



**Kamau (Administrator & Legal Representative of the Estate of Nduro Makau aka Nduku Makau - Deceased) v Parmar & another (As Administrators to the Estate of Nagindas Ramji - Deceased) (Environmental and Land Originating Summons 468 of 2014) [2024] KEELC 5285 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5285 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 468 OF 2014**

**LN MBUGUA, J  
JULY 11, 2024**

**BETWEEN**

**KALUKI KAMAU (ADMINISTRATOR & LEGAL REPRESENTATIVE OF THE ESTATE OF NDURO MAKAU AKA NDUKU MAKAU - DECEASED) ..... PLAINTIFF**

**AND**

**MADHUSUDAN NAGINDAS PARMAR ..... 1<sup>ST</sup> DEFENDANT  
NAVICCHANDARA NAGINDAS PARMAR ..... 2<sup>ND</sup> DEFENDANT  
AS ADMINISTRATORS TO THE ESTATE OF NAGINDAS RAMJI - DECEASED**

**JUDGMENT**

1. The Plaintiff commenced this suit vide an Originating Summons dated 31.3. 2014. She claims to have acquired 3 acres of land out of Parcel No. 42/6 Njiru by way of adverse possession. She seeks orders for the transfer of the said portion to her plus costs. The summons are supported by her affidavit sworn on 31.3.2014 where she contends that her deceased mother Nduro Makau whose estate she administers had been on the suit land since 1956 until she passed away on 26.1.2005.
2. That at the time her mother entered the suit land, it was all bush and unoccupied except for a portion that was occupied by an Asian family.
3. She avers that the Defendants’ father Nagindas Ramji found her deceased mother on the suit land and the 2 parties peacefully lived side by side. She added that her mother improved her parcel of land such that after her death, her family has inherited houses, wells and have continued to make more improvements without interference from the Defendants.



4. The suit is opposed by the Defendants vide the 1<sup>st</sup> Defendant's replying affidavit sworn on 14.8. 2014. He contends that the suit land is owned by his father (Nagindas Ramji) and that Nduro Makau (deceased) entered the suit land pursuant to his father (Nagindas Ramji)' licence to her husband Otieno Orimba (deceased) who was hosted on the suit parcel since he worked for his father.

#### **Case for the Plaintiff**

5. The case of the Plaintiff was advanced by 6 witnesses, with the plaintiff, Kaluki Kamau testifying as PW1. She adopted her affidavit sworn on 31.3.2014, a witness statement dated 31.3.2014 and a further witness statement dated 14.11.2017 as her evidence in chief. She produced 6 documents contained in her bundle filed on 16.4.2014 as P. Exhibit 1-6.
6. Her case as set out in the aforementioned affidavits and statements is that her father, one Makau Kilonzi started living in the suit property in 1940, then married her mother Nduro Makau aka Esther Ndulu Makau in 1949. Her family has 12 members including her siblings Masila Makau, Kanini Makau, Wambua Makau, Mbeke Makau, Mbolu Makau and Mina Makau who were all born and raised on the suit land until they matured and started their own lives, but only 4 are alive. They had a big homestead and house which was later demolished after the death of their mother Nduro Makau in year 2005.
7. She states that her father died in 1970's and left them and their mother on the suit land until 2003 when the sons of Nagindas, the Asian summoned their mother and asked her to vacate, but she stayed put till she passed away on 26.1.2005 after peacefully co-existing with the Defendants' father.
8. She avers that recently, the Defendants have erected a fence around their parcel and her mother's parcel, but they have left a gate leading to her mother's parcel where her family has lived for over 30 years and have planted banana, mango, lemons and avocado trees which are now mature trees on the 3 acres of land.
9. She states that they requested the family of Nagindas to issue them with title and even sought intervention from the chief, D.O and the P.C where they were advised to lodge the case in court.
10. In her oral evidence in chief, PW1 reiterated that they were all raised on the suit land. Her siblings namely; Mbeke, Kanini, Wambua and Maina are deceased. She was born in 1956, but when they grew up, they got married and moved out. The family members who remained on the land are Mbolu and Kaloki.
11. In cross-examination, PW1 stated that she did not have a document to show that she was a daughter to Esther Nduro Makau. That she cannot remember when her father died and her ID Card does not bear her parents' names. That further, at the time her father died, she was living in Murang'a where she is married, she still lives in Murang'a, but her brother Mbolu still lives on the suit property.
12. She stated that while her ID shows that she was born in Machakos, she was actually born in Njiru. That she obtained a limited grant in 2009 in relation to the estate of Nduro Makau aka Nduku Makau and that she did not indicate that the suit property formed part of her estate.
13. That her parents were buried in Mitamboni, Machakos where they originated from and had a piece of land whose size she did not know.
14. Referred to the indenture of the suit property, she stated that Nagindas purchased the suit property in 1968 and that by that time, she was already married.
15. She stated that she does not know the age of her brother Joseph Mbolu as he was the youngest, and was born after she had gotten married and she does not know whether he is also called Mboya. She



