



**Chege & 3 others v Kamau & another (Enviromental and Land Originating  
Summons 43 of 2020) [2023] KEELC 22046 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22046 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 43 OF 2020  
LN GACHERU, LN GACHERU, LN GACHERU & LN GACHERU, JJ  
NOVEMBER 30, 2023**

**BETWEEN**

**SIMON MURITU CHEGE ..... 1<sup>ST</sup> APPLICANT  
SIMON MURITU CHEGE ..... 2<sup>ND</sup> APPLICANT  
JOHN GIKONYO CHEGE ..... 3<sup>RD</sup> APPLICANT  
JOHN GIKONYO CHEGE ..... 4<sup>TH</sup> APPLICANT**

**AND**

**GERALD MACHARIA KAMAU ..... 1<sup>ST</sup> RESPONDENT  
GERALD MACHARIA KAMAU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. By an amended Originating Summons dated 6<sup>th</sup> December 2021, the Plaintiffs/ Applicants herein, Simon Muritu Chege and John Gikonyo Chege, have sued the Defendant Gerald Macharia Kamau, seeking for the following orders; -
  - a. That the Court be pleased to make a declaration that the Plaintiffs/ Applicants, Simon Muritu Chege and John Gikonyo Chege, are entitled by operation of the doctrine of adverse possession to be registered as the owners and proprietors of the free hold interest in land title Number Loc.12/Sub-Loc 1/153.
  - b. That the Court do issue an order directing and authorising the Land Registrar Murang'a, to cancel the name of the Respondent herein Kamau Macharia, (now deceased) or any other person claiming under or through him and substitute therefore the names of Simon Muritu Chege and John Gikonyo Chege, as the joint absolute proprietors of the said title number Loc. 12/Sub-Loc.1/153.



- c. That an order of Permanent injunction do issue restraining the Respondent by himself, his agents, servants, employees or any person claiming under or through him from interfering with the quiet possession and use by the Plaintiff/Applicants and their family of land parcel No. Loc.12/Sub-Loc.1/153.
  - d. That Court be at liberty to make any further orders as it may deem necessary and expedient in the matter.
  - e. That the Defendant/Respondent be ordered to pay costs of the suit.
2. The Plaintiffs/Applicants urged the Court to determine;
    - i. Whether the Plaintiffs by themselves and also through their father Chege Macharia (deceased), have been in exclusive and uninterrupted possession and occupation of the subject property for a period exceeding 12 years.
    - ii. Whether the said occupation, use and possession has been exclusive, open and adverse to the Respondent's right and interest over the suit property
    - iii. Whether the Respondent's registration as the proprietor of the suit land was and remains subject to the Applicants' rights conferred upon them by their operation of the Law and the doctrine of adverse possession(prescription).
    - iv. Whether the Applicants are entitled to registration as proprietors of the suit property by virtue of the application of the doctrine of adverse possession.
    - v. Which summons is supported by the joint Affidavit of the Applicants filed herewith and such further grounds as the nature of the case may permit to be adduced at the trial.
  3. The Originating Summons is supported by the Joint Affidavit of the Applicants – John Gikonyo Chege and Simon Muritu Chege, who have averred that they are siblings and sons of Chege Macharia, who died in 1991 and that their mother was Grace Wanjeri (deceased), who died in 1986. They also averred that they were seven siblings and three of them are deceased. It was their contention that their deceased parents and siblings were buried on the suit property-, Loc.12/Sub-Loc1/153.
  4. Further that they have brought the suit herein on behalf of the estate of their deceased father Chege Macharia, and on their own behalf.
  5. It was their further contention that on or about the year 1962, their late father Chege Macharia, did purchase from the Defendant's father, the late Kamau Macharia as a vendor land parcel No. Loc12/ Sub-Loc.1/153, measuring 0.48 ha. at the agreed purchase price of 840/=. That the purchase of the said parcel of land was reduced into writing as is evident from annexures JG 2 (a) & (b). Further that upon purchase of the said parcel of land, the late Chege Macharia proceeded to have the land cleared in 1962 and he settled thereon together with his young family. They contended that both of them were born on the suit land in the years 1967, and 1972, respectively.
  6. It was their further contention that the deceased's family has been in open and exclusive possession of the suit land, and have worked therein, utilized and occupied the whole land, that their deceased Kin are buried on the suit land. Further, that the Defendant has attended all the Plaintiffs/Applicants' family and social functions in the said homestead.
  7. The Plaintiffs also contended that they have built permanent homesteads and residences on the suit land where they live as their only known place of abode.



