



Mungania (Suing as the Administratrix of the Estate of the Late M'mungania M'imbi - Deceased) v Muriira (Sued as an Administratrix of the Estate of the Late Lawrence Muriira M'thiruane - Deceased) & another (Environment & Land Case E005 of 2021) [2023] KEELC 20552 (KLR) (11 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E005 OF 2021**

CK NZILI, J

OCTOBER 11, 2023

BETWEEN

KATHIRA MUNGANIA (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE M'MUNGANIA M'IMBI - DECEASED) PLAINTIFF

AND

SCOLA KARUTHU MURIIRA (SUED AS AN ADMINISTRATRIX OF THE ESTATE OF THE LATE LAWRENCE MURIIRA M'THIRUANE - DECEASED) 1ST DEFENDANT

MUTUMA GITONGA 2ND DEFENDANT

JUDGMENT

1. The plaintiff took out an originating summons dated 6.11.2020 in which she sought the court to declare her as entitled to LR No. Ntima/Ntakira/2591 under adverse possession. The originating summons was supported by a supporting and supplementary affidavit sworn on 6.11.2020 and 1.10.2021 by Naomi Kithira Mungania as the wife and an administratrix of the estate of the late M'Mungania M'Imbi.
2. Scola Karuthu Muriira, the 1st defendant on behalf of the defendants, opposed the originating summons through a defense dated 2.3.2021 and a replying affidavit sworn on 19.8.2021. She averred that the suit land belonged to her late husband and was not occupied by the plaintiff as alleged, for her residence was on LR No. Ntima/Ntakira/2592, where she had extensively developed, and L.R. No. Ntima/Ntakira/2591 had only trees and crops on it. Further, the 1st defendant averred that the plaintiff had attempted to trespass onto her land but was restrained by a court order in Meru H.C Civil Appeal No. 100 of 2019, with effect from 19.8.2020, which she had continued to disrespect and had never appealed against the said order. Additionally, the 1st defendant averred that in the Land



Dispute Tribunal case conducted on 29.1.2002, it was clear that her late husband had not sold any land as alleged. Moreover, the 1st defendant averred that the plaintiff was forum shopping after losing in Succession Case No. 110 of 2016 and Civil Appeal No. 100 of 2019. Lastly, the defendant averred that the bottom line to this dispute was an agreement between her late husband and the late Lawrence Muriira, who had agreed to exchange the suit land with L.R Ruiiri/Rwarera/4104.

