



**Nkoroï v Nyaga & 2 others (Environment & Land Case
001 of 2021) [2022] KEELC 3915 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3915 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 001 OF 2021
PM NJOROGE, J
MAY 24, 2022
IN THE MATTER OF LAND PARCELS, NO:
MWIMBI/S.MUGOMANGO/700,2408 AND 2409**

BETWEEN

MAGRET IGOKI NKOROÏ APPLICANT

AND

DAVID NYAGA 1ST RESPONDENT

FRANK KINYUA DAVID 2ND RESPONDENT

NICHOLAS NTWIGA NYAGA 3RD RESPONDENT

JUDGMENT

1. This suit was brought to court by way of Originating Summons dated 22nd July, 2020. It states as follows:

Originating Summons

- . (Under Sections 13 (i), 37 and 38 of the *Limitation of Actions Act* (Cap 22 Laws of Kenya) Section 1A, 1B and 3A *Civil Procedure Act* (Cap 21 Laws of Kenya), Section 80 (1) of the *Land Registration Act* 2012, Order 37 *Civil Procedure Rules* 2010 and all others enabling provisions of the law)

Let David Nyaga, Frank Kinyua David And, Nicholas Ntwiga Nyagawithin Fifteen (15) Days of service of these summons upon them inclusive of the days of such service, cause an appearance to be entered for them to the summons which is issued upon the application by the applicant suing on her behalf and for the determination of the following questions: -



1. Whether the Applicant is entitled by virtue of adverse possession to an order under Section 38 of the *Limitation of Actions* (Cap 22 Laws of Kenya) to be registered as an absolute proprietor of 0.8acres out of land parcel No. Mwimbi/s.mugomango/700 (and the resultant parcel Nos. Mwimbi/s.mugomango/2408 and 2409 upon subdivision of parcel No. Mwimbi/smugumango/700) held by Frank Kinyua David And Nicholas Ntwiga Nyagarespectively.
2. Whether the titles held by the 2nd and 3rd Respondents on the aforesaid land parcels Nos. Mwimbi/s/ Mugumangoi/2408 and 2409 stands extinguished by virtue of adverse possession in favour of the applicant
3. Whether the applicant is entitled to costs of the suit.

DATED AT EMBU THIS 22ND DAY OF JULY, 2020

NJERU ITHIGA& CO

ADVOCATES FOR THE APPLICANT

2. A conspectus of the Applicant's case is contained in her Supporting Affidavit sworn on 22nd day of July, 2020. By and large, her oral evidence and that of her witnesses is in congruence with what is deponed in this affidavit. It is reproduced in full herebelow:

Supporting Affidavit

I, Margaret Igoki Nkoroi care of P. O. Box 27 Chogoria Tharaka Nithi Countydo hereby Make Oath and state as follows:-

1. That I am the Applicant herein and hence competent to swear this affidavit.
2. That I am the daughter of the late Shadrack Nkoroi and the 1st Respondent David Nyaga is my elder brother.
3. Thatthe 2nd Respondent Frank Kinyua David and the 3rd Respondent Nicholas Nyaga are sons of the 1st Respondent and my nephews.
4. Thatthe 1st Respondent through our late father Shadrack Nkoroi was adjudicated land parcel No. Mwimbi/s. Mugumango/700 measuring 1.13 Ha or 2.82 acres which was registered in his names on 18.11.1970 to hold on trust for himself and his family and myself. (Annexed is a copy of the green card marked MIN1).
5. Thatmy brother (the 1st Respondent) and his family who include his two sons (the 2nd and 3rd Respondents) have settled on the said land parcel No. Mwimbi/s.mugumango/700.
6. Thatsometimes in 1978 our late father Shadrack Nkoroishowed and allocated me a portion of about 0.8acres out of land parcel No. Mwimbi/s.mugumango/700 to settle which I did and have extensively developed. (Annexed are photographic evidence marked MIN 2)
7. ThatI and the respondents have continued to occupy and develop our respective portions of land parcel No. Mwimbi/s.mugumango/700 through the time our father lived up to 3.11.1982 when he died to date.
8. Thatsometime in March 2012 and without my knowledge or consent, the 1st Respondent secretly and fraudulently subdivided land parcel No. Mwimbi/s.mugumango/700 into two equal portions of 0.56Ha or 1.4 acres being parcel Nos. Mwimbi/s. Mugumango/2408 and 2409 which he caused to be registered in the names of his sons Frank Kinyua David (the 2nd



