



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MURANG'A

CIVIL SUIT NO. 39 OF 2017

MARJORY NJERI NJOROGE.....PLAINTIFF

VERSUS

JOSEPH MUCHIRI NJUGUNA.....DEFENDANT

JUDGMENT

1. In her further amended amended Originating Summons dated 15/9/2021 the Plaintiff inter alia seeks;

- a. A declaration that the Plaintiff has acquired an overriding right over parcel L.R No. Makuyu/Kimorori Block. 111/727 (hereinafter after called the suit premises) under section 30 of the Registered Land Act Cap 300 Laws of Kenya.
- b. A declaration that MARJORY NJERI NJOROGE is entitled to the entire title, possession, occupation and transfer of property namely L.R No. Makuyu/Kimorori Block. 111/727 by way of Adverse Possession on account of uninterrupted possession thereof for over 14 years.
- c. A declaration that the sale and transfer of the said parcel of land L.R No. Makuyu/Kimorori Block. 111/727 to the Defendant herein in the year 2000 is null and void.
- d. A declaration that the property registered in the name of the Defendant be cancelled and transferred to the Plaintiff's name as the Plaintiff has acquired the title to the property by way of Adverse Possession.
- e. A declaration that the Defendant's title to the suit premises is also null and void.
- f. An order directing the Defendant to execute and deliver to the Plaintiff within 10 days, a transfer of property L.R No. Makuyu/Kimorori Block. 111/727 together with the original title of the property to procure, execute and deliver all documents necessary to confer title of the property to the Plaintiff free from any encumbrances failing which the Deputy Registrar of the Environment and Land should execute the transfer.
- g. A declaration that the Plaintiff herein is the absolute and proper owner of the suit premises herein.

2. The Originating Summons is supported by the Plaintiff's Affidavit sworn on 4/10/2017 where she deponed that she acquired a share from her husband's late uncle Philip Thuca in Kagua Farmers' Co-operative Society Ltd (*the Society*). That she was issued with a share certificate annexed as MNN2 dated 16/3/1981 which allowed her to participate in balloting and got plot no. 728 identified as Makuyu/Kimorori/Block.111/728 (*the suit land*). She averred that she took possession of the suit land and in 1984 allowed her sister in law, Jemimah Muchenga and her son Muchenga to till the land and later planted fruit trees thereon as shown in MNN3.

3. The Plaintiff further deponed that Plot No. 729 was owned by Mariko Kagwe, her former customer at Barclays Bank Thika and former Chairman of the Society while plot 730 owned by the late Mungai Mwaura. At para. 16 of the Supporting Affidavit, the deponent refers to plot 726 as the suit premises which she did not know the owner. Further that Doris resided on plot 731 and had leased 726 from Kariuki Gacheru. That in 1988 the Plaintiff was issued with Title for plot 728 annexed as MNN5, copy of certificate of official search and extract of title MNN5a and MNN5b respectively.

4. Additionally the Plaintiff swore that in the year 2000, while her family was attending her mother in law's funeral, unknown persons trespassed on the suit land on instructions of John Muchiri, the Defendant, to prepare the land for next planting. That the Plaintiff's husband reported the intrusion to the local chief where the Defendant was summoned and admonished for trespassing. On his part, the Defendant reported the dispute to the Local District Officer where he was asked for proof of ownership of the suit land he was claiming as his.

