



Mwaura (Suing as the Administrator of the Estate of the Late Robert Mwaura Kagonda) v Gachchu & 4 others (Environment & Land Case 372 of 2008) [2022] KEELC 12584 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 12584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 372 OF 2008**

JO MBOYA, J

JULY 14, 2022

BETWEEN

**PAUL KAGWA MWAURA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE ROBERT
MWAURA KAGONDU**

AND

**MOTURI GACHCHU 1ST DEFENDANT
DAVID WANYOIKE CACHOGU 2ND DEFENDANT
MUIRURI GACHOGU 3RD DEFENDANT
THE LAND REGISTRAR, KIAMBU DISTRICT 4TH DEFENDANT
THE DIRECTOR OF SURVEY 5TH DEFENDANT**

JUDGMENT

1. Vide Amended Plaintiff dated the October 25, 2018, the Plaintiff has sought for the following orders;
 - i. A Declaration that the Disputed Parcel of Land belongs to the Plaintiff.
 - ii. A Declaration that the Disputed Piece or Portion of Land measuring three decimal three one (3.31) acres lawfully belongs to the Plaintiff as of Right and in the alternative;
 - iii. A Declaration that the suit land belongs to the Plaintiff by Adverse Possession.



- iv. An Order that the Kiambu District Land Surveyor do amend his record to reflect the correct acreage of LR No Komothai/Kiambururu/155 as 14.81 acres.
 - v. An Order that the Director of Surveys do Revoke the said Survey done on the 25th August 1986 and remove the Beacons placed on the Land and to rectify the Registry Index Map to show that the brace should be on the Plaintiffs parcel of land, LR No Komothai/Kiambururu/155.
 - vi. An Order that the Director of Survey do Revoke the said Survey done on the August 25, 1986 to remove the Beacons placed on the land and to rectify the Index Map to show the brace on Plaintiffs parcel of land L.R Komothai/Kiambururu/155.
 - vii. An Order that the Land registrar Kiambu do amend the Registry Index map to reflect the correct acreage for the Plaintiffs and 1st, 2nd and 3rd Defendants' parcels of land.
 - viii. A Perpetual Injunction to restrain the 1st to 3rd Defendants jointly and severally, their agents and/or servants from entering or dealing in any way with the Plaintiff's land.
 - ix. An Order for Cancellation of titles L.R No. komothai/Kiambururu/513 to 515, which Parcels of Land include the disputed land L.R No's 514, 970, 1013 and 1014 which comprise of the disputed portion of land.
 - x. General damages for the said Trespass against the 1st to 3rd Defendants jointly and severally.
 - xi. Cost of this suit plus Interests at Court rates.
 - xii. Any Other or Further Reliefs as this Honourable Court may deem fit to grant
2. Upon being served with the Further Amended Plaint, the 1st, 2nd and 3rd Defendants herein responded by filing an Amended Defense and Counterclaim dated the September 10, 2020. For clarity, vide the Counter-claim under reference, the 1st, 2nd and 3rd Defendants sought the following Reliefs;
- a. Perpetual Injunction restraining the Plaintiff, Members of his Family, agents, servants or any person or entity claiming to be acting on their behalf from entering or interfering in any way with the Defendants land.
 - b. General Damages for Interference, damages to the Plaintiffs/counter claimers crops and trees and harassment by the Plaintiff.
 - c. Costs, Interests and any other Relief that this Honourable Court deems fit to Grant.
3. Though the Plaintiff herein was served with the Amended Statement of Defense and Counter-claim by and on behalf of the 1st, 2nd and 3rd Defendants, it appears that the Plaintiff herein neither filed a Reply to the Statement to Defense nor Defense to the Counter-claim.
4. Be that as it may, the pleadings herein closed upon lapse of 14 days from the date of service of the amended Statement of Defense and Counter-claim.



5. On the other hand, the 4th and 5th Defendants herein neither entered appearance nor filed any Statement of Defense.

EVIDENCE BY THE PARTIES:

a. PLAINTIFF'S CASE:

6. The Plaintiff herein testified as PW1 and same indicated that he was duly appointed and/or constituted as the Legal administrator of one Robert Mwaura Kagundu, now Deceased.
7. Further, the witness testified that one Mwaura Kagundu, now deceased, was the registered owner and/or proprietor of all that Parcel of land known as Komothai/Kiambururu/155, measuring 13.92 acres.
8. On the other hand, the witness further testified that the said parcel of land was traversed by a Road, which passed through same and thereby separating the said property into two portions.
9. Be that as it may, the witness further testified that unknown to his Deceased Father and himself, during the time of demarcation in the year 1959, the Surveyors erroneously placed a brace on LR No Komothai/Kiambururu/137, which belongs to one Gachogu Irungu, now deceased, who is stated to be the Father of the 2nd and 3rd Defendants.
10. It was the witness' further testimony, that LR No Komothai/Kiambururu/137, belonging to Gachogu Irungu, only measured 8.56 acres.
11. Nevertheless, the witness testified that after the death of Gachogu Irungu, the 1st to 3rd Defendants proceeded to and caused L.R No. Komothai/Kiambururu/137 to be subdivided into three portions and that in the course of such subdivision, the 1st to 3rd Defendants invaded and took possession of the disputed portion/parcel of land, which was hitherto under the use and possession of the Plaintiff.
12. Besides, the witness also testified and that in the course of taking possession of the disputed portion of the suit property, the 1st to 3rd Defendants damaged and destroyed the fence which had previously been erected by Robert Mwaura Kagundu, now Deceased, as well as damaging crops and trees, which were standing thereon.
13. Other than the foregoing, the Witness stated that same was constrained to and sought the intervention of the District Officer Githunguri to solve and/or address the Dispute under reference and in particular, to avert the invasion by the 1st to 3rd Defendants.
14. Pursuant to the lodgment of the Complaint with the District Officer, Githunguri, the Witness further testified that the dispute was thereafter escalated to the Land Registry, who thereafter engaged the Village Elders and the Provincial Administration, with a view to resolving the dispute.
15. Further, the witness also testified that investigations by the Land Registrar and his team, was discovered that the brace was wrongly placed on LR No Komothai/Kiambururu/137 and that instead, same ought to have been placed on LR No Komothai/Kiambururu/155.
16. On the other hand, the witness testified that thereafter, the Land Registrar Kiambu advised and/or informed the District Surveyor to correct the placement of the brace and in particular, to put the brace on LR No Komthai/Kiambururu/155.
17. However, the Witness continued and testified that despite the advise and request by the Land Registrar, the District Surveyor has failed and/or neglected to comply with and/or adhere to the advice and essentially to correct the Error pertaining to the placement of the brace.



