



**Miriti v Girishom & 3 others (Environmental and Land Originating Summons
06 of 2020) [2022] KEELC 14651 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14651 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 06 OF 2020**

CK YANO, J

NOVEMBER 9, 2022

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT

AND

**IN THE MATTER OF LAND PARCELS NOS. MUTHAMBI/
GATUA/2294, 2295 AND 2296 ORIGINALLY MUTHAMBI/GATUA/429**

BETWEEN

CHARLES NJAGI MIRITI PLAINTIFF

AND

LEONARD MUTEMBEI GIRISHOM 1ST DEFENDANT

JOSECK NYAGA M'RUCHA 2ND DEFENDANT

PHILLIS MPIO M'RUCHA 3RD DEFENDANT

KENNETH KIMATHI M'RUCHA 4TH DEFENDANT

JUDGMENT

Introduction

1. In this case, I am required to write a judgment based on the evidence that was partly taken by PM Njoroge, J, who was seized of the matter before he was transferred. The learned Judge took the evidence of the plaintiff who testified as PW1 as well as the evidence of PW2, PW3, PW4 and PW5. He also took the evidence of the 3rd defendant who testified as DW1, 2nd defendant (DW2), and the 4th defendant (DW3). Pursuant to the provisions of order 18 rule 8(1) of the Civil Procedure Rules, I proceeded with the matter and took the evidence of the 1st defendant who testified as DW4.



The Plaintiff's Case

2. The plaintiff moved the court vide the originating summons dated July 6, 2020 seeking for orders that:
 - i. The applicant has become the legal owner of LR Nos Muthambi/Gatua/2294, 2295 & 2296 (originally LR No Muthambi/Gatua/429) by adverse possession.
 - ii. The applicant be registered as the proprietor of the said parcels of land namely LR Nos Muthambi/Gatua/2294,2295 & 2296 (originally LR No Muthambi/Gatua/429) in place of the above named respondents in whose favor the suit lands are currently registered.
 - iii. The land registrar Chuka be directed to dispense with the production of the original title deeds in respect of LR Nos Muthambi/Gatua/2294, 2295 & 2296 and the land control board consent to facilitate the registration of the suit land in favour of the applicant.
 - iv. The Deputy Registrar of this court be empowered to sign the necessary documents to facilitate the registration of the suit lands in favor of the applicant.
 - v. Cost of this application be provided for.
3. The summons is supported by the evidence and facts set out in the affidavit of Charles Njagi Miriti, the plaintiff herein, in which he deposed that he has been living continuously on the three land parcels known as LR Nos Muthambi/Gatua/2294,2295 &2296 (originally LR No Muthambi/Gatua/429) measuring 3.1 acres since 1991 to date. That the land (Muthambi/Gatua/429) was gifted to him by his grandfather M'ruha M'mbwiria(deceased) who invited him into the said land and that upon the demise of his grandfather, the defendants without the plaintiff's knowledge obtained the registration of the suit lands in their names after subdividing the parent parcel. The plaintiff has exhibited the green cards marked "CNMI a, b & C" for the suit land.
4. The plaintiff avers that he has built a permanent house on the land and developed the same extensively by planting over 200 coffee trees, over 300 trees over 300 banana plants and subsistence crop, and further connected water and electricity thereon.
5. The plaintiff avers that he has lived and enjoyed uninterrupted continual possession of the said land since August, 1991 and carried out the said developments with the full knowledge of the defendants, and that his uninterrupted, continuous, exclusive possession of the suit land for more than 12 years entitles him to claim the ownership of the land by way of adverse possession.
6. At the hearing Charles Njagi Miritithe plaintiff testified as PW1. He was cross-examined and re-examined. He stated that he stays at Gatua, Mitheru Ward, Maara Constituency and that he is a business person. The plaintiff adopted his witness statement dated the March 15, 2021 as his evidence-in- chief in the case and produced copies of the green card for L R No Muthambi/Gatua/2294, 2295 and 2296 as the plaintiff exhibits No 1 (a, (b) and (c) and also produced a copy of the Bank Pass Book as plaintiff exhibit 2, minutes dated December 6, 1986 as plaintiff exhibit 3 and will dated March 15, 1999 as plaintiff exhibit 4.
7. On cross-examination by Ms Kjaru learned counsel for the defendant, the plaintiff stated that he was born in 1975 and did not have his identity card since he had forgotten it at home. When told that he was born in 1979, PW1 denied.
8. PW1 testified that the suit land was given to him by his grandfather Grishan M'Rucha in 1991 and that he put up a house for him and transferred his account to him since he was the one taking care of him.



