



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Nduma v Nduma & another (Environment & Land Case E002 of 2022)
[2023] KEELC 22420 (KLR) (14 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E002 OF 2022
LN GACHERU, J
DECEMBER 14, 2023
IN THE MATTER OF LAND PARCEL NO. LOC.13/GAKOE/829
IN THE MATTER OF SECTIONS 7&8 OF THE LIMITATION OF ACTIONS
ACT, CHAPTER 22 OF THE LAWS OF KENYA**

BETWEEN

RAPHAEL MUCHOKI NDUMA PLAINTIFF

AND

REGINA NJERI NDUMA 1ST DEFENDANT

REGINA NJOKI KAMAU 2ND DEFENDANT

JUDGMENT

1. Vide an amended Originating Summons dated 17th November 2022, the Plaintiff/Applicant herein Raphael Muchoki Nduma, sought for the following declarations against the Defendants/ Respondents;
 1. A declaration that the title of the said Maithori Ngacha alias Maithori Nduma, now deceased, to land parcel No. LOC.13/GAKOE/829, has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38, of the *Limitation of Actions Act*.
 2. A declaration that the Plaintiff has acquired title to the said land parcel No. Loc.13/GAKOE/829, by his adverse possession thereof for a period of more than 12 years from the year 1994 or thereabouts to-date.
 3. An order does issue requiring and directing the Land Registrar, Murang'a, to register that land parcel No. Loc.13/GAKOE/829, in the name of the Plaintiff herein Raphael Muchoki



Nduma, in place of Maithori Ngacha alias Maithori Nduma, (deceased), and in place of any other person succeeding the said MAithori Ngacha alias Maithori Nduma.

4. The costs of this suit be borne by the Respondents.
2. The Originating Summons is anchored upon the Supporting Affidavit of the Plaintiff herein, Raphael Muchoki Nduma and on the following grounds;
 1. That the Plaintiff/ Applicant has been in sole possession of land parcel No. LOC.13/GAKOE/829 ,measuring approximately 1.5 acres, since the year 1989, which is a period of over 12 years and that, has been peaceful, open and continuous.
 2. That the Plaintiff/Applicant has acquired proprietary rights over the said land parcel by operation of law.
 3. It is just that the suit land parcel No. Loc. 13/Gakoe/829, be registered in the name of the Plaintiff/ Applicant as sole proprietor thereof.
 4. That is in the interests of justice that the orders sought in the Originating Summons be granted.
3. In his Supporting Affidavit, the Plaintiff/Applicant averred that the registered proprietor of the suitland Loc.13/Gakoe/829, is Maithori Nduma, now deceased and he was registered as such during land consolidation and he died in 1993, as per the annexures RMN1 & RMN2 respectively. He further averred that the 1st Defendant/Respondent is the Personal Representative of Maithori Ngacha alias Maithori Nduma(deceased), by virtue of a Grant of Letters of Administration, issued vide Murang'a CMC Succession Cause No. 609 of 2019, as per annexure RMN3.
4. He also averred that the 2nd Respondent is a sister-in-law to the Plaintiff/Applicant, and she resides on land parcel No. Loc.13/Gakoe/830, which is registered in the name of her father-in-law Musa Nduma, where she has erected her Matrimonial home and she lives and carry out her farming activities todate.
5. He alleged that the Defendants/Respondents have never been on the suitland and have never utilized the suitland in any way. It was his contention that his family and himself have been on sole possession of the suit land since the year 1989, and they have lived therein peacefully, open and continuous.
6. Further that he moved out of land parcel No. Loc.13/Gakoe/830, where he was born and he went to live with Maithori Ngacha alias Maithori Nduma(deceased) on land parcel No. Loc.13/Gakoe/829, since Maithori Nduma had no wife nor Children. The Plaintiff alleged that in 1993, due to the cordial relationship he had with Maithori Ngacha alias Maithori Nduma, a Kikuyu ceremony known as "Guciarwo na Mburi" was conducted where he became an adopted son of the said Maithori Ngacha. Therefore, in 1993, he officially moved with his wife and three sons to the suit land, where he has erected a permanent house and he lives thereon with his family todate. He contended that they carry out farming activities on the suit land and have planted avocado trees and they rear cows, goats and poultry. That he has been in continuous and uninterrupted occupation of the suit land for over a period of 20 years, and therefore the said occupation has been adverse to the title of Maithori Ngacha alias Maithori Nduma, and of any Successor to his title, and he should be declared to have acquired title thereto by adverse possession. He urged the Court to allow his claim.
7. The 1st Defendant – Regina Njeri Nduma, filed a Memo of Appearance on 28th February 2022, and a Replying Affidavit on 18th July 2022.She admitted that she is the personal representative of the estate of Maithori Ngacha alias Maithori Nduma, by virtue of a grant of letters of administration issued to her vide Murang'a CMCC Succession Cause No. 609 of 2019. She also admitted that land parcel No. Loc.13/Gakoe/829, and registered in the name of Maithori Nduma(Deceased) and he was



