



Wainaina & 10 others v Kinyanjui & 4 others (Environment and Land Case Civil Suit E334 of 2021) [2022] KEELC 12710 (KLR) (16 June 2022) (Judgment)

Neutral citation: [2022] KEELC 12710 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E334 OF 2021**

**JO MBOYA, J
JUNE 16, 2022**

BETWEEN

**JOSEPH WAINAINA 1ST PLAINTIFF
PETER M KARANJA 2ND PLAINTIFF
STEPHEN MWANGI 3RD PLAINTIFF
DAVID K GITHINJI 4TH PLAINTIFF
TERESIA W NJUGUNA 5TH PLAINTIFF
HANNAH N MBUTHIA 6TH PLAINTIFF
SERIPHER WANGARI 7TH PLAINTIFF
CAROLINE WANJIRU 8TH PLAINTIFF
MUNENE N MBUGUA 9TH PLAINTIFF
MARGARET N KAHUNO 10TH PLAINTIFF
VIRGINIA W NJOROGE 11TH PLAINTIFF**

AND

**PETER ERASTUS KINYANJUI 1ST DEFENDANT
ARTHUR KUNGU MBUGUA 2ND DEFENDANT
MARY WANJIRU KINYANJUI 3RD DEFENDANT
REUBEN GICHURU MBUGUA 4TH DEFENDANT
TONY IAN MBUGUA 5TH DEFENDANT**



JUDGMENT

Introduction

1. Vide the plaint dated the September 15, 2021, the plaintiffs herein have sought for the following reliefs:
 - a. The honourable court be pleased to declare that the notice to vacate the suit land, dated the July 8, 2021 is null and void.
 - b. The honourable court be pleased to cancel the notice to vacate the suit land dated the July 8, 2021.
 - c. An order of permanent injunction against the defendants whether by themselves, their servants, their employees or agents or anyone acting on their behalf from evicting, occupying or in any way interfering with the plaintiffs quiet possession, use and/or occupation of land reference number Dagoreti/Riruta/S.655.
 - d. Costs of the suit.
2. Upon being served with the plaint and summons to enter appearance, the defendants duly entered appearance and thereafter filed a statement of defense and counter-claim dated the October 7, 2021.
3. Vide the counterclaim, the defendants have sought for the following reliefs;
 - a. Declaration that the plaintiffs are illegal and/or unlawful occupants on the defendants property known as LR No Dagoreti/Riruta/S.655 situate at Wanyee road at Dagoreti corner, in Nairobi county.
 - b. A mandatory injunction compelling the plaintiffs, whether by their servants and/or agents or otherwise to forthwith vacate and/or deliver up possession and/or or grant immediate vacant possession to the defendants of the property known as LR No Dagoreti/Riruta/S.655 situate at Wanyee Road at dogoreti corner, in Nairobi county.
 - c. A mandatory injunction compelling the plaintiffs, whether by their servants and/or agents or otherwise to forthwith remove from the defendants property all their material and structures they have erected thereon.
 - d. An order that if the plaintiffs do not comply with prayer c above within a period to be prescribed by the honourable court, the defendants be at liberty to remove all the plaintiffs materials and structures from its property at the plaintiffs costs.
 - e. An order directed at the police officer in-charge of Riruta police station and/or police post nearest to the defendants property to ensure compliance with and to enforce the orders granted herein.
 - f. Material damages.
 - g. General damages for trespass.
 - h. Any other and/or further orders that the court may deem necessary to make.
 - i. Cost of this suit and interest thereon at court rates with effect from the date of filing of the suit.



4. Following the filing and service of the statement of defense and counter-claim, the plaintiffs herein were obliged to and indeed filed a reply to defense and defense to counter-claim. However, *vide* the defense to counter-claim, the plaintiffs herein have sought for certain reliefs:
5. Based on the foregoing, it is therefore imperative to reproduce the reliefs which have been sought at the foot of the defense and defense to counter-claim. Same are as hereunder;
 - a. Declaration that the plaintiffs have been occupied LR No Dagoreti/Riruta/S.655 without the defendants authority and that the plaintiffs occupation has been open, public, exclusive, continuous and without interruption for more than 12 years.
 - b. Declaration that the plaintiffs have acquired by way of adverse possession ownership of LR No Dagoreti/Riruta/S.655.
 - c. The land registrar, Nairobi be directed that the judgment herein shall be an instrument of transfer of ownership of the all suit property from the defendants to the plaintiffs.