5. That later in 2004 the Plaintiff decided to settle her sister in law on the suit land by building her a house thereon; see annexure *MNN4*. The deponent gave a summary of the decisions of the LDT case No. 66 of 2004; Thika CMCC D.O case No. 58 of 2005 and District surveyor at paras. 25, 26 & 27 of the Supporting Affidavit. The Plaintiff maintained that she has been in occupation of the suit land for over 12 years without any interruption hence the suit.
6. At the hearing, the Plaintiff called PW1, **Mary Wanjiru Wainaina** who adopted her witness statement dated 4/10/2017 as evidence in chief. She testified that she is a member of the Society having balloted and allocated plot 729 neighboring Plot 730 (*Mwaura's*), 731 (*Doris's*) and Plot 728 (*Marjorie's*). That her daughter Lucy Wairimu Nganga also owned Plot no. 2095 which PW1 exchanged with her.
7. In **cross-examination**, PW1 insisted that she owned plot 729, had built on it but did not have its title in Court. That she was the registered owner of plot 2095 after exchanging titles with her late daughter. She denied knowing Danson Murigi, Mburu Maina and Kariuki Gacheru. That she was shown her plot by the surveyor long after balloting was concluded.
8. In **re-examination**, PW1 was adamant that her daughter was duly registered as the owner of plot 729 and upon her demise, she was buried there.
9. The Plaintiff testified as PW2. She relied on her Supporting Affidavit sworn on 4/10/2017 as her evidence in chief. It was her evidence that upon being issued with the share certificate No. 2123 by the Society, she balloted and picked no 728 and accordingly allocated plot no 728 located between plots 727 and 729. That she did not live on the plot but with her permission Jemimah Wambui Muchenga cultivated thereon. That the Defendant sued her at Makuyu LDT where the surveyor was directed to prepare a report on the suit land – see *MNN7*. Upon the Surveyor's visit in 2006, the Plaintiff claimed that she realized for the first time that she was on a wrong plot, No. 727 hence the Defendant's move to sue her for eviction.
10. That accordingly she instituted the instant proceedings to claim plot 727 by way of Adverse Possession. That by September 2000, she had been in occupation for over 12 years having been shown the plot in 1982 and 1984 cultivated it before settling Jemimah Wambui on it. That up to September 2000, the Plaintiff had never met nor known the Defendant.
11. On **cross-examination**, PW1 admitted the 2004 LDT case and the Kandara case No. 45 of 2011 by the Defendant against her. PW1 also conceded that she was not present when the plots were being shown to the allottees and did not know when subdivision was completed. That the Defendant bought the suit land in 2000. That she had not sued the Society and did know Mburu Mwaura. PW1 said that though she was the registered owner of plot 728, it was occupied by Mary Wainaina.
12. The third witness was the Plaintiff's husband, **Danson Njoroge Muchenga** who also adopted his witness statement dated 4/10/2017. He testified that the Plaintiff balloted and was allocated plot No 728. His evidence mirrored that of the PW2 to a large extent.
13. In **cross-examination**, PW3 said he was not present when his wife was shown her plot. That the land was initially owned by the Society before it was surrendered to the Government of Kenya and titles issued in 1988. DW3 was referred to DNM1 (sketch map) which he prepared in 1988. According to him plot 729 exists on sheet map no. 3; was not aware if title for plot 2095 had been transferred and plot 730 on map no.3 owned by Mungai Mwaura. That those plots were not appearing in his sketch, DNM1. DW3 also disclosed that plot 727 was registered in the name of Kariuki Gicheru who was a member of the Society. That Kariuki owned the said plot in the 1980s and cultivated it through Doris. Further that there was no appeal preferred against the LDT orders.
14. In **re-examination**, PW3 reiterated PW2's evidence that they obtained the suit land from the Society in 1982 and with their permission, his sister Jemimah started cultivating it in 1984. He added that the boundaries of their land were pointed out them and consequently they fenced it. DW3 also stated that all along they thought they occupied plot 728 only for the Surveyor to point out that they were on 727 hence the instant suit.
15. With leave of Court, PW2 was recalled to testify on 29/11/2018. She adopted her Reply to defence witness statements filed on 29/8/2018. Responding to the witness statement of Mburu Mwaura, PW2 said in PMCC 743 of 1995 Kariuki Gicheru sued Mburu Mwaura and the Society claiming ownership of plot 727 while Mburu Mwaura claimed ownership of plot 726. That Mburu Mwaura refused to vacate from plot 727 claimed by Kariuki. PW2 was categorical that she was not a party to that case.
16. PW2 went ahead to testify that in Kandara case no 45 of 2011, the Defendant herein sued her whom she accused of entering her land (plot 728) on 13/9/2000. That she occupied the suit land with the Society's permission before titles were issued. She denied that Mary Wainaina was occupying her land and neither was PW3 colluding with Wainaina.
17. In **cross-examination**, PW2 explained that 728 is registered in her name though she has been occupying 727 since 1981 (i.e. according to the map of 1983). That it was not until 2006 that she realized she was occupying 727 instead of 728. In relation to case no. 743 of 1995, PW2 insisted that she did not take part in those proceedings and the case was dismissed in 2002.
18. On 13/2/2019, PW1 was also recalled. She denied knowing Mburu Mwaura and living on PW2's land. That she did not know Peter Mwangi Maina and had never been involved in any dispute with PW2 over the land. Reiterating her earlier evidence, PW2 could not recall when she exchanged her plot 729 with 2095 and did not have any evidence thereof.
19. The fourth witness was **Doris Wanjiru Muturi** who also adopted her statement dated 4/10/2017. PW4 informed the Court that she did not know David Kariuki. That she left the land of Kariuki Gicheru after cultivating it from 1982 to 1989 for a period of 7 years. In cross-examination, she maintained that her plot is 731 while the Plaintiff's is three plots away.
20. Notably in **re-examination**, PW4 stated that the Plaintiff's land has never changed from where it was. That it was the fourth plot and its caretaker Jemimah Muchenga used to draw water from her land. It was her evidence that she leased plot No 726 from Kariuki Gicheru and

not 727.

21. Julius Muchenga testified as PW5. He similarly adopted his witness statement dated 4/10/2017 and supplementary Reply to RA sworn on 24/1/2018 as evidence in chief. It was his testimony that he cultivated the suit alongside his mother and denied knowing Peter Mwangi Maina. Just as PW4, PW5 reiterated that the Plaintiff's land is the fourth plot from below.

22. PW6 was Suleiman Kamau Mungai. He adopted his witness statement dated 4/12/2017 as evidence in chief and informed the Court that his father's land is plot 730 which according to him exists on the ground despite having been omitted in the 1993 Survey plan. In **cross-examination**, he said his father died in 2013 after he was shown beacons of the land in 1995. That he got to know the Plaintiff recently and was not aware of any case between the Plaintiff and Kariuki.

23. The Plaintiff's case was closed with the recalling of PW3 whose evidence was largely a repetition of his evidence above.

24. The Defendant opposed the Plaintiff's claim vide his Amended Reply to Originating Summons dated 1/10/2021. He denied the Plaintiff's claim in its entirety and put the Plaintiff in strict proof thereof. That the claim is misconceived and an abuse of Court process solely intended to frustrate him from accessing his land. That the suit land has been a subject of numerous legal proceedings to wit; Makuyu LDT Case No. 66 of 2004, Thika D.O Case No. 58 of 200 and Kandara SPMCC Case No. 45 of 2011. That the Plaintiff's claim should be against the occupant of land parcel 728. That the Plaintiff's Adverse Possession claim does not hold water because the Plaintiff's occupation was as a result of her membership in the Society which owned the original land vide L.R No. I.R 18582 before it was surrendered to the Government of Kenya on 30/9/1988. That thereafter Kariuki Gicheru became the registered owner of parcel 728 on 1/7/1988 but only became effective after 30/12/1988 when the surrender was effected. According to the Defendant, the period for Adverse Possession commenced on 30/12/1988 and not any earlier and in any event the Plaintiff never dispossessed Kariuki of his land.

