



**Ng'ang'a v Wamiti (Environmental and Land Originating Summons  
11 of 2020) [2023] KEELC 22252 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22252 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 11 OF 2020  
LN GACHERU, J  
DECEMBER 18, 2023  
IN THE MATTER OF SECTIONS 37 & 38 OF THE  
LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA  
IN THE MATTER OF LAND TITLE NUMBER LOC. 2 GACHARAGE/670**

**BETWEEN**

**JACINTA NJERI NG'ANG'A ..... PLAINTIFF**

**AND**

**MIRIAM MUGURE WAMITI ..... DEFENDANT**

**JUDGMENT**

1. Via an Originating Summons dated 20<sup>th</sup> March 2020, the Plaintiff/Applicant herein Jacinta Njeri Ng'ang'a sought for orders against the Defendant/Respondent as follows;
  1. That the Plaintiff/Applicant be registered as the proprietor of the portion of 6.0 acres, out of land parcel Number LOC. 2 Gacharage /670, under section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya on the grounds that the applicant together with her deceased husband, Samuel Nganga Wamiti and her family have been openly, peacefully and as of right been in exclusive possession, occupation and user of the portion which is clearly marked with a physical boundary since the year 1972, or thereabouts, that is to say for a period of over 12(twelve) years immediately preceding the presentation of this Originating Summons in Court.
  2. That the title to Land Parcel no LOC. 2 Gacharage /670, in the name of Henry Wamiti (deceased) as represented in these proceedings by the respondent who is his widow and the legal representative to his estate has been extinguished by the Applicant's adverse possession for the period of over 12 years under Section 17 of the Limitations of Actions Act, Cap 22 Laws of Kenya.



3. That the Applicant be registered as the legal owner of the portion of 6.0 Acres out of LOC. 2 Gacharage /670, and in particular that well-defined portion which the applicant does possess, occupy, cultivate, and has built on.
4. That the Applicant does get the costs of the suit.
2. The Summons is anchored on the Supporting Affidavit of the Plaintiff/Applicant Jacinta Njeri Ng'ang'a sworn on 20<sup>th</sup> March 2020, and filed in Court on 29<sup>th</sup> June 2020. It is the Applicant's averment that she is the widow of Samuel Ng'ang'a Warimwe who died in the year 1992, and the Defendant/Respondent is the widow of Henry Wamitwe, who died on 6<sup>th</sup> October 2004. That the late Henry Wamiti Ng'ang'a, Samuel Ng'ang'a Warimwe, and Jonathan Kang'ang'a, were all siblings, and their father (now deceased) was Joseph Warimwe. That the said Joseph Warimwe was the owner of LOC. 2 Gacharage /670, which land he caused to be registered in the name of Henry Wamitwe, to hold in trust for himself and his other two brothers, but in unequal shares.
3. That Samuel Ng'ang'a Warimwe, got a total of 6 acres comprising of 4.5 acres he purchased for value from his deceased father, and 1.5 acres being his share as a dependent, while both Henry Wamiti and Jonathan Kang'ang'a each got 1.5 acres being their shares as dependents.
4. Further, that LOC. 2 Gacharage /670, was physically subdivided in 1972, in the above manner in the presence of family members and each family has restricted its occupation to the designated portions since then. That Case No. SPMCC 38 of 2002, Jacinta Njeri Ng'ang'a vs. Henry Wamiti, was decided affirming the trust over LOC. 2 Gacharage /670. That the Defendant in the above SPMCC 38 of 2002, died before execution could happen and the said judgments stands to date as it was not appealed.
5. It is the Plaintiff/Applicant's further disposition that she and her immediate family members have openly lived, built, cultivated, and exclusively possessed their 6 acres of land out of LOC. 2 Gacharage /670, which she now claims by way of trust. That in an attempt to evade the judgment of the Court in SPMCC No. 38 of 2002, the Defendant/Respondent had fraudulently filed Nairobi Succession Cause No. 1708 of 2005, which matter is pending before the Court.
6. The Originating Summons is contested by the Defendant/Respondent via a Replying Affidavit sworn by Miriam Mugure Wamiti on 24<sup>th</sup> November 2020. It is the Defendant/Respondent's disposition that LOC. 2 Gacharage /670, which is the suit land is family land. That in year 2000, a dispute arose over the distribution of the suit property to the 3 family members involved. A dispute was filed before the District Officer and an adjudication was made on 22<sup>nd</sup> August 2000, allocating the 3 families about 3 acres each. That the suit property became the subject of litigation in Nairobi Succession Cause No. 1708 of 2005, and the Summons for Confirmation of Grant are pending hearing and determination at the High Court at Nairobi. That Nairobi Succession Cause No. 1708 of 2005, and in particular the Summons for Confirmation of Grant have been filed first in point to this Originating Summons and should be heard before the instant Originating Summons. That she is still asserting her family's interest over 3.3 acres of the suit property. That the 3.0 acres portion of the suit property the Plaintiff/Applicant occupies forms part of the family's entitlement to the property under the [Law of Succession Act](#).
7. After the close of pleadings, the matter proceeded for hearing via viva voce evidence. The Plaintiff/Applicant gave evidence for herself and called four witnesses and the Defendant also gave evidence for herself and called two more witnesses.



