



**Konjiru & another v Mwithimbu & another (Environment & Land Case E015 of 2022) [2024] KEELC 7454 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E015 OF 2022**

**CK NZILI, J**

**NOVEMBER 6, 2024**

**BETWEEN**

**CYPRIANO KONJIRU ..... 1<sup>ST</sup> PLAINTIFF**

**JULIUS MURITHI M'MUKIIRA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**GERVASIO MWITHIMBU ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN GITONGA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs moved this court through a plaint dated 28.7.2022. In it, the 1<sup>st</sup> plaintiff, as the registered owner of land L.R No. Ntima Igoki/1578, pursuant to a grant of letters of administration sued the 1<sup>st</sup> and 2<sup>nd</sup> defendants for eviction and permanent injunction. The 1<sup>st</sup> plaintiff averred that the 1<sup>st</sup> defendant had initially been permitted to temporarily cultivate the land and put up temporary farmhouses by the 2<sup>nd</sup> plaintiff's late father, M'Mukira M'Mithumbi, in 1985 and 1988, respectively. However, in 2020, he started claiming a purchaser's right and adverse possession.
2. The plaintiffs averred that the 1<sup>st</sup> defendant filed Meru ELC No. E001 of 2021 (O.S) against the 2<sup>nd</sup> plaintiff and his late brother Peter Kirimi M'Mukiira, which was dismissed on 21.7.2022 for non-attendance.
3. The plaintiffs averred that after filing the above suit, the defendants became violent and physically obstructed them from entering and or dealing with the suit land or alienating their mature coffee, macadamia, banana and grevillea trees. The plaintiff also averred that the occupation of the suit land by the defendant has been with the express consent of the late M'Mukiira M'Muthumba and the late Peter Kirimi M'Mukiira, with a condition to vacate the land when so requested. The plaintiffs averred that despite notice to vacate and hand over vacant possession, the defendants have been adamant, hence this suit.



4. The defendants opposed the suit through a statement of defense and counterclaim dated 11.8.2022. They denied the contents of the plaint. In reference to paragraph 5 of the plaint, the defendants averred that the 1<sup>st</sup> plaintiff deviously acquired ownership of LR No. Ntima/Igoki/1578, by filing Meru Succession Cause No. E014 of 2021 on 20.1.2021 after the 1<sup>st</sup> defendant had filed ELC No. E001 of 2021 (O.S.) on 4.1.2021 as a calculated move to steal a match against him, where he had sought adverse possession orders.
5. Further, the defendants averred that the plaintiffs evaded the area chief, who was resolving a dispute over the suit land, between the parties before an impartial and professional arbitrator and used another chief to defeat and to steal a match from the defendants.
6. Again, the defendants averred that after they discovered the existence of the succession cause, they filed an application dated 21/9/2021 whose ruling dated 2.2.2022 joined the 1<sup>st</sup> plaintiff to the previous suit, but the court declined to stay the succession cause, which unfortunately had distributed the suit land. The defendants averred that they have been residing on the suit property since 1970 and witnessed the demarcation previously as L.R. No. Ntima/Igoki 1659, whereby the government surveyor established the suit property and allocated the same to Rimberia Muthumba alias M'Rimberia.
7. The defendants averred that in 1975, the 1<sup>st</sup> defendant endeavored to trace the registered owners but only managed to trace his brother, M'Mukira Muthumba, who informed him that his brothers had died on 14.6.1971 leaving behind no heirs to his estate; hence, he was the next of kin. The 1<sup>st</sup> defendant averred that the said brother offered to sell the suit property to avoid eviction and destruction of his house. He finalized the transaction, whereby he was handed over a death certificate for transmission to be initiated, and eventually gained possession of the suit property.
8. Moreso, the defendants averred that the former suit was dismissed due to unavoidable circumstances on the fault of their counsel then on record, but the case had a high chance of success. The defendants averred that the requested orders by the plaintiff were prejudicial to their rights to property, which they have been enjoying exclusively and uninterruptedly for the last fifty years. They denied receipt of any demand letter to vacate the land; otherwise, the suit was full of misstatements and omissions of material facts calculated to mislead the court.
9. By way of a counterclaim that had no title or heading, the 1<sup>st</sup> defendant averred that he was born and raised on the suit property and his parents enjoyed exclusive and uninterrupted possession. The 1<sup>st</sup> defendant averred that in 1969, and National Government surveyors started demarcating the 1<sup>st</sup> defendant's locality, they resided on L.R. Ntima Igoki/1659, not the said surveyors established that the suit property existed, which was then allocated to Rimberia Muthumba alias M'Rimberia.
10. The 1<sup>st</sup> defendant averred that in 1970, he inherited his parent's property and got further possession of the suit property, following which, in 1975, he endeavored to trace the owners. However, he managed to get hold of his brothers, who informed him of the death and offered to sell the land as the next of kin, finalized the transaction and obtained a death certificate, hence took vacant possession of the land which he had exclusively possessed, farmed and erected a residential house for the last 50 years, until 9.1.2020, when the 2<sup>nd</sup> plaintiff tried to sell the property illegally.
11. The defendants relied on the doctrine of adverse possession, in which they prayed the court to declare the suit land as belonging to them, nullification of the title deed held by the plaintiff, rectification of the register, and permanent injunction to stop the plaintiffs from interfering with the suit land. The statement of defense was verified by an affidavit sworn on 11.8.2022 by the 1<sup>st</sup> defendant, with no accompanying authority from the 2<sup>nd</sup> defendant to swear or plead on his behalf.



