**Munuhe (Suing as the Legal and Personal Representative of the Estate of the Late Lucy Wanjiru Munuhe ) v Wagacha (Environment and Land Miscellaneous Application 114 of 2017) [2023] KEELC 18602 (KLR) (5 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18602 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 114 OF 2017**

**A NYUKURI, J**

**JULY 5, 2023**

**BETWEEN**

**CHRISTOPHER MWANGI MUNUHE (SUING AS THE LEGAL AND PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE LUCY WANJIRU MUNUHE ) ..... PLAINTIFF**

**AND**

**WAMBUI WAGACHA ..... DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated 8th April 2014 and supported by an affidavit sworn by the Plaintiff on 31st December 2014, the Plaintiff sought against the Defendant the following orders;

    1. An order of declaration that the Plaintiff/Applicant has acquired by adverse possession the whole of the LR. No. 20604/134 at Mavoko Municipality measuring about 80ft by 40ft.

    2. An order directing the Chief Land Registrar or the Registrar of Titles to transfer to the Plaintiff the ownership of the said Parcel of land know as L.R. 20604/134 which the Defendant/ Respondent has been holding on trust for the Plaintiff.

    3. An order of permanent injunction order be issued to restrain the Defendant/Respondent by himself or his servants or agents from entering working or trespassing into, alienating, charging, or selling or subdividing the said Parcel of Land and in any other manner from interfering with the Plaintiff's use and enjoyment of the said land.

    4. An order of temporary injunction be issued to restrain the Defendant by himself, or his agents or servants from entering trespassing into or working or selling or alienating or charging, or subdividing the said parcel of land and or in any other way or manner from interfering with the Plaintiff's use and enjoyment of the said land until this suit is heard and determined.

2. The Plaintiff averred that she was a member of Akwana Housing Co-operative Society Ltd (hereinafter referred to as Akwana Society) by virtue of her membership No. 0679. That Akwana Society allocated her land known as LR. No. 20604/134 (suit property) on 12th November 2000. That she subsequently began to develop the suit property by fencing, cultivating and building a house thereon and has been in occupation and possession of the suit property for a period exceeding 14 years without interruption from the Defendant. That she also obtained piped water and electricity on the suit property.

3. She further stated that she came later to realize that the suit property had been allocated and transferred to the Defendant by the officials of Akwana Society in January 2002. She alleged that the Defendant came on the suit property in March 2002 and found her caretaker on the plot and that the Defendant called her saying the plot was hers and that she was going to court but no steps were taken by the Defendant to evict her. Further that she has been building on the plot for the last 12 years and has spent Kshs. 6 million. She further averred that her building plans were approved by Mavoko Municipal Council and that she had been paying rates and rent. That she had been very sick and got paralyzed in 2007 when she was building on the plot. She attached an extract of title of the suit property, photographs, receipts for payment of rates, letter from Mavoko Municipal Council for approval of plans and a doctor's report.

4. The suit was opposed. The Defendant filed a replying affidavit sworn by herself on 20th March 2018. She deposed that the suit was time barred; that the Plaintiff had failed to satisfy the requirements for adverse possession; that the Defendant was the registered proprietor as lessee from the Government of Kenya of the suit property for a term of 99 years from 1st October 1994, his title having been issued to him on 13th June 1997; and that having acquired the suit property, he fenced it and erected a security dwelling thereon.

5. The Defendant denied the Plaintiff's depositions in the supporting affidavit and stated that the Plaintiff did not show evidence of allocation of the suit property in 2000; that the allotment by Akwana Society was a nullity as it could not defeat the Defendant's title issued on 13th June 1997; that it was not true that the Plaintiff was in possession of the suit property for 14 years; that the Defendant personally visited the suit property between 2002 to 2007 when she learnt that a third party had pulled down her fence and that on every occasion she only met the caretaker who stated that the Plaintiff was unavailable and refused to disclose where she could meet her and that therefore there was interruption. She stated that in December 2016, she visited the suit property and met a lady who identified herself as the wife of Christopher Munuhe and gave her Christopher's mobile No. 0722 76xx26. That the Defendant informed him the property was hers and she wanted vacant possession and that that as when he informed her that the property had been acquired by his mother and that there was a case pending in court.

