



**Muriithi (Suing as the Legal Representative of the Estate of Francis Mwaura Muiruri - Deceased) & another v Muturi & 2 others (Both 1st and 2nd Defendants are Sued as the Legal Representatives of the Estate of John Kariuki Gatuthu - Deceased) (Environment & Land Case 5 of 2023) [2024] KEELC 5212 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5212 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 5 OF 2023**

**LN GACHERU, J  
JULY 11, 2024**

**BETWEEN**

**LUCY WANJIRU MURIIITHI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF FRANCIS MWAURA MUIRURI - DECEASED) ..... 1<sup>ST</sup> PLAINTIFF  
DENNIS MUIRURI MWAURA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**STANLEY MWANGI MUTURI ..... 1<sup>ST</sup> DEFENDANT  
MARY WANJIRU KARIUKI ..... 2<sup>ND</sup> DEFENDANT  
KELVIN MBURU KARIUKI ..... 3<sup>RD</sup> DEFENDANT  
BOTH 1ST AND 2ND DEFENDANTS ARE SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOHN KARIUKI GATUTHU - DECEASED**

**JUDGMENT**

1. Vide an Amended Originating Summons dated 10<sup>th</sup> June 2022, the Plaintiffs herein brought this claim against the Defendants and sought for the following orders against them;
  - a. That the court be pleased to declare that the Defendants title to land parcel No. LOC.16/ GATURA/1912, has become extinguished by operation of the law and that the Plaintiffs herein have become entitled to whole of the said parcel of land through adverse possession.



- b. The Court be pleased to order that the whole of land parcel No. LOC.16/GATURA/1912, be registered in the name of LUCY WANJIRU MURIITHI and DENIS MUIRURI MWAURA.
  - c. The Defendants do execute all the necessary documents to effectuate the transfer of whole of that land known as LOC.16/GATURA/1912, to the Plaintiffs and in default the Deputy Registrar of this Honourable Court be empowered to do so.
  - d. The costs hereof be provided for by the Defendants.
2. The Originating Summons is premised on the following grounds;
    - a. The Plaintiffs have been in open, peaceful and as of right possession and occupation of the whole land parcel No. LOC.16/GATURA/1912, for a period of over 12 years.
    - b. The Plaintiffs' use and possession of the suit land has been open, uninterrupted, exclusive and without force until sometimes in November 2021, when the Defendants herein served the Plaintiffs' with Notice to vacate from the suit land.
    - c. The Plaintiffs have become entitled to ownership of the said parcel of land through adverse possession.
  3. The Originating Summons is also supported by the Affidavits of the Plaintiffs herein sworn on 10<sup>th</sup> June 2022. Lucy Wanjiru Muriithi, the 1<sup>st</sup> Plaintiff averred that she has brought the suit on her behalf and on behalf of the estate of Francis Mwaura Muiruri. She annexed the Grant AD LITEM, as her prove of such capacity.
  4. It was her averments that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the legal Administrators of the estate of John Kariuki Gatuthu, as is evident from the certificate of confirmed grant attached to the Affidavit. She also contended that the 3<sup>rd</sup> Defendant is the registered owner of land parcel no. Loc 16/Gatura/1912, the suit property, as is evident from the abstract of title attached thereto.
  5. She averred that the suit land initially belonged to the late John Kariuki Gatuthu, as is evident from the attached certificate of title. However, in 2007, her late husband Francis Mwaura Muiruri, purchased the suit land from the said John Kariuki Gatuthu. However, she claimed the sale agreement got lost after the death of her husband.
  6. She claimed that this suit land was a combination of land parcels No. Loc 16/Gatura/1743, and Loc 16/Gatura/1910, which parcels of land were registered in the name of the vendor, John Kariuki Gatuthu.
  7. That her late husband completed payment of the purchase price in 2011, and the family took possession of the suit land from 2007. That the family has been living openly, exclusively, continuously and without force or secrecy ever since.
  8. However, the vendor John Kariuki Gatuthu, died on 29<sup>th</sup> May 2012, before he could procure consent from the relevant Land Control Board, to transfer the suit land to her husband. Shortly thereafter, her husband also died on 17<sup>th</sup> July 2014, and was buried on the suit land.
  9. It was her contention that their occupation of the suit land since 2007, was well known to the deceased John Kariuki, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein who are his immediate family members. She claimed that she has assisted the said family members in filing Succession Cause, by contributing money to file the cause.



10. She alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants decided to leave her out while filing the succession cause, and she only learnt about it in 2021, after the suit land was sold to the 3<sup>rd</sup> Defendant. It was her contention that her son and herself have been in open and exclusive possession and occupation of the suit land since 2007, and have acquired the suit land by adverse possession.
11. She claimed that they constructed permanent houses on the suit land, cowshed, chicken coup and have developed the said land and fenced it. It was her allegations that even if she had divorced her husband, he still wooed her back for the sake of the family and she remained his wife. That she was even acknowledged in his eulogy.
12. Further, she alleged that after the death of her husband, she made the 1<sup>st</sup> Defendant the caretaker of the suit land until when her son Dennis Muiruri Mwaura, the 2<sup>nd</sup> Plaintiff became of age. That she trusted the 1<sup>st</sup> Defendant and allowed her to pick tea leaves from the suit land to cater for her needs, but she has now turned against her.
13. Consequently, it was her claim that she has acquired the suit land by virtue of adverse possession in accordance with section 28 of the [Land Registration Act](#), which is an overriding interest. She alleged that the acquisition of title deed by the 3<sup>rd</sup> Defendant did not interrupt her occupation or ownership of the suit land. She urged the court to allow her claim.
14. In his Supporting Affidavit, Dennis Muiruri Mwaura, the 2<sup>nd</sup> Plaintiff reiterated the contents of the 1<sup>st</sup> Plaintiff averments and added that he knew that his father, the late Francis Mwaura Muiruri, had bought the suit land from his cousin John Kariuki Gatuthu in 2007.
15. That his father used to farm on the suit land, and the 2<sup>nd</sup> Plaintiff would assist him during school holiday. That when he became of age, he went to stay on the suit land, until when he went to Qatar for a few years. That he left the 1<sup>st</sup> Defendant as the caretaker. That he had erected perimeter wall all-round the suit land.
16. It was his averments that since the year 2007, their family has been in open use, occupation and possession of the suit land, and they still occupy the same to date. That the family trusted the 1<sup>st</sup> Defendant and allowed her to take care of the land, but she has turned against them and sold the suit land to the 3<sup>rd</sup> Defendant. That the 1<sup>st</sup> Defendant knew about their occupation and possession of the suit land all along, and the fact that the 3<sup>rd</sup> Defendant has acquired a title over the said land, does not change their ownership by adverse possession, which is an overriding interest.
17. The Originating Summons is opposed by the Defendants herein. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Replying Affidavit through Mary Wanjiru Kariuki, sworn on 6<sup>th</sup> December 2021, wherein she averred that the instant Originating Summons is frivolous, vexatious, utterly scandalous and is marred with grave misrepresentations that are meant to deceive the court.
18. She admitted that she is the wife to the late John Kariuki Gatuthu, who was the registered owner of land parcel no. Loc 16/ Gatura/1912, having been registered so in 2011. It was her contention that prior to the said registration, the suit land was part of land parcel no. Loc 16/ Gatura/1911, which land was subdivided around 2011, giving rise to the suit land.
19. It was her allegation that on or around 2011, the late Francis Mwaura Muiruri, who was a cousin to her late husband was going through marital problems with the 1<sup>st</sup> Plaintiff herein, and he approached his cousin John, and requested him to allow him to live on a small portion of the suit land. That her husband generously allowed the late Francis to occupy a small portion of the suit land.



