



**Kijogi & another (As Legal Representatives of the Estate of Jerevasio Mitambo – Deceased) v M’murithi & 4 others (Enviromental and Land Originating Summons 40 of 2019) [2024] KEELC 3777 (KLR) (8 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3777 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 40 OF 2019**

**CK NZILI, J  
MAY 8, 2024**

**BETWEEN**

**DENNIS KIJOGI ..... 1<sup>ST</sup> PLAINTIFF  
MUGAMBI MITAMBO ..... 2<sup>ND</sup> PLAINTIFF  
AS LEGAL REPRESENTATIVES OF THE ESTATE OF JEREVASIO MITAMBO –  
DECEASED**

**AND**

**PAUL MUTWIRI M’MURITHI ..... 1<sup>ST</sup> DEFENDANT  
TITUS MBAYA MUTWIRI ..... 2<sup>ND</sup> DEFENDANT  
LAWRENCE MWENDA ..... 3<sup>RD</sup> DEFENDANT  
HARUN MUCHAI ..... 4<sup>TH</sup> DEFENDANT  
PROGRESSIVE CREDIT LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Though an amended originating summons dated 28.2.2023, where the plaintiffs, as legal representatives of the estate of the late Jerevasia Mitambo, seek to be declared entitled to L.R No. Nkuene/Taita/3537, 3538, 1199, 1200, 1201, 1202 and 1203 formerly, L.R No. Nkuene/Taita/627 by virtue of adverse possession.
2. The brief facts, as pleaded in the supporting affidavit by Jerevasio Mitambo, now deceased, sworn on 29.7.2019, are that the initial land measuring 2.27 acres was subdivided into six portions in the names of the defendants per the official copies of the search. It was averred that by an oral agreement, the deceased exchanged the suit land with the 1<sup>st</sup> defendant's L.R No. Abothuguchi/Igane/1072. The



- deceased averred that with the 1<sup>st</sup> defendant's assurance that the exchange would materialize, he applied for and obtained a letter of consent dated 26.1.1989, following a successful application for the same from the land control board dated 25.1.1989.
3. The deceased averred on oath that the exchanged land was pinpointed to him on the ground by the 1<sup>st</sup> defendant; subsequently, he executed transfer instruments in favor of the 1<sup>st</sup> defendant on 29.6.1989, who eventually became the registered owner of the land on 30.6.1989. The deceased averred that the 1<sup>st</sup> defendant kept on dilly-dallying in granting him vacant possession of the exchanged land in order to vacate the suit land in honor of the agreement.
  4. Despite this, the deceased averred that the 1<sup>st</sup> defendant subdivided the suit land and bequeathed a portion to his son, another to one Muchai, and some other third parties. The deceased averred that the said subdivisions and transfers occurred while the 1<sup>st</sup> defendant knew that he was still in occupation since he had not transferred L.R No. Abothuguchi/Igane/1072 to him or handed vacant possession. He termed the initial agreement for exchange null, void, and unenforceable for lack of consideration.
  5. The 1<sup>st</sup> & 2<sup>nd</sup> defendants opposed the suit through a preliminary objection dated 27.9.2019 on account of res-judicata, laches, as time-barred and full of fatal defects. Further, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 1.11.2019, attaching a judgment in Meru CMCC No. 223 of 1996 rendered on 16.2.2012. The 1<sup>st</sup> defendant averred the suit herein was a disguised appeal to the said judgment, yet the suit was resjudicata.
  6. Moreso, the 1<sup>st</sup> defendant averred that the structures occupied by the plaintiffs on the suit land were not permanent houses. In any event, the occupation has not been open, uninterrupted, or peaceful due to numerous litigation since 1996 to date, the intervention by the Njuri Ncheke panel of elders, and the applications for eviction in ELC Case No. 20 of 2019 filed on 28.3.2019. The 1<sup>st</sup> defendant averred that his title deeds, as issued under Section 26 of the Land Registration Act, were absolute and unimpeachable. The 3<sup>rd</sup> and 4<sup>th</sup> defendants were duly served with the amended originating summons and affidavits of service sworn by Gichunge Miriti, advocate on 28.4.2023, 25.5.2023, 2.5.2023. None opposed the suit.
  7. The 5<sup>th</sup> defendant opposed the suit through a replying affidavit by Christine Mikal Ayoti sworn on 22.1.2024. It was averred that on 10.1.2022, it secured interests in L.R No. Nkuene/Taita 3537, after it advanced a loan facility of KShs.1,687,500/= to the 4<sup>th</sup> defendant and registered a charge over it on 10.1.2022.
  8. The 5<sup>th</sup> defendant averred that the 4<sup>th</sup> defendant presented to it an original title deed and a certificate of official search confirming his ownership of the suit land which was free from any encumbrances as the land was vacant with no developments on it; neither was it aware of any adverse claim by the plaintiffs when it charged the suit property.
  9. The 5<sup>th</sup> defendant averred that the 4<sup>th</sup> defendant persistently defaulted in repaying the loan and was standing at KShs.2,230,583 as of 15.4.2022, following which it issued statutory notices to exercise its power of sale dated 18.3.2022. The 5<sup>th</sup> defendant averred that on 5.7.2022, it was only after it instructed land valuers to carry out a valuation for purposes of the auction that it came to know of the plaintiff's claim. Further the 5<sup>th</sup> defendant suspected that there was collusion between the plaintiffs and the 4<sup>th</sup> defendant to file the suit so as to frustrate its statutory power of sale.
  10. The 5<sup>th</sup> defendant averred that it has filed a notice of indemnity against the 4<sup>th</sup> defendant seeking for payment of the outstanding loan balance in the event the court was to allow the plaintiff's claim.