## Plaintiff's Case

8. PW 1 Jacinta Njeri Nganga, testified that she was born in Kigumo sub county of Murang'a County and produced her National ID Card as evidence before the Court. She adopted her Supporting Affidavit sworn on 20<sup>th</sup> March 2020, and the attachments thereto as her evidence in chief.
9. On cross-examination, she testified that Miriam Mugure Wamiti, was related to her as they were married to brothers. That her husband is called Samuel Nganga Warimwe, while the husband of Miriam Mugure is called Henry Wamiti and they were brothers. That when she got married, she did not find any other brother to her husband as (Jonathan Kananga), had died before she married into the home. That Miriam and herself are married to brothers, and they are therefore sisters-in-law. That her father-in-law did not have any other property, that she knew, apart from the suit land. That she occupied the land by virtue of being the wife of the late Samuel Nganga. That Miriam and herself had occupied portions of the Suitland because their husbands each had their own portion. That the suit land was registered in the name of Henry Wamiti but had been divided into six acres each. That the title should have been in the name of Samuel Nganga. That in her Affidavit sworn on 20<sup>th</sup> March 2020, she had indicated that her husband had purchased 4.5 acres of land and neither did she know when he purchased the same, nor did she have any documents to show it. That her husband is the one who purchased land and she was not there at the time of purchase as she was yet to be married.
10. Further, she testified that she did not know when she got married, but she was married, first and then Miriam followed. That Miriam had settled on the suit property because her husband was living there. That, she filed a case at the DO's office in Kigumo, and she gave evidence before the elders that her husband bought six acres of land. That a Succession Cause had been filed in Nairobi, but she did not know about it.
11. PW 2 Lucy Wanjiru Ng'ang'a, testified that she was born in 1967, as a second born and the Plaintiff/Applicant is her mother. That Miriam Mugure Wamiti was her aunt, as she is married to the brother of her father called Henry Wamiti. That her father was Samuel Nganga Warimwe. She proceeded to adapt her witness statement dated 3<sup>rd</sup> December 2020, as her evidence in chief.
12. On cross-examination, she testified that Henry Wamiti and Jonathan Kanganga were brothers to her father, and they were all deceased. That her grandfather called Joseph Warimwe, had also died earlier. That she was the 2<sup>nd</sup> born to the Plaintiff and the 1<sup>st</sup> born is called Joseph Warimwe, but he was not a witness in the instant matter. That she knew the suit property LOC. 2 Gacharage /670 . That at birth, she found her parents living on the suit property and Miriam Mugure also owned the suit land. That Jonathan Kanganga was living in Nairobi, and he had his own parcel of land. That she was aware of the succession matter and the suit land was supposed to be subdivided amongst the beneficiaries.
13. She further testified that their mother Jacinta Njeri Nganga, had filed an Affidavit objecting to the distribution of the property in Succession Cause No. 1708 of 2005. That the matter was still ongoing, and the distribution was yet to be agreed upon. That there was another case in Muranga being Civil Suit No. 389 of 2002, and the parties were Jacinta Njeri Ng'ang'a and Henry Wamiti, and there was another case filed before the District Officer in Kigumo. That the elders had decided that the suit land be subdivided, and her father would take 6 acres while the others took 1.5 acres each because her father had bought 4.5 acres from Joseph Warimwe. That the 4.5 acres was different from the land that was to be subdivided. That Kariuki Gathago was a witness before the District Officer and he is a witness here too. That Ida Wanjiku was not a witness before the District Officer Kigumo, and she did not know if the surveyor was a witness. That she was absent when the tribunal award was read, but it was directed that her father would get 3 acres out of the suit land and Henry Wamiti would get 3.5 acres.