3. In a supplementary affidavit sworn on 1.10.2021, the plaintiff denied the contents of the replying affidavit. She maintained that the initially intended exchange of the parcels of land had failed because the late Lawrence Muriira had no land in Ruiiri under his name capable of transferring to her late husband, despite obtaining a title deed for the suit land. Therefore, the plaintiff averred that no vacant possession took place as initially expected by the two parties. She attached the Provincial Land Dispute Tribunal committee proceedings, findings, and rulings confirming the facts. The plaintiff insisted that she had been occupying the land, where she had planted trees and food crops; otherwise, the 1st defendant would not have sought any restraining orders against her in the succession case.
4. Following the pre-trial conference and court's directions, parties filed paginated bundles of documents dated 22.2.2022. At the trial, Naomi Kathira M'Mungania testified as PW 1 and adopted her supporting and supplementary affidavit sworn on 6.11.2020 and 1.10.2021 as her evidence in chief. Her testimony was that she was the wife and legal administratrix of the estate of her late husband, who had been on the land for over 12 years, which the late Lawrence Muriira M'Thiruane, allegedly obtained from her husband after duping him that he would hand him over 2.5 acres out of Parcel No. 4104 Ruiiri/Rwarera Adjudication Section, which later turned out to be non-existent.
5. The plaintiff told the court that her late husband had already transferred the suit land to the defendant in anticipation of the promise, but fortunately, he had not vacated the land. It was the plaintiff's evidence that there had been numerous court battles over the land, including the succession case where the defendant had sought restraining orders against her, and as a result, she has been unable to erect any buildings on the land save for subsistence farming. The plaintiff produced a copy of the grant as P. Exh No. (1), official search certificate as P. Exh No. (2), second search in the name of the defendant's late husband as P. Exh No. (3), copy of judgment in the probate cause as P. Exh No. (4), copy of proceedings in the Land Dispute Tribunal Case as P. Exh No. (5) (a) and proceedings in Embu Land Dispute Tribunal case as P. Exh No. 5 (b) and the supplementary affidavit attaching the complete set of P. Exh No. 5 (b) a P. Exh No. 5 (c).
6. PW 1 testified that the land the 1st defendant's husband had promised her late husband in Ruiiri was established to be stolen land or non-available; hence, her late husband could not get any consideration for the suit land from the defendant. She clarified that the Provincial Land Dispute Tribunal Appeal Committee had resolved that each of them continued to utilize the land under their occupation, which decision has never been appealed against by the defendant.
7. In cross-examination, PW 1 told the court that some land surveyors visited the land and conducted some subdivisions on it. She insisted that there was a land exchange agreement between the defendant's late husband and her husband, in which land in Ruiiri was found to be under somebody else name and not the defendant's late husband. PW1 denied that after the subdivisions, any of the defendant's children had erected a building on the said portion, save for depositing some building materials, prompting her to resist any buildings being constructed vehemently. PW 1 further insisted that no land belonging to the defendant's husband was available for them in Ruiiri Rwarera. PW1 stated that any land records allegedly showing that she owned some land in Ruiiri must be forgeries. Asked about police interventions, PW 1 told the court that by a letter dated 24.4.2008, police officers were allegedly brought to her land by her neighbor Jennifer Mukothima. Additionally, PW 1 clarified that she participated in the probate cause and even sought an injunction order. PW 1 told the court that



- a follow-up of the land in Ruiru through the area District Office bore no fruits. She denied visiting the land with the area chief. Her testimony was that she has been seeking that the suit land reverts to her since the late husband to the defendant failed to avail any land in exchange in Ruiru, given the one available was in the name of M'Muguna M'Mwiruane, a brother to the late Lawrence Muiruru. PW1 insisted that she was allegedly being taken to the Ruiru land long after her husband had passed on, on the strength of letters from the lands office written after his death on 3.11.1993.
8. M'Ithinji M'Mwitari testified as PW 2 and adopted his witness statement dated 4.5.2022 as his evidence in chief. As a brother-in-law to the plaintiff, PW 2 told the court that his late brother had agreed with the defendant's late husband that he would surrender a quarter of an acre of his Ntakira land in exchange for two and a half acres of land in Ruiru due to breach of the agreement. PW 2 testified that the plaintiff never moved out of her land which she has planted with coffee trees and maize. Without alternative land, PW 2 told the court that the plaintiff did not formally hand over or vacate her land. He was categorical that the land had been tilled by the plaintiff and her children and not the defendant, who only planted maize on it a long time ago through her late husband.
 9. Scola Karuthu Muriira, the defendant, testified as DW 1. She adopted her witness statement dated 27.12.2021 as her evidence in chief. Her evidence was that she was an administrator of the estate of the late Muriira M'Thiruane, her late husband, and the registered owner of L.R No. Ntima/Ntakira/2591, which was adjacent to LR No. Ntima/2592, where the plaintiff's residence was situated. She denied that the plaintiff occupied the suit land as alleged or at all, for over 12 years since any such attempts to do so were thwarted by an order dated 19.9.2020, restraining the plaintiff's entry into the land, but which order she had disobeyed, leading to a police report. The defendant confirmed that there had been numerous disputes over the land going by proceedings on 29.1.2002, a letter dated 24.4.2008 from the Land Dispute Tribunal, Succession Cause No. 110 of 2016, and Civil Appeal No. 100 of 2019. The defendant insisted that her late husband had surrendered LR. No. Ruiru/Rwarera/4164 to the plaintiff's late husband in exchange for the suit land but the plaintiff had become adamant and selfish and intended to benefit twice. The defendant produced the order dated 19.8.2020 as D. Exh No. (1), letter dated 14.12.2021 as D. Exh No. (2), letter dated 24.8.2001 as D. Exh No. (3), from the land office, letter dated 9.12.2021 as D. Exh No. (4), a copy of the judgment in the probate cause as D. Exh No. (5) a copy of the green card for LR No. Ruiru/Rwarera 4104 as D. Exh No. (6).
 10. In cross-examination, DW 1 told the court that the suit land had been under the plaintiff's occupation since 2020, immediately after the probate cause. DW 1 insisted that she wrote a demand letter to the plaintiff to vacate her land, followed by a report to the police. DW1 acknowledged that no eviction orders were ever sought against the plaintiff. Further, DW 1 admitted that she was the one who allegedly cut down trees belonging to the plaintiff on the suit land. Regarding D. Exh No. 3. DW, I told the court that the portion was a subdivision of LR No. Ruiru/Rwarera/551, measuring 1.31 acres, which was less than the 1 ½ acres that the plaintiff's late husband had been promised by her late husband. DW 1 testified that Parcel No. 551 initially belonged to her father-in-law. She said she did not possess the agreement or letter allegedly signed by her late husband and the plaintiff's late husband, concerning the exchange of their respective parcels of land save for D. Exh No. (3), which had listed the plaintiff's deceased husband as a beneficiary of the land at Ruiru. DW 1 could not explain why the acreage in the letters from the lands office was less than what the parties had initially agreed to.
 11. DW 1 insisted that she took possession of the suit land after obtaining a title deed. She dug terraces, planted nappier grass and assorted trees, later sold and transferred the suit land to the 2nd defendant. She testified that the two parties were family members, hence the agreement to exchange the two parcels.
 12. Jennifer Mukomuthama testified as DW 2 and adopted her witness statement dated 27.12.2021 as her evidence in chief. As a neighbor, DW 2 told the court that the plaintiff was occupying the suit land



