



**Nagi & another v Mbugua & 2 others (Enviromental and Land Originating
Summons E003 of 2022) [2025] KEELC 911 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 911 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2022**

LN GACHERU, J

FEBRUARY 11, 2025

**IN THE MATTER OF CLAIM TO TITLE OF LAND BY ADVERSE POSSESSION
OVER PORTION IN PARCEL KABATI TOWNSHIP /6 (MEASURING 66X150
FT)**

BETWEEN

VICKY GITAU NAGI 1ST PLAINTIFF

MARY WAITHIRA GITAU 2ND PLAINTIFF

AND

JANET WANJIKU MBUGUA 1ST DEFENDANT

PETER NJOROGE MBUGUA 2ND DEFENDANT

LAND REGISTRAR, MURANG'A 3RD DEFENDANT

JUDGMENT

1. The Plaintiffs herein filed this Originating Summons dated 14th February 2022, wherein they sought for Judgement against the Defendants jointly and severally for the following orders that:
 - i. Vicky Gitau & Mary Waithera Gitau be declared to have adverse possession of all that parcel measuring 66ft by 150ft in land Kabati/Township/6, which parcel of land is clearly identifiable on the ground, as it is demarcated and fully developed by the Plaintiffs.
 - ii. The Land Registrar Murang'a where parcel Kabati Township/6 relates does rectify the Register in such a manner as will reflect the Plaintiffs herein as the registered proprietors jointly for the parcel measuring 66ft by 150ft or thereabout.
 - iii. The Honorable Court be pleased to restrain the Defendants by an order of permanent injunction from entering, alienating, disposing or in any other manner interfering with the



occupation use of the Plaintiff parcel measuring 66ft by 150ft or thereabouts known as Kabati Township/6.

- iv. The Defendants be enjoined permanently from use, occupation or leasing or wasting in any way the land parcel 66ft by 150ft in Kabati Township/6 pending the determination thereof.
 - v. That any other question as may be pertinent to the case be determined and appropriate directions and orders be given.
 - vi. That the costs of these proceedings be borne by the defendants.
2. It is the Plaintiff's contention that the 1st Defendant is the current registered proprietor to land parcel Kabati/Township/6 measuring approximately 66 feet by 150 feet (the suit property) as per the Certificate of Official Search dated 7th December, 2015; which, reflects that Janet Wanjiku Mbugua was registered as the proprietor thereof on 19th August 2004, and a Certificate of Lease issued in her name on the same date. The 1st Defendant herein is Jane Wanjiku Mbugua.
 3. The Plaintiffs averred that they entered into the suit land and occupied it in the year 2004, where they reared chicken and pigs on different seasons without any worry. Further, that the 1st Defendant appeared on the suit land in October 2006, or thereabout, claiming ownership of the said parcel of land and showed the Plaintiffs the title deed to the said land, after which the Plaintiffs expressed their interest to purchase the same.
 4. Thereafter, the Plaintiffs in the role of purchasers executed a Sale Agreement with the 1st Defendant being the Vendor of the suit land on 25th October 2006, wherein, the suit property was disposed to the Plaintiffs for the entire agreed-upon purchase price of Kshs.480,000/=, out of which Kshs.300,000/= was paid to the 1st Defendant through a Banker's cheque drawn in favour of C. Njeri Waweru at the signing of the said Sale Agreement.
 5. Further, the Plaintiffs paid a deposit of Kshs 430,000/=, and were to pay the balance of Kshs 50,000/=, upon completion of the transfer, which was never done as contracted, and the last payment was in October 2007; since then, the Plaintiffs continued to rear chicken and pigs on the said land, and had workers thereon, without any interruption.
 6. However, in July 2021, the 2nd Defendant erected a fence on the premises, encroaching on the land without any regard to the Plaintiffs, an incident that was reported to the OCS Kabati Police Station. The encroachment was so hostile that the Plaintiff's withdrew the service of their service men on the land, and even sold the chicken and the pigs as they waited for a court order on the ownership herewith.
 7. The Plaintiffs claimed that attempts were made to effect Service upon the 1st and 2nd Defendants to no avail. On 8th March 2023, an application was made by the Plaintiffs to effect Service by way of Substituted Service, vide Daily Newspaper Advert and/or Registered Post which application was allowed via an order dated 28th March 2023.
 8. Even with the substituted service, the 1st and 2nd Defendants did not Enter any Appearance nor file their Defence, and therefore the matter proceeded without their input.
 9. However, the 3rd Defendant entered appearance and filed a Replying Affidavit dated 6th March 2024, wherein it claimed that the suit land was registered in the names of the County Council of Murang'a, but had been leased to the 1st Defendant via a certificate of lease dated 19th August 2004. Further, that on 15th October 2013, a charge was registered against the property in favor of Chase Bank (k) Ltd, who are not parties to the suit. On 1st December 2021, a caution was registered against the suit property in favor of the Plaintiffs.