11. After counsel on record for the 1<sup>st</sup> & 2<sup>nd</sup> defendants made reports of the passing on of the 1<sup>st</sup> defendant on 3.5.2023, leave was granted to substitute him by 18.7.2023 and comply with Order 11 Civil Procedure Rules. The court extended the orders on 2.10.2023, whose default was that the suit would proceed against the rest of the defendants in the absence of substitution within 30 days. Leave was extended once more on 6.11.2023 for 30 days.
12. During the hearing on 29.1.2024. Mr. Miriti appeared for the plaintiffs, ready to proceed with six witnesses. Mr. Kiogora Mugambi advocate appeared for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, while Mr. Kariuki advocate appeared for the 5<sup>th</sup> defendant. Miss Kaume advocate told the court she was appearing for the 1<sup>st</sup> defendant, said to be deceased. Counsel urged the court to hear an application dated 26.1.2024, which had not been certified or served upon all the parties, seeking to substitute the 1<sup>st</sup> defendant. The matter was fixed for hearing at noon when Miss Kaume advocate insisted that her application be heard first. The court dismissed the application as the same was based on a defective limited grant and filed by a law firm improperly on record for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
13. At the trial, Dennis Kiyogi testified as PW 1 and adopted his witness statement dated 1.11.2021 as his evidence in chief. He told the court his late father was Jerevasia Mitambo and was born in 1987 and has lived on the suit land since then now subdivided by the defendants who have never possessed or occupied the land. He urged the court to cancel all the titles to the suitland, for the land to revert to the names of his late father since the 1<sup>st</sup> defendant had shortchanged him.
14. PW1 said that his father had never relocated to anywhere else apart from the suitland. PW 1 relied on an official search for L.R No. Nkuene/Taita/1199, 1200, 1201, 1202 & 1203 as P. Exh No. 1 (a) – (d), minutes at the District Officers offices Nkubu on 2.2.1992 as P. Exh No. (2) copies for land control board application dated 25.1.1989 and a letter of consent dated 26.1.1989 as P. Exh No. 3 (a) & (b), copy of the transfer form dated 29.6.1989 as P. Exh No. (4) application for consent of the land control board, P. Exh No. (5), letter of consent as P. Exh No. (6), pleadings in Nkubu PMCC ELC No. 20 of 2019 as P. Exh No. (7) and a copy of the record for L.R No. Nkuene/Taita/627 as P. Exh No. (8).
15. Similarly, PW 1 told the court that he sued the 5<sup>th</sup> defendant after it sent auctioneers to him in 2019, following a loan over the property by the 4<sup>th</sup> defendant, yet he was the one in occupation of the suit land.
16. In cross-examination by Mr. Murira, advocate for the 2<sup>nd</sup> defendant PW 1 told the court the suit land was his ancestral land initially L.R No. Nkuene/Taita/627 now subdivided into L.R No. 1198-1203 on paper, but not on the ground since no land surveyors visited the land. PW 1 said he was neither privy to the previous suit at Nkubu Law Courts, nor was he aware of its outcome. Cross-examined by Mr. Kariuki, advocate for the 5<sup>th</sup> defendant PW 1, told the court that though he was among the legal representatives of the deceased father, the letter of grant or a green card for L.R No. Nkuene/Taita/3537 were not produced as exhibits. He, however, said his siblings and the late father lived on the land until he passed on and that L.R No. 3537 was part of the land they were occupying save that their permanent houses lay outside L.R No. 3537.
17. PW 1 denied any occupation of the suit land by the 4<sup>th</sup> defendant and said that he became aware of the loan in 2019. PW 1 said he applied to substitute the deceased initial plaintiff after he passed on, and an order dated 15.10.2020 was issued. Further, PW 1 said an order for inhibition dated 30.7.2019 was issued by this court relating to L.R No. Nkuene/Taita/1198.
18. Phineas Mugambi, Jamlick Mutembei, David Mutonga, John Riungu, and Erastus Kinoti Mungania testified as PW 2 – 6, all adopting their witnesses' statements dated 1.11.2021 as their evidence in chief. While associating their evidence with that of PW 1, they confirmed exclusive occupation over the suit