- whose homestead was across the by-pass road from the suit land. Harriet Kinyua M'Marete testified as DW 3 and adopted her witness statement dated 27.12.2021 as her evidence-in-chief. She testified that the plaintiff was the defendant's sister-in-law, whose homestead was separated from the land by a by-pass road. She confirmed that the suit land had been under use by the plaintiff for over three years.
13. Salome Karimi M'Murithi testified as DW 4 and adopted her witness statement dated 27.12.2021. As the plaintiff's neighbor, her testimony was that the defendant had been given the land by his uncle Kaaria alias M'Mungania. She believed that the late Muriira used to till the land before the plaintiff took over in 2021 or thereabouts.
 14. By written submissions dated 14.6.2023, the plaintiff stated that she has been on the suit land for over 12 years; going by the findings on page 3 (a) of her paginated bundle dated 22.2.2022, the results by the Provincial Land Dispute Appeals Committee Case No. 34 of 2004 which decision was never appealed against by the defendants. The plaintiff submitted that under Section 3 (3) of the repealed Land Disputes Tribunal Act No. 10 of 1990, the tribunal was competent to make decisions on the user and occupation of land.
 15. Therefore, the plaintiff urged this court to invoke Section 44 (2) (2) of the *Evidence Act* and find her use, occupation, and work on the suit land as conclusively proved in 2004 to present, as the 12 years elapsed on 30.5.2020 before the claim herein was filed on 15.1.2021. On the evidence tendered that the 1st defendant was last on the land during the reign of the late President Moi, the plaintiff submitted that since December 2002, 12 years had also elapsed and given the contradictory evidence of DW's 2, 3 & 4 as to the nature of the activities that the 1st defendant had on the land, the plaintiff submitted that she had proved the ingredients of adverse possession.
 16. Further, the plaintiff submitted that after the lapse of the 12 years, the 1st defendant became a statutory trustee by operation of Section 37 (a) of the *Limitations of Actions Act* with her as the beneficiary; hence, the title became encumbered by a trust as per Section 27 (b) of the *Act*. Consequently, the plaintiff submitted that any land transfer to the 2nd defendant was subject to her accrued overriding interests and that the 1st defendant could not pass any better title to the 2nd defendant than she had under the doctrine of *nemo dat quod non habet*.
 17. By written submissions dated 26.6.2023, the defendants isolated two issues for determination. On whether adverse possession had been proved, the defendants submitted that there was an exchange agreement between the plaintiff's late husband and the 1st defendant's late husband, and since the title deed for Ruri/Rwarera took long, only a confirmation of ownership as per the letter dated 24.8.2001 was available. The defendants submitted that out of the said agreement, the 1st defendant immediately took vacant possession, fenced the land, planted trees and crops, while the plaintiff's late husband took over the Ruri land and started using it with his children until he passed on, going by the proceedings at the land dispute tribunal appearing on pages 17-30 of the plaintiff's paginated bundle of documents. The defendants submitted that the defense witnesses had confirmed her use, occupation, and developments on the land, unlike the plaintiff, who only trespassed into the land from late November 2020, in total breach of the court order dated 19.8.2020.
 18. Therefore, the defendants submitted that the plaintiff's alleged occupation on the suit land had not been peaceful, was contrary to the court order, and had been resisted by the 1st defendant going with the directives to the District Commissioner by a letter dated 24.4.2008, in the plaintiff's bundle of documents at page 38, for the maintenance of law and order. Relying on *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* (2017) eKLR, the defendants submitted that for possession to become adverse it must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile, and continued over the statutory period. The defendants submitted that by 2002



