



Kabura v Gaitho (Suing as legal representative or administrator of the Estate of Grace Wanjiru Macharia (Deceased) (Environment & Land Case 17 of 2020) [2022] KEELC 15544 (KLR) (20 December 2022) (Judgment)

Neutral citation: [2022] KEELC 15544 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 17 OF 2020
LN GACHERU, J
DECEMBER 20, 2022**

BETWEEN

ELIZABETH KABURA PLAINTIFF

AND

LAWRENCE KIMANI GAITHO (SUING AS LEGAL REPRESENTATIVE OR ADMINISTRATOR OF THE ESTATE OF GRACE WANJIRU MACHARIA (DECEASED) DEFENDANT

JUDGMENT

- 1 Through an Originating Summons dated 10th June 2021, the Plaintiff sought for orders against the Defendant as follows;
 - a. A declaration that the title of the land parcel number LOC. 20/Kambirwa/1860, has been extinguished by the Plaintiff's adverse possession thereof for a period of more than Twelve (12) years in terms of Limitations of Actions Act.
 - b. That the Plaintiff has become entitled by adverse possession to the whole land parcel comprised in title number LOC. 20/Kambirwa/1860, in Gikindu Location within Muranga County and registered under the Land Act in the name of Grace Wanjiru Macharia (deceased).
 - c. That the District Land Registrar Murang'a, be directed that the order herein shall be instrument of transfer of ownership of the land parcel reference number LOC. 20/ Kambirwa/1860 to the Plaintiff.
 - d. That the costs of this suit be provided for.
- 2 The Originating Summon was based on grounds set out on the face of the said Summons and the Supporting Affidavit of Elizabeth Kabura, sworn on 10th June 2021.



- 3 It is the Plaintiff's disposition that the suit land LOC. 20/Kambirwa/1860, is registered in the name of Grace Wanjiru Macharia (Deceased) and the Defendant is her legal representative and administrator. That the suit land was originally owned and registered in the name of Macharia Gaitho (Deceased, who is the father of the Defendant, before it was transferred to the aforementioned Grace Wanjiru Macharia. That sometimes in the year 1970, the said Macharia Gaitho (deceased) sold to the Plaintiff a parcel of land measuring approximately 3 acres more specifically being LOC. 20/Kambirwa/1634, and the same was registered in the name of the Plaintiff. That the said Macharia Gaitho approached her to purchase a further 2 acres land in 1976. That she purchased the additional two acres to be excised from LOC. 20/Kambirwa/1635 and she paid the whole purchase price as per the sale agreement executed.
- 4 It was her disposition that she took possession of the said 2 acres of the suit land immediately after the sale and she has extensively developed and cultivated on it since then. That the late Macharia Gaitho subdivided his parcel of land LOC. 20/Kambirwa/1635, into 2 portions of land more specifically being LOC. 20/Kambirwa/1860 and LOC. 20/Kambirwa/1861, ready to transfer LOC. 20/Kambirwa/1860 to the Plaintiff, but he died before he could complete the transfer process. That on 24th August 1999, the suit land parcel No. LOC. No. 20/Kambirwa/1860, was transferred to the Defendant herein pursuant to a Judgment of the Court in Muranga Senior Resident Magistrates Court Succession Cause 50 of 1987. That she objected the said succession matter and her objection was dismissed. She filed an Appeal being Nairobi High Court Appeal 177 of 1999, but the said Appeal was dismissed for want of prosecution.
- 5 The applicant deponed further that she has been in occupation of the suit land since 1976, and that the Defendant had never challenged her occupation. That she has been in open, peaceful, continuous and uninterrupted occupation of all that parcel of land known as LOC. 20/Kambirwa/1860 for over 45 years and has extinguished the Defendant's ownership and title over it.
- 6 The Originating Summons was strongly opposed by the Defendant herein through a Replying Affidavit sworn by Lawrence Kimani Gaitho on 1st September 2021. It is the Defendant's disposition that the Plaintiff had not acquired title to land parcel No. LOC. 20/Kambirwa/1860 via Adverse Possession as he had not been in occupation of the said land as alleged. That in Muranga SPM Succession Cause No. 50 of 198, the Plaintiff herein was claiming the suit land on grounds of purchaser's interest and wanted the Court to enforce the sale agreement. That the Plaintiff lodged an Appeal at High Court being Civil Appeal 177 of 1999, pursuing the claim of purchaser's right, but the Appeal was dismissed. That the Plaintiff entry into the suit land was permissive and she thereafter engaged in litigation over her claim and therefore time did not start running in her favour until after 11th November, 2011, at the earliest. That since the beginning of the year 2021, he had without success tried to evict the Plaintiff from his land. He urged the Court to dismiss the Originating Summons and order the Plaintiff to vacate the suit land.
- 7 The Originating Summons was canvassed via viva voce evidence and the Applicant/Plaintiff gave evidence for herself called 3 witnesses while the Defendant also gave evidence for himself and called one witness.