- land, the existence of an aborted exchange of land agreement by their late father and the 1<sup>st</sup> defendant, and the burial of their parents on the suit land.
19. Titus Mbae Mutwiri testified as DW 1 and adopted his witness statement dated 16.11.2021 as his evidence in chief. He told the court the 1<sup>st</sup> defendant was his biological father, who entered into a memorandum for part sale and part exchange of the suitland with his L.R No. Abothuguchi/Igane/1072 in 1989. DW 1 said that after the transaction went through, the 1<sup>st</sup> defendant subdivided the land into several plots and gave him one of them as L.R No. Nkuene/Taita/1198, which he took over in 1996 and started developing.
  20. DW 1 said that his late father had been unsuccessfully sued by the plaintiff's father in 1996, for rescission of the said agreement in CMCC No. 223 of 1996, which was finalized in 2016. Further, he said that the two parties had been in and out of court, the CID department and Njuri Ncheke Council of Elders since 1996 to date. He denied that the plaintiffs had been in exclusive control of the entire land since 1989 since his late father had been tilling the same before he died. Dw1 denied there was any permanent building on the suit land belonging to the plaintiffs other than his structure.
  21. As exhibits, D.W. 1 relied on a copy of a green card for L.R No. Abothuguchi/Igane/1072 as D. Exh No. (1) green card for L.R No. Nkuene/Taita 627 as D. Exh No. (2), decree and certificate 223 of 1996 as D. Exh No. (3), ruling dated 4.10.2016 as D. Exh No. (4), judgment thereof dated 16.2.2012 as D. Exh No. (5), transfer form dated 29.6.1982 as D. Exh No. (6), official search for L.R No. Abothuguchi/Igane/1072 as D. Exh No. (7), memorandum of agreement dated 26.1.1989 as D. Exh no. (8), receipt dated 30.6.1989 as D. Exh No. (9), a plaint in Nkubu PMCC ELC no. 20 of 2019 as D. Exh No. (10), summons from Njuri Ncheke dated 14.4.1999 and 11.8.1999 as D. Exh No's 11 and 12.
  22. In cross-examination, DW 1 admitted that he was not a party to the exchange agreement. He said that his late father had subdivided the land into six portions, transferred one to him, and sold another to the 4<sup>th</sup> defendant as a subdivision of L.R No. 1189. D.W. 1 said that he took possession of his land in 1995. His evidence was that after the exchange agreement, the plaintiff's father handed over to his later father vacant possession of the suit land. However, he admitted that the plaintiffs' deceased father late on unlawfully came back to the land alongside his children, among them the plaintiff, who, without authority, put up temporary structures therein and filed a suit in Nkubu Law Courts.
  23. Further, D.W. 1 said that he filed an eviction suit against the plaintiffs who, to date, have refused to vacate a portion of the land. DW 1 said the land has been under litigation since 1996 and that the issues raised herein were with finality determined in Meru CMC No. 223 of 1996.
  24. Joseph Kaura Kungare testified as DW 2 and adopted his witness statement dated 16.11.2021 as his evidence in chief. He confirmed the existence of the exchange agreement between the plaintiffs' late father and the 1<sup>st</sup> defendant in 1989 and the attempts by the deceased to rescind the agreement, leading to numerous cases in court and before the Njuri Ncheke panel of elders.
  25. The 3<sup>rd</sup> and 4<sup>th</sup> defendants failed to attend court despite service with a hearing notice. The court ordered their defense closed. The 5<sup>th</sup> defendant testified through Christine Mikal Ayoti, a legal officer who adopted her replying affidavit dated 22.1.2024 as her evidence in chief. DW 3 produced a copy of a charge dated 10.1.2023, certificate of official search for L.R No. Nkuene/Taita 3537 dated 11.1.2022 loan account statement, statutory notice dated 18.3.2022 notification of sale dated 17.6.2022, certificate of position dated 24.6.2022, valuation report dated 5.1.2022 and notification of indemnity dated 29.4.2023 as D. Exh No's. 13 – 20 respectively.
  26. In cross-examination, DW 3 told the court that a title deed for L.R Nkuene Taita/3537 was issued on 11.11.2022. She confirmed that the 5<sup>th</sup> defendant's officers visited the suit land before the facility