14. On further cross-examination, she testified that the suit land had already been subdivided in 2004, via an order of the Court, and under the supervision of the Police. That her mother lived on 1.5 acres and the issue of 6 acres is before the succession court in Nairobi. That it was the same issue before court in Civil Suit 38 of 2002, and before the District Officer - Kigumo. That their land is 6 acres and they are members of the same family.
15. On re-examination, she testified that her mother always occupied the 6 acres of land and her aunt Mugure occupied 1.5 acres. That the two parcels of land were distinct portions, subdivided by a fence. That Murang'a Civil Suit 38 of 2002, was between Jacinta Njeri Ng'ang'a and Henry Wamiti, the husband to Miriam Wamiti. That Judgment was issued by the Court and it was executed and boundaries fixed in 2004. That Henry Wamiti died in 2005, but he was alive in 2004 when the boundaries were fixed as a result of execution of the judgment. That the Judgment stands to date, and it has neither been set aside nor appealed. That Miriam Mugure filed a Succession cause in Nairobi, but she was not aware of it.
16. PW 3- Peter Gitau Ngugi, testified that he was a registered practicing Valuer No. 267, and a resident in Muranga. That he has been registered as a Valuer since 1988 and his company is called Up Country Valuers. That he got instructions from one Jacinta Njeri Nganga, to conduct a Valuation over LOC. 2 Gacharage /670. That his instructions were to prepare an occupation report, and value the development of his client, and ascertain the current value of the land occupied by his client. He inspected the land on 3<sup>rd</sup> June 2021, collected data, and prepared the Report. That as per his Report, the suit land was occupied by 3 families - Jacinta Njeri Ng'ang'a, Jonathan Kanganga, and Miriam Mugure Wamiti. That as per the said report, Jacinta Njeri Nganga occupied 6 acres of the suit land and her front gate is about 1.8m from the road while the one occupied by Jonathan Kang'ang'a is about 27m from the said road and Miriam Mugure Wamiti is 28 m along the said road. That all the parcels of land had distinct boundaries, and fence, which was a live hedge and each person knows their portion. That the land occupied by his client, is about Kshs. 16 million in value. That he concluded the Valuation on 10<sup>th</sup> June 2021, and he submitted the Report to his client which he produced in Court as an exhibit. That he charged the client Kshs. 15,000/= for the Valuation and Kshs. 10,000/= for court attendance.
17. On cross-examination, he confirmed that he was a registered Valuer, but he was not sure if he attached his practicing certificate for 2021. That Valuers are also gazetted every year, but he had not attached the gazette notice showing his gazettement, in 2021. That he was instructed by Jacinta Njeri Nganga, when she visited him in his office via verbal instructions. That at the time of instruction, he was not given a copy of the title deed of the subject land LOC. 2 Gacharage /670. That he conducted a search to ascertain ownership and the title was in the name of Miriam Mugure Wamiti, in trust for herself. That he attached a copy of the green card and not the title deed and he was not aware of the succession case. That on the Green Card there was an entry No 7 for Miriam Mugure Wamiti, dated 21<sup>st</sup> March 2007, from case No. 8 of 2005. However, the Green Card was not signed against this entry. That the entry was incomplete because it had not been signed.
18. On further cross-examination, he stated that there were 3 homesteads on the said property, and he did not talk to the other owners because they failed to cooperate, but he did not include this in the Report. That the 3 homesteads have distinct boundaries, and they have hedges. That subdivision was done, but the mutations were not registered. That he did not attach the Mutation Forms and the sizes of the homesteads were obtained from the ground. That on enquiring about the relationship between the homestead owners, he was told that they were brothers, and the land was from their father. That he had no evidence of the other acquired land and he did not record that. That he picked all the data that he put on record from Jacinta Njeri, as the other two were not there. That he did not go with a surveyor because the boundaries were marked, and there was no need for the surveyor as he carried the map.



