



**Kubai v Karimi (Sued as the administratrix of the Estate of Justus M'Murithi M'Mbagiri) & 3 others (Environment & Land Case 149 of 2021) [2023] KEELC 22619 (KLR) (12 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 22619 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 149 OF 2021**

**CK YANO, J**

**JULY 12, 2023**

**BETWEEN**

**JAMES TAITUMU KUBAI ..... PLAINTIFF**

**AND**

**JEMA KARIMI (SUED AS THE ADMINISTRATRIX OF THE ESTATE OF JUSTUS M'MURITHI M'MBAGIRI) ..... 1<sup>ST</sup> DEFENDANT**

**JOYCE KANANA MURITHI ..... 2<sup>ND</sup> DEFENDANT**

**JENADIS NKATHA MURITHI ..... 3<sup>RD</sup> DEFENDANT**

**FATH WANJA MURITHI ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. By an originating summons dated October 23, 2012 and which was amended on December 7, 2021 the plaintiff posed the following questions for determination-;
  1. Has the plaintiff occupied  $\frac{1}{4}$  acre of land parcel No Ntima/igoki/1227 (referred to as the suit land) for more than 12 years?
  2. Has the plaintiff's occupation been open, unhindered, notorious, undisturbed and uninterrupted for more than 12 years?
  3. Has the plaintiff been in occupation of the suit land since the year 1993?
  4. Did the plaintiff construct a building in the suit land in 1996 or thereabouts?
  5. Has the plaintiff become entitled to the suit land by way of adverse possession?



6. Have the defendants ever occupied the ¼ acre of the suit land where the plaintiff has had a constructed building.
  7. Has the plaintiff's building been demolished during the pendency of this suit in the month of December, 2020, in the pretext that he was a tenant?
  8. Has the demolition affected the plaintiff's claim of adverse possession?
  9. Are the defendants holding ¼ acre of the suit land as trustees of the plaintiff from the time the plaintiff's occupation became adverse?
  10. Has the change in ownership of the suit land effected on 21<sup>st</sup> May 2020 affected the plaintiff's quest for adverse possession?
2. The plaintiff seeks for issuance of orders that-;
1. A declaration that James Taitumu Kubai the plaintiff herein has become entitled by way of adverse possession of ¼ acre of the parcel of land known as LR No Ntima/igoki/1227.
  2. An order that the District Land Surveyor Meru Central District do visit the land parcel No Ntima/igoki/1227 and curve out ¼ acre thereof fronting the tarmac to Meru Maua Highway to be registered in the plaintiff's names and the District Registrar do amend the register accordingly to reflect the plaintiff as proprietor of ¼ acre thereof and issue a title deed in the names of James Taitumu Kubai while dispensing with the production of the original title deed.
  3. Costs of this suit be borne by the defendants.
3. The application is supported by the affidavit of James Taitumu Kubai sworn on December 7, 2021 and June 21, 2021 and is premised on the grounds-;
1. That the plaintiff has been in exclusive, open and uninterrupted occupation of ¼ acre of land parcel No Ntima/igoki/1277 For a period of more than 12 years since 1993.
  2. That the plaintiff has developed ¼ acres of the suit land.
  3. That the plaintiff had been in occupation of ¼ acre of the suit land for more than 12 years.
  4. That the eviction of the plaintiff during the pendency of this suit does not adversely affect his claim.
  5. That the defendants are holding the title a ¼ acre thereof as trustees.
  6. That the eviction of the plaintiff after occupying ¼ of an acre of the suit land for more than 12 years has not affected his claim for adverse possession as the defendants hold the land thereof as trustees.

### **The Plaintiff's Case**

4. The plaintiff has deposed that he occupied the suit land in the year 1993 and in 1996, he built a commercial building thereon in which he has over the years operated his business peacefully, notoriously, continuously and without hindrance by the defendants up until the filing of this suit in 2012. The plaintiff avers that the defendants evicted him from the suit land in December, 2020 in the pretext that he was a tenant and during the pendency of this suit and when an order of injunction was issued against them on November 5, 2012.