- the 1st defendant was still in occupation of and use of the land as per the Land Dispute Tribunal and Provincial Land Dispute Tribunal proceedings, which was corroborated by DW 2 & 3, her known neighbors, unlike the plaintiff's distant relatives. Given the long-ranging land dispute since 2002, the defendants submitted that the alleged use and occupation by the plaintiff had not been peaceful, exclusive, hostile, uninterrupted, notorious, or continuous.
19. Additionally, the defendants submitted that this suit was an afterthought, which came soon after the plaintiff's failed attempts to lay a claim on the land in numerous applications filed before the probate court. Relying on *Gabriel Mbui vs. Mukinida Maranya* (1973) eKLR, the defendants submitted that the alleged acts of adverse possession by the plaintiffs were unproved since, from the evidence tendered, the 1st defendant had the exercise of control over the land, felled down trees and proceeded to claim compensation on top of numerous cases concerning the ownership of the suit land during the erection of the bypass.
 20. On whether the title should be canceled and the plaintiff be registered as the owner of the suit land, the defendants submitted that no evidence was tendered to show that the alleged possession was without the true owner's permission and that the owner was dispossessed or discontinued his possession, that the adverse possessor had done acts on the land which were inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use it going by the evidence of DW 2 – DW 3, on the date of entry by the plaintiff on the land in 2020 and not 1992, as alleged on the numerous cases brought against the 1st defendant by the plaintiff. The defendants submitted that the plaintiff was fueled by greed and insincerity and was out to renege on the agreement above to unfairly benefit from the two parcels of land.
 21. The court has carefully reviewed the pleadings, the evidence tendered, written submissions, and the law. The issues commending themselves for determination are; -
 - i. If the plaintiff has proved the ingredients of adverse possession.
 - ii. What was the effect of the numerous cases and disputes between the parties to the plaintiff's claim?
 - iii. If the 1st defendant offered any consideration to be the exclusive owner, possessor, and occupant of the suit land.
 - iv. If the 2nd defendant holds the suit land as a trustee for the plaintiff.
 22. It is trite law, parties are bound by their pleadings, and issues flow from them. See *Raila Odinga vs IEBC* (2017) eKLR. By an originating summons dated 6.11.2020, the plaintiff based her claim on of the bold Order 37 Rule 7 *Civil Procedure Rules*, Section 7, 16, 17, and 38 of the *Limitation of Actions Act*. The answers she sought from this court were whether she has been in open, continuous, exclusive, and uninterrupted occupation of LR No. Ntima/Ntakira/2591 since 1992, to be entitled to adverse possession of the land and whether the change of ownership of the land from the deceased Lawrence Murira Thiruane to the 2nd defendant was subject to her accrued rights.
 23. In support of her claim, the plaintiff attached and later on produced as exhibits such as a copy of her grant for letters of administration dated 3.3.2017, a copy of the search dated 28.9.2016, showing that the 2nd defendant acquired the land in 2020, a copy of the search dated 28.9.2016 showing that the deceased owner the land with effect from 12.10.1992 and it had a restriction made on 8.3.2000 following a dispute at the chief's office, copy of the judgment in Meru CMCC Succession Cause No. 110 of 2016 and proceedings and an award before the land dispute tribunal all produced as P. Exh No. 1, 2, 3, 4 & 5 (a) (b) & (c) respectively.