8. That the Defendant has always stated, maintained and promised that he was ready and willing to transfer the land to the Plaintiffs family and had asked them to be patient.
9. That to their surprise, in the year 2020, the Plaintiffs received information that the Defendant had applied and obtained Land Control Board (LCB) consent, to have the suit land subdivided and alienated to third parties to defeat the Plaintiffs/Applicants' claim and interest. It was therefore their contention that their family has been in open and continuous possession of the suit land for the last 58 years and they have acquired the said land through adverse possession/prescriptive rights, and they deserve to be registered as the owners of the suit property and that the Defendant has been holding the said suit land in trust for themselves.
10. They urged the Court to allow their claim.
11. The Defendant opposed the Originating Summons via his Replying Affidavit dated 11<sup>th</sup> January 2021, sworn by Kamau Macharia now deceased. He denied the averment made by the Plaintiffs in their claim. He denied having sold the suit land to the Plaintiffs/Applicants' father. He contended that the Plaintiffs are children of his step-brother Chege Macharia, whom he had given occupational and cultivational rights, because he had another piece of land. That he was to get back the said land wherein he needed it. That the Plaintiffs are taking advantage of his generosity and there is another suit being Civil Case No. 1340 of 1977(OS), which had been filed at Nairobi High Court, and thus this suit is sub-judices. He urged the Court to dismiss the instant suit with costs.
12. The initial Defendant was Kamau Macharia (deceased), who is the registered owner of the suit property. He died during the pendency of the suit and was substituted with Gerald Macharia Kamau, his son who was issued with Letters of Administration Ad Litem on 21<sup>st</sup> June 2021.
13. After several adjournments, wherein the parties had attempted an out of Court settlement, the case proceeded for hearing on 19<sup>th</sup> June 2023. The matter had earlier been referred to Court Annexed Mediation, but a certificate of non-compliance was returned on 4<sup>th</sup> August 2023, as the Defendant declined to participate in the Mediation.

The matter proceeded via viva voce evidence.

### **Plaintiffs' Case**

14. PW 1: Peter Gitau Ngugi, practicing Land Valuer, gave evidence to the effect that he has a 30 years' experience as a Land Valuer and in this matter he was instructed by the Plaintiffs to value the suit land being Loc12/Sub-Loc.1/153, which is registered in the name of Kamau Macharia. That he visited the land on 8<sup>th</sup> June 2022, and carried a search at the lands office. The land was in the name of Kamau Macharia, and was approximate 1.186 acre and is occupied by the two brothers. That there are developments thereon being one permanent house and a semi-permanent house. That it has a Kitchen, Chicken house and it is cultivated. That the said land is a complete homestead, with mature coffee and subsistence crops. It was his testimony that the occupation by the two brothers is not current, but the said occupation is of a long time and the relatives of the Plaintiffs are buried on the suit land. As to his valuation, the land is valued at Kshs. 5,200,000/= . He produced the Valuation Report as P. Exhibit 2 and the receipt for his charges as P. Exhibit 3.
15. PW 2 John Gikonyo Chege, the 1<sup>st</sup> Plaintiff relied on the Joint statement recorded by both Plaintiffs herein. He also relied on his Supporting Affidavit dated 14<sup>th</sup> December 2020, as part of his evidence. He also produced the list of documents as P. Exhibit. In Cross-examination, he testified that the Defendant's father sold the suit land to the Plaintiffs' father. He further testified that the father to the Defendant had no problem with the Plaintiffs occupation of the suit land.