- also does not know whether their mother was married to one Otieno and whether they had children, but his brother lives on the suit property. She knows Kaloki who is her aunt's husband and who also stays on the suit property.
16. PW1 further stated that she knows that there is a factory on the suit property and that it has been there all along. She also knew 3 of Naginda's children.
  17. On re-examination, PW1 reiterated that her late mother resisted the Defendants' attempt to evict her from the suit property.
  18. The Plaintiff's 2<sup>nd</sup> witness, PW2 was Joseph Bolu Makau. He adopted his witness statement filed on 23.3.2018 as his evidence. He states that he is a son of Nduro Makau who was married to Makau Kilonzi. That he is over 45 years old (as at the time of recording his statement) and was born on the suit land in a house of 3 rooms of approximately 40 by 10 ft, that he went to school in Njiru and continues to live there to date.
  19. He further states that in their homestead, they had cows and they used to farm and to this end, they had planted fruit trees which are mature.
  20. That their neighbor was Nagindas Ramji who passed on in 1995 and after his death, they continued with peaceful occupation until 1999 when Ramji's sons sought to evict them and they reported the incident to provincial administration who stopped the eviction.
  21. That after his mother's death in 2005, Ramji's sons demolished part of their house in an effort to chase them away, and they now stay in other structures that were in the compound together with their relatives on the portion measuring 3 acres that was being used by their parents.
  22. In his oral evidence, PW2 stated that his parents were Makau Kilonzo and Esther Nduro and that he was never known as Mboya or Otieno. His siblings were 8 of which 4 died while 4 are alive.
  23. In cross-examination, PW2 was asked to produce his Id card. He produced a photocopy in his name of which the court observed that it is indicated that his District of birth is Machakos, the place of issue is Njiru and his date of birth is 15.5.1973.
  24. He stated that his father's name is Makau Malu not Kilonzo as indicated in his statement. That his father died in 2005, while his mother died in year 2006. He identifies PW1 Kaluki Kamau as his sister born of the same father and mother and that in 1970, he was very young. Thus if his sister states that their father died in 1970, then he could go with that since he was young at that time and they did not get letters of administration of his estate.
  25. He stated that he went to Dominic School in Njiru but did not reach class 7 and that their father was the 1<sup>st</sup> to settle on the suit land where he was just herding cattle.
  26. PW2 also stated that his sister PW1 obtained letters of administration of their mother's estate which enabled her to file this suit.
  27. In re-examination, PW2 clarified that Makau Malu is his grandfather, father to Makau Kilonzo and that his sister, PW1 obtained letters of administration of their mother's estate on behalf of the family. He stated that his mother died in year 2005, then changed the years to 2006.
  28. The Plaintiff's 3<sup>rd</sup> witness, PW3 was Florence Monica Kaloki. She adopted her witness statement dated 31.3.2014 as her evidence in chief. She states that she lives in Njiru on the suit land, where she was born and which parcel has always been occupied by her aunt Nduro Makau who raised her as her mother died a long time ago. That she started staying on the suit land when she was about 5 years old, and



