



REPUBLIC OF KENYA



**Karanja v Mbelezi & another (Environment & Land Case 374 of 2017)  
[2022] KEELC 13594 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13594 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 374 OF 2017  
LN GACHERU, J  
OCTOBER 19, 2022**

**BETWEEN**

**STEPHEN JAMES KARANJA ..... PLAINTIFF**

**AND**

**RAPHAEL MBELEZI ..... 1<sup>ST</sup> DEFENDANT**

**LUCAS KAMAU KARIITHI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide a plaint dated April 8, 2010, the plaintiff herein sought for judgement against the defendants jointly and severally for: -
  - a. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are unlawfully and illegally using and cultivating on the upper and lower parts of Kakuzi/Kirimiri/Block-8/739 respectively.
  - b. A permanent injunction against the defendants jointly and severally by themselves, their servants, employees and/or agents restraining them from ever entering, cultivating, encroaching onto, doing other acts of waste and or in any manner interfering with land parcel Kakuzi/Kirimiri/Block 8/739.
  - c. Costs of the suit and any other or further relief the court may deem fit to grant.
2. The plaintiff in the said claim averred that at all material times, he was a member of Mutithi Farmers Co-operative Society Limited (herein after called the ‘Society’) having joined the same in the year 1985, and was issued with share certificate No 900. That during the balloting by its members for their respective plots from the society, the plaintiff became a beneficiary of ballot No 739, and having made all the requisite payments to the said society, he was issued land parcel Kakuzi/Kirimiri/Block 8/739 on May 5, 1989. That on unknown dates, the 1<sup>st</sup> defendant encroached onto a big portion of the plaintiff’s land forming the upper part of the suit land. That the 1<sup>st</sup> defendant took possession of the upper part of the



- plaintiff's land without permission and/or authority of the plaintiff thereby depriving the plaintiff, of his rights to use and access to the suit land.
3. Further, that on unknown dates, the 2<sup>nd</sup> defendant encroached onto a big portion of the plaintiff's land forming the lower part of the suit land. That the 2<sup>nd</sup> defendant took possession of the lower part of the plaintiff's land without permission and/or authority of the plaintiff thereby depriving plaintiff of his rights to use and access to the suit land.
  4. Further that consequent to the acts of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the plaintiff has suffered loss and damage. That on various dates the plaintiff has sought the assistance of the District Surveyor and Land Registrar, Thika to persuade the defendants to desist from encroaching on his suit land without success. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants continue to encroach and trespass on the plaintiff's land despite his numerous efforts to stop the said encroachment.
  5. That the plaintiff's claim is for a permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendants to prevent them from unlawfully occupying and using his land.
  6. The plaintiff's claim was opposed by the 1<sup>st</sup> defendant through an amended statement of defence and counterclaim dated October 18, 2011. It is the 1<sup>st</sup> defendant's averment that he is the rightful owner of what has been referred to by the plaintiff as the upper part of the suit land. That he purchased land parcel No 535 from Mwongeli Wambua, and land parcel No 534, devolved to him following the death of his father Muthoka Linge and he purchased land parcel No 533 from Ruth Nduku. That the district surveyor had issued a directive to the land registrar to take necessary steps on arranging occupants according to the map, and the same was yet to happen. Further that he cannot be moved from his parcels of land because the bylaws of the society stated that all persons who were already settled on the land were not to be moved, but new comers were to be resettled where disputes arose.
  7. In conclusion, the 1<sup>st</sup> defendant averred that the plaintiff had no cause of action against him as he was the rightful owner of the parcel of land claimed by the plaintiff. That the instant case is misdirected, an abuse of the court process and should be dismissed with costs.
  8. In counterclaim, the 1<sup>st</sup> defendant prayed for judgment to be entered against the plaintiff as follows;
    - a. A declaration that the 1<sup>st</sup> defendant has acquired a portion of land parcel Kakuzi/Kirimiri/Block 8/739, by way of adverse possession.
    - b. Costs of the counterclaim
  9. The plaintiff's claim was also opposed by the 2<sup>nd</sup> defendant through a statement of defence dated May 3, 2010. The 2<sup>nd</sup> defendant denied all the allegations made in the plaint and did put the plaintiff to strict proof of the same. He averred that he is the registered owner of land parcel No Kakuzi/Kirimiri/Block 8/706, and that he has not encroached on land parcel Kakuzi/Kirimiri/Block 8/739. He urged this court to dismiss the plaintiff's suit with costs.
  10. The matter was heard through *viva voce* evidence. The plaintiff gave evidence for himself and called no witness. The defendants also gave evidence for themselves and called no witness.