- was extended and filed an internal report as part of due diligence. Unfortunately, Dw3 did not file or produce the report as an exhibit. DW 3 said that the 5<sup>th</sup> defendant was not aware of any developments or settlements on the land by anyone since due diligence report had indicated that the property was vacant.
27. As to the valuation report, DW 3 said photographs on the 1<sup>st</sup> page showed some buildings on the land. Additionally, D.W. 3 said the 5<sup>th</sup> defendant was not aware of any pending suits by 2022 despite the due diligence report. In re-examination, DW 3 said the charge was registered on 11.1.2022 since the land was free of any encumbrances. D.W. 3 admitted that the valuation report contained some information on occupation on the land.
  28. With the close of the 5<sup>th</sup> defendant's case, parties were directed to file written submissions by 29.2.2024. The plaintiffs, by written submissions dated 28.2.2024, submitted that on 14.10.2020, this court granted leave to substitute the initial plaintiff. Further, it was submitted that the 1<sup>st</sup> defendant to defeat this suit during its pendency, transferred L.R No. Nkuene/Taita/1198 to the 4<sup>th</sup> defendant, who in turn subdivided it into L.R No's. 3537 and 3538, charging the former to the 5<sup>th</sup> defendant and transferring the latter to the 3<sup>rd</sup> defendant.
  29. The plaintiffs submitted the oral evidence of PW 1 – PW 6, and documentary evidence buttressed the contents of the amended originating summons that the plaintiff's had been in occupation of the suit land throughout. As to the preliminary objection based on res judicata, the plaintiffs submitted that the previous suit was not based on adverse possession but a contractual claim. Reliance was placed on James Maina Kinya vs Gerald Kwendaka (2018) eKLR and Andrew Kariuki Boro vs David Kinuthia Kimani (2019) eKLR.
  30. Regarding when the time for limitation started running, the plaintiffs submitted that the 1<sup>st</sup> defendant failed to bring a suit for the recovery of land before the twelve years elapsed or after 1996 to regain the land. The plaintiffs submitted that by the time the eviction suit was filed, they had been on the land for 30 years without interruption. Reliance was placed on James Maina Kinya vs Gerald Kwendaka (supra).
  31. Regarding the charge, the plaintiffs submitted that the same could not stand in law, for adverse possessory rights had already accrued. They termed the charge as contrary to the doctrine of lis pendens. Reliance was placed on Martha Njeri Karanja vs Solomon Mukundi Gichinga, Equity Bank (interested party) (2018) eKLR.
  32. On the evidence of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, the plaintiffs submitted that the court should find their claim uncontroverted since the 2<sup>nd</sup> defendant's claim is limited to L.R No. Nkuene/Taita/1199.
  33. The 2<sup>nd</sup> defendant relied on written submissions dated 28.2.2024. It was submitted that the plaintiff's late father had filed a suit to renounce the mutual agreement in 1996 and trespassed on the land of the 1<sup>st</sup> defendant during the pendency of the suit, which was finalized on 16.2.2012.
  34. The 1<sup>st</sup> and 2<sup>nd</sup> defendants submitted a suit for eviction filed in Nkubu as ELC No. 20 of 2019, now stayed by this court. Therefore, the court was urged to find this suit res-judicata and the affidavit omitting disclosure of material facts.
  35. The 2<sup>nd</sup> defendant submitted that where there was consensual or permissive entry, adverse possession could not apply. The 2<sup>nd</sup> defendant submitted that the actual possessor must usurp the land without leave to maintain a cause of action as held in Mbui vs Maranya (1993) eKLR. In this case, if possession continued in accordance with any contract, express or implied, between the parties, adverse possession cannot be presumed. Further, the 2<sup>nd</sup> defendant submitted that the plaintiffs had not proved



- dispossession and discontinuance of possession, which was hostile, open, and uninterrupted, given the circumstances and the alleged breach of the exchange agreement and the subsequent litigation.
36. Additionally the 2<sup>nd</sup> defendant submitted that 12 years of occupation per se did not amount to adverse possession without dispossession and discontinuance of possession, coupled with the intention to do so. The 2<sup>nd</sup> defendant submitted acts inconsistent with the actual owner's use of the land must be proved as held in *Muthoni vs Kamau Wanduru* Court of Appeal Civil Appeal No. 73 of 1982.
  37. The 2<sup>nd</sup> defendant submitted that the relationship between him and the plaintiffs arose out of a sale agreement, which, until it was rescinded or repudiated, adverse possession could not arise.
  38. The 5<sup>th</sup> defendant relied on written submissions dated 29.2.2024 that the plaintiffs failed to prove the ingredients of adverse possession on open, notorious, continuous, exclusive use and actual possession of the suit land for a period of 12 years as held in *Tabitha Waitherero Kimani vs Joshua Ng'anga* (2017) eKLR.
  39. Regarding the 4<sup>th</sup> defendant, the 5<sup>th</sup> defendant submitted under Order 1 Rule 24 of the Civil Procedure Rules filed a notice of indemnity and urged the court to consider it as held in *John Kimani Njenga vs Margaret Wanjiru Kanyiri & others* (2018) eKLR.
  40. The issues commending themselves are:
    - i. If the plaintiffs have brought the suit in their individual capacity or that of the estate of the late Jervasio Mitambo.
    - ii. Whether this suit is res judicata.
    - iii. If the 2<sup>nd</sup> defendant can represent the interests of the 1<sup>st</sup> defendant or the estate of the 1<sup>st</sup> defendant.
    - iv. If the 1<sup>st</sup> defendant acted against a pending court order and the doctrine of les pendens to subdivide and transfer L.R No. 1198 in favor of the 3<sup>rd</sup> and 4<sup>th</sup> defendants.
    - v. If the 5<sup>th</sup> defendant conducted due diligence in charging the subdivisions of L.R No. 1198 contrary to an existing court order and the doctrine of lis pendens.
    - vi. If the plaintiffs have proved adverse possession against the defendants herein.
    - vii. Whether the plaintiffs are entitled to the reliefs sought.
    - viii. Whether the 5<sup>th</sup> defendant filed served and sought indemnity against the 4<sup>th</sup> defendant.
  41. This suit was commenced on originating summons dated 29.7.2019 supported by an affidavit sworn by Jervasio Mitambo, who claimed that he had been in occupation of the initial L.R No. 627 and continued occupying and developing the land, even after the subdivisions of the initial land into six portions and transfers in favor of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. He attached copies of official searches dated 17.6.2019 showing L.R No. 1199 as belonging to the 2<sup>nd</sup> defendant while L.R No. 1200 – 1203 belonged to the 1<sup>st</sup> defendant. The deceased also attached a copy of a transfer dated 25.1.1989, a land control board consent dated 26.1.1989, transfer form dated 29.1.1989 showing that the consideration was an exchange between L.R No's. 627 and L.R No Abothuguchi/Githongo/1072.