- That he had a copy of the map in Court, but it did not show the homesteads or the boundaries, instead, it only showed the suit land. That while he had shown how he arrived, at the value, he had not indicated the acres of each homestead, but he had indicated in meters. That even though he mentioned 6 acres in his Report, the same was an approximation and he recommended an actual survey to ascertain the sizes of the homesteads.
19. On re-examination, he confirmed that he had a Practicing Certificate for 2021, and he was gazetted. That he had only forgotten to attach his Practicing Certificate as evidence. That he took the actual measurements and there were 3 homesteads on his client's portion divided with live fences. That he engaged the other parties, but they did not cooperate and instead became hostile.
  20. PW 4- Joel M. Njiru testified that he worked at Murang'a Law Courts as a Court Executive Officer. That he was in possession of the Court file in CMCC No 38 of 2022, which was under his custody. The parties in that suit were Jacinta Njeri Nganga and Henry Wamiti Nganga. That the case is a concluded matter and there is a final order of the court dated 30<sup>th</sup> August, 2004. That the Order was signed by G.K. Mwaura, Principal Magistrate. He proceeded to produce the entire case file as an exhibit in Court.
  21. On cross-examination, he confirmed that he had been an Executive Officer for the last 10 years, and the impugned court file was in his custody. That he had brought the file to Court after fetching it from the archives. That he was familiar with the Court execution process, and the Court that handles a matter is the one that executes the final order and decree. That the Decree is not signed, but the Order is dated 30<sup>th</sup> August, 2022. That the said order emanated from an application to amend a decree. That he did not check if the matter was concluded and how it was concluded. That in the Court file, he saw the final Order, but he did not see the award from Kigumo DO's office. That an Order can only be executed by the Court that issued it.
  22. On re-examination, he confirmed that the trial Court had taken proceedings, and this Court could peruse the same.
  23. PW 5- Kariuki Gathagu confirmed that he knew Miriam Mugure, and he knew the mother of Nganga and he also knew Jacinta Njeri Nganga. He adopted his witness statement dated 30<sup>th</sup> December 2020, as his evidence in chief. He testified that there was a meeting held in 1973, and the minutes were in Court. That the meeting was attended by 8 elders and he could not remember all their names. That he was the only one remaining alive of the 8 elders. That at the said meeting, it was decided that the land which belonged to Joseph Warimwe be divided and Henry Wamiti, was asked to sign the minutes to confirm his agreement. That Henry Wamiti was informed that his land and that of his brother Kanganga was 3 acres. That the remaining land was given to Nganga, the husband of Jacinta Njeri, because he had bought some land from his father Joseph Warimwe. That when the land was subdivided, Henry had no objection, and the subdivision was done to avoid any conflict. That Nganga, Kanganga, and Wamiti were given land by their father before the consolidation and after consolidation, Nganga was registered as the proprietor. That later the registration was cancelled and the land was registered in the name of Wamiti. That at the subdivision, each person was shown their portion of land.

### **Defendant's Case**

24. DW 1 Miriam Mugure Wamiti testified that she is a peasant farmer and she resides on the suit land. That the Plaintiff and herself are sisters in law. That both the Plaintiff's husband and her husband are deceased. That the registered owner of LOC 2. /Gacharage / 670, is her husband Henry Wamiti Nganga. That the said property was not self-acquired, but it was inherited from the family. The family members were Jonathan Kanganga, Samuel Nganga and Henry Wamiti. That Henry Wamiti was her husband while Samuel Nganga was Jacinta's husband. That Henry, Samuel and Jonathan were all