Respondent) and Nicholas Ntwiga Nyaga (3RD Respondent) respectively. (Annexed are the copies of the respective green cards marked MIN 3 (a) and 3 (b)

9. That in subdividing the original land parcel No. Mwimbi/s.mugumango/700, the 1st Respondent totally disregarded my right of occupation and entitlement to the portion of 0.8 acres allocated to me by our late father in 1978 and my continuous occupation and development of the said portion for now over 41 years.
10. That the 2nd and 3rd respondents are now threatening to evict me and my two children from my home and land notwithstanding my long occupancy and development and I and my family stand to be landless and destitute.
11. That I am advised by my advocates on record which advice I verily believe to be true, that since I have occupied and developed a portion of the original suit land (No. 700) and now the resultant parcels Nos. 2408 and 2409 upon subdivision for more than 12 years, I have acquired good title over the said portion measuring about 0.8 acres by prescription or adverse possession.
12. That I ask the Honourable Court to cancel the titles and registration of land parcels Nos. Mwimbi/s.mugumango/2408 and 2409 and revert to the original parcel No. Mwimbi/s.mugumango/700 and order that I get my 0.8 acres exercised therefrom and thereafter the residents can retain the balance of about 2 acres.
13. That I have sent a demand letter to the respondents which has been ignored with impunity. (Annexed is a copy marked Min4).
14. That I swear this my affidavit in support of the Originating summons herein.
15. That what I have deponed above is true to the best of my knowledge information and belief.

Sworn at EMBU by the said)

Margaret Igoki Nkoro I)

This 22nd day of July 2020)

Before Me

Commissioner For Oaths/magistrate

Drawn And Filed By:

Njeru Ithiga & Co Advocates

BOX 1768 – 60100.

Embu

3. The 1st defendant /respondent replied to the Originating Summons via an affidavit sworn on 18th August, 2020. His Oral Evidence is by and large in congruence with the contents of this affidavit. The affidavit is reproduced herebelow:-

Replying Affidavit

I, David Nyaga of P.o. Box 27 Chogoria in the Republic of Kenya make oath and states as follows;

1. That I am the 1st respondent well versed with the particulars of this suit and therefore competent to make this oath.



2. That I have authority from 2nd and 3rd respondents to make and swear this affidavit on my behalf and on their behalf.
3. That the plaintiff applicant Originating Summons dated 23rd July 2020, its supporting affidavit sworn and dated 22nd July 2020 and the annexures thereto have been read over and explained to me by my counsel on record and having understood the content therein I wish to respond as follows.
4. That the background leading to the plaintiff applicant bringing this suit against me and the two other respondent is as follows.
 - i. That I am a son of one Shadrack Nkoroi
 - ii. The plaintiff applicant is the last born of our common father the said Shadrack Nkoroi.
 - iii. That the 2nd and 3rd respondents are my sons.
 - iv. I have 3 brothers and 5 sisters the plaintiff applicant being one of the sisters.
 - v. That Shadrack Nkoroidied on or around 1982 and left the following properties Lr.mwimbi/s.mugumango/699 and Mwimbi/n.mugumangu/199 (annexed marked D.N.N 1 a and and b are green cards of Mwimbi/s.mugumango/699 And Mwimni/s.mugumango/708).
 - vi. That Shadrack Nkoroi had intervals (sic) gifted me and my brother one John Kobi parcels of land namely Lr.mwimbi/s.mugumango/700 For Me And Mwimbi/s.mugumango/708(annexed and marked D.n.n.2are greens cards of LR. Mwimbi/s.mugumango/700 and Mwimbi/s. Mugamango/708).
 - vii. That all my sisters including the plaintiff applicant got married during the life time of our common father Shadrack Nkoroi.
 - viii. That our late father Shadrack Nkoroi was living at Mwiria Market and he died while there.
 - ix. That I opted to maintain my ageing mother consequently I built a house for her on my land Lr.mwimbi/s.mugumango/700 and upon her demise she was buried therein and so was our common father.
 - x. That on or around 1978 the plaintiff applicant deserted her matrimonial home after (sic) husband abandoned her at Mwiria Market where our common father was then living.
 - xi. It was at this point that I invited the plaintiff applicant to my plot to come and help my wife to take care of my ageing mother.
 - xii. It means therefore that plaintiff applicant came in my land with my full knowledge authority and license.
 - xiii. That the understanding between me and the plaintiff applicant was that she was to move and settle on her father's land Lr.mwimbi/s.mugumango/699 which was sharing a common boundary with my parcel Lr.mwimbi/s.mugumango/700.
 - xiv. That my mother Sara Igoki Shadrack died in 2001 and for all this while the plaintiff applicant and my wife were taking care of her.