18. Owing to the failure by the District Surveyor to correct the Error as concerns the placement of the brace, the witness testified that his Father, namely, Robert Mwaura Kagondu, was constrained to and filed a civil case, namely, Nairobi HCC No. 3413 of 1986.
19. Be that as it may, the Witness has further testified that the said case, namely, Nairobi HCC No 3413 of 1986 was latter on Withdrawn on the basis of technicality, on the June 4, 2008.
20. Other than the foregoing, the Witness testified that following the Withdrawal of the said case, the 1st to 3rd Defendants took advantage of the said withdrawal and invaded the disputed portion, which ought to form part of L.R Komothai/Kiambururu/155.
21. Besides, the witness herein testified that the dispute before hand has taken more than 27 years and yet the Land Officers, as well as the Villagers and Neighbors are privy to the truth, but same have failed to address and/or attend to the dispute.
22. On the other hand, the witness herein sought to adopt and rely on his Written statement dated the July 16, 2015, as well as the Further Written Statement dated the October 25, 2018.
23. For clarity, the two sets of Witness Statement, were thereafter adopted and admitted as the witness' Further Evidence- In -chief.
24. Other than the foregoing, the Witness herein also referred to the List and Bundle of Documents dated the October 25, 2018, containing 20 Documents and which Documents the Plaintiff sought to adopt and rely on as Documentary Exhibits.
25. Pursuant to the request by the Plaintiff, the Documents at the foot of the List dated the October 25, 2018 were thereafter admitted in Evidence and marked as exhibits P1 to P20, respectively.
26. On cross examination, the witness herein confirmed and admitted that the dispute before hand commenced and/or started in the year 1981.
27. Besides, the Witness further admitted that his late Father, namely, Robert Mwaura, now Deceased, had filed a previous case, namely, Nairobi HCC No 3413 of 1986, but that same was Withdrawn in the year 2008.
28. Further, the witness admitted that the Dispute herein relates to LR No's 137 and 155, respectively, which belong to two people, both of whom have since died.
29. As concerns the brace, the Witness admitted that same was placed and it is evident on the Registry Index Map. However, the witness contends that the placement of the brace was Erroneous and Mistaken.
30. Be that as it may, the Witness stated that he was not a Surveyor and that he does not know who was responsible for the drawing of the brace.
31. In further answer to a question on the cross examination, the Witness proceeded to and indicated that the brace in question was entered and/or placed by a Surveyor, representing the Government and essentially, the brace was endorsed by the Government of Kenya.
32. On re-examination, the witness stated that he has made various efforts to reclaim and/or recover the disputed portion of land from the 1st to 3rd Defendants, but to no success.
33. The 2nd witness called by the Plaintiff was one Waithera Mwaura who stated that she resides at Komothai Location within Githunguri Sub-County, in Kiambu County.



34. Further, the witness testified that she knew both Mwaura Kagaondu and Gachogu Irungu, who are both deceased.
35. Besides, the witness testified that she knew that Gachogu Irungu was a member of the Land Consolidation Board.
36. Be that as it may, the Witness testified that during the Demarcation of land and even after the demarcation, the disputed portion of land belonged to and was owned by the late Mwaura Kagondu and not otherwise.
37. Finally, the witness testified that the dispute over the portion of land herein was only raised by the sons of the Late Gachogu Irungu, albeit after his death.
38. The witness herein thereafter referred to her witness statement dated the 16th July 2015 and sought to adopt the contents thereof. In this regard, the witness statement was duly admitted and adopted as the witness' further Evidence in chief.
39. The next witness called by the Plaintiff was one Karanja Thiongo, who testified as PW3.
40. According to the witness herein, same knew both Robert Mwaura Kagondu and Gachogu irungu, respectively who are now deceased.
41. Besides the witness herein testified that same was aware that Robert Mwaura Kagondu was the registered owner and/or proprietor of LR No Komothai/Kiambururu/155, which parcel of land measured 13.92 acres.
42. At any rate, the witness further testified that the land belonging to Robert Mwaura Kagondu, was traversed by a road that splits same into two portions.
43. Other than the foregoing, the witness testified that the portion under dispute was variously used and possessed by one Robert Mwaura Kagondu during his life time and that there was no dispute between Robert Mwaura and Irungu Gachogu at all.
44. Be that as it may, the witness further testified that after the death of Gachogu Irungu in the year 1978, his Sons, who are now the Defendants herein entered upon the Disputed portion of land and started claiming ownership thereof.
45. Besides, the witness testified that in the year 1986, the Defendants herein entered onto the disputed portions and destroyed the fence erected by Mwaura Kagondu, now Deceased and also damaged assorted crops.
46. However, the Witness underlined that the disputed portions of Land forms part and parcel of L.R No. Komothai/Kiambururu/155, belonging to Robert Mwaura Kagondu.
47. Other than the foregoing, the Witness referred to his witness statement dated the July 16, 2015 and same sought to adopt and rely thereon. For clarity, the witness statement dated the July 16, 2015, was thereafter admitted and constituted as the witness' Further Evidence- in chief.
48. With the foregoing testimony, the Plaintiff's case was closed.

b.1ST, 2ND & 3RD DEFENDANTS' CASE:

49. The Defense case herein was anchored and/or premised on the Evidence of one Mwiruri Gachogo, that is, the 3rd Defendant, who testified as DW1.



