



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 968 OF 2007 (O.S)**

**(FORMERLY HCCC NO. 143 OF 2003)**

**PAUL NDUNGU KARIUKI.....1<sup>ST</sup> PLAINTIFF**

**JOHN NGANGA KARIUKI.....2<sup>ND</sup> PLAINTIFF**

**CLEMENT MWAURA KARIUKI.....3<sup>RD</sup> PLAINTIFF**

**DAVID MURIURI KARIUKI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**TERESIA WAITHERA WAINAINA.....1<sup>ST</sup> DEFENDANT**

**FRANCIS MUIGAI WAINAINA.....2<sup>ND</sup> DEFENDANT**

**(Sued as Personal Representatives of Wainaina Kariuki, Deceased)**

**JUDGMENT**

**Background:**

The plaintiffs are brothers. The 1<sup>st</sup> defendant is the widow of Wainaina Kariuki also known as Joseph Wainaina Kariuki, deceased (hereinafter referred to only as “the deceased” where the context so permits). The deceased was a brother to the plaintiffs. The 2<sup>nd</sup> defendant is a son of the 1<sup>st</sup> defendant and the deceased. The plaintiffs and the deceased are the sons of Margaret Muthoni and Kariuki, both deceased. Kariuki died before 1958 while Margaret Muthoni died in 1989. The deceased died on 9<sup>th</sup> April, 1992 and the defendants were appointed as his legal representatives on 24<sup>th</sup> December, 1996. The 3<sup>rd</sup> plaintiff died on 17<sup>th</sup> May, 2006 and his widow, Rose Wairimu Mwaura was appointed as his legal representative on 19<sup>th</sup> July, 2007. The plaintiffs, their deceased mother, deceased brothers and their families lived together for several years on all that parcel of land known as Dagoretti/Ruthimitu/T.194 measuring 0.15 acres (hereinafter referred to only as “the suit property”). The suit property is and was at all material times registered in the name of Wainaina Kariuki (“the deceased”) as the owner thereof. Between 1995 and 1997, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs vacated the suit property voluntarily leaving the 1<sup>st</sup> defendant and the 3<sup>rd</sup> plaintiff as the only occupants of the property.

**The plaintiffs’ case:**

The plaintiffs brought this suit through an Originating Summons dated 16<sup>th</sup> January, 2003 filed in court on 17<sup>th</sup> February, 2003 seeking the determination of the following questions;

- a) Whether the 1<sup>st</sup> plaintiff had occupied 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres continuously, openly and as of right for more than 12 years;1958 to 1995 (37years) and was therefore entitled to the same by adverse possession.
- b) Whether the 2<sup>nd</sup> plaintiff had occupied 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres continuously, openly and as of right for more than 12 years;1958 to 1995(37years) and was therefore entitled to the same by adverse possession.
- c) Whether the 3<sup>rd</sup> plaintiff had occupied 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres continuously, openly and as of right for more than 12 years;1958 to the date of filing suit (44years) and was therefore entitled to the same by adverse possession.

d) Whether the 4<sup>th</sup> plaintiff had occupied 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres continuously, openly and as of right for more than 12 years; 1958 to 1997 (39 years) and was therefore entitled to the same by adverse possession.

e) Whether the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the administrators of the estate of Joseph Wainaina Kariuki (“the deceased”), the registered owner of the suit property held;

i. 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres in trust for the 1<sup>st</sup> plaintiff under section 37 of the Limitations of Actions Act, Chapter 22 Laws of Kenya and whether that portion should be registered in the name of the 1<sup>st</sup> plaintiff.

ii. 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres in trust for the 2<sup>nd</sup> plaintiff under section 37 of the Limitations of Actions Act, Chapter 22 Laws of Kenya and whether that portion should be registered in the name of the 2<sup>nd</sup> plaintiff.

iii. 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres in trust for the 3<sup>rd</sup> plaintiff under section 37 of the Limitations of Actions Act, Chapter 22 Laws of Kenya and whether that portion should be registered in the name of the 3<sup>rd</sup> plaintiff.

iv. 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres in trust for the 4<sup>th</sup> plaintiff under section 37 of the Limitations of Actions Act, Chapter 22 Laws of Kenya and whether that portion should be registered in the name of the 4<sup>th</sup> plaintiff.

v. Who should pay the costs of the suit?