- xv. That after the death of my mother at 100 years, I told the plaintiff applicant she should be ready to move and settle in our fathers land Lr.mwimbi/s.mugumango/699.
 - xvi. The applicant plaintiff between 2002 and 2010 moved into Lr.mwimbi/s.mugumango/699 and developed the same extensively by
 - a. Constructing a shop and rental houses. (annexed and marked D.N.N. 3 a, b and c are photographs showing the shop, rental hoses and pit latrine.
 - b. Bundles of photographs showing other developments on Lr.mwimbi/s.mugumango/699 by the plaintiff applicant.
 - xvii. In the mean while the plaintiff applicant continued to use the house I had constructed for my mother and which the plaintiff renovated.
 - xviii. That the exhibit marked Min2 Annexed to the plaintiff supporting affidavit does not show the applicant's house, cows stores food, living house, children house, cows water tanks, cows sharp cutter house garden rather they belong to the applicant late mother and which properties I and my children helped her to construct.
 - xix. That on or around 2012, and with full knowledge of the plaintiff, I sub divided Mwimbi/s.mugumango/700 and transferred the resultants parcels namely Mwimbi/s.mugumango/2408 and 2409 to the 2nd and 3rd respondents respectively (annexed and marked D.N.N.4 a,b and c is the copy of mutation form of Mwimbi/s.mugumango/700, officials search of Mwimbi/s.mugumango/2408 and official search of Mwimbi/s.mugumango/2409)
 - xx. It is important to note that the plaintiff did not raise a finger when I subdivided Lr.mwimbi/s.mugumango/700 and this was informed by the facts that she knew she was on the land temporarily and her place to occupy and work on was her father's land Mwimbi/s.mugumango/699 which was Sharing one boundary with Lr.mwimbi/s.mugumango/700.
 - xxi. I must add that the plaintiff applicant does not make use of more than 0.15 acres out of the original Lr.mwimbi/s.mugumango/700 and most of her developments are on Lr.mwimbi/s.mugumango/699.
 - xxii. The instant OS is an afterthought and the plaintiff is very much aware that she was a tenant (licencee at will on Lr.mwimbi/s.mugumango/700) otherwise there can be no explanation why she came to court to claim an adverse possession when the land got subdivided in 2012.
5. That the contents of paragraphs 1,2,3 of the plaintiff/applicant supporting affidavit raises no canvassed issues between me and the plaintiff applicant.
 6. The content of paragraph 4 of the applicant's supporting affidavit is true to the extent that I am the registered proprietor of Lr.mwimbi/s.mugumango/700 since the adjudication and demarcation however I emphatically deny that I hold the said land in trust for the family the plaintiff inclusive more particularly noting that my brother John Kobia was given Lr.mwimbi/n.mugumango/199 for the benefit of the two brothers and five sisters who are gifted by our common father Shadrack Nkoroi intervals. (sic).



