



REPUBLIC OF KENYA



**Mwanthi v Theophilus & 2 others (Environment & Land Case
153 of 2012) [2024] KEELC 6409 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 153 OF 2012
CK YANO, J
OCTOBER 3, 2024**

BETWEEN

LEONARD KIMEU MWANTHI PLAINTIFF

AND

PATRICK KIRIMI THEOPHILUS 1ST DEFENDANT

JOHN NYAGA M'ITONGA 2ND DEFENDANT

THE PUBLIC TRUSTEE OF KENYA 3RD DEFENDANT

JUDGMENT

1. The plaintiff moved the court vide the Originating Summons dated 6th August, 2012 which was amended on 12th November, 2015 and further amended on 20th February 2020 seeking for determination of the following questions-
 1. Whether the 1st defendant:
 - a. Is the current registered proprietor of those parcels of land known as LR Nos. Nyaki/ Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout.
 - b. Acquired fraudulently, illegally, irregularly, unprocedurally, corruptly and/ or by misrepresentation, registration of parcels of land known as LR Nos. Nyaki/ Kithoka/657 and 658, measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout in his name and whether the said registration should be cancelled pursuant to the provisions of Section 80 (1) and 26 (1) (a) & (b) of the [Land Registration Act](#) No.3 of 2012.



- c. Whether the land sale agreement between the 1st defendant and the 2nd defendant one John Nyaga T. M'Itonga dated 8th August, 2011 is valid or whether it offends the provision of Section 43(2) of the *Land Registration Act* No.3 of 2012.
 - d. Whether the 1st defendant acquired a good title to the suit lands from the 2nd defendant Mr. John Nyaga T. M'Itonga.
2. Whether the plaintiff has acquired absolute title over land parcels Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout.
3. Whether the plaintiff has been in actual possession and occupation of LR Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout.
4. Whether the occupation and possession by the plaintiff of land parcels Nos Nyaki/Kithoka/657 and 658, measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout has been open, peaceful, continuous, uninterrupted and for a period in excess of 12 years.
5. Whether the occupation and possession by the plaintiff of land parcel Nos. Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout was on any express or implied authority from the defendants.
6. Whether the defendants have ever taken any steps whatsoever even through a demand notice, demanding that the plaintiff to vacate out of land parcel Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout.
7. Whether the plaintiff has extensively developed land parcels Nos Nyaki/Kithoka/657 and 658, measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout.

Particulars Of The Plaintiff's Developments On The Suit Land

- i. Erected a semi-permanent house comprising of 2 bedrooms, a store, sitting room, detached kitchen, toilet and bathroom and a zero-grazing unit for 4 cows, milking parlour and calf pen all valued at Kshs 600,000/= and physically placed the cattle on the suit lands.
- ii. Planted many gravelia trees in or about 1985 and 1987 which were mature as at 3rd March, 2012 when 1st defendant violently evicted the plaintiff and were valued at kshs 80,000/= (inclusive of sawdust, firewood and off cuts) each at the time. The plaintiff also used to prune them annually and fetched approximately Kshs. 30,000/= from the firewood (including those consumed at the plaintiff's home on the suit lands).
- iii. Planted a lot of napier grass including on the Meru-Ruiru road reserve adjacent to land No. Nyaki/Kithoka/658 which the plaintiff fed his 4 cows and their calves and he also used to earn well over kshs 50,000/= annually through sale of the same to his neighbors, over and above what was consumed by his cows.
- iv. Cultivated the entire remaining portions of land parcels Nos. Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha and fetched 40 and 50 bags(90kg) of maize,10 to 15 bags of beans and approximately 10 bags of English Irish potatoes among other crops per year.