25. The Defendant maintained that he is the legal owner of the suit land having purchased it from Kariuki and paid a purchase price of Kshs. 130,000/=. That he took possession of the suit land in May 2000 and a title deed issued in his favor on 6th July 2000 save for the Plaintiff's forceful interference with his peaceful occupation. That in 2004, he opted to institute his claim at the Makuyu LDT that culminated to the Murang'a Surveyor's findings that impelled this suit. Accordingly, the Defendant insisted that the Plaintiff is not entitled to any of the prayers sought and prayed that the claim be dismissed with costs.

26. The first Defence witness was **Joseph Muchiri Njuguna**, the Defendant. He relied on his Replying Affidavit dated 10/3/2015 as his evidence in chief. He produced the annexures thereto as D.exh. 1-28. It was his testimony that he bought plot 727 from Kariuki as per sale agreement, Dexh. 2. That he started cultivating the suit land in the year 2000 but was stopped by the area sub chief acting in concert with the plaintiff. That he proceeded to file his case at the Makuyu LDT and was later referred to Thika Court. At Thika DW1 did not succeed and he went ahead to file Kandara case. He was emphatic that the Plaintiff's husband found him on the suit land that rightly belonged to him vide his title, D.exh 8. That the Plaintiff's land is 728 yet she also claims his land, 727.

27. In **cross-examination**, DW1 explained that he was shown the suit land by Mburu Mwaura. He conceded knowing the case between Mburu and Kariuki though Kariuki did not disclose it to him. He added that had he known about the case at the time of purchasing the land, he would not have bought it. DW1 admitted that nowhere in his pleadings did he indicate that Kariuki showed him the suit land. Further, that he took possession of the suit land after issuance of his title in July 2000 and was interrupted by the sub chief's move to prohibit him from cultivating it.

28. DW1 informed the Court that by 2004 the Plaintiff's land was occupied by someone else; that the Tribunal did not make a definitive finding but ordered the Surveyor to conduct a site visit in October 2006 when it was determined that the Plaintiff wrongly occupied 727 yet her land was 728; that 728 was occupied by another person who had built a house on it. That it was against the Surveyor's findings that he decided to file Kandara case no. 45 of 2011 to evict the Plaintiff. That Kariuki had filed his case in Thika PMCC Case no. 743 of 1995 against Mburu Mwaura claiming plot 727 and the Court ruled in Kariuki's favor and ordered Mburu to vacate. The interpretation of this Ruling according to DW1, is that Kariuki sued Mburu who was in occupation of 727 since 1990 and not the Plaintiff herein because she never occupied it.

29. DW1 said that Mburu showed him the 5th plot occupied Mary Wanjiru Wainaina. That according to Dexh 27, Wainaina's occupation of the 5th plot instead of the 6th plot (no 2095) is the cause of the confusion as the Plaintiff is on 727. That Kariuki got title of plot 727 on 1/7/1988 and DW1 took possession in July 2000. He denied knowing details of plot 730.

30. David Kamau Kariuki testified as DW2 and adopted his witness statement filed on 14/9/2018 as evidence in chief. That he knew the suit land having resided in the area since 1988. That the suit land was the 6th plot from their plot (4th plot) while Doris occupied the 7th plot. That Mburu's plot was the 3rd plot adjacent to theirs. That his father, Pharis Kariuki Gicheru a.k.a Kariuki Gacheru is deceased and it was his mother who sold the land in the year 2000. Similar to DW1, DW2 he stated that his late father sued Mburu in the Thika and not the Plaintiff because she was not on their land.

31. The third witness was **John Kamande Karanja**, the son of Mikielina Gichingi Karanja who occupied plot 725. He relied on his statement dated 9/2/2018 and added that he was given the land in 1988. That Mburu Mwaura occupied 726 while 727 belonged to Kariuki Gacheru who was known to him. That after the Thika case between Kariuki and Mburu, the surveyor re-arranged the plots in 1996 and 727 was confirmed to Kariuki. DW3 contradicted himself when he said that he knew the Defendant since Kariuki Gacheru sold the land to the Defendant. That the Defendant took possession thereof but some people invaded the suit land. DW3 could not tell how the occupier of 727 entered the suit land.

32. In **cross-examination**, DW3 was firm that his mother has always occupied 725 while 724 belonged to Daniel Mwangi; Mburu Mwaura's 3rd plot, Kariuki Gacheru's 4th plot and Wanjiru's 5th plot. She denied the Plaintiff's occupation on 727 and insisted that Jemimah has occupied it since 2000.

33. DW4 was **Peter Mungai Maina** who adopted his statement dated 14/9/2018. He claimed he knew Kariuki Gacheru as his neighbor having occupied plot 669. That they took possession in 1976 but titles were issued in 1988. That he knew the Defendant after he bought plot 727 in 2000. That Mary Wainaina is registered as owner of the 6th plot but there is no building on it. That there is a building on 728 but the witness did not know the owner.

34. In **cross-examination**, DW4 was clear that he was a member of the Society and his plot is 669 and that he cultivated 683. Regarding the suit land, he maintained that there was no one living on it and he did not know Muchenga.

35. In **re-examination**, DW4 explained that he cultivated 683 for four years before the owner sold it. That in 1996, Kariuki was cultivating the suit land.

36. Following the Defendant's Application to substitute Mburu Mwaura, the last defence witness was Julius Mwaura Mburu pursuant to this Court Ruling dated 26/5/2021. He told the Court that he was Mburu Mwaura's eldest son living on plot 726 registered in his father's name. That he had built on plot 726 having entered it in 2008. That his father bought the land in the 1980s. He confirmed plot 726 as it appeared in Dex 27 and explained that 724 was occupied by a Mukurino lady; 725 by Kamande; parcel 727 belonged to Kariuki. That he knew the Defendant in 2000 after he bought parcel 727. DW5 acknowledged the case by Kariuki against his father, Mburu.