24. The defendants, on the other hand, opposed the originating summons through a replying affidavit by the 1st defendant sworn on 19.8.2021 on the basis that the suit was a non-starter, an exchange agreement was executed leading to the transfer of the land to the deceased, there was consideration given for the land, parties have been litigating over the land, adverse possession was inapplicable, injunctive orders had been in place against the plaintiff, and that the plaintiff was out to benefit twice from the two parcels of land. The defendants attached a copy of the order stopping the plaintiff from entering or remaining on the land occurrence book report for the illegal occupation, proceedings, and judgment in the succession cause. Later on, in testimony, the defendants produced a confirmation letter of ownership of Parcel No. 4104 Ruiriri/Rwarera dated 14.12.2021, a letter dated 24.8.2001 showing M'Mungania M'Mbwi as the recorded owner of parcel No. 4104, request for adjudication records dated 9.12.2021, judgment in probate cause No. 110 of 2016 copy of the order produced as D. Exh No. 1-6 respectively, showing that on 24.5.2017, M'Mungania M'Mbui became a registered owner and acquired title on 5.12.2017.
25. Other than the authority to plead dated 19.8.2021, which was not formally received by the court and court stamped the 2nd defendant did not expressly respond to the claim. The 1st defendant did not mention that she had the authority to plead and act on behalf of the 2nd defendant in her replying affidavit. The replying affidavit is also silent on questions 5, 6, and 7 of the originating summons. More curious, the 1st defendant did not, in her replying affidavit, deny the content of paragraphs 4, 7, and 8 of the affidavit in support of the originating summons by the plaintiff.
26. The essentials of adverse possession were restated by the Court of Appeal in *Loise Nduta Itotia vs Aziza Said Hamisi* (2020) eKLR. The court observed that Sections 7, 13, and 17 of the *Limitation of Actions Act* provide that, an action may not be brought after 12 years to recover land from the date of which the right of action accrued and that once the period of 12 years has expired without an effort to recover the land the title of the registered owner stand extinguished by the operation of the law.
27. The court cited with approval *Kimani Rubine vs Swift Rutherford & Co. Ltd* (1980) KLR 10, that a claimant must prove that they have used the land they claim as of right, with no force, secrecy, or persuasion, continuously and with no interruption. Regarding dispossession, the court cited with approval *Wambugu vs. Njuguna* (1983) KLR 172 that a claimant must prove dispossession with acts inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use it. On interruption or stoppage of time from running, the court cited with approval *Gulam Mirima Nordin vs Julius Charo Karisa* (2015) eKLR, that time is stopped either, when the owner asserts his right or when his right is admitted by an adverse possessor, which may include the institution of legal proceedings or the making of an effective entry to the land.
28. In *Mtana Lewa vs Kabindi Ngala Mwagandi* (2015) eKLR, the court cited with approval Johnson Kinyua vs Simon Gitura Civil Appeal No. 265 of 2005, that a claimant must prove proprietorship of land either by an extract copy of title or a certificate of official search and service of summons must be served upon the true owner, the burden after directions on hearing, being on the claimant to prove the ingredients of adverse possession on a balance of probability.
29. In the case of *Munge vs. Munge* Civil Appeal (application) 36 of 2020 (2023) KECA 75 (KLB) 3rd February 2023 (Ruling), the court cited with approval *Samuel Miki Waweru vs Jane Njeri Richu* (2007) eKLR that a claim of adverse possession could not succeed if the person asserting the claim was in possession, with the permission of the owner or under an agreement for sale or lease or otherwise since occupation to amount to adverse possession must be as of right. Regarding predecessors and successors in title, in *Peter Thuo Kairu vs Kuria Gicheru* (1988) 2 KLR, the court said adverse possession subsists not only against the present title holders but also their predecessors in title.



