



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC 279 OF 2017 – CONSOLIDATED WITH THIKA ELC 212/17

(FORMERLY NAIROBI ELC 110/13 AND NAIROBI ELC 212/17)

SIMON KIBE MWANGI

JOSPEH NDUNGU WAIRIMU

GEORGE KIMANI NGANGA

JOYCE WANJIRU THUO

MARY WAIRIMU MUIRURI

As duly elected officials of Gachagi land committee representing

residents of Gachagi.....PLAINTIFFS

VERSUS

THIKA GARISSA ROAD DEVELOPERS LTD.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE NATIONAL LAND COMMISSION.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

THE COUNTY GOVERNMENT OF KIAMBU.....5TH DEFENDANT

KENNEDY GATHOGO, ROBINSON KINYA GICHOHI,

MICHAEL KAMANDE (sued as the Chairman, Secretary and Vice Chairman respectively

of THIKA MUNICIPALITY BLOCK 31 welfare group).....6TH DEFENDANT

JUDGMENT

History/Background

1. I have one word to describe the dispute herein; **CONVOLUTED**. What with numerous disputes by various parties in various courts for the last 14 years. At the heart of the dispute is an expansive piece of land somewhere in the vicinity of Thika town known as **L.R No. 4953/1855** measuring **15.44 hectares**. The entity known as **THIKA GARISSA ROAD DEVELOPERS** (whom I will refer to as **Thika Garissa group** for ease of reference) acquired proprietorship to this land vide a title where the lease hold interest was to run from 1.8.1991 for a term of 99 years. The land appears to have been subsequently subdivided to give rise to other parcels owned by other parties. Probably in this category is a group of claimants identifying themselves as **THIKA MUNICIPALITY BLOCK 31 WELFARE GROUP** led by their leaders Kennedy Gathogo, Robinson Kinya Gichuhi and Michael Kamande who are chairman, secretary and vice chairman of this group respectively. For ease of reference I will refer to this group as the **Gathogo Group**.

2. Then there is another group of people who claim occupancy of the suit land for decades. They are claiming entitlement to the suit land by

way of Adverse Possession. They identify themselves as **the residents of Gachagi**. Initially the members who were litigating on their behalf were FRANCIS KARATU, GEOFFREY GACHERU and WANJIRU. The representation changed with time and by 26.10.2018, the representatives were Simon Kibe as chairman, Joseph Ndung'u as Secretary, Joyce Wanjiru as Treasurer, Mary Wairimu as women leader and John Kiarie as village elder. I will refer to this group as the **Gachagi group**.

3. The first salvo was thrown by the **Thika Garissa road group** sometime in year 2005 when they filed a suit against the **Gachagi group in Thika C.M.C.C. 1291/2005**. Not so soon thereafter (3-4 years later) in 2008 and 2009, the **Gachagi group** filed two miscellaneous applications in **Nairobi High court case no. 263/09 and 432/09** seeking transfer of the **Thika C.M.C.C. 1291 of 2005** to Nairobi High Court. The transfer was allowed vide a **court order of 19.8.2009** in the **Misc. Application No. 432/09 Nairobi**. On arrival at Nairobi, **Thika CMCC 1291/05** became **H.C.C.C No. 447/09**.

4. The Gachagi group then filed a miscellaneous suit **J.R case No. 21/2010 on 10.4.2010** against the **Thika Garissa group (plaintiffs in H.C.C 447/09)**, where the commissioner of Lands was sued as a second defendant. Their (**Gachagi**) claim was entitlement to the suit land parcel No. **4953/1855** by way of adverse possession. This file was then transferred from the Judicial Review Division on 5.12.2012 to the Environment and Land court Nairobi, where the suit was registered as **Milimani Environment and Land case No. 110/2013** where more defendants were added as Chege Karanja as third defendant, Chief Kamau as 4th defendant and Governor William Kabogo as 5th defendant. Within no time, there were amendments to this Originating Summons where 3rd defendant was dropped and in came the Chief Land Registrar, 4th defendant was replaced by The National Land Commission while 5th defendant was replaced by the County Government of Kiambu.

5. The file **Milimani Environment and Land Case NO. 110/2013** was then transferred from Nairobi to Thika Environment and Land Court (sometime before 14.3.2017) where it became **Thika Environment and Land Case no. 279/17** (the present file).

6. The **Gathogo group** appears to have filed a case of their own **Thika CMCC no. 40/16** against the **Gachagi group**. I am unable to trace fuller particulars of this matter. They then filed **Milimani Environment and Land Case no. 1312/16** which file was on 21.2.2017 also transferred to Thika ELC to become ELC Case No. **212/17**. The **Gathogo group had sued 10 members of the Gachagi group**.

Consolidation

7. After arrival of all these files in Thika Environment and Land Court, consolidation was done. **Thika ELC Case No. 212/17** was consolidated with **Thika ELC Case no. 279/17** on 12.2.2018 with the latter file becoming the lead suit.