- when she got married. She continued staying on that land. Her evidence regarding their occupation mirrors that of PW1.
29. In cross-examination, PW3 was asked to produce her ID Card which shows that her district of birth is Machakos and place of issue is Embakasi. It was issued on 10.9.2005 and her date of birth is 1960.
  30. She stated that Ndulo Makau is her aunt who was married to Makau who passed on in 1977. That she (PW3) started staying on the suit land in 2002 with her husband and to date, that is where they live, and would also want the suit land.
  31. In re-examination, PW3 stated that she referred to Esther Ndulo as her mother in her witness statement because she was raised by Ndulo from when she was 5 years old. She reiterated that her Aunt's husband died in the year 1977.
  32. The Plaintiffs 4<sup>th</sup> witness, PW4 was Peter Kaloki Kiwa. He adopted his witness statement filed on 23.3.2018 as his evidence in chief. He states that he was born in 1951 and that in 1981, he married PW3 who is a niece to Esther Ndulo Makau and they live on the suit land at the invitation of Ndulo Makau.
  33. That Ndulo Makau was staying with her last born Joseph Mbolu Makau and after her death in 2005, the Defendants' family demolished her original house in a bid to chase them away, but they got support from provincial administration and survived the eviction.
  34. In cross-examination, PW4 stated that while he knows the husband of Esther Ndulo, he does not know when he died. However, when he married his wife in 1991 and she invited him to stay on the suit land, he did not know "who amongst the woman or man" was the owner. However, the husband of the Aunt of his wife enabled him to get work. He added that he started to stay on that land before he married his wife.
  35. He avers that the aggression from Ramji's family pushed them right upto where the house is. He doesn't know when Madhu acquired the land.
  36. In re-examination, PW4 stated that he knew Ndulo Makau and her husband long before he married her niece (PW3), but did not know Omondi.
  37. Daniel Musyoki Mwanya testified as PW5 and he adopted his witness statement dated 31.3.2014 as his evidence. He states that he is 44 years old and that PW1 is his aunt, sister to his mother. That his mother passed away a long time ago so he was brought up by Ndulo Makau on the suit parcel where he still lives.
  38. In cross-examination, PW5 stated that he is a child of Mbeke, the child of Esther Ndulo. The court noted that his ID card indicates that his district of birth is Gatundu North, it was issued in Makadara in 2015 and that he was born on 13.5.1970. He avers that he is older than Joseph Mbolu (PW2) who was born in 1973.
  39. He stated that he used to visit his grandmother on the suit parcel, but he never stayed there. He however built a house there but he never completed it.
  40. Referred to one Saimon Mutisya Nandi who was apparently in court, he stated that he hears that he had married his mother, but he doesn't know him. He knows that his mother Mbeke was married to Mwanya.
  41. PW6 was Teresia Njoroge, who introduced herself as a Chief of Njiru location. She adopted her witness statement dated 2.11.2021 as her evidence without the annexures. She avers that she learnt of the dispute herein through area elders and had visited the suit property. She averred that Ndulo Makau



- used to live on the suit parcel from the 1960's, and she got this information from talking to different people who have lived in the area for decades.
42. That the same information was confirmed by one of the elders known as James Nguku who has lived in the area since 1953 and who at some stage worked with East Africa Tanners (Kenya) in the year 1960 and he had met the deceased living on the suit land.
  43. She pointed out that there are correspondences dated 11.4.2003, 20.5.2023 and arbitration proceedings dated 22.11.2023 which all show that provincial administration officers arbitrated this matter between Nduro and estate of Naginda Ramji (deceased) and the officers' opinion was that Nduro is entitled to the piece of land that she lived on for many years.
  44. In cross-examination, PW6 stated that she was working in Dagoretti Rumiritu location until August 2019 when she was transferred to Njiru.
  45. She further stated that she did not know Esther Nduro Makau in Person, all she stated about her is what she heard and neither does she know the 2<sup>nd</sup> Defendant or the owners of the suit land.
  46. She did visit the suit property and she found relatives of Nduro Makau at the edge of the land near the fence, she is not able to tell the size of the land they occupy but could estimate it to be 30 feet by 150 feet and it has over 5 structures.