20. That the late Francis Mwaura Muiruri moved into the suit land in the absence of the 1<sup>st</sup> Plaintiff, and together with John Kariuki, they cleared the bush and put up a small house, cowshed and a fence. The said Francis was allowed to occupy the land by John, his cousin and he did not purchase the suit land. That there was no sale agreement that was executed, as no sale took place.
21. It was her contention that after the construction of the house, the late Francis Mwaura Muiruri, moved into the suit land and he lived there without the 1<sup>st</sup> Plaintiff, until his demise on 17<sup>th</sup> July 2014. That she used to provide the said Francis Mwaura with food, as the Plaintiffs had abandoned him.
22. She alleged that after the death of Francis Mwaura, the property has remained unoccupied and unattended to date and the Plaintiffs allegations are not true. That upon the death of her husband John, she started the process of succession and the money claimed by the Plaintiffs were personal loans and not for purposes of succession and transmission of the suit land to the Plaintiffs.
23. She admitted that after the process of succession was completed, the suit land was transferred to her name after the grant was confirmed on 7<sup>th</sup> May 2021. Further that after the successful transmission of the suit land to her name, she later sold the suit land to the 3<sup>rd</sup> Defendant after executing a sale agreement. That the land was transferred to his name as per the certificate of title.
24. The 1<sup>st</sup> Defendants denied that the Plaintiffs have ever occupied the suit land, and she claimed that the structures on the suit land were put up by her husband and Francis Mwaura Muiruri. That the Plaintiffs had never set foot on the suit land, prior and after the death of Francis, nor prior to filing of this suit. That the Plaintiffs have started to threaten her to coerce her to give them part of the suit land.
25. She alleged that the Plaintiffs entered into the suit land using hired goons in December 2021, and cleared part of the suit land. Further that the Plaintiffs entered the suit land with the Police and harassed her and she reported the matter to Ndakaini Police Station. She denied that the Plaintiffs have any locus to file this suit. She claimed that she has been harvesting the tea leaves with the consent of the 3<sup>rd</sup> Defendant.
26. She urged the court to dismiss the Plaintiffs suit with costs.
27. The 3<sup>rd</sup> Defendant also filed his Replying Affidavit to the Originating Summons and denied all the allegations made in the claim. He averred that he purchased the suit land from the 1<sup>st</sup> Defendant after carrying out due diligence. That he established that the suit land belonged to the late John Kariuki Gatuthu, and thereafter, they obtained the Land Control Board Consent. That he paid the purchase price and the suit land was transferred to his name. He has a title deed to support his claim.
28. He alleged that the Plaintiffs are intruders to his parcel of land and that they had never occupied the suit land prior to his purchase of the same. He filed a Counter Claim against the Plaintiffs and prayed for;
  - i. A declaration that the Plaintiffs' actions between 17<sup>th</sup> November 2021, to date amount to illegal trespass onto the 3<sup>rd</sup> Defendant's suit land LOC 16/ Gatura/ 1912.
  - ii. A permanent injunction against the 1<sup>st</sup> Plaintiff restraining her either by herself, her agents, employees or servants or anybody or authority from interfering in any way with the 3<sup>rd</sup> Defendant's quiet occupation and possession of the suit land;
  - iii. Special damages and costs of the destroyed fence and portions of land;
  - iv. General damages for trespass, psychological harm and mesne profits,
  - v. Costs of the Counter- claim and the suit.



29. The 3<sup>rd</sup> Defendant urged the court to dismiss the Plaintiffs' suit and allow his counter-claim.
30. After several Pre-trial conferences, the suit proceeded for trial through viva voce evidence. The Plaintiffs gave evidence for themselves and called three witnesses to support their claim. The Defendants also gave evidence for themselves and called three witnesses to support their opposition to the Plaintiffs' suit.

### **Plaintiffs' Case**

31. PW1, Lucy Wanjiru Muriithi, told the court that she is a Police Officer based at Msambweni Police Station in Kwale County. She adopted her witness statement dated 20<sup>th</sup> July 2022, as her evidence in chief. She also produced her list of documents as P. Exhibits 1-9, P Exhibits 10-11 and P. Exhibits 12-16. It was her evidence that the suit land, Loc 16/Gatura/1912, was a combination of Loc 16/Gatura/ 1743 and 1910, which parcel of land was purchased by her husband in 2007, from John Kariuki Gatuthu, the husband to the 1<sup>st</sup> Defendant.
32. Later, that her husband died on 17<sup>th</sup> July 2014, although by then, he had taken possession and occupation of the suit land. That after taking over, they built cow sheds, temporary houses and planted tea bushes.
33. She testified that the vendor, John Kariuki was a cousin to her husband, and during the transaction, the two went to the Land Control Board for consent on 24<sup>th</sup> November 2006, at Gatanga. However, the consent was not signed, and that after the death of her husband, the sale agreement was misplaced.
34. That her husband used to pick the tea leaves and deliver it at Ngere Tea Factory, and his membership no was NGO 01401352232, and the last slip was for ksh 285/60 cts dated August 2014.
35. On cross exam by counsel for the 1<sup>st</sup>& 2<sup>nd</sup> Defendants, she confirmed that the suit land is a combination of land parcel no. 1743 and 1910, and they went to the Land Control Board in the year 2006, and she identified the said Land Control Board Application, which Application Form was signed, but not dated. However, it was her evidence that the consent was given on 24<sup>th</sup> November 2006.
36. She also confirmed that the Application for transfer was not registered by the Land Registrar. She did not have evidence of the amalgamation of the two parcels of land, but she alleged that the initial purchase was done in 2006, and the amalgamation was done in 2008. She further testified that her husband occupied the suit land, until the time of his death.
37. Further, that though there are developments on the suit land, he did not have approvals for them, and she did not have evidence to confirm that they constructed on the suit land, but they installed water and electricity thereon.
38. It was her evidence that all the documents relating to the purchase of the suit land were misplaced immediately when her husband passed on. That she has continued to pay for water and electricity, but she had no evidence to that effect.
39. She insisted that she sent money to Mary, the 1<sup>st</sup> Defendant to facilitate the filing of succession cause, and she identified the M-PESA statement as exhibit in court. It was her further evidence that she obtained the Letters of Administration in 2021, and she funded Mary to file the succession cause.
40. Further, she identified a payment advice from Kenya Tea Development Authority( KTDA), dated August 2014, which was the last payment after the death of her husband, and the said money was deposited in her husband's Account. She claimed that after the death of her husband, Francis Mwaura, they stopped picking tea leaves, but allowed the 1<sup>st</sup> Defendant to pick the said tea leaves as the caretaker of the suit land.



41. It was her further evidence that her husband commenced Divorce proceedings against her, and she was divorced in 2010. But when the properties were purchased, she was still married to Francis Mwaura, and that by the time of his death, she was still his wife.
42. Upon cross exam by counsel for 3<sup>rd</sup> Defendant, she confirmed that she went together with the 1<sup>st</sup> Defendant to get a letter for filing succession cause at the Chiefs office, but she was not indicated as a beneficiary. She also confirmed to having filed for the Divorce in 2004, which Divorce was concluded in 2010, and after Divorce, she moved to the property that she had bought at Ngoigwa.
43. However, she insisted that she has occupied the suit land since 2007, after purchase of the same, and the parcels of land were combined in 2010, and that the sale agreement was misplaced.
44. Further, she testified that though there was a transfer which was signed but not dated, her claim is on adverse possession as she has lived on the suit land since the time of purchase. Although she alleged that they practice Zero grazing on the suit land, it was her evidence that she did not avail any evidence of such Zero grazing farming.
45. She alleged that she allowed the 1<sup>st</sup> Defendant to pick tea leaves after her son, the 2<sup>nd</sup> Plaintiff, went to work in Qatar. She could not tell how many kilograms of tea are picked by the 1<sup>st</sup> Defendant, and she could not tell how many kilos her husband used to pick too.
46. On re-exam, she insisted that her husband bought the suit land in the year 2006, and added another in 2008, and then he developed the suit land. She also stated that her son has been living on the suit land, but only left it under the care of 1<sup>st</sup> Defendant when he went to work in Qatar in the year 2019. That during the burial of her husband on the suit land, there was no objection by anyone.
47. PW2 Simon Muturi Ngugi, from Gatanga area stated that he is the Chief of the area, as from June 2018. He adopted his witness statement dated 21<sup>st</sup> February 2023, as his evidence in chief.
48. It was his evidence that he knows the parties herein, and he also knows the suit land. That he was informed that the suit land had been transferred to the wrong person, contrary to what had been agreed. She confirmed having issued the letter to Mary Wanjiru, to file a succession cause, and she was in company of Lucy Wanjiru, the 1<sup>st</sup> Plaintiff herein. That the registered owner was John Kariuki, and the succession cause was over his estate. He testified that he did not know why Mary tagged Lucy along.
49. On cross exam by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he confirmed that he became the area chief long after Francis Mwaura was deceased, and so was John Kariuki. He further stated that he did not see any agreement between Francis Mwaura and John Kariuki, but relied on the word of mouth.
50. That he later received a complaint from Dennis Muiruri Mwaura, that there were over grown trees that needed to be cut. He issued him a letter to that effect, but the letter was issued to Mary, the 1<sup>st</sup> Defendant, who was the caretaker of the suit land.
51. On cross exam by counsel for 3<sup>rd</sup> Defendant, he confirmed issuing the letter for purpose of succession in 2019, and the letter was issued to Mary, who was in company of Lucy. He also confirmed that he knew Dennis Muiruri Mwaura, but not Lucy. That he knew Francis as he used to see him over the weekend, and he would also pick tea from his farm.
52. He confirmed that he was told that Francis had bought the suit land from John, who was his cousin. However, he did not see the sale agreement.
53. In re-exam, he confirmed that the deceased died before he was the area chief, but he knew that Dennis Muiruri Mwaura used to live on the suit land, and he used to see his father in Thika town.