6. It was the Defendant's case that the Municipal Council of Mavoko had no authority to approve plans of an individual who was not the registered proprietor of the suit property and that the minutes of Akwama Society provided by the Plaintiff were unsigned. She stated that the reason she did not file suit was because the Plaintiff had assured her that she will vacate peacefully, and that she relied on her word and that therefore the Defendant pleads equitable estoppel. She stated that the Plaintiff is a trespasser and should not benefit from an illegality. She stated that she had not been aware of the suit as she had not been served with pleadings. She stated that the allotment letter relied on by the Plaintiff is for Parcel LR 20604 also referred to as Plot No. 52 and not the suit property. That the same scenario also obtains in reference to the letter approving building plans.

7. The Defendant faulted the claim of adverse possession saying the documents by the Plaintiff showed development activity and interest in the suit property between the years 2004 and 2009 and that the

time of 12 years had not lapsed. She stated that vide letters of 1st April 2009 and 21st March 2009 to the Commissioner of Lands, and Akwana Society respectively, the Plaintiff acknowledged the Defendant's title and therefore time stopped running and began running afresh. She counterclaimed for the eviction of the Plaintiff and an order for vacant possession, mesne profits for the period occupied by the Plaintiff and damages for trespass.

8. Christopher Mwangi Munuhe the personal representative of the estate of the late Lucy Wanjiru Munuhe the original Plaintiff, filed a supplementary affidavit sworn on 11th July 2018. He deposed that the Plaintiff entered the land in 2000 and that the Defendant went on the land in 2004 and found a caretaker who called him saying the plot was hers but no steps were taken to evict the Plaintiff and that the Defendant has had full knowledge of the Plaintiff's possession. That when his mother entered the suit property, there was no fence and that on 11th October 2013, the plot was surveyed by Geometrics Services Licensed Land Surveyors. He denied the allegation that his mother had promised to leave the land.

9. He maintained that his mother was allocated Plot LR. No. 20604/134 and LR. No. 20604/52 and attached two letters of allotment to demonstrate that averment. He also annexed application for installation of electricity and water dated 1st August 2012, maps and surveyors report.

10. The suit proceeded by way of viva voce evidence. The Plaintiff presented three witnesses while the defence presented two witnesses.

**Plaintiff's Evidence**

11. PW1 Christopher Mwangi Munuhe testified on 10th May 2022. He testified that his mother was the initial plaintiff having filed this case but that she passed on. He stated that he got a grant to enable him litigate in her mother's place. He adopted his witness statement dated 3rd July 2018 as his evidence in chief. It was the Plaintiff's evidence that his mother Lucy Wanjiru Munuhe was a member of Akwana Housing Co-operative Society Limited, being member Number 0679 and by virtue of that membership, she was allocated the suit property on 12th November 2000 by Akwana Society.

12. He testified that the society allowed his mother to develop the Plot as the society worked on processing of the title deeds. He testified that his mother began fencing, cultivating and building on the plot and has been in occupation for a period exceeding 14 years without interruption or disturbance by the Defendant. That PW1's mother extensively developed the suit property and obtained piped water and electricity thereon only to realize that the suit property had been allocated and transferred to the Defendant by officials of Akwana Society in January 2002.

13. The witness stated that in 2004, the Defendant went to the suit property found a caretaker there and that PW1 was informed that the Defendant was claiming that the suit property was hers and that she would go to court but that she did not do so. He claimed that his mother had spent Kshs. 6 million to develop the suit property and had been paying rates to the Municipal Council of Mavoko. He stated that his mother had acquired the suit property by adverse possession and that the Defendant was merely a trustee for his mother's estate. He produced a limited grant ad litem, letter of allotment dated 12th November 2000, letter approving building plans dated 18th November 2003, survey plan form no. 3, minutes of Akwana Housing Cooperative meetings, debt certificate payment receipt, photographs of ongoing construction, debtor's report, copy of title deed, letter to the Commissioner of Lands and letter of Akwana Housing Cooperative Society.