37. In **cross-examination**, DW5 said he was born in 1960 and got married in 1978. He added that he no longer lived on plot 726 as his father sold it. He admitted that he had not visited the suit land for almost 3 years.

Parties' Written Submissions

38. The firm of **Mungai & Gakuru Advocates** filed submissions dated 14/12/2021 on behalf of the Plaintiff. She rehashed the background of the case and summary of her evidence in support of her claim. At the core of her claim, the Plaintiff avers that she is entitled to ownership of the suit land by Adverse Possession. That she has been in occupation of the suit land since 1982 and impugned the Defendant's attempt to possess the land on the basis of inconsistent dates namely; in the Makuyu LDT, Nyeri case no. 149 of 2011 and Kandara case no. 45 of 2011 proceedings, the Defendant said he attempted to take possession in July 2000 after he was issued with a title deed on 6/7/2000 but in Kerugoya ELC 111 of 2014 the time of possession was in May 2000 upon paying Kariuki Gicheru the balance of the purchase price.

39. Further, that the Makuyu LDT directed the Murang'a District Surveyor to visit the suit premises and file his report which was to the effect that the suit land is registered in the Defendant's name but cultivated and occupied by the Plaintiff while plot 728 registered in the Plaintiff's name is occupied and cultivated by Mary Wanjiru Wainaina – see page 9 of the Plaintiff's bundle of documents. That the startling Surveyor's revelations prompted the Plaintiff to institute this case as she had occupied the suit land believing it was hers.

40. The Plaintiff drew 11 issues for determination. Firstly, whether she has acquired the suit land by way of Adverse Possession, citing the case of **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR**, the Plaintiff submitted that she has satisfied the elements for proving Adverse Possession; possession and discontinuance of possession. That she has been in occupation for a period of over 12 years as testified by her witnesses; Danson, Julius, Mary, Doris and Suleiman. That the Thika case no. 743 of 1995 is crucial in determining Adverse Possession herein as the Plaintiff therein, Kariuki Gicheru had sued Mburu Mwaura for illegally trespassing on the suit land which Mburu denied and stated that he owned parcel 726, next to the suit land. That the same Mburu is the same one who pointed out the suit land to the Defendant herein and not Kariuki, the previous owner who purported to sell the suit land. Accordingly that by 1995, the Plaintiff had well settled on the suit land since 1982; a period exceeding the statutory 12 years.

41. The Plaintiff added that DNM1 produced by Danson had variances with survey map known as sheet no. 6 produced by the Defendant. That DNM1 shows the first plot as 725 and last plot as 733 while sheet no 6 shows first plot as 724 and the last plot 732-733 resulting in 10 owners of land claiming 9 plots of land. That the import of the Thika case is that Kariuki was landless but went ahead to sell a non-existent plot to the Defendant. Moreover that, that explains why Kariuki never sued the Plaintiff herein and neither reported her to the chief. That all along the Plaintiff has occupied the 4th plot, being the suit land and peacefully so hence Kariuki could not sue her.

42. Regarding her title, the Plaintiff stated that Kariuki having registered as the owner of 1/7/1988, the statutory 12 years period lapsed on 30/6/2000 before the Defendant's purported title was issued on 6/7/2000.

43. On the issue of surrender of title to the Government as pleaded by the Defendant in his amended reply to Originating Summons dated 13/10/2021, the Plaintiff was categorical that the suit land premises was privately owned having been transferred to the Society in 1960s and upon balloting it belonged to private individuals. Furthermore the Plaintiff pointed out that the Defendant's witness in particular Peter and Julius corroborated her evidence that there was a permanent structure on the 5th plot. That David's evidence was not credible as his evidence was mostly hearsay since he was a minor when his father bequeathed his mother their plot. In the end the Plaintiff argued that her occupation has been open and notorious as evidenced by the Surveyor's finding that the Defendant's portion of land was cultivated and occupied by the Plaintiff. That her occupation has been continuous and uninterrupted since 1982 until September 2000 when the Defendant's attempt to take possession failed.

44. The second issue for determination was whether the Plaintiff acquired overriding rights over the suit land under Section 30 repealed Registered Land Act and Section 28 Land Registration Act (LRA). It was submitted that an overriding interest is an interest to which a registered title is subject even though it is not noted in the register. That having proven Adverse Possession, the Plaintiff thus acquired overriding rights thereto.

45. On whether the sale of the suit land to the Defendant was null and void, the Plaintiff maintained that the Defendant purchased "air" as he was never shown the land by Kariuki. That Kariuki fraudulently entered into a contract to sell land he did not possess any good title to pass to the Defendant. Thus the Defendant had not come to Court with clean hands in view of the defective contract he entered into having admitted in his evidence that had Mburu disclosed the Court case over the suit land, the Defendant would not have purchased it.