12. By way of a reply to the defense and defense to the counterclaim dated 23.8.22, the plaintiffs denied the contents of the same in toto. In particular, the plaintiffs denied the dispute was handled by any area chief as alleged; otherwise, there was a collusion between the said Chief Augustino and the defendants to fabricate the alleged proceedings and verdict in his office to take away the land from them illegally. The plaintiffs denied that the succession cause was filed to deny the defendants any land. As to the previous suit, the plaintiff averred that the defendants averred that after they were granted 14 days to amend the originating summons to join the 1<sup>st</sup> plaintiff to the suit, there was no compliance with the court orders on time or at all.
13. The plaintiffs denied the alleged occupation of the land since 1970 or that the demarcation and registration of the land in the name of Rimberia Muthumba had anything to do with the 1<sup>st</sup> defendant.
14. The plaintiffs reiterated that the 1<sup>st</sup> defendant was permitted at his request into the suit land by the 2<sup>nd</sup> plaintiff's fathers in 1985-1986. The plaintiffs termed the counterclaim as incompetent, frivolous, vexatious, bad in law, and an abuse of the court process, especially in view of the previous suit dismissed for non-compliance with court directions and for non-prosecution or non-attendance.
15. At the trial, Cypriano Kanjiru testified as PW 1. He adopted a witness statement dated 28.7.2020 as his evidence in chief. His testimony was that the late Rimberia Muthumba was his uncle and the initial owner of L.R No. Ntima/Igoki/1578, who passed on without a wife or children, and the only beneficiary to his estate being his late brother M'Mukiira Muthumba (deceased) and his children. PW 1 said that the late M'Mukiira Muthumba passed on in 2013, before he sought and obtained probate and administration documents for the estate of his late brother.
16. PW 1 told the court that in 2020, the children of M'Mukiira Muthumba approached him, and in a meeting held on 1.3.2020, they entrusted him with the filing of the succession cause, on their behalf, regarding the suit land of their late uncle to which he sought and obtained a chief's letter alongside a consent duly signed by the family. PW 1 told the court that the succession cause was filed, heard and determined, following which he became the registered owner of the suit land.
17. PW 1 said that he was aware that the deceased used to till the land alongside his children and had planted mature coffee, gravellia, macadamia, banana trees. He added that it was only in 1985/86 that the 1<sup>st</sup> defendant was allowed to cultivate part of the suit land and also put up temporary structures to keep the wild animals from occasionally invading the land or destroying the crops or trees. PW 1 told the court that in 2013, the late M'Mukiira Muthumba passed on, and again, at the request of the 1<sup>st</sup> defendant to the 2<sup>nd</sup> plaintiff and his brothers, the late Peter Kirimi M'Mukiira, he allowed to cultivate a portion that the two sons were cultivating to continue harvesting coffee, banana, and macadamia trees proceeds.
18. Surprisingly, PW 1 said that in 2021, the 1<sup>st</sup> defendant filed a suit against the 1<sup>st</sup> plaintiff and his late brothers, claiming the purchaser's rights and adverse possession, to which they filed a response before it was dismissed on 21.7.2022 for non-attendance. PW 1 stated that since 2010, the defendants have denied them access or use of the land and have become violent making the filing of this suit a necessity, despite notice to vacate the land.
19. PW 1 relied on a copy of the receipts for L.R No. Nitma/Igoki/1578, title deed dated 15.2.2022; Minutes for a meeting held on 15.3.2023, application for grant of the letters of administration in Meru CMCC Succession Cause No. E014 of 2021 orders dated 9.2.2022 confirming the grant, consent to the applicant, copy of death certificate, copy of records, copy of the originating summons in Meru ELC No. E014 of 2020, replying affidavit by the plaintiff sworn on 12.2.2021, replying affidavit by the 1<sup>st</sup> defendant dated 7.4.2021 defendants, further reply sworn by Julius Muriithi M'Mukiira sworn on 20.8.2021, ruling in MERU ELC No. E001 of 2021 dated 22.2.2022 proceedings thereto, petition for



- the letters of administration in Meru CM Succession Cause No. E014 of 2021 and gazette notice as P Exhibit No's. 1 – 10, respectively.
20. Similarly, PW 1 told the court that it was not possible without letters of administration for his uncle to transact on the land with the 1<sup>st</sup> defendant and sell it for 200/= in 1975. Further, P.W 1 denied that the 1<sup>st</sup> defendant could have been on the suit land before the land adjudication commenced in the area or that the 1<sup>st</sup> defendant had any stake in the land during the adjudication process; otherwise, he could have filed before court objection proceedings to that effect. PW 1 insisted that entry into the land by the 1<sup>st</sup> defendant in 1985/86 was permissive and not on account of sale or adverse possession; hence was a mere licensee. Further, PW 1 insisted that the trees on the suit land belonged to his late uncle, who used to be taken care of by his mother and sister. PW 1 said that the demarcation of the land occurred in 1962 and that Civil Suit No. E001 of 2021 came after he had lodged the succession cause, and there was no objection to the grant by the 1<sup>st</sup> defendant. He denied that the original death certificate had been surrendered to the 1<sup>st</sup> defendant by his late uncle.
  21. PW 1 denied attending any meetings before the area chief. He termed the sale between his uncle and the 1<sup>st</sup> defendant as a forgery. P.W 1 also termed the defense and counterclaim as lacking merits. He described the 1<sup>st</sup> defendant's entry, occupation and development on the land as temporary, permissive and undertaken with the approval of the family.
  22. further said that the defendant had a separate or distinct land from the suit land, where they live and have developed permanent houses. Regarding the photographs displayed by the defendant, he termed them as lacking an electronic certificate. Nevertheless, he said that all the mature trees on the suit land belonged to his late uncle; otherwise, all the defendants have been doing on the land was tilling and harvesting the farm produce, which his late uncle had been occupying until 1985/86. P.W 1 said that he would occasionally visit the land that no one, including the 1<sup>st</sup> and 2<sup>nd</sup> defendants, occupied.
  23. As to the sale agreement, P.W 1 termed it as illegal, unknown to him and entered into by a party who could not deal with land belonging to a deceased person. Even though the late Mukiira Muthamba died without applying for letters of administration over his brother's estate, P.W 1 said that he was utilizing the land together with his late uncle before he passed on though the 1<sup>st</sup> defendant was duly using part of it.
  24. 1 said that the late uncle was both a neighbor and a friend of the 1<sup>st</sup> defendant, hence the reason he allowed him to act as his caretaker and erected a temporary structure on it to keep away wild animals from damaging his trees. Regarding the purported sale, PW 1 said that had it been confirmed, the 1<sup>st</sup> defendant would have taken steps to enforce its terms before the late uncle passed on and changed the land registration into his name. PW 1 said that since it was a permissive or consensual entry and occupation, the children of his late uncle had no reason to suspect that the 1<sup>st</sup> defendant would turn around and demand the land as his. P.W 1 said that photographs forming part of his list of documents were showing developments made on the land by his late uncle.
  25. Julius Muriithi M'Mukira, Rosemary Ringe M'Mukira and Teresia Ntara testified as P.W 2, 3, and 4. They all adopted the witness's statement dated 28.7.2022 as their evidence in chief. While associating their testimony with that of P.W 1, they told the court that after their parents stopped utilizing the land in 2013, P.W 2 and his late brother Peter Kirimi M'Mukiira were equally unable to continue utilizing the land.
  26. As a consequence, PW2 said that the two brothers allowed the 1<sup>st</sup> defendant to do so on their behalf, and so harvesting the farm produce, namely coffee, banana, and macadamia, only for him to turn around in 2021 to demand the land on account of a purported sale agreement and prolonged occupation. P.W