14. On cross-examination, PW1 stated that his mother began living on the suit property in 2000. He stated that he had no evidence to show his mother paid for the suit property. He stated that he had no evidence

to show that his mother accepted the allotment of the suit property. He said they realized the suit property was in the Defendant's name in the year 2004 when the Defendant went on the suit property, found them constructing on the land and objected to the construction claiming the land was hers. He stated that the photographs produced were taken on 1st November 2013 when they were constructing on the suit property and that there is no evidence of when the construction began. He also stated that he had no evidence to show that in 2002, his mother fenced, cultivated, put up septic tank and site office on the suit property. He stated that his mother used to pay rates in the Defendant's name. He stated that in 2003, they took the allotment letter to the Municipal Council to get approvals to construct and therefore the council opened a file in the name of the Defendant. He stated that the letter by the surveyor was to confirm that his mother was given Plot No. 134 and 52. He stated that he did not have the original allotment letter before court although he had it.

15. PW2 was Julius Nyerere Musyimi. He adopted his witness statement dated 29th June 2018 as his evidence in chief. It was his testimony that he was employed by the deceased Plaintiff as caretaker of her plots in 2002. That the plots were plot number 20604/134 and 52. He stated that he was instructed to fence the plots and construct site office in 2002. That he fenced the plots with posts and barbed wire. He stated that the deceased Plaintiff began construction of a permanent house on 6th March 2017 and by the time she died the house was half developed. He said that the deceased was living in the house together with her children. He testified that in 2014, the Defendant went on the suit property enquiring about the person putting up the developments. That she claimed the plot was hers when PW2 told her the plot belonged to Lucy Wanjiru Munuhe and gave her the phone number of Christopher Munuhe. He stated that he left the Plaintiff's employment in 2018 but that since 2014, he never saw the Defendant again. He stated that he stayed on the plot peacefully for 15 years.

16. On cross-examination, he stated that in 2002, the suit property was vacant and there was nothing on it. He stated that the statement in his witness statement that construction on the suit property began in 2017 was an error. He stated that the perimeter wall was built together with the house. He stated that the site office was on one plot and the house on another plot. That he lived in the site office and only moved to the other house in 2014. He stated that the Plaintiff started living in the house around 2014 to 2015.

17. PW3 was Godwin Kangata Kamau. He adopted his witness statement dated 4th July 2018 as his testimony in chief. It was his testimony that he had been a member of Akwana Society from 1997 and knew the deceased Plaintiff as a member of the society. That the society allocated the deceased Plaintiff the suit property in 2000. That members were allowed to develop their plots as the society proceeded to process titles. It was his testimony that in 2013, he was elected as the vice chairman of Akwana Society and that they visited the suit property on official business and stated that the deceased Plaintiff had already developed the property. He also told court that the records at Akwana Society indicate that the suit property was allocated and belongs to the deceased Plaintiff. He stated that the Defendant had never been a member of Akwana Society neither had she been allocated the suit property or any other property and that they have never received any complaint from the Defendant.

18. On cross-examination, PW3 stated that he did not have any evidence to demonstrate his membership of Akwana Society. He stated that the address of Akwana Society on the allotment letter was 11193 while the address on the stamp was 2307. He said the deceased's allotment is even on the Notice Board of Akwana Society although he had not produced such evidence. He stated that the deceased Plaintiff paid for the entire purchase price and that she did not get title as some officials of Akwana Society committed fraud and that a suit was filed against them. In re-examination, he stated that he became a committee member of Akwana Society in January 2013 and became a vice chairperson in January 2017. That marked the close of the Plaintiff's case.

**Defendant's Evidence**

19. DW1 was the Defendant Phillis Wambui Wagacha. She testified on 19th January 2023. She adopted the contents of her replying affidavit dated 20th March 2018 as her evidence in chief, which contents have been captured herein above. She also adopted as her evidence in chief her witness statement dated 6th September 2018. It was her testimony that the suit property belonged to her. She stated that she used to work for an organization called K-Rep as a manager and that K-Rep acquired the property for its staff. That she acquired four properties which she held to date. She stated that she holds the original title to the suit property, which title she showed the court. Her testimony was that she was a leasee from the Government of Kenya of the suit property for 99 years from 1st October 1994 and that the certificate of title was issued to her on 13th June 1997. That upon acquisition of the suit property, she fenced it, and put up a security dwelling to keep off trespassers.