registered so at the time of land consolidation, but he died in 1993. She also contended that the said Maithori Ngacha alias Maithori Nduma(deceased) was a biological brother to her late father Musa Nduma, and that the said Maithori Nduma had no wife nor Children, and he used to live with the Plaintiff/Applicant on his parcel of land Loc 13/ Gakoe/879. Further that through- a kikuyu ceremony known as Guciarwo na Mburi” the said Maithori Ngacha slaughtered a goat and thereafter adopted the Plaintiff as his son, and bequeathed him the suitland. Therefore, in 1993, the Plaintiff moved from their father’s land Loc.13/Gakoe/830, to the suit land Loc.13/Gakoe/829, at the request of Maithori Nduma, the proprietor of the suit land. That the Plaintiff moved with his wife and three sons unto the suit land and have established their matrimonial home therein where they live to date and carry on farming activities.

8. The 2nd Defendant/Respondent Regina Njoki Kamau, filed his Replying Affidavit on 24th January 2023, and opposed the instant amended Originating Summons. It was her contention that the instant suit is misconceived and a blatant abuse of the Court process, and should be dismissed with costs.
9. That the Plaintiff has not been the sole occupier of the said suit land because the 2nd Respondent has been utilizing a portion of the said land, and she does not seek the permission of the Plaintiff to till the said land as she was allowed by the owner, Maithori Ngacha to enter into the said land and utilize the same.
10. Further that the entry of the Plaintiff’s into the suit land was with the blessings and permission of the deceased owner. That the Plaintiff’s is only running away from the Intestate Succession proceedings in Murang’a Civil No. 609 of 2019. Further that the 1st Defendant is a blood sister to the Plaintiff’s and that the Plaintiff’s mother used to cultivate a portion of the suit land which was previously cultivated by her sister in law Nelius Wanjiku Kamore. She also alleged that the suit herein is aimed at making her not to get her rightful share as a wife to the Plaintiff’s deceased brother- Peter Kamau. That even if the Plaintiff is in exclusive and sole possession of the suit land, his occupation can never crystalize into adverse possession, and thus the suit herein ought to be dismissed with costs.
11. The matter proceeded by way of viva voce evidence. The Plaintiff gave evidence for himself and called two more witnesses. The 1st Defendant gave evidence for herself and called no witness, whereas the 2nd Defendant gave evidence for herself and called one more witness.

Plaintiff’s Case

12. PW 1: Raphael Muchoki Ndumo, adopted his witness statement dated 17th November 2022, and produced a list of documents as P.Exhibits1- 22, as his evidence. He also produced Further Index as P.EXhibit 23. In his witness statement, the Plaintiff reiterated most of the averments made in his Supporting Affidavit, and further stated that he has been in occupation of the suit property for over 28 years. He stated that his occupation is adverse to the title of Maithori Ngacha alias Maithori Nduma, and of any successor to his title. He urged the Court to declare him to have acquired title to the said parcel of land by adverse possession. In cross-examination by Counsel for 1st Defendant, he reiterated that he was given the suit land by his uncle and that there was a witness to that transaction. He also confirmed that the Photographs produced in court were taken under his supervision.
13. In cross-examination by Counsel, for the 2nd Defendant, he confirmed that the 1st Defendant is his blood sister and the 2nd Defendant is a wife to his late brother. He also stated that he entered into the suit land in 1989, and that he is an adopted son of Maithori Ngacha alias Maithori Nduma, who did not have Children. He also confirmed that the ceremony of “Guciarwo na Mburi” was conducted by elders whom he named as Maina Githinji and Mwangi Njiri ,and that his mother was present. That