42. The deceased's specific claim was that despite the said exchange and transfers, he remained in occupation of the land since the 1<sup>st</sup> defendant failed to put him into possession of L.R No. Abothuguchi/Githongo/1072. Accompanying the plaint, the deceased filed an application dated 29.7.2019 seeking interim orders, among them inhibition over L.R No. Nkuene/Taita, 1198, 1199, 1201-1203, and a stay of the Nkubu ELC No. 20 of 2019.
43. The court granted inhibition and injunctive orders on 30.7.2019, pending an inter-partes hearing on 30.9.2019.
44. The same was served on the 1<sup>st</sup> defendant, and a return of service was filed on 30.9.2019. The 1<sup>st</sup> defendant filed a notice of preliminary objection dated 27.9.2019 through the firm of Kaumbi & Co. Advocates. He later on filed a notice of change of advocates dated 23.10.2019. Since then, the 1<sup>st</sup> defendant has been represented by the firm of Kiogora Mugambi & Co. Advocates together with his son, the 2<sup>nd</sup> defendant.
45. By an application dated 4.11.2019 this court was urged by the plaintiffs to issue inhibition orders against L.R No's. Nkuene/Taita/3537 and 3558, which were subdivisions of L.R No. 1198, going by copies of searches dated 23.10.2019, showing that the two parcels of land were owned by Patrick Githinji Gatobu and Lawrence Mwenda Kithinji, following registration of title under their names on 7.8.2019 and 12.7.2019 respectively.
46. In the replying affidavit dated 11.1.2019 to the originating summons and the notice of motion dated 29.7.2019, the 1<sup>st</sup> defendant attached photographs as annexure PMM "2" showing occupation of the suit land by the plaintiff's late father. The 1<sup>st</sup> defendant, at paragraph 14 thereof, admitted that the further subdivisions and transfers were undertaken after the lapse of 30 days' stay, following the lower court judgment. In paragraph 17 thereof, the 1<sup>st</sup> defendant admitted the pendency of court orders issued on 30.7.2019.
47. Through an application dated 29.1.2020, the 1<sup>st</sup> defendant sought to stop the burial of the initial plaintiff on the suit land, who had passed on on 26.12.2020. By another application dated 4.5.2020, the defendants sought for Dennis Kiyogi and Mugambi Mitambo to join this suit on behalf of their deceased father, following a grant of a limited grant ad litem dated 19.2.2020. Through an order dated 15.10.2020, the court allowed for the substitution as requested by the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
48. As to the preliminary objection by a ruling dated 13.10.2021, the court found the suit was not res judicata. Further, the court declined to find the pending matter at Nkubu Law Courts for eviction as a pure point of law. On a statute-barred suit, the court held it was a matter requiring evidence at the hearing. On the application dated 29.7.2019, the court held that there was a need to preserve the suit land till the hearing.
49. Arising from the foregoing, it goes without saying that the 1<sup>st</sup> and 2<sup>nd</sup> defendants are the ones who brought on board the plaintiffs as legal representatives of the estate of the initial plaintiff, saying that the cause of action subsisted the deceased. The court initially heard the matter on 9.5.2022, only for the plaintiffs to re-open the suit with an application dated 26.7.2022, following the leave to amend the originating summons to bring on board the 3<sup>rd</sup> – 5<sup>th</sup> defendants.
50. The limited grant dated 19.2.2020 under sections 54 and 5<sup>th</sup> Schedule of The *Law of Succession Act* (Cap 160) grants the plaintiffs' capacity to advance the claim on adverse possession on behalf of the estate of the late Jervasion Mitambo. These facts are contained in the witness statements dated 1.11.2021 by PW 1 – 6<sup>th</sup>. The 1<sup>st</sup> and 2<sup>nd</sup> defendants were aware of the limited grant giving the plaintiffs the capacity



to join this suit. The 1<sup>st</sup> – 2<sup>nd</sup> defendants are therefore estopped in law from challenging obvious facts they have been privy to. This settles the first issue herein.