8. Consolidation in respect of the **Nairobi HCC 447/09** with **Nairobi JR 21/10** had been done much earlier on 22.2.2011 where it was stated that the operational file was to be JR Case 21/2010. Since **JR 21/10** is the one which became **Milimani Environment and Land Case 110/13**, then I can safely state that all the files are now captured in **Thika ELC Case 279/17**. By then the parties were appearing as follows; The **Gachagi group** were the plaintiffs, while defendants were;

- **Thika Garissa Road Developers LTD...1st defendant.**
- **The Chief-Land Registrar.....2nd defendant.**
- **The National Land Commission.....3rd defendant.**
- **The Honourable Attorney General4th defendant.**
- **The County Government of Kiambu5th defendant.**
- **Kennedy Gathogo, Robinson Kinya Gichohi, Michael Kamande Suing on behalf of Thika municipality BLOCK 31 Welfare group (Gathogo group)..6th defendants.**

Record/Case management

9. The record is in shambles but the court cannot wring its hands in despair. The dispute has to be determined. The pleadings, various orders and other crucial documents in the numerous suits are scattered in the said suits over a long period of time. However, **Article 159 2 (d) of the Constitution** shall come in handy, "**Justice shall be administered without undue regard to procedural technicalities**".

10. When the matter came up for hearing before me on 5.12.2018 the counsels pointed out the documents they were to rely on.

Plaintiff's case (Gachagi Group)-documents

11. Mr. Ngaringa appearing for this group indicated that they would be relying on the originating summons filed on 26.10.2018 and its supporting affidavit, their two lists of documents dated 3.12.2018 and 4.3.2011, and their list of statements of witnesses is dated 3.12.2018 and a supplementary one dated 4.12.2018. He also stated that they would rely on all other affidavits which had been filed for and on behalf of **Gachagi group**.

1st defendant; Thika Garissa Group- documents

12. Miss Wambui holding brief for Mr. Mbaho indicated that they would be relying on a Replying Affidavit dated 10.11.2010, another one of 19.8.2016, their list of documents filed on 11.3.2011 and on 31.7.2015 plus their statement of defence dated 30.7.2015.

2nd, 3rd and 4th defendants'-Documents

13. Miss Kerubo appeared for 2nd and 4th defendants but also held brief for Mahinda for 3rd defendant. She stated that they had no documents to rely on but the land registrar would be called to testify.

Case for 5th defendant

14. The County Government of Kiambu was represented by Miss Sanayet who informed the court that they had no documents to tender before the court.

6th defendant (Gathogo Group) – (plaintiff's in ELC 212/17)

15. There was no appearance for this group. The records of the court indicated that on 29.10.2018 when matter was scheduled for hearing to 5.12.2019, this group was represented by a Mr. Mburu holding brief for Mr. Nzavi. They were therefore aware of the date of hearing of 5.12.2018. The matter therefore proceeded in absence of this group.

The Evidence

Case for the plaintiffs – (Gachagi group)

16. The case for this group was advanced by 3 witnesses namely: **Wathoni wa Mwangi** who testified as **PW 1** and who adopted her statement of 3.12.2018 as her evidence, **Agnes Mwhaki, Pw 2** who adopted her statement of 4.12.2018 as her evidence and **Misheck Kibe Muiruri, Pw 3** who adopted his statement of 3.12.2018 as his evidence. **PW 3** also produced as exhibits the documents in their list filed of 4.3.2011, item 1-21 as plaintiffs' exhibit 1-21 and the list of 3.12.2018 item 1 to 7 as plaintiffs' exhibit 22-28.

17. **PW 1 & 2** are very old ladies. They walked to the witness dock while aided. One of them could hardly stand, let alone walk. Their evidence is the same word for word save the introductory part in paragraph 1 of their respective statements.

18. Their evidence is that they worked at **Anglo French company/Kenya canners Ltd** now **Delmonte company** as laborers in early 1960. All workers of this company whether casual or permanent were housed by this company until sometime in early 1960s when the company made a decision to evict the workers who were not permanently employed.

19. After their eviction from the company, they settled in the nearby bushes and uninhabited lands due to desperation. Around the year **1963/1964**, the company, **Anglo-French/Kenya canners (now Delmonte)** decided to relocate and settle them to **Makenji** area, along Thika-Murang'a road. There they put up a slum like settlement. Soon, they were spotted by the then late **President Jomo Kenyatta** who gave an address to the effect that it was not proper for the group to settle there as that is where foreigners and tourists passed by on their visit to the slopes of Mt. Kenya and he ordered that they (plaintiffs) be settled in a suitable alternative settlement.

20. After that roadside declaration by the then president, the local administrators decided to relocate them to **Mukuru Wa Muru Wa Mugwe** which is the current **Gachagi Village** where most of them could still access the **Anglo French company** for work.

21. At the time of settlement at **Gachagi**, there were around 40 families. The area was clearly demarcated into half acre parcels of land among all those who migrated although the area was then forested and bushy. The group endured hardship, as there were no roads of access or any social amenities. The Thika Garissa Highway as it stands today was constructed long after this group had settled at the **Gachagi village**.

22. **PW1** and **2** further stated that they have lived in the **Gachagi village** all their life since the migration from Makenji around **1964**. Each family occupies about half an acre. They have never been evicted nor has any one laid a claim against their parcels of land. They further stated that most of those that they migrated together with have died, but their children and Grandchildren still live in **Gachagi village** in their specifically demarcated plots of half acres and since demarcation was clear straight forward they never had disputes amongst themselves or with neighbours. They claim that they have been farming and cultivating the parcels of land at **Gachagi** village all these years. They also aver that poverty was and is still prevalent in the village, hence they were not able to follow up on the issue of titles.

23. The witnesses urged the court to order that they get title deeds in respect of the parcels that they occupy. This would make their mind settle down in their last days devoid of all the threats against their occupation by strangers.

24. **PW 3**, one **Mishek Kibe Muiruri** is not in the age group of PW1 and 2. He is a youthful man born at the **Gachagi village** in 1978 as per his testimony. He stays at the homestead of his grandmother where the family lives. He avers that there are no conflicts amongst the Gachagi villagers as each family occupies a clearly demarcated half an acre portion of land.