10. In her Replying Affidavit dated on 6th March 2024 E.M. MPUTHIA in her capacity as the Land Registrar, Murang'a, deposed that the register of the suit land was opened on 19th August, 2004, in the names of the County Council of Murang'a as per the annexed Green card thereto marked "EM 1." Further, the 1st Defendant was registered as the proprietor of the suit property on 19th August 2004, and a Certificate of Lease issued in her name on the same date.
11. Thereafter, a Charge was registered over the property in favour of Chase Bank Ltd on 15th October 2013, and after that, the Plaintiffs registered a Caution over the suit land on 1st December 2021, claiming purchasers' interest.
12. After the close of pleadings, the instant suit was dispensed by way of viva voce evidence, wherein the Plaintiff gave evidence through Vicky Gitau Nagi, the 1st Plaintiff herein and the 3rd Defendant gave evidence via E. M. Mputhia, the land Registrar Murang'a.

The Plaintiffs Case

13. PW1 Vicky Gitau Nagi, the alleged owner of the suit land, and husband to the 2nd Plaintiff testified that he acquired the suit land after purchase from the previous owner. He adopted his witness statement as his evidence in chief, and also produced his list of documents as P.Exhibit1.
14. It was his further evidence that after purchase of the said land, they fenced it, which measures 60 by 150. The witness testified that they purchased this parcel of land in 2006 for Ksh. 400,000/=. He claimed that the said amount was paid by instalments. However, there was a balance of Ksh.50, 000/=which he intended to pay land rent and rates.
15. However, the vendor left the Country, and they were not able to go through the whole process, but the Surveyor went to the ground, and the Land Control Board Consent, was never obtained.
16. It was his evidence that there is encroachment over the suit land, and the said encroachment has interrupted his life as he is a farmer, and his source of earning has been interrupted. He urged the court to allow his claim.
17. Upon being cross examined by Ms. Ruto for the 3rd Defendant, the PW1 testified that he bought the suit land from one Janet, who showed them a title deed, which title was not produced as an exhibit. He however did not know the original owner of the suit land. He claimed that he had not seen the documents by the 3rd Defendant, and he did not know about the lease.
18. He further claimed that he entered unto the suit land in 2006, and that completion was to take place after 120 days. Further that he paid the vendor using a cheque for Ksh.300,000/=:, and he confirmed that he had produced exhibits to show that he paid the purchase price. The witness also denied that he was aware that the original owner of the suit land was Muranga County Council, and he was not also aware that the lease was not supposed to sell the land.
19. Further, he confirmed that he did not sue Murang'a County Council, and he blamed Janet the vendor for all the mess, He urged the court to direct the Land Registrar to register the land in his name.
20. In re-exam, he confirmed that he saw the original title and took photocopy of the same, but Janet kept the original title, and therefore, he could not produce the original title.