16. In re-examination, he confirmed that he was born on the suit land about 50 years, ago and that their father showed them the Sale Agreement between himself and the Defendant's father.
17. PW 3, Simon Muritu Chege, testified that he was born on 1967, and his father was Chege Macharia, who died in 1991. That their mother was called Grace and she died in 1986, and that both of their parents are buried on the suit land.
18. That he was also born on the suit land. He relied on his Supporting Affidavit as part of his evidence. It was his testimony that he has lived on the suitland since birth, and that Kamau Macharia, the father to the Defendant had sold the suit land to their father Chege Macharia. That their father told them that he had bought the suit land from Kamau Macharia, as per the Sale Agreement produced in Court as exhibit. That the said vendor – Kamau Macharia, did not transfer the suit land to their father, even though he had confirmed that he had sold the suit land to Chege Macharia. That their father Chege Macharia, was buried on the suit land in 1991.
19. In cross-examination, he confirmed that the father to the Defendant died during the pendency of this case and he did not transfer the suit land to the Plaintiffs.
20. PW 4; Lucy Wairimu Mwangi, from Kangema stated that she was 70 years, old and she knows the Plaintiffs herein as she is their auntie. She relied on her witness statement dated 25<sup>th</sup> January, 2021 authored by Mwangi Macharia, who was her husband and who died during the pendency of this case.
21. On cross-examination, she confirmed that her husband Mwangi Macharia, lived on the adjacent land and that she has never lived on the suit land.

#### **Defendant's Case**

22. DW 1 Gerald Macharia Kamau, from Rwathia area stated that he was born in 1962, and that Kamau Macharia was his father, who died in April 2021. He denied that the Plaintiffs ever bought the suitland from his father. He admitted that his father Kamau Macharia, had allowed the Plaintiffs' father to occupy and use the land, but his father did not sell the Suitland to the Plaintiffs' father. He also confirmed that the Plaintiffs have lived on the suitland for long, and that their relatives are buried on the said land.
23. It was also his testimony that he has never utilised the suit land as he left for Nairobi in 1979, and returned to the village in 2019, and went to live in Rwathia, and not on the suit land. That his family has never lived on the suit land. In cross-examination, he admitted that the Plaintiffs' father settled on the suitland in 1962, and that his father Kamau Macharia, has never used the suit land since 1962, but Chege Macharia is the one who has been using the land.
24. He also confirmed that though his father gave the land to the said Chege Macharia to utilize, he never sold the same to the Plaintiffs' father. He told the Court that his family only grew tomatoes on the suit land in 1975, but thereafter, he left for Nairobi in 1979, and he has never demanded that the Plaintiffs move out of the suitland.
25. He also confirmed that there is a permanent house on the suit land and that his father attended the burial of the Plaintiffs' parents, which was on the suitland. It was his further testimony that none of his parents are buried on the suitland, and he relied on what his parents told him. That he now wants to sell the land to the Plaintiffs.
26. Further that he has five other brothers and none of them live on the suitland or are witnesses in this case.
27. Thereafter, the parties filed and exchanged written submissions.