The Originating Summons was brought on the grounds set out on the face thereof and on separate supporting affidavits sworn by the plaintiffs on 16<sup>th</sup> January, 2003. In his affidavit, the 1<sup>st</sup> plaintiff stated as follows: He had lived on 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres as of right, continuously and without interruption for 37 years from 1959. During his occupation of that portion of the suit property, he constructed a three roomed mud house with iron sheet roof. He also planted two fruit trees namely, *Murubaine* and *Mubera*. He contended that he had acquired title to the said portion of the suit property under sections 37 and 38 of the Limitation of Actions Act. He urged the court to compel the defendants who were the personal representatives of the deceased Wainaina Kariuki who held the said portion of the suit property in trust for him to transfer the same to him.

In his affidavit, the 2<sup>nd</sup> plaintiff stated as follows: He had lived on 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres as of right, continuously and without interruption for 36 years from 1959. During his occupation of that portion of the suit property, he constructed a three roomed timber house with iron sheet roof in which he lived with his family. He also installed electricity in the premises. He contended that he had acquired title to the said portion of the suit property by adverse possession and that the defendants who were the personal representatives of Wainaina Kariuki held the said portion of the suit property in trust for him and should transfer the same to him.

In his affidavit, the 3<sup>rd</sup> plaintiff stated as follows: He had lived on 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres as of right, continuously and without interruption for 44 years from 1959. During his occupation of that portion of the suit property, he constructed a three roomed timber house with iron sheet roof where he lived with his family. He also planted beans, maize, potatoes and bananas. In addition, he was also rearing chicken and goats on the said portion of the suit property. He contended that he had acquired title to the said portion of the suit property by adverse possession and that the defendants who were the personal representatives of Wainaina Kariuki held the said portion of the suit property in trust for him and should transfer the same to him.

In his affidavit, the 4<sup>th</sup> plaintiff stated as follows: He had lived on 1/6<sup>th</sup> portion of the suit property measuring 0.025 acres as of right, continuously and without interruption for 37 years from 1959. During his occupation of that portion of the suit property, he constructed a three roomed timber house with iron sheet roof where he lived with his family. He was also rearing goats and pigs on the said portion of the suit property. He contended that he had acquired title to the said portion of the suit property by adverse possession and that the defendants who were the personal representatives of Wainaina Kariuki held the said portion of the suit property in trust for him and should transfer the same to him.

#### **The defendants' case:**

The Originating Summons was opposed by the defendants through grounds of opposition and a replying affidavit sworn by the 1<sup>st</sup> defendant both dated 16<sup>th</sup> April, 2003. In the grounds of opposition, the defendants contended that the Originating Summons did not disclose any reasonable cause of action against the defendants and that the plaintiffs' suit was an abuse of the court process. The defendants averred further that the suit was *res judicata* and as such offended the provisions of the Civil Procedure Act. In her replying affidavit, the 1<sup>st</sup> defendant averred that the plaintiffs were her brothers-in-law. The 1<sup>st</sup> defendant stated that the plaintiffs were her deceased husband's brothers. The 1<sup>st</sup> defendant averred that the suit property was registered in her deceased husband's name and that the plaintiffs had not lived on the suit property as of right. The 1<sup>st</sup> defendant averred that the plaintiffs lived on the suit property as licensees having been permitted to live on the suit property by the deceased. The 1<sup>st</sup> defendant averred that the plaintiffs had instituted a suit in the Magistrate's Court against her over the suit property namely, Civil Case No. 283 of 1997. The 1<sup>st</sup> defendant averred that that suit was dismissed with costs and the plaintiffs' appeal to the High Court against the dismissal in High Court Civil Appeal No. 651 of 2000 was similarly dismissed.

