



**Registered Trustees of Gospel Evangelistic Church of Kenya v Mwangi & 11 others (Environment & Land Case 898 of 2015) [2023] KEELC 21371 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21371 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 898 OF 2015  
EK WABWOTO, J  
NOVEMBER 2, 2023**

**BETWEEN**

**THE REGISTERED TRUSTEES OF GOSPEL EVANGELISTIC CHURCH OF  
KENYA ..... PLAINTIFF**

**AND**

**ALEXANDER WAWERU MWANGI ..... 1<sup>ST</sup> DEFENDANT  
SAMUEL KAMAU ..... 2<sup>ND</sup> DEFENDANT  
HANNAH WAMBUI NJOGU ..... 3<sup>RD</sup> DEFENDANT  
ANTHONY IRUNGU ..... 4<sup>TH</sup> DEFENDANT  
PETER MUIRURI ..... 5<sup>TH</sup> DEFENDANT  
NICHOLAS KIAI ..... 6<sup>TH</sup> DEFENDANT  
JAMES KIVUVA ..... 7<sup>TH</sup> DEFENDANT  
PERIS WAIRIMU ..... 8<sup>TH</sup> DEFENDANT  
JULIUS NDUNGU ..... 9<sup>TH</sup> DEFENDANT  
PATRICK MAINA ..... 10<sup>TH</sup> DEFENDANT  
JOHN KIMUNGU (BEING SUED AS OFFICIALS OF BURUBURU RIVERSIDE  
SHG COMMITTEE AND ON THEIR OWN BEHALF) ..... 11<sup>TH</sup> DEFENDANT  
NAIROBI CITY COUNTY ..... 12<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. The Plaintiff filed an amended Plaint dated 13<sup>th</sup> October, 2021 in which it sought the following orders.
  - a. A declaration that the plaintiff has acquired prescriptive rights of ownership by way of adverse possession of all that property currently identified as Portion C having lived on the land without any disturbance and or interference for a period of over 30 years.
  - b. A permanent injunction restraining the 12<sup>th</sup> defendant whether by themselves, their agents, servants, employees or otherwise from entering, trespassing, encroaching, alienating or in any way interfering with ownership of the plaintiff of Portion C.
  - c. An order do issue to the Chief Land Registrar to issue a certificate of title for the said Portion C in favour of the plaintiff.
  - d. Costs of the suit.
  - e. Any other relief the court may deem fit and just to grant.
2. The suit was contested by the Defendant. The 1<sup>st</sup> to 11<sup>th</sup> Defendants filed a Statement of Defence and Counter-claim dated 24<sup>th</sup> November, 2021. The 1<sup>st</sup> to 11<sup>th</sup> Defendant sought for the following orders in their Counter-claim:
  - a. That the Plaintiff's suit be dismissed with costs
  - b. A permanent injunction be issued to restrain the Plaintiff whether by itself, its servants and or agents from interfering with the 1<sup>st</sup> to 11<sup>th</sup> Defendants and the various households occupying portion C that are members of Buruburu Riverside Self Help Group's quiet user and enjoyment of their property that lies between the Plaintiff's property LR No 16667 and Nairobi River, from trespassing thereon, attempting to build a wall on it or round it, defacing or removing beacons or otherwise dealing with portion C.
  - c. Costs of the Counter-claim.
3. The 12<sup>th</sup> Defendant filed its statement of Defence dated 18<sup>th</sup> February, 2022 wherein the 12<sup>th</sup> Defendant prayed for dismissal of the Plaintiff's suit with costs.

### **The Plaintiff's case**

4. The Plaintiff's case is that the Plaintiff is a registered religious organization duly registered under the [Societies Act](#) bearing registration number 1850 issued at Nairobi on the 7<sup>th</sup> January, 1986.
5. In its Plaint it states that on or before the year 1991 it took vacant possession of a parcel of land in the Buruburu area of the City County of Nairobi which has some proximity to the Nairobi River with a riparian reserve separating the said parcel of land from the river.
6. In the general neighborhood there is a neighboring portion of land that is occupied by the 1<sup>st</sup> to 11<sup>th</sup> Defendants.