51. On res judicata and the suit at Nkubu, which this court stayed, I entirely agree with the holding in *James Maina Kinya vs. Gerald Kwendaka and Andrew Kariuki Boro vs David Kinuthia Kimani* (supra). The defendants have produced no material to show that the issue of adverse possession was heard and determined by a court of competent jurisdiction to finality, for the doctrine of res judicata to apply as held in *Maina Kiai & others vs. IEBC & others* (2014) eKLR to apply.
52. On the doctrine of les pendens and a pending court order, there is no dispute that the lower court dismissed the plaintiff's suit on 16.2.2012 as per D. Exh No. (5). D. Exh No. 4 as a ruling delivered on 4.10.2016, while D. Exh No. 3 is the decree certificate of stated cost. The 1<sup>st</sup> – 5<sup>th</sup> defendants did not supply to this court a copy of records for L.R No. 1198 and its subdivisions. From the court record, there is no evidence by the plaintiffs on whether the order issued on 30.7.2019 was registered against the register for the titles at the land registry, apart from service upon the 1<sup>st</sup> – 2<sup>nd</sup> defendants.
53. In the application dated 4.11.2019, the plaintiffs sought inhibition against L.R No's. Nkuene/Taita/3527 and 3538, following the issuance of titles to Patrick Kithinji Gatobu and Lawrence Mwenda Githinji on 12.7.2019 and 7.8.2019. The 1<sup>st</sup> defendant, in a replying affidavit, has, however, averred on oath that he made further transfers and subdivisions when the order of stay lapsed to appeal against the lower court judgment. At the time, the plaintiffs came to this court on 29.7.2019, there was no copy of the record or search attached for L.R No. 1198, showing that the latter had mutated to L.R No's. 3537 and 3538.
54. The plaintiffs never prosecuted the application dated 4.11.2019 to date. Similarly, the plaintiffs did not produce before this court a copy of a record or green card for L.R No. 1198 and its resultant subdivisions to verify when the changes took place. The 3<sup>rd</sup> – 5<sup>th</sup> defendants were only brought on board following an amended originating summons dated 28.2.2023.
55. Between 4.11.2019 and 28.2.2023, the plaintiffs knew of the subdivisions and only sought to revive the application dated 4.11.2019. The orders covering L.R No. Nkuene/Taita/3537 and 3538 were issued following a ruling delivered on 25.1.2023. Tied to this issue, however, is whether the 5<sup>th</sup> defendant conducted due diligence before offering a loan facility to and charging the 4<sup>th</sup> defendant's land. In *Fanikiwa Ltd vs. Sirikwa Squatters and others* (2023) KESC 58 KLR 16 June 2023 (Ruling), *Dima Management Ltd vs. County Government of Mombasa* (2023) KESC 30 (KLR) (21<sup>st</sup> April 2023) (Judgment) and *Torino Enterprises Ltd vs A.G.* (2023) KESC 79 (KLR) 22<sup>nd</sup> September 2023 (Judgment), the court called for heightened diligence to avoid a sweeping denunciation of land rights and ownership. The court in *Torino Enterprises vs Attorney General and Dima Management vs County Government of Mombasa* (supra) said that to benefit from the defense of a bonafide purchaser, one has to take such steps as necessary to investigate the history of the land and go to the root of the title as opposed to simply concluding that the title was absolute and indefeasible. In *Fanikiwa Ltd vs Sirikwa Squatters Group* (supra) the court touched on the role of financiers as regards due diligence. The court said financial institutions were not purchasers but lenders.
56. The 5<sup>th</sup> defendant has pleaded and testified that after it conducted due diligence, it found that the title held by the 4<sup>th</sup> defendant was free of encumbrances, it had no notice of the pending litigation, the official search did not yield any adverse claims by the plaintiffs, and that the 4<sup>th</sup> defendant was not party or privy to the Nkubu PMCC ELC No. 20 of 2019.
57. Similarly, the 5<sup>th</sup> defendant pleaded and testified that it advanced substantial money to the 4<sup>th</sup> defendant, who has defaulted, leading to the initiation of the process of recovering it, that it came across



- the pending suit. Red flags had been raised against the title, which the 4<sup>th</sup> defendant was aware of. On the other hand, there is no evidence that the 5<sup>th</sup> defendant filed the notice of indemnity with payment of requisite court fees and that it issued a third-party notice to the 4<sup>th</sup> defendant. Additionally, the 5<sup>th</sup> defendant did not seek third-party directions for the determination of any issues between it and the 4<sup>th</sup> defendant. See *Gemini Insurance Co. Ltd vs. Beatrice Wanjiru & others* (2005) eKLR and *Kenya Wine Agencies vs Technomatic Ltd & another* (2014) eKLR.
58. The 5<sup>th</sup> defendant did not challenge the production of P. Exh No. (7), which shows that the 4<sup>th</sup> defendant was aware of the adverse claim and occupation of the mother title by the plaintiffs, which is why he was seeking eviction orders. The 5<sup>th</sup> defendant, as stated above, did not frame any issues for the court's determination between it and the 4<sup>th</sup> defendant, more so given P. Exh No. (5). Guided by the reasoning in *Fanikiwa Ltd vs Sirikwa squatters Group* (supra) and in *Penina Murugi Njenga & another vs. Samuel Muiruri Gitu* (2019) eKLR, I find there is basis to hold that the 4<sup>th</sup> defendant knew his title and L.R No. Nkuene/Taita/1198 was already under litigation as of 28.3.2019.
59. The 4<sup>th</sup> defendant had signed an authority to swear and act in favor of the 1<sup>st</sup> defendant dated 27.3.2019. The 1<sup>st</sup> and 4<sup>th</sup> defendant had attached as part of their exhibits an official search dated 14.7.2019 for a title deed jointly issued on 16.7.2018 in equal shares to them. D. Exh No. 14 shows that the 4<sup>th</sup> defendant acquired title to L.R No. 353 on 2.11.2022. The charge appears to have been executed on 31.12.2021 and registered on 11.1.2022 as per D. Exh No. (13). The charge was registered by the land registrar on 11.1.2022.
60. From the preceding, it is evident that L.R No. 3537 and 3538 were created from L.R No. Nkuene/Taita/1198 and, therefore, were part of the initial L.R No. 627. The 5<sup>th</sup> defendant's replying affidavit and evidence was limited to L.R NO. Nkuene/taita/3537. There is no evidence that the 5<sup>th</sup> defendant conducted due diligence covering the history of the said title before the 4<sup>th</sup> defendant acquired it. There is no evidence that the 5<sup>th</sup> defendant sought and obtained transfer documents from the 4<sup>th</sup> defendant over how he acquired his title and whether it established who was in possession of the land.
61. The historical context in which a party obtains a title deed is as good as the title. Had the 5<sup>th</sup> defendant taken the historical journey toward acquisition of the title it would have established that the title was acquired during a pendency of a suit and when orders of inhibition and injunction were in place against its mother title. In *Jacob Wekesa Bokoko Balongo vs Kincho Olokio Adeya & another* (2020) eKLR, the court held that a title obtained illegally, fraudulently, and unprocedurally is impeachable in law. Further the court said the trial court was in order to investigate the history of the title.
62. It is not lost to this court that on 13.10.2021, the court issued interim orders of inhibition injunction and stayed Nkubu PM ELC No. 20 of 2019, pending hearing and determination of this suit. In the replying affidavit sworn by the 1<sup>st</sup> defendant on 27.9.2022, he denied subdividing L.R No. 1198 after the issuance of the interim orders in 2019. On the contrary, the 1<sup>st</sup> defendant averred that he transferred L.R No. 1198 to the 4<sup>th</sup> defendant on 10.7.2018, as per an official certificate attached to it. There has been no copy of records by the 5<sup>th</sup> defendant to show the history of the title, which it charged before 2022. It was the 5<sup>th</sup> defendant who would be at risk of losing money if the property charged later turned out to be problematic. See *Suleiman Rahemtulla Omar & another vs. Musa Hersi Fahiyeh & others* (2014) eKLR.
63. In my view, the 5<sup>th</sup> defendant relied heavily on the 4<sup>th</sup> defendant, who, unfortunately, turns out from the record of this matter knew more than he may have disclosed to the 5<sup>th</sup> defendant. He concealed material facts from the lender.