Evidence by the Parties:

The plaintiffs' case:

6. On behalf of the plaintiffs, one Munene Mbugua, who is the 9th plaintiff testified as PW1. For clarity, the said witness testified on his own behalf and on behalf of the rest of the plaintiffs.
7. According to the witness, the rest of the plaintiffs and himself entered upon and have remained in occupation of the suit property for a period between 20 to 60 years, without interruption and/or interference by any one whatsoever.
8. On the other hand, the witness further testified that the 6th plaintiff was the 1st to enter upon and settled on the suit property and in this regard, the witness indicated that the 6th plaintiff entered onto the suit property in the year 1959.
9. Besides, the witness also testified that himself and the rest of the plaintiffs have build and/or constructed various, albeit numerous houses on the suit property, some of which are permanent in nature, while others are temporary in nature.
10. Further, the witness testified that the occupation by himself and the rest of the plaintiffs has been open, continuous and uninterrupted and that same have used portions of the suit property in a manner inconsistent with the rights of the registered owner and/or proprietor thereof.
11. Be that as it may, the witness further testified that on or about the July 8, 2021, same received and/or were served with an eviction notice, whereby same were being instructed to vacate and hand over vacant possession in respect of the suit property.
12. However, the witness stated that upon receipt of the eviction notice, same (read the plaintiffs) were constrained to and instructed their advocate to file and/or lodge the subject suit.
13. Other than the foregoing, the witness pointed out that same had recorded a witness statement dated the September 15, 2021 and in this regard, the witness sought to adopt and indeed adopted the witness statements.
14. On the other hand, the witness also alluded to a list and bundle of document and sought to adopt and rely on the bundle of documents contained at the foot of the list dated the September 15, 2021.



15. Based on the foregoing, the witness invited the court to adopt and admit the documents as exhibits and in this regard, the documents were admitted as exhibit P1 to P6 respectively.
16. On cross examination, the witness stated that the suit property belonged to and was registered in the name of Erastus Mbugua Kinyanjui. Besides, the witness also state that the title in favor of the said Erastus Mbugua Kinyanjui was issued on the December 23, 1974.
17. Further, the witness also stated that even though the suit property was registered in the name of the said Erastus Mbugua Kinyanjui, same (read the witness) has never met the said Erastus Mbugua Kinyanjui.
18. Besides, the witness while shown a copy of grant of letters of administration, confirmed that it was apparent that the said Erastus Mbugua Kinyanju had passed on the April 1, 1979.
19. Other than the foregoing, the witness confirmed that he lives and has been living on the suit property. That is, the property which is the subject of the instant matter.
20. In answer to the question whether same has been paying rents, the witness responded and stated that same has never paid any rents to any one right from when he entered onto the suit property to date.
21. As concerns whether same attended a meeting at Ngandu chief's office, the witness responded by stating that same has never been to any meeting at Ngandu chief's office.
22. On re-examination, the witness reiterated that the rest of the plaintiffs and himself have been in occupation and possession of the suit property for the last fifty (50) years.
23. On the other hand, the witness also stated that the owners of the suit property are the ones whose names are contained or reflected in the certificate of title/ certificate of official search which have been produced in evidence.
24. With the foregoing testimony, the plaintiffs' case was closed.

Defendants' Case:

25. The defendants' herein called two witnesses, namely Peter Erastus Kinyanjui and Tony Ian Mbugua, the 1st and 5th defendants, respectively.
26. According to Peter Erastus Kinyanjui, who testified as DW1, the suit property belonged to and was registered in the name of Erastus Mbugua Kinyanjui, now deceased.
27. On the other hand, the witness further testified that Erastus Mbugua Kinyanjui, now deceased was his father and that same died and/or passed on the April 4, 1979.
28. Other than the foregoing, the witness also testified that following the death of the deceased, himself and the 2nd to 4th defendants sought for and obtained grant of letters of administration over and in respect of the estate of the deceased.
29. In the premises, the witness continued to and testified that the 2nd to 4th defendants and himself were thereafter constituted as the legal administrators of the estate of the deceased.
30. Further, the witness testified that upon being constituted as the legal administrators, the 2nd to 4th defendants and himself applied to court for confirmation of grant and that the grant which was hitherto issued in their favor, was duly confirmed.