9. PW1 further stated that in 1991, he was 16 years old and was going to school in class 8 at Muguna Primary school. PW1 further stated that the land was registered in his grandfather's name. PW1 stated that the parcel of land that he is claiming case from parcel No 429 and the green card showed that it was registered in the names of Rucha Mbirwa on the November 6, 1997. When Pw1 was questioned if true that Rucha Mbirwa in 1991 was not the registered owner, PW1 stated that he could not answer that and that he had not looked at the title.
10. PW1 further stated that Leonard Mutembei is the step brother of his father and Joseph Nyaga M'Rucha is his father's elder brother while Phyllis M'Rucha is the younger wife of his grandfather and therefore the plaintiff's step grandmother. He stated that Kenneth Kimathi is the step brother of his father through the younger wife who is the step grandmother of PW1.
11. PW1 stated that his father is called Hezekiah Miriti and that he stays at the farm given to him by the plaintiff's grandfather. He further stated that all the defendants have their own parcels of land though PW1 said he did not know the parcel numbers.
12. When questioned about the minutes dated December 6, 1986 (P exhibit 3), PW1 stated that he was not present in that meeting. He confirmed that the minutes were talking about parcel Nos 2294, 2295 and 2296. He further confirmed that the minutes stated that Mutembei be given 2.3 acres.
13. Regarding P exhibit 4, PW1 stated that the document (will) was written by one Mary Gaji Rucha on March 15, 1999 and that Mary Gaji Rucha died in 2002, though PW1 did not have the death certificate. PW1 was however shown a death certificate which indicated that Mary Gaji died on December 10, 1990.
14. PW1 maintained that he has been living on the land since 1991 although the defendants were not the registered owners of the land. Whereas PW1 stated that the land was registered in his grandfather's name, he could not explain how that was possible when the land was only registered in 1997. PW1 confirmed that the defendants were registered as owners in 2003 after filing succession proceedings in Meru Succession Cause 15 of 2000, though he added that the succession proceedings were done secretly. PW1 stated that he appealed in Case No 40 of 2003 and that a second case that was filed was dismissed without them being heard.
15. PW1 agreed that there was no order opposing the succession case. That he filed Meru Case No 40 of 2003 on April 7, 2003 after the defendants had gotten their titles on March 11, 2003. PW1 confirmed that from 2003, he and the defendants have been in court. He further agreed that his case was dismissed on July 7, 2015. He stated that he filed this matter because the orders of inhibition were lifted and the defendants wanted to evict him from the land. He stated that he has lived on the land peacefully and that the defendants never came to the land. He also denied destroying their crops. He stated that no one has ever bothered with his stay on the land since 1991 and that the defendants did not even try to evict him after they got their titles. PW1 stated that all the defendants were given separate parcels of land by M'Rucha, his grandfather who he said had left the land for himself and his first wife.
16. PW2 was Eliud Nyaga M'rucha. He stated that the plaintiff was his nephew while the 1st and 4th defendants are his step brothers. He stated that he comes from Mitheru, Gatua sub-location Tharaka Nithi County and that he is a farmer.
17. PW2 testified that on 15.11.2021 he wrote a witness statement and adopted it as evidence in the suit. He was cross-examined and re-examined. His evidence was that his father had 2 wives Mary Gaji and Phillis Mpii and that he was the child of Mary Gaji. He stated that before his father died he lived separately and peacefully in different sides of the road of the same land and that he did not remember the number of the parcel of land and did not have a photograph of the same.