#### **Defence case**

47. The Defendants' case was advanced by DW1, Madhusudan Nagindas Parmar, the 1<sup>st</sup> Defendant. He adopted his witness statement filed on 17.11.2014 and a replying affidavit sworn on 14.8.2014 as his evidence. He produced the annexures to his affidavit as their D. Exhibit 1-7.
48. DW1 identified himself and the 2<sup>nd</sup> defendant as the administrators of the estate of their father Nagindas Ramji Parpar. He knows Ndulo Makau as the wife of one Peter Otieno who worked for their late father as a mechanic and that they were housed together with their children Mboya, Kavelo and Masila by their father in houses built for his (DW1's father's) employees.
49. That after working for his father for a long time, the said Otieno retired from employment on 31.12.1992 but he stayed on for an additional 7 months and left for Kisumu on 31.7.1993 together with his wife Nduro Makau (deceased) and their 3 children.
50. That after leaving with Otieno in 1993, the deceased (Nduro) came back in early 1999 with her child Mboya and requested his late father to give her a place to stay in one of the rooms, of which his father obliged.
51. That his late father Nagindas later allowed Nduro's son (Mboya) to build a temporary shelter next to the workshop. Later, Nduro died in 2005 and they (defendants) pulled down the workshop but Nduro's son, Mboya remained in the structure for 3 years, then he decided to leave and executed agreements dated 1.12.2008 and 7.1.2009 stating that he had no claim against the Defendants.
52. That DW1's father had for many years operated a family business known as East Africa Leather Factory now East Africa Tanners (Kenya) Ltd on the suit parcel as from 1942 and they lived there for 38 years until they moved out in 2003 but still operate the factory and have employees on the land.
53. He avers that their developments which are on the suit parcel include a borehole which was dug up by their late father, a chicken shade and a small orchard.



54. That he has been making efforts to remove strangers from the suit parcel but in 2013, he was summoned by the District officer who attempted to convince his family to give a portion of their land to the Plaintiff but they refused.
55. That he became aware that one Kaloki Karowa had built a house next to where Nduro (deceased) used to live and has since noticed that the Notice to vacate dated 3.11.2010 served on the Plaintiff erroneously addressed her instead of Kaloki Karowa who is the actual trespasser. He adds that their advocates filed the case ELC No. 639 of 2010 against the Plaintiff herein honestly believing that she was the trespasser and that he has accordingly informed them to amend the said pleadings and substitute the plaintiff's name with Kaloki Karowa.
56. In his oral evidence, DW1 stated that the indenture for the suit land was issued on 23.7.1937 to Suleiman Sumar, who then sold the land to Ranchard (an uncle of his father) and Nagindas (his father) on 18.2.1963, the uncle eventually transferred the whole land to his father Nagindas on 14.2.1968.
57. In cross –examination, PW1 stated that he came to know Nduro Otieno around 1960 as Otieno was working in their farm and by then, the property was not in his father's name since he became registered in 1963.
58. He stated that they started renting the parcel in 1942 from Suleiman Sumar, then purchased the said land in 1968. That between 2008-2013, he attended many meetings and discussions with provincial administration as they had required the plaintiff to vacate the land.
59. In re-examination, DW1 stated that in 1960, Nduro was staying on the suit land as a wife of Otieno Orimba who was working for East Africa Leather company.

### **Submissions**

60. Plaintiffs submissions are dated 20.2.2024 where it is argued that the conveyance documents tabled by the Defendant showing the dates and times when the suit land changed hands do not affect the Plaintiff's claim as a claim for adverse possession is attached to land and not title. To this end, the case of Maweu v Liu Ranching & Farming Co-operative Society [1985] eKLR as well as Gachuma Gacheru v, Maina Kabuchwa [2016] eKLR were relied upon.
61. It is submitted that the Plaintiff was in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years since 1949 when she got married to Makau Kilonzi until 2003 when the Defendant tried to evict her for the 1<sup>st</sup> time.
62. The Plaintiff submits that during cross-examination, the Defendant confirmed that the deceased's occupation of the suit land was not permitted by his late father Nagindas Ramji, yet he had full knowledge of her occupation and did not interfere hence, being the true owner, he was excluded from enjoyment of a portion of the suit property.
63. It is argued that by filing Nairobi ELC Suit No. 639 of 2010 against the Plaintiff herein which was dismissed for want of prosecution, it was a clear indication that the Defendants were aware that the Plaintiff was in occupation of the suit parcel.
64. The Defendant's submissions are dated 5.4.2024. Relying on the case of Elijah Nderitu Gachaga v Francis Gakuu Gachaga & 2 others [2019] eKLR, the court is urged to dismiss the suit since the Plaintiff seeks an order vesting the suit property in herself without first obtaining a full Grant of letters of administration and without accordingly amending her Originating Summons to seek the appropriate orders.