- 3 and 4 equally confirmed that P.W 2 and his late brothers had continued utilizing the land after the late uncle passed on; otherwise, the 1<sup>st</sup> defendant was the caretaker or licensee of the land on behalf of the family.
27. Gervasio Mwithimbu testified as D.W. 1. He relied on his witness statement dated 11.8.2021 as his evidence in chief. His testimony was that he was born and raised in Muringo Mbui Sub-Location in 1948, on L.R. No. Ntima Igoki/1659, where they lived and had established their residential home. D.W 1 told the court that in 1969, land surveyors visited the land, surveyed and demarcated it to fast-track issuance of a title deed, whereby they established that there was another property that they allocated to Rimberia Muthumba alias M'rimberia.
  28. D.W 1 said that in 1970, his parents and children left him exclusively using L.R. No Ntima/Igoki/1659. Therefore, DW 1 told the court that in 1979, he went to search for Rimberia Muthumba only to come across his brothers and next of kin, Mr. Mukiira Muthumba, who told him that his brother passed on 14.6.1971, leaving behind no siblings. D.W 1 said that they entered into an implied agreement whereby he gave him Kshs.200/= as consideration for the land, and in exchange, he gave him an original death certificate for the registered owner to take exclusive control of the suit land where, in 1970, he had erected a residential house and was doing farming activities.
  29. D.W 1 said that the land is 0.28 ha, and unfortunately, the 1<sup>st</sup> plaintiff initiated a succession cause without involving him, following which he instructed his lawyers to apply for a stay of proceedings in vain. D.W 1 said that he only came to know about the suit property when the plaintiff tried to transfer the land illegally, but the area chief intervened since parties were amicably trying to settle the dispute, only for the plaintiffs to obtain an authority letter from another chief, hence bypassing him.
  30. D.W. 1 asked the court to declare him the bona fide owner of the land. D.W 1 relied on a certificate of official search for L.R No. Ntima/Igoki/1578, photographs, court ruling, death certificate dated 31.5.1975, letter dated 22.1.2020, minute dated 27.3.2000, letters of confirmation as application dated 28.8.2011 retention letter dated 25.2.2021, succession petition No. E014/2021 letter dated 20.2.2018 and 19.1.1998, agreement dated 9.1.2921 as D.exhibit No. 1 – 12. respectively.
  31. D.W 1 said that the suit land was wholly fenced and under his use since purchasing it in 1975, with no one staking a claim on it until 2021. As for the former suit, D.W 1 said that through D. Exh No. (3), the court declined to stay the succession cause. D.W 1 admitted non-compliance with the court orders leading to dismissal of the originating summons on 21.7.2022, which orders he did not appeal against or seek for review or reinstatement of his suit.
  32. D.W 1 insisted that his counterclaim was properly before the court based on entry into the land in 1969 before the land was demarcated under his name. DW 1 said that after discovering that his land indicated L.R. No. 1578, he took no action to complain why the register was in the name of Rimberia Muthumba. DW 1 said that he had no acknowledgment note from the person who sold the land to him other than the original death certificate. Between 1975 and 2021, D.W 1 said that he took no action to apply for letters of administration on account of the recorded owner changing the land to his name until the brother who sold the land died in 2013. D.W 1 gave no reason for that omission, save to say he believed the land was his, for he had the original death certificate.
  33. D.W 1 denied that the reason he took no action to assist his ownership rights was because he was a mere licensee to the land since 1985/86. Asked about the farm produce, D.W 1 said that he would take coffee cherries to the Kathagiri Tea Factory, though he had no cherry delivery book or records, notes, or vouchers for the alleged Form No. 1234.



34. He said that the land had no permanent fence. Further, D.W 1 said that he did not lodge a claim or demand for the transfer of the land between 1995 and 2021 from the late M'Mukira Muthamba until he learned that the plaintiff wanted to sell the land. The court noted that the witness was reluctant to answer questions regarding D. Exh No. (12). Regarding the letter dated 22.1.2020, D.W 1 said that he was trying in vain to lodge a caution against the register. Asked about the minutes dated 23.3.2020, D.W 1 said that he was present at the chief's meeting. Equally, the court noted that the witness was being evasive in answering questions from the counsel for the plaintiff. Asked about the development on the land D.W 1 said that he was unable to erect any permanent house on the suitland for lack of financial resources. Again, D.W 1 said that the 2<sup>nd</sup> defendant, who is his son, was occupying the suit land, which is closer to his land L.R. No. 1659, and he who lives in the semi-permanent structures as per the photographs produced as D. Exh No. 2(a) – (f).
35. According to DW 1, L.R. No. 1578 was part of his parent's L.R. No. 1659. He produced no records to that effect. D.W 1 denied that he was violently or forcibly denying the plaintiff entry or occupation of the suit land. DW 1 said that he started asserting his ownership rights when the plaintiff started purporting to sell the land to third parties. Answering questions by the court, D.W 1 said that he became aware of the actual owners in 1971, but did not lodge a complaint against him with the land office. Similarly, D.W 1 said that he had no survey maps to show that the two parcels of land were surveyed as one piece of land in his favor and not as separate parcels of land. DW 1 admitted that between 1975 and 2013, he never lodged succession or citation proceedings against the family of the initial landowner.
36. Agustino Kinyua Ngeera testified as D.W 2. As a former chief Igoki location, he relied on a witness statement dated 11.8.2020 and produced DMF1 No. 5 & 12 as D. Exhibit No. 1 5), (6) (7), (8), (10) & (11). He confirmed writing minutes and letters dated 27.3.2020, 22.1.2020 and 23.11.2020. DW 2 told the court that P.W 2 and his late brothers came to his office with a view of seeking a letter to lodge succession proceedings so as to dispose of the suit land, yet the 1<sup>st</sup> defendant was the one occupying it after purchasing it. D.W 2 said that he appreciated that the 1<sup>st</sup> defendant had made local arrangements to buy land belonging to a deceased person and had been utilizing it for a long time without formalizing its ownership from the deceased owner.
37. D.W 2 denied that he was partisan in handling the dispute, or biased towards D.W 1 and denied the plaintiff's letter to apply for letters of administration. D.W 2 said that he was unaware that the 1<sup>st</sup> defendant's parcel of land was covering the disputed land. D.W 2 denied that in handling the dispute, he was intermeddling with the estate of a deceased owner since he lacked jurisdiction to determine the matter. DW 2 said that he was not aware of the date of entry to the land by the 1<sup>st</sup> defendant, but he had always seen him tilling the land. Further, D.W 2 said that he was unable to know the extent of the 1<sup>st</sup> defendant's lands vis a vis the disputed land. D.W 2 admitted that the 1<sup>st</sup> plaintiff had called him about the suit land. As to D. Exh No. (12), D.W 2 said that he did not know of its source, but since it was the 1<sup>st</sup> defendant who bought it for him. Concerning the meeting for 27.3.2020 and the outcome minutes produced as D. Exh No. (6) D.W 2 said that the minutes were not signed by any of the attendees to the meeting, which is an oversight on his part. As regards the assertions in paragraph 12 of the undisputed facts of his witness statement D.W 2 however admitted that he had no evidence to verify the same. DW 2 acknowledged that he wrote a witness statement dated 18.3.2021 in the former suit.
38. Stephen Gatobu testified as D.W 3. Relying on a witness statement dated 18.8.2022 as his evidence in chief and being the owner of parcel No. 1590, he confirmed that it was the 2<sup>nd</sup> defendant who had been utilizing the suit land. D.W 3 said that he came to know about the dispute in 2021; otherwise, he was unaware of the relationship or dispute between the owners or occupants of P/No. 1579 and



1659, since the commencement of the demarcation process in the locality save that he knew as a fact that M'Mukiira sold the land to D.W 1. D.W 3 clarified that D.W 1 was his uncle. D.W 3 also confirmed attending the chief's meeting.