54. PW3 Samuel Gatuthu Muiruri, a businessman adopted his witness statement as his evidence in chief. It was his further evidence that Francis Mwaura was his brother, and Lucy Wanjiru, was his wife. He also confirmed that he knew the suit land, as his brother Francis purchased it in 2010.
55. That he visited the said land and was shown the boundaries, and his brother used to keep livestock, rear chicken and had planted tea bushes. That his brother also showed him where he wanted to be buried, and after his death, his brother was buried on the suit land.
56. It was his further evidence that the suit land was sold to Francis Mwaura by John Kariuki, who was a cousin to him, and that Francis was not just given a place for burial, but he had purchased the suit land.
57. On cross exam by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he confirmed that his brother Francis Mwaura bought the suit land in 2010. However, he did not see the title deed for the suit land nor the sale agreement.
58. It also confirmed that though Lucy Wanjiru was married to Francis Mwaura, they later divorced and Lucy lived in Thika town, and he did not know why the two divorced.
59. On cross exam by counsel for 3<sup>rd</sup> Defendant, he confirmed that he did not see any sale agreement over the suit land. He did not know how much the land was bought for, but the land was 1¼ acres, and that the late Francis Mwaura had three children. That Dennis lives on the suit land, but not Lucy.
60. In re-exam, he confirmed that in 2010, he found livestock on the suit land, which belonged to his brother Francis, and that when he visited the land again in 2020, there were no activities going on as Dennis was out of the Country.
61. PW4 George Muiruri Gatuthu, from Gatanga area also adopted his witness statement dated 20<sup>th</sup> July 2022, as his evidence in chief. It was his evidence that John Kariuki Gatuthu was his brother, and Francis Mwaura Muiruri was a cousin to them.
62. It was his evidence that Francis Mwaura Muiruri started to live on the suit land in 2007, wherein he was farming and had built a house thereon. Francis had also grown tea bushes, built cow shed and a wall. That when Francis passed on, he was buried on the suit land. Further that Francis tea was being picked by his employee with the permission of Dennis.
63. He stated that though Francis Mwaura Muiruri bought the suit land, he was not present during the transaction of sale of this suit land, but he saw Francis giving his brother John, some money in the tune of ksh 100,000/=, and he did not know if a sale agreement was drawn. That this transaction was around 2008, and Francis had started using the land in 2007.
64. On cross exam by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he confirmed that the suit land was sold to Francis Mwaura Muiruri by John Kariuki, and John Kariuki had gotten this land from their father through succession. He confirmed that he never saw any sale agreement, and he did not know the purchase price. He also did not know the acreage of the suit land.
65. He confirmed that Francis Mwaura used to pick tea from the farm, but after his death, he does not know who picks it, but Mary, the 1<sup>st</sup> Defendant was a caretaker. He stated that Lucy has never lived on the suit land.
66. On cross exam by counsel for the 3<sup>rd</sup> Defendant, he confirmed to have seen ksh 100,000/= being exchanged between Francis Mwaura, the purchaser and John Kariuki the vendor. He also did not know how much money was later paid to John by Francis and that Lucy was not present during the transaction.



67. In re exam, he confirmed that even after the death of Francis, his son Dennis continued to live on the suit land and take care of the said farm.
68. PW5 Dennis Muiruri Mwaura, the 2<sup>nd</sup> Plaintiff from Mombasa adopted his witness statement as his evidence in chief, and also his Supporting Affidavit dated 10<sup>th</sup> June 2022. It was his evidence that Francis Mwaura was his father, and Lucy Wanjiru, the 1<sup>st</sup> Plaintiff is his mother.
69. It was his evidence that his father bought the suit land in 2007, and lived thereon wherein he built a house, cow shed, chicken coup, and dog kennel. That he supervised the said construction and took care of the land after the death of his father. That he used to live on the suit land, but later moved to Mombasa, and there is no one picking the tea now, as there is a court order barring anyone from picking the tea.
70. On cross exam by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he confirmed that in 2007, he was 15 years old, but became an adult in 2010. That he has lived on, the suit land as an adult for 11 years now. That he allowed Mary to pick the tea leaves, as he stopped picking the tea after the death of his father.
71. It was his further evidence that though he saw John going to his father office at Thika to collect the purchase price, he did not know how much was the purchase price.
72. On cross exam by counsel for 3<sup>rd</sup> Defendant, he confirmed that he cleared school in 2009, but he did not attend college and after the death of his father, he continued to pick the tea from the suit land, but by 2021, he was not picking the tea from the suit land. It was his evidence that the sale agreement got lost/ and or misplaced after the death of his father. However, he never took any Police abstract over the same.
73. It was his further evidence that when he went to work in Qatar, he left Mary, the 1<sup>st</sup> Defendant to take care of the suit land. That when his father died, his grandfather took all the documents relating to the suit land and he has refused to release them to him. It was his evidence that no succession has been done over his father's estate.

### **Defence Case**

74. DW1, Mary Wanjiru Kariuki, the 1<sup>st</sup> Defendant from Gatura village adopted her witness statement dated 6<sup>th</sup> May 2022, as her evidence in chief. She also produced her list of documents as Exhibits 1-11. She also relied on her Replying Affidavit entirely.
75. It was her evidence the suit land was owned by her late husband John Kariuki Gatuthu, and she later acquired it through succession of her husband's estate. She stated that the late Francis Mwaura Muiruri, was a cousin to her husband.
76. That the said Francis Mwaura had issues with his wife, and he asked his cousin John to allow him to put up at their parcel of land, which John did and they started a project together.
77. That Francis occupied the whole of land parcel No 1912, and the said Francis stayed alone, but not with the Plaintiffs. Later Francis died in 2014, and was buried on the suit land, and by then, he had separated and / or divorced with his wife.
78. It was her further evidence that she used to pick tea leaves from the suit land and that the late Francis Mwaura never picked any tea. She claimed that she cannot be caretaker in her own parcel of land, and there was no agreement that she had signed with Lucy. She also denied receiving any money from Lucy to file the succession cause.