31. It was the witness further testimony that after the issuance of the grant of letters of administration, the 2nd to 4th defendants and himself instructed their advocates on record to issue and serve an eviction notice upon the plaintiffs herein.
32. Based on the foregoing, the witness testified that an eviction notice was duly issued and served upon the plaintiffs and which notice invited the plaintiffs' to vacate and move out of the suit property within three (3) months from the date of service.
33. On the other hand, the witness also testified that the plaintiffs herein were illegal occupants and trespassers on the suit property.
34. Other than the foregoing testimony, the witness alluded to his written statement dated the October 7, 2021 and which statement the witness sought to adopt and to rely on. Consequently, the witness statement herein was indeed admitted as the witness' evidence in- chief, alongside the oral testimony.
35. Besides, the witness also alluded to the list and bundle of documents which were filed on his behalf and in this regard, the witness adopted the documents at the foot of the list dated October 7, 2021, which were thereafter admitted in evidence and marked as D exhibit 1 to 12, respectively.
36. Besides, the witness herein also referred to the documents at the foot of the list dated March 8, 2022 and sought to rely on same. Consequently, the documents at the foot of the list dated the March 8, 2022, were produced as exhibit D13 to 25, respectively.
37. Other than the foregoing, the witness emphasized that the plaintiffs' herein are illegal occupants and trespassers on the suit property.
38. On cross examination, the witness herein stated that the plaintiffs' are squatters and trespassers on the suit property.
39. Besides, the witness has further stated that based on the fact that the plaintiffs' are squatters and trespassers, same were obliged to extract and issue the eviction notice upon the plaintiffs.
40. Other than Peter Erastus Kinyanjui, DW1, the other witness who testified was Tony Ian Mbugua, namely, the 5th defendant herein.
41. According to the 5th defendant, one Erastus Mbugua Kinyanjui, deceased was his grand father.
42. On the other hand, the witness has further stated that during the lifetime of his grand father, namely, Erastus Mbugua Kinyanjui, same would accompany the deceased to the suit property and would thus help in slashing of the grown-u grass and also helping in maintenance of the drainage system.
43. Further, the witness also testified that his grand father, now deceased had built and/or constructed residential premises on the suit property and that same were rented out to various tenants, who would pay rents to the deceased.
44. Nevertheless, the witness further testified that the tenants who were in the suit property, failed to pay rents to the deceased and continued in such neglect.
45. Besides, the witness testified that the 1st to 4th defendants herein are his uncles and uncles and same are currently the owners of the suit property.
46. Other than the foregoing testimony, the witness alluded to his written statement dated the November 3, 2021 and sought to adopt and rely on same. In this regard, the witness statement was adopted and admitted as the witness further evidence in chief.



47. On cross examination, the witness herein indicated that the deceased had built houses on the suit property and that same were rented to and in favor of various tenants.
48. Besides, the witness testified that the tenants, who were in occupation of the houses standing on the suit property would pay rents to the deceased. Nevertheless, while still under cross examination, the witness stated that same did not have any proof or evidence of payment of rents before the court.

Submissions by the Parties:

49. Upon the close of the defendants case, the parties herein, namely, the plaintiffs and the defendants, agreed to file and exchange written submissions.
50. Pursuant to the foregoing, directions were thereafter issued relating to the filing and exchange of the written submissions by the parties. For clarity, the plaintiffs herein proceeded to and filed their written submissions on the March 25, 2022.
51. On the other hand, the defendants prepared and thereafter filed their written submissions on the April 19, 2022. However, the said submissions are inadvertently, dated April 19, 2021.
52. Briefly, the plaintiffs' submitted that the eviction notice which was issued by the defendants' herein was illegal and invalid, insofar as by the July 8, 2021, when same was issued, the plaintiffs had been in occupation of the suit property for between 20 to 60 years.
53. In the premises, it was the plaintiffs' submission that the defendants claims, rights and/or interests over the suit property had been extinguished by effluxion of time.
54. Secondly, the plaintiffs' further submitted that given the length and duration of time that same occupied the suit property, the plaintiffs' herein had attracted and/or accrued adverse possessory rights over and in respect of the suit property.
55. Based on the foregoing, the plaintiffs' therefore sought for a declaratory order to the effect that same were entitled to be registered as the owners of the suit property on account of adverse possession or *vide* prescription.
56. Thirdly, the plaintiffs' herein conceded that the claim for adverse possession had only been introduced *vide* reply to defense and defense to counter-claim, but nevertheless, same maintained that the court was still seized of jurisdiction to grant and decree adverse possession.
57. In the premises, it was the plaintiffs' submission that the court ought not to decline granting orders of adverse possession, merely because same were sought *vide* reply to defense and defense to counter-claim.
58. Finally, the plaintiffs' have submitted that the defendants rights and/or title to the suit property having been extinguished, the defendants' are therefore not entitled to the reliefs at the foot of the counter-claim.
59. In short, the plaintiffs' herein implored the court to grant the reliefs in favor of the plaintiffs and essentially decree adverse possession, to and in favour of the plaintiffs.
60. On their part, the defendants' have submitted that upon the death of Erastus Mbugua Kinyanjui, deceased, who was the registered owner of the suit property, the 1st to 4th defendants sought for and obtain grant of letters of administration, which were thereafter confirmed.