28. The Plaintiffs through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates, filed their submissions on 22<sup>nd</sup> June 2023, and submitted that they have proved their case on the required standard of balance of probabilities and urged the Court to allow their claim. The Plaintiffs attached various decided cases to their submissions; among them the case of Susan Wangari Mathenyu & Another vs James Peter Mathenyu (2015) eKRL, where the Court quoted with authority the case of Mbira vs Gachuhi (2002) 1 EALR 137, where the Court held;
- “a person who seeks to acquire title to land by method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption”
29. The Respondent through the Law firm of Karuga Wandai & Co. Advocates, filed his submissions on 6<sup>th</sup> July 2023, and submitted that the Plaintiffs did not meet the standard of proof of a case of adverse possession as was stated in the case of Mbira vs Gachuhi(supra), it was the Defendant’s further submissions that the initial Defendant (Kamau Macharia –deceased) had stated in his affidavit that the “Applicants are the children of his step-brother, Chege Macharia who he had given occupational and cultivational rights, because he had another piece of land and was to get it back when he wanted”.
30. That it was wrong for the Plaintiffs to take advantage of the generosity of the Defendant by claiming the said land instead of being grateful.
31. He also submitted that the sale agreement dated 8<sup>th</sup> February 1963, had no relationship with the suit property Loc.12/Sub-Loc.1/153, which is the subject matter of this case and the agreement does not mention the suitland. Therefore, the Defendant submitted that there is nothing adverse in this case, and the Plaintiffs have not been able to prove adverse possession by themselves as against the Defendant herein. He urged the Court to dismiss the Plaintiffs suit with costs to himself.
32. The Court has carefully considered the pleadings, the available evidence, the written submissions and the cited authorities together with the relevant provisions of law and finds the issues for determination are;
- i. Whether the Plaintiffs have met the threshold for grant of orders of adverse possession.
  - ii. Whether the Plaintiffs are entitled to the orders sought in the Originating Summons.
  - iii. Who should bear costs of this suit.
33. Before delving into the issues for determination, the Court will first deal with the lamentation made by the Defendant in his submissions to the effect that he was not given a fair hearing since he was denied his right to have an advocate. The Defendant submitted that this case was only 2½ years, old since it was filed in December 2020.
34. With respect to the Defendant’s advocate, the Court should alert him that according to the Judiciary Performance Management and Measurement Understanding(PMMU), which has been wholly embraced by the Judiciary, a case is ordinarily supposed to be determined within a period of 360 days from the date of filing. Further according to the Overriding Objective of the Civil Procedure Act, which is emphasised in Sections 1A and 1B thereon,.. the overriding objective of that Act and the rules made thereon is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act,



35. This is such a Civil dispute governed by the said Act, and thus should be resolved expeditiously. A case being in the Judicial system for more than one year is going against the above Oxygen principle. After 360 days, or one year, a case becomes a backlog. This case was filed on 13<sup>th</sup> December 2020, and as rightly submitted by the Defence Counsel, by 19<sup>th</sup> June 2023, when the matter came up for hearing, it was about 2½ years in the Judicial system and thus a backlog. This Court need not to emphasis this point any further.
36. On whether the Defendant was denied a fair hearing, it is not in doubt that fair hearing applies to all the parties in Court and matters filed in Court should be heard expeditiously as justice delayed is Justice denied.
37. From the Court record, the Pre-trial proceedings were finalised on 11<sup>th</sup> February, 2021, when the Court was informed that both parties had complied with Order 11 of the Civil Procedure Rules. The case was set down for hearing on 10<sup>th</sup> March 2021.
38. When the matter came for hearing on 10<sup>th</sup> March 2021, both advocates were present in Court and Mr Karuga Wandai for the Defendant informed the Court that the parties were related and requested the Court to allow them time to explore an out of Court settlement. The said request was allowed by the Court and matter was set to be mentioned on 4<sup>th</sup> May 2021, to record a consent. However, there was no action until 5<sup>th</sup> October 2021, when the Defendant was substituted through an application made by the Plaintiffs.
39. The matter was given a hearing for 26<sup>th</sup> April 2022, wherein the same did not proceed as the Defendant's advocate was allegedly unwell. The Plaintiffs were present in Court and ready to proceed. Again, the matter was set down for hearing on 27<sup>th</sup> June 2023, which date, the matter did not proceed because there was a possibility of settling the matter out of Court. The Court allowed the parties to attempt an out of Court settlement, with a mention on 15<sup>th</sup> August 2022, for possible recording of a consent. There was no settlement, and there was a certificate of non-compliance from the Court Annexed Mediation.
40. On 25<sup>th</sup> January 2023, when the matter come up for hearing, and there was an application for adjournment, the Court granted the said adjournment and marked it as a last adjournment. Another hearing date was given for 21<sup>st</sup> February 2023. On 21<sup>st</sup> February 2023, Ms Gachago holding brief for Mr Karuga Wandai for the Defendant sought for adjournment on the ground that Mr Karuga was unwell and sought for another date.
41. The Court noted that there was no evidence of Mr Karuga's illness, but still gave an adjournment with an order that the Defendant do pay adjournment fees. The matter was again set down for hearing on 7/3/2023.
42. On 7<sup>th</sup> March 2023, the matter did not proceed as it was indicated that there was a possibility of settling the matter out of Court. However, on 23/5/2023 it was indicated that the Defendant preferred to be heard by the Court and Mr Karuga Wandai for the Defendant submitted that the Defendant preferred to take a hearing date for the matter. The Court noted that the parties did not submit themselves to mediation and gave a hearing of 19<sup>th</sup> June 2023.
43. On 19<sup>th</sup> June 2023, when the matter was called out, the Plaintiffs were present and ready to proceed for hearing. The Court gave a time allocation of 10.30am. However, on the same day at 11.00am, in open Court, a Mr Matu, appeared holding brief for the Defence Counsel, and sought an adjournment on an allegation that the Defence Counsel was bereaved. The Court noted that the Defence Counsel had not informed the Plaintiffs' counsel of his bereavement and so the Plaintiffs were all present in Court and



