



**Mugambi (Suing in personal capacity and also as an administrator of the Estate of the Late Julius Murunga Mugambi - Deceased) & 3 others v Kairiari & 2 others (Environmental and Land Originating Summons E003 of 2020) [2024] KEELC 5095 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5095 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2020**

**CK YANO, J**

**JULY 4, 2024**

**BETWEEN**

**PATRICK MWONGERA MUGAMBI (SUING IN PERSONAL CAPACITY AND ALSO AS AN ADMINISTRATOR OF THE ESTATE OF THE LATE JULIUS MURUNGA MUGAMBI - DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**BEATRICE RIGIRI MURINGI (SUING IN PERSONAL CAPACITY AND ALSO AS AN ADMINISTRATRIX OF THE ESTATE OF LATE JULIUS MURIUNGI MUGMABI - DECEASED) ..... 2<sup>ND</sup> PLAINTIFF**

**ERIC KIOGORA MUGAMBI ..... 3<sup>RD</sup> PLAINTIFF**

**MARTIN KOOME MUGAMBI ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**JENNIFER KAIRIARI ..... 1<sup>ST</sup> DEFENDANT**

**KINYUA HOSEA ..... 2<sup>ND</sup> DEFENDANT**

**NTINYARI AGNES ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By an originating summons dated 19<sup>th</sup> October, 2020 and amended on 25<sup>th</sup> October, 2021, the plaintiffs claim to have become entitled to the whole of land parcel No. Ntima/Igoki/4228 and all parcels of land excised and/or emanating therefrom by operation of the *Limitation of Actions Act*, Cap 22 Laws of Kenya under the doctrine of adverse possession. The amended originating summons is supported by an affidavit of Patrick Mwongera Mugambi, the 1<sup>st</sup> plaintiff sworn on 25<sup>th</sup> October, 2021. The plaintiffs listed ten questions for determination.



2. In opposing the plaintiff's claim, the defendants filed a replying affidavit sworn by Jennifer Kariari, the 1<sup>st</sup> defendant on 25<sup>th</sup> November, 2021.
3. The 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs are the joint administrators of the estate of the late Julius Muringi Mugambi (deceased). The deceased was the husband to the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are their children. The 1<sup>st</sup> defendant is a sister to the deceased while the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are her children. The 1<sup>st</sup> defendant is therefore the sister-in-law of the 2<sup>nd</sup> plaintiff and aunt of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs.

### **Plaintiffs' Case**

4. The plaintiffs aver that the deceased was the registered owner of LR. NO. Ntima/Igoki/4229 since 10<sup>th</sup> September, 1990. That the said land was later sub-divided into L.R No. Ntima/Igoki/9105 – 9108 after succession. That the resultant parcels were transferred to the 3<sup>rd</sup>, 2<sup>nd</sup>, 1<sup>st</sup> and 4<sup>th</sup> plaintiffs respectively as ordered by the succession court.
5. The plaintiffs aver that on the other hand, the 1<sup>st</sup> defendant was the registered owner of the then neighbouring parcel L.R No. Ntima/Igoki/4228 since 20<sup>th</sup> March 1991 until 7<sup>th</sup> January, 2020 when the 1<sup>st</sup> defendant sub-divided it into four parcels, being L.R No. Ntima/Igoki/11097 – 11100 of which she initially retained parcel numbers 11097 and 11100 and transferred parcel number 11098 to the 3<sup>rd</sup> defendant and parcel No. 11099 to the 2<sup>nd</sup> defendant and later on transferred the remaining parcel numbers 11097 and 11100 to the 4<sup>th</sup> and 5<sup>th</sup> defendants respectively.
6. The plaintiffs state that both L.R No. Ntima/Igoki/4228 and 4229 among others originally belonged to the late M'Itwamwari M'Itwerandu (deceased) who was father to the 1<sup>st</sup> defendant and the late Julius Muringi Mugambi (deceased) and came about as a result of sub-division of the original parcel number, 537 before it was subdivided on 17<sup>th</sup> January, 1990. That the two parcels L.R No. Ntima/Igoki/4228 and 4229 were rectangular in shape while the deceased had been using a triangular portion of what came to be LR. No. Ntima/Igoki/4228 and 4229, though almost the same size as any of the two parcels and had made immense permanent developments thereon. That as a result, Julius Muringi Mugambi (deceased) filed Meru HCCC No 29 of 1999 against the late M'Itwamwari M'Itwerandu (deceased) seeking to have the survey re-done in such a way that it would not deprive him of his permanent developments. That being a family dispute, on 7<sup>th</sup> February, 1990 the parties agreed to have the same arbitrated upon by the clan which recommended re-adjustment of the common boundary between the two parcels so as to accommodate the permanent developments of Julius Muringi Mugambi (deceased) in one parcel but without affecting the acreage of the other. That the then District Surveyor re-visited the two parcels of land and re-aligned their common boundary accordingly, and a new live fence planted at the re-aligned boundary which exists to-date, though currently cut down partly by the defendants but the stumps are visible and the adjusted survey plans drawn.
7. The plaintiffs aver that the defendant in that case adamantly refused to attend Land Control Board to obtain consent to officially alter the common boundary between the two parcels as a result of which the re-aligned survey plans were not registered, but the common boundary as re-adjusted and marked by live Kei-apple fence on the ground remains and had been observed and respected by all and sundry until early 2020 when the 1<sup>st</sup> defendant subdivided her parcel LR No. Ntima/Igoki/4228 according to the old 1990 pre-realignment registered boundaries ignoring the 1<sup>st</sup> December, 2015 sub-division of parcel number 4229 which formalized the triangular shape of the two parcels as a result of which she purported to reinstate the rectangular shape of the two parcels which was the very reason for filing of Meru Hccc No. 29 of 1990. That the 1<sup>st</sup> defendant's action took up huge chunks of the current land