30. On the nature and particulars of occupation, the court in *Chevron (K) Ltd vs Harrison Charo wa Sbutu* (2016) eKLR observed that building of structures on the suit premises without obtaining permission from the true owner, was a clear manifestation of an intention and a mind of dealing with the land as if it was exclusively of the claimant and in conflict with the true owner's rights.
31. On the exact acreage in the occupation the court in *Harrison Muindi Baruthi vs Willys Gatiuku & another* C.A No. 98 of 1998, held that a claimant must prove that the land he was claiming was definite and identifiable with straightforward and stringent evidence as observed in *Peter Njau Kairu vs Stephen Njenga & another* C.A No. 57 of 1997. As to res judicata, in *Mubamudo & another vs. Juma* (2022) KEELC 2642 (KLR) (13th July 2022) Judgment) the court cited with approval *Priscilla Ndubi & another vs. Gerishon Gatobu Mbui* Meru Succession Cause No. 720 of 2013, that the primary duty of a probate court was to distribute the estate, to the beneficiaries and where issues arise in a succession cause over third party claims to the estate such issues are to be resolved before any Environment and Land Court which has jurisdiction over them. See *Re estate of Alice Mumbua Mutua (deceased)* (2017) eKLR.
32. Regarding a claim against a deceased estate, the court in *Mati Gitabi vs Jane Kaburu Muga & 3 others Nyeri* C. A No. 43 of 2015 held that he continued adverse occupation without secrecy, without violence, and permission may be adverse to the rights of the deceased's estate, his heirs, and all those claiming under him. On the effect of the letter of administration, the court in *Peter Mbiru Michuki vs Samuel Mugo Michuki Nyeri* C. A no. 22 of 2013, held that the effect of letters of administration was that the estate administration related back to the date of the death.
33. So, applying the preceding case law, has the plaintiff made up a case for the reliefs sought? The plaintiff pleaded that her late husband had allowed the transfer of the suit land to the 1st defendant's deceased husband in exchange for land equivalent to 2.5 acres at Ruiiri/Rwarera, which unfortunately was found to be non-existent until her late husband passed on. Consequently, the plaintiff averred and testified that vacant possession to the 1st defendant was never granted to the 1st defendant's late husband as agreed or at all, and so was the land in Ruiiri.
34. The plaintiff pleaded and called evidence that her use, occupation, and possession of the suit land has been on since 1992 to the present and that the defendants have never evicted her from the suit land or stopped her activities on it, which have been adverse to the rights of not only the current holder of the title but also the predecessors in title. Further, the plaintiff testified that she has consistently asserted her superior rights on the land against those of the 1st defendant and that any sale and transfer to the 2nd defendant was subject to her accrued overriding rights.
35. To prove adversity and hostility to the title held by the defendants, the plaintiff produced documentary evidence by way of proceedings before the Land Dispute Tribunal and Provincial Land Dispute Tribunal as well as at the probate court.
36. On the other hand, the 1st defendant denied that the plaintiff had been in adverse possession since any entry accrued in November 2020, and despite a court order, the plaintiff had used force and deviance to cling to the land despite the land at Ruiiri being available as per the exhibits produced by the defense.
37. On the other hand, the 2nd defendant did not specifically deny the assertion by the plaintiff either by way of pleadings or evidence, particularly on the two main concepts of adverse possession, dispossession, and discontinuance of possession of the true owner. The official search certificate indicates that Lawrence Muriira M'Thuruane became the owner on 12.10.1992, a restriction was placed on the title on 8.3.2000 due to a case before the chief. From the evidence tendered, there is no dispute that the 1st defendant and the plaintiff are related. Whereas the 1st defendant and the plaintiff agree that there