- his uncle blessed him with the suit property and he denied that his mother was using the land, and he testified that he was the 1st one to utilize the suit property.
14. He also confirmed that there was a Succession Cause that had been filed by his mother, wherein the said grant was later revoked. It was his evidence that his mother is now deceased and that his sister has her land at their father's parcel of land, and that his sister is an administrator of the estate of Mathiori Ngacha alias Maithori Ndumo(deceased).
 15. That the only asset for said Maithori Ngacha was the suit land.
 16. In cross-examination, he confirmed that he lives on the suit land which land was owned by Maithori Ngacha and that the Defendants live on land parcel No. 830, which belonged to their father. He also confirmed that though he entered into the suit land in 1993, at the time of the ceremony, he started to assist Maithori Ngacha in 1989, and that he died in 1993.
 17. PW 2: Ephantus Macharia Kinyua also adopted his witness statement as evidence in Court. In his statement, he alleged that he is a neighbour and family friend to the parties herein. He also confirmed that he knew Maithori Ngacha alias Maithori Nduma, since they came from the same locality and is the registered owner of the suit land Loc.13/Gakoe/829. That Maithori Ngacha alias Maithori Nduma, did not have a wife nor children and in 1993, through a ceremony known as "Guciarwo na Mburi" he adopted the Plaintiff as his Son. Then the same year, the Plaintiff and his family moved into the suit land where they have constructed a permanent house and they carry on farming activities therein such as growing crops and rearing livestock and poultry.
 18. In cross-examination by Counsel for the 2nd Defendant, he testified that the 2nd Defendant Regina Njoki Kamau, was married in the homestead of Nduma. He also confirmed that Maithori Ngacha, who was known to him was a brother to the father of the Plaintiff. He further told the Court that he never saw the mother of the Plaintiff utilizing the suit property.
 19. It was his evidence that he did not attend the said Kikuyu Ceremony of adoption of PW 1 by Maithori Ngacha, but he heard about it. It was his evidence that the 2nd Defendant does not live on the suit land.
 20. In re-examination, he confirmed that the mother to the Plaintiff was Naomi Njoki Nduma.
 21. PW 3 Susan Wagaturi Muchoki, also adopted her witness statement dated 17th November 2022, and stated that she is a wife to the Plaintiff herein. That the Defendants are her Sister-in-laws and 1st Defendant is the legal representative of the estate of Maithori Ngacha. It was her evidence that she got married to the Plaintiff in 1982 and in 1993, they moved into the suit land where Maithori Ngacha alias Maithori Nduma, was residing. That they took care of him due to old age and in a ceremony known as "Guciarwo na Mburi" the said Maithori Ngacha adopted the Plaintiff as his son as he had no wife or Children.
 22. That they have built a permanent house on the suit property and also carry on farming activities and rearing livestock and poultry. That they have lived on the suit property todate.

1st Defendant's Case

23. DW 1: Regina Njeri Nduma adopted the evidence averred in her Replying Affidavit and her witness statement dated 16th February 2023. She also produced a list of documents as D.Exhibit 1. In her witness statement, she averred that the Plaintiff is her brother and the 2nd Defendant her sister-in-law. She confirmed that the land parcel Loc.13/Gakoe/829, is registered in the name of Mathiori Ngacha, who died in 1993. She further stated that he was a brother to their father Musa Nduma, and the said Maithori Nduma had no wife or children. That he lived with the Plaintiff after adopting him in a



ceremony called “Guciarwo na mburi” and he bequeathed his land to the Plaintiff. Further that the Plaintiff moved out of land parcel 830, in 1993 and has solely been living and utilizing the entire suit land where he has erected his Matrimonial home. It was her testimony that the 2nd Defendant resides in land parcel No. Loc. 13/Gakoe/830, where she has established her matrimonial property.

24. In cross-examination by Counsel for the Plaintiff, she testified that though her father died first, they have not filed a succession cause for his estate, but have filed for Maithori Ngacha. She also stated that the Plaintiff lives on the suit land.
25. In cross-examination by Counsel for the 2nd Defendant, she admitted that she is a co-administrator of the estate of Maithori Ngacha, and she is entitled to a share of the suit property, but she is not interested. She confirmed that she was present during the Kikuyu ceremony wherein the Plaintiff was adopted by Maithori Ngacha alias Maithori Nduma as his son.