parcel number 9105 belonging to the 3<sup>rd</sup> plaintiff, 9108 belonging to the 4<sup>th</sup> plaintiff and the road of access created to access parcel numbers 9108 and 9017 thereby rendering them landlocked. That from the sketch and the report, parcel no. 9105 has been encroached by No. 11097 by approximately 0.0109 hectares, by 11098 by approximately 0.0347 hectares and by 11099 by approximately 0.0039 hectares making a total encroachment of 0.0495 hectares leaving the 3<sup>rd</sup> plaintiff with only 0.0015 hectares while he has fully and permanently developed his plot.

8. That from the same report and sketch, parcel No. 9108 has been encroached by number 11099 by approximately 0.0159 hectares while the road of access has been encroached by parcel No. 11098 by 0.0043 hectares making a grand total of 0.0697 hectares being the portion of the original parcel No. 4229 encroached by the new boundaries created through the subdivision of parcel No. 4228 on 7<sup>th</sup> January, 2020. The plaintiffs believe that the surveyor who sub-divided parcel No. 4228 did not physically visit the land but only used the mutation registered in 1990 and which was altered on the ground with the sanction of the court in Meru Hccc No. 29 of 1990.
9. The plaintiffs further aver that when they sub-divided their parcel No. 4229 on 1<sup>st</sup> December, 2015, the surveyor came to the ground and picked the boundaries as they existed since 1990 and the Registry Index Map was adjusted according to the existing boundary and the 86<sup>th</sup> edition of the Registry Index Map published showing the existing boundaries and that the same was in the existence until 102<sup>nd</sup> edition of the map which the 1<sup>st</sup> plaintiff purchased from the survey offices. That previously, the map reflected the registered 17<sup>th</sup> January, 1990 boundaries as the re-alignment was not registered for want of Land Control Board consent. That unfortunately, when parcel No. 4228 was sub-divided on 7<sup>th</sup> January, 2020, the boundaries of the plaintiffs' current parcels on the Registry Index Map were irregularly erased therefrom and the original parcel No. 4229 reinstated on the map, leaving the plaintiffs with title deeds that do not exist in the map though previously, were mapped.
10. The plaintiffs aver that all the transactions affecting parcel numbers 4228 and 4229 were all subject to the overriding interest of the successive owners and tenement created from the said two numbers by operation of Section 28 (h) of the *Land Registration Act*, 2012 and previously Section 30 (f) of the then Registered *Land Act* Cap 300 (repealed). They aver that the late Julius Muringi Mugambi (deceased) and the plaintiffs as his dependents through the original parcel number 4229 have been in adverse possession of the said portion of land measuring 0.0697 hectares from the 1<sup>st</sup> defendant's original parcel no. 4229 since 1991 and parcel No. 4229 since 1991 and that the defendants cannot file any claim to recover possession of the same and have been rendered trustees for the benefit of the plaintiffs by operation of the *Limitation of Actions Act*, Cap 22 since the year 2003 when the statutory period lapsed, and that it is only fair and just that the plaintiffs be registered as owners thereof by respecting their current title deeds and the subdivision of parcel number 4229 on 1<sup>st</sup> December, 2015. The plaintiffs therefore urged this Honourable court to allow their claim by determining all the issues raised in the originating summons herein in the affirmative.
11. In the affidavit in support of the amended originating summons, the 1<sup>st</sup> plaintiff annexed copies of the grant issued in Meru Hc Succ Cause No. 482 of 2011 in respect of the estate of the late Julius Muringi Mugambi (deceased), registers, bundles of official search certificates, proceedings in Meru Hccc No. 29 of 1999, clan decisions, survey report and a graphic sketch, an extract of the 102<sup>nd</sup> edition of the Registry Index Map and mutation form subdividing parcel No. 4229, and extract of 71<sup>st</sup> edition of Registry Index Map showing the two parcels in rectangular shape and a copy of the 113<sup>th</sup> edition of the Registry Index Map, mutation form for LR. No. Ntima/Igoki/4229, photographs and supplementary surveyor's report.