7. It further states that when it seized possession of the said parcel of land the same was impassable and inaccessible as it was used as a dumping ground for black cotton soil which had been excavated from the massive residential development from the neighbouring estates of Umoja and Buruburu itself.
8. The Plaintiff thereafter on its own volition and donation from well-wishers spent a substantial amount of money and resources to rehabilitate the said parcel of land.
9. It further embarked on planting to enhance the use of the land. It was also averred that at the time that the plaintiff took possession of the said parcel of land it was unalienated public land and due to its efforts, the government of the Republic of Kenya rewarded it by allocating a portion of the said parcel of land by issuing a certificate of title in its favour for the portion of land measuring 3.001 hectares being land reference Number 16667 IR 57417.
10. Subsequently, the Plaintiff sub-divided the said registered land in 2 portions of land namely LR No 16667/1 and LR No 16667/2.
11. On parcel no 16667/1 it constructed a Church complex including a temple and offices designated as Nairobi Calvary Temple which at the same time operated as its head office.
12. On land parcel LR No 16667/2 it constructed a rehabilitation center hospital and staff quarters which exist in the said parcel of land to date.
13. It was also averred that there is a portion of land between this parcel of land and the Riparian reserve which is unregistered and which the Plaintiff has identified as land Portion "C" which forms the subject of this Case and is therefore the suit land.
14. It was also averred that from the time that it took possession of the above parcels of land, it had control and use of the said suit land which has been at all material times used as a play field which is used to date by the community especially the youth and schools.
15. Having general superintendence over the said registered parcels of land and the said suit land, the plaintiff approached the National Land Commission via letter dated 16th September 2015 seeking its authority to manage the riparian Land that borders the suit land and its registered parcels of land.
16. In a response dated 17th September 2015, the said National Land Commission undertook to visit the site and advice as to the best modalities for the plaintiff to supervise the use of the said riparian land which the plaintiff recognized as public land.
17. Eventually on the 13th July 2017 a report was prepared and issued by the Chief Executive Officer of the Water Resources Authority (WRA) recommending that the plaintiff plays an active role in conserving the riparian area.
18. It further observed that the 120 Defendants had already allocated part of the riparian land thereto and recommended that those allocations should be revoked as the riparian reserve was public land.
19. It was further averred that the 1<sup>st</sup> to 11<sup>th</sup> defendants started interfering with the use and possession of their parcel of land up to the 9th September 2015 when they attempted to dispossess the plaintiff of the said suit land but their efforts were repulsed by the plaintiff with the assistance of the relevant authorities with the result that the 1<sup>st</sup> to 11<sup>th</sup> defendants did not assume possession of the suit land.
20. It was further that the plaintiff therefore continues occupying the said suit land peaceably openly and uninterrupted to date.