61. Besides, the defendants' have further submitted that upon the confirmation of the grant of letters of administration and the issuance of certificate of confirmation, the 1st to 4th defendants were duly registered as the proprietor of the suit property.
62. Owing to the foregoing, the defendants therefore submitted that the 1st to 4th defendants, by virtue of being the registered owners are thus entitled to exclusive occupation and possession of the suit property.
63. Secondly, the defendants' herein have also submitted that by virtue of being the registered owners of the suit property, the 1st to 4th defendants were therefore obliged to issue and serve the eviction notice dated the July 8, 2021. In this regard, it has been contended that the eviction notice was therefore lawful and valid.
64. Thirdly, the defendants' have submitted that the plaintiffs' claim premised on adverse possession, which has been mounted on the basis of a reply to defense and defense to counter-claim is incompetent, illegal and invalid. For clarity, it is the defendants' submission that a claim for adverse possession can only be mounted *vide* originating summons and not otherwise.
65. Fourthly, the defendants' have submitted that to the extent that the registered owners of the suit property, namely Erastus Mbugua Kinyanjui, passed on the April 4, 1979, the activities by the plaintiffs' on the suit properties between the said period up to 2018 when the grant of letters of administration was issued, amounted to intermeddling with the estate of the deceased.
66. Fifthly, the defendants' have further submitted that a claim for adverse possession can only be maintained as against the registered owner of the suit property and not otherwise. In this regard, the defendants' have thus contended that same only became the registered as owners of the suit property on the January 14, 2021. Consequently, it was contended that adverse possession could not be decreed against same, namely, the defendants or at all.
67. Further, the defendants' have submitted that having only been registered as the proprietors of the suit property on the January 14, 2021, the plaintiffs herein cannot mount and/or sustain a claim for adverse possession as against the same, to the extent that the statutory 12 year period has not expired and/or accrued.
68. In support of the foregoing submissions, the defendants' have invoked and relied in the case of [*Henry Mwangi Kihara v Rachael Nyambura Kimani & 4 others*](#) (2005)eKLR.
69. Other than the foregoing, the defendants' have submitted that having been duly registered as the proprietors of the suit property, same are conferred with the legal rights and/or interests by dint of sections 24 and 25 of the [*Land Registration Act*](#), 2012.
70. In the premises, the defendants' have therefore contended that same are entitled to the reliefs sought at the foot of the counter-claim.
71. Finally, the defendants' have further submitted that the plaintiffs herein, who have been intermeddling with the estate of the deceased, are not entitled to the reliefs sought at the foot of the plaint and the reply to the defense and defense to counter-claim.
72. In short, the defendants have implored the court to dismiss the plaintiffs' claim with costs to the defendants'.



Issues for Determination:

73. Having reviewed the plaint dated the September 15, 2021, together with the witness statements and bundle of documents attached therewith and having also reviewed the statement of defense and counter-claim, as well as the witness statements and bundle of documents attached thereto and having similarly considered the oral testimony and the written submissions filed, the following issues do arise and are thus germane for determination;
- a. Whether a claim for adverse possession can only be mounted *vide* originating summons and not otherwise.
 - b. Whether a claim for adverse possession can subsist and/or accrue against the estate of a deceased, who was hitherto the registered proprietor of land subject to adverse possession.
 - c. Whether the plaintiffs' herein have established and/or proven a claim for adverse possession.
 - d. Whether the defendants' are entitled to the reliefs sought at the foot of the counter-claim.