5. The plaintiff avers that the suit land belonged to one Justus Murithi Mbagiri (now deceased) at the time the plaintiff settled on the land, but has changed hands and is registered in the names of the defendants who are heirs to the estate of the deceased. It is the plaintiff's contention that though he has been evicted, he has never been a tenant on the suit land and that he has acquired proprietary rights of  $\frac{1}{4}$  of an acre of the suit land by way of adverse possession.
6. In the supporting affidavit, the plaintiff has annexed copies of the order of injunction issued on November 5, 2012 a copy of the certificate of official search in the name of the deceased, a copy of the search certificates in names of the defendants and certificate of confirmation of a grant of letters of administration intestate in succession cause No 15 of 2007 issued to the 1<sup>st</sup> defendant.
7. During the hearing, the plaintiff testified as PW 1 and called three witnesses. He adopted averments in the affidavits in support of the summons and his witness statement as his evidence in chief and produced the documents annexed thereto as P exhibits 1 – 49. He was cross examined and re-examined.
8. It was the plaintiff's evidence that the late Justus M'Murithi was a friend of his father, Johana M'Imwendwa Mbaimwenda. That he came to know the deceased in 1991 when his father brought him to him for assistance over a land dispute with his brother, one Samson over the suit land. That he paid legal fees for the deceased and later became close friends.
9. The plaintiff further stated that the deceased sought his assistance over marital dispute between the deceased and his wife, the 1<sup>st</sup> defendant who had allegedly left the deceased in the year 1992. That the 1<sup>st</sup> defendant wanted the land sold so that the proceeds would go to educate the children. He stated that the deceased requested him to educate the children and to protect the land from being sold. He further stated that in 1994 he was brought divorce papers filed by the 1<sup>st</sup> defendant in meru CMCC Divorce cause No 9 of 1994 which was however not finalized for one reason or another. Briefly, it is the plaintiff's evidence that he assisted Justus M'Murithi (deceased) supported his children and took possession and remained in the suit land to have it protected and which he is now claiming by way of adverse possession. He stated that he was put in the succession cause because of his interest in the land and nothing else.
10. 2 was Mwongela Solomon Mugwika who adopted his statement dated June 21, 2022 and testified that he was employed as a caretaker at the suit premises until the year 2020 when the plaintiff was evicted therefrom. He further stated that the plaintiff occupied the premises uninterrupted from the year 1999 up to the year 2020 when the premises were destroyed. He denied that the plaintiff was a tenant of the original registered owner, the late Justus M'Murithi (deceased). He however could not tell how the plaintiff entered the premises.
11. Zakayo Mwiti Joseph testified as PW 3 and adopted his statement dated June 21, 2022 as his evidence in chief. He stated that he rented a butchery on the suit premises from the plaintiff in the year 2000 and remained until the year 2009 when he left. He did not know how the plaintiff entered into the premises.
12. Pw 4 was Joseph Mwiti who adopted his witness statement dated June 21, 2022 as his evidence in chief. He stated that he was the area manager Mwithumwiru area and that he knew the plaintiff when he was building on the suit land. He also stated that he knew Justus M'Murithi who owned the land. That the plaintiff occupied the premises until the year 2020 when the premises were demolished. He did not know how the plaintiff entered the suit land.