21. During trial, a total of 3 witnesses testified on behalf of the Plaintiff. Patrick Marai Mungai, a Trustee of the Plaintiff testified as PW1. He relied on his witness statement dated 13<sup>th</sup> October, 2021 and also the plaintiff's list and bundle of documents dated 13<sup>th</sup> October, 2021 which was produced in evidence. He also relied on a further list of documents dated 26<sup>th</sup> May, 2022 as his evidence in chief.
22. On Cross-examination by Mr. Mwangi, counsel for the 1<sup>st</sup> -11<sup>th</sup> defendants, he stated that the land known as portion "C" does not have a title deed and that the Plaintiff first entered the land in 1996. He also stated that the plaintiff's entry to the land was through a letter of temporary allocation which had been issued by Nairobi City Council. He further stated that the plaintiff is legally on the suit land which was initially used as a dumping ground and the plaintiff used own resources to clear it.
23. He also stated in cross-examination that the 1<sup>st</sup> – 11<sup>th</sup> Defendants came to the land after they had already been in occupation for over 12 years. No objection was made and that the plaintiff is currently in occupation of the property. He also stated that the said portion occupies about 3.2 acres.
24. On re-examination, he stated that the Plaintiff moved to the land after they had been given a letter of temporary occupation.
25. Philip Njuguna Njoroge testified as P.W.2. He relied on his witness statement dated 13<sup>th</sup> October, 2021. In his evidence in chief and in cross-examination, he stated that the Church had not put up any building in portion "C" but was in occupation of the same. He also stated that the Church did not have a title for portion "C" and that he was not aware that the Defendants had been allocated the said portion. He also stated that he was not aware if the said land had been surveyed.
26. He also stated in Cross-examination that the Church has not applied for a title in respect to the said property.
27. When re-examined, he stated that the Church used its own resources to make the property habitable. He disputed the fact that portion "C" could be 30 acres and also disputed the fact that 800 households cannot fit on that portion which is about 3.25 acres. He stated that the Church cannot be trespassers in the said property. He also stated that the Plaintiff has been in portion "C" for more than 30 years. He also stated that the letter of allotment is not title to land.
28. The last witness for the Plaintiff was Festus Mbaabu Rimbera who testified as PW3. he stated that he is a licensed land Surveyor who was engaged by the Plaintiff herein. He relied on his witness Statement dated 19<sup>th</sup> May, 2022 and report on record as his evidence in Chief.
29. When re-examined by Mr. Mwangi, Counsel for the 1<sup>st</sup> – 11<sup>th</sup> Defendants, he stated that portion "C" is not part of LR No 16667/2.
30. He also stated that when he visited the site, he only saw not more than 2 mabati structures on the said part and that the unplanned settlement was across the river. He could not confirm whether he took any photographs at the site that were part of his report.
31. On further Cross-examination, he also stated that he had not seen any government Surveyor's report but having read the same, it was not different from his report. He also stated that the plaintiff had not told him that Plot C belonged to a different group. He also stated that he did not see any existing map to show that the area has ever been surveyed. He also stated that the Church needed his report to determine the actual size of portion "C". He also stated that there is no existing title to portion "C".
32. When cross-examined by Mr. Nyamweya, Counsel for the 12<sup>th</sup> Defendant, he stated that he has not received any documents for ownership of portion "C". He also stated that his purpose for the site visit



was to verify that the land known as portion “C” belongs to the defendant because there was a dispute. He also stated that he did not visit the physical planning office of the 12<sup>th</sup> defendant.

33. When re-examined, he stated that it was not necessary to take any photos while at the site since a survey report is about the establishment of the boundaries. He also stated that there were no beacons on the ground. He further stated that the purpose of the report was to assist the Court. He further stated that he was aware of the recommendation of the Water Resources Authority in respect to the area being a riparian land.

**The case for the 1<sup>st</sup> – 11<sup>th</sup> Defendants.**

34. The 1<sup>st</sup> to 11<sup>th</sup> defendants filed their defence and counterclaim dated 24<sup>th</sup> November 2021. They denied the averments made by the plaintiff in respect to property known as portion.
35. The 1<sup>st</sup> to 11<sup>th</sup> defendants averred that the property was originally owned by the 12<sup>th</sup> defendant and it is occupied by more than 800 households who are members of Buruburu Riverside Self Help Group. In their counterclaim they sought for the dismissal of the suit and a permanent injunction against the plaintiff in respect to proportion C.
36. During trial, the 1<sup>st</sup> – 11<sup>th</sup> defendants called two witnesses to testify on their behalf. Alexander Waweru Mwangi , the Chairman of Buruburu Riverside Self Help Group testified as DW1. He relied on his witness Statement dated 24<sup>th</sup> November, 2021 and the 1<sup>st</sup> – 11<sup>th</sup> defendants bundle of documents on record as his evidence in Chief.
37. On Cross-examination by Mr. A.G.N. Kamau, Counsel for the Plaintiff, he stated that he was in Court on behalf of thousands of people as their Chairman. He also stated that he had not filed any authority of the 2<sup>nd</sup> -11<sup>th</sup> defendants. He also stated that the details of the Secretary and Treasury of their group had not been submitted to court.
38. When asked about whether he had his allotment letter, he stated that he did not have any. He also stated that the Church had sued them because they had trespassed to their land.
39. When Cross-examined by Mr. Nyamweya Advocate for the 12<sup>th</sup> Defendant, he stated that the land belonged to Nairobi City Government before they were allocated.
40. On re-examination, he stated that the letters of allotment were issued to individuals and not a Committee. He also stated that the Church had demolished their houses.
41. The Second witness who testified on behalf of the 1<sup>st</sup> -12<sup>th</sup> Defendants was Geoffrey Gatundu, a registered Valuer. He relied on his valuation report dated 28<sup>th</sup> April, 2022 and witness statement dated 22<sup>nd</sup> June, 2023 as his evidence in Chief.
42. On Cross-examination by Mr. A.G.N. Kamau, Counsel for the Plaintiff, he stated that he did not value the suit property. He also stated that a plot has value even if it is not registered. He further stated that he was not shown any portion “C”. He stated that there were no permanent structures on the land and neither were there any people on the said parcel. He also stated that the valuation report was done only for the proposes of the pending Court proceedings.
43. When re-examined, he stated that he went to the site but could not establish whether the semi-permanent structures were occupied by anyone.