79. She denied that her late husband sold the suit land to Francis, and it was her contention that there was no sale agreement between Francis and John her husband. That when her husband died, she was left on the suit land.
80. Upon cross exam by counsel for the Plaintiffs, she stated that she could not remember when Francis went to stay with them on the suit land. She confirmed that Francis and her husband fenced the suit land, No 1912, built cow shed, and chicken coup.
81. It was her evidence that Francis lived on land parcel no 1912, which land was supposed to be inherited by her son Geoffrey Gatuthu, but since the said son passed on, it did not happen. She stated that she did not know if her husband went to Land Control Board over sale of land parcel no 1912. She admitted that land parcel no 1912, was a combination of two parcels of land.
82. Further, she stated that when her husband died in 2012, and he was buried in 1911, and Francis was buried in 1912. It was her evidence that her grower no was MG14-159, which she obtained upon the death of her husband, and that Francis did not have a grower's number. That even if Lucy had given her money, she lent it to her for school fees, but not for filing succession cause.
83. It was her evidence that Francis Mwaura was buried on the suit land because he had an agreement with her husband that he would be buried thereon, and she was present when the said agreement was made orally.
84. Dw1, confirmed to have sold the suit land to 3<sup>rd</sup> Defendant for Ksh 4Million, after the succession proceedings were finalised at Kandara Law Courts. She identified the sale agreement dated 2<sup>nd</sup> August 2021, and the title deed dated 1<sup>st</sup> July 2021, and the Land Control Board meeting was on 26<sup>th</sup> June 2021.
85. On cross exam by counsel for the 3<sup>rd</sup> Defendant, she confirmed that she used to pick tea leaves from both land parcels No 1911 and 1912. That Lucy destroyed the tea bushes on land parcel No1912, and threatened her with the Police officers.
86. She confirmed having sold the suit land to Stanley, the 3<sup>rd</sup> Defendant, and he took possession of the said land. That Lucy did not participate in the succession proceedings, and she did not attend her husband's burial.
87. It her evidence that Denis, the 2<sup>nd</sup> Defendant stayed with her son Geoffrey after he finished school. That later, she asked his mother, the 1<sup>st</sup> Plaintiff to pick him after the death of her husband. That Denis appeared again in 2021, with the Police Officers. That the graveyard for Francis was renovated recently, as this case was ongoing.
88. In re-exam, she confirmed Francis Mwaura did not own any other land at Gatura area. She confirmed that she was the only one picking tea on land parcel No 1912.
89. DW2, David Muhia Gatuthu, testified that the 1<sup>st</sup> Defendant is a wife to his step brother. He adopted his witness statement dated 6<sup>th</sup> May 2022. It was his evidence that land parcel no 1912, was owned by his step brother John Kariuki, who had allowed Francis to use the land. That later, Mary Wanjiru, the 1<sup>st</sup> Defendant sold the suit land to 3<sup>rd</sup> Defendant after succession proceedings.
90. On cross exam by counsel for the Plaintiffs, he stated land parcel No 1912, was a subdivision of land parcel No 285, which belonged to their father. That he was given land parcel no 1910, and the late John Kariuki was given 1911. That he did not know the genesis of land parcel no 1912.



91. It was his evidence that Francis had projects on land parcel No 1912, but he did not own it, and the late Francis was buried on Land parcel no 1912, which belonged to John Kariuki. He denied having seen Francis Mwaura utilizing the suit land.
92. On cross exam by counsel for 3<sup>rd</sup> Defendant, he confirmed that Francis Mwaura had started a project on the suit land together with his brother John. He also confirmed that John had not sold this suit land to Francis.
93. Further, he confirmed that Francis was married, but he later separated with his wife, and the wife did not attend Francis burial. It was his evidence that John Kariuki had built his permanent house a long time ago, and did not depend on Francis Mwaura to build the said house.
94. DW3; Stanley Mwangi Muturi, a retired teacher also adopted his Replying Affidavit which acted as his witness statement dated 7<sup>th</sup> March 2023, and produced a list of documents as D. Exhibits 1-7.
95. It was his evidence that he purchased the suit land from Mary Wanjiru, the 1<sup>st</sup> Defendant after carrying out due diligence. That he bought the land with his retirement benefits, and before he could use the land, he was sued by the Plaintiffs.
96. He testified that the suit land is his, and that he has also filed a counter claim. For this, he produced further list of documents as D. Exhibits 8-13. That before he purchased the suit land, he confirmed that it initially belonged to John Kariuki who is deceased, and Mary Wanjiru acquired it through succession.
97. It was his evidence that he cleared payment of the purchase price, and he signed the sale agreement. That Lucy, the 1<sup>st</sup> Plaintiff entered the suit land on 1<sup>st</sup> December 2021, and she was in company of the Police officers, and he reported to Ndakaini Police Station about that invasion. However, with this case in court, he was told to wait.
98. On cross exam by counsel for the Plaintiffs, he confirmed that he got his title deed in July 2021, for land parcel No 1912, which is a combination of 1743 and 1910.
99. It was his evidence that he bought the suit land for Ksh 4million, which he has paid in full. He confirmed having found a perimeter wall around the land, old structures and a borehole. He confirmed that Mary lives on land parcel No 1911.
100. He stated that though he saw the grave of Francis Mwaura on the suit land, he did not ask why he was buried in the said land, and he does not know any of his relatives, and that he did not know the late Francis Mwaura before his demise. He also did not know the Plaintiffs herein.
101. On being cross examined by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he confirmed that he carried a search before he bought the suit land, and he noted that the land was registered un the name of John Kariuki, the husband to the 1<sup>st</sup> Defendant, the vendor.
102. He claimed when he did his due diligence, he did not find anyone on the suit land, but there was an old perimeter wall. That he never found Dennis on the suit land, and he paid all the purchase price.
103. On re-exam, he confirmed that he does not have the grower's number as he left the tea bushes to Mary to harvest in the meantime, and he has never sold the tea leaves at the buying centre.
104. DW4; Francis Kinuthia Mwangi; told the court that he knows Stanley the 3<sup>rd</sup> Defendant herein. He adopted his witness statement dated 2<sup>nd</sup> May 2022, as his evidence in chief.
105. On cross exam by counsel for the Plaintiffs, he confirmed there are structures on the suit land, cow sheds and chicken pen. That he also saw the fence, and he did not know when it was built, and he



- did not know the late Francis Mwaura, and his relationship with John Kariuki, who was a husband to Mary Wanjiru, the 1<sup>st</sup> Defendant herein.
106. On cross exam by counsel for 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he stated that though there are structures on the suit land, he did not know who lives thereon. He stated that he has never seen anyone living on this suit land, and he does not know who picks the tea leaves. that he knew John Kariuki for long.
  107. DW5; Naftali Kaige Muturi, also adopted his witness statement as his evidence in chief. He claimed that he knew Mary Wanjiru, and Stanley Muturi and also the parcel of land no 1912.
  108. It was his evidence that he did not know Lucy Wanjiru, but he used to see Dennis earlier on.
  109. On cross exam by counsel for the Plaintiffs, he stated that the late John Kariuki was his age mate, and he introduced Francis Mwaura to him. That the two carried zero grazing on the suit land. That John Kariuki gave Francis accommodation on the suit land in 2008, as Francis had marital problems with his wife.
  110. He confirmed that John Kariuki gave Francis a place to stay on the suit land, and Dennis used to visit his father. However, he did not know whether Dennis lived on the suit land or not. Further, that since he stays near the suit land, he knows the history of the land, No. 1912, but he did not know where John got the land from.
  111. It was his evidence that when Mary wanted to sell the land, she requested him to find a buyer for her. He also confirmed that the late Francis Mwaura was buried on the suit land, and his grave was renovated the other day.
  112. On cross exam by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he confirmed that the late John Kariuki was his friend, and the said John, did not inform him that he had sold the suit land. That he never saw any sale agreement between John and Francis. He also stated that Lucy never lived on the suit land, and Francis was buried on the suit land, and Lucy did not attend the burial.
  113. He denied that there is a caretaker on the suit land, as there was no one using the land before it was purchased by 3<sup>rd</sup> Defendant. However, he confirmed that Mary Wanjiru used to pick tea leaves from the suit land.
  114. After the viva voce evidence, parties did file and exchange written submissions. The Plaintiffs filed their submissions dated 8<sup>th</sup> March 2024, through the Law Firm of Kanyi Kiruchi & Co Advocates and submitted on various issues.
  115. On whether the amalgamation of Loc 16/ Gatura/ 1743 and 1910, gave rise to Loc 16/ Gatura/ 1912, the suit land, it was submitted that the 3<sup>rd</sup> Defendant title deed for Loc16/ Gatura/1912, confirms that it is a combination of Loc16/ Gatura/ 1743 and 1910. That the green card confirms the same, and therefore there is no doubt that the suit land is a combination of Loc16/ Gatura/ 1743 and 1910.
  116. On whether the late Francis Mwaura had purchased land parcel Loc16/ Gatura/1912, it was submitted that there was evidence that the late John Kariuki had applied to Land Control Board to transfer land parcel no 1743 to Francis Mwaura, and the said consent was allowed in 2006. Further that the said John Kariuki actually transferred the suit land to Francis Mwaura, and with evidence that the parties did attend Land Control Board for consent, then it is evident that Francis Mwaura did purchase the suit land from John, but the transfer did not go through as John Kariuki died in 2012, before the transfer could be realized.
  117. On whether the late Francis Mwaura owned, possessed and utilized the entire Loc16/ Gatura/ 1912, it was submitted that since there was evidence that Francis Mwaura bought land parcel No Loc16/