12. Patrick Mwongera Mugambi, the 1<sup>st</sup> plaintiff testified on behalf of the plaintiffs and they closed their case. He relied on the facts in his affidavits in support of the originating summons and produced the annexures thereto as P exhibits 1 to 18 respectively. He reiterated that their claim was for adverse possession of the suit land LR No. Ntima/Igoki/4228 which has since been subdivided. He was also cross-examined and re-examined. He testified that his father sued his grandfather wanting to have his permanent properties in parcels 4228 and 4229 in one parcel. He also confirmed that his late father had sued the 1<sup>st</sup> defendant herein over parcel No. 4228 seeking to declare her registration of the same as null and void and for an order of rectification of the register. P.W 1 confirmed that the court in its judgment in Meru CMCC No. 177 of 1994 was dismissed with costs and there was no appeal against the said judgment that was filed. He also confirmed that there have been other cases over the suit property including Meru CMCC No. 177 of 1994, No. 29 of 1990, Succession cause No. 482 of 2011, Criminal cases including Criminal case no. 464 of 2021.
13. In their submissions dated 26<sup>th</sup> February, 2024 filed through the firm of M/s Mwenda Mwarania, Akwalu & Co. advocates, the plaintiffs gave a summary of the case and submitted inter alia, that they have proved their case on a balance of probabilities and urged the court to resolve all the issues raised in the originating summons in the affirmative. The plaintiffs also urged the court to dismiss Meru CMC ELC case no. 57 of 2020 which was consolidated with this case. It is their submissions that the prayer to evict the 2<sup>nd</sup> plaintiff in Meru CMC ELC case no. 57 of 2020 is an act of possession by the plaintiffs on portions of the defendants' land. The plaintiffs' counsel cited Order 2 Rule 11 (1) of the Civil Procedure Rules and submitted that the failure to file a reply to defence amounts to an admission to the averments therein.