Case for 1st defendant (Garissa Group)

25. The case for 1st defendant was advanced by one **NELSON NDARU (DW1)** who introduced himself as the secretary of the group. He adopted his statement dated 30.7.2015 as his evidence. He also relied on his affidavit dated 19.8.2016 and that of **Wilson Mburu Muchuku** dated 10.11.2010 and the annexures thereof. He also produced as exhibits documents in their list filed on 11.3.2011, item 1-13 as Defence exhibit 1-13. He further relied on the documents in their list dated 31.7.2015 item 1 -2 as 1st defendant's Exhibit 14 and 15 respectively.

26. He averred that 1st defendant became a grantee of all that parcel of land known and or described as **L.R No. 4953/1855** on 14th June, 1993 acquiring rights, interests and privileges appurtenant thereto. According to this witness, prior to the date aforesaid, the subject land was at all material times government land. Therefore, the plaintiffs statements are false and misleading when they state that they have been in

possession of the suit land since 1964 since the land belonged to the Government of Kenya at the time and that there was no evidence to support the claims of the plaintiffs that the land belonged to **Delmonte (K) Ltd.**

27. He also averred that the plaintiffs could not have acquired the land by adverse possession since they claim to be the bonafide owners through donation of the suit land. He also states that it was only between **January 2001 and 2004** that the plaintiffs devoid of any colour of right trespassed in and settled on the suit land necessitating the 1st defendant to file a suit being **THIKA CMCC no. 1291 of 2005** against the plaintiffs herein seeking for the plaintiffs' eviction from the suit land. The said suit was filed on 7th September 2005 and the plaintiffs filed their defence on 7th October, 2005. On 3rd July 2009 an order was made for the said suit to be transferred for hearing and determination before the High court. That the plaintiffs rather than having the said suit heard went on to file an Originating Summons on 5th June, 2009 and another one on 1st April, 2010 seeking to be declared proprietors thereto by adverse possession which 1st defendant terms as an abuse of the court process. He also averred that the 1st defendant acquired rights and interest in the subject matter on 14th June 1993 hence the plaintiffs cannot be heard to have lived on the suit land for more than 40 years as is spuriously alleged by the plaintiffs and that the 1st defendant has the grant hence it was only fair and just that the plaintiffs be evicted from the suit land. **DW1** termed the plaintiffs claim as baseless and unmeritorious and it should thus be dismissed with costs to the 1st defendant.

28. **DW 1** has further averred that they did file the 2005 suit for eviction in respect of just a small area which had been taken by some people. He contends that they have since subdivided the land amongst their members. The Garissa group also sold a portion of land in form of **250 plots** as **Block 31** to 6th defendant (**Gathogo group**). **DW1** stated that they are the ones who have been in occupation of the land.

Case for 2nd, 3rd and 4th defendants

29. The current Thika Land Registrar one Bernard Kipkemoi Leitich is the one who testified for these defendants. He averred that he had records of **Thika Municipality Block 31** starting from plot no. **1 to 375**. He also testified that in plaintiffs list of 3.12.2018 item no. 2, it was a certificate of lease and they had it in their records for plot no. 142 in the name of Joseph Nganga Murega issued on 8.1.2013. He also testified that he brought along a certified copy of the register containing documents which he produced as follows;

- (i) A white card for plot no. 142 which is their exhibits 1.
- (ii) A certificate of lease for plot no. 153 in the name of Joseph Nganga Murega issued on 8.1.2013 – white card is exhibit no. 2.
- (iii) Certificate of lease for parcel no. 132 in the name of Peter John Mwangi, Joseph Nganga Murega and Elizabeth Njeri Mwangi as trustees of Kanda Warile investments issued on 13.7.2001- the white card being exhibit 3.
- (iv) Certificate of lease for plot no. 230 in the name of Kennedy Gathogo Karuru issued on 8.12.2015- white card is exhibit no. 4.

30. The Land Registrar further testified that in plaintiff's list 3.12.2018, item no. 1 shows that the headquarter had active records. He testified that in case of change of user or conversion, the records in the headquarter had to be closed giving way to opening of records in the district registries but parallel records in two registries cannot be maintained. He went on to say that one of the lease was a surrender which ought to have been noted at the headquarters, since, if there was a surrender there, should be no records in Nairobi headquarters.

Case for 6th defendant

31. No evidence was tendered for the Gathogo group as they did not appear on date of hearing.

Submissions

Plaintiffs' submissions

32. Plaintiffs have submitted that they are entitled to the land parcel no. **4953/1855** by way of adverse possession since they settled on the suit land in **1964** thus they have been in occupation of the land for a period of over **46** years. It is also submitted that plaintiffs have built permanent structures on their specific demarcated portions. It is also averred that pursuant to **section 7 of the Limitation of Actions Act**, the law relating to prescription affects not only present holders of the title but their predecessors too. On this point, plaintiffs proffered the case of **Kairu vs Kuria Gacheru (1988) 2KLR 111**

33. Plaintiffs aver that they have met all the conditions set out in law for acquisition of land by adverse possession, and they have relied on **Bramwell L J in Leigh vs Jack (1879) 5 EX D 264, 272** where in reference to the statute of limitation, it was stated that ;

“Two things appear to be contemplated by that enactment; dispossession and discontinuance of possession. If this is the right way to approach the problem, the question becomes, has the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period? Rather than, has the claimant proved that he has (through himself or others on whose possession he can rely) been in possession for the requisite number of years”. It certainly makes it easier to understand the authorities if one adopts the first formulation”.