2nd Defendant’s Case

26. DW 2: Regina Njoki Kamau, from Gitugi also adopted her witness statement dated 19th January 2023. She stated that the suit land originally belonged to Maithori Ngacha, who is now deceased. That her husband is the late Peter Kamau, a brother to the Plaintiff. That during his lifetime, Maithori Ngacha, who had no family had indicated that his parcel of land Loc.13/Gakoe/829, would be inherited by his brother’s Son’s being Peter Kamau, John Maina and Raphael Muchoki, the Plaintiff herein. That in 1993, Maithori Ngacha pointed to her the portion of land which was in the middle for her to use as it was allocated to her husband Peter Kamau. That she started utilizing the suit land from 1994 to 2018 ,when the Plaintiff claimed that she should stop utilizing the suit land. That a Succession cause over the estate of Maithori Ngacha, was filed in 2019, but the Plaintiff failed to sign the consent. The grant issued to Naomi Njoki Nduma, as the administrator was later revoked. That when Naomi Njoki Nduma passed on, the 2nd Defendant was substituted in her place. It was her claim that the Plaintiff failed to use the succession proceedings but filed the current suit. She denied that the Plaintiff herein was an adopted son of Maithori Ngacha, and it was her contention that the occupation of the Plaintiff over the suit land was with the blessings and permission of the owner and thus cannot be adverse.
27. In cross-examination by Counsel for the Plaintiff, she stated that she took care of Maithori Ngacha just like Susan did. That she was also given land by Maithori Ngacha in 1993.
28. In re-examination, she stated that the Plaintiff evicted her from the suit land in 2019. That the suit land was to be subdivided among the three sons being Muchoki, Maina and Peter Kamau, her husband(deceased).
29. DW 3: Harrison Maina Githinji, from Gakoe village also adopted his witness statement dated 19th January 2023, and stated that the suit land Loc.13/Gakoe/829, initially belonged to Maithori Ngacha, who is now deceased. That Maithori Ngacha was neither married nor had children. That upon his demise, he was survived by his only brother Moses Nduma, and his mother Naomi Njoki Nduma. That Maithori Ngacha had stated that his parcel of land was to be inherited by the Sons of his brothers being Peter Kamau, John Maina and Raphael Muchoki - the Plaintiff herein. That Naomi Njoki Nduma, the mother to the Plaintiff also used to utilize the suit land. That the ceremony in 1990s by the Plaintiff was for him to appease his uncle Maithori Ngacha, so that he can give him land just like the other brothers. That the allegations that Raphael Muchoki was adopted by Maithori Ngacha, was untrue and unfounded. It was his evidence that the Plaintiff, his mother and 2nd Defendant have been utilizing the suit property.



30. In cross-examination by counsel for the Plaintiff, he stated that all the parties have been utilizing the land. He confirmed that in a Kikuyu ceremony, the Plaintiff gave out a goat which was requested by Maithori Ngacha.
31. In re-examination by counsel for the 2nd Defendant, he confirmed that he was the one who slaughtered the said goat and that Maithori Ngacha, had requested for the goat so that he can give a piece of land to the Plaintiff, but not to adopt him as his son. That the other brothers had been given land by Maithori Ngacha in his life time.
32. Parties thereafter filed and exchanged written submissions.
33. The Plaintiff through the Law Firm of Githiga Kimani & Co. Advocates, filed his submissions on 17th July 2023, and submitted that he has met the threshold for grant of orders of adverse possession. He relied on the case of Samuel Kihamba vs Mary Mbaisi(2015) eklr, 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 license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”
34. He urged the Court to allow his claim.
35. The 2nd Defendant filed her submissions on 14th August 2023, and urged the Court to dismiss the Plaintiff's claim. She relied on the case of Samuel Miki Waweru vs Jane Njeri Richu C.A. No. 122 of 2011(UR) where the court held;

“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 or in pursuance of an agreement for sale or lease or otherwise.”
36. It was her further submissions that the possession by the Plaintiff has not been continuous, exclusive, actual and uninterpreted.
37. The Court has not seen the submissions by the 1st Defendant/Respondent.
38. The Court has carefully considered the pleadings herein, the exhibits produced and the rival written submissions and the Court finds that the main issue for determination is whether the Plaintiff herein has met the threshold for grant of orders of adverse possession.
39. There is no doubt that the parties herein are related. The suitland in issue is registered in the name of Maithori Nduma, and was registered so on 19th July 1965, as is evident from the copy of Green Card attached to the amended Originating Summons. This is a first registration.
40. There is evidence that the said Maithori Nduma, was a brother to Musa Nduma, the father to the Plaintiff and 1st Defendant. He was also the father-in-law to the 2nd Respondent who is a wife to Peter Kamau (Deceased), brother to the Plaintiff herein. There was also evidence by all the parties that the said Maithori Ngacha alias Maithori Nduma had no wife nor children. He died intestate and there is a Succession cause filed in 2019 by Naomi Njoki Nduma and the 1st Defendant. It is evident that the 1st Defendant Regina Njeri Nduma is an legal administrator of the estate of Maithori Ngacha alias Maithori Nduma. There is evidence that the Grant issued in respect of the estate of Maithori Ngacha