ready to proceed with the hearing. Given the number of previous adjournments, the Court declined to allow any further adjournment and directed the matter to proceed for hearing. The Defendant – Gerald Macharia Kamau, was present in Court and he did not object and proceeded with the hearing.

44. From the above chronology of events, it is very clear that the Court had given the parties ample time to prepare, had given last adjournment and had even overlooked the said last adjournment and the Defendant’s advocate knowing very well that the matter had a last adjournment chose not to inform his learned colleague, Counsel for the Plaintiffs that he would not be available on 19<sup>th</sup> June 2023. As the Court stated earlier, fair hearing applies to all the parties and precious hearing dates should also be guarded and adhered to. Enough of that.

**i. Whether the Plaintiffs have met the threshold for grant of orders of adverse possession?**

45. It is not in doubt that the suit property herein Loc. 12/Sub-Loc.1/153, is registered in the name of Kamau Macharia (deceased) who has now been substituted with Gerald Macharia Kamau, as per the Letters of Administration Ad Litem issued on 21<sup>st</sup> June 2021, upon the application made by the Plaintiffs/Applicants.
46. It is also not in doubt that the alleged sale agreement was between Chege Macharia, the father to the Plaintiffs and Kamau Macharia (now deceased). It is trite that a claim for adverse possession is attached to land and not title.
47. The Plaintiffs have averred and testified in Court that they have lived on the suit land all their lifetime. That one was born in 1967 and the other in 1972, and therefore they have been in occupation for over 12 years.
48. The Plaintiffs testified that their father entered into the suit property in 1962, with the permission of Kamau Macharia, the original proprietor and current registered owner. That Chege Macharia, entered unto the suit property through purchase. A Sale Agreement dated 1963, written in Kikuyu Language and translated to English was produced in Court as an exhibit.
49. For a claim of adverse possession to attach, the mode of entry into the suit property is crucial. It must be non-permissive, actual and open and without force. See the case of Samuel Kihamba vs Mary Mbaisi(2015) eKRL, where the Court held;
- “Strictly, for one to succeed in a claim for adverse possession, one must prove, and demonstrate that he has occupied the land openly, that is without force, without secrecy, and without licence 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 Latin phraseology of nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi or intention to have the land”.
50. From the Plaintiffs evidence the mode of entry was through purchase as per the sale agreement produced by them as exhibits. That means that the entry into the suit land by the Plaintiffs’ father was permissive one from Kamau Macharia(deceased), the registered owner of the said land
51. The Plaintiffs claim is for adverse possession, and they must demonstrate that the same was non-permissive and non-consensual and without licence. See the case of Mombasa Teachers Co-operative



Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR, where 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 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