64. As to the doctrine of lis pendens, the 4<sup>th</sup> defendant knew there was active litigation on the matter by the time he acquired the land, which he later used as collateral. The subdivisions and transfer between the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants were definitely affecting the rights of the plaintiffs in the pending suits. See *Mawji vs USIU International University & another* (1976) KLR 185.
65. In *Fredrick Joses Kinyua & another vs. G.N Baird* NRB HC No. 6587 of 1991, the court said the doctrine is intended to prevent not only the defendant from transferring the suit property when litigation is pending, but is equally binding on those who derive their title through the defendant whether they had or had no notice of the pending proceedings. The doctrine of lis pendens starts proper from the time the proceedings are initiated until they are finally completed and a decree issued and executed so as to prevent the subject matter of the proceedings from becoming extinct.
66. In my view, both the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants knew of the pendency of the litigation and interim orders in existence regarding L.R No. 627 and its resultant subdivisions. The principle of obedience to court orders applied to them. See *Omega Enterprises Ltd vs Kenya Tourist development Corporation Limited & 2 others* (1998) eKLR. They had no right to deal otherwise with the suit land.
67. In *Elijah Kipngeno Arap Bii vs Samuel Mwehia Gitau & another* (2014) eKLR, the court held that it was the duty of the mortgagee to act in good faith and see that the deal date is not tainted with some impropriety. In *Macfoy vs United Africa Ltd* (1961) 3 ALLER 1169, the court held that a nullity is a nullity, and everything found on it is incurably bad. The act of the 4<sup>th</sup> defendant in subdividing the land and offering it as collateral to the 5<sup>th</sup> defendant by concealing material facts within his knowledge as to its legal status, pending suits, court orders and while he knew of the claim based on overriding interests by the plaintiffs was live renders, the whole process a nullity ab initio.
68. As to adverse possession, it is not in dispute that there was an agreement dated 16.1.1989 between the 1<sup>st</sup> defendant and the father to the plaintiffs from the said agreement the date for taking over vacant possession for the respective parcels of land upon transfers under clause number 6 was not specified. The manner of taking vacant possession was not specified. The initial plaintiff averred on oath that the 1<sup>st</sup> defendant failed to pinpoint on the ground and facilitate his taking possession of L.R no. Abothuguchi/Githongo/1072. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not provide evidence of the payment of Kshs.6,300/= upon the transfer as per clause number 5 of the agreement. Default by any party attracted liquidated damages of Kshs.20,000/=.
69. Even though the plaintiffs availed all the transfer forms, letter of consent, and an application for the land control board regarding L.R No. 627, none was availed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to show that the 1<sup>st</sup> defendant honored the terms and conditions of the agreement on time or at all. Therefore, going by the evidence tendered by the plaintiffs, my finding is that the initial plaintiff did not hand over any vacant possession to the 1<sup>st</sup> defendant in line with the agreement. Similarly, the 1<sup>st</sup> defendant, in his affidavit sworn on 1.11.2019 and in the witness statement dated 16.11.2021, did not plead and attach documents to show when he excised and transferred 3 acres out of his L.R No. Abothuguchi/Igane/1072 and received an additional Kshs.7,500/= from the initial plaintiff in compliance with the agreement.
70. It was not enough to state in the witness statement that the transfer occurred on 30.6.1986, without availing the supporting documents. In *Meru Chief Magistrates Case No. 223 of 1996*, the 1<sup>st</sup> defendant was sued for breach of contract on account of misrepresentation and fraud. There is no evidence that the 1<sup>st</sup> defendant counterclaimed for vacant possession and eviction on the basis that there was completion of the exchange agreement with each of them taking possession of their respective parcels of land. What is, however, evident in *D. Exh No. (5)* is that the plaintiff in the suit was still occupying



the land 23 years after the exchange agreement. After the judgment on 16.2.2012, it took the 1<sup>st</sup> and 4<sup>th</sup> defendants seven years to file a suit for eviction, namely Nkubu PM ELC No. 20 of 2019, in paragraphs 5 and 6 D. Exh No. (10), the 1<sup>st</sup> and 4<sup>th</sup> defendants herein, as the plaintiffs, averred that the denunciation of the mutual agreement by the 1<sup>st</sup> defendant occurred in 1996, followed by trespass to the suit land and building of dwelling houses therein.