#### **Defendants' Case**

14. It is the defendants' case inter alia that the plaintiff's amended originating summons is baseless, ill-intentioned and an afterthought to deny the defendants their rightful share of land which they have occupied and continue to eke a living out of since time immemorial. It is admitted that LR. Nos. NTIMA/IGOKI/11097, 11098, 11099 and 11100 all came into existence as a result of subdivision of LR. NO. Ntima/Igoki/4228. That the plaintiffs have no valid claim to the said parcel of land.
15. The defendants aver that the second question raised in the amended originating summons is wrong as none of them have ever been summoned to answer to any claim of adverse possession in relation to their actions or omissions in relation to parcel No. Ntima/Igoki/4228 or any part thereof. They cited section 33(1) of the *Limitation of Actions Act* and argued that the plaintiffs are estopped by the doctrine of laches. They also accused the plaintiffs of being guilty of material non-disclosure. That the plaintiffs failed to disclose to the court that three years after the sub-division of LR. No. NTIMA/IGOKI/4228, the late Julius Muringi (deceased), husband to the 2<sup>nd</sup> plaintiff and father to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs, filed civil case no. 177 of 1994 against the 1<sup>st</sup> defendant who is his younger sister over the said land. That judgment in that case was delivered on 16<sup>th</sup> August 2018 in favour of the 1<sup>st</sup> defendant. A copy of the judgment is annexed to the replying affidavit by the 1<sup>st</sup> defendant. It is the defendants' contention that the principle of adverse possession is misplaced in the wake of such interruption and want the second question in the originating summons answered in the negative. The defendants also answered the third, fourth, fifth, sixth, seventh and ninth questions in the negative.
16. The defendants contend that subdivision of LR. No. Ntima/Igoki/4229 into L.R No. Ntima/Igoki 9105, 9106, 9107 and 9108 are contested as they were influenced by the plaintiffs and in total disregard of the laid down procedure. That there is no map showing the said parcels in all the Registry Index Maps. That the 86<sup>th</sup> edition has clear discrepancy between the resultant title numbers and the Registry



Index Maps, adding that that is a clear manifestation of fraud used to acquire the same. Further, that the plaintiffs have intentionally opted not to produce the mutation form used to sub-divide their parcel to establish the authenticity of the Land Surveyor, the District Surveyor who authored and signed for the subdivisions. It is the defendants' contention that the principle of adverse possession is being misapplied to the current situation as it doesn't apply. That the said parcels are not subject to adverse possession by the plaintiffs in any way since LR. No. 4228 has distinct boundaries as established on 15<sup>th</sup> January, 1990 vide mutation no. 223 dated 15<sup>th</sup> January, 1990 which subdivided L.R No. Ntima/Igoki/537 to give portions Ntima/Igoki/4227, 4228, 4229, 4230 and 4231. The deponent of the replying affidavit has annexed copies of the mutations and other relevant documents.

17. The defendants aver that LR No. Ntima/Igoki/537 belonged to M'Itwamwari M'Itwerandu (deceased) who distributed the portions as follows;

Ntima/Igoki/4227 sold to one Jennifer Kagwiria, Ntima/Igoki/4228 gifted to Jennifer Kairiari (daughter – the defendants' estate) Ntima/Igoki/4229 gifted to Julius Muringi (son – the plaintiffs' estate), Ntima/Igoki 4230 gifted to Johnson Gituma (son), and Ntima/Igoki/4231 gifted to Eunice Kaari (daughter). That a look at the Registry Index Maps show the lands to be in rectangular shape. Copies of the map extracts and other documents are annexed.

18. The defendants aver that there have been illegal forceful occupation on LR No. 4228 through threats, intimidation, use of public administration and thereafter use of protracted court process vide case no. 177 of 1994 that was disposed of on 16<sup>th</sup> August 2018 in favour of the 1<sup>st</sup> defendant. That the principle of adverse possession cannot come to the plaintiffs' aid in light of the interferences and hostilities to the said occupation. It is stated that after the demise of M'Itwamwari M'Itwerandu (deceased) in 1992, Julius Muringi (now deceased) and father to 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiff and husband to 2<sup>nd</sup> plaintiff filed case no. 177 of 1994 against Jennifer Kairiari, and judgment was delivered on 16<sup>th</sup> August 2018 in favour of Jennifer Kairiari. That Julius Muringi (deceased) in blatant disregard to the wishes of his father, physically destroyed the beacons that were erected during the subdivision between parcels LR No. Ntima/Igoki/4228 and 4229. Further, that before the subdivision of LR No. Ntima/Igoki/537, there were haphazard buildings all over the land by the beneficiaries. That after sub-division, everyone including the late Julius Muringi, moved their houses from their properties that did not belong to them to the suit land. The defendants accuse the plaintiffs of using force and during the pendency of civil case no. 177 of 1994 to erect buildings over the suit land and excerpts from google maps are annexed to the replying affidavit. It is the defendants contention that there was no open, exclusive and uninterrupted possession since the 1<sup>st</sup> defendant had been trying to establish boundaries and the various court cases on board since 1994. That the possession, if any was interrupted by civil case No. 177 of 1994 and the numerous disputes in place pre – 1991.
19. The defendants aver that there has never been a legal amendment to the Registry Index Map after the one done on 15<sup>th</sup> January, 1990. That any purported alteration could only have been done fraudulently. The defendants cited the provisions of Section 26 (1) of the *Land Registration Act*, 2012, and argued that the plaintiffs have not demonstrated that they made the purported boundary amendment legally or through the instructions of the Land Registrar, nor made public nor the two parcels 4228 and 4229 cancelled and given new numbers in accordance with Section 16 (2) of the said Act. That the prayer by the plaintiffs that the land be re-subdivided in a rectangular shape is a clever way of appealing case No. 177 of 1994.
20. With regard to the eighth question, whether the County Surveyor should be compelled to amend the Registry Index Map to accord to the actual ground boundaries existing between the then LR No.