8. Whether the plaintiff has an overriding interest over land parcels Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout pursuant to the provisions of sections 7 and 28 (h) of the *Land Registration Act* No.3 of 2012.
9. Whether land parcels Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout were still legally available for distribution by the now late Mary Karai M' Itonga (now deceased) to the 2nd defendant, one John Nyaga T.M' Itonga as at 2011 through Meru Succession Cause No.382 of 1994 taking into account that the same had been legally sold to the plaintiff's family by the 3rd defendant in 1984 and 1987 through public auction and the said sales were never nullified by any competent court of law or at all.
10. Whether the plaintiff has in any event acquired title by way of adverse possession over land parcel Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively.
11. Whether the defendants have lost legal rights and authority by operation of section 7 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, to claim from the plaintiff, parcels of land Nos Nyaki/Kithoka/657 and 658, measuring approximately 0.32 Ha and 0.36 Ha respectively which the plaintiff has been in actual occupation openly, continuously, peacefully, uninterruptedly and without the authority of the defendants for a period in excess of 12 years.
12. Whether the plaintiff has now acquired absolute ownership of land parcels Nos. Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout while the defendants have lost ownership of the same by operation of section 17 of the *Limitation of Actions Act* Cap 22 of the Laws of Kenya.
13. Whether the plaintiff is now entitled to be registered as the legal proprietor of land parcels Nos Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively which the plaintiff has been in occupation of since the year 1987 and 1984 respectively.
14. Whether the 1st defendant should be ordered to execute all the necessary documents to effect transfer, including application for consent and transfer of land parcels Nos. Nyaki/Kithoka/657 and 658 measuring approximately 0.32 Ha and 0.36 Ha respectively or thereabout to the plaintiff in place of himself and in default the deputy registrar of the honourable court be empowered to apply for the said consents for transfer referred to herein above.
15. Whether the now late Mary Karai M'Itonga transferred a good title to the 2nd defendant, one Mr. John Nyaga T. M' Itonga when she fraudulently distributed the suit lands in Meru High Court Succession Cause No/383 of 1994 notwithstanding the titles to the suit lands were extinguished a long time ago through the operation of Section 17 of the Limitations of Actions Act and the plaintiff hereby seeks a declaration by the court to the effect that the now late Mary Karai M'Itonga and the 3rd defendant only used to hold them in trust for the plaintiff.
16. Whether the subsequent forcible eviction of the plaintiff by the 1st defendant should be declared as null and void and of no consequences as to interruption of previous continuous possession and occupation of the suit lands by the plaintiff because the 1st defendant applied extra judicial methods by using armed invasion and violently ejecting the plaintiff out of the suit lands instead of the due process of the law because his intention was to deliberately gain illegal, unfair and underserved advantage over the plaintiff by creating legal and technical



hurdles whereby plaintiff was forced to sue and argue this case while being kept outside the suit lands.

17. Whether the now late Mary Karai M'Itonga and the 3rd defendant ever summoned the plaintiff or his wife Lucy Catherine Mwanthi to defend his or her interests in the suit lands Nos. Nyaki/Kithoka/657 and 658 ,during the hearing of the application for revocation of grant in Nairobi Succession No.354 of 1982 and/or Meru Succession No.382 of 1994 and the subsequent release of discharge of charge and land titles for the suit lands to the now late Mary Karai M'Itonga as required by the principle and practice of natural justice.
 18. Whether the plaintiff is entitled to costs of this suit and damages /indemnity under the provision of section 83 of the Land Registration Act No.3 of 2012 and/or any other relevant law.
2. The plaintiff prays for judgment as follows:
- a. A declaration that he is entitled to be registered as the owner of LR Nos. Nyaki Kithoka/657 and 658 through the doctrine of adverse possession. and the land registrar, Meru be directed to cancel the name of the 1st defendant in the register and replace him with the name of the plaintiff,
 - b. A permanent injunction restraining the 1st and 2nd defendants together with their family members, employees, servants, agents and/or anybody else claiming under them or acting at their behest, direction or instructions from entering into, trespassing onto, remaining in, utilizing in any manner or whatsoever interfering with the plaintiff's peaceful, quiet and exclusive possession, user and enjoyment of LR Nos Nyaki/Kithoka/657 and 658
 - c. Cost of the suit and interest thereon against the defendants jointly and severally.
3. The summons is supported by an affidavit sworn by the plaintiff on 20th February, 2020 and a supplementary affidavit dated 8th October, 2012.
4. In opposing the originating summons, the 1st defendant filed replying affidavits dated 28th August 2012, 17th December, 2015 and 4th March 2020. The 2nd defendant filed a replying affidavit dated 17th August, 2012, and a further replying affidavit dated 18th October, 2012. The 3rd defendant filed a replying affidavit dated 1st October, 2012.

