothers moved out he started amalgamating the portions left behind and built permanent structures despite warnings from the Respondents. It appears from the Respondent's own admission that the Applicant occupied a portion of the suit land before the year 2001 and in that year he expanded the said occupation.

49. The second test is to establish the nature of the Applicant's possession. The evidence on record shows that the Applicant was present on the suit land by virtue of being a son of Mbuthi Mwinzi (deceased) and a grandson of the Mwinzi Nguma and a nephew of the deceased Muthui Mwinzi the registered proprietor of the land.
50. The Respondents gave the history of the land and pointed out that the title was obtained through the process of land adjudication in the Matinyani Mutulu adjudication area. It was their evidence that no one including the brothers of Muthui Mwinzi, their wives and children or any neighbor or clan elder objected to the registration of Muthui Mwinzi as the sole proprietor of Parcel No. Matinyani/Mutulu/716 during the land adjudication process. The Applicant produced an official search of the land and the same shows that the title deed was issued to the deceased on 5.9.1979. In their view, this showed that the land was owned by Muthui Mwinzi absolutely and he did not hold the same under an intergenerational trust.
51. As stated above the title deed to the suit land was issued to the deceased on 5<sup>th</sup> September, 1979 meaning that the process of land adjudication had been completed yet the Applicant and his family members continued to occupy the land until the year 2001 when all, apart from the Applicant and another brother, who remained.
52. It is the court's view that the Applicant's father established a home on the suit land as part of the land belonging to his father Mwinzi Nguma and the Applicant's grandfather before the area was declared an adjudication area. The Court is also inclined to believe that the Applicant established his home on the same part of the suit land which his father occupied and they continued such occupation even after land adjudication and issuance of the title deed to the deceased Muthui Mwinzi. Such continued occupation was, in the court's view, with the consent and permission of the registered owner as it has been established that the said Muthui Mwinzi did not ask his brother and/or his children to vacate the land even after a title deed was issued to him. No evidence was adduced to indicate that at any one time, the deceased owner ever withdrew his permission and/or consent to have the Applicant continue possession of the suit land.
53. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”
54. Evidence adduced in Court shows that the permission given to the Applicants father and members of his family was withdrawn at some point in time. The Applicant's brothers who were PW 3 Peter Kilonzo Mbuthi and PW 4 Thomas Mutundu Mbuthi testified that all was well with their occupation



of the suit land until their father died and the Respondents started claiming the land and proceeded to file the succession cause claiming to own it absolutely. The said brothers moved from the suit land by the year 2001 but the Applicant remained.

55. Before then evidence adduced shows that from 1998 there was a dispute raging over ownership and occupation of the suit land between Onesmus K. Mbuthi (the Applicant herein) and Musyoka Muthui (the 2<sup>nd</sup> Respondent herein) starting with the letter from the District Officer Kabati dated 8.1.1998 where it was stated that the Applicant was claiming ownership of a portion of the suit land. Other letters dated 28<sup>th</sup> March, 2001 and 29<sup>th</sup> March, 2001 by the District Officer Matinyani Division Musyoka Muthui, the 2<sup>nd</sup> Respondent was the complainant accusing Kasaki Mbuthi the Applicant of illegal occupation of a section of the suit land.
56. The parties and family members were summoned to resolve the dispute and there is evidence of clan meetings and deliberations being called and held over the same dispute. According to the Applicant, his witnesses and minutes of clan meetings it was decided that the suit land was registered in the name of the deceased Muthui Mwinzi for himself and in trust for his brothers and thus the Applicant and other family members were rightfully in occupation. The Respondents on the other hand exhibited minutes of a meeting showing sale of part of the suit land to the Iloo Mwinzi family and another portion to Fredrick Mbuthi in essence showing that the said family members acknowledged that the land they occupied did not belong to them.
57. From the foregoing it becomes clear that as far as the Respondents were concerned the suit land belonged to their father absolutely and any extended family member in occupation of any part of the land was in such occupation illegally as a trespasser. The permission to remain on the suit land alluded to earlier had obviously been withdrawn and the Respondents wished to have the Applicant move out of the land.
58. It is noted that at this juncture the Respondent's father Muthui Mwinzi had already passed on since he was not involved in the disputes and no one had yet been issued with a grant of letters of administration to his estate. Evidence before the court shows that the grant was issued jointly to the Respondents herein Paul Saiti Muthui and Francis Musyoka Muthui on 19<sup>th</sup> October, 2004.
59. The question then arises as to whether the Respondents had the capacity to end the permission or consent granted to the Applicant to occupy the suit land after the death of the deceased and before being issued with a grant of letters of administration. This question was answered in the affirmative by Okong'o J in the case of Joseph Kamau Gichuki (Suing as the administrator of the Estate of Gichuki Chege (Deceased) v James Gatheru Mukora & another [2019] eKLR when the court stated that;