Ntima/Igoki/4228 and 4229, it is the defendants' contention that the same is not necessary. That instead, the court should compel the County Surveyor Meru and or land Registrar to give their report to this court on the illegality and purported alternation of the boundaries by the plaintiffs on 1<sup>st</sup> December, 2015, and further compel the County Surveyor to re-establish the beacons destroyed by the plaintiffs' father and husband as per the existing current official Registry Index Map. That the court should not interfere with the existing legal boundaries and title deeds for LR Nos. Ntima/Igoki/11097, 11098, 11099 and 11100 belonging to Phineas Mutuma, Agnes Ntinyari, Kinyua Hosea and Lenny Kirimi respectively.

21. The defendants urged the court to dismiss the originating summons with costs.
22. In Meru CMC ELC No. 57 of 2020, Agnes Ntinyari has sued Beatrice Rugiri Muringi and Kiogora Mugambi seeking an order for the removal of structures on LR No. Ntima/Igoki/11098 and permanent injunction. The plaintiff in that case ( who is also the 3<sup>rd</sup> defendant in the originating summons) contends that she is the rightful and bonafide owner of the said land measuring about 0.04 ha and holds a valid certificate of title, and accused the defendants of encroachment and trespass.
23. The defendants filed a defence wherein they averred that the boundaries between the plaintiff's suit parcel of land and four others on one hand and their own land parcel No. Ntima/Igoki/9105 and 9106 and two others on the other are the subject of Meru ELC No. E003 of 2020 (OS). They sought to have the two suits consolidated. They added that owing to effluxion of time, the issue of adverse possession had arisen and the subordinate court lacked the jurisdiction to determine the same. They prayed for the suit to be dismissed with costs.
24. Kinyua Hosea testified as DW 1 on behalf of the defendants and adopted the facts contained in the replying affidavit sworn by Jennifer Kairiari as his evidence – in- chief. He produced the authority to sign pleadings, the judgment in case No. 177 of 1994, order, mutation forms and maps as D exhibits 1 to 5(c) respectively. He was cross-examined and re-examined.
25. D.W 1 stated that the parcels of land have never been triangular in shape and that there is a river that crosses the land therefore some portion is on riparian area, and accused the plaintiffs of wanting to push the defendants to the riparian area which cannot be of much use.
26. The defendants filed written submissions dated 10<sup>th</sup> March 2024 through the firm of Mutuma Gichuru & Associates Advocates wherein they gave an introduction and analysis of the facts and evidence. It is submitted inter alia that the plaintiffs are not sure of what claim to pursue as they are clutching their luck with the claim of adverse possession, boundary dispute and encroachment. The defendants counsel cited Sections 27, 25, and 26 of the Land Registration Act, Section 108 and 109 of the Evidence Act and relied on the case of Koinange and 13 others Vs Koinange (1986) KLR 23.
27. It is submitted on behalf of the defendants that the claim of adverse possession is a doctrine of law that dispossesses a legal owner of land by the operation of the law. That it is therefore a doctrine that has stringent ingredients which must be proved by a party to dispossess another of their rightfully acquired land. The defendants counsel relied on the case of Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui [2017] eKLR and submitted that the fact that the plaintiffs have recently encroached on the defendants' land does not mean that the lack of possession of the encroached portion amounted to dispossession of the 1<sup>st</sup> defendant's title more so because such occupation by the plaintiff being interrupted. The defendants referred to Civil case No. 177 of 1994 and the judgment issued in 2018.
28. The defendants also relied on the case of Wanie Vs Saikwa (No. 2) (1984) KLR 284 and submitted that the plaintiffs' pleadings are at variance with the evidence tendered on the issue of adverse possession and the boundary dispute claim. That all such are not substantiated. It is the defendants' submissions