39. At the close of the defense case, parties filed written submissions. The plaintiffs relied on written submissions dated 18.10.2024. They isolated four issues for the court's determination. On whether the claim is proved on a balance of probabilities. The plaintiff submitted that the 1<sup>st</sup> plaintiff was the bona fide registered owner of the land, following succession proceedings regarding the estate of Rimberia Muthumbi (deceased), the initial owner of the land and whose late brother, Mukiira Muthumba, had permitted the 1<sup>st</sup> defendant to till and take care of the land on his behalf with effect from 1985/1986.
40. The plaintiffs submitted that after 2013, the permissive entry continued after P.W 2 and his deceased brother renewed the 1<sup>st</sup> defendant's license, only for him to turn around in 2021 and stake a claim based on the alleged purchaser's rights as adverse possession, after an alleged sale of the land in 1975. The plaintiffs submitted that the 1<sup>st</sup> defendant was unable to verify or substantiate his allegations on the sale and handover of the original death certificate by a brother of the deceased owner.
41. The plaintiffs submitted that their evidence was truthful, consistent, credible and not shaken by the defendants that the entry was permissive. Further, the plaintiffs submitted that the defense by the defendants on sale and adverse possession was not proved, as D.W 1 was unable to tender any acknowledgment note from the seller. D.W 2 and 3 were unable to tell the date of adverse possession entry, and he was unable to explain or substantiate his assertion that L.R No. 1578 initially formed part of his late father's L.R. No. 1659.
42. Regarding whether the defendants had any defense against the claim, the plaintiffs submitted that the defendants were unable to prove hostile title, exclusive use, dispossession, nor discontinuance of the actual owners for 12 years, especially in right of evidence by the plaintiffs of permissive entry from 1985/86 and the renewal after 2013. As to the counterclaim, the plaintiffs submitted that the 1<sup>st</sup> defendant's claim was based on a sale agreement, but adverse possession is based on non-permissive entry or possession.
43. In the absence of evidence of when the licence was terminated, payment of the total purchase price, and computation of time for adverse possession was not substantiated. Reliance was placed on *Chesomei Vs. Muigai E&LC E005 of 2023 (2024) KEELC 560 (KLR) 25<sup>TH</sup> July 2024* (Judgment) *Mubiri Michuki vs Samuel Mugo Michuki (2014) eKLR* and *Mombasa Teachers Cooperative Savings & Credit Society Ltd vs Robert Muhambi Katana & others (2018) eKLR*. Regarding Meru ELC (O.S) E001 of 2021, the plaintiff submitted that following the dismissal, the only remedy available for the defendant under Order 12 Rule 6(2) & 7 of the Civil Procedure Rules was to seek for reinstatement and not to file a counterclaim over the same issue, which was contrary to Section 7 & 8 of the [Civil Procedure Act](#). Reliance was placed on *Margaret Wanjiku Henry vs Road Touch Services (2022) eKLR*.
44. The plaintiffs submitted that even if the defendants had a claim on adverse possession in the former suit, the 2<sup>nd</sup> plaintiff had filed a replying affidavit denying the claim. Therefore, after the dismissal and filing of this suit for eviction, time ceased to run, there were interruptions of occupation in respect of time, and time had to start running afresh; hence, by 17.8.2022, the 12 years had not elapsed in favor of the defendants when the defense and counterclaim were filed. Reliance was placed on *Gicho vs Kenacto Transport Co. Ltd (Civil Appeal E084 of 2021 (2024) KECA (717) (KLR) 21<sup>ST</sup> June 2024* (Judgment).
45. Regarding the probate and administration cause, the plaintiffs submitted that the defendants failed to file any protest or objection to preserve the property since they knew that it was a permissive entry;



hence, the registration in favor of the 1<sup>st</sup> plaintiff was regular, protected and lawful. As to the death certificate, license and capacity, the plaintiffs submitted that a sale agreement and the date of payment were not proved, witnesses to the sale were not called and therefore, the death certificate in possession of the 1<sup>st</sup> defendant could not be verified as amounting to evidence of sale or entry or an acknowledgment note to the sale of the land.

46. As to the 2<sup>nd</sup> defendant, the plaintiffs submitted that he failed to come to court to corroborate the 1<sup>st</sup> defendant's evidence that from 2005, he left him to continue with the occupation.
47. The plaintiffs urged the court to find that the evidence of the 1<sup>st</sup> defendant, whose demeanor in court was evident untrusted, had no faithful witness on occupation and possession of the suit land and that the alleged sale of the land was also through a person who had no capacity in law, to enter into a sale agreement or pass any title to him.
48. The defendants relied on written submissions dated 18.10.2024 and isolated three issues for the court's determination. On declaration that the plaintiff is the legal and bona fide owner of the land, the defendant submitted that the ownership by the 1<sup>st</sup> plaintiff came out of a succession cause as a nephew of the original owner, whose evidence is that the entry into the land by the defendants was permissive, yet evidence to that effect was missing. The defendants submitted that their claim is based on adverse possession after the final payment of the purchase price to a next of kin of the initial owner, followed by exclusive possession and productive life on the suit land, between 1971 and 1975 and to date, which they had fenced off together with his ancestral home as one property, in an exclusive, open, continuous, notorious, with knowledge, persistent and with the intention to own. Therefore, the defendants submitted that all ingredients of adverse possession had been met. Reliance was placed on *Ann Itumbi Kiseli vs James Muriuki Muriithi* (2013) eKLR, *Wambugu vs Njuguna* (1983) KLR 173, *Public Trustee vs Wanduru* (1984) KLR 72), *Mate Gitabi vs Jane Kabubu Muga alias Jane Kaburu Muga & others* (2023) eKLR.
49. As to the former suit, the defendants submitted that Order 12 Rule 6(2) of the Civil Procedure Rules was to the effect that a suit dismissed for lack of attendance, no fresh suit may be brought in respect of the exact cause of action. The defendants submitted that in the instant suit, they were only defending the suit against a frivolous suit, made against them by the defendant; hence, they do not offend Order 12 Rule 5(2) of the Civil Procedure Rules. Reliance was placed on *Kuria Kiarie Kuria & another vs Sammy Magesa* (Civil Appeal 326 of 2017 (2018) KECA 467 KLR). Further, the defendants urged the court to dispense substantive justice rather than being rigid Article 159 2(2) of *the Constitution* Order 37 of the Civil Procedure Rules, Section 13 of the ELC Act. Reliance was placed on *Vishva Stone Suppliers Co. Ltd vs RSR Stones (2006) Ltd (Civil Appeal 55 of 2020)* (2020) KECA 357 (KLR) (Civ).
50. The court has carefully gone through the pleadings, evidence tendered, written submissions and the law. The issues calling for my determination are-;
  1. If the plaintiffs have proved trespass to unjustified possession and occupation of the suit-land by the 1<sup>st</sup> defendant.
  2. If the plaintiffs are entitled to an eviction and a permanent injunction.
  3. If the defendants have a competent defense and counterclaim to the plaintiff's suit.
  4. If the defendants purported counterclaim, even if it was regular, offends Order 12 Rule 6(2) of the Civil Procedure Rules
  5. If the defendants have justified and proved a defense of adverse possession against the claim of eviction and permanent injunction.