46. Consequently, the fourth issue was answered in the affirmative that the Defendant's title over the suit land is automatically rendered null and void to the aforesaid vitiating factors.
47. The Plaintiff also agreed that the Defendant held his title in respect of the suit land in trust for her having occupied the suit land since 1982.
48. On whether the Court should declare the suit land be registered in the Plaintiff's name instead of the Defendant, the Plaintiff submitted that Section 8 of LRA empowers this Court to order such rectification and urged the Court to do so.
49. The other issues were all answered in the affirmative that; the Plaintiff has proven she is the absolute owner of the suit land; this Court has discretion to cancel the Defendant's title since the Plaintiff has proven her ownership by adverse possession; accordingly the Court should compel the Murang'a Land Registrar to transfer the Defendant's title to the Plaintiff; the Defendant be ordered to execute and deliver to the Plaintiff within ten days all necessary documents to transfer the land to the Plaintiff's name failing which the Deputy Registrar of this Court be at liberty to execute and lastly that the Court restrains the Defendant or his agents from interfering with the Plaintiff or her agents access to quiet possession of the suit land. The Plaintiff beseeched the Court to allow her claim with costs.
50. On the other hand, the Defendant filed his submissions dated 26/1/2022 through the firm of **Ngonyo Munyua & Co. Advocates**. According to him, the Plaintiff failed to discharge the burden of proof in support of her claim. That all defence witnesses testified that the suit land belonged to Kariuki Gicheru as the first occupant and he never lost possession at any point until he sold the land to the Defendant. Reliance was placed on the case of **Raphael Kahindi Kawala v Mount Elgon Beach Properties Ltd [2018] eKLR** on burden of proof in Adverse Possession claims.
51. In discussing the elements of Adverse Possession, the Defendant relied on the Court of Appeal decisions in **Wambugu v Njuguna (1983) KLR 173** and **Mbira v Gachuhi (2002) IEALR 137** and argued that the Plaintiff's contention that she has been in possession since 1982 alone is not proof of Adverse Possession. That in any event whether Kariuki's ownership begun on 1/7/1988 as opposed to 30/12/1988, the statutory period of 12 years had not lapsed in the Plaintiff's favour. That the Plaintiff did not prove occupation and dispossession against Kariuki because; the Plaintiff's entry to the suit land was as a licensee by virtue of her membership to the Society; the Society's title to the suit land was extinguished on 30/12/1988 when the Society surrendered the entire land to the Government; that if Kariuki never took possession of the suit land, then the Plaintiff's claim of dispossessing him the land fails; that upon such surrender to the Government, the suit land was then transferred to Kariuki on 1/7/1988 being the earliest date when time could run and thus the 12 years had not run; that there is evidence that the Defendant entered the suit land before July 2000 hence the alleged Plaintiff's occupation was interrupted; that since a parcel of land cannot have two titles at a go, the Society's title was extinguished on 30/12/1988 and Kariuki could not assert his rights before such date and therefore time could not run against him.
52. Highlighting his evidence, the Defendant referred the Court to his Trial bundle dated 7/10/2020, Julius Mburu's witness statement and an amended Reply to the amended Originating Summons. He was firm that his evidence and that of his four witnesses remained unshaken that Kariuki possessed the suit land until 1995 when the suit land's geophysical identity arose. That Kariuki was never dispossessed of the suit land but it was the Defendant who gave up possession in 2004 due to incessant disturbances and the Plaintiff took advantage to construct a house thereon in the pendency of Makuyu LDT case that the Plaintiff admitted. That the Plaintiff forcefully re-entered the land with the help of her family and local administration and restrained the Defendant from his peaceful occupation and cultivation of the suit land.
53. On the certainty of the suit land on the ground, the Defendant pointed out that the cadastral map produced proves that sub division of the scheme was completed in 1993, therefore before that time, the suit land was not geophysically ascertainable; a fact admitted in the Plaintiff's amended Supporting Affidavit sworn on 10/3/2017 and that averment cannot be challenged as it speaks to the Plaintiff's cunningness, bona fides and demeanor. The Plaintiff's credibility was also faulted for later denying the existence of plot 724. That even going by the cadastral maps she produced in Court, the same was inscribed '**Complied by Survey of Kenya 1993**' and therefore the claim for Adverse Possession cannot arise when the land is not ascertained.
54. Regarding registration of the suit land, the Defendant inter alia relied on the Society's Title No. I.R 18582, instrument of surrender Dated 30/12/1988, Plaintiff's share certificate, Green card for the suit land, Kariuki's Title deed, pleadings in Kandara case, Makuyu LDT the totality of which it was submitted that the Society acquired ownership of the entire land on 21/1/1975 and used the title as security for loans as evidenced by registration of charges and discharges thereto. That on 30/12/1988, the Society surrendered the original parcel of land to Government in favor of an approved subdivision scheme that birthed the various plots thereat including the suit land.
55. That according to Section 44(1) repealed Registered Titles Act, Kariuki's Title deed became a legal document on 30/12/1988 and he became a registered owner of the suit land and rightly transferred the suit land to the Defendant deserving of protection under Sections 24(a) and 26(1) of the Land Registration Act.
56. Concerning Kariuki's occupation of the suit land, the Defendant relied on the Plaintiff's deposition in para. 13 of her Affidavit of 10/3/2017 that the plots were numbered consecutively from 724-733 and the Society's official pointed out to the members their respective plots and thus Kariuki occupied 727. That he occupied it until 1995 when a dispute arose and Kariuki is said to have mistakenly sued Mburu Mwaura instead of the Plaintiff because Kariuki believed Mburu occupied the suit land.
57. On whether the Plaintiff proved Adverse Possession, the Defendant disputed the same and submitted that even if the Court was to find continuous occupation since 1982, there was no proof dispossessing Kariuki his land. That the Plaintiff did not prove using the land as of right that is *nec vi, nec clam, nec precario* as was held by Kneller J in the case of **Kimani Ruchire v Swift Rutherfords & Co. Ltd (1980) KLR 10**. That according to the Plaintiff's evidence, she had been in occupation of the land believing the same to be 728 and not 727 until the Surveyor's determination that showed she occupied 727 being Kariuki's land. That accordingly as the Court of Appeal decision in **Gabriel Mbui v Mukindia Maranya (1993) eKLR**, the owner must know that he has been dispossessed off the land for an Adverse Possession claim to suffice. That the Plaintiff was bound to show that Kariuki was aware of the Plaintiff's occupation in his land. Therefore her claim fails as it is based on mistaken identity of the suit land.