Plaintiff's Case

- 8 PW 1 Elizabeth Kabura adopted her witness statement dated 10th June 2021, as her evidence in chief and produced the documents contained in her list of documents dated 12.1.2022, and those attached to her Supporting Affidavit of 10.6.2021 as her exhibits. She testified that she was a peasant farmer and she came from Loc. 20 Kambirwa. That she knew the Defendant and the parcel of land in question is LOC. 20/Kambirwa/1860. That she had lived on the said suit land since 1976 and was cultivating



- different crops on it. That the suit land was registered in the name of Grace Wanjiku Macharia, and she had never attempted to evict her from the suit land. That she entered the suit land after she purchased it, but the title was never given and/or transferred to her name.
- 9 On cross examination, she testified that she had never been evicted from the suit land since she occupied it in 1976. That she had never been sued or received any suit documents from Court in relation to the suit land. That she acquired the suit land via purchase from the Late Macharia Gaitho. That prior to the sale in 1976, the late Macharia Gaitho, had allowed her to use and take care of the suit land. That in 1976, she purchased the suit land and began doing subsistence farming on it. That the late Macharia Gaitho never at any time evicted her from the suit land. That the late Macharia Giatho sold to her the suit land, but did not transfer title of the land to her, even after they attended the Land Control Board together.
- 10 Further that the suit land has since been transferred from Macharia Gaitho to Grace Wanjiru Macharia, his wife via Muranga PM Succession Cause 50 of 1987. That she did not know when the Succession cause was filed, but she had placed a caution claiming purchaser's interests. That she had filed an Appeal in Nairobi, but she did not know the outcome of the said Appeal.
- 11 PW 2 Francis Wamwea Mwangi adopted his witness statement dated 10/6/2021, as part of his evidence in chief. He testified that he is the chief of Gikindu Location Kwambira Sublocation. That he knew the Plaintiff and she was his neighbour in Kwambira sublocation. That he knew the parcel of land in question and it was about half a kilometre from his home. That he started seeing the Plaintiff in 1982, when he became chief of the area and she has never been evicted from her parcel of land. That the Plaintiff had planted mango trees and other subsistence crops on the suit land. That the Plaintiff had reported to her office that she bought land from Macharia Gaitho and the said Macharia Gaitho had refused to transfer the said land to her. That upon receiving the said complaint, he wrote a letter to the DO Kiharu and copied the same to the chief in Weithaga where the said Macharia Gaitho lived. That he found her on the suit land in 1982 and she was utilizing it and he did not know if the said Macharia Gaitho had allowed her to use it.
- 12 On cross examination, he testified that he only learned about Macharia Gaitho when the Plaintiff came to his office to file a complaint against him. That Macharia had allowed the Plaintiff to use the land. That he used to visit the area and he saw the Plaintiff utilizing the land.
- 13 PW 3 Michael Karanja Ndegwa, adopted his witness statement dated 10th June 2021. He testified that he knew the Plaintiff. That he was a mason and he built the Plaintiff's first home on land Parcel No.1634. That the Plaintiff has been cultivating land Parcel No.1860 since 1976. That in 1976 he was building a kitchen for the Plaintiff and she told him that she had acquired land Parcel No.1860. That the Plaintiff has lived on the suit land since 1976, and she had planted trees and subsistence crops.
- 14 On cross examination, he testified that he was 76 years old and that the suit land was sold to Kabura by Macharia Gaitho, who was known to him. That the Plaintiff had stayed on the suit land since she purchased it in 1976. That he did not know Kabura before 1970, when she engaged him to construct her house. That he knew the land that was the subject of this case and that the Plaintiff only started to cultivate it in 1976.
- 15 PW 4 Zakayo Mwangi Muchina, adopted his witness statement dated 10th June 2021, as part of his evidence in chief. He testified that he knew the Plaintiff since 1982, when he settled in Kambirwa. That the Plaintiff's land was No. 1634, while his land was land Parcel No.1227. That the Plaintiff was also using land parcel No.1860, and she was growing subsistence crops on it. That he did not know how the Plaintiff acquired land Parcel No.1860.