Analysis and Determination:

Issue Number 1: Whether a claim for adverse possession can only be mounted *vide* originating summons and not otherwise.

74. It is settled and/or common ground that the plaintiffs herein did not implead and/or claim adverse possession in the plaint originating the subject proceedings. For clarity, the plaint under reference contains reliefs seeking to impeach, invalidate and negate the eviction notice dated the July 8, 2021 and which was issued at the instance of the defendants.
75. Besides, the issue of adverse possession has only been alluded to and/or raised by the plaintiffs' *vide* the reply to defense and defence to the counter-claim dated the October 25, 2021.
76. Based on the fact that the claim for adverse possession was neither captured in the plaint nor mounted *vide* the originating summons, the defendants herein have thus raised the issue that the claim for adverse possession mounted *vide* defense to counterclaim is irregular, incompetent and invalid.
77. Owing to the contention by and/or at the instance of the defendants' that a claim for adverse possession can only be raised *vide* originating summons, it is therefore imperative that this contention be interrogated, analyzed and resolved beforehand.
78. Before venturing to address the contention herein, it is worthy to take cognizance of the provisions of order 37 rule 7 (1) of the [Civil Procedure Rules 2010](#).
79. For convenience, the said provisions are reproduced as hereunder;
7. Adverse possession [order 37, rule 7.]
 - (1) An application under section 38 of the [Limitation of Actions Act](#) shall be made by originating summons.
 - (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
 - (3) The court shall direct on whom and in what manner the summons shall be served.



80. Looking at the foregoing provisions, one would obviously agree with the contention and submission by the defendants' that a claim for adverse possession ought to be commenced *vide* and by way of originating summons and not otherwise.
81. Indeed, there was a point in time in our legal history and jurisprudence when that contention held sway. However, the literal and grammatical reading of the provisions of order 37 rule 7 of the [Civil Procedure Rules, 2010](#), has since been eschewed and abandoned. Consequently, it is no longer tenable to insist and/or contend that adverse possession can only be pursued and/or claimed by way originating summons and not otherwise.
82. To buttress the foregoing position, it is imperative to take cognizance of the Decision in the case of [Gulam Miriam Noordin v Julius Charo Karisa](#) [2015] eKLR, where the Court of Appeal observed as hereunder;

When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's title was so extinguished. By section 3(2) of [Appellate Jurisdiction Act](#) we order the appellant do transfer the suit property to the respondent at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar, High Court, Malindi will execute on behalf of the appellant all the necessary transfer documents.

83. The foregoing position, which sanctioned and underscored the fact that a claim for adverse possession can be commenced in a manner, other than originating summons, was further affirmed and ratified *vide* decision in the case of [Chevron \(K\) Ltd v Harrison Charo Wa Shutu](#) [2016] eKLR, where the Court of Appeal observed as hereunder;

It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of [Wabala v Okumu](#) [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure.

Similarly, in [Bayete Co Ltd v Kosgey](#) [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted."

84. Other than the foregoing legal position, it has also been underscored by the Court of Appeal that a claim for adverse possession can also be commenced and maintained by way of a plaint.
85. In this regard, the holding and decision of the court in the case of [Stephen Kaguku Mariba v Kibe Mariba \(legal representative of the estate of Margaret Magiri - Deceased\) & another](#) [2007] eKLR, stands out.
86. Based on the foregoing, it is therefore not correct for counsel for the defendants' to state that the only way to implead a claim for adverse possession is by way of originating summons.
87. Further, I hold and find that a claim for adverse possession, subject to proof, can still be maintained *vide* defense to the counter-claim in the manner pleaded by the plaintiffs herein, insofar as a defense to the counter-claim is still part of pleadings filed by the parties. At any rate, the issue as to whether the



claim for adverse possession can be mounted otherwise than *vide* originating summons, is one of form and procedure and curable *vide* the provisions of article 159 (20 (d) of the Constitution, 2010.

Issue Number 2

Whether a Claim for Adverse Possession can subsist and/or accrue against the Estate of a Deceased, who was hitherto the registered proprietor of land subject to Adverse Possession.