that the defendant's claim for adverse possession must fail as they have not met the ingredients of the doctrine. They relied on the case of Daniel Otieno Migore Vs South Nyanza Sugar Co. Ltd [2018] eKLR, Wambugu Vs Njuguna (1983) KLR 173 and Ernest Wesonga Kweyu Vs Kweyu Omuto CA Civil Appeal No. 8 of 1990.

29. It is further submitted on behalf of the defendants that the issue before court is a pure boundary dispute which is a preserve of the Land Registrar and not this court. That the suit as framed is bad in law and an abuse of the court process as it violates the express provisions of Section 18 of the [Land Registration Act](#). It is submitted that this court does not enjoy the jurisdiction to hear the matter in view of Section 18 (2) of the [Land Registration Act](#). The defendants counsel also cited Section 19 of the said Act.
30. It is also submitted that the matter is res judicata. The defendants counsel cited Section 7 of the [Civil Procedure Act](#) and Section 28 of the [Environment and Land Court Act](#) and relied on the case of Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others [2017] eKLR. That it is evident that the current suit satisfies all the elements for res-judicata in view of Civil suit No. 177 of 1994 between the 1<sup>st</sup> plaintiff herein and the 1<sup>st</sup> defendant herein in which judgment was delivered on 16<sup>th</sup> August 2018, and no appeal has been preferred since. The defendants counsel also relied on the case E.T.V V Attorney General & another [2012] eKLR and Pangara Holdings LLC & another Vs Hacienda Developments Ltd & 2 others [2020] eKLR. The defendants urged the court to dismiss the plaintiff's suit with costs to the defendants.

### **Analysis And Determination**

31. Having considered the pleadings, the evidence on record and the submissions, the issues for determination are whether the plaintiffs have acquired the suit property by way of adverse possession and whether the orders sought by the plaintiff in Meru CMC ELC NO. 57 of 2020 should be granted or not.
32. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is alive in section 7 of the [Limitation of Actions Act](#) which provides as follows;
  - “7. 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 accrued to some person through whom he claims, to that person.”
33. Section 17 of the same Act Provides as follows-;
  - “Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to land is extinguished.”
34. Section 13 of the said Act states as follows-;
  - “(1) A right of action to recover land does not accrue unless the land is in 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 section 9,10,11 and 12 of this act a right of action to recover possession on the date, a right of action does not accrue unless and until some person takes 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.”

35. Further, Section 38 (1) of the [Limitation of Actions Act](#) provides that:

- “(1) where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of this Acts, he may apply to the High Court for an Order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

36. In *Wambugu Vs Njuguna* (Supra), the Court of Appeal restated the principles for adverse possession and held as follows;

- “1. The General Principle is that until the contrary is proved, possession in law follows the right to 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.”

37. In *Mtana Lewa V Kahindi Ngala Mwangandi* [2015] eKLR the Court of Appeal stated as follows;

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

38. In the instant case, it is not in dispute that the parties are all related. The 2<sup>nd</sup> plaintiff is mother to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs and sister in law to the 1<sup>st</sup> defendant. The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are children of the 1<sup>st</sup> defendant and the 2<sup>nd</sup> plaintiff is their aunt while the other plaintiffs are their nephews/cousins. Julius Muringi Mugambi (deceased) who was husband to the 2<sup>nd</sup> plaintiff and father



to the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs was also a brother to the 1<sup>st</sup> defendant. It is also not in dispute that the family patriarch, the late M'Itwamwari M'Itwerandu (deceased) who was father to the late Julius Muringi Mugambi (deceased) and the 1<sup>st</sup> defendant herein was the owner of the original parcel of land known as LR No. Ntima/Igoki/537 before the same was subdivided into parcel No. Ntima/Igoki/4228 and 4229 among others. The occupation of the suit land therefore must have been due to the parties relationship. The occupation of land by a person who pleads adverse possession must be non-permissive use i.e without permission from the true owner of the land occupied. It has been held many times that "acts done under license or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute." (see Gabriel Mbui Vs Mukindia Maranya [1993] eKLR.