7. The content of paragraph 5 of the applicant's supporting affidavit are true and correct and they require no qualification.
8. In answer to the content of paragraph 6 of the applicant was shown 0.80 acres, I wish to respond as follows:
 - a. It is untrue that Shadrack Nkoroishowed the applicant 0.80 Acres in 1978 to occupy settle and make use of.
 - b. I offered the applicant a license to come to my land Mwimbi/s.mugumango/700 after the applicant was abandoned by her husband at Mwiria Market where our common father was living.
 - c. That I only allowed the applicant to use the house on the suit land that I had constructed for my mother and I equally allowed the applicant to use the properties belonging to my mother on the suit land.
 - d. That I in particular allowed the applicant to come into Lr.mwimbi/s.mugumango/700 because I wanted her to assist my wife to take care of our aged mother.
 - e. The understanding between me and the applicant was that she was to help in caring for our mother and later move to her father's land Mwimbi/s.mugumango/699 which was adjacent to my suit land. The portion my mother was using and which the applicant also started using was less than 0.15 acres.
9. That admittedly the applicant has been occupying about 0.15 acres (and NOT 0.80 acres as alleged) as contended in paragraph 7 of the applicant supporting affidavit, however it is important to note that she has always been on this land with my knowledge and consent consequently the doctrine of adverse possession cannot apply.
10. In answer to the content of paragraph 8 of the applicant supporting affidavit I wish to respondent as follows;
 - a. It is true that in 2012 I openly and honestly sub divided Lr.mwimbi/s.mugumango/700 into two parcels namely Lr.mwimbi/s.mugumango/2408 AND 2409 and transferred the said parcels to the 2nd and 3rd respondent respectively.
 - b. That it untrue for the applicant to aver that she was not aware that indeed 2012 I sub divided Lr.mwimbi/s.mugumango/700, particularly noting that the applicant was at home when the land was surveyed, clear beacons were placed after the sub division of the suit land and which beacons were right in front of the pit latrine which was clear and visible and which the applicant uprooted.
 - c. That even after learning that the suit land had been sub divided the applicant did not lodge a caution or inhibition against the two resultants parcels of land for the purpose of preserving the same
 - d. The applicant new (sic) very well that she was a tenant at will on Lr. Mwimbi/s.mugumango/700 and at one time or another she was to move out and settle on her father's land Mwimbi/s.mugumango/699.
11. That in response to the content of paragraph 9 of the applicant's supporting affidavit I contend that Shadrack Nkoroihad no powers to give to the applicant Lr.mwimbi/d.mugumango/700



or part thereof granted that I was by then registered proprietor and in any event the applicant occupation as deposed herein above, the applicant was on the suit land as tenant at will and with authority from me, otherwise the applicant is pursuing the same trends with his brother Isaac M'imanene Shadrack who had sued me in Meru Hcc No190 of 1987 claiming half share of the suit land but the suit was dismissed with cost (annexed and marked D.N. N. 5 A and B is the letter from the deputy Registrar Meru Law Court and Kenya gazette dated 1st February 2019.

12. That in answer to the content of paragraph 10 of the applicant supporting affidavit I contend that nothing so far has been done by the 2nd and 3rd respondents to commence eviction proceeding and it is further untrue for the applicant to depose that she should be rendered landless and destitute when she have (sic) the better part of her development on Lr.mwimbi/s.mugumango/699 and if anything, she is acting the Arabs and Camel principle
13. In answer to the content of paragraph 11 of the applicant supporting affidavit I am advised by my counsel on record which advise I verily believe to be true that the applicant has not acquired 0.80 acres our (sic) of the original Lr.mwimbi/s.mugumango/700 by way of prescription or adverse possession for the following principle (sic) grounds
 - a. That the applicant entered the suit land under my authority and therefore a (sic) tenant at will.
 - b. That the applicant does not occupy 0.80 acres as alleged but rather occupies approximately 0.15 acres.
 - c. That the applicant does not specify on which land parcel Lr.mwimbi.s.mugumango/2408 and 2409 the portion she claims is situated.
 - d. That the threshold of claiming under the doctrine of adverse possession has not been met by the applicant.
14. In response to the content of paragraph 12 of the applicant's supporting affidavit I aver that it will serve no purpose for the court to reinstate Mwimbi/s.mugumango/700 and order 0.80 acres transferred to the applicant because the applicant has not proved she is entitled to anything from the suit land under the doctrine of adverse possession or prescription.
15. The content of paragraph 12 of the applicant's supporting affidavit is denied.
16. That I swear this affidavit in opposition of the applicant's originating summons and in response to the applicant's supporting affidavit sworn and dated 22nd July, 2020.