### **Plaintiff's Case**

11. PW 1 Stephen James Karanja Mburu testified that he has known the defendants since the year 2007. That he came to know them when he went to check on his land parcel Kakuzi/Kirimiri/Block 8/739, at Mutithi Farmers Cooperative Society. He adopted his witness statement dated March 3, 2014, as



- part of his evidence. He also produced the documents contained in his list of documents dated March 3, 2014, and his supplementary list of documents date December 16, 2021 as P exhibits.
12. He further testified that he joined Mutithi Farmers Cooperative Society in 1985, and he was issued with share certificate No 900. That as a member of the aforementioned Society, he balloted for his share and his ballot was No 739. That subsequent to the balloting, he was allotted land parcel Kakuzi/Kirimiri/Block 8/739, and the same was duly registered in his name and a title deed to that effect issued. That he was shown his portion of land by the surveyors of the society and thereafter he returned to Nairobi where he resided.
  13. That when he returned to the land sometime in 2007, he found that his parcel of land had been cultivated by both the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That they involved both the Surveyor and Land Registrar Thika in an attempt to resolve the dispute, and they had several meetings at the contested area. That the findings from the meetings were that in that block, there were people who had settled on parcels of land not belonging to them. That both the 1<sup>st</sup> and 2<sup>nd</sup> defendants had encroached on the plaintiff's land parcel and there was no land left for the plaintiff to occupy. That the 1<sup>st</sup> and 2<sup>nd</sup> defendants have refused to vacate his land prompting him to approach this court for relief.
  14. With regards to the counterclaim filed by the 1<sup>st</sup> defendant, the plaintiff denied its allegations entirely. That balloting for land was done in 1985, and after being shown his land by the surveyor, he went to Nairobi. That he was not aware of what was happening on the ground until 2007. That the defendants had not built on his land, but had been cultivating thereon.
  15. On cross-examination, the plaintiff told this court that he did not know when the 1<sup>st</sup> defendant acquired the said land. Further, that he was not aware about the events prior to 1985. When asked about the surveyor's report, he testified that the report showed the road had been left out. He added that the report recommend that Mutithi Farmers Cooperative Society should show people their right parcels of land. It was his further testimony that he was shown his land, which had beacons, but was not issued with a beacon certificate.
  16. He also testified that the 2<sup>nd</sup> defendant is his neighbour who occupies land parcel 706. He acknowledged that there was a report by the society's surveyor, which showed that he was occupying a road reserve and which recommended that he should be given another parcel of land. He was however not in agreement with the said report.
  17. In re-exam, he maintained that he balloted for the suit land in 1985. He insisted that he did not agree with the report that was prepared by the surveyor.

### **Defence Case**

18. DW1 Raphael Mbezezi Muthoka adopted his witnesses statement dated May 12, 2017, as evidence and also produced the documents contained in the list of documents dated July 12, 2017, as evidence. He also testified that he lives on Land parcels Nos 533, 534 & 535 and not 739. That he bought the said parcels of land from Ruth Nduku, Michael Muthoka and Mwangela Wambua, respectively. He explained that when the foregoing got their parcels. He informed this court that the society acquired the land in 1964, and they started living therein in 1964, while balloting was done in 1989. However, they acquired ballots for the parcels of land on which they were living.
19. Further, that he came to know about the plaintiff in the year 2008, and that he did not see him balloting. It was his testimony that the plaintiff has a title deed, but neither does he have a corresponding parcel of land on the ground nor a beacon certificate to that effect.