50. It was the testimony of the witness herein that LR No Komothai/Kiambururu/137, initially belonged to and was registered in the name of Gachogu Irungu, now Deceased.
51. On the other hand, the Witness further testified that the said parcel of LR No Komothai/Kiambururu/137, measured 11.2 acres.
52. Further, the Witness also testified that after the Death of Gachogo Irungu, the Public Trustee carried out and/or undertook Succession in respect of the Estate of the Deceased and thereafter the Public Trustee proceeded to and caused LR No Komothai/Kiambururu/137 to be subdivided into three portions, namely LR No Komothai/Kiambururu/513, 514 and 515 respectively.
53. Other than the foregoing, the witness herein testified that upon the subdivision of L.R No. Komothai/Kiambururu/137 into three portions, the resultant portions were transferred to and registered in the names of himself and his two other brothers.
54. Nevertheless, the Witness continued to and stated that all along his Family, including his late Father had used and been in possession of the Disputed portion of land, which is now being claimed by the Plaintiff.
55. On the other hand, the Witness herein also testified that the allegation that himself and his brothers trespassed onto the disputed portion of land and seized possession thereof from the Plaintiff, is incorrect and misleading.
56. In any event, the witness testified that the subdivision of the initial L.R No. Komothai/Kiambururu/137, was carried out and/or undertaken by the Public Trustee in an open and transparent manner and that all the neighbors, including the Plaintiff herein were aware of the process, but did not raise any Complaints.
57. Besides, the witness herein also testified that the allegation that an Elders and Village committee found and held that the disputed portion of land belongs to Robert Mwaura Kagondu, now deceased, is misleading.
58. Nevertheless, the witness further testified that the decision and/or award of the Local Elders vide letter dated November 11, 1981 was the subject of Land Case Number 32 of 1984, wherein the Resident Magistrate, quashed the recommendation/award therein.
59. On the other hand, the witness has also testified that the Plaintiff's late Father had proceeded to and filed a case, namely, Nairobi HCC 3413 of 1986, claiming the disputed portion of land, but the said case was later on Withdrawn.
60. Be that as it may, the Witness further testified that at the time when himself and his brothers took possession of their respective portions of land, after the subdivision by the Public Trustee, same did not damage any crops belonging to the Plaintiff.
61. Finally, the witness herein testified that during the course of this matter, Honourable the Court gave an order which directed the Land Registrar and the District surveyor to visit the disputed parcel of land and to prepare reports pertaining to the ground delineation and status of the brace complained of.
62. In this regard, the Witness testified that both the Land Registrar and Surveyor, thereafter proceeded to the two parcels of land and upon the visitation thereof same proceeded to and crafted their reports, which were ultimately filed before the court.



63. In short, the witness testified that the two Reports which were filed by the Land Registrar and the surveyor Kiambu sub-county, confirmed that the disputed portion of land lawfully formed part of and belonged to L.R No Komothai/Kiambururu/137.
64. Other than the foregoing, the witness referred to his statement dated the December 10, 2020 and sought to rely in respect thereof. In this regard, the witness statement was admitted as the witness further evidence in chief.
65. Further, the witness referred to the List and Bundle of Documents dated the September 10, 2020 containing 9 Documents and same sought to have the Documents admitted in Evidence. Consequently, the documents at the foot of the list dated the September 10, 2020 were admitted as Defense Exhibits 1 to 9, respectively.
66. On cross examination, the witness herein confirmed that the Plaintiff was indeed his neighbor and the two parcel of lands, namely, LR No Komothai/Kiambururu/155 and 137, are adjacent to one another.
67. Other than the foregoing, the witness herein also confirmed that same had produced before the Court the two sets of Green Cards relating to LR No Komothai/Kiambururu/155 and 137.
68. As concerns the Green card for LR No Komothai/Kiambururu/155, the witness confirmed that there was evident cancelation on the acreage, but the cancelation was not countersigned.
69. In respect of the Green Card for L.R No. Komothai/Kiambururu/137, the witness confirmed that similarly, there was evident cancelation on the acreage, but the cancelation was similarly, not countersigned.
70. Nevertheless, the Witness stated that same was not aware and/or knowledgeable of who was responsible for the cancelation.
71. With the foregoing testimony, the 1st to 3rd Defendants' case was closed.

SUBDIVISION - c.THE 4TH AND 5TH DEFENDANTS:

72. As pointed out elsewhere herein before, the 4th and 5th Defendants neither entered appearance nor filed any Statement of Defense.
73. On the other hand, the 4th and 5th Defendant, similarly did not attend and/or participate in the subject proceedings.
74. In the premises, the 4th and 5th Defendants' cases, were closed without adduction of any Evidence, whatsoever.submissions by the parties:

a.PLAINTIFF'S SUBMISSIONS:

75. The Plaintiff filed his written submission dated the March 30, 2022 and in respect of which, the same sought to persuade the court to find and hold that the Plaintiff's case was proved and/or established.
76. It was the counsel for the Plaintiff's submissions that the Plaintiff parcel of land, namely, Komothai/kiambururu/155, otherwise referred to as the suit property included the disputed portion of land, which was later on encroached upon and seized by the 1st to 3rd Defendants.
77. At any rate, Counsel for the Plaintiff further submitted that the disputed portion has hitherto been under the occupation, possession and use by the Plaintiff as well as Robert Mwaura Kagondu, now Deceased and such usage continued up to and including the year 1986.



78. On the other hand, Counsel for the Plaintiff has further submitted that though the brace was mapped on a portion of L.R No Komothai/Kiambururu/137, belonging to and registered in the name of Gachogu irungu, now Deceased, on or about 1959, the placement of the brace was however Erroneous.
79. Premised on the foregoing, Counsel for the Plaintiff has further submitted that the illegality and/or error pertaining on the placement of the brace, was discovered by Robert Mwaura Kagondu, now Deceased, on or about the year 1981.
80. Be that as it may, Counsel for the Plaintiff has submitted that upon the discovery of the Error pertaining to the placement of the brace on L.R No Komothai/Kiambururu/137, one Robert Mwaura Kagondu, now Deceased, lodged a Complaint with the District Officer, Githunguri Division and that the Complaint was thereafter escalated to the Land Registrar, Kiambu District.
81. Further, Counsel for the Plaintiff has submitted that thereafter the Land Registrar, Kiambu District proceeded and conducted investigation and which investigations led to the discovery that indeed the impugned brace, was irregularly placed on L.R No. Komothai/Kiambururu/137.
82. Based on the foregoing, Counsel for the Plaintiff has therefore submitted that the fact pertaining to the illegality in the placement of the brace, were established and/or confirmed by the Land Registrar.
83. Other than the foregoing, counsel for the Plaintiff further submitted that the Land Registrar, Kiambu District proceeded to and advised the District Surveyor, Kiambu District to effect the removal of the brace and thereafter correct its placement, but the District Surveyor has since failed and/or neglected to comply.
84. Owing to the foregoing, Counsel for the Plaintiff submitted that the Plaintiff's predecessor, namely, Robert Mwaura Kagondu, was constrained to and indeed filed Civil proceedings vide Nairobi HCC 3413 of 1986.
85. Nevertheless, Counsel further submitted that the said suit, namely HCC 3413 of 1986 was thereafter withdrawn on the June 4, 2008.
86. Notwithstanding the foregoing, it was the Plaintiff's contention that the Disputed portion, which was illegally braced into LR No Komothai/Kiambururu/137, lawfully forms part of LR No Komothai/Kiambururu/155, belonging to the Plaintiff.
87. Suffice to note that Counsel for the Plaintiff did not refer to any Case law or at all, to support the Plaintiff's submissions.
88. Nonetheless, Counsel for the Plaintiff contended that the Plaintiff's case had been proven and that the Honourable Court should proceed to grant the Reliefs sought.

b.1ST, 2ND AND 3RD DEFENDANTS' SUBMISSIONS:

89. On behalf of the 1st, 2nd and 3rd Defendants (hereinafter referred to as the designated Defendants) same filed their written submissions on the April 4, 2022.
90. On behalf of the designated Defendants, it was submitted that the disputed portion of land, was lawfully braced into and thus formed part of LR No Komothai/Kiambururu/137, which was hitherto registered in the name of Gachogu irungu, now deceased.
91. Secondly, counsel for the designated Defendant has submitted that to the extent that the impugned brace was placed during the Land Demarcation and Registration, in year 1959, the placement of the



said brace cannot now be challenged vide a suit filed in the year 2008. Essentially, counsel for the designated Defendants has therefore contended that the suit is time barred.