### **The case of the 12<sup>th</sup> defendant**

44. The 12<sup>th</sup> defendant filed a Statement of Defence dated 18<sup>th</sup> February, 2022. It was averred that the plaintiff illegally took possession of the property adjacent to LR No 16667 referred to as portion “C”. It was also averred that portion “C” lies between the Plaintiff’s property and Nairobi River in Buruburu and is not part of riparian reserve.
45. The 12<sup>th</sup> defendant averred that the property was originally owned by itself and was further occupied between the year 1990 and 2011 by the members of Buruburu Self Help Group which is a Community based organization registered under the Ministry of Gender, Children and Social Development.
46. At the trial, Peter Ndungu Wanyoike testified as D.W.3 and on behalf of the 12<sup>th</sup> defendant. He relied on his witness statement dated 18<sup>th</sup> February, 2022 and a bundle of documents dated the same day. He also added that the allotment letters issued by the Nairobi City County.
47. When cross-examined, he stated that he is a Senior Surveyor with the City County of Nairobi. He also stated that Portion “C” is not the same as LR No 16667 which is registered in the name of the plaintiff. He also stated that he is not aware of any resolution made by the Court in respect to portion “C”. He also stated that he had not said anything about portion “C” in his Statement and that he is not an author of the documents filed by the 12<sup>th</sup> defendant.

### **The Plaintiff’s Submissions.**

48. The plaintiff filed written submissions dated 14<sup>th</sup> August, 2023. In its submissions, five issues were framed for determination by the Court namely:
  - i. Did the defendants have the requisite locus standi to file the written statement of defence and Counter-claim?
  - ii. To the extent that the 1<sup>st</sup> -11 defendants claim that they represent a Community – based organization, does that organization have any capacity to sustain a claim?
  - iii. Has the parcel of land in contention for purposes of adverse possession been identified by parties?
  - iv. Flowing from the plaintiff’s claim for adverse possession, when does time start running for purposes of computing the statutory period of limitation for the said doctrine?
  - v. What is the status of the suit land in respect of which the plaintiffs lay the claim for adverse possession?
49. It was submitted that the written statement of defence has detailed an extra 10 persons as the defendants in this suit.
50. There has been no written authority as required by the provisions of the *Civil Procedure Rules* authorizing the 1<sup>st</sup> defendant or indeed the 11 defendants from acting for and on behalf of the 168 members whose names are contained in their list of documents nor as their witness valuer indicated that he carried out a valuation for 145 plots presumably belonging to different individuals who are not named.