20. On cross-examination, he led the court on his understanding of the surveyor's report and the map. He further testified that some parcels of land were on the map, but were missing on the ground. He maintained that he is not cultivating on the plaintiff's land.
21. DW2 Lucas Kamau Kariithi also adopted his witness statement dated October 6, 2017, as evidence in chief. He further testified that his land is land parcel No 706, having been shown by the surveyor and has lived there with his family for some time now. It was his further testimony that he never balloted, but used a piece of paper he had to acquire his title deed. He confirmed that on the upper part of his land, there is an access road and when the map came out, it showed that his land was not touching the access road. He also testified that he was pushed to the lower side of his land which is allegedly the plaintiff's land. He added that sometime in 2007, the plaintiff complained that he had encroached on his parcel of land.
22. On cross-examination, he testified that his land was pushed to the plaintiff's side and therefore he was on half of the plaintiff's land. He confirmed that he was willing to return the plaintiff's half parcel of land on condition that half of his portion would also be returned to him.
23. The parties thereafter filed and exchanged written submissions. The plaintiff filed his written submissions dated June 27, 2022, through the law firm of Njoroge-Kugwa & Co Advocates and urged this court to allow his claim as prayed.
24. It is the plaintiff's submissions that sections 27 and 28 of the *Registered Land Act* (now repealed) gave absolute and indefeasible title to a registered proprietor of land, unless the contrary is proven either by encumbrances, conditions, and restrictions as against the title. That the plaintiff being the registered owner of Kakuzi/Kirimiri/Block 8/739 should be allowed to enjoy absolute title and possession of the same without any interference by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
25. The 1<sup>st</sup> defendant filed his written submissions dated May 18, 2022, through the law firm of N.M Kamwenda & Co Advocates and raised two issues for determination by this court. The 1<sup>st</sup> defendant highlighted the evidence adduced by the parties and submitted on the evidence in his favour. In submitting that he did not commit acts of trespass, he invited this court to the meaning of trespass as set out in *Clerk & Lindsell on Torts*, 7<sup>th</sup> Edition and submitted that the trespass if any was justified.
26. On his claim for adverse possession, the 1<sup>st</sup> defendant relied on the provisions of sections 7, 13 & 38 of the *Limitation of Actions Act*, and a litany of cases. He further submitted that he has by evidence satisfied the necessary ingredients to prove the doctrine of adverse possession and this court should thus allow his counter-claim as prayed.
27. The 2<sup>nd</sup> defendant filed his written submission dated June 29, 2022, through the law firm of Kamiro R.N & Co Advocates reiterating his evidence and the averments in his pleadings. He maintained that he had not encroached on the plaintiff's land and urged this court to dismiss the plaintiff's claim with costs.
28. This court has carefully considered the pleadings in general, the evidence adduced in court and exhibits produced therein, the rival written submissions and the relevant provisions of law and finds the main issues for determination are;
  1. Whether the plaintiff has established a claim for trespass against the defendants
  2. Whether the 1<sup>st</sup> defendant has proven adverse possession as against the plaintiff.
  3. Who should bear the costs of the suit.