92. Thirdly, Counsel for the designated Defendants has also submitted that pursuant to a court order made by this court on the 1st November 2018, the Land Registrar and surveyor, Kiambu county were ordered and/or directed to visit the disputed parcel of lands, namely, LR No's Komothai/Kiambururu/137 and 155 respectively and thereafter to file their respective reports before the court.
93. It was counsel's submissions that pursuant to the order under reference, the Land Registrar and the surveyor, respectively, proceeded to and indeed visited the suit properties and thereafter filed their respective Reports Honourable before the court.
94. It was further submitted that the Reports by the two Officers, namely, the Land Registrar and the surveyor, Kiambu county, respectively, confirmed that the disputed portion of Land was lawfully braced into and thus formed part of LR No Komothai/Kiamburur/137 and not otherwise.
95. Finally, Counsel for the designated Defendants submitted that by virtue of the fact that the disputed portion of the land fell within and formed part of LR No Komothai/Kiamburur/137, which has since been subdivided, the Plaintiff herein has not proved his case.
96. Similarly, Counsel for the designated Defendants has also not refer:ed to any Case law or at all.

ISSUES FOE DETERMINATION

97. Having reviewed the Pleadings filed by the Parties herein, the Witness Statements and the Documents, together with the oral Evidence tendered on behalf of the Parties; and having similarly considered the written submission filed , the following issues are pertinent and worthy of Determination;
 - i. Whether a Suit or Proceedings can legally be mounted against the Estate of a Deceased person or better still, whether the Estate of the Deceased is a Legal entity known to Law.
 - ii. Whether the 2nd and 3rd Defendants can be sued for and on account of the actions/omissions of one Nashon Gachogu Irungu, Deceased.
 - iii. Whether the suit against the 4th and 5th Defendants is legally tenable in light of the provisions of section 3 of the *Public Authority Limitation Act*, Chapter 39 Laws of Kenya.
 - iv. Whether the Suit against the 1st, 2nd and 3rd Defendant is barred by Section 7 of the *Limitation of Action Act* Chapter 22 Laws of Kenya.
 - v. Whether the Disputed portion of the land belongs to the Plaintiff as claimed or otherwise.
 - vi. Whether the Disputed portion of land has been acquired vide Adverse Possession or otherwise.
 - vii. Whether the 2nd and 3rd Defendants are entitled to and Reliefs at the foot of the Counter-claim.



ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1: Whether a Suit or Proceedings can Legally be mounted against the Estate of a Deceased Person or better still, whether the Estate of the Deceased is a Legal Entity known to law.

98. It is important to point out at the onset that the suit herein was commenced vide the original Plaint dated the August 1, 2008 and in respect of which the Plaintiff herein had impleaded one, Muturi Gachogu, as the 1st Defendant alongside the rest of the Defendants.
99. Subsequently, the Plaint by and/or on behalf of the Plaintiff herein was amended vide amended Plaint dated the May 12, 2009. However, vide the amended Plaint the 1st Defendant remains as Muturi Gachogu.
100. Be that as it may, the Plaint on behalf of the Plaintiff was Further Amended and in this regard, a Further Amended Plaint dated the 25th October 208, was filed.
101. Pursuant to the Further Amended Plaint, details in terms of the preceding paragraph, the name of one Moturi Gachogu, which had hitherto appeared as the 1st Defendant was removed and replaced by the name; the Estate of the late Moturi Gachogu- Deceased.
102. Premised on the name contained in the Further Amended Plaint as the 1st Defendant, the Question that arises for determination is; whether the Estate of the said Deceased, is indeed a Legal Entity, known to law and capable of being sued.
103. Under the provisions of Section 82 of the *Law of Succession Act*, Chapter 160, Laws of Kenya, the Estate of a Deceased person is represented by a duly appointed and constituted Legal Administrator, Representative and/or Executor.
104. Suffice it to point out that it is only the duly appointed Legal Administrator, Executor and/or Representative Of the Estate, that becomes the Eegal entity and/or person, seized of the requisite capacity to sue or be sued on behalf of the Estate of the Deceased.
105. To my mind, the Estate of a Deceased, is an Omnibus and amorphous term, but which refers to no living and/or legal person, whatsoever.
106. In the premises, it is my considered view that no suit can lie and/or be maintained against the Estate of a Deceased, which has not been succeeded and/or administered by the duly appointed Legal administrator.
107. It is also imperative to note that where a Party, in this case the 1st defendant, who has hitherto been sued dies during the pendency of the proceedings, it behooves the Plaintiff to take out Citation as against the known Heirs and/or Family members of the Deceased.
108. For the avoidance of doubt, the provisions of Rule 21 and 22 of the Probate and Administration Rules made pursuant to the Law of Successions Act, Chapter 160 Laws of Kenya are imperative.
109. For convenience, it may be appropriate to reproduce the said Rules and same are reproduced as hereunder;
21. Citations generally



- (1) Every citation shall be drawn by the applicant in one of the Forms 31 to 36 as appropriate and settled by the registrar of the registry from which, upon payment of the prescribed fee, it is to be issued.
- (2) Every averment in a citation, and such other information as the registrar may require, shall be verified by an affidavit in one of the Forms 20 to 24 as appropriate sworn by the citor or, if there are two or more citors, by one of them:

Provided that the registrar may in special circumstances, for reasons to be recorded, accept an affidavit sworn by the citor's advocate.
- (3) Every citation shall be served on the person cited either personally or by acknowledged registered post unless the registrar directs some other mode of service, which may include notice by advertisement.
- (4) Except where a will is not in the citor's possession and the registrar is satisfied that it is impracticable to require it to be filed, every will referred to in a citation shall be filed in the registry from which the citation is to issue but before such issue takes place.
- (5) A person who has been cited to appear may, within fifteen days of service of the citation upon him, inclusive of the day of such service, or at any time thereafter if no application has been made by the citor under rule 22(5) or rule 23(2), enter an appearance either in the principal registry or in the Mombasa registry by filing Form 27 and shall forthwith thereafter serve on the citor a copy of that Form sealed with the seal of the registry:

Provided that the registrar may in any case at the time of issue of the citation increase the period of fifteen days to such period as he thinks fit.
- (6) The provisions of this rule shall apply also to the issue of a citation by direction of the court under section 71(2)(d) of the Act.