“The defendants had contended that since Mukaria died on 14th July 1960 and no administrator had been appointed in respect of his estate until 1992, the limitation period could not run against him. I am not persuaded by this argument. Under the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, the death of a registered owner of land does not stop time from running for the purposes of adverse possession. Section 16 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides as follows: -

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration.”



From the evidence placed before the court, the defendants are the legal representatives of the estate of Mukaria. Their right to claim the suit property dates back to the date of death of Mukaria. What this means is that when the deceased entered the suit property in 1974, the defendants are deemed to have been entitled to possession of the property as of that date and in that regard, for the purposes of limitation of actions, time started running against them from that date although they had not obtained a grant of letters of administration. It follows therefore that, as at the time the defendants were issued with a grant of letters of administration in respect of the estate of Mukaria in 1992, their claim over the suit property was already time-barred, the deceased having occupied the suit property continuously for over 18 years.”

60. In the present case, I do agree with the Hon. Judge in applying Section 16 of the Limitation of Actions Act and state that acts taken by the administrators in withdrawing permission or consent to the Applicant’s occupation of the suit land is to be taken as if there had been no interval of time between the death of the deceased person and the grant of letters of administration. Withdrawal of permission to the Applicant to occupy the suit land can be taken to have occurred in the year 1998 when there is evidence that there was a dispute over the occupation of the land with the Respondents seeking to have the Applicant move out of the land.
61. Alternatively, the clearest evidence that the permission or consent to occupy the land had been withdrawn is the letter written to the Applicant by the Respondents Advocates Mwanyumba, Nzuki Mwinzi & Co. Advocates dated 17<sup>th</sup> May, 2001 where the said Advocates stated that “You have without any colour of right and/or unlawfully you have unjustifiably continued to encroach on the said piece of land, fettering our client’s quiet possession/occupation of the said land thus occasioning him great prejudice and loss” In reply, the Applicant’s Advocate M/S Kalili & Co. Advocates wrote a letter dated 29<sup>th</sup> May, 2001 stating that; “Your client may proceed to file the alleged suit if he feels he has a genuine and good case against our client. Our client will not comply with your client’s demand”
62. At this point, the battle lines were drawn and in the court’s view, the Respondent’s right to recover the land from the Applicant accrued as from the said time and time started running for purposes of adverse possession.
63. The next issue for consideration is whether the fact of the Applicant’s possession was known to the other party. In the court’s view, this question has been answered elsewhere in this judgement since the Respondents admit knowledge of the Applicant’s possession of the portion of the suit land.
64. The question of the length of time the possession has continued has also been dealt with elsewhere in this judgement and the court has found that the Applicant has lived on the suit parcel of land all his life. It was indeed confirmed by the Respondents that by 1988 he was married and was living on the suit land. The Respondents further confirmed that in 2001 the Applicant expanded the land he was occupying when he amalgamated the pieces of land occupied by his brothers who had moved out of the suit land.
65. The other question is whether the possession was open and undisturbed for the requisite 12 years. The answer to this question is that the possession was open and undisturbed. The Respondents claim that the possession was disturbed by the letters of demand and the communication from various offices mentioned showing that his presence on the land was contested.
66. However, the position of the law is that a letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law. This position was taken by the Court of Appeal in Civil Appeal No. 121 of 2006; - Benson Mukuwa Wachira v Assumption Sisters