88. In respect of the issue herein, it is worthy to note that the defendants' counsel had also contended that between the April 4, 1979 when the original owner of the suit property passed on to 2018 when grant of letters of administration were issued to the 1st to 4th defendants, the actions and/or activities of the plaintiffs amounted to and/or constituted intermeddling with the deceased estate.
89. On the other hand, the defendants' have further submitted that the duration between the death of the original owner to the grant of letter of administration in favor of the administrators, namely, the 1st to 4th defendants can not be reckoned and/or taken into account in computing the period for adverse possession.
90. Further, the defendants' had also submitted that adverse possession can only be decreed as against the registered owner(s) of the subject property and not otherwise.
91. Based on the foregoing submissions, the defendants' thus contended that an order for adverse possession cannot thus issue as against same, insofar as same were not the duly constituted administrators of the estate of the deceased nor were same the registered thereof, prior to the issuance of the grant of letters of administration in 2018.
92. However, it is important to observe that the plaintiffs' herein contend to have entered into and taken possession of the suit property during the life time of the deceased, who was hitherto the registered owner of the suit property.
93. On the other hand, it is also worthy to take into account that by the time of the death of the deceased, the plaintiffs' were already accruing rights and the said rights did not abate and/or stop, merely because the then registered owner of the suit property passed on.
94. Nevertheless, it is my observation that where a person is in adverse occupation and /or possession in respect of a particular property, the death of the registered owner does not affect, interrupt or otherwise, disturb the accrual and/or actualization of the adverse possessory rights.
95. At any rate, the rights of a person who is in adverse possession over the designated property, whose owner passes on shall accrue and subsist as against the estate of the deceased and the mere transfer of title to and in favor the administrators or otherwise, the new owner does not affect the running of time.
43. To buttress the foregoing position, it is imperative to take cognizance of the decision in the case of *Phyllis Wanjiru Kamau v Wilson Gichubi Gachagwe & 2 others* [2019] eKLR, where the court observed as hereunder;

“Having established that this court has jurisdiction to deal with the dispute, I will now turn to the question; whether the claim for adverse possession can be made against the estate of a deceased person and whether defendants have been properly sued. section 16 of the Limitation of Actions act provides that;“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person



is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration”.

96. Other than the foregoing observation, it is also important to take note of the decision in the case of *Mate Gitabi v Jane Kaburu Muga and 3 others* Nyeri Court of Appeal civil case No 43 of 2015, the court was dealing with a situation where an adverse possessor claimant was in occupation of the land of a deceased person. The court stated thus;

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than thirty years since the appellant took adverse possession of the land or dispossessed the 1st respondent...”

97. Flowing from the jurisprudence alluded to and/or espoused in the foregoing decisions, it is immaterial when the heirs and/or representatives of the deceased take out grant of letters of administration in respect of the estate of the deceased.
98. Suffice it to state, that when the letters of administration was granted in favor of the 1st to 4th defendants herein, the administration of the estate dates back to the date of death of the deceased. Consequently, there was no lacuna, in the ownership of the suit property so as to affect and/or interrupt the running of time for purposes of acquisition of adverse possession.
99. If any case law is necessary to vindicate and/or to buttress the foregoing decision, then one ought to take cognizance of the decision of the Court of Appeal in the case of *Peter Mbiri Michuki v Samuel Mugo Michuki* Court of Appeal at Nyeri Civil Appeal No 22 of 2013, the court had this to say in respect of section 16 of the aforementioned Act;

“The effect of this provision is that when the letters of administration was granted for the estate of the plaintiff in this case, the administration of the estate dates back to the date of death”

100. Finally, the defendants’ herein have also contended that same only became registered as the proprietors of the suit property on the January 14, 2021 and hence the statutory 12 year period for acquisition of title *vide* adverse possession had not accrue.
101. My short answer to the defendants submission, is that the mere change of ownership of the suit property, *vide* transmission or otherwise from the name of the deceased unto the names of the 1st to 4th defendants does not affect, interrupt and/ or suspend the running of time.
102. In any event, it is appropriate to state that a claim for adverse possession survives the death of the deceased, who was hitherto the registered owner of the impugned property.