58. The next issue was whether Kariuki's title was extinguished by 9/6/2000. The Defendant first submitted on the Plaintiff's allegation of occupation from 1982 to 1988 and dismissed the same because Kariuki was registered as the owner on 30/12/1988 and by 9/6/2000 the statutory period had not run in the Plaintiff's favour. That both the Plaintiff and Kariuki were members of the Society and her claim for Adverse Possession since 1982 cannot stand as she entered the land on account of her membership in the Society and the contractual relationship that arose upon balloting. Further reliance was placed on para. 10 of the Plaintiff's Supporting Affidavit at page 89 of her Trial Bundle where she avowed that '*at that stage there were not titles for the plots and I therefore occupied the land as a licensee from the Kagaa Co-operative Society*'. That therefore her claim is unfounded because she occupied the land with permission, a licensee and the time bar of 12 years could not start in 1982 until 1988 when the Society's title was extinguished.

59. About surrendering the Society's land to the Govt, reference was made to page 155 of the Plaintiff's trial bundle that showed the surrender dated 30/12/1988 registered on the same date and yielded the subdivision scheme that created the suit land. So that as at that date, the Government of Kenya owned the land and a claim for Adverse Possession cannot arise. The cases of **Beatrice Mukuwa Wavhira v Assumption Sisters of Nairobi Registered Trustees (2016) ECLR** and **Amos Weru Murigu v Murata Wangari Kambi & Anor. [2009] eCLR** were cited in support of that proposition.

60. As to whether time bar applied between 30/12/1988 and 9/6/2000, the Defendant was emphatic that Kariuki acquired his title on 30/12/1988 and not earlier. That be that as it may be, if Kariuki's ownership is taken to be from 1/7/1988 when his title was issued, he transferred the suit land on 9/6/2000 and not later. So that the act of transfer superseded the date of issuing the title deed hence the statutory period does not favor the Plaintiff and thus Kariuki passed good title to the Defendant.

61. In addition to that, it was argued that even if the Plaintiff's occupation of the suit land was continuous, it was interrupted by the Defendant's entry on the suit land in May 2000. That as it was already submitted Kariuki's assertion of right would only commence on 30/12/1988 and therefore 12 years would lapse on 30/12/2000 and the Defendant's entry extinguished any purported occupation. That the Defendant's sale agreement produced in Court was specific that possession would be granted upon completion of payment of the purchase price and the same was done in May 2000. That despite the various dates alluded to in the various pleadings before Court, the Defendant implored the Court to adopt the earlier date of May, 2000.

62. Last but not least, the Defendant urged that Thika case no. 743 of 1995 was not heard and determined on merit but dismissed for want of prosecution. That even so, Mburu Mwaura filed his defence and asserted that he was not occupying the suit land but 726 which is next to the suit land. The Defendant beseeched the Court to accept the parties' consensus that they settled the issue out of Court by calling the Government surveyor to identify their respective plots on the ground and this was done. That the Defendant filed Kandara case no. 45 of 2011 seeking eviction orders against the Plaintiff but the proceedings were stayed pending the determination of this case.

63. Having read and considered the pleadings, evidence, written submissions and all the material placed before me, the main issue for determination is whether the Plaintiff has acquired title to the suit land by way of Adverse Possession.

64. It is not in doubt that the Plaintiff's claim is for a declaration by Adverse Possession.

65. The background of this case is that Kagaa Farmers' Cooperative Society Limited (The Society) acquired approx. 2635 acres of land in 1975. (see copy of the mother title). The land was used for cattle ranching, coffee farming and other ancillary agricultural activities. The Society was comprised of members who held shares in the Society. In the 1980s the clamour for private ownership of land grew and the Society began the process of subdivision and distribution of the land amongst its members.

66. It is the Plaintiff's case that she acquired shares from her husband's Uncle namely Philip Thuca in 1980 and obtained a share certificate No 2123 for 50 shares issued on the 16/3/1981. That in 1982 she balloted and got ballot No 728 for the land. Upon balloting she and other members were shown the plots they had balloted and took possession of the same. It was her case that the plots had been marked with the plot numbers against each plot for ease of identification. That in 1984 she invited her sister in law Jemimah Muchenga also known as Mukorino to take care of the land for her since she lived and worked in Thika. That she became registered owner of the land on the 1/7/1988 and has lived on the land from then to date.

67. That Jemimah and her son would continue cultivating the land planting subsistence crops until the year 2000 when the Defendant attempted to gain entry into the land claiming a purchaser's right.

68. The Defendant on the other hand led evidence that he purchased the suit land from Kariuki Gicheru in the year 2000. According to the evidence of the Defendant there are various versions of when he entered the land; upon payment of the purchase price in May 2000, after obtaining the title in July 2000, whichever is obtaining, it suffices to state that his entry was short lived. That through the local administration, the Plaintiff was able to resist the Defendant's intrusion.

69. Unhappy with the turn of events, the Defendant proceeded to sue the Plaintiff at Makuyu LDT vide case no. 66 of 2004. On 28/9/2004, the LDT ruled that a Government surveyor visit the suit land to determine ownership of the protracted parcel of land. The LDT proposal was adopted in Murang'a D.O case no. 58 of 2005 on 14/11/2005 (see page 76 Plaintiff's Trial Bundle). The District Surveyor made the following findings; the Defendant is the registered owner of Parcel 727 that was cultivated and occupied by the Plaintiff while the Plaintiff was the registered owner of parcel 728 occupied by Mary Wanjiru Wainaina, PW1. This revelation led to the filing of the instant suit.