22. Citation to accept or refuse or to take a grant

- (1) A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.
- (2) Where power to make a grant to an executor has been reserved, a citation calling on him to accept or refuse a grant may be issued at the instance of the executors who have proved the will or of the last survivor of such executors or of any beneficiary under the will.
- (3) A citation in Form 35 calling on an executor who has intermeddled in the estate of the deceased to show cause why he should not be ordered to take a grant may be issued at the instance of any person interested in the estate at any time after the expiration of three months from the death of the deceased:

Provided that no citation to take a grant shall issue while proceedings as to the validity of the will are pending.
- (4) A person cited who is willing to accept or take a grant may petition the court for a grant on filing an affidavit showing that he has entered an appearance and that he has not been served by the citor with notice of any application for a grant to himself.
- (5) If the time limited for appearance has expired and the person cited has not entered an appearance in either the principal registry or the Mombasa registry, the citor may—



- (a) in the case of a citation under subrule (1), petition the court (if he has not already done so) for a grant to himself;
- (b) in the case of a citation under subrule (2), apply to the court by summons for an order that a note be made on the grant that the executor in respect of whom power was reserved has been duly cited and has not appeared and that all his rights in respect of the executorship have wholly ceased;
- (c) in the case of a citation under subrule (3), apply to the court by summons on notice to the person cited for an order requiring such person to take a grant within a specified time or for a grant to himself or to some other person specified in the application.

110. From the foregoing Rules, it was incumbent upon the Plaintiff to pursue and/or takeout Citation and thereafter, subject to acceptance or otherwise, consider substitution of the Deceased 1st Defendant.
111. In any event, it was also incumbent upon the Plaintiff herein to ensure that such substitution, if any, was carried out and/or undertaken within 12 Months from the date of the Death of the 1st Defendant. For clarity, the provisions of Order 24 of the Civil Procedure Rules 2010, are explicit.
112. Nevertheless, it appears that upon the death of the original 1st Defendant, no citation was taken out and hence the Estate of the 1st Defendant now deceased was never succeeded by a known Administrator.
113. To this extent, what becomes apparent is that the suit which the Plaintiff had mounted against the original 1st Defendant, who was substituted by the amorphous body in the name of the Estate of the Deceased, abated.
114. Consequently, it is my humble position that the continuation of the subject proceedings as against the amorphous 1st Defendant, was/is an illegality that cannot be countenanced by and/or acceptable in law.
115. Notwithstanding the foregoing, it is also worthy to point out that the suit as against the original 1st Defendant and by extension his Estate, therefore abated and no legal orders can issue and/or be granted against the current 1st Defendant.
116. As concerns the import and/or implication of abatement, it is sufficient to point out that abatement of a suit extinguishes the suit and same becomes non-existent in the eyes of the law.
117. To buttress the foregoing observation, it is appropriate to adopt and restate the Dictum in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the court stated as hereunder;

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.

118. In a nutshell, other than the fact that the suit against the original 1st Defendant had abated, it is my finding and holding that no legal suit could be mounted and maintained against the amorphous body referred to as the Estate of the Deceased, either in the manner impleaded or at all.



119. Simply put, the suit mounted as against the current 1st Defendant was a nullity ab initio and same cannot be cured in any manner whatsoever, even if counsel on record for the 1st 2nd and 3rd Defendants neither raised nor ventilated the said points.
120. To my mind, the situation pertaining to the suit against the 1st Defendant is aptly captured vide the Dictum in the case of *MacFoy v United Africa Co. Limited* (1961) 3 All ER 1169, that
- “If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...”

ISSUE NUMBER 2 Whether the 2nd and 3rd Defendants can be sued for and on account of the actions/ omissions of one Nashon Gachogu Irungu, deceased.

121. It is common ground that L.R No. Komothai/Kiambururu/137, on which the impugned brace was placed, belonged to and was hitherto registered in the name of one Nashon Gachogu Irungu, now Deceased.
122. It is also settled that the alleged error and/or fraud pertaining to the placement of the brace occurred during the land demarcation and registration in the year 1959.
123. Insofar as the actions and/or omissions occurred during the land demarcation and registration and during the lifetime of one Naashon Gachogu Irungu, now deceased it is imperative to note that such actions and omissions, could only be attributable (sic) to the said Deceased.
124. Given the foregoing, it is important to state that any actions and/or omissions attributed and/or attributable to one, Naashon Gachogu irungu, now deceased, can only be maintained against the said deceased, if same was alive or better still against his legal administrators.
125. Based on the foregoing, it is now appropriate to interrogate and/or discern whether the 2nd and 3rd Defendants were indeed appointed and/or constituted as the legal administrators of the estate of Naashon Gachogu Irungu, now deceased.
126. Pursuant to the foregoing, it is important to recall that DW1, testified that upon the death of their late Father, namely, Naashon Gachogu Irungu, Public Trustees took out Letters of Administration and thereafter proceeded to and caused the Estate to be distributed in favor of the 2nd and 3rd Defendants, as well as one Moturi Gachogu, now deceased.
127. What becomes apparent is that neither the 2nd nor the 3rd Defendants were appointed as the legal administrators of the Estate of one Naashon Gachogu Irungu, now deceased.
128. Having not been appointed and/or constituted as the Legal administrators of the Estate of the said Naashon Gachogu Irungu, deceased, can the 2nd and 3rd Defendants be sued in their names, albeit on the actions and/or omissions of the deceased.
129. To my mind, any actions and/or omissions perpetrated by the deceased, if any, can only be litigated against the duly constituted Legal administrators and not otherwise.
130. In the circumstances, it is my finding and holding that the suit against the 2nd and 3rd Defendants who were neither appointed nor constituted as the legal administrators of the Estate of the Deceased cannot suffice and/or be maintained.