18. Pw2 contended that PW1 had been employed to look after his father and after his demise he was left looking after Philis Mpii in the lower part of the land. He further stated that there was no case concerning the land but that the clan had discussed the matter and that he knows the plaintiff had filed a case at Meru and that the case concerned the land in this matter and the same was filed after the death of their father. He averred that he came to know about the succession case after surveyors came to the land and that Joseck Nyaga the 2nd defendant, never told him about the succession case.
19. PW2 stated that when the surveyors came he went to the court in Meru asking the court to review the succession case since he did not know about it but the case was not completed and that it kept being adjourned and later he was informed that it was dismissed. He further stated that he was never served with an application for removal of the inhibition.
20. PW2 confirmed that the plaintiff brought the case after the removal of the inhibition. He denied evicting Philis Mpii his step mother from LR Muthambi/Gatua/429 and stated that she was living on her land. PW2 stated that before his father died he was living on the upper side of the land and that the 3rd defendant was living on her land across the road and the two parcels had a road dividing them.
21. PW3 was Hezekiel Maritawho adopted his joint witness statement dated March 15, 2021 as his evidence-in-chief in the case. PW3 was cross examined and re-examined and he averred that his father had 2 wives each living in one side of the road and the other on the other side and that all his brothers had their land elsewhere not on Parcel 429. PW3 stated that Charles Njagi the plaintiff, is his son and that he was looking after his grandfather who was living with Mary Gaji together with the plaintiff.
22. PW3 stated that the plaintiff was given the whole of parcel 429 and that the 1st and 2nd defendants filed succession proceedings secretly and that they only saw surveyors with askaris who were armed with guns. PW3 further stated that PW1 went to live with his grandfather when he was a small child and that is why he left the land to him and that his father called the clan and told them that he had given the land to the plaintiff.
23. PW3 was re-examined by Gachuki Advocate, and stated that the plaintiff had stayed with his grandfather for 27 years and that they were all called by him and informed that parcel no.429 was to be given to the plaintiff. PW3 denied that they had evicted the 3rd defendant from parcel 429 adding that she had been taken to her parcel a long time ago and that M'rucha had given her that land. PW3 denied that the 3rd defendant cultivated or built any structures on parcel 429.
24. PW4 was Timothy Njagi who relied on the joint statement made with PW1 and associated himself with the evidence of PW2.
25. PW5 was Shadrack Nthiga who associated himself with the evidence of PW3 and PW4.

The Defendants' Case

26. The defendants filed a replying affidavit sworn by Leonard Mutembei Girishon, the 1st defendant on November 16, 2020. He has deposed that he is the registered owner of parcel No Muthambi/Gatua/2295 jointly with his mother Phylis Mpii M'Rucha, the 3rd defendant herein. He averred that land parcels No LR Muthambi/Gatua/2294, 2295 and 2296 are as a result of sub-division of land parcel No Muthambi/Gatua/429 which was registered in the name of his late father Rucha Mbwiria (deceased) who acquired title in 1997 on first registration which he stated is indefeasible in law.
27. The 1st defendant has deposed that land parcel No Muthambi/Gatua/429 constituted the estate of his late father and that they filed a succession cause at Meru High Court No. 15 of 2000 whereby a



certificate of confirmation of the grant was issued on 18th October, 2001. That he benefited from the estate by virtue of being a rightful beneficiary of the estate of the late Rucha Mbwiria.