## The Defendants' Case

13. The defendants filed a replying affidavit sworn by Jema Karimi, the 1<sup>st</sup> defendant on July 8, 2022. The 2<sup>nd</sup> to 4<sup>th</sup> defendants are the children of the 1<sup>st</sup> defendant and beneficiaries of the estate of the late Justus M'Murithi M'Mbagari (deceased) while the 1<sup>st</sup> defendant is the widow of the deceased. It is the defendants' case that they became registered as owners of land parcel No Ntima/igoki/1227 following the determination of Meru High Court succession cause No 15 of 2007. A copy of the confirmed grant has been annexed.
14. The defendants aver that the plaintiff entered the suit land with the permission of the deceased whereby he was to put up a shop on the land and then recover the cost of construction from rent received therefrom, and that after recovering his costs and profits, the building was to revert back to the deceased. The defendants pointed out that the deceased had similar arrangements with other people namely Geoffrey, Mangu, and Mungania.
15. That upon the demise of the deceased, the plaintiff hatched a scheme to take over the ownership of the suit land together with one Teresia Mwakithi (formerly the 2<sup>nd</sup> defendant herein) who claimed to be the 2<sup>nd</sup> wife of the deceased while the plaintiff claimed to be a son of the deceased and proceeded to file Meru High Court Succession cause No 15 of 2007 claiming the deceased's estate. That in the judgment delivered on December 18, 2019, the court specifically found that the plaintiff and the said Teresia Mwakithi had no legitimate claim over the deceased's estate. A copy of the judgment has also been annexed. That on May 7, 2020, the High Court further issued an order restraining the plaintiff from collecting any rent from the deceased's estate and that the 1<sup>st</sup> defendant herein was the one to collect the rent. A copy of the order has been annexed. That the tenants who were paying rent to the plaintiff refused to comply with the court orders and the 1<sup>st</sup> defendant levied distress for rent whereupon the tenants filed Meru Chief Magistrate's court ELC No 126 OF 2020 under the instructions of the plaintiff challenging the said distress, but the said suit was struck out by the court on August 19, 2020 on the basis that it was an attempt to circumvent the orders of the court in High Court Succession Cause No 15 of 2007. That the distress for rent proceeded and the said tenants opted to move out of the premises on the suit land. That the court in Meru ELC Appeal No 45 of 2020 similarly rejected an application for injunctive orders made by the said tenants in cahoots with the plaintiff herein, and the plaintiff filed this suit claiming adverse possession. A copy of the ruling has been annexed. It is the defendants' contention that the plaintiff has no legitimate claim over the suit land since the finding of the court in Meru High Court succession cause No 15 of 2007 still stands and has not been reviewed or set aside. The defendants further contend that the suit herein lacks merit and amounts to a gamble with the court process.
16. The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants testified on behalf of the defendants who called one witness. Jema Karimi testified as Dw 1 and relied on the replying affidavit and the witness statements dated May 9, 2022 as her evidence in chief. She also produced the documents annexed to the said affidavit as D exhibits 1 to 4. It is the evidence of Dw 1 that the plaintiff entered the suit land with the permission of the late Justus M'Murithi (deceased) who permitted the plaintiff to construct a building on the land and upon recovering the expenses and profits, he would pay rent. That the plaintiff recovered his expenses and started paying rent to the deceased. That after the demise of the deceased on May 25, 2003, the plaintiff declined to pay the defendants rent. It is her evidence that the plaintiff was a tenant in the suit premises, adding that the issue raised by the plaintiff in the suit herein were determined by the High Court in Meru succession cause No 15 of 2007, and that the plaintiff's structures were demolished pursuant to a court order.



17. Isabella Karimi Mungania testified as Dw 2 and adopted her witness statement dated May 9, 2022 as her evidence-in-chief. She testified that her late husband, Samuel Joshua Mungania was a tenant in the suit premises and had entered into an agreement to construct a business premises on the suit land and recover the cost plus profits from the rent due and thereafter the premises would revert to Justus M’Murithi. The agreement was produced as exhibit. That after the demise of Justus M’Murithi, they entered into an agreement with the 1<sup>st</sup> defendant to pay the rent to her which they did until they vacated from the suit land. Dw 2 testified that the deceased had similar arrangements with the plaintiff and others. She was also a witness in Meru High Court Succession cause No 15 of 2007.
18. Jenadis Nkatha Murithi, the 3<sup>rd</sup> defendant testified as Dw 3 and adopted her witness statement dated July 28, 2022 as her evidence-in-chief. Her evidence is basically similar to that of Dw 1. Dw 3 stated that the plaintiff was a tenant and that she referred to him as a guardian as he was paying her school fees from the rent due from the suit premises.
19. Faith Wanja Murithi, the 4<sup>th</sup> defendant testified as Dw 4 and adopted her witness statement dated July 28, 2022 as her evidence in chief. Her evidence echoed that of the other witnesses, adding that after the death of their father, they were depending on the rent that was being paid by the plaintiff and other tenants, and that explains why she wrote letters to the plaintiff to cater for her needs.