That what I have deposed above is true to the best of my knowledge belief and information.

Sworn at chuka by the said David Nyagathis 18th day of August, 2020.

4. PW1, Margaret Njoki Nkoroj, the applicant told the court that David Nyaga, the 1st defendant was her elder brother and that the 2nd and 3rd defendants were here nephews as they were children of the 1st defendant.
5. She told the court that the 1st defendant had been registered as owner of the suit land as trustee. She went on to tell the court that after her marriage failed in 1978 she returned to her parents' home and that her father instructed the 1st defendant to take care of her and give her 0.80 of an acre of land out of the land parcel No. Mwimbi/South Mugumango/700.
6. PW1 told the court she moved into the land and has been living on the land with her family. She claimed that sometimes in 2012, the 1st defendant secretly and fraudulently subdivided the suit



land into 2 portions, to wit parcel Nos Mwimbi/South Mugumango 2308 and Mwimbi/South Mugumango/2309 and transferred the sub-divisions to the 2nd and 3rd defendants.

7. PW1 told the court that in March, 2020, the 1st defendant blocked her gate and stopped her from extending her house. She was categorical that that is when she discovered that the suit land had been sub-divided. This forced her to file this suit.
8. She told the court that she had lived on the suit land and hence wanted the court to declare her owner of the portion of 0.80 acres, which she was claiming, through the doctrine of adverse possession. She admitted that her father had other pieces of land. She, however, denied PW1's assertion that she ought to move to these other pieces of land owned by her father.
9. During Cross-examination, she admitted that her father also owned land parcel No. Mwimbi/South Mugumango/699 which borders land parcel No. Mwimbi/South Mugumango/700. She went on to tell the court that when she was returned by her former husband to her parents, both of them were living on parcel No. 700. She denied that the house she moved into had been constructed for her mother by the 1st defendant who was the family's eldest brother whereas she was 9th (the youngest) out of their 9 siblings.
10. PW1 denied that the 1st defendant welcomed her to his land as a desperate refugee. She, however, agreed that the 1st defendant had allowed her to live on the suit land.
11. PW1 denied that she had a commercial building and tea on parcel No. Mwimbi/South Mugumango/699 which is next to the suitland. She claimed that the Commercial building belonged to her sister who she did not name. She denied that after the 1st defendant opposed electricity connection to the house she is living in, she connected electricity from Land parcel Mwimbi/South Mugumango/699.
12. PW2, Rufus Kubai Daniel, told the court that he was a retired chief and that he hailed from the locality of the suit land. He testified that he knew all the parties in this suit. He also testified that he knew Shadrack Nkoroi, the father of the plaintiff and the 1st defendant. In addition, he testified that he and the parties in this suit belonged to the same clan. I note that in his oral evidence in chief, he did not testify on the claims made by the plaintiff such as that the 1st defendant had been registered as owner of the suit land as a trustee for the plaintiff or even how the plaintiff moved into the suit land.
13. During cross-examination he told the court that the suit land was land parcel No. Mwimbi/South Mugumango/199 and added that he was not sure. He also told the court that he did not know about the ownership of other land owned by the late Shadrack Nkoroi, the father of the defendant and the plaintiff. He testified that he only knew about land parcel No. Mwmbi/South Mugumango/700 which is registered in the name of the defendant. I do find this rather odd when this comes from a former chief who lives in the locality of the suit land.
14. PW2 muddled the plaintiff's case when he testified, during cross-examination, that he did not know when and how the plaintiff moved into the parcel No. Mwimbi/SouthMugumango/700, the suit land. This being a claim for possession by way of adverse possession, this timeline is material just in case the court found in the plaintiff's favour.
15. PW2 told the court that he did not know if or if not, the plaintiff and 1st defendant's father had told the plaintiff to move into the 1st defendant's land. He added that he did not know if or if not it is the 1st defendant who had invited the plaintiff to live in his land. Regarding Land Parcel No. Mwimbi/South Mugumango/699, PW2 testified that he knew that there was a commercial development but said that he did not know who had constructed it. He also denied knowledge that land parcel No.