6. What are the orders as to costs?
51. The brief facts of the plaintiff's claim are that L.R. No. Ntima/Igoki 1578 belonged to the late Rumberia Muthumba. The register for the title was opened on 8.1.1970. The deceased passed on on 14.6.1971 leaving behind no heirs to his estate. According to P.W 1, the deceased's parcel of land remained under the use and possession of his brother until 1985/86, when he authorized his friend and neighbour, the 1<sup>st</sup> defendant, to harvest the farm produce as a caretaker. The plaintiff's testimony was that after the brother passed on in 2013, his sons renewed the 1<sup>st</sup> defendant's license to continue utilizing the suit land. The plaintiff's averred and testified that they continued utilizing the land until 2021, when they sought and obtained a certificate of confirmation of grant only for the 1<sup>st</sup> defendant to become hostile, violent and purported to claim ownership by virtue of an alleged sale in 1975 and or based on adverse possession.
52. They denied any alleged sale or adverse possession; otherwise, the 1<sup>st</sup> defendant was a mere licensee to the suit land. On his part, the 1<sup>st</sup> defendant termed the purported application for and procurement of a certificate of confirmation of grant as secretly obtained, with a view of defeating his suit, Meru ELC No. E001 of 2021 dated 11.12.2022 seeking adverse possession of 0.28 ha out of L.R. No Ntima/Igoki/1578.
53. By a ruling dated 2/2/2022, the court directed that the Originating summons be amended within 14 days, to reflect the capacity of the defendants to the suit. The plaintiffs in the suit failed to comply with the amendments or Order 11 Civil Procedure Rules or attend the hearing on 21.7.2022. The suit was, therefore, dismissed with costs to the defendant for non-attendance.
54. The plaintiffs have produced a copy of the confirmation of the grant dated 11.2.2022, where he was given the suit land. Subsequent to that, he obtained a title deed dated 15.2.2022. The plaintiffs rely on P. Exh No's. (1-16), which the 1<sup>st</sup> defendant has not challenged. P. Exh No. (11) was a replying affidavit to the originating summons E001 of 2021 explaining the circumstances under which the 1<sup>st</sup> defendant came into the land as a licensee or caretaker and not an adverse possessor, as alleged. P.W 1, in paragraphs 5 and 6, explained how after the late M'Mukiira Muthumba passed on in 2013, was approached by the 1<sup>st</sup> defendant to renew the licensee and which request was accepted. The basis of the 1<sup>st</sup> defendant's justification to be on the suit land is captured in a counterclaim dated 11.8.2022 and filed on 17.8.2022. The same was filed after the 1<sup>st</sup> defendant's suit was dismissed for non-attendance on 21.7.2022.
55. It is trite law that a counterclaim is a stand-alone suit that fails or succeeds independent of the main suit. It is governed by Order 7 of the Civil Procedure Rules. In *Beatrice Mumbi Wamahiu vs Mobil Oil (K) Ltd* (2011) eKLR, the court observed that the withdrawal of the main suit did not affect the counterclaim, for it is treated as a separate suit under section 35 of the Limitations of Actions Act (Cap 22). See *County Government of Kilifi vs Mombasa Cement Ltd* (2017) eKLR. In *Kenyariri & Associates Advocates vs Salama Beach Hotel Ltd & others* (2017) eKLR, the court observed that a counterclaim contains the assertion that a defendant could have made by starting a lawsuit if the plaintiff had not already begun an action and is governed by almost the same rules that regulate a claim made by a plaintiff except that it is a part of the answer that the defendant files in response to the plaintiff's claim and therefore, is in all respects a suit by the defendant.
56. In the *County Government of Meru vs Mwirigi Kaburu & Co Advocates* (ELC Misc App. E016 of 2020) (2020) KEELC 503 (KLR) 26<sup>TH</sup> June 2024 (ruling), the court cited *S.H. Jag Mohan Chawla & another vs Dera Radha Swami Satsang & others* 7<sup>th</sup> May 1996 that a counterclaim relates to the original subject matter of the suit and succeeds or fails on its own, regardless of the outcome in the primary suit



and that instruction fee to defend the main suit and file a counterclaim must be on both the statement of defense to the main suit and for the filing of a counterclaim.

57. Black's Law Dictionary 11<sup>th</sup> Ed defines a counterclaim as a claim for relief asserted against an opposing party after an original claim has been made. J Halsburys Laws of English 4<sup>th</sup> Ed Vol 42, a counterclaim is defined as any claim in respect of which the defendant could bring an independent action against the plaintiff, which may be enforced subject only to the limitation that it would be such as can conveniently be tried with the plaintiff's claim.
58. In SH. Jag Mohan Chanwala & another (supra), a claimant had sought a perpetual injunction to restrain the respondent from interfering with their possession of the property. The respondent filed a defense saying that they had purchased the land and were in possession and enjoyment of the land. They sought a counterclaim of permanent injunction to restrain the appellants from interfering with their enjoyment and possession of the said land. The appellants attacked the counterclaim for not being maintainable and applied for its exclusion from the statement of defense. The court observed that a counterclaim is expressly treated as a cross-suit with all the indices of pleadings as a plaint, including the duty to aver his cause of action and payment of requisite court fees thereon.
59. A counterclaim must have a titular heading. It must capture the plaintiffs and the defendants to the counterclaim. It must have a verifying affidavit. If there are two plaintiffs to a counterclaim, there must be an authority to plead, sue and act for and on behalf of the co-plaintiff to the counterclaim as provided under Order 4 Rule (1) & (2) and Order 7 Rule 5(a) of the Civil Procedure Rules.
60. In Kibona vs Transcan Timbers Ltd (1998) 1 EA 121 and Samoki Industries Limited vs Samaki Industries (1997) eKLR, the court said that a counterclaim has its title and parties. The defendant's counterclaim suffers from non-compliance with the laid aspects. The irregularities are not mere technicalities but go to the jurisdiction of the court. See also Kabuito Contractors Ltd vs David Makii Mareka t/a Mareka & Co Advocates (2003) eKLR and M'Arimi & others vs M'Arimi & others (ELC E029 of 2022) (2023) KEELC 21629 KLR) 15<sup>th</sup> November 2023 (Judgment)
61. The plaintiffs have objected to the counterclaim since it was filed after a similar suit based on the same cause of action was dismissed for non-attendance and non-prosecution. The plaintiff relies on Sections 7 and 8 of the *Civil Procedure Act*. In response, the defendant urges the court to be guided by substantive justice under Article 159 (2) (d) of *the Constitution* instead of procedural technicalities.
62. In Thomas K. Sambu vs Paul K. Chepkwony (2018) eKLR at issue was whether the dismissal of a suit for non-attendance amounted to a final judgment of the court. The court guided by Salem Ahmed Hassan Zaidi vs Faud Hussein Humeidan (1960) E.A. 92, Henderson vs Henderson (1843 – 60) ALLER 378 UHDL vs CBK & others (1996) eKLR took the view that Order 12 Rule 6(1) & (2) of the Civil Procedure Rules provides that an order of dismissal for non-attendance was in the nature of a final judgment. As to whether the court could save the appellant's right over the suit land by applying the principle of Article 159(2)(2) of *the Constitution*, the court guided by Jaldesa Toke Dabelo vs IEBC & Others (2015) eKLR and Raila Odinga & others vs IEBC & others (2013) eKLR the court said that procedures were the headmasters of justice and that a court of law should not allow the prescriptions of procedure and form to trump the primary objective of dispensing substantive justice.
63. Further, the court cited Patricia Cherotich Sawe vs IEBC & others (2015) eKLR that Article 159 (2) (b) was not a panacea for all procedural shortfalls as not all procedural deficiencies can be remedied through the article.
64. In this suit, the 1<sup>st</sup> defendant, after his suit was dismissed for non-attendance, had an option to redress his default by appealing or applying for review of the orders in the same suit. The 1<sup>st</sup> defendant exercised