20. She stated that she had been paying rates in respect of the suit property. She stated that between 2002 and 2007, she went to the suit property numerous times, approximately ten times, upon learning that a third party had pulled down her fence and started putting up a building thereon. She stated that on all the occasions that she visited the suit property, she informed the caretaker that she was the registered owner thereof and that she had not consented to the construction on the property. She stated that these visits constituted interruption of the Plaintiff's occupation. She testified that on one occasion, she visited the suit property with her sister one Mrs. Mercy Ngoima in December 2016 and spoke to a lady who identified herself as the wife of Mr. Christopher Munuhe and gave the Defendant Christopher's mobile phone no. 0722 xxxx26 which she called and that Christopher told her the land had been acquired by his mother and that there was a case pending in court.

21. The Defendant conceded not filing a case against the Plaintiff for eviction and stated that the reason was because the Plaintiff had assured her that she would vacate the premises peacefully. That she trusted the Plaintiff's word but that it appears her intention was to run down time and thereafter claim adverse possession. According to DW1, the Plaintiff became aware that the Defendant was the registered proprietor of the suit property in the year 2006, as demonstrated by the Plaintiff's evidence, which was the reason she attempted to challenge the Defendant's title before the Commissioner of Lands in her letters dated 1st April 2009 and 21st March 2009, and the letter to Akwana Society and that therefore these constituted an acknowledgment that the Defendant owned the land; hence stopped time from running so that time began to run afresh from 2009.

22. DW1 testified that the Plaintiff erected a structure on the suit property without the necessary approvals as the property is for residential use yet the Plaintiff erected residential/commercial use and no change of user was applied for. The witness stated that Mavoko Municipal Council had no authority to grant approvals of building plans to an individual who was not a registered proprietor of the suit property. She further stated that the letter from the Mavoko Municipal Council for approvals dated 18th November 2003 was altered and therefore its authenticity is questioned.

23. The witness testified that she had been pursuing the matter with her advocate and agent one Benson Karenju unaware that this suit had been filed as she had not been served with pleadings herein. She faulted the allotment letter produced by the Plaintiff stating that it lacked the land reference Number as it referred to LR 20604 and Plot No. 52. She stated that LR. No. 20604/52 belonged to Geoffrey Nasubo while the suit property belonged to her. She stated that the Plaintiff may have been allocated another parcel of land as she had not demonstrated a proprietary right over the suit property. She stated that if the suit property was allocated to the deceased Plaintiff, then she failed to conduct due diligence to confirm that the same was registered in the Defendant's name. She stated that the Plaintiff's documents only showed development activities between 2004 and 2009 which is not enough period

to claim adverse possession. According to DW1 the court should disregard the minutes of Akwana Society produced by the Plaintiff as they were unsigned. She sought for eviction of the Plaintiff, mesne profits and damages for trespass.

24. She produced documents attached to her list of documents dated 6th September 2018. She produced a certificate of title, document showing payment of land rates to Mavoko Municipal Council, a letter from Benson G. Karenju dated 9th March 2018 and search certificate.

25. On cross-examination, she stated that after leaving K-Rep in 1999, she worked with KIPPRA. She stated that she put up a structure for the watchman on the property and fenced it in 1997, although she had no evidence of that. That she found the Plaintiff developing the land in 2004 and informed the person on the property to stop.

26. DW2 was Benson Gichure Karenju. He adopted the contents of his witness statement dated 6th September 2018 as his evidence in chief. He stated that he was a real estate agent and was managing the Defendant's properties. He stated that the suit property was not one of the properties he was managing as the Defendant had asked him to get a buyer for the property. He stated that he had visited the property more than five times. He stated that he met the Defendant in 2005. He stated that in 2010, he was engaged by the Defendant to sell her Plot LR. No. 20604/136 which is adjacent to the suit property and which was sold to one Michael Samuel Kiprop. He testified that in the course of conducting the said sale in 2010, he visited the suit property with the Defendant and found ongoing construction. That since the Defendant confirmed that she had not authorized the construction, they sought to know the identity of the person who was constructing but that the person on the property, who had rented the front shop declined to reveal the identity of his landlord.

27. That he returned to the suit property severally but his inquiries of the owner of the buildings was unsuccessful as the person on the property claimed that he had no contact of the owner.

28. On cross-examination, he testified that he assisted the Defendant to sell LR No. 20604/136 and was paid commission. He stated that he was instructed to sell the suit property, and that he went to the property more than five times beginning in 2010. That in 2010, ground floor had been constructed and first floor was ongoing. That marked the close of the Defence case.