28. It is the defendants case that the plaintiff herein did not file for the revocation of the grant, but instead he rushed to court vide Civil Case No 40 of 2003 at Meru seeking an injunction restraining any dealings on the subsequent land parcels LR Muthambi/Gatua/2294 and 2296. They denied the plaintiff's averment that he has been in uninterrupted possession of the land since 1991, arguing that they were in occupation and carried out farming on the said parcel of land Muthambi/Gatua/429. The defendants argued that the plaintiff has never been in occupation of the land as he alleges, adding that the title deed to the land was first issued in 1997 whereby the deceased was the registered owner. A copy of the green card has been exhibited. It is the defendants contention that the plaintiff has no legal or equitable rights over the land since it has been having a dispute and therefore cannot claim adverse possession.
29. Phyllis Mpii M'rucha, the 3rd defendant testified as DW1 She adopted her witness statement dated March 12, 2021 as her evidence-in-chief and produced the lists of documents dated March 12, 2021 as defence exhibits 1 to 9. DW1 was cross-examined and re-examined.
30. DW1 testified that M'Rucha Mbwiria (deceased) was her husband while Gaji was her co-wife. That the deceased gave each one of them their own land where each lived with her children. That the deceased gave all his children land, except Kimathi, the 4th defendant, who was still young at the time when M'Rucha died.
31. DW1 stated that she lived on the land which was left for her by her deceased husband, but was evicted therefrom, and her house destroyed. That she now lives on other people's land. DW1 stated that when their late husband was alive, they used to live together. That Mary Gaji and herself lived in separate parcels near each other which was separated by a road. She stated that the 1st defendant has his own land which was not given him by his father who also gave land to all his sons except the 4th defendant. That before the demise of the deceased, they all lived on parcel No 429.
32. Joseck Nyaga M'rucha, the 2nd defendant testified as DW2 and adopted his witness statement dated March 12, 2021 as his evidence-in-chief and was cross-examined and re-examined. DW2 stated that the plaintiff is the son of Hezekiah Miriti and therefore his nephew as DW2 and Hezekiah Miriti are brothers.
33. DW2 testified that parcel LR No 429 belonged to Girishon M'Rucha Mbwiria. That the land was being occupied by Girishon M'Rucha and his mother, Mary Gaji and step mother, Phillis Mpii, the 3rd defendant. DW2, stated that the 3rd defendant was chased away by the plaintiff aka Kinyua. That the plaintiff and his brothers do not allow them to enter the land. He stated that their father gave all his sons their separate parcels of land except the 4th defendant who was in school.
34. DW2 stated that the plaintiff has constructed a house on parcel No 429, while the 3rd and 4th defendants also cultivate the land. That when the 3rd and 4th defendants go to the land, they are chased away.
35. DW2 denied stating in his statement that he had a house on the land, adding that his timber house was demolished and he reported, though he did not have an OB number. DW2 stated that he lives on land left to him by his father and mother adding that all his brothers were allocated land by their father. He stated that M'Rucha (deceased) lived with his two wives.
36. DW2 confirmed that he filed a succession cause together with the 1st defendant and that Phillis Mpii and Leonard were jointly given ½ an acre in the grant while Joseck and Gaji would jointly get ½ acre, and Kenneth Kimathi was to get 2.1 acres. That Elius Nyaga, Shadrack Nthiga, Timothy Njagi and Ezekiel Miriti were not cited in the Grant because they had been given land by their father.



37. Kenneth Kimathi M’rucha the 4th defendant testified as DW3. He adopted his witness statement dated March 18, 2021 as his evidence-in-chief and was cross-examined. He testified that he is the son of the 3rd defendant while the 1st defendant is his brother. That his father had two wives, Mary Gaji and Phillis Mpii. That when his father died, the two families were living on the same piece of land. That before he died, his father had given his 6 sons land except DW3 himself. He stated that he has crops and a house on parcel 429, and denied that the plaintiff has put up a house on the land. He agreed that Eliud Nyaga, Shadrack Nthiga, Timothy Njagi and Ezekiel Miriti and all daughters of M’Rucha are not in the Grant. He stated that in the grant, Leonard Mutembei stands for Phyllis Mpii and Joseck Nyaga stands for Marcy Gaji, but 2.1 acres was supposed to be for Joseck, Kimathi (DW3), and that the plaintiff should not claim the land as his father Hezekiah Miriti has his own land. That he tries to cultivate the land but Hezekiah Miriti and Charles Njagi Miriti, the plaintiff uproot the crops and harvest the coffee which is not theirs. He stated that the land had a dispute.
38. Leonard Mutembei Girishon the 1st defendant testified as DW4. He adopted his witness statement as his evidence-in-chief and was cross-examined and re-examined. He testified that the plaintiff is his nephew and son of Hezekiah Miriti his stepbrother. That his father had two wives Phillis Mpii, the 3rd defendant who is his mother and Mary Gaji. He stated that the 2nd defendant is his step brother and the eldest in their family, while the 4th defendant is his brother.
39. DW4 testified that the 3rd defendant cultivates on parcel No 429 but is not living there. That parcel No. 429 was subdivided into three parcels No 2294 for Mary Gaji and Joseck Nyaga, 2295 for Phillis Mpii and Leonard Mutembei while 2296 was for Kenneth Kimathi. That LR 2294 is used by Joseck Nyaga, Hezekiah Miriti and Charles Njagi who are from the 1st house while LR 2295 is used by Phillis Mpii, and LR 2296 is used by Kenneth Kimathi but Charles Njagi and Hezekiah Miriti harvest it. That plot 2295 ought to be for 3rd defendant but was chased away by Charles Njagi and Hezekiah Miriti.
40. DW4 stated that there was a dispute including Meru Case No 40 of 2002 in which the plaintiff lost and thereafter filed this case. He asked the court to allow his mother the 3rd defendant and brother, the 4th defendant to go back to their land, adding that the plaintiff has his own land measuring 7 acres. That everyone was given his own land except the 4th defendant who was still schooling in Japan.
41. DW4 maintained that the 3rd defendant cultivates on LR 2295 while the 4th defendant cultivates on LR 2296, though the plaintiff and Hezekiah are the ones harvesting the crops and chasing them away. He confirmed that his father had two wives and that before his death in 1995, he had subdivided the land to all his sons, except the 4th defendant. He denied that the 4th defendant has land in Embu, though he has a family who stay in Embu Town. He denied chasing away the 3rd and 4th defendants after the land was registered in his name. He stated that they still stay in his place.
42. DW4 stated that when his father died, they filed a succession cause in which the grant was given to him and the 2nd defendant. DW4 produced the grant as D exhibit No 1. It was over parcel 429 in which DW4 and 3rd defendant were jointly given 0.5 acres, the 2nd Defendant and Mary Gaji jointly got 0.5 acres, and the 4th defendant was given 2.1 acres. That he (DW4) represented the 2nd house while the 2nd defendant represented the 1st house. That the rest were to get their shares from their mothers. He denied that the 2nd defendant was the only one using the land LR 429, and stated that the plaintiff had constructed a house on a portion belonging to his grandmother.
43. At the close of the defence case, the matter was referred to the court annexed mediation in view of the fact that the parties were close family members. However, the parties did not reach any agreement. By consent of the parties, the County Surveyor, Tharaka Nithi visited the suit parcels of land Muthambi/Gatua/2294, 2295 AND 2296 formerly LR 429 and filed a report dated March 14, 2022.