16 On cross examination, he testified that he knew the suit land but he did not know the boundary between land Parcel No. 1634 and land Parcel No.1860. That he could not differentiate between land parcel No.1634 and 1860 because they were together. That he did not know how the Plaintiff acquired land Parcel No.1860, and he had never asked her about it.

Defense Case

17 DW 1 Lawrence Kimani Gaitho, adopted his Replying Affidavit sworn on 1/9/2021, as part of his evidence in chief and produced the documents contained in his list of documents dated 12th January 2022, as exhibits. it was his testimony that the Plaintiff is not adverse to the suit land as she had been in occupation of it after being allowed to cultivate it by her father. That his father sold land Parcel No.1634, to the Plaintiff, and the same was transferred to her successfully. That after his father subdivided the land, he was left with into 2 parcels being No.1860 and 1861 and he intended to sell No.1860. That he never saw any sale agreement for No.1860, and that his father later changed his mind about selling land Parcel No.1860. That his father changed his mind after consulting the family and they objected to the sale.

18 Further that his father died in 1986 and in 1987 his mother filed a Succession Cause regarding his estate. That land Parcel No.1860 was included among the property available for distribution. That the Plaintiff objected in the succession proceedings, and her objection was not sustained. That she subsequently filed an appeal and it was heard and judgment was delivered, but he was unable to obtain a copy of the said Judgment. That the litigation was ongoing as at 24/1/2011. That he has filed a suit at the Magistrate's court seeking eviction orders against the Plaintiff. That before he filed the said suit, the Plaintiff was only in occupation of part of the suit land, and not the whole of it. That the instant suit was filed after he filed his suit at the Magistrates Court. That he did not file the suit from 2011 to 2021 as he had not received Letter of Administration over the estate of his mother.

19 It was his further testimony that the Plaintiff only occupied the entire suit land in 2021, after he sued her. That in Jan 2011, the Appeal filed by the Plaintiff had not yet been decided and the Plaintiff filed the instant suit in June 2021 and only a period of 9 ½ years had passed. He urged the Court to issue an eviction order against the Plaintiff.

21 On cross examination, he reiterated that that he started seeing Kabura on the suit land in 1976, and his father had allowed her to cultivate part of it. That his father did not inform him that he had sold the suit land to the Plaintiff. That his father could not have sold the suit land to the Plaintiff, because he had not consulted the family about it. That his father received Kshs. 9000/= for 1 ½ acres and land Parcel No.1860, was 2 acres. He confirmed that he had filed another suit in 2021 before the Chief Magistrates Court, seeking to evict the Plaintiff. That he had attempted to stop the Plaintiff from using the suit land, but she could hear none of it and she continued using the suit land. That before his father passed on, there was no dispute between him and the Plaintiff. That the Plaintiff had forced his father to transfer the suit land to her, but he refused and the dispute was referred to the chief though nothing happened. That his father never issued the Plaintiff with a notice to vacate, and he did not know why. That he came to learn later that some money had been paid and the said amount was never refunded to the Plaintiff.

22 DW 2 Margaret Gakere Irungu, testified that the Defendant herein was her brother and also the Administrator of the estate of their late mother Grace Wanjiru Macharia. She went on to adopt her Replying Affidavit sworn on 1/9/2021, as part of her evidence in chief. She testified that she came to know of the Plaintiff in 1980, as she used to visit their home. That the Plaintiff want to purchase land from their father but their father did not sell the land. That the Plaintiff only uses part of land Parcel



No.1860, and not the entire parcel. That she only started to cultivate the whole of 1860, in 2021, when a suit was filed against her.

23 On cross examination, she stated that the Plaintiff was allowed permission to use land Parcel No.1860, by their late father. That she has never been evicted from the suit land and that her family had never used the suit land. That she gets food for her cows from the suit land. That the Plaintiff was not in good terms with her father and her mother used to chase her away from their home every time she came to see him when he was sick. That the Plaintiff wanted to buy land Parcel No.1860, and she is not aware if her father received any money as purchase price from the Plaintiff.