51. In the plaint and in the evidence, it is stated that the 1<sup>st</sup> - 11<sup>th</sup> defendants are part of a group of 800 households who presumably have a substantial interest in these proceedings.
52. It was also submitted that it is only the 1<sup>st</sup> Defendant who swore a witness statement and that the defence and counter-claim do not amount to a representative suit as prescribed by law.
53. The plaintiff submitted that a community-based organization which in the 1<sup>st</sup> -11<sup>th</sup> defendants' defence is designate Buruburu Riverside SHG Committee has no status or the locus standi to initiate and or defend proceedings in its own name and that the lapses by the 1<sup>st</sup> – 11<sup>th</sup> Defendants in this regard lead to the result that both the defence and the counter-claim cannot avail them and therefore this suit should thus be treated as undefended.
54. It was also submitted that the plaintiff had during trial identified portion “C” in which it claims by way of adverse possession. It was also submitted that portion “C” measures approximately 3.002 acres.
55. The plaintiff submitted that it had occupied the land way before 1991 and the same was no longer public land.
56. In respect to the computation of time for purposes of the statutory period of limitation for the said doctrine, it was submitted that the plaintiff's took possession of land Portion “C” together with the land in respect to which the government alienated in its favour in 1992 way before the year 1990.
57. It was contended that after the plaintiff alienated its registered land and the 12<sup>th</sup> Defendant alienated the balance of the land, the only public land remaining is the Riparian Reserve.
58. It was the plaintiff's contention that since the suit land was alienated in the year 2002 and letters of allotment issued in favour of the 1<sup>st</sup> – 11<sup>th</sup> defendants and to their members the time for purposes of adverse possession started running on the 14<sup>th</sup> October 2002 and hence therefore the prescriptive period lapsed on the 14<sup>th</sup> October 2014 being a period of 12 years at which time the Plaintiff was in exclusive and physical possession of the land which occupation was open, uninterrupted and adverse to the possessory rights of the 1<sup>st</sup> to 11<sup>th</sup> Defendants and their members as it was continuous and exclusive.
59. In support of its submissions, the Plaintiff relied on the following cases which the Court has duly considered; *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR, *Ravji Karsan Sanghani v Peter Gakunu* [2019] eKLR, *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR, *Mwangi Gitbu v Livingstone Ndeete* [1980] eKLR among others.

### **The Submissions of the 1<sup>st</sup> – 11<sup>th</sup> Defendants**

60. The 1<sup>st</sup> -11<sup>th</sup> defendants filed submissions dated 28<sup>th</sup> August, 2023. The following issues were outlined for consideration by the Court:
  - i. Has the plaintiff proved its Claim for adverse possession in regard to portion C and if it has, should an order be issued to the Chief Land Registrar to issue a Certificate of title for portion C in favour of the plaintiff?
  - ii. Do the 1<sup>st</sup> – 11<sup>th</sup> defendants have locus standi to defend the case and lodge a Counter-claim?
  - iii. Has either Party proved that it is entitled to the reliefs of permanent injunction as prayed in the Plaint in the 1<sup>st</sup> – 11<sup>th</sup> defendants defence?
  - iv. Who will bear the costs of the plaintiff's suit and the Counter-claim?



61. It was submitted that Portion “C” is government land vested in the 12<sup>th</sup> Defendant since it is not registered in anybody’s name. It was also submitted that the 12<sup>th</sup> defendant had however allocated it to the 1<sup>st</sup> – 11<sup>th</sup> defendants and members of Buruburu Self Help Group and allotment letters issued.
62. It was further submitted that an adverse possession can only be maintained against a registered owner of land and that there is no title in respect of portion “C”. Reliance was made to the cases of *Moses Chepkoga Cheron v Margaret Njoki* [2017] eKLR and *Titus Mutuku Kasure v Miwaani Investments Limited & 4 others* [2004] eKLR .
63. On whether or not the defendants had locus standi to defend the suit, it was submitted that the defendants were sued in their individual capacities as officials of Buruburu Riverside Self Help Group and as such they Defended themselves as required by law.
64. In respect to the reliefs sought by the 1<sup>st</sup> – 11<sup>th</sup> defendants in the Counter-claim, it was submitted that the 1<sup>st</sup> to 11<sup>th</sup> defendants have proved that they have a legitimate claim over the suit property and hence they are entitled to the relief of permanent injunction together with costs of the suit. The 1<sup>st</sup> to 11<sup>th</sup> defendants also prayed for dismissal of the plaintiff’s suit.