was an initial agreement to exchange of the suit land with some land in Ruiriri/Rwarera, the agreement was not produced before the court. The contents of the same were not clarified at all. When vacant possession was to be handed over, the consequences of any breach by either party were not pleaded or testified to before this court. Additionally, none of the witnesses to the agreement was called to shed light on its terms and conditions. Similarly, whereas the plaintiff is not disputing the circumstances under which the 1st defendant's late husband became the registered owner of the suit land, the plaintiff, however, insists that vacant possession was not handed over to the 1st defendant's late husband in 1992 since unfortunately, the land in Ruiriri/Rwarera was not readily available for occupation by the plaintiff's husband and or was not transferred to him on time or at all until he passed on, yet he had already performed his part of the agreement by 12.10.1992. P. Exh No. 5 (a) indicates that as of 29.1.2002, which was almost ten years after the 1st defendant's deceased husband had become the registered owner, a dispute had arisen since the plaintiff's late husband was claiming that he was yet to be shown the land that he had been promised and or that whatever the 1st defendant's late husband showed her was not conducive to her as LR No. 4104.

38. Exh No. 5 9 (b) indicates that parties went for a Provincial Appeal Case No. 38/2004 whose outcome the plaintiff complained that the land he allegedly exchanged with did not belong to the 1st defendant's deceased husband but one M'Muguna M'Irware. The verdict was that both parties had not shifted from their suit land as of 15.4.2008. The award was that the plaintiff be given back her land measuring $\frac{1}{4}$ an acre while the 1st defendant's husband would remain with his 2 $\frac{1}{2}$ acres of land in Ruiriri.
39. In her defense, the 1st defendant believed that the land in Ruiriri was still under adjudication in 1992 and it took time before the title deed could be processed, which was a fact the plaintiff was privy to. Nevertheless, the 1st defendant testified that the plaintiff's late husband's rights or interests in the land were confirmed through D. Exh No. 6, a copy of the records showing a title deed was issued to M'Mungania M'Mbwii on 5.12.2017. The exhibit shows that the register was opened on 24.5.2017 for LR No. Ruiriri/Rwarera/4104, for land measuring 0.53 ha. D. Exh (2), was a letter from the County Land Adjudication and Settlement Officer dated 14.12.2021 clarifying that parcel No. 4104 was a subdivision of LR No.551, a letter dated 24.8.2001 from District Land Adjudication and Settlement Officer Meru Central showed L.R 4104 belonging to M'Mungania M'Mbwi was measuring 2.5 acres was produced as D. Exh No. (3) and D. Exh No. (4).
40. From the said exhibits, what comes out is that as of 1992, there was no documentation showing that the plaintiff's late husband had been transferred any interests to any land at Ruiriri/Rwarera by the 1st defendant's late husband, the same way he had caused a transfer and registration of the suit land to the names of the deceased. Other than Parcel No. 4104 being mentioned during the hearing of the District Land Dispute Tribunal late 29.1.2002, there was nothing to show that the 1st defendant's husband had honored his part of the agreement and put the plaintiff into possession of a defined land in Ruiriri/Rwarera.
41. Coming to the Provincial Land Dispute Tribunal, which was heard on 15.4.2008, the 1st defendant never provided any documentation of land ownership in Ruiriri in the name of the plaintiff's late husband. D. Exh No's. 2, 3, and 4 appeared almost ten years later, and so did D. Exh No. 6, which showed that the title deed was for 0.53 ha was registered on 24.5.2017, almost 15 years after the initial agreement.
42. Going by the precedings, it is evident that the evidence by the plaintiff that her late husband waited until he passed on before he could be issued with a formal document of ownership and or could not vacate his land until there was consideration for the exchange, appears more credible than that of the 1st defendant and her witnesses.