- Gatura/ 1743, which was combined with Land parcel No 1910, to produce land parcel No 1912, then it is evident that Francis Mwaura, owned and possessed the entire parcel of land no 1912.
118. That the said Francis Mwaura had built a cow shed, farm houses, dog kennels and kept livestock on the suit land, and thus, it is clear and without doubt that he owned the said suit land. Further that the fact that the late Francis Mwaura was buried on the suit land is a clear indication that he owned the suit land.
119. On whether the Plaintiffs have proved their case on adverse possession, on the required standard, it was submitted that the issue of adverse possession being an issue of facts, then through the available evidence, the Plaintiffs have proved that they have been on the suit land for more than 12 years.
120. Reliance was placed on the case of Gabriel Mbui vs Mukindia Maranya(1993) klr , where the court held;
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
121. On whether the Defendants defences are merited, it was submitted that the root of the 3<sup>rd</sup> Defendant’s title was suspect. They relied on the case of Munyu Maina v Hiram Gathiha [2013] eKLR, where the Court of Appeal expressed itself thus;
- “We have stated that when a registered proprietor’s root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”
122. Therefore, it was their submissions that the 3<sup>rd</sup> Defendant’s title was defective, and did not follow the due process of acquisition of the same, as there was no evidence of payment of stamp duty, and thus the title was fraudulently acquired.
123. On costs, it was submitted that the Plaintiffs are entitled to costs of the suit and interest thereon.
124. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their written submissions dated 3<sup>rd</sup> April 2024, through the Law Firm of Tony Martins Law LLP, and submitted on a number of issues.
125. On whether the suit land was sold by John Kariuki to Francis Mwaura, it was submitted that the Plaintiffs did not produce any sale agreement/s to support their claim. It was also submitted that the sale agreement for land parcel No Loc 16/ Gatura/1743, is undated and unregistered and the Land Control Board Application attached, was also undated. There was no transfer or consent to transfer that was ever produced for the suit land.
126. Reliance was placed on the case of Gerald Murithi vs Wamugunda Muriuki & Another(2010) eklr, where the court while making reference to the case of Wambugu vs Njuguna( 1983) klr held that;
- “where a claimant claims the right to land under an agreement and in the alternative seeks adverse possession the rule is; the claimant possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The



claimant would succeed under adverse possession upon occupation for at least 12 years after such payment”

127. It was their submissions that there was no evidence of payment and the court cannot infer adverse possession.
128. On whether the Plaintiffs have established the principles for grant of adverse possession, it was submitted that the late Francis Mwaura was allowed into the suit land by his cousin John, and so his entry was with permission. That the 1<sup>st</sup> Plaintiff was separated with her husband through Divorce and that was the reason why Francis was looking for a place to stay. Therefore, the 1<sup>st</sup> Plaintiff has not been in open, and notorious occupation of the suit land.
129. Reliance was placed in the case of Margaret Nyakinyua Murigu vs Charles Wahome Kariuki(2014), eklr, where the court held;

“Having set out in detail the evidence tendered, let me now restate the ingredients needed to apply the doctrine of adverse possession. In Wambugu =Vs= Njuguna (1983) K.L.R 173, the Court of Appeal restated those principles when it held inter alia as follows:

1. The general principle is that until the contrary is proved, possession in law follows the right of possess.
2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.
3. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years. 4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant, although the respondent's possession was exclusive and continuous but was not adverse; it only became adverse after the licence was determined.
5. The rule on “permissive possession” is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land. For the respondent's claim for adverse possession to succeed, he must



have an effective right to make entry and recover possession of land. He could not have that effective right because the occupation was under a contract, or licence, which had not been determined.

6. Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of section 12 of the [limitation of actions act](#) but time cannot run in favour of a licensee. A licensee therefore has no adverse possession (Hughes v Griffin (1969) 1 WLR 23).”

130. It was also submitted that since there is no evidence of a contract, where the date of completion can be clear, then adverse possession cannot apply. Reliance was placed in the case of Wilfred Kegonye Babu vs Henry Mose Onuko(2019) eklr, quoting from Wambugu vs Njuguna (1983) KLR where the court held;

“where the Claimant is a purchaser under a contract of sale of land.....then possession can only therefore become adverse once the contract is repudiated.”

The court further stated that;

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

131. Further, it was submitted that the Plaintiffs have not proved that they carried any developments on the suit land. Reliance was placed on the case of Jandu vs Kirplal & Another (1975) EA 225, where the court held;

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

132. On whether the Plaintiffs have locus standi to bring the suit, it was submitted that the 1<sup>st</sup> Plaintiff had letters of Administration AD LITEM, but she seeks to have the suit land registered in her name, while she claims to represent the estate of Francis Mwaura. That the said prayer negates the purpose of the grant, which was only meant to initiate the suit on behalf of the estate of the deceased.

133. It was their submissions that a limited grant AD Litem does not give the administrator rights over the property claimed, as it vests in the estate. See the case of [Julian Adoyo Ongongo vs Francis Kiberenge Abano: Migori Civil Appeal No 119 of 2015](#), where the court held;

“A party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”



134. On whether the 3<sup>rd</sup> Defendant is an innocent purchaser for value, it was submitted that indeed he is an innocent purchaser for value without any notice of defect. That his right is protected under Article 40(1) & (2) of the Constitution which states;

“ 40.

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person-
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

135. On who is entitled to costs, it was submitted that as provided by section 27 of the Civil Procedure Act, the costs should go to the successful litigant. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants urged the court to dismiss the Plaintiffs suit with costs to the Defendants and allow the 3<sup>rd</sup> Defendant’s Counter- claim as prayed.

136. The 3<sup>rd</sup> Defendant submitted through the Law Firm of Musa Boaz & Thomas Advocates, and raised three issues for determination.

137. On whether the Plaintiffs have proved their case on the required standard, it was submitted that parties are bound by their Pleadings. That the Plaintiffs suit is on adverse possession, and they cannot bring in the issue of purchase, and whether the 3<sup>rd</sup> Defendant has a good title or not.

138. It was also submitted that the Plaintiffs did not prove the elements of adverse possession as stated in the case of John Kiplagat Barbaret & 8 others vs Isaiah Kiplagat Arap Cheluget(2017), where the Court held that;

“ A person claiming to have become entitled by adverse possession to land registered under any of the Acts referred to in Section 37 of the Limitation of Actions Act, is entitled to apply to the High Court for an order to be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land if he can show that:

- (1) he has, as a trespasser, been in adverse possession to the title of the registered proprietor for a period of not less than 12 years; and
- (2) he has had continuous and exclusive possession of the suit land adversely to the title of the registered proprietor; and
- (3) during the period of adverse possession the registered proprietor knew of the act of trespass on the suit land by the plaintiff; and



- (4) that he was not on the suit land with the consent of the registered proprietor; and
- (5) that the registered proprietor has never during the 12 year period asserted his title to the suit land; and
- (6) that the 12 year period of adverse possession has never been interrupted or broken; and
- (7) that the plaintiff has been in exclusive possession of the parcel of land he claims and where such parcel of land is only a portion of a bigger parcel comprised in a title of the registered proprietor, that he can point out the physical boundaries of the portion he is in possession of; and
- (8) that as was held in the case of *Mwangi Githu vs. Livingstone Ndeete* [1984] KLR 776, the plaintiff would be entitled to only the portion he (the plaintiff) is in exclusive possession of.”

139. Further, that the Plaintiffs did not attach the abstract of title of the suit land that they are claiming. That the initial abstract of title was for Loc16/Gatura/1911, and on that account alone, the entire suit is incompetent.