65. It is submitted that the affidavit in support of the Originating Summons is fatally defective as the annexures thereon are neither securely sealed nor marked and executed by a commissioner for oaths contrary to the Oaths and statutory declaration Act. To this end, the case of Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR is cited.
66. It is also argued that the Plaintiffs claim cannot succeed since she failed to recognize the Defendant's title over the suit land. The case of Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Kenya Commercial Bank [2014] eKLR as well as *Njue v Matiabe & 3 others [Environment and Land Case E050 & E10 of 2021]* (consolidated) [2023] KEELC 17361 (KLR) (11MAY 2023) (Judgment) are cited.
67. It is submitted that the Plaintiff was not competent to prove adverse possession and failed to establish how Nduro Makau allegedly entered the suit land as contrasted with the Defendant's evidence that Nduro entered the suit land under license on account of her husband being an employee at their tannery operating on the suit land.
68. It is argued that the deceased could not have been in exclusive possession of the portion claimed, as PW6 and PW2's accounts collaborate DW1's testimony that there were other employees housed on the suit land and the Defendants continued to operate their leather factory situated on the suit land without hindrance.
69. It is also the Defendants' submission that the Plaintiff did not sufficiently identify the claimed portion of the suit land for purposes of levying adverse possession. It is pointed out that PW6 has contradicted the Plaintiff's claim of 3 acres of the suit land by stating that the family of deceased is living on a 30 feet by 150 feet plot.
70. The Defendants also rely on the case of Tius Kasuve v Mwaani Investments Ltd & 4 others [2004] eKLR, Mombasa Teachers co-operative Savings Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR, Mwangangi Kisyula & another v Francis J Maingi Munyao [2012] eKLR, John Nyang'au Maragaia v Ogotu Mang'are Osoro [2021] eKLR as well as Hana Kenya Limited & another v Dhirey Mohanlan Shah [2018] eKLR.

### **Determination**

71. I have considered the rival pleadings, evidence and submissions. I find that the issue falling for determination is; Whether Esther Nduro Makau aka Nduku Makau's estate is entitled to a portion of the land no. 42/6/Njiru to the tune of three acres through the doctrine of adverse possession.
72. The Plaintiff's claim is that Nduro Makau (deceased) had been on the suit land occupying three acres thereof since 1940s until year 2005 when she passed on, and that her family members continue to stay on the said land. On the other hand, the defendants refute those averments, contending that Nduro Makau came to that land as a wife of one Peter Otieno Orimba, who was their employee at defendant's leather factory, and the couple left when Otieno retired.
73. This court has a duty to sieve through the evidence to determine which version of the events is plausible. In so doing, the court will have to set out the applicable law in a claim of adverse possession. But before delving into the said issue, the court will determine the two technicality points raised by the defence which was seeking to have the suit dismissed.
74. The first point raised by the defence is that, the annexures to the Originating Summons offend the Oaths and Statutory Declaration Act since the said annexures are not commissioned and marked with serial letters of identification. I find that the case of Jeremiah Nyangwara Matoke v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR (supra) relied on by the Defendants to



advance their case for dismissal is distinguishable from this case in the sense that in the instant suit, the matter proceeded by viva voce evidence where the annexures in question were subjected to the rigors of cross examination just like any other documents relied on during a hearing. To this end, I see no basis to expunge the said annexures.

75. The other point of technicality raised by the defendants is that Plaintiff only has a limited grant of letters of administration ad litem and therefore the suit property cannot be transferred to her. Firstly, I find that the limited Grant ad litem availed by PW1 indicates that it was for “purposes only of filing the suit”; Meaning that PW1 had obtained the requisite authority enabling her to file the case. What then happens if the suit succeeds?. I hold the view that the suit property would be vested in the estate of Nduro Makau if the suit succeeds, since PW1 has filed the suit in her capacity as a legal representative. Thus again the objection raised by the defence fails.
76. Back to adverse possession, the legal regime governing the said doctrine is to be found under the Limitations of Actions Act. Section 7 thereof provides that an action may not be brought by anyone to recover land after the end of the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Where a person claims to have become entitled by adverse possession to land which has been registered, he is allowed by virtue of the provisions of section 38 of the aforementioned statute to apply to the Environment and Land Court for an order that he be registered as the proprietor.
77. In *Kasuve v. Mwaani Investments Ltd. & 4 Others* (2004) eKLR, it was held that;
- “In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.
78. And in *Mount Elgon-Beach Properties Limited v Kalume Mwanongo Mwangaro & another* [2019] eKLR, the Court of Appeal while citing previous decisions set out the prerequisites required by claimants of adverse possession as follows;
- “Strictly, 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 force, without secrecy, 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 phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”.
79. From the aforementioned case law, it emerges that for one to succeed in a claim for adverse possession, he/she must prove the following elements:-
1. He/she must have made physical entry and be in actual possession of the land for the statutory period, the said period being 12 years.
  2. The entry and occupation must be with or maintained under some claim or colour of right or title.
  3. The occupation must be non-permissive.
  4. The occupation must evidence unmistakable *animus possidendi*, that is occupation with the clear intention of excluding the owner and all other persons.