#### **The submissions of the 12<sup>th</sup> defendant**

65. The 12<sup>th</sup> defendant filed submissions dated 19<sup>th</sup> September, 2023. The 12<sup>th</sup> defendant submitted on the following two issues:
  - i. Whether the plaintiff has met the threshold to be granted orders of adverse possession of portion C.
  - ii. Whether the plaintiffs have proved their case on a balance of probability against the 12<sup>th</sup> defendant.
66. It was submitted that it is a common ground that portion “C” belongs to the 12<sup>th</sup> defendant and that the allotment letters which were produced by the 1<sup>st</sup> to the 11<sup>th</sup> Defendant have never been challenged by the plaintiff.
67. It was also submitted that when the above matter came up for hearing, the authenticity of the allotment letters held by the members of Buruburu Riverside Shg Committee including the 1<sup>st</sup> to 11<sup>th</sup> defendants was never challenged and in fact, the 12<sup>th</sup> defendant confirmed to this Honourable court that the said letters of allotment were issued by itself.
68. The 12<sup>th</sup> defendant contended that as the records can bear, on the other hand no rebuttal was mounted by the plaintiff that the allotment letters held by the members of Buruburu Riverside SHG Committee including the 1<sup>st</sup> to 11<sup>th</sup> defendants were fake to persuade this Honourable Court that they have been in occupation of portion “C” without interruption for a period of more than 12 years as alleged.
69. It was submitted that the plaintiff having sued the 12<sup>th</sup> defendant is a clear admission that portion “C” belongs to the 12<sup>th</sup> Defendant which admission immediately makes portion “C” unavailable for orders of adverse possession sought by the plaintiff.
70. Reliance was placed to Section 41 of the Law of *Limitation of Actions Act* Cap 22 Laws of Kenya states as follows:
 

“ This Act does not enable a person to acquire title to or any easement over Government Land or otherwise enjoyed by the Government.



- i. Mines or minerals as defined in the *Mining Act* Cap 306. (III) Mineral oil as defined in the Mineral Oil Act Cap 307.
  - ii. Water vested in the Government by the *Water Act* Cap 372.
  - iii. Land Vested in the County Council (other than land vested in it by Section 102 (8) of the Registered *Land Act*.
  - iv. Land vested in the trustees of National Parks of Kenya.”
71. The 12<sup>th</sup> defendant also referred to the case of *Ravi Karsan Shanghani v Peter Gakumu* [2019] eKLR the court considered whether adverse possession could apply to land owned by the Government and at paragraph 15 of the judgment the court stated as follows:

“The Defendant was allocated the suit land on 23<sup>rd</sup> April 1986 following his application for allocation. At the time of allocation, the land was unsurveyed and it constituted part of Government land and that is how the Government could alienate it. It is trite law that adverse possession cannot accrue against land that is owned by the Government. The Plaintiff contended he occupied the suit land in 1979 and had since that time effected various developments thereon which demonstrated his occupation and possession was adverse to the rights and interests of the registered owner. Thus, even assuming the Plaintiff had during the period 1979 to 1986 occupied and possessed the land under circumstances that could amount to adverse possession, my view is the Plaintiff could not adversely possess the land against the Government such that the Government’s rights and interests over the land could be extinguished”.

72. Further reliance was placed in the case of *Ongwen & another -vs- Keya & another* (Environment & Land Case E027 of 2021) [2023] KEELC C 279 (KLR) the court held that”

“The Plaintiffs do not satisfy the requirements to be declared in adverse possession as they have not demonstrated to be in actual possession of the land. Even if they were in possession of the land, the prerequisite 12 years have not accrued. Moreover, an order of adverse possession cannot be made against the government. Section 41 of the *Limitation Actions Act* Cap 22 Laws of Kenya provides that the doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government.”

73. The 12<sup>th</sup> defendant urged the Court to dismiss the plaintiff’s suit with costs.

### **Analysis and Determination:**

74. The Court has considered the pleadings filed by the parties, the documentary and oral evidence adduced together with the written submissions presented to the Court and is of the view that the following issues arise for determination:

- i. Whether the 1<sup>st</sup> – 11<sup>th</sup> defendants have the requisite locus standi to defend the suit?
- ii. Whether the plaintiff has met the threshold for adverse possession?
- iii. Whether the plaintiff is entitled to the reliefs sought?