131. Simply put, the Plaintiff's suit as against the 2nd and 3rd Defendants was not only pre-mature and misconceived, but same is also legally untenable.
132. To underscore the legal position that a suit can only be maintained by or against the Estate of a deceased by suing the legal administrators thereof, it is imperative to restate the holding of the Court of Appeal vide the case of Virginia Edith Wamboi Otieno versus Joash Ochieng Ougo & another [1987] eKLR, where the Court of appeal held as hereunder;

But the difficulty remains that the general rule in relation to administration is that a party entitled to administration can do nothing as administrator before letters of administration are granted. Section 80(2) of the *Law of Succession Act* provides that a grant of letters of administration, with or without the will annexed, shall only take effect as from the date of the grant. In contrast section 80(1) provides that a grant of probate shall establish the will as from the date of death, and shall render valid all intermediate acts of the executor or executors to whom the grant is made consistent with his or their duties as such. This means that in the case of an executor he may perform most of the acts appertaining to his office before probate including the bringing of a fresh action, because he derives title from the will and the property of the deceased vest in him from the moment of the intestate's death (see 1 Williams on Executors and Administrators (14th edn) paras 84 et seq and 230 et seq). But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception. The doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration, to the date of the intestate's death, cannot be invoked so as to render the action competent (see *Ingall v Moran* [1944] 1 KB, and the cases which follow namely *Burns v Campbell* [1952] KB 15). This doctrine is as old as *Wankford v Wankford* [1702] where Powys J said:

'but an administrator cannot act before letters of administration granted to him.'

133. To the extent that the 2nd and 3rd Defendants herein were not the Legal administrators of the Estate of Naashon Gachogu Irungu, Deceased, the suit against same was therefore void and otherwise invalid.

ISSUE NUMBER 3 Whether the Suit against the 4th and 5th Defendants is Legally tenable in light of the provisions of section 3 of the Public Authority Limitation Act, Chapter 39 Laws of Kenya.

134. Before venturing to address and resolve the third issue herein; it is important to mention that there has been a growing tendency of suit being mounted against Government officers in their own names and Government Departments, albeit for actions that were taken and/or performed in the course of and within the Scope of their official duties with the Government of Kenya.
135. To my mind, I am not convinced that Government Officials and/or government Departments, ought to be impleaded, sued and/or made Parties in ordinary civil proceedings, like the one before hand.
136. My thinking and view, as articulated in the preceding paragraph finds support and anchorage in the Provisions of Section 12 of the *Government Proceedings Act*, Chapter 40 Laws of Kenya.
137. For convenience, it may also be necessary to take note and/or cognizance of the provisions of Section 12(1) of the *Government Proceedings Act*, Chapter 40 Laws of Kenya (supra), which touches on and/or concern proceedings against the Government. For coherence, Section 12(1) provides as hereunder;

“ 12. Parties to proceedings:



- (1) Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.
- (2) No proceedings instituted in accordance with this Part of this Act by or against the Attorney-General shall abate or be affected by any change in the person holding the office of Attorney-General.”

138. Based on the foregoing provision, the current suit herein ought not to have impleaded the 4th and 5th Defendants, but instead the Honourable Attorney General, who is the Principal advisor to the Government, ought to have been sued and/or impleaded.
139. Nevertheless, it is common ground that no objection was taken against the joinder and/or proceedings against the 4th and 5th Defendants and the matter proceeded on that basis. Consequently, I shall proceed and deal with the merit of the case, as though the 4th and 5th Defendants are legal entities, capable of being sued, albeit which is not the case.
140. Notwithstanding the foregoing observation, it is also appropriate to point out that the obtaining legal position would be different if the proceedings commenced were vide a Constitutional Petition, which is ordinarily anchored on inter-alia of Articles 22, 23 and 258 of *the Constitution* 2010.
141. On the other hand, it is also imperative to state that the Legal Regime would also be different if the proceedings were commenced vide Judicial Review, seeking the known Reliefs. For clarity, it suffices to state that Judicial Review Proceedings are underpinned vide Sections 8 and 9 of the Law reforms Act, Chapter 26 Laws of Kenya, as well as the Fair Administrations Act, 2015.
142. Be that as it may, the point to be addressed and/or dealt with in respect of the third issue relates as to whether the Suit/ Proceedings against the 4th and 5th Defendants being Government Officers/ Departments of Government, could be mounted and/or sustained, where the cause of action arose more than 12 months before the actual institution of the suit.
143. The starting point herein relates to ascertaining the nature of the complaint and whether same gives rise to a Cause of action in Tort or in Contract.
144. Nevertheless, it is evident that the Plaintiff’s claim is that the placement of the brace on L.R No. Komothai/Kiambururu/137 was Erroneous, Fraudulent and illegal. Consequently, there is no gainsaying that the cause of action herein, is one of Tort and not otherwise.
145. To the extent that the cause of action is premised and/or predicated on tort, it was incumbent upon the Plaintiff herein to file and/or commence the suit, if at all, within 12 months from the date of occurrence or, within 12 months from the date of discovery of the Fraud and or error, whichever, is latest.
146. In respect of the subject matter, it is stated that the Error concerning the placement of the brace occurred in 1959, during the land demarcation and registration. However, it is further stated that the Error was discovered in the year 1981.
147. Having discovered (sic) the error in the year 1981, it was therefore incumbent upon the Plaintiff to file and/or commence the suit within 12 months, reckoned from the date of discovery of the Error and/ or Fraud.
148. In this regard, the provisions of Section 3 of the Public Authorities Limitations Act becomes relevant and crucial. For clarity, Section 3 (supra) provides as hereunder;



3. Limitation of proceedings

- (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.
- (2) No proceedings founded on contract shall be brought against the Government or a local authority after the end of three years from the date on which the cause of action accrued.
- (3) Where the defence to any proceedings is that the defendant was at the material time acting in the course of his employment by the Government or a local authority and the proceedings were brought after the end of—
 - a) twelve months, in the case of proceedings founded on tort; or
 - b) three years, in the case of proceedings founded on contract, from the date on which the cause of action accrued, the court, at any stage of the proceedings, if satisfied that such defendant was at the material time so acting, shall enter judgment for that defendant.

149. In the premises, it was not open for the Plaintiff herein to file and/or commence the subject proceedings in the year 2008, yet it was admitted and acknowledged that the cause of action was discovered in the year 1981.

150. Simply put, by the time the subject suit was being filed and/or lodged, same was barred under the law and the Plaintiff stood permanently non-suited.