The Plaintiff's Submissions

44. The plaintiff filed his submissions dated June 27, 2022 on July 12, 2022 through the firm of Mithega & Kariuki Advocates. It is the plaintiff's submission that he has been in actual occupation and possession of the suit lands from 1997 – 2005 and has allocated a portion of Muthambi/Gatua/2296 to one Luka Kirimi. The plaintiff submits that the County Surveyor's report is conclusive evidence of his actual occupation and possession. Counsel for the plaintiff relied on the case of *Kasuve v Mwanja Investments Limited & 4 others* [2004] 1 KLR 184, *Mweu v Kiu Ranching & Farming co-operative society Ltd* [1985] KLR 430 and *Chevron (K) Ltd v Harrison Charo wa Shutu* [2016] eKLR.
45. It is the plaintiff's submission that the defendants herein failed to assert their right by seeking legal proceedings against the plaintiff or making an effective entry into the suits lands. The plaintiff's counsel relied on the case of *Joseph Gabumi Kiritu v Lawrence Munyambu Kabura* CA No 20 of 1993, *Adnam v Earl of Sandwich* (1877) 2 QB 485 and *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR and submitted that the evidence on record has proved the Plaintiff's claim on a balance of probabilities and is entitled to the prayers sought.

The Defendants' Submissions

46. The defendants filed their submissions dated September 12, 2022 and filed on September 15, 2022 through the firm of Kijaru, Njeru & Co Advocates. Learned counsel for the defendants submitted that there was a change of entries in the certificate of title for parcel Muthambi/Gatua/429 in 2003 when the land was subdivided into three portions Nos. Muthambi/Gatua/2294, 2295 and 2296 after filing of a succession cause No 15 of 2000 in which the defendants became the absolute registered owners in accordance with section 24 and 25 of the *Land Registration Act*. That their certificates of title were issued on March 11, 2003 which meant that the plaintiff's time had stopped running from 1997, and therefore 12 years had not lapsed by the time the suit was filed. The defendants counsel relied on the case of *Kimani Ruchere v Swift Rutherford and Company Limited* (1980) KLR.
47. It is the defendants submissions that the plaintiff's occupation and possession was not open and continuous and cited the institution of Civil Suit No 40 of 2003 at Meru High Court by the plaintiff which suit was dismissed for want of prosecution. That the plaintiff has never enjoyed peaceful possession because of the existing dispute that has been there since 2003 upto 2020 when the plaintiff instituted the instant suit.
48. The defendant also submit that the plaintiff's admission that he was invited into land parcel Muthambi/Gatua/429 by his deceased grandfather, M'Rucha to live and possess the land meant that the claim of adverse possession cannot accrue since the occupation was by consent or license. Counsel for the defendant relied on the case of *Mwinyi Hamis Ali v Attorney General & Philomen Mwaisaka Wanaka* Civil Appeal No 125 of 1997. That if at all the plaintiff entered the land he did so as a licensee and not a trespasser and submitted that the law stipulates that for one to prove adverse possession, the person must enter the property as a trespasser. The defendants pointed out that the plaintiff's submission that the surveyor's report ascertained that the plaintiff lived, occupied and had constructed a permanent home on the suit land is misleading as paragraph 2 of the same report states that he built on parcel No 2294 which is owned by Mary his grandmother and his father, the 2nd defendant, and which the defendants have no interest in since it is their share. That the surveyor's report also stated that all the parties could not trace their boundaries because the same had been interfered with by the plaintiff.