- none of the options. He instead added that the 2<sup>nd</sup> defendant opted to file a fresh suit. He ought to have known that the doctrine of res-judicata and abuse of court process could be used against him. The addition of an extra party did not change the cause of action. By failing to exercise such options, the defendants cannot be heard to invoke Article 159 of *the Constitution*. In *Birds Paradise Tours & Travel Ltd vs Hotel Secretaries* (1990) KLR 58, the court said dismissal either directly or otherwise involving the exact cause of action having not been set aside or varied, the party was prohibited from bringing the present application.
65. In *Cooperative Bank of Kenya Ltd vs Cosmas Mrombo Moka & another* (2019) eKLR, the Court of Appeal held that a matter dismissed for want of prosecution could not be reinstated through a fresh suit, for in doing so, it could offend the doctrine of res-judicata. The court was clear that the former suit, having been dismissed for want of prosecution the latter suit was res judicata and could not stand. The court said that the 1<sup>st</sup> respondent had filed a suit which he did not prosecute; it could not be proper for him to wake up and decide to start the same process again; otherwise, it would be contrary to public policy and litigation must come to an end and that the best that the 1<sup>st</sup> respondent could do was to invoke the appellate process and not by filing a fresh suit.
66. The next issue is whether the plaintiff was in order to file a succession cause without consulting or involving the 1<sup>st</sup> defendant. Oblivious of his pending ELC No. E001 of 2021 (O.S). The primary role of a probate and administration court is the identification of the deceased's beneficiaries, their determination, and distribution of the same amongst the beneficiaries, see *Re-estate of Alice Mumbua Mutua (deceased)* (2017) eKLR and *Re-estate of Ndubi Javan (deceased)* (2018) eKLR.
67. In *Re-estate of Stone Kathuli Muinde (deceased)* (2016) eKLR, Musyoka J held that claims to ownership of alleged estate property as between the estate and a third party should be resolved through the civil process in a civil suit adequately brought before a civil court in accordance with the *Civil Procedure Act*.
68. In the *Re-estate of Julius Wachira (deceased)* 2022 eKLR, the court observed that claims based on trustees fall under the ELC Courts. In *Dias Property Ltd & others vs Githae & 10 others* (Civil Appeal E155 & E157 of 2023 (Consolidated) (2024) KECA (318) KLR) 22<sup>nd</sup> March 2024) Judgment. The court pronounced itself on the interplay between the ELC & probate court. The court said that under Rule 43 (1) of the Probate and Administration Rules, wherein a succession cause, a party claims he was beneficially entitled to a parcel of land that the deceased left in his name, or that in a general dispute on the ownership of land in the name of the deceased, such dispute should be adjourned and be determined through an originating summons in a separate case, after which the probate court can distribute. The court said that there was nothing wrong for the ELC court to deter to the jurisdiction of the High Court in the succession cause for it to determine in an application for revocation under Section 76 of the *Law of Succession Act* Cap 160 where the grant was procured through non-disclosure and concealed the actual ownership of the suit property.
69. My finding, therefore, is that there was no obligation on the part of the 1<sup>st</sup> plaintiff to involve the 1<sup>st</sup> defendant in the succession cause, for he was not a beneficiary to the estate. At the same time, the pendency of the originating summons was not a bar to the filing of the succession cause.
70. Coming to adverse possession a party seeking adverse possession based on an aborted sale agreement has to prove several things. Adverse possession occurs when a registered owner of the land fails, ignores, or neglects to take action against an intruder on his land for a period of 12 years, who continues uninterrupted in undertaking actions on the land that are inconsistent with the purpose for which the valid owner intended to use it. See *Mtana Lewa vs Kahindi Mwangandi* (2016) eKLR.



71. In *Richard Wafwafwa Songoi vs Songoi* (2020) eKLR, the court said adverse possession was an assertion of hostile title in denial of the title of the actual owners, which starts with the wrongful dispossession of the rightful owners. In this suit, the 1<sup>st</sup> defendant had to establish the date he came into possession, the nature of his possession, if the opposite party knew of his possession, for how long the possession has continued, whether the possession was open, continuous uninterrupted and undisputed for 12 years.
72. As to permissive entry, time for adverse possession starts to run after clearance of the last installment. See *Wanyoike vs Kahiri* (1979) eKLR, *Public Trustee vs Wanduru Ndegwa* (supra) A party must also prove animus possidendi see *Munyaka Kuna Co. Ltd vs Bernado Vivezode Marsi* (2018) eKLR. The 1<sup>st</sup> defendant pleaded that he bought the land from a deceased brother of the rightful owner in 1975, who also gave him an original death certificate showing the rightful owner passed on on 14.6.1971.
73. Section 45, 76, 82 of the [Law of Succession Act](#) provides that it is illegal and amounts to intermeddling with a deceased's property, if one deals with such property of an estate where there is no legal representative. Such sale agreements by non-legal representatives are unlawful and not enforceable unless done with leave of court. The brother of the registered owner of the land had no capacity in law to transact on the land. See *Munyasya Mulili & others vs Sammy Muteti Mulili* (2018) eKLR, *Re estate of Josephine Magdalene* (2016) eKLR and *Re Estate of Julius Ntulibi Mithinji deceased* (2016) eKLR, *Re estate of Paul M'Maria (deceased)* 2017) eKLR. See also *Martevé Guest House Ltd vs Njenga & others* (Civil Appeal 410 of 2018 (2022) KECA 539 (KLR) 28<sup>th</sup> April 2022) (Judgment). Evidence that the seller was a bona fide next of kin of the registered owner was not availed. Similarly, evidence that the said brothers were an executor of the will of the registered owner was not availed. The 1<sup>st</sup> defendant failed to avail an acknowledgment note of the sale.
74. In *Mayfair Holdings Ltd vs Ahmed* (1990) eKLR, the court held that a donee of a power of attorney had to register the same with the Registrar of Documents so as to be conferred with powers of rights to deal with the land, evidencing the issue of the authority of the principal. As to the oral agreement, in *Peter Mbiri Michuki vs Samuel Mugo Michuki* (supra), the court observed that the [Law of Contract Act](#) before 2003, required memoranda or note in writing signed by a party to be charged or some person authorized by him to sign, provided however, there was part performance of the contract, possession or performance of some act in furtherance of the contract.
75. The court said that actual possession of the suit property since 1964 in an open, uninterrupted and continuous manner till the filing of the originating summons in 1991 was enough. The court said oral contracts were exempted by the law of contract where there was part performance. In this suit, there is evidence that the person who allegedly sold the land or permitted the 1<sup>st</sup> defendant to occupy the land was not the valid owner and could not, therefore, bind the valid owner.
76. So, if he was not the actual owner between 1975 to 2013, on what basis would the 1<sup>st</sup> defendant claim that he was in hostile and adverse possession of the land with the knowledge of the valid owner? In *Mbui vs Maranya* (1993) eKLR, the court was of the view that the occupation of the land would be without permission either as a tenant, licensee, contract, purchaser in possession, and or easement holder. There must also be a clear intention to exclude the actual owner as well as other people. The court said that exclusive possession means the exercise of dominion over the land without sharing it with the actual owner. Additionally, the court said there must be dispossession and discontinuance of possession.
77. PW 1 - 4 told the court that they used to till the land alongside their uncle until he died in 2013. On the other hand, D.W 1, 2, & 3 told the court that they did not know if the land belonged to someone else