- brothers. That her husband became the registered owner of the suit land during land consolidation and demarcation. She adopted her Replying Affidavit sworn on 27<sup>th</sup> November 2020, and the documents attached thereto as her evidence in chief and produced the documents as exhibits.
25. Miriam further testified that Jacinta's claim was based on falsehood and that the suit land had never been subdivided. That the said land was family land and each of the brothers was entitled to 3 acres each. That the Plaintiff did not occupy 6 acres as claimed, but she only occupied her husband's portion. That while she had filed a case and obtained Judgment, the said judgment was never executed as she had applied that the same be set aside. That she did not know how the case ended. She asked the Court to dismiss the claim filed with costs.
  26. On cross examination, DW 1 confirmed that indeed that land was family land and was the entitlement of all the 3 brothers. That she was the Legal Representative of her husband's estate, and she was issued with Letter of Administration after filing a Succession Cause in Nairobi. That she was aware of the case in Murang'a Law Courts when she filed the Succession cause. That she was also aware of the Order issued by the DO and the tribunal. However, the same was never filed in Court for adoption. That it was within her rights to file the Succession Cause anywhere, and she was not limited to Murang'a only. That she was not aware of the fact that her husband had agreed to the award of the tribunal before he died. That Jacinta was using 6 acres of land, but she was entitled to only 3 acres of the family land.
  27. DW 2 John Njuguna M. Mugo, testified that he was a senior village elder in his home area in Mununga village. That he knew Jacinta Njeri Nganga and he also knew her husband Samuel Nganga from 1956. That he also knew Miriam Mugure and he knew her husband from 1957. That the husbands of Jacinta and Miriam were brothers, and they had another brother called Kanganga who was the first born. He proceeded to adopt his witness statement dated 26<sup>th</sup> May 2021, as part of his evidence in chief.
  28. On cross-examination, he testified that he had known the family in question since 1957. That the land parcel No. 670 was initially owned by Kanganga and it was a family land. That the said Kanganga had two sons called Nganga and Joseph Warimwe. That the land in question was family land and Henry Warimwe was in charge of the family and he represented the family in the succession cause. That he did not know the portion of land each member of the family was to get as the matter was before the DO. That he could not remember when the matter before the DO was filed but he was a witness in the year 2000. Further that the brothers were sons of one mother and they had three sisters. That the people in court were married to sons of the same father.
  29. DW 3- Maina Kiricha, adopted his witness statement dated 30<sup>th</sup> May 2021, as part of his evidence in chief. He testified that he knew Jacinta Njeri and her husband Samuel Nganga who is now deceased. That he also knew Miriam Mugure Wamiti and her husband Henry Wamiti. That the husband of Miriam and the husband of Jacinta were brothers together with another brother called Kanganga.
  30. On cross-examination, he stated that all the brothers were of the same mother and he was not related to the family. That he did not know the history of the land, but he knew that it was registered in the name of Henry Wamiti during land consolidation and demarcation. That their father called Nganga was however the initial owner of the land. That he knew the said Nganga, but he did not know how the land was distributed between his sons.
  31. After the close of the Viva Voce evidence, the Court directed the parties to file and exchange submissions.
  32. The Plaintiff filed her submissions on 3<sup>rd</sup> February 2023, through the Law Firm of Kirubi Mwangi Ben & Co. Advocates. The Plaintiff submitted that the subject of the instant claim is land parcel Loc. 2/ Gacharage /670, which was both family and ancestral land registered in the name of Henry Wamiti



- Nganga. (deceased). That the said registration was done in 1962, during land consolidation and it was so registered in the name of Henry Wamiti to hold in trust for his other two siblings Samuel Nganga Wamiti, and Jonathan Kanganga Wamiti. That upon the demise of Henry Wamiti the Defendant/ Respondent had filed a succession cause in Nairobi without informing the Plaintiff/Applicant who has an interest over the suit land. That in Murang'a Civil Suit 38 of 2002, the Court had discerned the issue and held for a trust and subsequently dissolved the trust by directing that the suit land be distributed among the 3 families.
33. The Plaintiff relied on the case of *George Mbiti Kebia vs. Isaya Theuri M'Lintari & another* 2014 eKLR, among others and submitted that the Plaintiff had proved the existence of a trust, both constructive and continuing. It was his submissions that trusts are provided for under the *Land Act* in Section 28(b) and the customary trust proven over the suit land was an overriding interest.
  34. On whether the Plaintiff had made a case for adverse possession, she submitted that she has been in open possession and occupation of 6 acres, out of the suit land for a period of over 12 years. She relied on the case of *Francis Kimani Gathuita vs. Benson Irungu Njuguna* (2018)eKLR, where the Court held that a claim for adverse possession is a claim in rem and not in person and as such an interest survives the death of the registered owner. It was her further submissions that adverse possession is a prescriptive right that binds the land and runs against the registered owner, and it is not affected by the mere change of ownership of the land as held in *Githu vs. Ndeete* (1984) KLR 776.
  35. Based on the foregoing, the Plaintiff submitted that she had proved her claim for adverse possession as provided for under Section 7 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya. The Plaintiff also relied on the case of *Regina Wairimu Mwago & Another vs. Lucy Wairimu Gichuhi & 2 others* (2019)eKLR and asked the Court to grant her orders as prayed.
  36. The Defendant on the other hand filed her written submissions dated 20<sup>th</sup> February 2022, through the Law Firm of Osoro Mogikoyo & Co Advocates.
  37. The Defendant submitted that the Plaintiff's case was fatally defective and ought to be struck off because the Plaintiff failed to attach a copy of the title extract which was a mandatory requirement under Order 37 Rule 7(2) of the Civil Procedure Rules 2010. The defendant relied on the Court of Appeal case of *Wilson Kazungu Abdala Bakshwen and Another* (2015) eKLR, where the appellate court held that the requirement was couched in mandatory terms failing of which it would render the Originating Summons incompetent.
  38. The Respondent further submitted that Plaintiff occupied the suit land by virtue of her marriage and that did not make her a person who had unlawfully acquired the land to enable her file a claim for adverse possession. That the Plaintiff had gained access to the suit land with the consent of the registered owner by virtue of her marriage to his brother. Reliance was placed on the case of *AbdiRashid Adan Hassan vs. Estate of the Edgley* (2022) eKLR, where it was held that a claim for adverse possession cannot succeed if the claimant gained possession of the land with the permission of the owner.
  39. Based on the foregoing and other grounds set out in the said submissions the Defendant/Respondent urged this court to dismiss the Plaintiff's case as she had failed to prove her case on a balance of probability.
  40. Before delving into the merits and or demerits of the suit, the Court notes that both the Plaintiff and the Defendant herein are sisters in law, having been married to brothers that is Samuel Ng'ang'a and Henry Wamiti, both deceased. It is also not in dispute that the suit land was registered in the name of Henry Wamiti during land consolidation and demarcation, to hold in trust for the entire family.