- Mwimbi/South Mugumango/699 belonged to the father of the plaintiff and the 1st defendant. He also told the court that he did not know whether or not the house the plaintiff lives in was constructed by the 1st defendant. He also testified that he did not know when the father of the 1st plaintiff and the 1st defendant died.
16. PW2 testified that he did not know that the dispute concerning this matter had started before 2020. He also told the court that he did not know if or if not Shadrack Nkoroi had given the plaintiff part of the suit land.
 17. PW3, John Phares Njeru, told the court that the plaintiff and the 1st defendant were his cousins. He supported the 1st defendant's assertion that Shadrack Nkoroi their father, had appointed the 1st defendant to be guardian of the plaintiff, after the plaintiff had moved out of her husband's place.
 18. PW3 told the court that he was not sure of the size of the portion of the suit land occupied by the plaintiff. He however said that it was not 0.15 of an acre and that 0.80 of an acre was a better estimate. He also said that he did not know that the 1st plaintiff had in 2005 started her construction on parcel no. Mwimbi/South Mugumango/699.
 19. PW4, Anna Wanja Nderi, testified that the 1st defendant and the plaintiff were her siblings.
 20. In her witness statement, which she asked the court to adopt as her evidence, PW4 gave evidence in support of her sister's assertion that her father had allocated 0.8 acres of land to the plaintiff out of land parcel No. Mwimbi/South Mugumango/700 which was originally registered in the name of the 1st defendant. She added that the plaintiff had lived on the suit land for 41 years and was unequivocal that the 1st defendant and his sons were envious of the developments made by the 1st plaintiff and had the intention of retaining them after evicting her.
 21. PW5, Jim Muthomi Shadrack, told the court that he was a government employee at the Kenya Bureau of Standards and that he was also a businessman. He testified that he is the son of the plaintiff and the 1st defendant was his uncle. He said that the 2nd and 3rd defendants were the children of the 1st defendant and were his cousins. He said that he had a house on the portion of the suit land occupied by his mother.
 22. During Cross-examination, PW5 told the court that he was born in 1981 and would therefore not know how his mother moved into the suit land in 1978.
 23. Contrary to what his mother had testified that the development on parcel No. Mwimbi/South Mugumango/699 belonged to her sister, PW5, told the court that the said developments belonged to him. PW5 denied knowledge of several things including knowledge that land parcel Nos. Mwimbi/South Mugumango/2428 and 2429 were subdivisions of land parcel Mwimbi/South Mugumango/700. He also told the court that he had no knowledge that his mother had knowledge concerning the subdivision of the suit land.
 24. DW1, David Nyaga, the 1st defendant told the court that the plaintiff was his sister. He told the court that his father was originally a missionary teacher who after retirement became a hawker selling bananas, cakes, mandazi e.t.c. He proffered that his father was operating from a Market known as Mwiria whereas his mother stayed at their home.
 25. DW1 told the court that the 2nd and 3rd defendants were his sons to whom he had given the two subdivisions of parcel No. Mwimbi/Mugumango/700. He testified that his father had also given land to his two brothers and wondered why the plaintiff was only interested in his land when his two brothers had also been given land by their father. He claimed that although the suit land was partly ancestral land, he had bought the bigger portion.