29. The parties were granted leave to file written submissions in support of their respective cases. On record are the Plaintiff's submissions dated 17th March 2023 and the Defendant's submissions dated 22nd February 2023.

**Plaintiff's Submissions**

30. Counsel for the Plaintiff submitted that the Plaintiff had proved title by adverse possession. Reliance was placed on Section 38 (1) and (2) of the *Limitation of Actions Act* and the case of Kasuve v. Mwaani Investments Limited & 4 Others 1 KLR 184 to contend that for a person to be entitled to land by adverse possession they must demonstrate exclusive possession openly and as of right without interruption for a period of 12 years after dispossessing it of the owner or by discontinuation of possession by the owner of his own volition.

31. It was therefore submitted for the Plaintiff that she had demonstrated uninterrupted occupation of the suit property since 2000 until the suit was filed in 2014. Counsel argued that the Defendant never took peaceable entry nor sue for possession. It was argued for the Plaintiff that the evidence produced by her demonstrate that she had acquired the suit property by adverse possession.

**Defendant's Submissions**

32. Counsel for the Defendant submitted that the Plaintiff's challenge of the Defendant's title and assertion that the deceased was the legal owner of the suit property through a purchase scheme and allotment by Akwana Society is inconsistent with and diametrically opposed to the claim for adverse possession because a claim of adverse possession cannot co-exist with a claim for ownership through legal means of, for instance purchase or gift. Further that a claim for adverse possession cannot succeed where the Applicant also challenges the legality of title of the dispossessed Defendant. To buttress this assertion, the court was referred to the case of Haro Yonda Juaje v. Sadaka Dzengo Mbauro & Another [2014] eKLR, where it was held that a person cannot succeed in a claim for adverse possession before conceding that the registered proprietor is the true owner of the disputed land.

33. Further reliance was placed on the cases of Richard Wefwafwa Songoi v. Ben Munyifwa Songoi [2020] eKLR, Wainaina v. Njii Mwaura (Interested Party) Environment and Land Court Case No. E023 of 2022 [2023], Indian Supreme Court Case of Mohan Lal v. Irza Abdul Gaffar 1996, 1 SCC 639, for the proposition that a person cannot claim land under the doctrine of adverse possession where he believed he owned the land.

34. Counsel argued that the prerequisites for a claim of adverse possession were set out in the case of Gabriel Mbui v. Mukindia Maranya [1993] eKLR which require the claimant to show actual possession of the land that is hostile to the current owner, visible, open, notorious and exclusive; exercised continuously and uninterrupted for the statutory period; maintain under some colour of right as against everyone else; and with evidenced unmistakable animus possidendi and held in good faith without fraud.

35. It was further submitted that the claimant must demonstrate the date of possession, the nature of possession, whether the fact of his possession was known to the other party, the length of possession and that the possession must be open and undisturbed for 12 years. In that regard, reference was made to the case of Ernest Wesonga Kweyu v. Kweyu Umuto CA Civil Appeal No. 8 of 1990.

36. Counsel argued that the Plaintiff had not proved elements of adverse possession. Counsel contended that the Plaintiff did not lead any evidence to show intention to dispossess the Defendant as the deceased had no knowledge that the Defendant was the registered proprietor of the suit property. Counsel argued that the Plaintiff testified that she entered the suit property under impression that she was the true owner of the suit property which she purchased through Akwana Society. Counsel contended that believing she was the true owner, the Plaintiff lacked the requisite animus possidendi to dispossess the Defendant and that an owner cannot be an adverse possessor.

37. Counsel pointed out that the letter by the Plaintiff to the National Lands Commission showed that the deceased only learnt that the suit property had been registered in the Defendant's name on 5th October 2011. Counsel therefore argued that animus possidendi on the part of the Plaintiff could only arise after 5th October 2011. Counsel contended that the Plaintiff's allegation that the deceased occupied the suit property from the year 2000 until the date of filing suit in 2014, was a question of fact which needed to be proved. Counsel argued that the Plaintiff's evidence was merely a rehash of the deceased's witness statement and supporting affidavit and that therefore the same constituted hearsay. Counsel argued that there was no cogent evidence to show the deceased moved into the suit property in 2000, by fencing cultivating and building a septic tank, toilet and site office as contended in the Originating Summons. Counsel submitted that the deceased's evidence was of a low probative value having not been tested by cross-examination.