34. So, what constitutes dispossession of the proprietor? Again, plaintiffs have made reference to **Bramwell L J in Leigh vs Jack** at 273 where it was stated that ;

“To defeat a title by dispossessing the former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it...”

35. Other authorities cited by the plaintiff in support of their claim of adverse possession include- **Chevron (K) Ltd vs Harrison Charo Wa shutu (2016) eKLR**, where the judges when analyzing salient features of adverse possession had this to say;

“..We are equally satisfied from the evidence that by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant’s rights. The appellant was, as such dispossessed of the suit premises by those acts. The respondent’s acts were *nec vi nec clam, nec precario* (that is neither by force nor secretly and without persuasion)”.

36. **Adnam vs Earl of sandwich (1877) 2QB 485**, where the following passage was quoted;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties”.

37. **Francis Kanyori Mahiu vs Salim Manji (2018) eKLR (Thika ELC No. 557 of 2017)** where Lady Justice Gacheru had this to say in a similar case;

“..... There is undisputed evidence that the applicant has been in uninterrupted occupation of the suit property since 1999. There is also undisputed evidence that the applicant has erected a permanent structure on the suit land where he lives therein to date with his family. That action of the applicant has dispossessed and discontinued the rightful owner’s possession of the said suit property. Therefore the court finds that the applicant herein has met the elements of adverse possession....”.

38. Plaintiffs submit that the facts in ***Francis Kanyori*** only differ with this case to the extent that the occupation of the plaintiffs herein has been there since 1964, more than half a century, and that such occupation was without any interruption. The plaintiffs contend that they were still in occupation of the suit land by the time defendants were acquiring the titles and that such acquisition was not in any way a fact of dispossession.

39. Plaintiffs aver that the first title was registered in 1991 and therefore by the year 2003, the title to the suit land had been adversely acquired by the plaintiffs who had been on that land since 1964.

40. Plaintiffs have also commented on the concept of adverse possession in respect of leasehold interests on account of the fact that the grant issued to 1st defendant was a leasehold title for 99 years. Reference has been made to the case of **Saka Developers Limited vs Mary Aoko Omondi (2018) eKLR (Eldoret ELC 259 of 2015)**, where the court had an occasion to address the issue of adverse possession in respect of leases, where it was held that;

“.....in a nut shell, the limitation of actions Act applies to the land that was previously managed under the Government Lands Act cap 280 Laws of Kenya (repealed) and registered under the registered Lands Act cap 300 Laws of Kenya (repealed). The only exception is public land under section 41 of the act. The attorney General has no sufficient interest in this property in any manner whatsoever as the same is not public land due to the fact that it has already been alienated as private land and a lease issued to the plaintiff. When the lease expires, the same will revert to the state. The subject matter is a leasehold interest in which the defendant has already acquired prescriptive rights of the unexpired period....”

41. Plaintiffs aver that in essence they have acquired the land for the unexpired period of the lease as the land has already been alienated for private use and is no longer public land.

42. The plaintiffs further submit that they are honest litigants who have pursued their cause for decades. They are fully settled and in possession of the suit land. A finding to the contrary would lead to disastrous consequences a kin to displacing a whole population. As such the orders sought are justly deserved, and prayed with humility that they be granted.

43. The prayers sought by the plaintiffs in their submissions are;

(i) A declaration that the plaintiffs have been in continuous and uninterrupted occupation of the suit property for more than 12 years.

(ii) A declaration that the plaintiffs have acquired prescriptive rights to the entire suit property being land parcel number 4953/1855.

(iii) An order that the leases issued by the 5th defendant to third parties and any other such leases purportedly issued to members of the 6th defendant over the land parcel number 4953/1855 are illegal, null and void and have no force of law and stands revoked.

(iv) An order that the plaintiffs are entitled to be registered as owners and or proprietors of the portion of land number

4953/1855.

(v) An order directing the 2nd and 3rd defendants to issue title document in favour of the plaintiffs in respect of parcel of land number L.R 4953/1855.

(vi) An order restraining all the defendants either by themselves, their agents, stooges, servants, officers and or any other persons and or authority connected herewith from trespassing, encroaching, selling, transferring, alienating or in any other manner interfering with land parcel number 4953/1855.

(vii) Costs of the suit.

Submissions of 1st defendant

44. 1st defendant has submitted that prior to it becoming the registered owner of the suit land, the said land belonged to the Government of Kenya until 12.6.1991, when 1st defendant was issued with a letter of allotment. Then on 14.6 1993, 1st defendant was issued with the grant. The suit land was thereafter subdivided with approval from commissioner of lands.

45. On or around 2001 – 2004, plaintiff's encroached on the land prompting the 1st defendant to file a suit for eviction in **Thika Civil Suit no, 1291 of 2005**.

46. 1st defendant has submitted that plaintiffs have not met the criteria of an adverse possessor. That plaintiffs' claim cannot be sustained since the latter claims to have occupied the suit land in 1964, yet the **Limitations of Actions Act** came into force in 1967.

47. 1st defendant contends that plaintiffs have not been in exclusive possession of the suit land openly without interruption for a period of 12 years. The 1st defendant became the registered owner as at 14th June 1993 and filed an eviction suit in 2005. The plaintiff's encroached the suit property between 2001 and 2004. In regards to the said timelines 12 years had not accumulated.

48. It has also been submitted that plaintiffs produced a list of allottees of Gachagi village (plaintiff exhibit 10) whereby none of the plaintiffs or their witnesses before court are members. The 1st defendant therefore wonders as to who these plaintiffs are and what claim do they have on the suit property.