The Plaintiff however lays claim to a portion of 6 acres to be excised out of the suit land alleging that her husband had purchased some 4.5 acres from his father and an additional 1.5 acres which was her rightful ownership by virtue of distribution.

41. The Court has carefully read, and considered the pleadings of the parties, analysed the evidence adduced, the rival written submissions, and the relevant provisions of the law and finds that the issues for determination are;
- i. Whether the instant Originating Summons should be struck out?
  - ii. Whether the Plaintiff has met the threshold for grant of orders for adverse possession?

**i. Whether the instant Originating Summons should be struck out?**

42. Procedural aspects of an action claiming adverse possession are found at Section 38 (1) and (4) of the *Limitation of Actions Act* Chapter 22 Laws of Kenya and Order 37 rule 7 of the Civil Procedure Rules, 2010. Section 38 (1) and (4) of the aforesaid Act provides:

38. Registration of title to land or easement acquired under Act

- (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.

.....

- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

Order 37 rule 7 provides:

7.

- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served.

43. There is therefore no doubt that the requirement that the Originating Summons be supported by an Affidavit to which a certified extract of title to the land in question is annexed is a mandatory one.

44. The Court has perused the supporting Affidavit and the annexures thereto and there is no certified extract of title to the suit property. There is good sense in the requirement that a certified extract of the title be annexed. In proceedings where an Order is sought that a litigant has become entitled to land by adverse possession, it is acutely important to identify with precision not only the land in question, but also the registered proprietor thereof. Though the identity of the land may not be susceptible to regular changes, ownership may change frequently. In the case of *Grace Jesoimo Tarus & another v Sarah Rop & 2 others* [2018] eKLR this court held that:

“The need for production of a form of a copy of title document must be exhibited to indicate that the person sued is the registered owner of the suit land. This can be a copy of an extract



of the register or an official search showing the details of the registration. Failure of such evidence is fatal to the claimant's suit as orders can be granted in respect of a parcel of land that does not belong to the respondent.”

45. In the case of *Johnson Kinyua v Simon Gitura Rumuri* [2011] eKLR, the Court found that proprietorship can be established by producing a copy of an official search certified by the Registrar or a certified copy of an extract of the Green Card which gives the details of the entries.
46. In the instant case, while the Plaintiff has not attached the certified copy of title to her Supporting Affidavit, she has attached a Valuation Report that was produced in court by PW-3. In the said Valuation Report there is a copy of the Green Card certified on 2<sup>nd</sup> August 2007. The Court notes that the instant suit was filed in 2020 about 12 years, since the said Green Card copy was obtained. The Court opines that it is for this reason that a certified extract of title comes in handy since by looking at it and, in view of the date when it was signed by the Registrar, one cannot be sure of the latest status on the Register. Needless to state, the requirement of certification adds an extra layer of credibility.
47. While the Order 37 does not talk about a recent certified copy of title, it would be unreasonable for this court to rely on a copy made about 12 years before it was presented in court. The Plaintiff should have obtained a search over the suit land to help the court satisfy itself about the ownership of the suit land. This Court therefore has no hesitation in finding, as it hereby does, that the Originating Summons herein is in breach of the mandatory provisions of Order 37 rule 7 of the Civil Procedure Rules.
48. Having held as above, the court will proceed to probe what the consequences of failure to comply with Order 37 Rule 7 of the Civil Procedure Rules are. The Defendant herein argues that such a failure is fatal to the Originating Summons and should result in its striking out. The Plaintiff on the other hand does not in her submissions address this issue and she has not filed any further submissions to respond to it.
49. Procedural rules are important since they ensure orderly and just conduct of litigation. When a rule makes some action or step mandatory, litigants have no choice over the matter: they must comply! This is the spirit of Section 1A of the *Civil Procedure Act* which provides:  
  