- and or the extent of its boundaries vis a vis the boundaries of the land owned by the 1<sup>st</sup> defendant. The question then is, did the 1<sup>st</sup> defendant prove exclusive control of the land through the period between 1975 and 2013?
78. With the evidence of P.W 1, 2, 3, and 4, can it be said that the valid owner or his representatives had totally been driven or gone out of the land and left the 1<sup>st</sup> defendant to exercise domination over the land? In my view, the evidence of P.W 1, 2, 3, and 4 was clear that they had not given up or abandoned possession and had not totally been eliminated from the lands by the 1<sup>st</sup> defendant. The plaintiffs continued to visit the land which the 1<sup>st</sup> defendant was caretaking for them.
  79. In *Mbui vs Maranya* (supra), the court was of the view that the mere fact that nothing has been done on the land to improve it is not evidence that the owner had abandoned possession or had been eliminated from it. Further, the court said that the mere fact that for 12 years or more, there has been no suit brought against a squatter or the mere fact that for 12 years, a squatter has been in actual possession of the land is not enough to make the Limitations of Actions (Cap 22) operative. The court further said that where the valid owner has no immediate use of the land, so leaves it unoccupied, does not lose the title to it simply because someone else entered the land and continued using it for some purposes, knowing it does not belong to him.
  80. The evidence by both the plaintiffs and the 1<sup>st</sup> defendant is that the actual owner passed on in 1971, leaving behind no heirs. Those facts were known to the 1<sup>st</sup> defendant as early as 1975 when he says he obtained a death certificate for the late Rimberia Muthumba. For close to 47 years, the 1<sup>st</sup> defendant knew that the owner was dead. So, the actual owner did not know that there was an intruder on his land. P.W 1 & 2 said that after their late father passed in 2013, D.W 1 approached them with a view of renewing his license to continue utilizing the land, which they accepted. DW 1 did not refute that piece of evidence.
  81. If the 1<sup>st</sup> defendant then were a bona fide purchaser, obviously he would have said so in 2013, or perhaps taken steps between 1975 and 2013, to regularize the sale and transfer with the person whom he had transacted with and not the one who gave him the death certificate for his late brother. In cross-examination, the 1<sup>st</sup> defendant gave no valid reasons why he would keep an original death certificate for over 47 years without taking any action to enforce the sale agreement, by taking legal action to be transferred the suit land and then perhaps cite the brother to take up letters of administration so as to effect his accrued adverse rights after 12 years. That would have been the most apparent evidence that the 1<sup>st</sup> defendant was on the suit land as an adverse possessor with the animus possidendi to own it as of right and to disrupt the rights of the valid owner. Evidence by the plaintiffs was that they used to physically enter into the land and co-use it with the 1<sup>st</sup> defendant.
  82. The filing of letters of administration by the 1<sup>st</sup> plaintiff, followed by legal proceedings for eviction, are clear indications that the plaintiff had not abandoned the land. The meeting in 2013 after M'Mukira Muthumba passed on between the 1<sup>st</sup> defendant and the plaintiff amounted to recognition or acknowledgment by the 1<sup>st</sup> defendant of the claim by the rightful owners of the land. The plea of adverse possession is always based on facts that must be asserted, pleaded, and proved.
  83. In his evidence, D.W 1 told the court that he was born and grew up in his father's land, L.R. No. 1659, until his parents and siblings moved out and left him there, where he established a residential home.
  84. He told the court that in 1969, a Government Land Surveyor came to survey the land and told him the subject land belonged to Rimberia Muthumba, who he went to look for in 1975. In *Sisto Wambugu vs Kamau Njuguna* (1982 – 88) 11 KLR 217 and in *Samuel Miki Waweru vs Jane Njeri Richu* Civil Appeal No. 122 of 2001. The court took the view that where the purchaser occupies land that is subject



to a sale agreement with the consent of a vendor, time does not start running until the sale agreement is terminated.

85. In this suit the 1<sup>st</sup> defendant has used several ways to assert adverse possession. One is that the suit land was part of his late father's parcel of land hence the reason the same was fenced together as one property. Material or documentary evidence to show that the said assertions are valid has not been tendered by way of an adjudication or registry index map and or registration records preceding the date. The register of the suit land was opened in 1970. Secondly, the 1<sup>st</sup> defendant failed to produce copies of records and title deed for his parcel of land to show that the said parcel of land during adjudication was inclusive of the 1<sup>st</sup> plaintiff's parcel of land and, therefore, his occupation of the land preceded the registration of the suit land in favor of Rimberia Muthumba.
86. In deciding the issue of adverse possession, the court draws legal inferences from proven facts. See *Kweyu vs Omuto C.A No. 8 of 1990*. The 1<sup>st</sup> defendant also wanted the court to find time to start running in 1975. When the land was sold to him by a brother of the deceased. So, if the land time for adversity starts to run from the date the agreement terminated, then the onus was on the 1<sup>st</sup> defendant to prove the date of the agreement payment of the consideration and being put into possession of the land by the valid owner. If the seller could not sell land belonging to a deceased owner, then the 1<sup>st</sup> defendant cannot rely on an illegal contract. Equally, this court cannot sanction an illegality or allow the 1<sup>st</sup> defendant to benefit from an illegal contract.
87. The other reliance by the 1<sup>st</sup> defendant is D. Exh No. 5, 6, & 12. The certificate of confirmation of grant was issued to the 1<sup>st</sup> plaintiff on 17.2.2022. Before the issuance of the same, none of the parties to D. Exh No. (12), dated 9.1.2020 and D. Exh No. (6) dated 27.3.2029 had the legal capacity to deal with and dispose of land belonging to the late Rimberia Muthumba.
88. None of the persons alleged to have transacted with the land had beneficial ownership rights sanctioned by a court of law to deal with the land. Similarly, the D. Exh. No. (12) then failed the test in Section 3(3) of the *Law of Contract Act* and Section 38 of the *Land Act*, for it was not witnessed or signed by all the parties. See *Cheromei vs Muigai (supra)*.
89. An adverse possessor must also show that he has undertaken acts of activities on the land inconsistent with what the actual owner intended to use the land. The 1<sup>st</sup> defendant has relied on D. Exh No. 2(a), (b), (c), (d), (e) and (f). The date, place, particulars of the land, maker of the photographs, and certificate of the production of the photographs have not been given or provided before the court in line with Section 106B of the *Evidence Act*. See *Samuel Kazungu Kambi vs. Nelly Ihong & others (2017) EKLR*.
90. The 1<sup>st</sup> defendant's electronic evidence, other than being contrary to the law, was not corroborated by any other evidence that the building and assorted trees in the photographs are actually lying on L.R. No. Ntima/Igoki/1578 and not L.R. No. Ntima/Igoki 1659.
91. The 1<sup>st</sup> defendant failed to produce any government report to support his assertion that he has developments on the suit land spreading for over fifty years. By merely looking at the photographs, this court is unable to establish that they are on the actual land claimed. There was no expert report tendered to show that the coffee, banana, macadamia trees and their farm produce form No. 1234, as testified by the 1<sup>st</sup> defendant, were drawn from L.R. No. 1578 and not any other farm belonging to the 1<sup>st</sup> defendant. See *Hamisi Juma Mwamad & others vs Mombasa Teachers Cooperative Savings & Credit Society Ltd (2021) eKLR*. The land claimed for adversity must be ascertainable. The onus was on the 1<sup>st</sup> defendant to identify and specify the land, which he has extensively developed and occupied for 12 years. In his evidence, the 1<sup>st</sup> defendant told the court that he did not know until the land surveyor