49. Reference was made to the evidence of PW 3, that the 1st defendant and the agents of the 5th defendant have been interrupting their stay at the suit property. The 1st defendant therefore contends that plaintiff's claim for adverse possession must fail.

50. It has also been submitted that Kenya Cannery Ltd vide their memo dated 7th June 2001 disowned the suit land, hence plaintiffs claim that the land was donated to them by Kenya Cannery Ltd in year 1964 is unfounded.

51. The 1st defendant have cited the Supreme Court of India case of **Karnataka Board of Wakf. Vs Government of India & Others (2004) 10 SCC 799** where the requirements of adverse possession were stipulated as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, and hostile and continued over the statutory period”.

52. The 1st defendant have also proffered the case of **Kasuve Vs Mwaani Investment Limited and 4 Others (2004) IKLR**, where the Court of Appeal in its dictum stated that;

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

53. Further, the case of **Kimani Ruchite Vs Swift Rutherfords & CO. LTD 1980 KLR 10** has been cited where at page 16 letter B, Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right; nec vi, nec clam, nec precario (no force, no secrecy, no persuasion) so the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration”.

54. The 1st defendant has also invoked provisions of **Section 26 of the Land Registration Act** which stipulates that;

“The certificate of title shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except;

- On the ground of fraud or misrepresentation to which the person is proved to be a party, or

- Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”.

55. The 1st defendant contends that it acquired title to the suit land after due process was followed. No illegal acts were committed for acquisition of the said grant and no fraud has been proved. 1st Defendants argues that the plaintiffs herein are trespassers and are occupying the suit property illegally.

56. **The 1st defendant has urged the court to dismiss the plaintiff’s originating summons with costs to the 1st defendant and enter judgment in favour of the 1st defendant by issuing an eviction order against the plaintiffs and a permanent injunction restraining the plaintiffs their agents, servants and residents from entering or interfering with land reference number 4953/1855.**

Submissions of 2nd and 4th defendant

57. These defendant have framed the issues for determination as follows:

(a) who is the legal and rightful owner of the suit parcel

(b) Whether the occupation of the suit land by the plaintiffs amounted to adverse possession.

Who is the legal and rightful owner of the suit parcel?

58. It is submitted that the grant for land reference number **L.R No. 4953/1855** is registered in the name of the 1st defendant. DW 2 produced copies of white cards showing that THIKA MUNICIPALITY BLOCK 31 is registered in the names of individual members of the 6th defendant. It is however important to note that the issue of who is the registered owner is not in contention in this suit as the 1st defendant and the 6th defendant have not brought this issue for determination before this Court in the present suit.

Whether the occupation of suit land by the plaintiff’s amounted to adverse possession.

59. It has been submitted that plaintiffs did not adduce any evidence to show that they were allocated the land by Delmonte Ltd or that this company ever owned the suit land. And even if Delmonte Ltd were to prove that they were allocated the suit parcel, they did not have powers to donate/allocate it to anyone as the Commissioner of lands was the only officer mandated to allocate leasehold land.

60. These defendants also submitted that at the time the plaintiffs were entering into the suit land, the same was an un-alienated Government land under the **Registration of Titles Act** (now repealed) and the doctrine of adverse possession cannot therefore apply.

61. To buttress this point, reference has been made to the case of **Sammy Mwangangi & 10 others vs Commissioner of lands & 3 others (2018) eKLR**, where the plaintiffs were claiming adverse possession over land that they had entered in the year 1923, and the same land was later allocated to someone else in the year 1995. The Court of Appeal held that:-

“It is necessary to state that at the time when the suit was filed, the land claimed by dint of adverse possession had been registered under the Registration of titles Act (repealed). We reiterate that if the land is registered in favour of the Government the doctrine of adverse possession would not apply to it and the claim would fail.

62. Reference has also been made to **Section 41** of the **Limitation of Actions Act, cap 22** which provides that:-

“Exclusion of public land; this act does not – enable a person to acquire any title or any easement over – government land or land otherwise enjoyed by the government;

63. The 2nd and 4th defendant desire that plaintiffs claim be dismissed with costs.

Submissions by 3rd defendant

64. The issues for determination as framed by 3rd defendant are:

(a) Whether the plaintiffs have acquired L.R No. 4953/1855 by way of adverse possession

(b) Whether the orders sought should be granted

Whether the plaintiffs have acquired LR No. 4953/1855 by doctrine of adverse possession

65. The 3rd defendant has submitted that for adverse possession to mature into title to land, the following conditions must be fulfilled:

- (a) The trespasser has to demonstrate that he/she has been in continuous and uninterrupted possession without the consent of the owner of the land.
- (b) The trespassers interest has to be inconsistent to the interests of the true owner of the land.
- (c) The possession has to be open and notorious, to enable the owner be on notice that there is a trespasser on his/her land;
- (d) The possession has to be actual to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of limitation to claim back the land.
- (e) The possession has to be exclusive, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.
- (f) The period of open continuous, notorious and uninterrupted possession has to be at least twelve years.
- (g) The claimant has to prove they did not have permission to enter into the suit land.

66. It is submitted by the 3rd defendant that plaintiffs cannot assert the principle of adverse possession because their entry to the suit land was with consent and permission of Delmonte (K) Limited.

67. The 3rd defendant has relied on the case of **Kweyu vs Omutut (1990) KLR 709**, Court of Appeal, where Gicheru JA as he then was stated as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted notorious exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor....”