140. On the prove of elements of adverse possession, the 3<sup>rd</sup> Defendant submitted that the said elements must be fully proved. He cited the case of *Wambugu vs Kamau Njuguna* (1983) klr, which quoted the case of *Walli’s Cayton Bay Holiday Camp ltd vs Shell-Mex& BP ltd* (1975) QB 94; where it was held: ...“in order to acquire by statute of Limitation, a title to land, which has a known owner, that owner must have lost his right to the land, either by being dispossessed of it, or by having discontinued his possession of it..”

141. Further reliance was placed in the case of *Kimani Ruchine vs Swift Rutherford & Co Ltd* (1980) KLR 10: where Kneller J held that;

“The plaintiffs have to prove that they have used this land which they claim, as of right: *nec vi, nec clam, nec precario* (No force, no secrecy, no persuasion). The possession must be continuous. it must not be broken for any temporary purpose or any endeavors to interrupt it or by any recurrent consideration”

142. On whether the 3<sup>rd</sup> Defendant is entitled to the orders sought in the counter- claim, it was submitted that the 3<sup>rd</sup> Defendant is an innocent purchaser for value, without Notice, and the Plaintiffs cannot challenge his title and the same time claim adverse possession. Reliance was placed in the case of *Hannington Oloo Ogumbo vs Albert Makau Kyambo& Another* (2021) eKLR; where the Court held;

“in any event, the Plaintiff cannot claim the suit property by way of adverse possession and in the same breath challenge the 1<sup>st</sup> Defendant’s title. By mere fact that the Plaintiff is claiming the suit property by way of adverse possession, he has conceded to the fact that the 1<sup>st</sup> Defendant is the bonafide registered proprietor of the suit property”



143. It was further submitted that the 3<sup>rd</sup> Defendant is entitled to his Counter-claim and General damages, for trespass. He relied on the case of Duncan Nderitu Ndegwa vs Kenya Pipeline Company and Another (2013)eKLR, where it was held:
- “..on the issue of quantum and general damages, once a trespass to land is established , it is actionable per se and indeed no proof of damages is necessary for the court to award general damages”
144. On costs, the 3<sup>rd</sup> Defendant submitted that costs follow the event, and after the dismissal of the Plaintiffs suit, costs should be awarded to the Defendants and the costs of 3<sup>rd</sup> Defendant’s Counter-claim, should also be borne by the Plaintiffs herein.
145. The above is a summary of the Pleadings by the Parties herein, the evidence adduced in court and their respective written submissions, which this court has carefully read and considered.
146. From the available evidence, there is no doubt that the suit land in issue is Loc16/ Gatura/1912, which was initially registered in the name of John Kariuki Gatuthu, as from 1<sup>st</sup> December 2011. The green card produced by the parties confirms the said position.
147. There is also no doubt that the said Green card shows that the suit property is a combination of land parcels No.1743 and 1910, and that should not be an issue for determination by the court. The Green Card speaks for itself and no party should make heavy weather on whether or not the suit land was a combination of the two parcels of land.
148. There is also no doubt that the late John Kariuki, as the original owner of the suit land had a special relationship with Francis Mwaura Muiruri, and the two were cousins.
149. It is not in doubt that John Kariuki died in 2012, and was buried on land parcel no Loc16/ Gatura/1911, where his family resides. John was married to 1<sup>st</sup> Defendant, Mary Wanjiru Kariuki.
150. Further, it is evident that Francis Mwaura Muiruri, died in 2014, and was buried on land parcel no Loc16/ Gatura/ 1912. Further, it not in doubt that for some time, the late Francis Mwaura lived on the suit land. Further, the parties admitted that there are structures on the suit land, which structures were put up during the lifetime of John and Francis.
151. The Plaintiffs alleged that these structures were put up by Francis after he purchased the suit land from John. However, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants alleged that the said structures were put up by John and Francis after Francis moved into the suit land, and the two carried a project together of livestock keeping.
152. Further, it is evident that Francis and the 1<sup>st</sup> Plaintiff went through a divorce, which divorce proceedings were concluded in 2010, and their marriage was dissolved. During the period that Francis stayed on the suit land, he was separated/and or divorced from the 1<sup>st</sup> Plaintiff. There was evidence that the 1<sup>st</sup> Plaintiff did not even attend the burial of Francis, her divorced husband.
153. There is no doubt that the 1<sup>st</sup> Defendant sold the suit land to the 3<sup>rd</sup> Defendant in the year 2021, after succession proceedings, and 3<sup>rd</sup> Defendant has a title deed to that effect. However, after the said purchase, it is alleged that the Plaintiffs invaded the suit land in the company of Police Officers, and later filed this case. The court issued a status quo order and the 3<sup>rd</sup> Defendant is therefore not utilising the suit land.



154. The Plaintiffs have alleged that they have acquired the suit land through adverse possession, as they have remained in occupation and use after the same was purchased by Francis Mwaura. However, the Defendants denied that allegation and contended that Francis Mwaura was allowed to use the suit land, after experiencing marital problems, and he did not purchase the suit land.
155. With the above background, the court finds the issues for determination are;
- i. Whether the Plaintiffs have availed sufficient evidence to prove that they have acquired the suit land by adverse possession,
  - ii. Whether the 3<sup>rd</sup> Defendant is an innocent purchaser for value, without notice of any defect, and thus has acquired a good title,
  - iii. Whether the Plaintiffs are entitled to the prayers sought in the Amended Originating Summons.
  - iv. Whether the 3<sup>rd</sup> Defendant is entitled to the prayers sought in the Counter-claim,
  - v. Who is entitled to costs of this suit and / or Counter-claim?

**i) Whether the Plaintiffs have availed sufficient evidence to prove that they have acquired the suit land by adverse possession?**

156. The Plaintiffs claim is hinged on adverse possession, which is essentially a situation where a person takes possession of land belonging to another, and asserts rights over it, and the person having title to it omits or neglects to take action against such a person who is asserting title for a period of 12 years. See the case of *Mtana Lewa vs Kahindi Ngala Mwangadi* (2015) eKLR.
157. For a claim of adverse possession to crystalize, the Applicant has to call evidence and prove that she/he has been in continuous, uninterrupted occupation and possession of the suit land for a period of 12 years. That such occupation into the suit land was open, without force and without secret. See the case of *Kimani Ruchune vs Swift Rutherfords & Co. Ltd* (1980)KLR 10 Kneller J held that;
- “the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)..... The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt \*it or by any recurrent consideration;
158. A claim of adverse possession is set out in various provisions of law, specifically the *Limitation of Actions Act* in Sections 7, 13 and 38. Section 7 provides;
- “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.
159. Section 13(1) provides;
- “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date,



a right of action does not accrue unless and until some person takes adverse possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

160. Courts in Kenya have severally determined on the principles to be considered in a case of adverse possession. See the case of *Wambugu vs Njuguna* (1983) klr 172, where the Court held;

“In order to acquire by statute of limitations title to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it.....”

161. The right to adverse possession does not automatically accrue, but the person claiming such right has to take action as provided by Section 38 of the *Limitation of Actions Act*. The Plaintiffs have claimed that they have acquired ownership of the suit land Loc 16/ Gatura/ 1912, by adverse possession, and have consequently moved the court through this Originating Summons to assert their right.

162. The Plaintiffs are the ones who have asserted or alleged, and so the burden of proof is upon them as provided in sections 107 and 108 of the *Evidence Act*, which provides;

“ 107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

163. In the case of *Mbira vs Gachuhi*( 2002) 1 EALR 137: the court held as follow:

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

164. For this court to determine whether the Plaintiffs have proved their case on the required standard, the court will answer the following questions:

- i. Did the Plaintiffs prove that they took over possession? If so, how did they take possession,
- ii. When did the Plaintiffs take possession and occupation of the suit property,
- iii. What was the nature of their possession if they ever took possession and occupation?