### **The Plaintiff Submissions**

20. It is the plaintiff’s submissions that the probate court’s jurisdiction in Meru Succession Cause No 15 of 2007 did not extent to the plaintiff’s right over the land vide the doctrine of adverse possession. The plaintiff’s counsel submitted that this was a preserve of the Environment and Land Court and relied on the case of *Estate of Alice Mumbua Mutua (deceased)* 2017 eKLR, *Patrick Kirimi M’Nganabu v Njeru Muchiri* [2021] eKLR and *Phyllis Wanjiru Kamau v Wilson Guchubi Gangagwe & 2 others* [2019] eKLR.
21. It is the plaintiff’s submissions that he took possession of ¼ of an acre of the suit land, asserted his right over it and the person having title to it did not take action until 2020 which was after 27 years. That he possessed the land neither by force, stealth nor under the licence of the owner and that he was removed against the doctrine of lis pendens. That he had been in quiet, peaceful and continuous occupation of the parcel for more than 12 years. The plaintiff’s counsel relied on the case of *Kahindi Ngala Mwangandi v Mtana Lewa* [2014] eKLR, Chuka Elc No (OS) E003 of 2021 *Irrine Wenda Iaphet v Wilberfoce Micheni & another*, *Kweyu v Omuto* [1990] KLR 709 and *Wambugu v Njuguna* (1993 KLR 173.
22. The plaintiff’s counsel submitted that the change of title from the original owner to the defendants does not affect the doctrine of adverse possession and did not stop time from running as was held in *Paul Kamande Gicheba v Jacob Kinyua Kiragu* [2018] eKLR and urged the court to allow the plaintiff’s claim as it has been proved.

### **The Defendants Submissions**

23. It is the defendants submission that the plaintiff in this matter has failed to meet the requirements for a claim for adverse possession as set out in the cases of *Titus Mutuku Kasuve v Mwaani Investments Limited* [2004] eKLR, *Mbira v Gachubi* [2002]1EALR 137 and *Samuel Miki Waweru v Jane Njeri Riddui* [2007]eKLR, *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, *Peter Thuo Kamau & another v Luvy Wamaittha Kiarie & 5 others* [2021] Eklr and *Stella Nduru Ichunge & another v Ezekiel Nkamani M’Ichunge & another* [2019] eKLR. It is the defendants submission that the plaintiff having failed to prove a claim of adverse possession, it follows that the defendants do not hold any portion of



the suit land in trust for the plaintiff. The defendants therefore urged the court to dismiss the plaintiff's suit with costs.

### **Analysis And Determination**

24. The court has carefully considered the pleadings the evidence adduced and the submissions filed. I have also taken into account the legal authorities cited by the parties. The issues for determination are whether the plaintiff has proved his claim for adverse possession and whether he is entitled to the reliefs sought.
25. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard, the plaintiff must prove on a balance of probabilities that he has been in occupation of a portion of the suit land measuring  $\frac{1}{4}$  of an acre for a period of over twelve (12) years, that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse or inconsistent with the right of the registered owner. This is in line with the well established principles and requirements for a claim for adverse possession as discussed by the courts.
26. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which states:-
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims, to that person.”
27. Section 13 of the same *Act* provides as follows:-
- “(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and where under Section 9, 10, 11 and 12 of this *Act* a right of action to recover 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 again takes adverse possession of the land.”
28. Section 17 of *Cap 22* states that-;
- “Subject to Section 18 of this *Act*, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
29. Further, Section 38 (1) of the same *Act* provides that -;
- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts, cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the