151. If any emphasis was necessary, it would be imperative to take cognizance of the holding of the Court of Appeal vide the case *Benja Properties Limited Versus H.h. Dr. Syedna Mohamed Burhannuddin Saheb & 2 others* [2015] eKLR, where the Court of Appeal stated as hereunder;

Our re-evaluation of the evidence on record leads us to find that the appellant's cause of action arose when it came to its actual knowledge that a third party, in this case the 1st, 2nd and 3rd respondents were laying claim to the suit land. This actual knowledge came into being when the appellant was served with the 1st, 2nd and 3rd respondents' Statement of Claim in the year 2000. Limitation period against the 4th and 5th respondents began to run in the year 2000. We find that the trial court did not err in holding that the appellant's claim against the 4th and 5th respondents was statute-barred. It is our view that under the provisions of section 3 (1) and (2) of the *Public Authorities Limitation Act*, the appellants claim is statute barred. We see no reason to delve into discussions that section 13 A of the *Government Proceedings Act* had been declared unconstitutional by the High Court because our holding pursuant to section 3 (1) and (2) of the *Public Authorities Limitation Act*, is a bar to the appellant's claim against the 4th and 5th respondents. It is also our considered view that even if the appellant established facts in support of the doctrine of estoppel, estoppel cannot alter the provisions of statute, estoppel cannot enlarge the limitation period and estoppel is no bar to implementation of express statutory provisions. (See *Tarmal Industries Limited -v- Commissioner of Customs & Excise* (1968) EA 471; see also *Marimite Electric Co. Limited -v- General Dairies Ltd.* [1937] 1 All ER 748; see also *Henry Muthee Kathurima -v- Commissioner of Lands & Another* [2015] eKLR, Nyeri Civil Appeal No. 8 of 2014 wherein it was stated that estoppel cannot be used as a shield to protect unlawfully acquired



property or override express statutory procedures. And as a principal, estoppels only applies to stated matters of fact not law.

152. Premised on the foregoing, my answer to issue number three is that the suit as against the 4th and 5th Defendants was statute barred as at the time the subject suit was mounted and/or filed.

ISSUE NUMBER 4: Whether the Suit against the 1st, 2nd and 3rd Defendant is barred by Section 7 of the Limitation of Action Act Chapter 22 Laws of Kenya.

153. From the Pleadings filed and/or mounted on behalf of the Plaintiff herein, it was stated that the disputed portion was Erroneously braced into L.R No. Komothai/Kiambururu/137 during the land demarcation and registration process. For clarity, it has been admitted that the said process took place and/or occurred in the year 1959.
154. On the other hand, it was also posited that despite the Error pertaining to the brace, the Plaintiff's deceased Father possessed and/or used the disputed portion of land up to and including the year 1986, when the 1st 2nd and 3rd Defendants are stated to have invaded the disputed portion and assumed possession thereof.
155. Other than the foregoing, it was also underlined that the error and/or fraud leading to the placement of the brace on L.R No. Komothai/Kiambururu/137, was discovered in the year 1981.
156. From the foregoing facts, it is thus settled that the Plaintiff herein knew that the disputed portion of land, which same claims, fell within and/or formed part of L.R No. Komothai/Kiambururu/137.
157. In the premises, if the Plaintiff was convinced that the disputed portions ought to have formed part and parcel of L.R No. Komothai/Kiambururu/155, belonging to and registered in the name of Robert Mwaura Kagonda, now deceased, whose Estate is represented by the Plaintiff, then the Plaintiff ought to have filed the suit within the 12 years from the accrual of the Cause of action.
158. Nevertheless, despite the fact that the cause of action was discovered in the year 1981, the subject suit was not filed nor mounted until the year 2008, which duration falls beyond and/or outside the prescribed timelines.
159. In respect of the foregoing legal statement, it is imperative to refer to and take cognizance of the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
160. For ease of reference, the provision of Section 7 (supra) are reproduced as hereunder;

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.

161. In my humble view, the Plaintiff's claim over and in respect of the disputed portion of land, which was the subject of recovery proceedings, was extinguished by dint of Limitation of Actions.
162. Consequently, a cause of action that is extinguished by operation of the law, in this case, the *limitation of actions Act*, is rendered redundant and sterile. Such an action becomes dead and incapable of being ventilated before a court of law.
163. To underscore the legal implication of a cause of action rendered redundant by operation of the law, it is important to adopt and restate the holding of the court vide 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.

164. In short, the current suit, which was mounted and/or filed on the 18th August 2008, is therefore void, invalid and thus legally untenable.

ISSUE NUMBER 5 Whether the Disputed portion of the land belongs to the Plaintiff as claimed or otherwise.

165. The Plaintiff herein and the two witnesses called by the Plaintiff, contended and/or testified that the disputed portion of land, which is the subject of the proceedings herein falls within and/or forms part of L.R No Komothai/Kiambururu/155.
166. On the other hand, the Plaintiff and his witnesses also maintained that the disputed portion of land belonged to one Robert Mwaura Kagondu, deceased and whose Estate is represented by the Plaintiff herein.
167. In short, it was the Plaintiff's position that the disputed portion therefore lawfully belongs unto him and hence the court should proceed and decree that the suit portion is the property of the Plaintiff.
168. Before the court can make such an order, it was therefore incumbent upon the Plaintiff to tender credible and believable Evidence to vindicate his claim.
169. However, as concerns the subject matter, the Plaintiff's plea and/or claim over and in respect of the disputed portion of land was neither proven nor established.
170. To the contrary, Evidence abound that the disputed portion of land, which is claimed by the Plaintiff, formed part and parcel of L.R No. Komothai/Kiambururu/137, right from the onset.
171. For the avoidance of doubt, the Report by the Land Registrar dated the December 30, 2019, as well as the Report by the County Surveyor dated the April 25, 2019, which were produced as exhibits D1 and D6, respectively, confirm that the disputed portion of land lawfully and legally fell within L.R No. Komothai/Kiambururu/137.
172. It is imperative to restate that the two reports, which I have alluded to in the preceding paragraphs, were indeed filed in court pursuant to and as a result of the order of the court made on the 1st November 2018 and in the presence of counsel for the Plaintiff, one hand and counsel for the 1st, 2nd and 3rd Defendants, on the other hand.



173. In view of the contents of the foregoing Reports and coupled with the Evidence of DW1, that same have been in occupation and possession of the disputed portion of land, it is my finding and holding that the Disputed portion does not belong to the Plaintiff.
174. In any event, the Burden of proving that the disputed portion of land belonged to and/or fell within the Land registered in the name of the Plaintiff herein, was on the Plaintiff.
175. However, I am afraid that the Plaintiff herein has not been able to Discharge the Burden of Proof placed on him in accordance with the provisions of Sections 107, 108 and 109 of the Evidence Act, Chapter 80 Laws of Kenya.
176. To underscore the Burden of Proof and on whom same lies, it is imperative to adopt and take cognizance of the decision in the case of Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard) [2018] eKLR, the Court expounded on section 107 and 109 of the Evidence Act as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of Miller vs Minister of Pensions (1947) explained as follows:-“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough.