- iv. How long have the Plaintiffs been in possession of the suit land if at all?
165. It is also trite that a claim of adverse possession is attached to land, and not title, and it does not matter who is the registered owner of the land, so long as there is prove of adverse possession, the right will accrue. See the case of *Gachuma Gacheru vs Maina Kabuchwa (2016) eklr*, where the court held;
- “adverse possession is a fact to be observed upon the land. It is not to be seen in the title”.
166. Therefore, if the Plaintiffs are to prove that they have acquired the suit land by adverse possession, it does not matter then that the 3<sup>rd</sup> Defendant has a title to the suit land.
167. For a claim of adverse possession to crystalize, the person claiming it must prove that the entry into the suit land was non -permissive and non – consensual and without Licence. Therefore, from the above analysis, it is clear that a claim based on sale agreement or entry through purchase cannot stand, since the vendor’s consent and permission is obtained before one gains entry into the suit land.
168. The Plaintiffs claim emanates from the purported purchase of the suit land by the late Francis Mwaura Muiruri, who was a cousin to John Kariuki Gatuthu, the original owner of the suit land. If the entry of the said Francis Mwaura was through purchase, and the alleged vendor allowed Francis to enter into the suit land, then such entry was permissive.
169. However, there are exception to the rule, and in several cases, the courts have held that in cases of sale agreements, limitation of action begins to run from the date of final payment. See the case of *Public Trustee vs Wanduru Ndegwa(1984) eKLR*, and *Hosea vs Njiru & others ( 1974) EA 526*: where the court held that;
- “once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor, and henceforth, by occupation for 12 years, he was entitled to become registered as the proprietor”
170. The court will now analyse the available evidence, take into account the provisions of Sections 107 & 108 of the *Evidence Act*, on the issue of burden of proof to arrive at a conclusion on whether the Plaintiffs have called sufficient evidence to prove that they are entitled to the orders of ownership of the suit land by adverse possession.
171. This court is guided by the holding of the court in the case of *Gabriel Mbui vs Mukindia Maranya (1993) eklr*, where the court held:
- “the adverse character of possession must be established as a fact. It cannot be assumed, as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
172. The first question to answer is whether the Plaintiffs did prove that they took over the suit land, and if so, how? In the amended Originating Summons, the 1<sup>st</sup> Plaintiff has sued as the legal representative of the estate of Francis Mwaura Muiruri, after having obtained Limited Letters Ad Litem for purposes of administering the estate.
173. However, in their prayers, the Plaintiffs have sought to be registered as the owners of the suit land by dint of adverse possession. They have not sought a declaration that the estate of Francis Mwaura Muiruri is entitled to the suit land by adverse possession. Therefore, if the Plaintiffs are seeking to be



- declared as the owners through adverse possession, they have to prove their entry and occupation, was without permission of the owner, which possession is for a period of over 12 years.
174. The Plaintiffs alleged that they got into the suit land in 2007, after the late Francis Mwaura Muiruri, purportedly purchased the suit land from the late John Kariuki, the registered owner of the suit land.
  175. There was no concrete sale agreement produced by the Plaintiffs herein as an exhibit or part of the evidence adduced. However, if the said entry was through purchase, then the entry was permissive and consensual.
  176. Further, there was no evidence of payment of the purchase price or what was the purchase price. The court cannot hold or find on which was the last date of payment of the purchase price so that time can start running. The Application for consent at Land Control Board, and the alleged consent are not dated. This court cannot hold that they are clear evidence of purchase of the suit land. The said Application is for land parcel No Loc 16/ Gatura/ 1743, and not the suit land.
  177. Even if the Plaintiffs would want the court to believe that the suit land is a combination of Land parcels No 1743 and 1910, there no evidence that Francis Mwaura did purchase and paid the full purchase price for the suit land.
  178. What is clear is that Francis Mwaura and John Kariuki had a special relationship, and at some point, Francis lived on the suit land. He was buried thereon, and during his stay, he was divorced from the 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff did not attend his burial, and the divorce proceedings started in 2004 to 2010.
  179. It was alleged that Francis Mwaura requested John Kariuki to accommodate him on the suit land during this time of matrimonial turmoil. Indeed, Francis Mwaura entered into the suit land alone, and there is no evidence that the 1<sup>st</sup> Plaintiff entered into the suit land at all, given that she did not even attend Francis burial, as their marriage had been dissolved in 2010.
  180. As for the 2<sup>nd</sup> Plaintiff, he became a major in 2010, and even if he claims he was in possession of the suit land from the time his father purchased the same, it is evident then that his claim could only crystalize in 2010, when he became a major. However, after the death of his father, he told the court that he stopped picking the tea leaves.
  181. At some time 2<sup>nd</sup> Plaintiff went to Qatar to work, and therefore, it is not clear when he allegedly entered into the suit land, and whether he ever took exclusive possession of the same. See the case of Kimani Ruchine( supra) where the court held:” ... the possession must be continuous . it must not be broken for any temporary purpose or any endeavours to interrupt it or by any recurrent consideration”
  182. The next question is when did the Plaintiffs take possession of the suit land? As held above, there is no evidence that the 1<sup>st</sup> Plaintiff ever took possession of the suit land, since at the time of the alleged entry of Francis Mwaura unto the suit land, she was separated from him and eventually divorced. The fact that the eulogy stated that Francis Mwaura married Lucy Wanjiru in 1989, did not mean that she was his wife at the time of his death. The court documents are very clear that the two were divorced, and Lucy did not attend his burial.
  183. What was the nature of their possession if any? The court has found and held that there was no evidence that the Plaintiffs ever occupied and or took possession of the suit land.
  184. How long have they been in possession? Since there was no evidence that the Plaintiffs ever entered into the suit land, took possession, occupied openly and notoriously, without force or secrecy, this court finds it cannot answer this question.



185. Therefore, there is no sufficient evidence adduced by the Plaintiffs that they took possession of the suit land with intention of dispossessing the family of John Kariuki Gatuthu. See the case of *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009)eklr*, where the court held;

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor”

186. Consequently, after analysing the available evidence, this court finds and holds that the Plaintiffs have not called sufficient evidence to prove that they have acquired the suit land by adverse possession.

**ii. Whether the 3<sup>rd</sup> Defendant is an innocent purchaser for value without notice of any defect and thus has acquired a good title.**

187. From the available evidence, it is evident that the 3<sup>rd</sup> Defendant Stanley Mwangi Muturi purchased the suit land in the year 2021, after 1<sup>st</sup> Defendant had finalized the process of succession over the estate of her deceased husband, the late John Kariuki Gatuthu. The letters of administration and confirmed grant were produced as exhibits.

188. The 3<sup>rd</sup> Defendant in his evidence testified that when he was introduced to the 1<sup>st</sup> Defendant, and the fact that she was selling the suit land, he carried out his own due diligence and noted that indeed the suit land belonged to her deceased husband, the late John Kariuki Gatuthu.

189. Further, that the children of 1<sup>st</sup> Defendant had no objection to the sale of this suit land, and he had no doubt that the family had agreed to sell the land. With the confirmed grant, and having the title in her name, the 1<sup>st</sup> Defendant with the consent of her family had the right to deal with the suit land as she so chose to do, and selling it was one of the options. See section 24 of the [Land Registration Act](#), which grants absolute and indefeasible ownership to a holder of certificate of title.

190. The 3<sup>rd</sup> Defendant having been satisfied that the 1<sup>st</sup> Defendant was the rightful owner of the suit land, then he saw no reasons to decline to purchase the said land, as the title had no defect, and there was no inhibition and or caution placed on the title.

191. Black Law Dictionary defines bonafide purchaser for value as;

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

192. Further, bonafide purchaser for value was defined in the case of *Lawrence Mukiri vs Attorney General & 4 others (2013) eKLR*, as;

“... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:

- a. He holds a certificate of Title.
- b. He purchased the Property in good faith;



- c. He had no knowledge of the fraud;
- d. The vendors had apparent valid title;
- e. He purchased without notice of any fraud;”

193. The above definition has been adopted in many other judicial decisions. The court finds that the 3<sup>rd</sup> Defendant did purchase the suit land for ksh 4million, from the 1<sup>st</sup> Defendant, and he paid for it in full using his retirement benefits. There is a sale agreement to that effect, and due process was followed. Thereafter, the 3<sup>rd</sup> Defendant was registered as the owner of the suit land on 1<sup>st</sup> July 2021.

194. Having been registered as so, the 3<sup>rd</sup> Defendant became the absolute and indefeasible owner as is provided by section 24 of *Land Registration Act*, and his registration can only be defeated as provided by the Act. See Section 25(1) of *Land Registration Act*, which provides;

“ 25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”

195. The Plaintiffs have alleged that the 1<sup>st</sup> Defendant could not pass a good title, as they owned the suit land by dint of adverse possession, and that the suit land was already sold to the late Francis Mwaura Muiruri.