68. Still on the aspect of permission, the 3rd defendant has relied on the case of **Samuel Miki Waweru Versus Jane Njeri Richu, C.A NO. 122 OF 2011 (UR)** which was quoted with approval in the case of **Wambugu versus Njuguna (1983) KLR 172** where the court opined as follows:

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise”.

69. Further, the 3rd defendant has stated that the high court correctly held in **Jandu Versus Kilipal (1975) EA 222** that possession does not become adverse before the end of the period for which permission to occupy has been given.

70. The 3rd defendant further contends that the suit land **LR no. 4953/1855** is a leasehold title. The same is government land and it therefore falls under **Section 41 (a) (1) of the Limitations of Actions Act**, which expressly prohibits anyone from claiming adverse possession of land owned by government or and which is otherwise enjoyed by government. No claim of adverse possession can therefore be advanced by the plaintiffs as the land in question is government land.

71. The 3rd defendant further submits that the burden of proving adverse possession is on the plaintiff. On this point, the cases of **Kirugi & Another Versus Kabiya & 3 Others (1987) KLR 347** and **Gabriel Mbui Versus Mukindia Muranya eKLR** have been proffered to buttress this point.

72. The 3rd defendant avers that it is rather absurd that the plaintiffs claim to have been in possession of the suit land from 1964 to date, yet they have in fact never moved to court until recently to claim the suit land by adverse possession. If the plaintiffs were keen on advancing their claim, they would have moved to court with utmost urgency.

Whether the orders sought should be granted

73. The 3rd defendants have submitted that plaintiffs have not proved their case on a balance of probabilities and hence the orders sought herein should not be granted. They argue that the present application was in bad light and aimed solely at dragging the 3rd defendant through needless litigation on frivolous, vexatious and scandalous grounds, and hence, plaintiff's case should be dismissed with costs.

Submissions of 5th defendant

74. The 5th defendant, the county government of Kiambu submits that they were never served with the original originating summons nor were they served with summons to enter appearance as party to the above suit. They only came into the picture when they were served with an amended Originating summons dated 27th October 2017 and a supporting affidavit of similar date. Both of which were received by the Defendant on 14th May 2018 prompting the Defendant to seek representation and enter appearance. Further all supporting documents filed in court by the Plaintiff were served upon the Defendant on 3rd December 2018.

75. The 5th defendant has framed one issue for determination; **Whether the Defendant has the right to lease the said property?**

76. The 5th defendant has cited **Section 7** of the **Land Act** as the basis of land acquisition, where the methods of such acquisition of title to land includes: (a) allocation; (b) land adjudication process; (c) compulsory acquisition; (d) prescription; (e) settlement programs; (f) transmissions; (g) transfers; (h) long term leases exceeding twenty one years created out of private land; or (i) any other manner prescribed in an Act of Parliament.

77. The 5th Defendant claims that it has the function to allocate public land to individuals who follow the due process. i.e, for Public land, the same is allocated by way of public auction to the highest bidder. The 5th defendant avers that plaintiffs have never approached the 5th defendant or the land registry either to pay land rates and rent and or to acquire titles to the suit land.

78. The 5th defendant submits that allocation of the suit property was done in accordance with the available legal mechanisms, and that the occupation of the said land by the Plaintiffs was not recorded or made aware to the Defendants.

79. The 5th defendant has urged the court to dismiss the case of the Gachagi group with costs to the Defendants.

Determination

80. I frame the issues for determination as follows:

(1) Whether the claimants in ELC 279/17 (Gachagi Group) are entitled to the suit land L.R No. 4953/1855 or its subdivisions thereof by way of adverse possession.

(2) Whether the claimants in the suit Thika CMCC No.1291/2005 (Thika Garissa group) are entitled to orders of eviction of the Gachagi group members.

(3) What orders should be given.

Adverse possession

81. I find that all the parties herein appear to be in agreement as regards the applicable law in adverse possession claims. That a party claiming land through adverse possession must prove that his possession is *nec vi, nec clam, nec precario* (it is peaceful open and continuous). The claimant must prove that the possession of the land was without permission of the owner.

82. Prescriptive rights are anchored under section 17 of the Limitation of Actions Act where it is provided that;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

83. Going by the first suit, **Thika C.M.C.C No. 1291/2005**, it cannot be in dispute that the Gachagi group was in occupation of the suit land since the prayer there in by the **Thika Garissa group** was for the eviction of the **Gachagi group**. Further, **DW1**, while being cross examined by advocate for the plaintiff had stated that their group did not want to mix with the plaintiffs as that could cause chaos. It follows that by the time the suit no **Thika C.M.C.C 1291 of 2005** was being filed, the people who were in occupation of the suit land were the Gachagi group. The question is, **how and when did the plaintiffs (Gachagi group) enter the suit land?** To answer this question, the court will examine the element of **Consent, when did the plaintiffs enter the suit land? the statutory period of prescriptive rights, occupation and animus possindendi.**

Consent/Permission

84. Plaintiffs have submitted that they have been on this land since **1964**. **PW 1 & 2** are two old women, who have given an account of how they settled on this land in 1964. They were apparently relocated to a place called **Makenji** in **1963-1964** by the **Anglo French Kenya Company** called **Kenya cannors (now Delmonte)** after they were evicted by the company in 1960's. Then after the president declared that their settlement in **Makenji** would hurt tourism industry, they were relocated to the suit land (known as **Mukuru wa muru wa mugwe**) by the local administration. This is where the 40 families settled, each occupying half an acre of land.