70. The Plaintiff's case is that she has been in occupation of the suit land believing it to be hers since 1982.

71. The Legal provisions on Adverse Possession are contained in the Limitation of Actions Act Cap 22 Laws of Kenya and relevant to this case in sections 7, 13, 17 and 38 that;

7. Actions to recover land

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.

13. Right of action not to accrue or continue unless Adverse Possession

(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.

17. Title extinguished at end of limitation period

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

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.

72. The **Black's Law Dictionary, Ninth Edition** defines Adverse Possession as;

“the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious.

73. The rationale of time bar in the recovery of land was set out over a century ago in the case of **Adam v Earl of Sandwich (1877) 2QB 485** where the Learned Bench stated;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties “

74. It is for that reason that Adverse Possession is a fact to be observed upon the land. It is not to be seen in the title even under Registered Land Act Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it. See **Mweu v. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430**.

75. The Court of Appeal in the case of **Mtana Lewa Vs Kahindi Ngala Mwangandi [2015] eKLR**, defined the concept as follows;

“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.”

76. The Court of Appeal in the case **Leonola Nerima Karani V William Wanyama Ndege[2012]eKLR** while citing the case of **Wambugu Vs Njuguna (1983) KLR 171** laid down the following guiding principles:-

- a. The general principle is that until the contrary is proved, possession in law follows the right to possess.
- b. 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.....
- c. 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.
- d. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession become adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.....
- e. The rule on "permissive possession" is that possession does not become adverse before the end of the period during which

the possessor is permitted to occupy the land.....

f. Adverse Possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour.....time cannot run in favour of a licensee. A licensee therefore has no Adverse Possession (Hughes v. Griffin [1969] 1 WLR 23."

g. Apart from the above, the following principles also apply when considering an application under section 7 of the Limitation of Actions Act;

h. For the registered owner of land to be dispossessed, the party claiming ownership by adverse possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. See Ngati Farmers Co-operative Society Limited V. Councillor John Ledidi & 15 others, Nkr CA No. 94 of 2004.

i. The mere change of ownership of land which is occupied by another person under adverse possession, does not interrupt such person's Adverse Possession.

j. Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. See Githu V. Ndeete [1984] KLR 776. Running of time will not be interrupted by sending a notice or letter from the true owner to the claimant.

k. Exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. See Powell V. McFarlane [1977] 38 P & Cr. 452."

77. With the above principles in mind I shall now analyze the case of the parties using the prism of the law and precedent.

78. Was the Plaintiff's possession adverse to the title of Kariuki Gicheru? It is on record that the Plaintiff's title was parcel 728 while she settled physically on parcel 727 belonging to Kariuki Gicheru, see copy of title deed issued on the 1/7/1988. The Plaintiff led unchallenged evidence that she occupied the land from 1982 on the permission of the land buying company. Time therefore did not start running from 1982 – 1988 because during that time titles had not been issued. The Plaintiff occupied the suit land as a licensee of the Society as they awaited titling process to be concluded.

79. It is on record that the titles were issued on 1/7/1988 for the parcel 727 and 728 in the names of Kariuki Gicheru and the Plaintiff respectively. Evidence was led that in 1995 Kariuki Gicheru sued Mburu Mwaura, the owner of parcel 726 on account of trespass. In his defence Mburu Mwaura defended himself as the owner of 726 and not 727. It is instructive to note even at this point Kariuki never asserted his title against the Plaintiff, not in 1988 when he got title and not in 1995 when he filed suit against Mburu Mwaura. The Defendant has argued that adverse is unfounded because the Plaintiff had no knowledge that she was on Kariuki's land. The law is that time runs against the title of the registered owner and not against the possessor however innocent he or she may be.

80. Was Kariuki aware of the possession of his land by the Plaintiff? It is important to point out that in Adverse Possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There does not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in Adverse Possession will run. But knowledge that the owner knows of the trespasser on the land must be strictly proved. It is not enough for the trespasser to speculate that the owner must have known that he was on the land without showing clearly that the owner knew or could not in the circumstances of the case be ignorant about it. If there is evidence that the trespasser occupied and carried activities and/or developments on the land claimed which the world could see and it is shown, for instance, that the owner lives near the land claimed or visits the area where it is located, the owner cannot be allowed in law to feign ignorance that he does not know of the trespass.

81. Evidence was led that Kariuki was one of the earliest occupants of the land in 1983 or thereabouts. Doris led evidence that she leased land from Kariuki for a period of 7 years from 1982 -1988. However DW2 Kariuki's son informed the Court that Doris leased the land for 2 seasons. It is also on record that Kariuki sued Mburu for trespass over 726. This evidence is important to buttress the position that Kariuki was present in the area and being the title holder of parcel 727 was entitled to assert title on his land but he did not. Evidence was led that the Plaintiff was in possession carrying out farming activities on the land through her sister in law popularly known as Mukorino. Doris led evidence that Mukorino farmed the land and all seemed to have known her in the area. This evidence points the Court to possession that was open and not stealth or shrouded in secrecy. It is not probable that Kariuki did not know or see that the Plaintiff was on the land all this time.

82. It is trite that the period of limitation or prescription begins to run against the owner of land, from the date when the owner was entitled to immediate possession and the squatter occupied the land under some color of right. In the case of registered land, Adverse Possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land. The evidence of the Plaintiff that Kariuki neither sued her nor demanded the land was unassailed. Equity does not look with favour at a man who holds a title and does nothing to assert his title for a period of over 12 years. The conclusion is that Kariuki exercised no vigilance as a title holder and became caught up with time bar.