of Nairobi Registered Trustees [2016] eKLR where the court affirmed the sentiments of the Court in *Amos Weru Murigu v. Marata Wangari Kambi & Another* where the Court held:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be an interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, the institution of suit against a trespasser does interrupt and stop the time from running.”

67. In the present case, and as found previously in this judgement, the Respondents did not assert their rights even through the succession proceedings. As was stated in *Eldoret Civil Appeal No. 212 of 2012;- Isaac Cypriano Shingore v Kipketer Togom* (supra) where the Court held:

“There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent’s possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in *Githu Vs. Ndeete* [1984]KLR 776 “Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire’s Modern Law of Real Property*, 11th edition at p 894”.)”

**C. Whether the deceased Muthui Mwinzi held the suit land Matinyani/Mutulu/716 under an inter-generational customary trust for his brothers including the Applicant’s father or he held the same as the absolute proprietor.**

68. As noted earlier, the title deed to the suit land was issued on 5.9.1979 and the parties produced an official search that shows that the land is registered in the name of Muthui Mwinzi. The effective law at the time of registration was the Registered *Land Act* CAP 300 Laws of Kenya (repealed). Section 27 (1) of the Act stated that;

“the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;”

Section 28 stated that;

“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”

Section 25 of the [Land Registration Act](#)

- “ 1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

69. In the above provisions of the law, there is recognition of the duty or obligation of a proprietor of land to be bound to any trust he/she is subject to.

70. The Supreme Court of Kenya in the case of *Isack M’inanga Kiebia v Isaaya Theuri M’lntari & another* [2018] eKLR restated, clarified and gave guidelines concerning customary trusts stating that;

“Flowing from this analysis, we now declare that a customary trust, as long as the same can be proved to subsist, upon a first registration, is one of the trusts to which a registered proprietor, is subject under the proviso to Section 28 of the Registered [Land Act](#).

71. From the foregoing it is clear that the question of a customary trust is anchored in law. However, in the present case the Applicant’s primary claim as sought in the Originating Summons dated 26<sup>th</sup> July 2019 is for adverse possession under Order 37 Rules 7 and 14 of the Civil Procedure Rules and Section 38 of the [Limitation of Actions Act](#) CAP 22 Laws of Kenya. The claim for a declaration of an intergenerational customary trust over the suit land was an alternative claim essentially to be considered if the claim for adverse possession failed. Having found that the claim for adverse possession had been proved, the court is of the view that it is not necessary to delve into the question of whether or not the deceased, Muthui Mwinzi held the suit land both for himself and under an intergenerational customary trust on behalf the family of Mwinzi Nguma.

72. For the foregoing reasons the court finds that the Applicant has proved to the required legal standard that he has become entitled to ownership by adverse possession for over twelve (12) years to the portion of land measuring 1.5 acres from Land Parcel Number Matinyani/Mutululu/716.

73. The court thus makes the following orders;

1. That the Applicant be and is hereby declared to have become entitled to ownership by virtue of his adverse possession for over twelve(12) years of a portion of land measuring 1.5 acres from



Land Parcel Number Matinyani/Mutulu/716 and that the Respondents be and are hereby ordered to transfer to the Applicant the portion of land measuring 1.5 acres from Land Parcel Number Matinyani/Mutulu/716 and the same be registered in the name of the Applicant in place of the above named Muthui Mwinzi (Deceased).

2. The Respondents will pay the costs of the suit.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgment read in open court and virtually in the presence of-

Musyoki: Court Assistant

J. K. Mwalimu for Plaintiff

Samuel holding brief for Mutua for the Defendant

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