85. In their pleadings, the **Gachagi group** avers that the suit land was allocated to them in 1964 by the then **Anglo French Sisal company** which later became **Kenya Cannors** and is now known as **Delmonte** as a token of appreciation. This averment is contained in both the Originating Summons and in their defence to the **Thika CMCC 1291 of 2005** case.

86. Plaintiff exhibit 15 is a letter dated 20.3.2001 written by Hon. Stephen Ndicho the then member of parliament for Juja Constituency to the **CEO Delmonte (K) Ltd** and I deem it necessary to extract some of the contents therein.

“RE: REQUEST FOR DECLARATION OF OWNERSHIP/TITLE HOLDER OF LAND NEXT TO LEATHER INDUSTRIES OF KENYA

I am kindly requesting and praying for your declaration that it was Delmonte K. Ltd the former Kenya cannors Ltd that indeed

donated the above referred parcel of land locally known as Gachagi as a token of appreciation to your former employees”.

87. If indeed it is the **Kenya Cannery/Delmonte** which had given out the land in **1964**, there would have been no need for the company to be beseeched to make this declaration? Furthermore, there is no document indicating that this land ever belonged to **Delmonte Company** or its predecessor, **Kenya Cannery**. It cannot therefore be said that the Gachagi group had permission from **Kenya Cannery, Delmonte** or anyone else to occupy the suit land.

When did the Gachagi group occupy the suit land?

88. The 1st defendant has stated that this group came onto the land from 2001. However, there are telltale signs that the **Gachagi village** had existed long before this time. First, I had an opportunity of seeing the two very elderly ladies who testified as **PW1 and 2**. Pw1 could not recall when they entered that land, but it was after independence of the Republic of Kenya. According to her, all their children were born on that land. The three plaintiffs’ witnesses aver that they have always been on that land. The paper trail availed by the plaintiffs appear to corroborate this claim. For instance, **plaintiff’s exhibit 2 is a list of the land less people** at Kenya Cannery plantation and **Pw1’s name** is there as number 8 in the **Sasa Camp**. This document is dated **13.10.1969**. Again PW1’s name is in the **two lists of the landless people from Maendeleo, Hospital and Sasa Camps** where she is number 26 and number 9. This document is dated **13.3.1970** and is plaintiff Exhibit 3. Still PW1 is number 9 in the list of **helpless squatters** (plaintiff exhibit 8) which document bears the date of **1974**. I must point out that in these lists, the name of Mwihi Kibe too is included, though it has not been clarified as to whether that Mwihi is the same person as Agnes Mwihi, PW2.

89. The letter by the MP, Mr. Ndicho (P-exhibit 15), was written on 20.3.2001, concerning the plight of the plaintiffs, where the MP was stating that the suit land was locally known as **“Gachagi”**. This means that the village was already in existence before 2001. I am inclined to believe that the **Gachagi group** had been in occupation of the suit land long before the issuance of the lease certificate to 1st defendant.

90. In the plaint in **Thika CMCC No. 1291/2005**, the **Thika Garissa Group** has indicated in paragraph 4 that on diverse dates between January 2001 – 2004 the defendants (Gachagi group) who were not members of plaintiffs company trespassed on the land reference No. **4953/1855.....**. The defence filed by the **Gachagi group** was to the effect that they had lived on that land since they were born to date with their parents (now deceased) who acquired the land from Delmonte Ltd. Thus it can be seen that even in their pleadings, the Gachagi are consistent in their claim that they had been in occupation of the suit land for a very long time, long before the 1st defendant came into the picture in the 1990s.

The statutory period for Prescriptive rights

91. Pursuant to provisions of **section 37 of the Law of Limitation of Actions Act**, the claim for adverse possession runs in respect of land registered under the acts mentioned there in.

92. The plaintiffs have submitted that adverse possession can be claimed on leasehold interest – see **Salka Developers Limited vs Mary Aoko Omandi (supra)** and as such they in essence acquired the land for the unexpired period of the lease on the land already alienated for private use and is no longer public land.

93. The leasehold interest in the suit land came to be in 1991 (**from 1.8.1991**) going by 1st defendant exhibit 3 (**the grant**). This appears to be the time when the land was registered under the **Registration of Titles Act**. The land was therefore public land before this period and hence not available to be claimed under adverse possession.

94. In the case of **Kweyu vs Omutut (1990) KLR 709, the court of appeal – Gicheru JA** opined as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous....” The question is what was the colour of right that triggered the counting of time for adverse possession? None can be stated with certainty before 1991.

95. In the case of **Chevron (K) Ltd (formerly known as Caltex oil Kenya Ltd vs Harrison Charo wa Shutu Court of appeal Malindi Civil Appeal No. 17/2016** the court stated that;

“It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. Until 1994, the property was government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory period of 12 years as there cannot be a claim of adverse possession against public land..... the relevant period would therefore be between 1994, the date of registration of the appellant as the proprietor”.

96. The issue of registration was again emphasized in **Titus Kigaro Munyi vs Peter Mburu Kimani Court of Appeal Civil appeal No. 28/2014 Nyeri** where the court made reference to its own decision in **Francis Gitonga Macharia vs Muiruri Waitthaka Civil Appeal No. 110 of 1997** where it was stated that;

“Limitation period for purposes of adverse possession only starts arising after registration of the land in the name of the respondentAny man who buys land without knowing who is in possession of it risks his title just as he does if he fails to inspect his land for twelve years after he has acquired it”.