83. Evidence was generally led that the plots were changed in 1987 when the Society asked the plot owners to shift plots to accommodate a road at the bottom of the Land. It is unfortunate that neither the Plaintiff nor the Defendant called the Surveyor to address the issue of change of plot numbers on the ground. Be that as it may, the Plaintiff was categorical that the plot owners resisted the Society's request to shift the plots. There was conflicting evidence tendered to explain the mixup of occupation on the plots by a few members. For example Kariuki appears to have leased plot No 726 on the ground belonging to Mburu Mwaura believing to be plot 727. The Plaintiff's plot no 728 was occupied by Mary Wainaina believing it to be plot No 729. Other conflicting evidence was that there are 10 plots on the row. Other stated

that they are 9. Looking at PEX No 24 – The survey Plan of 1993, plot No 724 which was said to have been taken by the road exists. Plot No 730 is missing despite the assertion of DW4 that the plot exists. The Plaintiff insisted that her plot is No 4 if plot 724 was counted from the bottom. The evidence of conflicting plot Numbers and occupation aside, the Plaintiff evidence was forthright and consistent that she has never relinquished possession of parcel 727 since she entered in 1982. The Defendant did not place any evidence to support the Plaintiff's discontinuation of possession.

84. Was the occupation peaceful? As stated above Kariuki did nothing to disturb the peaceful occupation of the Plaintiff's land. There is evidence that Kariuki's attempt to assert his right on parcel 726 in Thika CMCC 743 of 1995 vide a plaint dated 25/5/1995 was against Mburu Mwaura and the Society only. Mburu opposed the suit and maintained that he rightfully occupied his land parcel no. 726 and not 727. There is no evidence of any action taken against the Plaintiff at all. Further, the Defendant in his examination in chief stated,

'At the time I purchased, there was no building on the plot. Currently there is a temporary building constructed around 2004. It was after the case started at LDT.'

85. This evidence was in tandem with the Plaintiff's that she decided to build a house for her sister in law on the suit land in 2004, she having controlled the land throughout the period.

86. Was time interrupted from running? According to the evidence led on trial the Plaintiff occupied the land peacefully until 2000 when the Defendant attempted to take possession. It was the Plaintiff's evidence that before the Defendant's entry on the suit land, no one including Kariuki had ever taken her to Court over the same land. The Defendant maintained that he took possession sometime in May 2000 and only got to know about the land dispute in September 2000 by which time he already had a title deed in his name. That it was the Plaintiff's husband who interrupted his occupation in September 2000.

87. When did time start running for purposes of calculating adversity? Time started running from the time Kariuki was issued with a title on the 1/7/1988 up to and including the 30/6/2000. It is on record that the Defendant became registered as owner of the suit land on the 6/7/2000, 6 clear days after the right of Adverse Possession crystalized in favour of the Plaintiff. By this time Kariuki held the title in trust in favour of the Plaintiff, title having been extinguished by effluxion of operation of time on the 30/6/2000.

88. The Defendant has emphatically contended that time was interrupted by his entry into the land in May, June, July or September 2000. He has also argued that Makuyu LDT of 2014 interrupted possession. Given the analysis in para. 88 above, it is clear that by the time the Defendant sued the Plaintiff in the LDT, adversity had crystalized and a right of Adverse Possession had accrued in favour of the Plaintiff. The actions of the Defendant did nothing to halt a right that had accrued. The Defendant therefore acquired a title in parcel 727 that was encumbered with Adverse Possession thus held the title in trust in favour of the Plaintiff.

89. The Defendant has argued that though the members were given titles in July 1988, the instrument of surrender of the Society's title was on the 30/12/1988 in favour of the subdivision scheme that birthed the titles. He argues that title therefore existed only as at December 1998 and not the 1/7/1988. Fundamentally Adverse Possession can only be maintained against a registered owner. In this case Kariuki became registered as owner on the 1/7/1988 and effectively that is the time that he acquired the rights interest and estate in parcel 727 and not later. See the Court of Appeal decision in **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR**.

90. With respect to the Surveyor's findings, the report shows that the person who occupied the Plaintiff's land (728) did so before the Plaintiff acquired her respective plot and that person's parcel was supposed to be 2095. This report goes to buttress the Plaintiff's claim that she was in occupation of the land.

91. Based on the evidence led and on a balance of probability, the upshot of my analysis leads to the conclusion that the Plaintiff's claim for Adverse Possession over the suit land succeeds; it is allowed in the following terms:

- a. A declaration that MARJORY NJERI NJOROGI is entitled to the entire title, possession, occupation and transfer of property namely L.R No. Makuyu/Kimorori Block. 111/727 by way of Adverse Possession.
- b. A declaration that the sale and transfer of Makuyu/Kimorori Block. 111/727 to the Defendant herein in the year 2000 is null and void.
- c. A declaration that the property registered in the name of the Defendant be cancelled and transferred to the Plaintiff's name as the Plaintiff has acquired the title to the property by way of Adverse Possession.
- d. An order directing the Defendant to execute and deliver to the Plaintiff within 10 days, a transfer of property L.R No. Makuyu/Kimorori Block. 111/727 together with the original title of the property to procure, execute and deliver all documents necessary to confer title of the property to the Plaintiff free from any encumbrances failing which the Deputy Registrar of the Environment and Land Court should execute the necessary documents to effectuate the orders.
- e. Costs shall be in favour of the Plaintiff.

92. It is so ordered.

DELIVERED, SIGNED & DATED AT THIKA ON THE 25TH DAY OF APRIL 2022 VIA MICROSOFT TEAMS.

J.G KEMEI

JUDGE

Delivered online in the presence of:

Mr. Mungai and Ms. Onsembe for the Plaintiff

Ms. Munyua for the Defendant

Court Assistant: Phyllis