alias Maithori Nduma was revoked, when the Plaintiff herein objected. After the said revocation, the Plaintiff did not pursue the Succession Cause, but filed this suit. The Plaintiff alleged that he entered into the suit property Loc. 13/Gakoe/829, with the blessings and permission of the registered owner in 1993, who allegedly adopted him after carrying on a Kikuyu ceremony known as “Guciarwo na Mhuri”.

41. This evidence was opposed by the 2nd Defendant and her witness but supported by 1st Defendant who is a blood sister to the Plaintiff.

42. The Plaintiff herein is the one who has alleged and therefore the burden of proof laid squarely upon him as provided by Section 107 of the Evidence Act, which provides;

“ whoever desires any Court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist”

43. The doctrine of adverse possession is provided for under sections 7,13,17 and 38(1) and (2) of the Limitation of Actions Act. Further section 28 of the Land Registration Act, provides that rights acquired by prescriptions is one of the overriding interests over a registered land. Section 7(d) of the Land Act provides that prescription or adverse possession is one method of acquisition of the title to land.

44. The suit land is registered in the name of Maithori Nduma alias Maithori Ngacha, which was registered so in 1965, under the Registered Land Act Cap 300(now repealed). As provided by Section 27 of the said Cap 300(now repealed) the said Maithori Nduma is deemed to be the absolute owner entitled to all the right and privileges belonging or appurtenant thereto. This is mirrored in Section 24 of the Land Registration Act 2012. Further in Section 28 of the said Cap 300(now repealed) provides that the rights of such proprietor shall not be liable to be defeated except as provided by the law. (The said provisions of law is reiterated in Section 25 of the Land Registration Act).

45. Therefore, the right of Maithori Nduma(deceased) can only be defeated as provided by the law and adverse possession is one of such provision of law that defeats the right of proprietor.

46. A Claim of adverse possession accrue on land and not title and for such claim to be granted, a party has to move to Court. In the case of Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKRL, 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.

47. For a party to succeed in a claim for adverse possession, he must establish several aspects. See the case of Mbira vs Gachuhi (2002) I EALR 139, where the Court held;

“ ... a person who seeks to acquire title to land by the 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 statutorily prescribed period without interruption...”



48. The principles to be considered while determining a claim for adverse possession were well set out in the case of *Wambugu vs Njuguna Civil* [1983] KLR 172, where the Court stated that:
- “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.”
49. In the case of *Kimani Ruchune vs Swift Rutherfords & Co. Ltd* (1980)KLR 10 Kneller J held that
- “the Plaintiffs have to prove that they have used this land which they claim as of right: *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion)..... The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt *it or by any recurrent consideration; see *Wanyoike Gathire vs Berverly*. (1965) E.A 514, 518,519 per Miles J”
50. From the above quoted cases, it is clear that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly, without secrecy, without force and of right without interruption for a period of 12years either after dispossessing the owner or by discontinuation of possession by the owner on his own violation. See the case of *Kasuve vs Mwaani Investments Ltd & 4 Others* IKRL 184, where the Court of Appeal restated what a claimant for adverse possession has to prove; “ in order to be entitled to land by Adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and of right without interruption for a period of 12 years...”
51. Further in the case of *Mate Gitabi vs Jane Kabubu Muga & Others* (Nyeri Civil Appeal No. 43 of 2018) (unreported) the Court held as follows; -
- “For one to succeed in a claim for adverse possession, he must prove that he occupied the said land openly, without secrecy, without force and without licence or permission of the owner with the intention to have the said land”.
52. Therefore, for one to succeed in a claim for adverse possession, there must be dispossession of the said land from the owner and the entry into the said land must be without force and without secrecy. These elements are contained in the Latin maxim ‘*nec vi, nec clam, nec precario*’.
53. Has the Plaintiff herein been able to establish the principles for adverse possession.
54. These principles are;
1. one must have been continuous and un interrupted possession of land for at least 12 years.
 2. Such possession has been open, notorious to the knowledge of the owner.
 3. Such possession is without the permission of the owner.
 4. The claimant has asserted a hostile title to the owner of the property.
55. The Plaintiff herein alleged that he has been in continuous and uninterrupted possession of the suit land for more than 12 years, that is from 1993 to date. It was his evidence that he entered into the suit land upon the invitation of the registered owner Maithori Nduma, who adopted him as his son. However, the 2nd Defendant alleged that the registered owner Maithori Nduma, who did not have