24 Thereafter the parties filed their respective written submissions.

25 The Plaintiff filed her written submissions dated 22nd June 2022, through the Law Firm of L.M. Kinuthia & Associates and identified 4 issues for determination by this Court. The Plaintiff relied on a litany of cases and submitted that she had proved that she was in actual and uninterrupted use and occupation of the suit land since 1976 and had therefore become adverse to the suit land as per the provisions of Sections 7 and 38 of the Limitation of Actions Act. She urged the Court based on the foregoing to allow her claim as prayed.

26 The Defendant on other hand also filed his written submissions through the Law Firm of Waiganjo Gichuki & Co Advocates dated 11th July 2022. The Defendant submitted that the Plaintiff gained occupation of the suit land as licensee of the registered owner and cannot therefore claim adverse possession. That the Plaintiff's occupation of the suit land had been subject of litigation upto 2011, and therefore time for adverse possession should begin to be computed from 2011. That with time beginning to run in 2011, the Plaintiff had not reached the 12-year legal threshold required in adverse possession. That the Plaintiff's suit should therefore be dismissed with costs.

27 The Court has carefully read and considered the pleadings by the parties herein, the evidence adduced, the relevant provisions of law and finds that the issues for determination are;

- I. Whether the Plaintiff has met the threshold for grant of orders for adverse possession
- II. Whether the Succession Causes stopped time in adverse possession from running?
- II. Who should bear the cost of the suit?

i. Whether the Plaintiff has met the threshold for grant of orders for adverse possession

28 The impugned land is registered in the name of Grace Wanjiru Macharia, having been issued with title on the 26th August 1999. The effect of such registration was espoused in Section 27(a) of the Registered Law Act, the regime under which the land was initially registered and now repeated in Section 24(a) of Land Registration Act 2012; which states:-

24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

29 Additionally, section 25(1) of the said Act provides that a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the Land Registration Act, as not requiring noting in the register.



30 Section 28 of the *Land Registration Act* provides that:

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

- (a)
- (b)
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

31 The Plaintiff herein wishes to defeat title on the basis of prescriptive rights as allowed above. It is the Plaintiff case that she has been in continuous, uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the Plaintiff.

32 The Law on adverse possession is set out under the *Limitation of Actions Act*. Section 7 places a bar on actions to recover land after 12 years from the date on which the right accrued. Section 13 provides that adverse possession as the exception to this limitation:

- (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.”

33 Finally, Section 38 of the *Act* provides that:

“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.”

34 The principle of adverse possession was more elaborately set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts



which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

35 This right is adverse to land and does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the *Act* gives authority to the claimant to apply to Court for Orders of adverse possession. In the case of *Mtana Lewa Vs Kabindi Ngala Mwangandi* [2015] eKLR, the Court held:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

36 Further, in the case *Mbira v. Gachuhi* (2002) 1 EALR 137:the court stated as follows;

“... 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 statutorily prescribed period without interruption...”

37 Therefore, to determine whether the Plaintiff’s rights accrued the Court will seek to answer the following;

- i. How did the Plaintiff take possession of the suit property?
- ii. When did she take possession and occupation of the suit property?
- iii. What was the nature of her possession and occupation?
- iv. How long have the Plaintiffs been in possession?

38 For a claim of adverse possession to suffice, the claimant must demonstrate that the same was non-permissive and non-consensual and without license. It is clear from the above analysis that a claim based on a sale agreement cannot issue, since the vendor’s consent and permission is obtained before one can gain ingress into the land. The Plaintiff’s claim emanates from a purported sale Agreement, which this Court has read and concludes the entry was permissive.

39 However, every rule has an exception and the Court in the case of *Public Trustee v Wanduru Ndegwa* [1984] eKLR found that in cases of sale agreement Limitation of action begun running from the date of final payment. Further, in the case *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, the Court held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.