Plaintiff's Case

5. The plaintiff's case is that in the 1980's, the 3rd defendant sold the suit lands to the plaintiff's wife, Lucy Catherine Muiyia alias Lucy Catherine Muiyia Mwanthi, through public auction, but failed to release the title deeds and discharge of charge to her in order for her to be registered as proprietor of the parcels of land. That after engaging in protracted correspondences over the issue which bore no fruits, Lucy Catherine Muiyia alias Lucy Catherine Muiyia Mwanthi and her family settled on the suit parcels of land in the 1980's under the doctrine of adverse possession.
6. The plaintiff states that in 2012, the 1st defendant, who is a relative of the registered proprietor emerged from nowhere, claimed that he had sold the suit lands to yet another relative, the 2nd defendant herein, and forcibly and illegally evicted the plaintiff therefrom using hired people and demolished his property. That the plaintiff's pleas to the police for assistance to be reinstated failed, prompting the plaintiff to file this suit. The plaintiff's case is that his possession and occupation of the suit parcels of land from 1984 and 1987 upto 2012 was adverse. That by the time he was forcibly evicted by the 1st defendant in 2012, he had acquired overriding interest over the suit land.



7. The plaintiff avers that his then wife, Lucy Catherine Muiyia alias Lucy Catherine Muiya Mwanthi migrated to the United States of America in 1994 and in 1995, she petitioned for divorce while still there which was granted and still lives there to-date. It is the plaintiff's contention that he is claiming ownership of the suit lands in his own right and not as an agent of Lucy Catherine Muiyia. That even when they were still married, he did not occupy the suit lands with the permission of his former wife, but as a party with implied equal rights.
8. At the hearing, the plaintiff testified as P.W 1. He stated that he is a veterinary Doctor and currently lives at Kaaga Location. That before he went to Kaaga, he used to live in the suit properties. That he started living in L.R No Nyaki/Kithoka/658 in 1984 and LR NO. Nyaki/Kithoka/ 657 in 1987. The plaintiff was also cross examined.
9. Silas Mwit Rutere testified as P.W 2. He adopted his statement dated 12th April 2012 as his evidence in chief and was cross examined and re-examined. His evidence is that he started seeing the plaintiff use the suit land around 1986. The witness stated that he used to graze their cattle on the said land which belonged to one of their neighbors, one Mr Magiri M'Itonga alias Kamuiru. That both Kamuiru and the plaintiff were cultivating portions of the land next to each other, but with no boundaries. That in 1987, Kamuiru demolished his house and relocated to Ruiru together with his family. That soon thereafter, the plaintiff started utilizing the whole land and planted nappier grass and gravelia trees that the plaintiff used to sell to him and other neighbours until 2012 when unruly armed youths drove into the suit land, found the witness and asked him to leave immediately. That thereafter, those youths demolished the plaintiff's structures and chased the plaintiff away.

The 1st Defendant's Case.

10. It is the 1st defendant's case that the plaintiff has no claim over the suit properties. That the documents relied on by the plaintiff showing purchase of the parcels of land by the plaintiff's divorced wife were illegal. That if there was public auction of the suit parcels of land by the 3rd defendant, the same would be illegal ab initio on the grounds that the wife of Jamlick Mugambi (deceased) would have no right to sell the suit lands as she was not the owner, and that the court in High court succession cause No. 354/1982 had granted her only 30% stake in the deceased's estate while the remaining 70% went to the children and mother of the deceased. The 1st defendant further stated that the grant dated 16th June 1988 in Nairobi HC succession cause No. 354 of 1982 was revoked. Further, that any sale by the 3rd defendant would have been illegal since the suit lands were still charged to the bank, even as at the date of the purported sale.
11. It is also the 1st defendant's contention that the suit lands could not have been sold to Lucy Catherine Muiyia alias Lucy Catherine Muiya Mwanthi since they were still registered in the name of the deceased and no transmission had been done, either to the public trustee or to the beneficiaries in Nairobi HC Succession cause No. 354/1982. It is the 1st defendant's contention that he followed the right procedure in acquiring the properties. That the plaintiff cannot claim property that had purportedly been purchased by his divorced wife, adding that from the documents on record, Lucy Catherine Mwanthi had filed suit against the public trustee which was however dismissed. That Lucy Mwanthi had never claimed the suit parcels of land. It is also the 1st defendant's contention that the plaintiff has no claim over the suit properties and that any possession of the same was interrupted on 3rd March 2012, therefore the issue of adverse possession does not arise. That the suit properties remained properties of the deceased forming part of his estate up to and including 10th February, 2012 when they were transmitted to the administratrix who in turn transferred them to the 2nd defendant who thereafter sold them to the 1st defendant.