26. DW1 testified that he had invited the plaintiff to his land after she fell out with her husband. He was categorical that she moved into their mother's house which he had built. He averred that she still lives in that house and built nothing on the suit land.
27. DW1 told the court that his mother died in 2001 and soon thereafter he started telling the plaintiff to get out of his land and move to parcel no. Mwimbi/South Mugumango/699 where she (the plaintiff) had constructed a commercial building and which parcel of land was next to the suit land.
28. DW1 told the court that he had given the suit land to the 2nd and 3rd defendants who were his sons. He testified that the plaintiff was fully aware when he subdivided the suit land and gave it to his sons. He explained that since the 2nd and 3rd defendants were his sons, they could not add any more information to his evidence. He prayed that the plaintiff's suit be dismissed.
29. I frame the only issue to be determined in this suit as if or if not the Plaintiff has satisfied the Court that 0.8 of an acre out of Land Parcel No. Mwimbi/south Mugumango/700 has devolved to her by way of the doctrine of adverse possession.
30. The parties filed written submissions in support of their diametrically incongruent assertions. I wish to point out that written submissions cannot replace the oral and other evidence proffered by the parties. Also written submissions cannot be allowed to introduce new evidence. If this is done such evidence evinces no probative evidential value.
31. The plaintiff proffered two cases in support of her assertions. The first one is *Celina Muthoni Kitbinji Versus Safiya Binti Swaleh*, Mombasa ELC No. 248 of 2016 [eKLR]. The copy of the case availed to the Court was substantially illegible. The court is unable to bring out the legal principles enunciated by that case. The other case is *Wilson Njoroge Kamau Versus Ng'ang'a Mucuru Kamau*, Murang'a ELC No. 259 of 2017 (OS), [eKLR]. In this case the court, inter-alia, opined as follows: "In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether the possession is adverse or not is a matter of legal conclusion to be drawn from findings of facts as eruditely postulated in the case of *Kwengu Versus Omuto*, CA, Civil Appeal No. 8 of 1990 [eKLR]". In this case the court was satisfied that the plaintiff had proved adverse possession against the defendant.
32. Adverse possession must be proved by way of a cogency of preponderance of evidence. Inference drawn from the facts emanating from the evidence proffered by the parties has to take into account the totality of circumstances surrounding each case. This is why the veracity of the evidence proffered by the parties is crucial. Corroboration and inconsistencies cannot be ignored.
33. This is a case involving a brother and a sister. Their claim and the consequential rebuttal are clear. The plaintiff's case which was supported by her witnesses is that the plaintiff's father gave her 0.8 acres of land out of land parcel No. Mwimbi/South Mugumango/700. She claims that the land was registered in the name of the defendant to hold part of it in trust for her. I do note that the land was registered in the name of the 1st Defendant on 18th November, 1970. The plaintiff only returned to her parents after leaving her then husband's home in 1978, 8 years later. It is therefore not plausible that for 8 years before her return to her parents, the land had been held in trust for her in a possible anticipation for her eventually being separated from her husband.
34. There were material inconsistencies in the plaintiff's evidence. For example, she categorically denied being the owner of a commercial building standing on land parcel No. Mwimbi/south Mugumango/699 which is next to the suit land. However, her son, Jim Muthomi Shadrack Nyaga,



- PW5, testified that the commercial development on parcel No. Mwimbi/South Murumango/699 belonged to him. This brings in a reasonable inference that the development may have belonged to his mother.
35. PW4, owned up that her father owned many pieces of land. She could not explain why her father did not give the plaintiff any other piece of land except the one registered in the name of the 1st defendant. She categorically denied any knowledge of parcel No. Mwimbi/South Mugumango/699 which was her father's land and was next to the suit land. This had the effect of raising suspicion regarding her truthfulness. She also denied knowledge of any other land owned by her late father including parcel no Mwimbi/South Mugumango/199. Pressed further during cross-examination she said that she was aware of other pieces of land owned by her late father. Inconsistencies galore! She concluded by opining that the 1st defendant would suffer her father's curse if the plaintiff was evicted from the land.
36. The evidence of PW2, Rufus Kubai was that the plaintiff's claim was valid and that he supported her claim. He said that he was a former chief of the locality where the land is situated. He said that he was a member of the clan of the parties. He said that the disputed portion of land had been shown to the plaintiff by her father, Shadrack Nkoroï and that the father had told the 1st defendant to accommodate her. Interestingly, during cross-examination PW2 denied knowledge of most of the issues surrounding this case. He said that he was not there when Shadrack Nkoroï instructed the 1st defendant to give land to the 1st plaintiff and to be the guardian of the plaintiff. He also told the court during cross-examination that he was only well versed with issues that arose after 2020. He also told the court that he did not know the year the plaintiff moved into the suit land. This is material to the establishment of when the time necessary for adverse possession to accrue starts to run.
37. DW1, the first defendant's evidence was succinct. He told the court that he welcomed the plaintiff, his sister, into his land after she left her former husband. He said that he felt pity for her and also wanted her to help taking care of their aged mother. He said that the plaintiff moved into her mother's house, which he had built. He denied that she had put up the house she was living in.
38. DW1, informed the court that his father's family had 9 siblings. He said that his 2 brothers had also been given land by their father. He wondered why the plaintiff did not claim land from her other brothers. DW1 was categorical that when he subdivided the land and gave it his sons in 2012, the plaintiff was fully aware. According to him, this suit was an afterthought as it was filed 8 years after land parcel No. Mwimbi/South Mugumango/700 ceased to exist. He told the court that after the death of his mother he had asked the plaintiff to move to their father's land parcel No. Mwimbi/South Mugumango/699 which is next to the suit land and where she (the plaintiff) had put up a building.
39. DW1 told the court that he had bought most of the suit land and only a small part of it was ancestral land. He also challenged the claim by the plaintiff that the land was allocated to him to hold part of it on behalf of her. Since the family had 9 siblings, he wondered why she wanted to be given special treatment.
40. As already stated, adverse possession must be proved by way of cogent evidence. The mere effluxion of time to 12 years after possession is not enough. The length of stay even if it is 50 years or more cannot begin to run if entry into the land was with the permission of the registered owner. In this case, the plaintiff's evidence would suit a case other than a claim for adverse possession. The plaintiff admits that she was allowed to move into the suit land in 1978 by the 1st defendant after he had been the registered owner for 8 years. If she had developed part of the land, she has not sought compensation for such development. This is a case concerning a claim for adverse possession. Adverse possession is inferred after the court takes into account the totality of the evidence proffered by the parties. The plaintiff and her witnesses did not give evidence that supported accrual of adverse possession. By and large, their