103. To this extent, it is sufficient to invoke and rely on the decision in the case of *Karuntimi Raiji v M'Makinya M'itunga* (2013)eKLR where the Court of Appeal observed:-

“...another issue raised by the appellant is that a claim for adverse possession does not survive a deceased person. section 30 (f) of the Registered Lands Act and section 2 of the *Law Reform Act* provide an answer to the issue. section 30 provides that:

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

104. In the premises, the submissions by the defendants' counsel that the statutory 12 year period had not accrued and/or actualized as against the defendants, computed from the date of registration of the suit property in their names, is therefore erroneous, misconceived and legally untenable.

Issue Number 3

Whether the plaintiffs' herein have established and/or proven a claim for adverse possession.

105. The 9th plaintiff, who testified for and on behalf of the rest of the plaintiffs, indicated that the plaintiffs' have been in occupation and possession of the suit property ever since the year 1959 onwards.

106. It was further stated that by the time the defendants' herein generated and served the eviction notice, namely, on the July 8, 2021, the plaintiffs' had been in occupation of the suit property for a duration ranging from 20 to 50 years.

107. On the other hand, PW1 also adverted to and produced in evidence assorted pictures, showing the nature of developments, which same have carried out and/or undertaken over the suit property over the years. For clarity, the pictures showed, *inter alia*, the existence of permanent structures, as well as temporary/mabati structures.

108. It is worthy to note and/or recall that the defendants herein did not dispute the fact of occupation and possession of the suit property by the plaintiffs. At any rate, the defendants herein endeavored to show that the plaintiffs were indeed tenants' of the deceased registered proprietor, but who had failed and or neglected to pay rents.

109. Nevertheless, DW2 conceded during cross examination that same had no evidence before the court to show that the plaintiffs' were tenants and had hitherto been paying rents or at all.

110. Other than the foregoing, DW1 conceded that the plaintiffs' were squatters and trespassers on the suit property and that same were therefore not tenants.

111. Notwithstanding the foregoing, DW1 further conceded that the plaintiffs had been in occupation and possession of the suit property for along time and that it has taken himself, DW1 and by extension the defendants more than 42 years to approach the court for purposes of obtaining an eviction order.

112. Essentially, the evidence tendered by DW1 corroborated and reinforced the evidence of PW1, as concerns the duration and longevity of occupation of the suit property.

113. To my mind, having been squatters and trespassers on the suit property, it then means that the plaintiffs' did not have the consent and/or permission of the registered owner and subsequently of the administrators thereof, to occupy the suit property.



114. Put differently, it is evident that the plaintiffs' occupation and possession of the suit property were therefore inconsistent with, adverse and hostile to the interests of the registered owner. Consequently, plaintiffs' occupation of the suit property were therefore adverse to the rights of the deceased and by extension, the current registered proprietors.
115. In the premises, it is my finding and holding that the plaintiffs' herein have established and/or proven a case for adverse possession.
116. In support of the foregoing observation, it is imperative to take note of the decision of the Court of Appeal in the case of *Wambugu v Njuguna*, (1983) KLR 173, where the court held that adverse possession contemplates two concepts:

‘Possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is 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 or she has been in possession for the requisite number of years.

A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession.
- (b) what was the nature of his possession?
- (c) whether the fact of his possession was known to the other party.
- (d) for how long his possession has continued and
- (e) that the possession was open and undisturbed for the requisite 12 years.

Issue Number 4

Whether the defendants are entitled to the reliefs sought at the foot of the counter-claim.

117. True, the 1st to 4th defendants herein are currently registered owners of the suit property. Consequently, the 1st to 4th defendants registration as the proprietors of the suit property, would no doubt attract the protection envisaged vide the provisions of section 24 and 25 of the *Land Registration Act*, 2012 (2016).
118. Nevertheless, it must be observed that the registration of a person as the owner of a designated property is however, subject to overriding interests, easements and customary trust, if any subsisting against the title.
119. To this end, it is imperative to take cognizance of the provisions of section 28 of the *Land Registration Act*, 2012 (2016) which provides as hereunder;
28. Overriding interests unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
- (a) deleted by Act No 28 of 2016, s 11(a);
 - (b) trusts including customary trusts;
 - (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;



- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) deleted by Act No 28 of 2016, s 11(b);
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law provided that the registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the registrar deems necessary.