5. The acts of the adverse possessor must be inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.
80. The first question to interrogate relates to the entry and occupation of the suit property by Nduro Makau. The plaintiff and her witnesses have advanced a claim that Nduro Makau's entry to the land was through courtesy of her marriage to one Makau Kilonzi. To this end, Pw1 and PW2 who are apparently siblings claim that they were born on that land where they lived with their parents, Makau Kilonzi and Nduro Makau and their other siblings. This evidence however has gaps and does not give a cogent account as to how Nduro Makau entered the suit land.
81. To start with, PW1 avers that her father Makau Kilonzi was originally from Mitamboni, their ancestral land "that is where my father and mother were buried". That being the case, PW1 and her witnesses ought to have given a plausible account as to how the parents particularly, Makau Kilonzi moved into that land.
82. In her witness statement filed on 23.3.2018, PW1 avers that her father came to the land in 1940, then he married her mother in 1949 while on the suit land. PW2 also mentions year 1949 as the time when their parents got married. In her affidavit in support of the Originating Summons, PW1 avers at paragraph 4 that Nduro Makau started living on the suit land in 1956, while at paragraph 9 thereof, she mentions the year of entry as 1957.
83. PW1 has further stated that her father died in 1970 and by then, she was married and no longer staying on the suit land. She was at her husband's place in Murang'a. On the other hand, PW2, a brother of the plaintiff who was apparently born in 1973, gave contrary evidence stating that he was staying with the father on the suit property. During cross examination, he repeatedly (3 times) stated that his father died in 2005!. As for pw3 she stated that she knew Makau, the husband of her aunt Nduro Makau and that he died in 1977!.
84. The aforementioned witnesses apparently knew Makau Kilonzi very well as a close family member and a father; the occupation of the land by Nduro Makau is tied to the entry of the land by Makau Kilonzi, however, these witnesses cannot agree on such a grave matter as to when Makau Kilonzi exited this world. On the same breadth, this court is not persuaded by the evidence of PW1 that her father just entered the land in 1940, then married the mother in 1949 or the 1950s while on the suit land.
85. As for PW3, she stated in her recorded statement that she was born on the suit land. But in cross examination, she stated that she was actually born in Machakos. She further stated that she stated staying on the suit land when she was only 5 years old when she was taken in by her Aunt Nduro Makau. According to her ID, she was born in 1960 which would place her entry to the land as 1965. She still went ahead to state in cross examination that; "I started staying on that land in year 2002"!.
86. As for PW3's husband who testified as PW4, he avers that when he married PW3 in 1991, he started staying in the suit premises. Further, pw4 stated that when he moved into the suit plot in 1991 he "didn't know who amongst the woman or man was the owner". He went on to say that "the husband of the Aunt of my wife also enabled me to get work". Just who is this man whom pw4 found in the home of his wife's Aunt in 1991?. Certainty it was not the husband of Nduro who apparently died in 1970 according to the plaintiff.
87. As for PW5, in his recorded statement, he identifies himself as a grandchild of Nduro Makau, that his mother passed away and was raised by Nduku Makau on the suit land. However, during cross examination, he stated that "I was born in 1970. I used to visit my grandmother in 1970. I used to visit my grand mother but I have never stayed there.....".