71. In paragraph 7 thereof, the 1<sup>st</sup> & 4<sup>th</sup> defendants averred that despite the judgment in Meru CMCC No. 22/1996 on 16.2.2012, the initial plaintiff continued to forcefully and illegally occupy the suit land. The 1<sup>st</sup> & 4<sup>th</sup> defendants did not plead that the plaintiffs were only occupying L.R No. 1198 and not the rest of the land.
72. Be that as it may, that suit was stayed by the court on 30.7.2019. The issue of lis pendens, therefore, applies as regards the 1<sup>st</sup> & 4<sup>th</sup> defendants. The 1<sup>st</sup> defendant, in a witness statement dated 20.3.2019, stated he jointly owned L.R No. 1198 with Harun Muchai Murithi, already trespassed into by the plaintiffs with dwelling houses.
73. From these clear pleadings by the 1<sup>st</sup> and 4<sup>th</sup> defendants in the earlier suit it is evident that the initial plaintiff in this suit was occupying the land as of 1996 and undertaking acts inconsistent with the purpose for which the 1<sup>st</sup> defendant intended to use the soil.
74. For adverse possession to be established, there must be proof of possession which is adequate, in continuity, in publicity and extent to show that the possession is adverse to the actual owner. It starts with a wrongful dispossession of the rightful owner in an actual, visible, exclusive, hostile, and continuous manner. See Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui (2017) eKLR.
75. The court has found as a fact that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants acknowledged the trespass took place in 1996 following a suit for rescission of the mutual agreement. There is no evidence that after the 1<sup>st</sup> defendant became the owner in 1989, subdivided it into six portions, transferred some of the portions to himself and went on to take vacant possession. Even assuming that the 1<sup>st</sup> defendant took vacant possession following the mutual agreement, evidence of when this took place was not availed to this court. More curious is whether the 1<sup>st</sup> defendant equally performed his part of the bargain and ensured that the initial plaintiff took over L.R No. 1072 in 1989.
76. There is no evidence that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants asserted rights or made an effective entry over the land in 1996 or soon after the judgment was made on 16.2.2012. See Githu vs Ndeete (1984) KLR 776.
77. There is evidence that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants became dispossessed and were discontinued from possession If they had any in 1996 when the plaintiffs erected dwelling houses therein were not evicted. See Wambugu vs Njuguna (1998) KLR 173.
78. The law of adverse possession affects not only the present holders of the title but also their predecessors in the title. See Titus Kigoro Munyi vs Peter Mburu Kimani (2015) eKLR. Therefore, there is evidence that the 1<sup>st</sup> defendant never took vacant possession after the land was transferred to him. Equally, he could not hand over any possession of the resultant subdivisions to the beneficiaries while the initial plaintiff was still in possession. There is no evidence that the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> defendants stopped the occupation and developments by the initial plaintiff on the land on account of superior rights in 1996, before the judgment in 2012 and soon after that until 2019, when an eviction suit was filed.
79. Adverse possession rests on defacto use and defacto occupation. See Kweyu vs Omuto (1990) KLR 709. It includes a hostile takeover against the rights of the valid owner, followed by the possession and appropriation of the premises to the detriment of the valid owner. The circumstances of the entry by



the initial owner and the remainder of the land until his demise in 2020 were with the intention to own as of right since he had denounced the initial agreement for lack of consideration. The deceased had insisted that the 1<sup>st</sup> defendant failed to complete the agreement by handing over an alternative land. See *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR. *Manason Ogendo Afwanda vs Alice Awiti Orende & another* (2020) eKLR. *James Maina Kiai vs Gerald Kwendaka* (supra) and *Andrew Kariuki Boro vs David Kinuthia Kimani* (supra).

80. In my considered view, therefore, I find the plaintiffs have proved the ingredients of adverse possession to the required standards to be entitled to the reliefs sought.
81. A declaration as a result of this is issued that the defendants hold L.R No. Nkuene/Taita/627 and its resultant subdivision L.R No. 1198, later subdivided into L.R No. (3537 & 3538), 1199, 1210, 1201, 1202 & 1203 in trust for the estate of the late Jerevasio Mitambo for the avoidance of doubt. The title deed for L.R No's 3537 & 3538 is hereby canceled and invalidated under section 80 of the [Land Registration Act](#) for being a nullity to revert to L.R No. 1198.
82. The same shall be re-transferred to the estate of the late Jerevasio Mitambo within two months from the date hereof In default, the Deputy Registrar of this court shall do so. Costs to the plaintiffs.

Orders accordingly.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU  
ON THIS 8<sup>TH</sup> DAY OF MAY, 2024**

**In presence of**

C.A Kananu

Plaintiffs

Miriti for the plaintiff

Kariuki for 5<sup>th</sup> defendant

**HON. C K NZILI**

**JUDGE**

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