1A
  - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
  - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
50. Order 37 rule 7 does not state what consequences should follow failure to annex the certified extract of title. Consequently, the court has discretion to decide the fate of an Originating Summons. That discretion must be exercised in a judicious manner and with a view to rendering substantive justice in line with the provisions of Article 159 of *the Constitution*.
51. The adage that procedure is the handmaiden of substance or justice remains valid. In *Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others* [2014] eKLR the Supreme Court stated as follows:



- (37) Service of a notice of appeal is crucial. Kiage, JA in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others* [2013] eKLR states:

“... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned...”

- (38) We are persuaded by this dictum of the learned judge. The notice of appeal ought to be served as provided by the law and all subsequent legal procedures followed.

....

- (42) The sanctity of the record of appeal has been emphasized above in this ruling. The question then is whether the address of service is such a mandatory provision, that its exclusion falsifies the entire record, or is it an anomaly that can be cured by Article 159 of *the Constitution*? In the *Law Society* case, this Court reiterated its earlier decision when it warned itself on a blanket invocation of Article 159 thus:

“Indeed, this Court has had occasion to remind litigants that Article 159(2) (d) of *the Constitution* is not a panacea for all procedural shortfalls. All that the Courts are obliged to do is to be guided by the principle that “justice shall be administered without undue regard to technicalities.” It is plain to us that Article 159 (2) (d) is applicable on a case-by-case basis *Raila Odinga and 5 Others v. IEBC and 3 Others*; Petition No. 5 of 2013, [2013] e KLR”.

- (43) Informed by the role that the notice of appeal plays, it is our considered opinion that such a document ought to be filed first before the appeal. However, while the rules require that it be served, to allow the respondent(s) to file an address of service, and the address of service then to be contained in the record of appeal, the lack of that address of service does not warrant striking out of the appeal. We add that the nature of the instant matter, which is urgent and constitutionally time - bound, is one of those exceptional cases where this Court will apply Article 159 of *the Constitution*, in order to render substantive justice. It is also our view that Article 163(4) (a) of *the Constitution* gives the appellant a ‘right’ to come to Court when seeking a constitutional interpretation and/or application. Such a right should not be abruptly excluded blatantly for non-compliance with a procedural rule, especially where no apparent prejudice to the other party can be deduced.”



52. Based on the foregoing, it is evident that, substantial justice is better served by allowing the Plaintiff to comply with the law especially where there is no imminent prejudice to be suffered by the defendant. In the instant case, however, the matter has already proceeded to a full hearing and is only pending judgment. If the suit is struck off, both parties will suffer great prejudice. Equity does not aid the indolent. This Court notes that the Defendant had every opportunity to raise this issue early in the hearing, but has sat on her right since 2020 to date and now wishes to benefit from their indolence. The Court notes that some of the witnesses who appeared before it to give testimony are quite advanced in age and returning the Plaintiff to the drawing board would not serve the ends of justice. It also notes that from the evidence of the parties, the suit land was initially registered in the name of Henry Wamiti Nganga who was the Defendant's husband before his demise and later transferred to Miriam Mugure Wamiti through a Court order.
53. Therefore, while this Court is cognizant of the importance of a certified copy of title to these proceedings, it finds that it is in the best interest of justice that this matter is determined on merit as the ownership of the suit land has been ascertained through other evidence tendered before it. Having said that, this Court will now move to establish if the Plaintiff has proven her case to the required degree.