- came in 1969 that the suit land did not belong to a deceased person. So, the question of where he has lived since 1948, belonging to his father, and the boundary with the suit land was vital.
92. No land survey maps, Registry Index Maps, sketch maps, or valuation reports were produced to show the extent of trespass and the nature of occupation and developments by the 1<sup>st</sup> defendant on the plaintiffs land.
  93. In *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR, the court held that adverse possession was a matter of fact, provided through evidence on a balance of probabilities. Dispossession and discontinuance of possession, as held in *Wambugu vs Njuguna* (1983) eKLR, are the key aspects. The 1<sup>st</sup> defendant based his claim on both possessive entry out of a sale and adverse possession. He had the onus to prove when the permissive entry terminated and the consent given to use the land as a licensee, as pleaded by the plaintiffs was withdrawn for time for adverse possession to start running. Denial of title and hostility towards the actual owner was equally crucial to be established by the 1<sup>st</sup> defendant. This is confounded by the facts that the 1<sup>st</sup> defendant dealt with a person without the capacity to consent to his occupation in the first instance and kept a mere death certificate for over 47 years without enforcing his rights, if any existed, as a purchaser of the land.
  94. The evidence by the area chief was of no assistance to the 1<sup>st</sup> defendant's case. The area chief was dealing with land belonging to a deceased person. The minutes and proceedings have no probative value. Adverse possession must be devoid of violence, stealth, or force. In *Chevron (K) Ltd vs Harrison Charo wa Shutu* (2016) EKLR, it was observed that there must be a clear mind with no intention of dealing with the land exclusively and in a manner in conflict with the actual owner's rights. The court said that there must be no force nor secrecy without the permission of the valid owner. Evidence of D. Exh No. (12) is a clear testimony that the valid owner's relatives, as early as 2020, were expressing or asserting ownership and had not abandoned exclusive ownership to the 1<sup>st</sup> defendant.
  95. Looking at the totality of all the evidence, I find glaring gaps in the 1<sup>st</sup> defendant's pleadings and testimony. For instance, the 2<sup>nd</sup> defendant to the counterclaim and defense failed to testify, yet D.W 1 said that from 2005, he was the one on the suit land. So, if the two parcels of land have been amalgamated or merged, was it not the 2<sup>nd</sup> defendant who would have corroborated the testimony of D.W 1?
  96. In *Ann Itumbi Kiseli vs James Muriuki Muriithi* (Supra) and *Mate Gitabi vs Jane Kabubu Muga alias Jane Kaburu Muga & others* (supra), the court said a party must prove acts done on the land inconsistent with the actual owner's rights. The failure to call the 2<sup>nd</sup> defendant to substantiate his exclusive occupation of the temporary structures on the suit land was fatal to the defendants' defense. I find the defendants' defense lacking merits. As to the counterclaim, the same is incompetent, res-judicata and lacking merits.
  97. Regarding the prayers sought by the plaintiffs, they hold a title deed, which is prima facie evidence of ownership that the defendant has not challenged on account of illegality, fraud, procured through corrupt means and subject to any overriding rights in favor of the defendants. In a claim for eviction, vacant possession and permanent injunction, what is required is evidence that the defendant has no reasonable or lawful excuse to be in occupation of the land. The defendants failed to object to the confirmation of the certificate of grant and the distribution of the land in favor of the 1<sup>st</sup> plaintiff.
  98. The 1<sup>st</sup> defendant failed to enforce any sale agreement that he had between 1975 and 2013. The 1<sup>st</sup> defendant also failed to appeal against an order that dismissed the suit for adverse possession for non-prosecution and non-attendance. Trespass is defined as an entry on another's ground, without lawful authority and doing some damage, however inconsiderable, to his real property. See Black's Law



Dictionary 8<sup>th</sup> Edition. In *Park Towers Ltd (K) John Mithama Njika & others (2014)* eKLR, the court observed that where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded damages.

99. In *Anthony Nduga Maina vs Faith Wanjiku Maina (2020)*, the court issued eviction orders against the defendant after the court found that the plaintiff was the owner of the suit property and had entitled to all rights and privileges thereto as provided by Sections 24 & 25 of the *Land Registration Act*. In *Maina Kubuchwa vs Gachuma Gacheru (2018)* eKLR, the court cited *Entick vs Carrington (1765)*, the words of Lord Camben C.J.

“Our law holds the property of every man so sacred that no man can set his foot upon his neighbor’s close without his leave.”

100. This court has already found that the suit land belongs to the 1<sup>st</sup> plaintiff. Once this was done, the burden of proof shifted to the defendants to justify their entry and occupation of the suit property. In *Kioko vs Muoki & another Civil Appeal 366 of 2018 (2024) KECA 190 (KLR) 23<sup>rd</sup> February 2024* (judgment). The appellant had refused to vacate the suit land and had ambushed on such hostilities as barring the 1<sup>st</sup> respondent from accessing the land and driving her out of the land. This led to a suit for vacant possession and eviction at the High Court. The appellant’s defense and counterclaim was not the grant of letters of administration that the respondent was fraudulently obtained and that he had bought the land from the 2<sup>nd</sup> respondent, a son to the 1<sup>st</sup> respondent for value in 1984 and he had been on the land for over 12 years to take possession of the land. He, however, failed to allow the court to ventilate the defense and counterclaim, though duly served with a hearing date.
101. The court said that on the doctrine of adverse possession, there must be a degree of physical contact on the land and that possession must be actual, notorious, exclusive, continuous, apparent, and manifest to the actual owner. The court then said that the date that the issue of ownership got settled walks along with the claim on adverse possession. In this case, the Succession Court had on 9.10.2009 pronounced the land as part of the deceased’s estate, to be administered by the deceased personal representative. The court said that before the date, the deceased property or estate was not available for distribution and or sale; hence, the appellant had no legal interest. The court found that the claim for adverse possession was only less than a year and so the respondent was well within time to file the suit. The court dismissed the appeal.
102. Applying the above binding decision of the Court of Appeal, I think the facts in the suit are similar to the suit appeal. Even if the defendants had a valid counterclaim, till time for adversity began to run, it would not favor them to be justified to occupy, remain and deny the title holder to the land his privilege, rights and obligation.
103. The upshot is that I find the reliefs sought merited. They are so granted. Costs to the plaintiffs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 6<sup>TH</sup> NOVEMBER, 2024**

In presence of

C.A Kananu

1<sup>st</sup> defendant

Miss Gitonga for Nyamu Nyaga for the plaintiff

Muheria for defendants



**HON. C K NZILI**

**JUDGE**

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