196. However, this court had found and held that there was no evidence adduced by the Plaintiffs to prove that the late Francis Mwaura purchased the suit land, paid all the purchase price, and the only thing that remained was the transfer of the said parcel of land to him.

197. Further, the court has held that there is no sufficient evidence to prove that the Plaintiffs have acquired the suit land by virtue of adverse possession. Without that evidence, there was nothing that prevented the 1<sup>st</sup> Defendant from acquiring the suit land through transmission, and later selling it to whoever she chose to sell to, 3<sup>rd</sup> Defendant being the purchaser herein.

198. The 3<sup>rd</sup> Defendant testified that he noted the grave on the suit land, and he was told that the person buried thereon was Francis Mwaura, who had entered into agreement with the late John Kariuki, that in the event of his death, he should be buried on the suit land. It is also very clear that burying a person



on the parcel of land does not mean the deceased person owns the said land. See the case of Doris Kageni Nthiiri v John Mbuba [2018] eKLR;

“I, however, add that ownership of the suit land will have to be proved during the hearing of the main suit. I also point out that allowing the body of the deceased husband of the applicant to be buried on the suit land does not, ipso facto, entitle the applicant to the prayers she is seeking in her plaint. This will have to be canvassed.”

199. Therefore, this court has no reasons to doubt that from the description of an innocent purchaser for value, without notice, the 3<sup>rd</sup> Defendant fits it, and thus the court finds and holds that the 3<sup>rd</sup> Defendant herein is an innocent/ bonafide purchaser for value, without any defect on the title. This court has no reasons to doubt his ownership of the parcel of land.

### **iii. Whether the plaintiffs are entitled to the Prayers sought in the amended Originating Summons dated 10<sup>th</sup> June 2022?**

200. It is trite that for a claim of adverse possession to suffice, the claimants must prove all the ingredients of adverse possession, among them, possession which is non- permissive, without secrecy, without force for a period of over 12 years. See the case of Mombasa Teachers Co-operative Savings & Credit Society Limited Vs Robert Muhambi Katana & 15 others [2018] eKLR), where the Court held:

“non permissive or non-consensual, actual open, notorious, exclusive and adverse use/ occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario”).

201. This court has found and held that there was no evidence that the Plaintiffs herein did acquire the suit land through adverse possession, and also there was no evidence that the late Francis Mwaura, purchased the suit land from the late John Kariuki, and paid all the purchase price. There is no evidence that the said Francis Mwaura, was in exclusive possession of the suit land. Further, there is no evidence that the Plaintiffs herein ever dispossessed the 1<sup>st</sup> Defendant and her family, and have been in notorious occupation, without secrecy or force for more than 12 years. There was no evidence adduced that the 1<sup>st</sup> Defendant and her family ever lost possession of this suit land to the Plaintiffs herein for a period which exceeds 12 years.

202. Having found as above, this court finds and holds that the Plaintiffs are not entitled to any of the Prayers sought in their Amended Originating Summons.

### **iv) Whether the 3<sup>rd</sup> Defendant is entitled to the prayers sought in his Counter- claim?**

203. The court has found and held that the 3<sup>rd</sup> Defendant is an innocent purchaser for value, without notice of any defect. He was issued with a Certificate of title on 1<sup>st</sup> July 2021. The said title has not been impeached by any court of law, or cancelled. The certificate of title is a valid document, confirming ownership of the suit land. See section 26 of *Land Registration Act* which provides;

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances,



easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

204. As the title holder, the 3<sup>rd</sup> Defendant is entitled to enjoy rights of an absolute owner as provided by section 24 of *Land Registration Act*, possession, and / or use of the suit land is one of such rights. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants testified that in December 2021, the 1<sup>st</sup> Plaintiff in company of the police invaded the suit land, and destroyed the wall and harassed the 1<sup>st</sup> Defendant and her family. Due to the said harassment, the 3<sup>rd</sup> Defendant could not use the land. Further, the Plaintiffs filed this case, wherein status quo orders were issued and thus the 3<sup>rd</sup> Defendant is not able to use the land.

205. However, as the owner of the suit land, he has the right to use and occupy the suit land, as he so wish. Therefore, the court finds and holds that the invasion of the suit land by the Plaintiffs between 17<sup>th</sup> November 2021, to date amounts to illegal trespass.

206. Consequently, the court finds and holds that the 3<sup>rd</sup> Defendant is entitled to protection by this court through issuance of the orders sought in his Counter-claim dated 7<sup>th</sup> March 2022.

207. The 3<sup>rd</sup> Defendant has sought for permanent injunction against the Plaintiffs from interfering with the 3<sup>rd</sup> Defendant’s, use, occupation and possession of the suit land. Having established that the Plaintiffs did invade the suit land, this court finds and holds that the 3<sup>rd</sup> Defendant is entitled to the said prayer. See the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR,

.....“A permanent injunction fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.”

208. On the payment of special damages for destroyed wall, the said costs were not specifically pleaded and will not be awarded. It is trite that special damages should be specifically pleaded. See the case of *Hahn vs. Singh, Civil Appeal No. 42 of 1983* [185] KLR 716, the Court of Appeal held as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

209. On General damages, it is evident that the 3<sup>rd</sup> Defendant has proved that he owns the suit land, and the Plaintiffs did trespass on his parcel of land from 17<sup>th</sup> November 2021, to date. He is thus entitled to



General Damages for trespass. See the case of Duncan Nderitu Ndegwa v. KP& LC Limited & Another (2013) eKLR, where the Court held as follows;

“...once a trespass to land is established, it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ trespass.”

210. For the above reasons, this court awards the 3<sup>rd</sup> Defendant General Damages of Ksh 500,000/= for trespass, payable with interests from the date of this judgement until payment in full.
211. Consequently, this court finds and holds that the 3<sup>rd</sup> Defendant is entitled to the prayers sought in his Counter-claim in terms of prayers No. i, ii, iv and v. For prayer No. iv, the General damages is awarded at Ksh 500,000/=

**v) Who is to bear costs of this suit and / or Counter-claim?**

212. As provided by Section 27 of the *Civil Procedure Act*, costs are awarded at the discretion of the court. However, costs follow the event, and are ordinarily awarded to the successful litigant, unless there are circumstances warranting the court to depart from the above rule.
213. The Plaintiffs’ suit/claim has been dismissed and the 3<sup>rd</sup> Defendant’s counter-claim has been allowed. The Defendants are therefore the successful litigants, and are entitled to costs of the suit. Further, the 3<sup>rd</sup> Defendant is entitled to costs of his Counter-claim and these costs are to be borne by the Plaintiffs herein.
214. Ultimately, this court finds and holds that the Plaintiffs have not proved their case on the required standard of balance of probabilities. Consequently, their claim as contained in the Amended Originating Summons dated 10<sup>th</sup> June 2022, is dismissed entirely with costs to the Defendants.
215. Further, the court finds and holds that the 3<sup>rd</sup> Defendant has proved his Counter-claim dated 7<sup>th</sup> March 2022, on the required standard of balance of probabilities. For the above reasons, the said Counter-claim is allowed as above stated with costs to the 3<sup>rd</sup> Defendant, to be borne by the Plaintiffs. Costs with interests is at court rates.
216. Further, having found that the 3<sup>rd</sup> Defendant is the rightful owner of the suit property and is entitled to use his land as he so wish, this court lifts and/or vacates the Status quo Orders issued earlier by the court.
217. The 3<sup>rd</sup> Defendant is at liberty to occupy, possess and use the suit land Loc16/ Gatura/1912, as he so wish, as the absolute and indefeasible owner of the said land.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 11<sup>TH</sup> JULY 2024.**

**L. GACHERU**

**JUDGE**

**11/07/2024.**

Delivered online in the presence of

Mr. Kanyi Kiruchi for the Plaintiffs.



Mr. Kuria for 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr. Njoroge H/B for Mr. Tumu for 3<sup>rd</sup> Defendant.

Joel Njonjo - Court Assistant.

**L. GACHERU**

**JUDGE**

**11/07/2024.**