Children or a wife had alleged in his life time that the suit land would be inherited by the sons of his brother's sons, and these three sons are; Peter Kamau, John Maina and the plaintiff herein Raphael Muchoki. This evidence was supported by DW 3, Harrison Maina Githinji, who alleged that he was present when the alleged goat was slaughtered and it was slaughtered by the Plaintiff so that he can be allowed to utilize some portion of the suit land just like by other brothers. The Plaintiff's independent witness one Ephantus Macharia Kinyua, was not present when the alleged goat was slaughtered. The Court finds that though the Plaintiff has put up his permanent house on the suit property, there was uncontroverted evidence that the 2nd Defendant had been utilizing a portion of the suit land, and thus the Plaintiff has not been in continuous and uninterrupted possession of the suit land for at least 12 years.

56. On the principles of whether such possession was open and notorious to the knowledge of the owner, it was evident from the available evidence that the Plaintiff got into the suit land with the blessings of the registered owner in 1993. The said registered owner Maithori Nduma died in 1993, and therefore the Plaintiff had not been in open and notorious possession of the suit land with the knowledge of the owner for at least 12 years by the time the said Maithori Nduma passed on. See the case of Gabriel Mbui vs Mukindia Muraya(1993) eKLR, where the court held;

“It has been held many times that acts done under licence or permitted by or with love of the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the Limitation Statute”

57. The Plaintiff herein fails on this principle.
58. On whether such possession is without the permission of the owner, it is evident that all the parties did allege and adduce evidence to the fact that the Plaintiff got into the suit land with the permission of the registered owner in 1993. Therefore, his occupation cannot be said to be adverse to the right of the registered owner. He entered into the suit land in 1993, and the registered owner died 1993, and therefore, his occupation cannot be said to have been without permission of the owner, that is without secrecy, without force and without license or permission of the owner with intention to have the land. His entry in 1993, if any was with the permission of the registered owner – Maithori Nduma.
59. On whether the Plaintiff asserted a hostile title to the owner of the suit property, it is clear that it is the owner of the suit property who invited the Plaintiff into the suit property. Though the 1st Defendant has supported the Plaintiff's claim, it is clear that the claim herein is a collusion between the two blood siblings to remove the suit property herein from the preview of Succession proceedings. The suit property herein was a registered property of Maithori Nduma alias Maithori Ngacha ,who died intestate. He had relatives who are the parties herein. They should pursue the Succession proceedings so that the suit property can be distributed as per the Law of Succession. The evidence by the Plaintiff that he was adopted by the late Maithori Ngacha alias Maithori Nduma, was controverted by the 2nd Defendant and her witness. PW2, Ephantus Macharia Kinyua was not present during the alleged Kikuyu ceremony of “Guciarwo na Mburi” and he could not tell what really transpired during the said ceremony and therefore could not testify with certainty on whether the plaintiff was adopted by Maithori Ngacha and given the suit land or not.
60. However, the 2nd Defendant witness, Harrison Maina Githinji's evidence was not shaken during cross-examination and his explanation of the reasons as to why the said goat was slaughtered was more probable, and this Court has no reasons to doubt it.
61. For the above reasons the Court finds that that the Plaintiff has not proved his case against the Defendants especially the 2nd Defendant, on the required standard of balance of probabilities.



62. Consequently, the Plaintiff's claim as stated in the amended Originating Summons dated 17th November 2022, is hereby dismissed entirely with costs to the 2nd Defendant herein.

63. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF DECEMBER, 2023

L. GACHERU

JUDGE

Delivered online in the presence of

Mr. Kimani Githiga for the Plaintiff/Applicant

1st Defendant/Respondent – Absent

Ms Waititu for the 2nd Defendant/Respondent