2nd Defendant's Case

12. Mary Karai M³itonga (now deceased) was the original 2nd defendant. Upon her demise on 3rd August 2013, she was substituted by her son, John Nyaga T. M³Itonga. The 2nd defendant's case is that the suit lands belonged to Jamlick Rutere Mugambi (deceased) who died around 1982 and who was a son to the original 2nd defendant and brother to the current 2nd defendant. That Jamlick Rutere Mugambi (deceased) purchased the properties in 1975. That the deceased had asked his step brother by the name Magiri to take care of the parcels of land since the deceased was working and living away in Nairobi. That Magiri has been living and cultivating the land until his demise. That thereafter, the deceased's brother, Gitonga continued living and using the land until he moved to his father's land at Ruiru. That the deceased defendant then used the land until she grew too old. The 2nd defendant denied seeing the plaintiff using the land, adding that he must have been trespassing on it. The 2nd defendant also denied knowledge of the alleged sale of the suit properties by the 3rd defendant through public auction.
13. The original 2nd defendant who is now deceased stated that she later filed succession cause No. 382/1994 in respect of the estate of Jamlick Mugambi (deceased) and the grant was confirmed without any objection and the same still subsists. That the estate was distributed to the current 2nd defendant who later sold it to the 1st defendant who is his step brother and who took possession and is now in occupation.
14. At the hearing, the 1st defendant testified on his behalf and on behalf of the 2nd defendant. He basically reiterated the averments in their replying affidavits and was cross -examined and re-examined.

3rd Defendant's Case.

15. Although the 3rd defendant filed a replying affidavit dated 1st October,2012, they did not participate at the hearing. In my view, the court is not obligated to consider the said affidavit since pleadings in a suit are not normally evidence. They may become evidence only if a witness is called to make references to them or if they are expressly or impliedly admitted, and also in a case where the matter is canvassed by way of affidavit evidence.

Submissions

16. Both the plaintiff and the 1st and 2nd defendants filed written submissions which I have read and considered and I need not reproduce the same in this judgment.

Analysis And Determination

17. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also considered the legal authorities proffered by the parties. The court identifies the following issues for determination:
 - i. Whether the plaintiff has met the threshold for grant of orders of adverse possession.
 - ii. Whether the plaintiff is entitled to the orders sought.
18. In considering the above issues, the question that calls for an answer is whether the plaintiff has proved that he has acquired the suit properties by way of adverse possession to be entitled to the reliefs sought.



19. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya which provides as follows-;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some persons through whom he claims, to that person.

20. Section 13 of the same Act states that-;

“(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 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 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 takes adverse possession of the land.”

21. Section 38(1) of the same Act provides as follows-;

“(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 those Acts, he may apply to the High Court for an Order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land.”

22. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standards in civil cases, the plaintiff must prove that he has been in occupation of the suit land for a period of over twelve years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse, i.e inconsistent with the right of the registered owner.

23. In *Wambugu Vs Njuguna* (1983) KLR 173, the Court of Appeal restated the principles for adverse possession 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 limitation 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 to enable 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.”
24. In the case of *Mtana Lewa Vs Kalindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal (Makhandia JA) 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 prerequisite 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.”
25. The Court of Appeal in the case of *Ruth Wangari Kanyagia Vs Josephine Muthoni Kinyanjui* [2017] eKLR while acknowledging that adverse possession is a common law principle reiterated the same by citing the India Supreme Court decision in the case of *Kamakata Board of Wakf Vs Government of India & others* [2004] 10 SCC 779 where the court stated thus-;

“In the eye of the law, all owners would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam nec precario,” that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”
26. Therefore, a person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another’s land, without the consent of that other, and in such a way that the occupation or possession is open, peaceful and continuous for a period of 12 years and above. The Court of Appeal in *Keyu V Omututu* [1990] eKLR observed inter alia, that-;