52. Since the Plaintiffs occupation through their late father Chege Macharia was permissive, then it is clear that a claim for adverse possession may not attach. However, Courts have held that such a claim can be sustained after the payment of the last instalment. This has been held in a number of decided cases. In the case of Public Trustee vs Wanduru Ndegwa(1984)IKLR, the Court held that Limitation of action begun running from the date of the final payment. Further, in the case of Hosea vs Njiru & Others (1974) EA526, the Court held that once payment of the last instalment of the purchase price has been effected, the purchaser’s possession became adverse to the Vendor.
53. The Defendant herein had denied ever selling the suit property to Chege Macharia, the father to the Plaintiffs herein. It was his submissions that the sale agreement did not mention the suit property herein and did not describe it as Loc.12/Sub-Loc.1/153.
54. However, it is evident that the sale agreement is from 1962, and the witness testified that the said land was sold immediately after land demarcation and consolidation. From a copy of official search, the suit land was registered in the name of Kamau Macharia in 1977, and the land certificate was issued on 15<sup>th</sup> March 1977.
55. Given that the land certificate was given in 1977, then the said Sale Agreement could not describe the land as it had not been registered.
56. Further from the sale agreement, the last instalment was made on 23/5/1976, and as was held in the case of Hosea vs Njiru (supra), the occupation of the said Chege Macharia(deceased), and the Plaintiffs herein became adverse to Kamau Macharia(deceased), the father to Gerald Macharia, the substituted Defendant herein, after 12 years from 23<sup>rd</sup> May 1976. Therefore, for purposes of computing time, the Court finds that time started running on 23<sup>rd</sup> May 1976, after the final payment and 12 years ended in 1988.
57. The Plaintiffs alleged that after the final payment, their family continued to be in open, continuous and exclusive occupation of the suit property. The Defendant did admit in evidence that the Plaintiffs family has been in occupation of the suit property from 1962, todate and that the Plaintiffs have buried their deceased parents on the said suit land.
58. The Plaintiffs testified that they have built their homestead on the suit property and that they have never lived elsewhere since they were born. For this evidence, the Plaintiffs attached photographs of their homesteads, which comprises of permanent, semi-permanent houses, cowsheds, chicken pen, mature coffee bushes and other trees which showed long occupation. This fact was not disputed by the Defendant herein as he also confirmed in his evidence that the Plaintiffs herein and their families have occupied and used the suit land for a long time without interference or interruption of their possession. Further, the Valuer, PW 1 gave evidence to the effect that the Plaintiffs have put up permanent and semi-permanent houses on the suit property and he availed evidence to prove that assertion. Therefore, the Plaintiffs have been able to prove that they have been in open, continuous and exclusive occupation of the suit property for a period exceeding 12 years.



59. This occupation has dispossessed and discontinued the proprietor of the use and occupation of this suit land. The Defendant confirmed that his father had never asked the Plaintiffs and their family to move out of the suit property. Therefore, the late Kamau Macharia never asserted his right. See the case of *Mtana Lewa Vs Kahindi Ngala Mwangadi*(2015) Eklr, where the court held as follows;

“Adverse possession is essentially a situation where a person takes possession of land and asserts right over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve years(12years). The process springs into action essentially by default or inaction of the owner....”

60. The Defendant also admitted that his family and himself have never lived on this suit property or ever demanded that the Plaintiffs move out of the suit property and therefore, the Defendant having failed to assert his right over the suit property was dispossessed and discontinued of its use.

61. In the case of *Isaac Cypriano Shingore Vs Kipketer Togom* [2016] eKLR) where the Court held;

“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 respondent 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”).

62. Having considered the available evidence, the Court finds that the Plaintiffs have met the threshold for grant of orders of adverse possession.

## **ii. Whether the Plaintiffs are entitled to the orders sought in the Originating Summons.**

63. The Plaintiffs have averred that the suit property herein is registered in the name of Kamau Macharia(deceased), who was the father to Gerald Macharia Kamau, now substituted as the Defendant. The Plaintiffs did not attach a copy of the title deed, but they attached a copy of certificate of official search, which shows that the land herein is registered in the name of Kamau Macharia. PW 1, the land Valuer also testified to that effect.

64. It is trite that registration of land in the name of a proprietor confers him/her indefeasible title to the said party. However, this right of a registered owner can be defeated through prescriptive rights as it is subject to overriding interests as provided in Section 28 of the Land Registration Act which states;

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

(a) .....