97. The 1st defendant contends that it bought the suit land in **March 1993** and the grant was thereafter issued on 14.6.1993. Thus according to 1st defendant time in any event can only run from **4.6.1993** and therefore plaintiffs claim would not have matured by **2005** when the **Thika**

C.M.C.C. 1291 of 2005 suit was filed.

98. The question as to whether a claimant can ONLY claim adverse possession in respect of registered land was dealt with in the case of **Benson Mukuwa Wachira vs. Assumption sisters of Nairobi Registered Trustees, Nairobi Court of Appeal Civil Appeal No. 121 of 2006**, where reference was made to the trial court's findings as follows;

“The learned trial judge delivered himself as following –

I have considered whether the word registered, as used in S.38 of the Limitation of Actions Act (Cap 22) is to be taken literally. Registration of title to land, as I have already noted herein, is the culmination of governmental processes which ascribe ownership of a parcel of land to a particular individual - and those processes may entail allotment, surveying and the registration. The term “registration” is not recurrent in the common law literature, but it is in use in Kenyan statute law, in a country in which, I would take judicial notice, there also exist unofficial, customary tenures. If the term “registration” were not used in Kenyan law relating to adverse possession, then it is conceivable, I believe, that one could claim adverse possession in relation to obsolescent traditional tenures, and this would entail complications of public policy and of law enforcement. This perception leads me to conclude that the term “owner of land”, as it would appropriately apply in Kenyan law, would refer to a person who either already bears a final paper title, or a process document secured by law and leading to the issuance of the final paper title. I would adopt this wider interpretation of the statute law, as I believe it will accommodate certain adverse possession situations of merit”. (Emphasize added)

99. In the present case, the leasehold interest was to run from 1.8.1991, which is the date of registration of the suit land. Thus after the government allocated the land to 1st defendant through the leasehold interest, the government divested itself of interest in the suit land and 1st defendant therefore became the owner of that land. Time therefore started to run from **1.8.1991**. It follows that by the time the **Thika CMCC No. 1291 of 2005** was filed on **7.9.2005**, the statutory period of **12 years** had already matured on **1.8.2003**. The suit by the 1st defendant did not interrupt the relevant period of prescriptive rights.

Occupation

100. Who is in occupation of the suit land? Going by the **Thika CMCC suit no 1291 of 2005**, the Gachagi group was in control and occupation of the suit land since the prayers therein was for their eviction. After the filing of that suit, there is no evidence to indicate that the Gachagi group ever left the suit land. Further, plaintiffs have availed photographs of the area showing the nature of occupation of the suit land. Plaintiffs have built their dwelling houses thereon. The place has an appearance of a slum settlement. The 1st defendant on the other hand has never taken over possession of the suit premises. In the circumstances, I do find that the Gachagi group is the one in control of the suit premises.

Animus possidendi

101. Sir **Robert Megarry and Sir William Wade** (**The Law of Real Property, 6th Ed**) have defined “**Animus Possidendi**” to mean “**an intention for the time being to possess the land to the exclusion of all other persons, including the owner with the paper title**”. The intention to possess must be manifestly clear, so that it is apparent that the squatter was not merely a persistent trespasser, but was seeking to dispossess the true owner of the land. In the present dispute, it is clear that the intention of the Gachagi group has always been to possess the suit land to the exclusion of the owners of the land.

102. From the foregoing analysis, I am satisfied that the Gachagi group (plaintiffs in Thika ELC 279/17) have met the criteria required to succeed in a claim of adverse possession.

Eviction

103. There is no doubts that first defendant was the registered owner of land no.4955/1855. The suit filed by 1st defendant in **Thika CMCC no.1291 of 2005** however came late in the day as the **Gachagi group** had already become entitled to the suit land by adverse possession. As such, the prayer for eviction fails.

104. Final orders:

- 1) A declaration is hereby issued that the plaintiffs (Gachagi group) have acquired prescriptive rights to the entire suit property being land parcel number 4953/1855.**
- 2) An order is hereby issued to the effect that the lease(s) issued to 1st defendant and any other such leases purportedly issued to third parties or to members of the 6th defendant over the land parcel number 4953/1855 are hereby cancelled.**
- 3) An order is hereby issued to the effect that the plaintiffs are entitled to be registered as proprietors of the suit land number 4953/1855, for the remainder of the leasehold interest.**
- 4) An order is hereby issued directing the 2nd defendant to issue leasehold title documents in favour of the plaintiffs (Gachagi Group) in respect of parcel of land number L.R 4953/1855, whereby this parcel is to be subdivided amongst the members of this group.**

5) An order is hereby issued restraining all the defendants either by themselves, their agents, servants, officers and or any other persons and or authority connected herewith from trespassing, encroaching, selling, transferring, alienating or in any other manner interfering with land parcel number 4953/1855.

6) As to costs, the court has taken into account the treacherous litigation odyssey that the parties have undertaken. The court has also considered that the registered owners of the land have lost their rights and interests in the land due to the doctrine of prescriptive rights. It would be unfair to condemn such parties to pay costs. I therefore direct that each party bears their own costs of the suit (s).

Dated, signed and delivered at Thika this 2nd day of May, 2019.

MBUGUA LUCY

JUDGE

2/5/2019

In the presence of

Court Assistant: Diana

Ishmael Counsel for Plaintiff

M/s Wambui H/B for Mboha Counsel for 1st Defendant

M/s Ndundu H/B for M/s Kerubo Counsel for 2nd 3rd & 4th Defendant

1st Plaintiff

2nd Plaintiff

3rd Plaintiff

4th Plaintiff

5th Plaintiff