## 1. Whether the Plaintiff has established a claim for trespass against the Defendants.

29. It is not in doubt that the plaintiff is a member of Mutithi Farmers' Cooperative Society Limited, having been issued with a share certificate No 900, issued on January 2, 1985. Being a member of Mutithi Farmers, the plaintiff picked ballot No 739, and was subsequently issued with land parcel No Kakuzi/Kirimiri/Block 8/739, which was registered in his name on May 5, 1989.
30. The plaintiff claims that the defendants have encroached on his land parcel stated above, and that he cannot access the said land at all due to the said encroachment.
31. Section 27 of the Registered of Land Act cap 300 (now repealed) provides that the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging and appurtenant thereto. The plaintiff has claimed that he is not able to enjoy the said rights and privileges since the defendants have encroached or trespassed on his suit land.
32. Further, section 28 of the Registered Land Act (repealed) provides that;
- The rights of a proprietor, whether acquired on first registration or whether acquired 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”.
33. Further section 26 of the Land Registration Act provides;
26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground fraud of or misrepresentation to which the person is proved to be a party;  
or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”
34. It is clear from the above provisions of law that a certificate of title is to be taken by courts of law as a *prima facie* evidence that the person named therein is the indefeasible and absolute owner, subject to such encumbrances as endorsed on the title. It is also manifestly clear that the said certificate of title should not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
35. Further, the right of such registered owner cannot be defeated except as provided by the law.
36. The plaintiff being the registered owner of Kakuzi/Kirimiri/Block 8/739, and having been issued with a title deed on May 5, 1989, is therefore deemed to be the indefeasible and absolute owner, of the said parcel of land, unless the said title deed (certificate of title), is proved to have been acquired illegally, and/or unprocedurally. The said title can also be impeached on grounds of fraud and/or



- misrepresentation and it can only be impeached through the court process or as provided by the law or the Act.
37. In the instant case, the defendants have not denied and/or sought for the impeachment of the plaintiff's certificate of title on any of the aforementioned grounds. This court therefore does not find it difficult to conclude that indeed the plaintiff is the absolute owner of Kakuzi/Kirimiri/Block 8/739.
38. Having stated the above, this court will now move to investigate if the plaintiff has established a case for trespass against the defendants. It is the plaintiff's statement that after being issued with the suit land, he moved back to Nairobi and only returned in 2007, wherein he found that both the 1<sup>st</sup> and 2<sup>nd</sup> defendants had encroached on his land. The defendants on the other deny the allegations made by the plaintiff. The 1<sup>st</sup> defendant stated that he was the owner of land parcels Nos 533, 534 & 535, and that he did own land parcel No 739.
39. He further added that he bought the above parcels of land from Ruth Nduku, Michael Muthoka and Mwongela Wambua respectively. The 2<sup>nd</sup> defendant on the other hand testified that he was the owner of land parcel No 706, and that after survey was done, he was pushed to the lower side of his land which is allegedly the plaintiff's land. He also testified that sometime in the year 2007, the plaintiff complained that he had encroached on his land.
40. Trespass has been defined by the 10<sup>th</sup> Edition of *Black's Law Dictionary* as;  
an unlawful act committed against the person or property of another; especially wrongful entry on another's real property."
41. Section 3 (1) of the *Trespass Act*, cap 294 provides that:  
Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."
42. The court in *John Kiragu Kimani v Rural Electrification Authority* [2018] eKLR in defining trespass relied on *Clark & Lindsell on Torts*, 18<sup>th</sup> Edition on page 923, which defines trespass as;  
'any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the plaintiff to prove that the defendant invaded his land without any justifiable reason'.
43. Having set out the foregoing, it is trite law that he who alleges must prove and the burden of proof in the instant case squarely lies with the plaintiff, being the one alleging trespass.
44. The plaintiff in support of his case produced a bundle of documents to wit a surveyor's reports, area map, report from Land Registrar, Thika and notices of boundary disputes among others. Admittedly, from the surveyor's reports and report from Land Registrar Thika, there exists a problem. According to the report dated February 14, 2020, by the National Government Surveyor, Kiambu County, all the parcels of land on the ground tally with the map except for land parcels Nos 706, 739 & 535. Additionally, as per the Land Registrar's letter dated February 19, 2020, the same indicates that there was an initial survey of 1988, which was carried out leaving an access road.
45. The Land Registrar further noted that some land owners are occupying wrong parcels of land and she gave an example of William Kangethe. On the part of the plaintiff, the Land Registrar noted that the plaintiff, has not been able to access his land, and she recommended that Mutithi Farmers' Co-operative Society to correct the anomalies.