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

.....

65. The Plaintiffs herein wishes to defeat the title of Kamau Macharia(deceased), on the basis of prescriptive rights, as stated above. The Plaintiffs adduced evidence to the effect that they have been in continuous, uninterpreted occupation and possession of the suit property for a period in excess of 12 years. Infact, they testified that they were born on the suit land in 1967 and 1972, respectively. That their father Chege Macharia, entered into the suit property through purchase in 1962.
66. The Court found that the purchase price was paid in full in 1976, and therefore time started to run then.
67. A period of 12 years lapsed in 1988, and there was no evidence of any demand of the suit land within that period and therefore, the Defendant herein did not assert his right so as to interfere with the said long and uninterrupted period of exclusive possession and occupation. There was also no evidence of any interruption at all of the Plaintiffs occupation. Chege Macharia, the father to the Plaintiffs and the person who initially entered unto the suit land in 1962, and whose time started to run in 1976, died in 1991, and by that time a claim of adverse possession had accrued. In fact, the parties herein were all in agreement that the said Chege Macharia (deceased) was buried on the suit property without any objection from Kamau Macharia (deceased), the registered owner, who though deceased now, was alive then or the current Defendant, who is a son to the registered proprietor.
68. Further, there was evidence that the Plaintiffs were born and bred on the suit property, and the Defendant had never interrupted their stay on the suit property.
69. The Principles of adverse possession are set out in the case of Wambugu vs Njuguna (1983) KLR 172, where the Court held;

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

70. The right of adverse possession does not accrue automatically. The person in whose right has accrued must take action by filing a suit as provided by Section 38 of the Limitation of Actions Act. This is what the Plaintiffs herein have done.
71. For the Court to determine whether the Plaintiffs are entitled to the prayers sought, it had to determine;
- i. How the Plaintiffs took possession of the suit property?
  - ii. When did they take possession and occupation of the suit land?



- iii. What was the nature of their possession and occupation?
  - iv. How long have they been in possession?
72. The Plaintiffs averred and testified that their father entered into the suit land in 1962, and their father, the Plaintiffs and their families have lived thereon without any interruption. The Defendant admitted that the Plaintiffs family has occupied the suit land for long, though he averred that it was with permission of his father Kamau Macharia.
73. However, having established that time started running after the payment of the last instalment of the purchase price in 1976, then this Court finds and hold that by 1991, when Chege Macharia died, he had lived on the suit property adversely for a period of over 12 years. The Plaintiffs herein and their families have continued to live thereon to date and it is clear that their occupation has discontinued and dispossessed, the registered proprietor of the said suit property.
74. Therefore, the Court finds and holds that the Plaintiffs are entitled to the prayers sought in the Originating Summons.

**iii. Who should bear costs of this suit?**

75. It is trite that costs shall follow the event, and that successful party is ordinarily awarded costs. The Plaintiffs are the successful parties, but given the relationship between the parties herein, the Court directs each party to bear his own costs.
76. Having now carefully considered the available evidence, the Court finds that the Plaintiffs have proved their case on the required standard of balance of probabilities.
77. For the above reasons, the Court enters Judgement for the Plaintiffs herein as against the Defendant in terms of prayers 1, 2 and 3 of the Originating Summons dated 14<sup>th</sup> December 2020.

Each party to bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**L. GACHERU**

**JUDGE**

**30/11/2023**

Delivered online in the presence of; -

Mr. Mwangi Ben for 1st Plaintiff/Applicant

2nd Plaintiff/Applicant

No appearance for Defendant

Joel Njonjo - Court Assistant

**L. GACHERU**

**JUDGE**

**30/11/2023**

Amended at Murang'a this 12th February, 2024 to read as follows;



For the above reasons, the Court enters Judgement for the Plaintiffs herein as against the Defendant in terms of prayers 1, 2 and 3 of the Amended Originating Summons dated 6th December, 2021.

Each party to bear its own costs.

It is so ordered.

**L. GACHERU**

**JUDGE**

**12/02/2024**