Analysis and Determination

49. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. In my view, the issues for determination are whether the plaintiff has acquired LR Nos Muthambi/Gatua/2294, 2295 and 2296 (originally LR No Muthambi/Gatua/429) by adverse possession and whether the plaintiff is entitled to the reliefs sought.
50. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire title to it. In Kenya, the doctrine is anchored on specific sections of the *Limitation of Actions Act* cap 22 and the *Land Registration Act*, 2012.
51. 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.”
52. Section 13 of same *Act* states:
- “(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 until some person takes adverse possession of the land.
- (2) Where a right 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 purpose of the 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 adverse possession of the land.”
53. Section 17 on the other hand states as follows:
- “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.”
54. 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 *Act* 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.”

55. The law and requirements for adverse possession was laid down by the Court of Appeal in *Titus Mutuku Kasuve v Mwaani Investments Limited* [2004] eKLR where it stated as follows:

“In order to be entitled to any 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.”

56. In *Mbira v Gachubi* [2002] 1 EALR 137 it was held thus:

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”

57. In the instant case, there is no dispute that the parties are all related by either being the widow, son or grandson of the late Rucha Mbwiria (deceased) who was the registered owner of Parcel No Muthambi/Gatua/429. The deceased became registered as proprietor on November 6, 1997. After the demise of the deceased, succession proceedings in Meru High Court Succession Cause No 15 of 2000 were instituted and the court issued a grant which was confirmed on October 18, 2001. The family of the deceased subdivided the land amongst themselves in accordance with the court order and the subdivisions became land parcel Nos Muthambi/Gatua/2294, 2295 and 2296.

58. In his supporting affidavit, the plaintiff has deponed that he was gifted the land by his grandfather M'Rucha M'Mbriria (deceased) who is stated invited him to the said land. From the authorities cited above, it is trite that a person who seeks to acquire title to land by way of adverse possession must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period of twelve years without interruptions. However, in this case, the plaintiff himself has confirmed on oath that he was invited into the suit land. Moreover, the plaintiff claim to have enjoyed a peaceful and exclusive possession and occupation when the evidence on record confirm that that was not the case. The court has noted that there was a Civil Suit No 40 of 2003 filed by the plaintiff and others against the 1st and 2nd defendants herein. In that suit, the plaintiff acknowledged in his pleadings that the suit land Muthambi/Gatua/429 belonged to the deceased and was to be shared amongst the family members. The plaintiff who is a grandson of the deceased in my view, could only have asserted his claim as a beneficiary of the estate of the deceased through Succession Cause No 15 of 2000, but not through this claim of adverse possession. Indeed in their plaint in Civil Suit No 40 of 2003, it was pleaded in paragraph 11 that the 2nd to 5th plaintiffs in that case who are beneficiaries to the estate of the deceased had “consent to the estate to be wholly transferred to the 1st plaintiff” who is the plaintiff herein.

59. Going by the threshold set out for adverse possession, I am not convinced that the plaintiff herein has on a balance of probabilities proved his claim for adverse possession.

60. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. It is



my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession.

61. Consequently, the plaintiff's suit is without merit and the same is hereby dismissed.
62. Although costs of an action or proceedings are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the Civil Procedure Act. A successful party should ordinarily be awarded costs of an action unless the court for good reasons directs otherwise. Although the parties in this case are all related, the court finds no good reason why the successful litigants should not be awarded costs of the suit. Accordingly, the defendants shall have costs of the suit to be borne by the plaintiff.
63. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH DAY OF NOVEMBER, 2022 IN THE PRESENCE OF:

C/A: Martha

Ms Masamba for plaintiff.

Ms Kijaru for defendants.

CK YANO,

JUDGE.