46. The plaintiff testified that he visited the land in 2007, and he was not able to trace his parcel of land, which he had been allocated to by the society on May 5, 1989. He testified that he found out that his parcel of land had been cultivated on and when a hearing was conducted at the surveyor's office, it emerged that the defendants had encroached on his land. Interestingly, DW2 testified on cross-examination that his land was pushed to plaintiff's side and when he saw the map, he noted that half of his was on Karanja's(plaintiff's) side. DW1 testified that he is not an immediate neighbor of the plaintiff, and there is no way he could have encroached on plaintiff's land. He added that even if his parcel was pushed, there is no way the same could have been pushed, to the plaintiff's side.
47. What is clear from the foregoing is that there exists confusion in the land settlement and it is as a result of this confusion that the plaintiff might have lost his land. This court has no reason to doubt that the plaintiff has land in the said locality after all he has a valid certificate of title that has not been challenged. Within the meaning of section 26 of the Land Registration Act, the said certificate of title deed held by the plaintiff herein is conclusive evidence of proprietorship. There was no evidence that challenged his membership at Mutithi Farmer's Cooperative Society, where he got his parcel of land from. That being the case, this court has a duty to protect his proprietary right as guaranteed by article 40 of the Constitution.
48. The issue of boundaries is not within the confines of this court to determine as provided by section 18(2) of the Land Registration Act which provides:
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”
49. What is required of this court will be to confine itself within the findings of the Land Registrar, Thika who has the jurisdiction to determine the boundary disputes. The Land Registrar gave recommendations on boundary disputes, herein and on whether the same has been effected or not, that has not been brought to the attention of this court. What the court will seek to unveil in order to establish whether there is trespass or not is Whether the plaintiff is the owner of the suit property Whether there is any unlawful occupation and/ or cultivation thereon Whether the foregoing is attributed to the defendants Whether there was consent
50. This court has already established hereinabove that the plaintiff is the legal and/ or registered owner of land parcel No Kakuzi/ Kirimiri/ Block-8/ 739, which has been adversely referred to as land parcel No 739. While the plaintiff maintains that the defendants have unlawfully occupied his land, the defendants hold otherwise. The 2<sup>nd</sup> defendant admitted in evidence that he is occupying the plaintiff's land even though he attributed his occupation to the confusion. The 1<sup>st</sup> defendant on the other hand objected to it and testified that there is no way he could have encroached into the plaintiff's land since their parcels of land are far apart. However, on cross-examination, he testified that land parcel No 535 is almost near 739.
51. A cursory look at the map produced before this court as evidence shows that land parcel No 739, borders parcels 706, 739, 536 & 747. While the 1<sup>st</sup> defendant admitted in evidence that he is the owner of land parcels No 533, 534 & 535, the 2<sup>nd</sup> defendant testified that he is the owner of parcel No 706. There is no evidence as to the proprietorship of land parcels No 536 and 747, and the same are not the subject matter of this suit. There is no way the proprietor of land parcels No 533, 534 & 535, could encroach into land parcel No 739, unless, it can be established that their encroachment into land parcel No 536 led into encroachment into land parcel No 739, and which this court finds that it has not been established.



52. The 2<sup>nd</sup> defendant in his own testimony admitted that he might be occupying land parcel No 739. There could be a possibility that since he is proprietor of land parcel No.706, which borders No 739. Undoubtedly, he has no consent from the plaintiff to occupy and/ or cultivate his land. As a matter of fact, he admits that he is ready to give the plaintiff his land, as long as his other half is returned. sadly, he cannot compel this court to do so, yet the plaintiff is not to blame. Thus, this court has on a preponderance of evidence and law found that the plaintiff has established a case of trespass against the 2<sup>nd</sup> defendant.

**(ii) Whether the 1<sup>st</sup> Defendant has proved his case of adverse possession as against the Plaintiff.**

53. The doctrine of adverse possession is one of the ways of land acquisition in Kenya. This court will highlight some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act, cap 22 and the Land Registration Act No 6 of 2012;

Section 7 of the Limitation of Actions Act states that;

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”

54. Further in section 13;

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

55. Section 16 provides as follows;

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.”