120. In view of the foregoing, it is my finding and holding that despite the fact that the 1st to 4th defendants, are currently the registered proprietors of the suit property, their registration and title is subject to the accrued rights premised on the [Limitation of Actions Act](#).
121. On the other hand, the defendants herein, as well as their predecessor in title, were obliged to commence the process of recovery of the suit property prior to and/or before lapse of the 12 year period from the date of accrual of the cause of action. See sections 7 and 12 of the [Limitation of Actions Act](#), chapter 22 Laws of Kenya.
122. However, the defendants herein as well as their predecessor in title, did not mount, originate and/or commenced the requisite recovery proceedings within the statutory duration and premised on such failure, the defendants rights to recover the suit property stood extinguished.
123. For the avoidance of doubt, limitation of actions has the effects of rendering a claim and/or cause of action sterile, redundant and ineffectual. Consequently, the beneficiary of such cause of action becomes barred and/or prohibited from actualizing and/or pursuing same before a court of law.
124. To this end, I beg to adopt and endorse the holding of the court in the case of [Moffat Muriithi Muchai \(suing on behalf of the Estate of the Late Milka Njoki Muchai \(Deceased\)\) v Wanjiru Wanjohi Gatundu & 2 others](#) [2019] eKLR, where the court stated as hereunder;
34. Section 7 of the [Limitation of Actions Act](#), provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the plaintiff's mother having bought the suit land in the 1990's and thereby claiming ownership in the same, he could seek to recover it from the 1st defendant, but only if he did so within twelve years from the date on which the right of action accrued to him.
35. There is no doubt that a period of about sixteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve-year period has been exhibited before this court. The plaintiff needed to commence his claim within the time prescribed under section 7 of the [Limitation of Actions Act](#). It follows therefore that by the time he filed this suit, the claim was statute barred.



125. Premised on the foregoing, I therefore find and hold that the defendants' right to recover possession of the suit property, stood extinguished in line with the provisions of sections 7, 12, 16 and 17 of the Limitation of Actions Act, chapter 22 Laws of Kenya.

Final Disposition:

126. Having analyzed and/or considered the various issues flowing from the pleadings filed by and/or on behalf of the parties herein and having considered the obtaining jurisprudence, it is thus appropriate to render the dispositive order.

127. Based on the analysis, herein before alluded to, the court thus makes the following orders;

- a. The plaintiffs' claim premised and/or based on adverse possession over and in respect of land reference number Dagoreti/Riruta/S.655 be and is hereby allowed.
- b. The defendants' title to and in respect of land reference number Dagoreti/Riruta/S.655 be and is hereby declared to have extinguished upon the lapse of the statutorily 12 year period within which recovery proceedings ought to have commenced and/or mounted.
- c. The defendants' title to and in respect to land reference number Dagoreti/Riruta/S.655 be and is hereby revoked, canceled and/or nullified.
- d. The register in respect of land reference number Dagoreti/Riruta/S.655 be and is hereby ordered to be rectified by removing the names of the 1st to 4th defendant therefrom and replacing same with the names of the plaintiffs' as owners in common in equal shares.
- e. The 1st to 4th defendants be and are hereby ordered and/or directed to execute the requisite transfer instrument, if any, to facilitate the transfer and/or conveyance of land reference number Dagoreti/Riruta/S.655 to and in favor of the plaintiffs and such execution to be undertaken within 30 days from the date of rendition of the judgment.
- f. In default by the 1st to 4th defendants to execute the requisite transfer instruments and incidental documents to facilitate the transfer and registration of land reference number Dagoreti/Riruta/S.655 in favor of the plaintiffs, the deputy registrar of this court to execute the requisite transfer instrument to facilitate the transfer and registration in enforcement of the terms of the decree herein.
- g. The eviction notice dated the July 8, 2021, issued and served by the defendants be and is hereby recalled, rescinded and revoked.
- h. A permanent injunction be and is hereby granted against the defendants jointly and/or severally restraining same whether by themselves, their servants, their employees or agents or anyone acting on their behalf from evicting, occupying or in any way interfering with the plaintiffs quiet possession, use and/or occupation of land reference number Dagoreti/Riruta/S.655.
- i. The defendant's counter-claim be and is hereby dismissed.
- j. The plaintiffs' be and is hereby awarded costs of the suit and counter-claim, to be agreed upon and taxed by the taxing officer of this court.

128. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2022.



OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Ms Chekorir holding brief for Ms Muhoro for the Plaintiffs.

Mr Mwenesi h/ b for Mr. Kotonya for the Defendants.