38. Counsel argued that the photographs produced by the Plaintiff lacked any probative value for failure to be accompanied by the mandatory certificate required under Section 106B of the *Evidence Act*

and that even if the said photographs were admissible they would not assist the Plaintiff's case as they are unspecified on their location, they do not establish the date of he initial occupation by the Plaintiff, they do not show the deceased fenced, cultivated or built a septic tank and toilet on the suit property in 2000 and that on their face, the photographs were taken only 2 years prior to institution of suit. Counsel also pointed out that Julius Nyerere Musyimi PW2 confirmed that there were no developments on the suit property in 2002 when he was engaged by the deceased, which evidence discounts the claim by the deceased that she began her occupation in the year 2000. Counsel further pointed out that the witness statement of Julius Nyerere Musyimi stated that construction of the permanent dwelling on the suit property commenced in March 2017. Counsel concluded that the conflicting evidence between the Plaintiff and his witnesses and the admission by the deceased that she only learnt of the Defendant's ownership of the suit property on 5th October 2011, meant that the statutory period had not lapsed.

39. It was further submitted for the Defendant that there was no evidence that the deceased had exclusive possession of the suit property and no evidence was adduced to establish that the Plaintiff occupied and utilized the whole of the suit property or knew its actual extend. In that respect, counsel relied on the case of Peter Okoth v. Ambroce Ochido Andanjo & Benedict Odhiambo Oketch [2021] eKLR.

40. On whether the possession was uninterrupted, counsel submitted that the Plaintiff's evidence show that the Defendant visited the suit property and asked those on the property to vacate. Counsel argued that Paragraph 5 of the Plaintiff's supporting affidavit stated that the Defendant went on the suit premises in 2002 and talked to the caretaker and the Plaintiff on phone. Counsel further pointed out that paragraph 6 of the Plaintiff's supplementary affidavit stated that the Defendant went on the suit property and encountered the caretaker and spoke to the Plaintiff on phone in 2004. Counsel argued that as per the evidence of the Defendant, the Plaintiff's occupation was constantly challenged by the Defendant's visits on the suit property and that in one of the telephone conversations, the Plaintiff agreed to vacate the land.

41. Counsel placed reliance on the cases of Mwangi Githu v. Livingstone Ndeete [1980] eKLR and Wilson Kazungu Katana & 101 Others v. Salim Abdalla Backshwen & Another [2015] for the proposition that when the true owner of land asserts their right, time stops running.

42. Counsel argued further that although the Plaintiff claimed legal ownership of the suit property through allotment by Akwana Society, courts have held that a letter of allotment is transient and incapable of granting absolute proprietorship rights. Reliance was placed on the decisions of Wreck Motor Enterprises v. Commissioner of Lands & 3 Others [1997] eKLR and Dr. Joseph N. K. arap Ngok v. Justice Moijo Ole Keiwa & 4 Others [1997] eKLR.

43. Counsel therefore argued that a letter of allotment does not confer title to land as it only confers beneficial rights and a beneficial owner is not a true owner. Counsel also argued that the deceased's allotment letter cannot defeat the certificate of title held by the Defendant. Counsel argued that the letter of allotment lacked probative value because it contained discrepancies in the address and telephone numbers; the Plaintiff did not have original allotment letter; the Plaintiff did not call an official of Akwana Society to confirm authenticity of the allotment letter and the alleged official of Akwana Society who testified in favour of the Plaintiff had no proof of his membership of Akwana Society. Counsel argued that despite the Plaintiff arguing that Akwana Society wrongfully transferred the suit property to the Defendant, even after allegedly realizing that in 2011, the Plaintiff did not file any suit against them.

**Analysis and Determination**

44. I have carefully considered the pleadings, evidence and submissions on record. The only issue that arise for determination is whether the Plaintiff has proved that he is entitled to the suit property by way of adverse possession.

45. A claim of adverse possession is a claim based on time limitation as provided for in the *Limitation of Actions Act*. Section 7 of the *Limitation of Actions Act* provides as follows;

Actions to recover land

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.

Section 13 provides as follows;

Right of action not to accrue or continue unless adverse possession

(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

Section 17 provides as follows;

Title extinguished at end of limitation period

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

Section 38 provides as follows;

Registration of title to land or easement acquired under Act

(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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.