- 40 The Defendant has refuted the purported sale and testified that the Plaintiff did not at any time purchase the suit land from his father as alleged. That his father had intended to sell the suit land, but he had reneged on his intention upon consultation with his family which was opposed to the said sale.
- 41 The onus to prove that indeed a sale agreement was executed between the Plaintiff and the late Macharia Gaitho lies squarely with the Plaintiff. The Plaintiff alleged that she bought land parcel LOC. 20/Kambirwa/1860, from the late Macharia Gaitho in 1976. She corroborated her evidence via a document executed between the Plaintiff and the late Macharia Gaitho on 11/5/1976 and 2/5/1976, evidencing payment of Kshs. 9,000/= for two acres of land. The Court notes further that while the Defendant denied the existence of the sale agreement, he did not tender any evidence to support his allegations and in fact, he confirmed that the Plaintiff was in occupation of land Parcel No. LOC. 20/Kambirwa/1860, with the permission of his father the late Macharia Gaitho.
- 42 This Court appreciates that the proof of sale document produced by the Plaintiff did not specifically refer to the suit land, and that it was only evidence of payment of monies and not a sale agreement. However, the said document referred to two acres of land owned by Macharia Gaitho and the suit land LOC. 20/Kambirwa/1860 measures approximately 2 acres. According to the Plaintiff's statement she purchased LOC. 20/Kambirwa/1860, measuring 2 acres from the late Macharia Gaitho and the 2 acres was adjacent to her land parcel LOC. 20/Kambirwa/1634, which she had purchased earlier from the late Macharia Gaitho. The Defendant through the evidence of DW 1 and DW 2 confirm that indeed LOC. 20/Kambirwa/1860, is adjacent to the Plaintiff's land and there was no demarcation between them and the Plaintiff's land. They further confirmed that indeed the Plaintiff was occupying some of the suit land since the 1980's.
- 43 Based on the foregoing, the Court finds that the evidence of the Plaintiff is that there was a sale of the suit land between the late Macharia Gaitho and herself to be believable and has been corroborated with cogent evidence. While the Defendant deny that the Plaintiff bought the suit land from his father, he has not produced any evidence to the contrary. In fact, from the evidence of both DW 1 and DW 2, they seemed not to know when the Plaintiff gained access into the suit land, as they only began to see her in the 1980's. In addition, the Defendant did not even on cross examination dispute the details of the proof of sale produced in Court and it is right to conclude there indeed was a sale agreement for the suit property between the vendor and the purchaser therein.
- 44 Having concluded that there was a sale agreement between the Plaintiff and the late Macharia Gaitho over the suit land, it follows that time for adverse possession begins to run from 3/5/1979, when the Late Macharia Giatho confirmed receipt of the last instalment from the Plaintiff
- 45 Having found that there was a sale agreement and time for adverse possession started to run in 1976, the next issue for determination is whether the Plaintiff's possession was continuous and uninterrupted since 1976, and whether the Objection proceedings in the Succession Cause stopped time from running.

ii. Whether the succession causes stopped time in adverse possession from running?

- 46 It is not in doubt that the late Grace Wanjiru Macharia acquired title over the suit land following a Succession cause in the estate of the late Macharia Giatho. It is also not in doubt that Grace Wanjiru Macharia is also deceased and the Defendant is the administrator of her estate. Further, it is not in dispute that the Plaintiff herein filed objection proceedings in Muranga Principal Magistrate Succession Cause 50 of 1987 claiming purchasers' interest over 2 acres of land known as LOC. 20/Kambirwa/1860, having purchased the same from Macharia Gaitho. This Court has perused the judgment of the said Court produced in Court and notes that the Objection claim filed by the Plaintiff



herein was dismissed. The Court notes that the Plaintiff herein being dissatisfied with the Judgment of the Court in Muranga Principal Magistrate Succession Cause 50 of 1987 preferred an appeal in the High Court of Nairobi Civil Appeal 177 of 1999, which upon hearing and consideration was also dismissed. In dismissing the said Appeal, the High Court stated “ it is trite law, that a succession Court will determine who beneficiaries are in accordance with the Succession Act. ... A creditor can only sue in a civil suit and not in succession proceedings. ...”