- iv. Whether the 1<sup>st</sup> to 11<sup>th</sup> defendants are entitled to the reliefs sought in their counter claim.
75. This court shall now proceed to analyses the said issues sequentially.
76. On the first issue, the plaintiff submitted that the proceedings by the 1<sup>st</sup> to 11<sup>th</sup> defendants offend the provisions of Order 1 rule 8 of the Civil Procedure Rules and that the suit should be treated as an undefended suit. It was argued that the 1<sup>st</sup> to 11<sup>th</sup> defendants defence does not to a representative suit.
77. On this issue, the 1<sup>st</sup> to 11<sup>th</sup> defendants submitted that they were sued in their individual capacities and as officials of Buruburu Riverside Self Help Group and having been sued they defended themselves as required by law.
78. The court has referred to paragraph 2 of the plaintiff's amended plaint which stipulated that the 1<sup>st</sup> to 11<sup>th</sup> defendants were sued in their individual capacity as officials of Buruburu Riverside SHG Committee. While it is trite law that the Buruburu Riverside SHG cannot be sued in its names, the plaintiff filed the instant suit as against the 11 defendants in their individual capacity as officials of Buruburu Riverside SHG and as such the 11 defendants had a right to defend themselves. In the circumstances, it is the finding of this court that the defence and counterclaim by the 1<sup>st</sup> to 11<sup>th</sup> defendants is properly before this court and they have locus standi to defend the suit.
79. On whether or not the plaintiff has met the threshold for the claim sought of adverse possession, it is evident that the ingredients of adverse possession which must be proved for a party to succeed were laid out in the case of Tabitha Waittherero Kimani v Joshua Ng'ang'a [2017] eKLR *inter alia*;
- “(A) Open and notorious use, where the adverse party's use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
- (B) Continuous use: which refers to the adverse party must, hold that property continuously for the entire limitations period, and use it as a true owner would for that time.
- (C) Exclusive use: – The adverse party holds the land to the exclusion of the true owner.
80. It is noteworthy that the above discussed ingredients must be met conjunctively and not disjunctively. In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No 122 of 2001, the Court of Appeal delivered the following dictum:
- “...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.”
81. In the instant suit, it was the defendants case that the property known as portion “C” upon which the plaintiff was laying its claim for adverse possession was public land and had no title to the same.



82. Section 37 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya adverse possession would only apply where the land is registered. Section 37(a) provides:-

“ 37. This Act applies to land registered under the *Government Lands Act*, the *Land Titles Act*, or the *Registered land Act*, in the same manner and to the same extent as it applies to land not so registered, except that -

- a. Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished. Such title is not extinguished but is held by the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act.”

83. The doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government. Section 41 of the *Limitation of Actions Act* excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

41. Exclusion of public land

This Act does not –

- (a) enable a person to acquire any title to, or any easement over –
  - i. Government land or land otherwise enjoyed by the Government;
  - ii. Mines or minerals as defined in the *Mining Act* (Cap. 306);
  - iii. Mineral oil as defined in the *Mineral Oil Act* (Cap. 307);
  - iv. Water vested in the Government by the *Water Act* (Cap. 372);
  - v. Land vested in the County Council (other than land vested in it by Section 120(8) of the *Registered Land Act* (Cap. 300)); or
  - vi. Land vested in the Trustees of the National Parks of Kenya.

84. The plaintiff claimed that portion “C” was alienated land and no longer public land and that the only public land was the riparian reserve. It was also the plaintiff’s case that the suit land was alienated in the year 2002 and that the letters of allotment were issued in favour of the 1<sup>st</sup> to 11<sup>th</sup> defendants by the 12<sup>th</sup> defendant and hence time started running on 14<sup>th</sup> October 2002.



85. In the case of *Wreck Motors Enterprises v The Commissioner of Lands & 4 Others* CA No 71 of 1997 [1997]eKLR the Court of Appeal held;

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

86. It is registration of title that confers rights of ownership to a proprietor of land. A letter of allotment does not confer rights of ownership but is merely a conditional offer of the land to the allottee subject to the allottee satisfying the terms and conditions of the allotment. The allotment can be revoked and/or cancelled before the title to the land is processed and issued in the name of the allottee. It is only after one has adhered to the requirements set out in the Letter of Allotment and is subsequently registered and issued with title that one acquires an absolute and indefeasible proprietary interest in the land. In my view, adverse possession can only run against the title of a registered proprietor.