88. PW6 who is a chief posted recently to Njiru location could not also answer this question of entry and continuous occupation of the land by plaintiff's family. She admitted that her evidence on the issue was based on hearsay save what she observed upon a visit to the suit land.
89. It is not lost to this court that even the close family members of the deceased do not seem to have a seamless identification of each other. PW3, Florence Kaloki identifies Nduku Makau as her mother in her recorded statement. She clarified during cross examination that Nduro Makau was actually her Aunt who raised her. This witness is the one who is married to pw4 Peter Kaloki who also identifies pw3 as a niece of Nduku Makau. However, the plaintiff (PW1), in cross examination identified Kaloki as a husband to her Aunt!.
90. The defendants have on the other hand advanced a claim that Nduro Makau was staying on the suit land as a wife of their employee, one Peter Otieno Orimba with their 3 children including one called Mboya. That when Otieno retired, the family left in 1993 but Nduro later came back in 1999 with her son Mboya and was given a room to stay by defendants' father. Later, Mboya too was allowed to put up a structure, but when Nduro died in 2005, the defendants pulled down the structures and in 2008 and 2009, Mboya signed documents availed by the defendants as annexures "D" indicating that he would leave the land.
91. PW1, 2 and 3 have vehemently denied that pw2 is the person referred to as Mboya. It is however noteworthy that PW1 has made reference to Mboya twice. In cross examination, she (PW1) stated that Mboya (referring to her brother) had recorded a statement saying he was 45 years old. And while concluding her testimony, PW1 stated as follows in re-examination; "Mboya will be called as a witness, he is my brother". Certainly this could not have been a slip of the tongue. It is a tell tale sign that the plaintiffs were not forthright in their evidence.
92. This far, I say that the evidence of entry and continuous uninterrupted occupation of the suit land by Nduro Makau and her family has not sufficiently been established.
93. Another point for consideration relates to the question of exclusive occupation. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court had this to say on the claim of adverse possession;
- "The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the dispossessed owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an animus possidendi for the requisite time. It must be shown that the owner has ceased to be in occupation and that the claimant is and has continuously been in occupation. An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession". Emphasize added.
94. In light of the foregoing case law, it was incumbent upon the plaintiff to demonstrate the nature and extent of their ground occupation on the suit land.
95. PW1 and her brother PW2 claim that the suit land is 3 acres out of parcel 42/6 Njiru. Pw1 even stated in her statement of 31.3.2014 that their 3 acres is well demarcated. However, no evidence was tendered



to demonstrate how the three acres were demarcated on the ground. In her oral evidence Pw1 stated that “ the suit property has a bore hole and factory...”. And in cross examination, she stated that “ I know there is a factory on the suit property. The factory has been there all along”. That evidence is in tandem with defence claim that they had been operating a leather factory for many years, since 1942.

96. At paragraph 7 of her affidavit in support of the Originating summons, PW1 avers that “when the defendants due to security reasons fenced the parcel with a stone wall they put up a barbed wire fence separating the area the deceased has been living and working on since 1957 from their own area.”
97. In her statement dated 31.3.2014, PW1 averred that they lived with the defendants peacefully even after their father died until recently when they put up a wall fence , all round the plaintiff’s parcel and defendants parcel leaving a gate to plaintiffs parcel.
98. As for PW2, he avers that after the death of Naginda in 1995, his sons created problems and in 1999, “they erected a fence around the whole land including the portion we were occupying claiming that the whole land belongs to them”!
99. Similarly, PW3 in her statement averred that it was after the death of Naginda that his family erected a stone wall encircling both plaintiff’s and defendants parcel, but according to PW3, this was done to enhance security.
100. Further, the plaintiff’s witnesses have stated that the house which had been occupied by Nduro Makau and the family was demolished by the defendants after her death in 2005.
101. And when PW6 visited the suit premises, she found that the family of the plaintiff were at the edge of the land occupying about 30 by 150 feet portion of land.
102. This far, it is clear that the element of animus possidendi, the intention to possess the land to the exclusion of the owner is missing, as there is no evidence to indicate that there was exclusivity in occupation of the land to the extent of 3 acres by plaintiff’s family.
103. Has the plaintiff proved the case to the required standard, that is on a balance of probabilities?. In Samson S. Maitai & another V. African Safari Club Limited & Another [2010] eKLR, the court had this to say in relation to proof.

“Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute.”

104. I find that the plaintiff has not proved the case on a balance of probabilities on a claim of adverse possession. Thus the suit is hereby dismissed. Each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11<sup>TH</sup> DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Ms. Ng’ang’a holding brief for Kaigai for Plaintiff

M/s Moga holding brief for Mr. Lutta for Defendants

Eddel: Court Assistant