- 47 This is a claim for adverse possession and it is trite that such a claim accrues on land and not title, and therefore it matters not that title had not been issued to Grace Wanjiru Macharia in 1976 when the Plaintiff gained access into the suit land.
- 48 The Plaintiff contended that she gained ingress into the suit land after the impugned sale in 1976, and this Court herein above has found that indeed there was a sale agreement that granted the Plaintiff possession and occupation of the suit land. That since the said 1976, she has been in open, continuous and uninterrupted occupation of the suit land. The evidence of the Plaintiff was corroborated by PW 2, PW 3 and PW 4. The Defendant also confirmed that indeed the Plaintiff had occupation and use of the suit land since before the 1980's and that neither him or his parents now deceased had attempted to evict her.
- 49 The Defendant on the other hand contends that while it is true the Plaintiff gained entry sometime in 1976, the said entry was permissive and therefore adverse possession and could not suffice. The Defendant contends further that even where possession and occupation is established, time for adverse possession stopped running when the Plaintiff filed an objection in Muranga Principal Magistrate Succession Cause 50 of 1987 and consequently filed High Court of Nairobi Civil Appeal 177 of 1999. That even though this Court were to consider the Plaintiff's Claim for Adverse Possession, it should compute time from 24/1/2011, when the High Court dismissed the Plaintiff's Appeal. The Defendant contends that the threshold of 12 years has therefore not been met and he had filed a suit being Muranga CMCC no. E009 of 2021 over the suit land seeking eviction orders against the Plaintiff .
- 50 What can stop time from running is the filing of a suit to assert rights. In Malindi CoA Civ' App' No. 29 of 2016 *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR, the Court held
- in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.
- 51 In *Githu vs Ndeete* {1984} KLR 776, the Court found that issuance of notice was not a step to stop time from running. Similarly, the Court of Appeal in *Presbyterian Church of East Africa (Uthiru Church) & Another vs Kiboro & 3 Others* {2022} civil appeal no.303 of 2018 found that the trial Court erred when it held that the demand letter amounted to interruption of time.
- 52 The suit referenced to in the pleadings is Muranga Principal Magistrate Succession Cause 50 of 1987 and consequently filed High Court of Nairobi Civil Appeal 177 of 1999. The Court notes that the objection proceedings and consequently the High Court Civil Appeal were both initiated by the Plaintiff herein in an attempt to protect her purchaser's interests. This Court is guided by the decision in of the Court of Appeal in the case of *Peter Kamau Njau v Emmanuel Charo Tinga* (*supra*), where the Court found that for time in adverse possession to stop running, the owner of the suit land had to take active steps towards recovery of the land and/ or to assert his rights as the owner.
- 53 In the instant case, prior to 2021, neither the Defendant nor his parents had taken any steps to assert their rights over the suit land. Both DW 1 and DW 2 testified that prior to 2021, they had never evicted the Plaintiff and /or interfered with her use and occupation of the suit land. The Court has perused the



Plaint filed in Muranga CMCC no. E009 of 2021, by the Defendant seeking eviction orders against the Plaintiff in respect to the suit land. The Court notes that the said suit was only filed in 2021, yet it has already been established that the Plaintiff had been in possession of the suit land since 1976. By the time the Defendant filed a suit for eviction orders, the Plaintiff had been in occupation for close to 45 years. In that case therefor, this Court has established that there is nothing that stopped time from running within the 12 years of the Plaintiff's occupation and possession. Even so as at February, 2021 the Plaintiff had become adverse to title and is therefore entitled to it.

54 The upshot of the above is that the objection proceedings filed in Muranga Principal Magistrate Succession Cause 50 of 1987 and the consequent Appeal, more specifically being Nairobi Civil Appeal 177 of 1999, filed by the Plaintiff did not interrupt the running of time for purposes of adverse possession. For purposes of computing time, this Court finds that time started running from 1979, the 2021 interruption notwithstanding and the Plaintiff is therefore entitled to the suit property. To this end, this Court finds and holds that the Plaintiff has met the threshold for the grant of Orders of Adverse Possession and is therefore entitled to LOC. 20/Kambirwa/1860 to the exclusion of the Respondent herein

iii. Who should bear costs of this suit

55 It is trite that costs shall follow the events, and that the successful party be awarded costs. It is not in doubt that the Applicant is the successful party and this Court has no reasons not to exercise its discretion in his favor. To this end, this Court finds and holds as follows:

- a. That the Plaintiff/Applicant has proved her claim for adverse possession to the required standard.
- b. That the Plaintiff/Applicant is entitled to LOC. 20/Kambirwa/1860, and should be registered as the absolute proprietor forthwith.
- c. That Land Registrar Murang'a be and is hereby directed to transfer title for LOC. 20/Kambirwa/1860, from the name of the late Grace Wanjru Macharia to the name of the Plaintiff/Applicant.
- d. The Plaintiff/Applicant is awarded costs of the suit.

56 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 20TH DAY OF DECEMBER 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr. Kinuthia -Plaintiff

No appearance - Defendant

Joel Njonjo – Court Assistant.

L. GACHERU

JUDGE



20/12/2022