3rd Defendant's Case

21. DW1, E.M. Mputhia, the Land Registrar Muranga relied on her Replying Affidavit dated 6th March 2024, as her evidence in chief. She also produced the annexures thereto as her Exhibits, marked DEXHBT1.
22. Upon being cross examined by M/s Wangui for the Plaintiffs, she confirmed having produced exhibits, and produced the White Card, which shows the suit land has a leasehold tenure, and there is a caution registered thereon, claiming purchaser's interest. She also confirmed that her office also registers interests on leasehold properties.
23. Further, the witness confirmed that the lease prohibits the sale of the suit land, as the land belongs to the County of Muranga, but has only leased it. However, where there are conditions to that effect, the lessee can sell and subdivide the land.
24. After the viva voce evidence, parties were directed to file and exchange written submissions, which directions were complied with. The said respective submissions are as follows;
25. The Plaintiffs herein filed their written submissions dated 27TH August 2024 through Chris Maina & Co. Advocates and they identified six (6) issues for determination being;
 - a. Whether there was a valid sale agreement dated and executed on 25th October 2006 between the Plaintiffs and the 1st Defendant
 - b. Whether the Plaintiffs have a claim to adverse possession.
 - c. Whether the Plaintiffs are the lawful owners of part of Kabati/Township/6 parcel measuring 66ft by 150ft or thereabouts
 - d. Whether there was trespass by the 2nd defendant and if an order of permanent injunction should issue
 - e. Whether this honorable court has jurisdiction to order the rectification of title/register in relation to land parcel Kabati/Township/6
 - f. Whether the Plaintiff is entitled to costs.
26. The Plaintiffs submitted that the 1st Defendant executed a Sale Agreement disposing off the suit land for the entire consideration of Kshs. 480,000/=, and on the date of execution of the agreement, the Plaintiffs paid a deposit of Kshs.300,000/= whereupon the Vendor handed over the premises to them for fencing.
27. He further submitted that the terms of the sale agreement dated 25th October 2006, were express, clear and unambiguous, as to the obligations of the parties thereto, and the 1st Defendant clearly understood the import of the entire agreement, including but not limited to the obligations set out thereunder.
28. It was also submitted that the Plaintiffs paid a total of Kshs.430,000/= to the 1st Defendant, the last payment thereof Kshs.20,000/- was rendered on 23rd October 2007, and the balance of Kshs.50,000/= was to be paid upon transfer.
29. Further, that the 1st and 2nd Defendants never entered appearance nor filed any defence to controvert the evidence that such sale agreement was entered and executed. Therefore, there was a valid, express and clear agreement for the sale of the suit property.



30. On the question of whether the Plaintiffs have a claim on adverse possession, it was submitted that the Plaintiffs made the last payment of Kshs.20,000/= to the 1st Defendant on 23rd October 2007, and ever since, they have been residing in and in occupation of the suit property, where they had workers and were rearing pigs and chicken.
31. Further, that they conducted a search on the property dated 7th December 2015, which showed that the 1st Defendant was still the registered proprietor of the suit property. Therefore, it is indisputable that the 1st Defendant is still the registered proprietor of the suit property.
32. That the Plaintiffs had actual and/or constructive possession of the suit property since October 2007, and the possession was open, uninterrupted and continuous until July 2021 when the 2nd Defendant encroached on the said property. The occupation was based on a claim of right and/or occupation as a bona fide purchaser for value.
33. For the above submission, the Plaintiffs relied on the decision of the Court in the case of Francis Gicharu Kariri vs Peter Njoroge Mairu, Civil Appeal No. 239 of 2002 (Nairobi).
34. The Plaintiffs also submitted that they have never used force to occupy the suit property, and neither have they used force to continuously remain in possession and/or occupation of the said suit property.
35. Further, they submitted that the Plaintiffs have proven on a balance of probabilities that they took possession of the suit property with the intention to possess the same and asserted their rights that were inconsistent with those of the 1st Defendant as the proprietor of the land. Reliance was sought in the holding of the Court in the case of Alfred Welimo vs Mula Sumba Barasa [*CA No. 186 of 2011*](#); Mbira v Gachuhi (2002) 1 EALR 137; and, Mtana Lewa V Kahindi Ngala Mwangandi [2015] eKLR in support of the argument that the Plaintiff's occupation of the suit property cannot be termed as permissive or consensual on the part of the 1st Defendant.
36. There were further submissions that the Plaintiff's possession of the suit property was adequate, in continuity, in publicity and to the extent that it was adverse to the registered proprietor. For this, the Plaintiffs relied on the provisions of Section 38 of the [*Limitation of Actions Act*](#), and the holding of the Court in the cases of Wambugu vs Njuguna (1983) KLR 172; and, Christopher Kioi & another v Winnie Mukolwe & 4 others (2018) eKLR to buttress the submission that they are the lawful owners of that portion of land parcel known as KABATI/TOWNSHIP/6 measuring 66ft by 150ft or thereabouts.
37. It was the Plaintiffs' further submissions that the 1st Defendant's title over the suit land has become extinguished and the Plaintiffs have become entitled to be registered as the owners of the suit property by reason of having been in adverse possession for the requisite period of 12 years.
38. The Plaintiffs also submitted that they have proven on a balance of probability that they are worthy of acquiring by the statute of limitations title to the suit property.
39. Regarding the issue of whether there was trespass by the 2nd Defendant, and if an order of permanent injunction should issue, it was argued that the 2nd Defendant herein encroached on the suit property in the month of July 2021. Therefore, the said encroachment was hostile, and as a result the Plaintiffs had to halt the agricultural activities and withdraw services of their grounds men from the suit land.
40. It was their further submissions that since the encroachment in 2021, the Plaintiffs have not been able to enjoy peaceful and quiet occupation and use/utilization of the suit property. Therefore, the Plaintiffs have met the conditions for grant of an order of Permanent Injunction as was held in the case *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358. Therefore, an order of permanent