39. In the case of Gabriel Mbui Vs Mukindai Maranya (supra) Kuloba J. held inter alia that for adverse possession to succeed it "must be one nec vi, nec clam, nec precario. It must not be clandestine, and it ripens into prescriptive title only if it is juridical, and must have none of the vitia possession as clam, vi, aut precario (by stealth, violence or supplication)". It was also held that "it is a well known in our law, that the adverse character of the intruder's possession of another's land must be proved as a clear fact, and cannot be assumed as a matter of law from the mere exclusive possession, no matter how long it is continued. From the clearly proved facts, the court is to draw legal inferences as to whether there was or there was no adverse possession."
40. From the material on record, it is clear that the original land was family or customary land which was subsequently subdivided among the family members. Previously, the family members were all in occupation of the land on different portions. However, upon subdivision and distribution, each family member acquired title to a specific portion with a parcel number. In my view, the plaintiffs cannot purport to have been in possession adverse to the defendants for the requisite period of twelve years when the evidence on record shows that they all entered the land by virtue of being family members. Certainly, the plaintiffs' occupation and possession cannot qualify to be called adverse since that was their family land. In my view, each of the beneficiaries was required to move to and confine themselves within the portion or parcel given to them upon subdivision of the land.
41. Further, the essential prerequisites in the doctrine of adverse possession being that the possession must be neither by force or stealth nor under the license of the owner have not been met. It must also be adequate in continuity, in publicity and in extent to show that the possession is adverse to the title owner. In this case, it is clear that the plaintiffs entered the land with the permission of the original owner by virtue of their close family relationship. It is also clear that the possession by the plaintiffs was not peaceful. This is so because the record shows that there have been disputes over the boundaries of the suit parcels of land, including case no. 177 of 1994. Therefore, there were interferences with the plaintiffs' alleged possession. The plaintiffs claim for adverse possession must fail because they have not met the prerequisites of the doctrine of adverse possession. From the material on record, this is a dispute over the boundaries of the respective parcels belonging to the parties and which dispute can be rightfully determined by the land registrar as required by Section 18 of the *Land Registration Act*.
42. Considering the totality of the evidence availed in this case, and applying the legal principles outlined in law, I am not satisfied that the plaintiffs have proved their case on a balance of probabilities. It is my finding that the plaintiffs have failed to bring themselves within the limits of the doctrine of adverse possession.
43. On whether the plaintiff in Meru CMC ELC case No. 57 of 2020 is entitled to orders of vacant possession and injunction, it is not in dispute that Agnes Ntinyari is the registered owner of land Parcel No. Ntima/Igoki/11098. As the rightful owner of that land, Agnes Ntinyari is entitled to enjoy the rights of a proprietor of the land as provided for under Section 25 of the *Land Registration Act*. The



claim of adverse possession having failed, those who have encroached and/or trespassed on the said land have no right to continue in occupation and possession thereof. It is my finding that Agnes Ntinyari is entitled to vacant possession of her land.

44. I accordingly enter judgment as follows-;

1. The suit, Meru ELC case no E003 of 2020 (OS) is dismissed.
2. The suit, Meru CMC ELC No. 57 of 2020 is allowed in terms of prayer (a) and (b) of the plaint dated 20<sup>th</sup> July, 2020.
3. Beatrice Rigiri Muringi and Eric Kiogora Mugambi and/or their agents shall within 90 days of the date of this judgment remove and/or relocate their structures from parcel No. Ntima/Igoki/11098 failure to which Agnes Ntinyari as the proprietor of that land shall be at liberty to remove the said structures under the protection of the law enforcement agencies in line with the provisions of Sections 152A to 152H of the *Land Act*.
4. Considering the close relationship of the parties herein, I order that parties bear their own costs of the consolidated suits.

45. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 4<sup>TH</sup> DAY OF JULY, 2024**

In the presence of

Court Assistant – Tupet.

Ms Kajuju holding brief for Mwenda Mwarania for plaintiff

Ms Mwiti holding brief for Ashaba for defendants

**C.K YANO**

**JUDGE**