**(ii) Whether the Plaintiff has met the threshold for grant of orders for adverse possession?**

54. It is trite that the burden of proof, according to Sections 107, 108 and 109 of the *Evidence Act*, is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of the right to property, the burden is particularly high.
55. In the instant suit, the burden of proof squarely lies on the Plaintiff to demonstrate that she has met the requirements for the grant of an order of adverse possession. (See *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where the Court stated as follows;

" The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by adverse possession (*Mamuji v Dar* [1935] 2 E A CA 111, *Bwana v Ibrahim* (1948) 15 EACA 7; and *Forbes, JA, in Abdulkarim and another v Member for Lands and Mines and another 1* [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner."

56. Having said that, this Court will proceed to look at the issues outlined above. It is trite that adverse possession is defined as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, to the exclusion of all others including the true owner of that land. The doctrine of adverse possession is enshrined under the *Limitation of Actions Act*.



Section 7 of the said Act provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

Further, Section 13 provides;

- (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

57. This right though provided for, does not accrue automatically, and must be invoked through a Court of Law by the person in who wishes to benefit from it. Section 38 of the [Limitation of Actions Act](#) gives authority to the claimant to apply to Court for orders of adverse possession. See the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR where the Court held:

“ Adverse possession is essentially a situation where a person takes possession of land and asserts rights 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 (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

58. The period of twelve years starts to run from the moment the trespasser and/or stranger takes adverse possession of the land, and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of *Wambugu –v- Njuguna* (1983) KLR 173, the Court of Appeal held thus:

1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. 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 for which he intended to use it.
3. The [Limitation of Actions Act](#), on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. 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 for the requisite number of years.”

59. To determine whether the Plaintiff’s right adverse possession accrued this Court will seek to answer the following;
- i. How did the Plaintiff take possession of the suit property?
  - ii. When he took possession and occupation of the suit property and for how long he has remained in possession?
  - iii. What was the nature of his possession and occupation?
60. The elements to prove for a claim of adverse possession to succeed are: the intruder resisting the suit or claiming the right by adverse possession must make physical entry and be in actual possession of the land for the statutory period; the entry must be with some claim or colour of right or title; the occupation of the land by the intruder must be non-permissive, the non-permissive actual possession must be unequivocally exclusive and with the clear intention of excluding the real owner (animus possidendi) and the acts of the owner must be inconsistent with the owner’s enjoyment of the soil.
61. In the case of *Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka*, -Civil Appeal No. 125 of 1997, the Court held that entry of land by the consent, permission and licence of the registered owner does not create a right to title to land by way of adverse possession. Further, in the case of *Waweru –vs-Richu* (C.A.122 of 2001) at page 406 it was held that:
- “ .....it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner .....”
62. In *Wanje –vs-Saikwa* (No.2) Civil appeal Number 72 of 1982 [1984] KLR Justice Chesoni said at page 289:
- “ A person who occupies another person’s land with that other person’s consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of his land and the possession is not illegal. Again, there is no adverse possession when land is occupied under a license until the license has been determined”.
63. It is on record that both the Plaintiff and the Defendant were married to brothers known as Samuel Nganga and Henry Wamiti respectively. Further, they both occupied the suit land by virtue of their marriage to the said brothers. While the Plaintiff alleges that her husband had purchased some 4.5 acres from her father-in-law, she did not adduce any evidence before this Court to prove the same. In addition, she stated that she did not know when her husband purchased the land and that by the time she was married, the said land had already been purchased. This Court is a court of record, and it finds it difficult to believe the Plaintiff without an iota of evidence.
64. Based on the foregoing, it is evident that the entry of the Plaintiff/Applicant into the suit land was permissive and such a scenario negates the non-permissive entry which is a key tenet of adverse possession.
65. To this end, this Court finds that the Plaintiff/Applicant has not discharged his burden of proving the case on the required standard of balance of probabilities and the Plaintiff/Applicant’s claim has not



been proved as required by the law for the Court to find and hold that she has acquired the said parcel of land by adverse possession.

66. Consequently, the Court finds and holds that the Plaintiff/Applicant's claim as contained in the Originating Summons dated 20<sup>th</sup> March 2020 is not merited and the same is dismissed entirely with costs to the Defendant/Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 18<sup>TH</sup> DAY OF DECEMBER, 2023.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of: -

Mwangi Ben for the Plaintiff/Applicant

Mr Osoro Mogikoyo for the Defendant/Respondent

Joel Njonjo - Court Assistant.

**L. GACHERU**

**JUDGE**