87. Recently the Supreme Court in the case of *Torino Enterprises Limited v Attorney General* (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) while pronouncing itself on the said issue held as follows;

“So, can an Allotment Letter pass good title? It is settled law that an Allotment Letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In *Dr Joseph N.K. Arap Ng’ok . Justice Moiwo Ole Keiyua & 4 Others* CA 60/1997 [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 Others* HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

“It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all ” [Emphasis added].

The pronouncement in *Gladys Wanjiru and Dr. Joseph N. K. Arap Ng’ok (Supra)* has been echoed in various Environment and Land Court decisions post the 2010 Constitution, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & Another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 Others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.

Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Stand Premium and Ground Rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfilment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an Allotment Letter. In *Peter Wariire Kanyiri v Chrispus Washumbe & 2 Others*, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:

“In the case at hand, in the absence of any title registered in the name of the Plaintiff, the Court is unable to hold that the Plaintiff is the registered proprietor



of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences” [Emphasis Added].”

88. Similarly in the case of *Francis Gitonga Macharia v Muiruri Waitbaka* Civil Appeal No 110 of 1997 [1998]eKLR which was cited with approval in the case of *Titus Kigoro Munyi v Peter Mburu Kimani* Civil Appeal No 28 of 2014 [2015] eKLR the Court of Appeal held that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent.<sup>st</sup> to 11<sup>th</sup> Defendants. It is evident that a mere letter of allotment may not be sufficient to establish adverse possession. Adverse possession requires actual possession and use of the property in a manner that is inconsistent with the true owners’ rights. In the circumstances the 1<sup>st</sup> to 11<sup>th</sup> defendants cannot have acquired any legal interests in the property as a basis upon which the plaintiff’s claim of adverse possession can be sustained. It is not possible to sustain a claim for adverse possession against a person who is not the registered owner of the land and it is the finding of this court that the plaintiff’s claim of adverse possession has not been proved to the required standard.
89. Having evaluated the evidence that was tendered herein during trial, it was evident that the suit parcel known as portion “C” had not title save for letter of allotment purportedly issued to the 1
89. On whether or not the plaintiff is entitled to the relies sought, this court having found that the plaintiff has not proved the claim for adverse possession to the required standard, the same are not for granting and this court will proceed to dismiss the suit.
90. In respect to the counterclaim filed by the 1<sup>st</sup> to 11<sup>th</sup> Defendants, several orders were sought therein. A counterclaim is a suit and it ought to be proven to the required standard just like any other claim.
91. From the evidence that was tendered herein, this court is not satisfied that the 1<sup>st</sup> to 11<sup>th</sup> defendants have proved their counterclaim to the required standard. The 1<sup>st</sup> to 11<sup>th</sup> defendants were unable to prove and demonstrate any legitimate interest in respect to the suit parcel since no title had been issued in respect to the said property. The 1<sup>st</sup> to 11<sup>th</sup> defendants witness, Alexander Waweru who testified as DW1 was not certain on the status and particulars of the land. It was also evident that the 1<sup>st</sup> to 11<sup>th</sup> Defendants are not in occupation of the suit property and as such the orders sought of a permanent injunctive order against the plaintiff cannot be granted and as such the counterclaim fails.
92. On the issue of costs, it is trite law that costs shall follow the events, but it is also noteworthy that this court retains the discretionary rights on award of costs. However, considering the fact that both the plaintiff and the defendants have not been successful in their claim and counterclaim respectively, this court directs each party to bear own costs of the suit and counterclaim.

### **Final Orders**

93. In the end, the suit by the plaintiff and counterclaim by the 1<sup>st</sup> to 11<sup>th</sup> defendants are disposed as follows;
- a. The plaintiff’s suit is dismissed.
  - b. The counterclaim by the 1<sup>st</sup> to 11<sup>th</sup> defendants is dismissed.
  - c. Each party to bear own costs of the suit and counterclaim.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2<sup>ND</sup> DAY OF NOVEMBER 2023.**

**E. K. WABWOTO**

**JUDGE**



In the presence of:

Ms. Mbirwe h/b for Mr. A.G.N. Kamau for the plaintiff.

Mr. Mwangi for the 1<sup>st</sup> to 11<sup>th</sup> defendants.

N/A for the 12<sup>th</sup> defendant.