injunction should issue as against the 1st and 2nd Defendants to protect the Plaintiffs from further acts of trespass/ encroachment that would cause them irreparable loss which cannot be compensated by way of damages.

41. They further submitted that the Court is vested with the jurisdiction to order for the rectification of title/ register in relation to the suit land as per provision of Section 80 of the [Land Registration Act](#), and the dictum of the Court in the case of Samuel Kamau Macharia vs Kenya Commercial Bank & 2 others, Civil Appeal No. 2 of 2011.
42. On the issue of costs, reliance was placed on the provisions of Section 27 of the [Civil Procedure Act](#), to underpin the proposition that the Plaintiffs have proven their claim against the Defendants herein on the required standard of balance of probabilities and are therefore entitled to the costs of the suit.

The 3rd Defendant's Submissions

43. The 3rd Defendant filed its written submissions on 5th September 2024, through the office of the Attorney-General wherein, two (2) issues were identified as follows:
 - i. Whether the occupation by the plaintiffs constituted adverse possession
 - ii. whether the plaintiffs are entitled to the orders sought?
44. The 3rd Defendant submitted that the Plaintiffs cannot succeed in their claim for adverse possession on the following three (3) grounds:
 - a. Their entry into the suit property was with the permission of the 1st defendant as there was a sale agreement between themselves and the 1st defendant. They were therefore licensees of the 1st defendant.
 - b. They have not completed the sale through payment of the full purchase price. They only paid Kshs 430,000/= out of the purchase price of Kshs 480,000/=, leaving them with a balance of Kshs 50,000/= as they admitted during the hearing.
 - c. As at the time the charge to chase bank was registered, their right to adverse possession had not crystallized. The 12-year-old period of uninterrupted use of the suit land was to commence on the date of the sale agreement been 25th October 2006 or from October 2007 when they purportedly paid the last installment. However, their right to acquire the suit property would have crystallized in 2018 or 2019 after the date the charge was registered.
45. The 3rd Defendant relied on Sections 7 and 38 of the [Limitation of Actions Act](#), and, on the reasoning of the Court in the case of Kimoi Ruto & another v Samwel Kipkosgei Keitany & another [2014] eKLR. They also submitted that the Plaintiffs are not entitled to the Orders sought because the law is very clear that despite the 1st and 2nd Defendants not defending the suit, the Plaintiffs must still adduce sufficient evidence, which in the absence of contrary evidence by the Defendant/s convinces the court that on a balance of probabilities their assertions are correct.
46. It was the 3rd Defendant's further submissions that the Plaintiffs have not successfully proven that they have acquired the suit land by way of adverse possession; as such, the order for rectification of the register, permanent injunction, and costs of the suit are untenable and must fail.
47. For the above submissions, reliance was placed on Sections 107, 108 and 109 of the [Evidence Act](#), and on the holding of the Court in the case Charter House Bank Limited (under statutory Management vs Frank N. Kamau [2016] eKLR.



48. Having now carefully considered the available evidence, the exhibits thereon, rival written submissions and cited authorities, the court finds the issues for determination are;
- i). Whether the Plaintiffs are entitled to the Orders sought.
 - ii). Who shall bear the costs of the suit?

i) Whether the Plaintiffs are entitled to the Orders sought?

49. The Plaintiffs' suit is founded on the doctrine of Adverse Possession pursuant to Section 38 of the *Limitation of Actions Act*, which states as follows:

“...where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 the proprietor of the land”.

50. Further, Section 7 of the *Limitation of Actions Act* states as follows:

“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.”

51. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal defined Adverse Possession in the following terms:

“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 or 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.”