56. Section 17 goes on to state;

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

57. Finally, section 38(1) and (2) states;



- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
58. Section 28(h) of the *Land Registration Act*, 2012, recognizes that overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under section 7 of the *Land Act*, 2012, prescription is one of the ways of acquisition of land.
59. The combined effect of these sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor, at the expiry of 12 years of occupation of the adverse possession on the suit land.
60. In the case of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a plaintiff in a claim for adverse possession has to prove;
61. In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.
62. The key test is that the owner of the land must have been dispossessed or have been discontinued of possession of the property. In the case of *Francis Gacharu Kariri v Peter Njoroge Mairu*, civil appeal No 293 of 2002 (UR): the court held;
- “...the possession must not be broken, or any endeavours to interrupt it.”
66. The claim for adverse possession was brought forward by the 1<sup>st</sup> defendant in his defence and counter-claim. This is oblivious of his testimony that he has never occupied the plaintiff’s land and that his land is far from the plaintiff and there is no way he could have encroached onto the plaintiff’s land.
67. It is trite law that for a claim of adverse possession, the claimant must proof possession, and the same must have been uninterrupted, continuous and non-permissive for a period of more than twelve years.
68. While the plaintiff did not object to the 1<sup>st</sup> defendant’s evidence on adverse possession, it does not mean that the 1<sup>st</sup> defendant’s claim will automatically succeed. He must lead evidence satisfying the ingredients of adverse possession. It is the findings of this court hereinabove that there is no way that the 1<sup>st</sup> defendant could be occupying the plaintiff’s land, yet in between them lies a parcel of land known as land parcel No 536.
69. The 1<sup>st</sup> defendant did not place any evidence before this court to demonstrate that he is or has been occupying the plaintiff’s portion of law. Without occupation being proven, there is no way a claim for adverse possession can stand. It is the occupation whether currently or previously that will inform this court to determine that the same was open, continuous, non-permissive or uninterrupted for a period of twelve years.
70. To this end, this court finds and holds that the 1<sup>st</sup> defendant has failed to satisfy the ingredients of adverse possession and proceeds to dismiss the 1<sup>st</sup> defendant’s counter-claim as amended on the October 18, 2011, and filed on the October 24, 2011.



71. Having found that the 2<sup>nd</sup> defendant has encroached and/ or trespassed onto the plaintiff's parcel of land, the court finds that the 2<sup>nd</sup> defendant should be restrained from further encroachment.
72. Consequently, the court proceeds to issue an injunction against the 2<sup>nd</sup> defendant.

**(iii) Who should pay Costs of this suit?**

73. This court retains its discretionary rights donated by section 27 of the *Civil Procedure Act* to award costs. The plaintiff is the successful party and is thus entitled to costs of this suit as there is no reason not to award him costs.
74. Having now carefully considered the available evidence, the court finds that the plaintiff has proved his case of trespass against the 2<sup>nd</sup> defendant herein on the required standard of balance of probabilities. However, he has not proved his case against the 1<sup>st</sup> defendant herein.
75. Further, the court finds that the 1<sup>st</sup> defendant has failed to prove his case against the plaintiff on the claim of ownership by virtue of adverse possession as claimed in his counter-claim dated October 18, 2011.
76. For the above reasons, the 1<sup>st</sup> defendant counter-claim is dismissed entirely with costs to the plaintiff.
77. Consequently, judgement is entered for the plaintiff against the 2<sup>nd</sup> defendant herein as stated in the plaint dated April 8, 2010 in terms of prayers No (a), (b) and (c). However, the said claim is dismissed against the 1<sup>st</sup> defendant.
78. Further the 1<sup>st</sup> defendant counter-claim against the plaintiff dated October 18, 2011, is dismissed entirely with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022**

**L. GACHERU**

**JUDGE**

**In the presence of; -**

Joel Njonjo – Court Assistant

Ms Waigwa H/B Njoroge Kugwa for the Plaintiff

Mr Kamwendwa for the 1<sup>st</sup> Defendant

2<sup>nd</sup> Defendant – N/A

L. GACHERU

JUDGE

19/10/2022