So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”

177. In answer to issue number five hereof, I return the verdict that the Plaintiff did not discharge the Burden of proof in establishing that the disputed portion of land belongs to and ought to be decreed in his favor.

ISSUE NUMBER 6 Whether the Disputed portion of land has been acquired vide Adverse Possession or otherwise.

178. Contrary to the claim by the Plaintiff whereby same had contended that the disputed portion of land lawfully belongs to himself, on the basis of being the legal administrator of the estate of one Robert Mwaura Kagundu, deceased, the Plaintiff has now sought a Declaration that same has acquired the disputed portion vide Adverse possession.
179. To my mind, a claim for Adverse possession cannot be mounted and/or maintained, where the claimant disputes the legality and title of the Adverse Party, in this case, the title of the 2nd and 3rd Defendants.
180. Further, it is common ground that a claim for Adverse possession cannot also be mounted in respect of the same suit, where the Plaintiff similarly claims ownership and title to the suit property by right.
181. In my humble view, a claim for Adverse possession is antithetical to and contrary to a claim for ownership of land as by right or to a claim premised on Fraud.
182. In a nutshell, a Plaintiff whose Claim to own land is premised and/or anchored on the doctrine of adverse possession, must from the onset concede and admit that the suit property belongs to the Adverse Party and thereafter same, namely, the Claimant must prove entry onto, continuous and



interrupted occupation of the suit property, albeit without the consent and/or permission of the registered Proprietor.

183. To my mind, the claim that has been ventilated by and/or on behalf of the Plaintiff herein is contrary to and cannot therefore warrant a Declaration of acquisition of title by Adverse Possession.
184. To vindicate the foregoing observation, it is important to refer to and restate the observation of the Court of Appeal in the case of Catherine Koriko & 3 others v Evaline Rosa [2020] Eklr:

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property.

185. Perhaps, the law pertaining to the issue that a claim for adverse possession cannot be maintained until and unless the claimant concedes that the title of the suit property lawfully belongs to the Adverse Party was succinctly captured in the case of Haro Yonda Juaje –versus- Sadaka Dzungo Mbauro & Kenya Commercial Bank (2014) eKLR, where the Court it was stated:

(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

186. The Jurisprudence flowing from the foregoing case law, underscores that one cannot succeed on a claim for Adverse possession without first and foremost conceding that the title belongs to the Adverse party, namely, the Defendant in the proceedings.
187. Consequently, my answer to the issue as to whether the disputed portion of land belong to the Plaintiff vide adverse possession, is the negative.

ISSUE NUMBER 7 Whether the 2nd and 3rd Defendants' are entitled to and Reliefs at the foot of the Counterclaim.

188. Other than the claim that was mounted by the Plaintiff in respect of the subject matter, it is also worthy to note that the 2nd and 3rd Defendants also filed and/or mounted a counterclaim.
189. Suffice it to note, that upon the death of one Naashon Gachogu Irungu, deceased, who was the Father of the 2nd and 3rd Defendants, the Estate of the Deceased was administered by the Public Trustees.
190. Further, evidence was tendered that following the procurement of the Grant of Letters of Administration, the Public Trustees proceeded to and caused L/R No. Komothai/Kiambururu/137 to be subdivided into three portions, culminating into the creation of L.R No's 513, 514 and 515, respectively.



191. Other than the foregoing, it is also important to note that DW1 tendered evidence to show that the resultant parcels of land were thereafter transferred and registered in the names of Moturi Gachogu, David Wanyoike Gachogu and Joseph Muiruri Gachogu, (read the 3rd Defendant herein).
192. From the foregoing, it is evident that the 2nd and 3rd Defendants, as well as Moturi Gachogu, now Deceased thereafter became the lawful and legitimate proprietors of the resultant parcels of land, namely, L.R No's 513, 514 and 515, respectively.
193. Premised on the fact, that the 2nd and 3rd Defendants, as well as Moturi Gachogu, now Deceased became the registered Proprietor of the resultant parcels of land, emanating from L.R No. Komothai/Kiambururu/137, same accrued and/or attracted lawful rights and/or interests thereto.
194. In the premises, the Rights and Interests of the 2nd and 3rd Defendants, as well as that of Moturi Gachogu, now Deceased, are well delineated vide the Provisions of Sections 24 and 25 of The [Land Registration Act](#), 2012.
195. For clarity, the provisions of Section 24 and 25 (supra), provides as hereunder;
 24. Interest conferred by registration Subject to this Act—
 - (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
 - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
 25. Rights of a proprietor
 - (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
 - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
 - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.



196. Premised on the foregoing, I am inclined to find and hold that the 2nd and 3rd Defendants, as well as Moturi Gachogu, now Deceased are entitled to enjoy the benefits and privileges attendant to their properties without interference, from anyone, the Plaintiff herein, not excepted.

197. Consequently, I am disposed to find and hold that the counter-claim dated the 10th September 2020, has been duly proven and is thus merited.

FINAL DISPOSITION:

198. From the analysis, which has been displayed and/or alluded to in the body of the Judgment, it must have become obvious and/or apparent that the Plaintiff's claim was/is not Meritorious.

199. On the other hand, it must also be apparent that the counterclaim by and/or on behalf of the 2nd and 3rd Defendants has merit and is thus meritorious.

200. Premised on the foregoing, the orders that commend themselves to me are as hereunder;

- i. The Plaintiff's suit be and is hereby Dismissed.
- ii. The Counter-claim dated the September 10, 2020 be and is hereby allowed in terms of prayer (a) thereof. For clarity, an order of Perpetual injunction be and is hereby granted to restrain the Plaintiff either by himself, agents, servants, employees and/or anyone claiming under himself from entering upon and or in any other way interfering with the 2nd and 3rd Defendants rights to and in respect of L.R No. Kimothai/Kiambururu/137 (including the resultant Parcels arising therefrom).
- iii. Costs of the Suit and the Counterclaim be and are hereby awarded to the 2nd and 3rd Defendants, to be taxed and certified by the Taxing Officer of this court.

201. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH _____ DAY OF JULY 2022.

HON OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Etole for the Plaintiff.

Mr. Njiru Mbogo for the 1st, 2nd and 3rd Defendants.

No appearance for the 4th and 5th Defendant