52. Further, in the case of *Kasuve vs Mwaani Investments Limited & 4 Others* [2004] 1KLR, the Court held as follows:

“In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

53. The Court of Appeal in the case of *Mate Gitabi vs Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* [2017] eKLR, stated as follows:

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*.”



54. In this suit, the Plaintiffs claim to have entered onto the suit property sometimes in year 2004, and occupied the said land until year 2006 whereupon the 1st Defendant paid a visit to the property, introduced herself as the registered owner thereof, and showed her title deed to the Plaintiffs. After that visit, the Plaintiffs executed a Sale Agreement for the disposal of suit property with the 1st Defendant.
55. The period between years 2004 and 2006, when the Plaintiffs claimed to have been in occupation of the property prior to the entry of the 1st Defendant does not count in computing the period of their occupation as it was interrupted by the 1st Defendant's entry, and assertion of ownership over the property. In the case of Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura [1996] eKLR, the Court proclaimed as follows:
- “Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him...He must therefore make a peaceable and effective entry, or sue for recovery of land.”
56. Therefore, from the available evidence, the Plaintiffs' occupation of the suit property was with the express permission of the 1st Defendant who is the registered proprietor thereof. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), the Court delivered the following dictum:
- “...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu vs Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”
57. As can be discerned from the evidence on record, the Plaintiffs entry into the suit land was permissive and premised on the Sale Agreement executed with the 1st Defendant. Notwithstanding that the 1st and 2nd Defendants did not defend the suit, it remained the Plaintiffs' obligation to call enough evidence to prove their case pursuant to the provisions of Sections 107, 108 and 109 of the Evidence Act.
58. It is trite that in a purchase scenario, the period of computation of time for purposes of adverse possession accrues upon payment of the final instalment by the Purchaser/s.
59. In the instant case, the Plaintiffs argued and submitted that they paid a total of Kshs.430,000/- to the 1st Defendant from the entire purchase price of Kshs.480,000/=, and retained Kshs.50,000/=, awaiting transfer by the 1st Defendant, which transfer did not take place. The Plaintiffs further cast blame on the 1st Defendant for failure to complete transfer of the portion of the suit land in contention as contracted, which failure informed their decision to retain the balance sum of Kshs.50,000/-.
60. In the case of Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR) the Court held as follows:
- “Accordingly, as it is my view that the respondent made no attempt to perform his obligations and to pay the remainder of the purchase price for several years after the balance was due, he cannot at this late stage obtain an order for transfer of the land pursuant to the contract, and registration of it in his name.”



61. Similarly, in the case of Gabriel Mbui vs Mukindia Maranya (1993) eKLR, the Court delivered itself on the same question as follows:

“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price...”

62. It is evident that the Plaintiffs did not pay the entire, agreed-upon purchase price in respect of the suit property to the 1st Defendant. Furthermore, the Plaintiffs did not “at any time repudiate the contract, or treat it as at an end”, For this, see the holding of the Court in Sisto Wambugu v Kamau Njuguna (supra).

63. In the circumstances, the Court holds and finds that the time did not begin to run for purposes of adverse possession. Having found and held as above, it is clear and evident that the suit herein is not merited as the Plaintiffs failed to call sufficient evidence to prove their case on the required standard of balance of probabilities.

64. Having found that the Plaintiffs have failed to prove their case on the required standard, this court finds and holds that the suit herein is not merited and the same is hereby dismissed entirely.

65. On the issue of costs, it is trite that costs follow the event and are awarded to the successful party in the suit. Further, the Court has the discretion to award or not to award costs pursuant to the provisions of Section 27 of the *Civil Procedure Act*. See the Supreme Court’s decision in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others SC Petition No 4 of 2012: [2014] eKLR.

66. As noted hereinabove, the 1st and 2nd Defendants did not enter appearance or defend the suit hence are not entitled to any costs, and the 3rd Defendant discharged its statutory and legal mandate in the present case. Accordingly, the Court directs each party to bear its own costs.

67. Ultimately, the Plaintiffs suit is dismissed entirely with an order that each party to bear its own costs.
It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11TH DAY OF FEBRUARY, 2025

L. Gacheru

Judge

11/2/2025

Delivered online in the presence of:

Joel Njonjo – Court Assistant

M/s Wangui Kabuu holding brief for Mr. Maina for the Plaintiff

N/a for 1st and 2nd Defendants

M/s Ndundu for the 3rd Defendant