46. Essentially, for anyone to claim for land under the doctrine of adverse possession, they must show that they have had continuous and uninterrupted occupation of land owned by another, with the knowledge of the true owner for a period of 12 years.

47. Adverse possession was described in the case of Mtana Lewa v. Kahindi Ngala Mwagandi [2015] eKLR 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 period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possession is neither by force or stealth nor under licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

48. The elements for adverse possession were restated in the case of Richard Wefwafwa Songoi v. Ben Munyifwa Songoi [2020] eKLR where the Court of Appeal stated that a claimant of land under adverse possession must establish the following;

a. On what date he came into possession.

b. What was the nature of his possession.

c. Whether the fact of his possession was known to the other party.

d. For how long his possession has continued an

e. That the possession was open and undisturbed for the requisite period of 12 years.

49. Therefore to prove adverse possession, a claimant must demonstrate that possession and occupation of the land in dispute was open, without force, without secrecy and without permission of the true owner for a period of over 12 years. There has to be intention to have the land.

50. In the case of Samuel Kihamba v. Mary Mbaisi [2015] eKLR, the Court of Appeal held as follows;

Strictly for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that the animus possidendi, or intention to have the land.

51. In the instant suit, the Plaintiff's evidence was that on 12th November 2000, she was allocated the suit property by Akwana Society by virtue of her membership of the said society. That she however later realized that the said society wrongly transferred the land to the Defendant. He also stated that his

deceased mother had occupied the suit property from 2000 to 2014 when she filed suit having occupied it for 14 years without interruption from the Defendant.

52. While the issue of allocation of the suit property may not directly address the question of adverse possession, I must point out that no evidence was presented by the Plaintiff to show the basis of the said allocation as no evidence was presented to show that Akwana Society owned the suit property or had beneficial interest therein, to enable them allocate the same to its members. Therefore there is no proof that the Plaintiff had any proprietary interest in the suit property.

53. Turning to the question as to whether the Plaintiff had demonstrated adverse possession by proving open continuous, adverse, hostile and non permissible occupation of the suit property, I note that it is not in dispute that the Plaintiff has put up a permanent although incomplete building on the suit property. The question that remains to be answered is when the possession took place and whether it was open, exclusive and without secrecy.

54. From the evidence on record, the Defendants visits on the suit property which the Plaintiff confirms happened in 2002, 2004 and 2014, resulted in the Defendant interacting with the caretaker of the suit property and only talking on phone with PW1 in 2016 when the Plaintiff had already filed suit. Can the Plaintiff's occupation be said to be open and without secrecy? I do not think so. The evidence from both parties show that the deceased was unwilling to be identified as the one constructing on the suit property. At no time did the Defendant find the Plaintiff on the suit property and the Plaintiff was unwilling to meet the Defendant and indeed demonstrate that she had open, hostile and unpermitted occupation. In my view, what the Plaintiff was doing was merely hiding from the Defendant as time ran, so that the Plaintiff could claim for adverse possession. In the circumstances, it is my opinion that the Plaintiff's occupation was not open but was shrouded in secrecy, and cannot constitute adverse possession. An adverse possessor ought to occupy the property in dispute in a manner that can be seen by any third party that indeed they are the ones in occupation. In a situation where a claimant remains faceless and in the shadows for 12 years and only shows up to file their suit for adverse possession, even if they constructed permanent structures, that would not entitle them to a claim for adverse possession. Their occupation should be in such a manner as to make the true owner of land in dispute, aware without any shadow of doubt, as to the identity of the person who is in possession. This is because a claim for adverse possession is based on lapse of time to bring suit and an owner of property may not be able to sue a person whose identity they are not aware of, or one who has been playing hide and seek for purposes of defeating any suit that may be filed against them. If this were to be allowed then brazen land grabbers could find a platform to make claims under adverse possession.