43. The 1st defendant has pleaded that the plaintiff was actuated by greed and wanted to benefit twice. Asked in cross-examination why LR No. Ruiru/Rwarera/14104 appears to be of less acreage than what was agreed as 2 ½ acres; DW 1 could not explain the anomaly. DW1 was also unable to explain why D. Exh No. (3) was talking of 2.5 acres yet D. Exh No. 2 and D. Exh No. (6) referred to 0.53 ha leading credence to the evidence that the plaintiff was justified to hold on to the suit land as of right, since no value had been given in exchange to justify the 1st defendant to be entitled more than her late husband had bargained for.
44. Looking at the defendants' evidence, if the 1st defendant, as of 2021, wrote D. Exh No. (4) still seeking confirmation from the lands office on the status of Ruiru Rwarera (4104), it, therefore means that the 1st defendant had not verified the exact land, its acreage, status and whether or not the plaintiff's late husband had been put into vacant possession as agreed in 1992 and became satisfied with both the size, size, status and the locality.
45. Having established that the plaintiff did not vacate her land in 1993 and or hand it over to the 1st defendant as alleged or at all, the next issue is whether the possession of the land by the plaintiff was hostile, open, continuous, notorious, uninterrupted and adverse to the rights of the true owner. Evidence tendered by the plaintiff and admitted by the 1st defendant is that the exchange agreement was that ¼ of the land would be sold to the 1st defendant's late husband and the other ¼ to be compensated by 2 ½ acres of land in the Ruiru/Rwarera The plaintiff testified that she had carried out various activities on the suit land without any interruption from the 1st defendant. From the record and the evidence tendered, it is apparent that as of 2002, when the dispute went before the District Land Dispute Tribunal, the plaintiff was still on the land, which was close to 10 years since 1992.
46. Again as of 2008, the Provincial Land Dispute Tribunal award indicated that the plaintiff was still on the land asserting ownership rights regardless of a title deed held by the 1st defendant's deceased husband. Further, as of 19.8.2020, the 1st defendant sought for injunctive orders against the plaintiff over the suit land. P. Exh No. (2) shows that as of 14.7.2020, the 2nd defendant was already a registered owner of the suit land. So, the order against the plaintiff in favor of the 1st defendant was issued without disclosure of material facts. The 1st defendant knew she had already extinguished her rights over the suit land to the 2nd defendant but still sought the court's intervention to stop the plaintiff from the land permanently. In P. Exh No. (4) the lower court had not determined the rights of the plaintiff by 25.7.2019, when the judgment was rendered. The lower court was categorical that it lacked jurisdiction to handle the claim by the plaintiff.
47. So the moment the land came under the 1st defendant's name, it appears that within a year, she hurriedly transferred the same to the hands of the 2nd defendant, who has not challenged the alleged dispossession and discontinuance of possession of the predecessor in title, as of 14.7.2020, with effect from 1992. Therefore, when the 2nd defendant became a registered owner, the plaintiff's rights on adverse possession had already crystallized. The registration in the name of the 2nd defendant did little, if anything, to defeat those rights. The 1st defendant tendered no evidence that eviction orders were sought and obtained by her late husband against the plaintiff or her late husband before he passed on. Similarly, the 1st and 2nd defendants did not produce any eviction notice or order for contempt of court or proceedings based on forcible detainer leveled against the plaintiff if at all she had disobeyed a lawful court order issued in 2020 or 2021.
48. The plaintiff has alluded to acts inconsistent with the true purpose by which the registered owner in 1992 intended to use the soil. Such actions have been consistent and manifest a clear intention on the part of the plaintiff to occupy the suit land as of right and without hesitation to resist the alleged



ownership rights of the registered owner. The 2nd defendant has not denied the averments and evidence tendered by the plaintiff that his title deed was subject to the overriding rights by the plaintiff with effect from 1992, to when he became the registered owner.

49. The upshot is that I find the plaintiff has established on a balance of probabilities, adversality and hostility to the title held by the 2nd defendant. Therefore, I direct that the plaintiff be registered as the owner of L.R No. Ntima/Ntakira/2591, within two months, in default of which the Deputy Registrar of this court shall sign the transfers. Costs to the plaintiff.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 11TH DAY OF OCTOBER 2023

In presence of

C.A Kananu

Muriira for Mwarania for the plaintiff

Mwirigi for Ogoti for defendant

HON. CK NZILI

ELC JUDGE