case was that the 0.8 acres she claims out of parcel No. Mwimbi/South Mugumango/700 was given to her by her father who also instructed the 1st defendant to be her guardian after she left her former husband's home. This is not evidence that proves adverse possession. Even had this been a claim other than for adverse possession, the plaintiff's evidence and that of her witnesses was riddled with material inconsistencies. For example, in his evidence, PW5, Jim Muthomi Shadrack Nyaga, the plaintiff's son said he was born in 1981. Although, in her submissions, it is said that the plaintiff's children were born in the suit land. This is not true because when she left her ex-husband's place in 1978, she already had another child. For purpose of this case and proof of a claim by way of adverse possession, this comment is just by the way meant to confirm the many inconsistencies in the plaintiff's evidence.

41. If or if not the 1st defendant will suffer the curse of his late father as claimed by PW4, Anna Wanja Nderi, his sister, if the plaintiff leaves the suit land is veritably immaterial. Mere sympathy does not count as proof. All ingredients necessary for adverse possession to accrue must be proved. In this case they were not proved.
42. Assuming that her possession without the consent of the 1st defendant started in 2012 when she discovered that the suit land had been subdivided and given to the 1st Defendant's two sons, she filed this case only 8 years later. Time for counting accrual of adverse possession is not sufficient. In any case, the evidence is clear that the 1st defendant has never been dispossessed of his land. The plaintiff indeed admits that he has been asking her to move out of the suit land. The upshot of this is that the plaintiff has not proved her claim for ownership of 0.8 Acres out of Land Parcel No. Mwimbi/Mugumango/700 by way of adverse possession.
43. Unequivocally, I wish to state that the plaintiff's father, the late Shadrack Nkoroi, had no legal authority to give a portion of the suit land which was registered in the name of the 1st defendant to the plaintiff.
44. Although conventionally costs follow the event, I will depart from this route. This suit involves a sister and a brother. In the past, I have come across cases where costs degenerate into other suits which have rendered some relatives destitute. In this case, and primarily to promote harmony in the parties' family, I will not award costs to the defendants.
45. I issue the following orders: -
 - a. This suit is dismissed with the result that questions 1, 2, and 3 in the Originating Summons are answered in the negative.
 - b. Parties will bear own costs.

DELIVERED IN OPEN COURT AT ISIOLO THIS 24TH DAY OF MAY, 2022 IN THE PRESENCE OF:

Court Assistant: Balozi

Tyson Mwendwa h/b Njeru Ithiga for the Plaintiff

Halkano Abdullahi h/b I.C Mugo for the Defendant

HON. JUSTICE P. M. NJOROGE

JUDGE