High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

30. In addition, Order 37 Rule 7 of the [Civil Procedure Rules](#) provides that -:
- “(1) An application under Section 38 of the [Limitation of Actions Act](#) shall be made by originating summons.
  - (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
  - (3) The court shall direct on whom and in what manner the summons shall be served.”
31. From the contents of the originating summons as set out above, the plaintiff is claiming to be entitled to the suit land by adverse possession. The summons is brought under Section 38 of the [Limitation of Actions Act](#) and Order 37 Rule 7 of the [Civil Procedure Rules](#). Whereas Order 37 Rule 7 prescribes that the summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed, I note that no such extract was annexed to the summons herein. However, the plaintiff has instead annexed a copy of certificate of official search. In addition, while the plaintiff is claiming adverse possession in respect of part of the suit land measuring  $\frac{1}{4}$  of an acre, there was no evidence in the form of a sketch map showing the portion claimed.
32. In this case, the plaintiff testified that he entered the suit land in the year 1993 and constructed a building thereon in 1996 or thereabouts. That he took possession from 1993 upto the year 2020 when his structures were demolished. From his own testimony, the plaintiff admitted that he entered the land upon a request made by the defendants’ deceased father who wanted it protected from being sold to Mafuko Industries. The plaintiff categorically stated that the deceased sought his help through the plaintiff’s father. In my view, that also explains why the plaintiff was paying for some of the defendant’s fees and other needs. The only logical conclusion I can make is that he was making those payments from rent due from the suit premises.
33. From the pleadings and evidence, it is clear that in this case, the plaintiff was on the suit land with the permission of the defendants’ deceased husband and father who was originally the registered owner of the land.
34. The law on adverse possession provides that the entry of the adverse possession should not be with the permission or consent of the owner. In [Ndiema Samburi Soti v Elvis Kimtai Chepkeses](#) [2010] eKLR, the Court of Appeal held as follows-;
- “A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not disposed the owner and the possession is not illegal. (*Wanje v Saikwa* (No 2) (1984) KLR 284).
35. This was also observed by Lenaola J ( as he then was) in [Beatrice Syokau Gathumba v Kenya Airports Authority & 2 others](#) [2012] eKLR where he stated as follows:
- “I must emphasis that it is an element of adverse possession that it ought to be hostile’ and without permission from the true owner of the land. The fact that the petitioner’s husband was permitted occupancy of the suit premises at one time as a manager of the animals and in the second time as a licensee is inconsistent with the doctrine of adverse possession because



an intruder who is given permission or a license has no cause of action during the period of his permission or license”

36. I further note in the judgment in Meru High Court Succession Cause No 15 of 2007 delivered on December 18, 2019, the probate court specifically found that the plaintiff herein had no legitimate claim over the estate of Justus M’Murithi (deceased) which include the suit premises. It is clear therefore that the plaintiff’s possession is an afterthought after his quest in Meru High court Succession cause No 15 of 2007 flopped.
37. From the evidence on record, it is my finding that the plaintiff has not proved on a balance of probability a claim for adverse possession of ¼ of an acre of suit land. The plaintiff was invited into the land by the owner and allowed to put up a building, recover his expenses and thereafter pay rent. That was an agreement the deceased owner had also with other tenants. As a tenant, the plaintiff cannot be allowed to turn around and assert his right over the suit premises against the owners who permitted him to be on the land. It is therefore my finding that the plaintiff has not proved his case on a balance of probabilities and his claim for adverse possession must fail.
38. For the foregoing reasons, the plaintiff’s suit is dismissed with costs to the defendants.
39. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 12<sup>TH</sup> DAY OF JULY, 2023**

**C.K YANO**

**JUDGE**

In the presence of

Court assistant – V. Kiragu

Mrs. Muia for plaintiff

Ms Gitari for 1<sup>st</sup> – 4<sup>th</sup> defendant