“The adverse character of the possession must be proved as a fact, it cannot be assumed as a matter of law from the mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under colour of right claiming title hostile to the true owner and the world,



and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

27. As already stated, the plaintiff is claiming to be entitled to the suit properties by adverse possession. The suit parcels of land were previously registered in the name of Jamlick Rutere Mugambi (deceased) before they were transferred to the 2nd defendant through transmission and thereafter sold to the 1st defendant.
28. The plaintiff's case is that the 3rd defendant advertised the suit properties and the plaintiff and his former wife attended the auction sale wherein the plaintiff's now divorced wife, Lucy, bid and was declared the highest bidder. That Lucy paid the requisite deposit and thereafter paid the balance and was issued with a certificate of sale, but the 3rd defendant failed to release the title deeds and the discharge of charges. That Lucy filed Meru High court Civil suit No. 71 of 1991 in an attempt to compel the 3rd defendant to release the two titles and the discharge of charges but that case was dismissed on 23rd March 1993. The plaintiff has also joined the 3rd defendant in this case.
29. It is trite law that to succeed in a suit for adverse possession, one needs to demonstrate that he has been on the land *nec vi nec clam, nec precario*, that is without violence, without secrecy and without permission of the registered owner for a continuous, uninterrupted and peaceful period of over 12 years. The claimant also needs to demonstrate the necessary *animus possidendi* or intention to acquire the land.
30. From the evidence on record, it is not in dispute that the plaintiff is no longer in possession and occupation of the suit properties. The plaintiff's evidence is that he was evicted, albeit illegally, in 2012. The 1st defendant who was sold the parcels of land by the 2nd defendant is now the registered owner and is the one who is in possession and occupation.
31. It is also clear from the evidence on record that at the time the plaintiff was on the land, if at all, then it was pursuant to the alleged purchase of the suit properties by the plaintiff's former wife through public auction. It is therefore apparent that the plaintiff was on the land with the permission of his then wife. In the case of *Gabriel Mbui Vs Mukindia Maranya (1993) Kuloba J* while considering the definition of “adverse possession” stated as follows-;

“... It is possible to define “adverse possession” more fully, as the non- permissive physical control over land coupled with the intention of doing so by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to and to the exclusion of all others, including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of the land for purposes for which the owner intended to use it...”

32. In that case, the learned judge went on and stated-;

“The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e without permission from the true owner of the land. It has been held many times that acts done under the license or permitted by, or with love of the owner do not amount to adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on adverse possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a



permissive possession or occupation accorded on the grounds of clarity or relationship was intended, limitation operates from the time when possession first became adverse....

... where possession was consensual or contractual in its inception, it cannot be called “adverse”.

33. What has come out clearly in this case is that the plaintiff alleged that he entered the land which he thought his wife (now divorced) had purchased from the 3rd defendant. This shows that the entry and possession was consensual and/or contractual in its inception. That certainly cannot be called “adverse”. How could such possession be termed as “adverse” when it involved husband and wife as they were at the time. In this case, the plaintiff has not shown how and when his possession ceased to be permissive by virtue of their relationship with his then wife and/or the contract for sale between the plaintiff’s divorced wife and the 3rd defendant. Indeed, the plaintiff has in this case sued the 3rd defendant also presumably to pursue the enforcement of the public auction sale. Whereas the suit is disguised as a claim for adverse possession, this court cannot resist to reach the conclusion that the plaintiff is trying to enforce the said sale and that is the reason he joined the 3rd defendant in the suit.
34. This court has also taken note of the fact that the 2nd defendant herein acquired the suit properties through transmission before he sold them to the 1st defendant. There is no evidence to show that the orders issued by the High Court in the succession cause, including the confirmed grant that was used to distribute the estate of the deceased, which included the suit properties, were even reviewed or set aside. In addition, it is also doubtful whether the plaintiff’s possession and occupation was peaceful considering the plaintiff’s own admission that there were other previous cases, including Meru High Court Civil Suit No. 71 of 1991 between the plaintiff’s wife (now divorced) and the 3rd defendant. In addition, the plaintiff’s own witness (P.W2) testified that both the plaintiff and one Magiri M’Itonga alias Kamuiru, each cultivated portions of the suit parcels of land. This in my view, is a confirmation that the possession by the plaintiff, if any, was not exclusive.
35. Therefore, on the face of the facts of the case, and having analyzed the evidence adduced in totality, I am not persuaded on a balance of probabilities that the plaintiff has acquired title to the suit parcels of land by way of adverse possession. Consequently, it is my finding that the plaintiff has not met the threshold for the grant of orders of adverse possession.
36. The upshot is that the plaintiff’s suit is dismissed with costs to the 1st and 2nd defendants.
37. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 3rd DAY OF OCTOBER, 2024

in the presence of

Court Assistant – Tupet.

Plaintiff present in person.

Mrs Ngera for defendant

C.K YANO

ELC JUDGE