55. In any event, apart from alleging that the deceased Plaintiff took possession of the suit property in 2000, no evidence was adduced to show the date of entry on the suit property. The photographs provided by the Plaintiff merely show a building but nothing in the photographs show that the Plaintiff took possession of the suit property in 2000. The Plaintiff produced a letter from Mavoko Municipal Council dated 18th November 2003 for approval of building plans. The same was indicated as referring to Plot LR. No. 20604/(4)/1134. As pointed out by both parties that letter had alterations on the plot number and had no attached proposed residential plans. What was attached was a map. The Plaintiff further produced bills from Mavoko Municipal Council dated 5th June 2012 and 12th June 2012 being building plan approval fee (residential) and plan renewal fees. PW2 Julius Nyerere Musyimi stated in his witness statement that the building on the suit property began in 2017 and that in 2000 when he was employed by the Plaintiff to be her caretaker, there was nothing on the suit property and that the same was vacant. In the premises, no evidence was presented by the Plaintiff to demonstrate the exact date that the deceased Plaintiff entered the suit property. In the premises therefore, I am not convinced

that the Plaintiff has occupied the suit property for the statutory period of 12 years, openly exclusively and adversely.

56. On whether the occupation was uninterrupted, by the Plaintiff's own admissions, the Defendant visited the suit property in 2002, 2004 and 2014 claiming the property was hers although she was giving this information to the person who was on the suit property who was not willing to confirm the identity of the person constructing thereon. It is therefore my view that the Defendant's visits on the suit property restating that the property was hers, did interrupt the Plaintiff's albeit secretive occupation, and therefore the Plaintiff's occupation was not uninterrupted.

57. In view of the reasons given above, I find and hold that the Plaintiff has failed to prove on the required standard that he is entitled to the suit property by adverse possession and his suit is hereby dismissed with costs.

58. The Defendant sought for vacant possession and eviction of the Plaintiff, together with mesne profits and damages for trespass. The evidence on record show that the Plaintiff became the registered proprietor of the suit property on 13th June 1997, for a leasehold period of 99 years from 1st October 1994. The title is in respect of the Defendant. The Plaintiff has not challenged the Defendant's title on fraud as his claim was for adverse possession meaning that he recognized that the Defendant was the true owner of the suit property. That being the case, the Plaintiff's occupation of the suit property is unlawful and amounts to trespass. (See the definition of 'trespass' in the Black's Law Dictionary 11th Edition).

59. As the Plaintiff has no lawful justification to continue occupying the Defendant's property, it is only fair and just that she is allowed to enjoy all the rights of a registered proprietor as spelt out in Section 24 of the *Land Registration Act* No. 3 of 2012. She can only enjoy those rights only if the Plaintiff grants her vacant possession and therefore the prayer for the Plaintiff's eviction is justified and hence granted.

60. On the question of mesne profits and damages for trespass, I understand mesne profits to mean the money paid in respect of wrongful occupation of land by a person who occupies without permission of the owner. Blacks Law Dictionary defines mesne profits as follows;

    The profits of an estate received by a tenant in wrongful possession between two dates.

61. Essentially, therefore mesne profits is the amount of money paid for the wrongful occupation of another's land for the damage suffered due to such occupation. Therefore in my view a person can only be awarded mesne profits or damages for trespass and not both as both are in respect of the unlawful occupation and granting both will result in unjust enrichment for the claimant which is unconscientious. On the claim for mesne profits and damages for trespass, no evidence was led in that regard to demonstrate the nature of the loss or damage suffered due to the Plaintiff's unlawful occupation. It is not disputed that the Plaintiff has erected a two stored building on the suit property which is incomplete. Damages for trespass need not be specifically proved as long as trespass is demonstrated. In this case, it is clear from the evidence on record that indeed the Plaintiff has trespassed on the suit property. In view of the trespass, the Defendant has not been able to use her land or sell it as she had planned. In the premises, I award the Defendant general damages for trespass in the sum of Kshs. 2,000,000/-.

62. The upshot is that the Plaintiff's claim for adverse possession is dismissed with costs. Subsequently, this court enters judgment for the Defendant as follows;

    a. The Plaintiff to give vacant possession of LR. No. 20604/134 to the Defendant within sixty (60) days from the date of this judgment and in default the Defendant to evict him and the cost of the eviction be borne by the Plaintiff.

b. The Defendant is awarded damages for trespass in the sum of Kshs. 2,000,000/-.

c. Costs of the Defendant's suit/counterclaim is hereby awarded to the Defendant.

63. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Mr. Oloo for Defendant

No appearance for Plaintiff

Josephine – Court Assistant