The 1<sup>st</sup> defendant averred that the plaintiffs' suit was merely intended to delay her from taking possession of the suit property since as mere licensees, the plaintiffs could not maintain an action for adverse possession in respect of the suit property. The 1<sup>st</sup> defendant averred that the issue that the defendants were holding the suit property in trust for the plaintiffs could not arise since the suit property was purchased by her deceased husband who had it registered in his sole name.

### **The evidence adduced by the parties:**

The Originating Summons was heard through oral evidence. The first to give evidence was the 1<sup>st</sup> plaintiff, Paul Ndungu Kariuki (PW1). PW1 testified as follows: The other plaintiffs were his brothers while the 1<sup>st</sup> defendant was the widow of their deceased brother, Joseph Wainaina Kariuki. The suit property was registered in the name of the 1<sup>st</sup> defendant's deceased husband. He lived on the suit property for 37 years. The suit property was purchased by their mother, Margaret Muthoni. During his stay on the suit property, he constructed a three roomed house with iron sheet roof. He lived on the suit property with his wife, Teresiah Waithera who shared a name with the 1<sup>st</sup> defendant, and their children. The other plaintiffs and the deceased, Joseph Wainaina Kariuki also constructed houses on the suit property. He planted fruit trees on the suit property. They lived in peace on the suit property. Due to congestion, the area Chief gave some of them land to move to. All the plaintiffs vacated the suit property save for the 3<sup>rd</sup> plaintiff. It was the 3<sup>rd</sup> plaintiff and the 1<sup>st</sup> defendant who were left on the suit property. He could not remember when he vacated the suit property. He used to occupy 1/6<sup>th</sup> portion of the suit property. He urged the court to grant him that portion of the suit property.

Next to give evidence was the 2<sup>nd</sup> plaintiff, John Nganga Kariuki (PW2). PW2 testified as follows: The other plaintiffs were his brothers while the 1<sup>st</sup> defendant was the widow of his deceased brother, Joseph Wainaina. They were five sons in the family. Joseph Wainaina, deceased was the eldest son. The suit property was registered in his name. The money that was used to purchase the suit property was given by the husband of their sister, Miriam Wanjiru. The suit property was purchased at Kshs. 300/-. All the plaintiffs and their deceased brother built houses on the suit property. Their mother had directed that the suit property be shared amongst them. He lived on the suit property for 37 years. All the plaintiffs vacated the suit property save for the 3<sup>rd</sup> plaintiff. The people who were left occupying the suit property were the 3<sup>rd</sup> plaintiff and the 1<sup>st</sup> defendant. PW2 urged the court to grant him 1/6<sup>th</sup> portion of the suit property that he used to live on. He denied that the plaintiffs occupied the suit property with the permission of their deceased brother, Joseph Wainaina.

The 3<sup>rd</sup> plaintiff died before the hearing of the suit. His widow, Rose Wairimu Mwaura (PW3) was substituted in his place and gave evidence as his legal representative. PW3 testified as follows: She was the widow of the 3<sup>rd</sup> plaintiff. She got married to the 3<sup>rd</sup> plaintiff in 1967. When she got married, she found the 3<sup>rd</sup> plaintiff living on the suit property. Her mother in-law, Margaret Muthoni Kariuki was residing on the suit property with her five (5) sons and two (2) daughters; Wanjiru and Waithira. Her mother in-law died in 1989 and left them on the suit property. Her husband, the 3<sup>rd</sup> plaintiff died in 2006 while they were residing on the suit property. The 1<sup>st</sup> defendant was the widow of Joseph Wainaina who was her husband's eldest brother. Her mother in-law had allowed his sons to occupy the suit property freely. The 3<sup>rd</sup> plaintiff constructed a three roomed house on the suit property in which she was rearing chicken. The suit property was divided into six (6) portions one of which belonged to her mother in-law. She corroborated the evidence of PW2 that the suit property was purchased by money that was given by the husband of her sister in-law, Wanjiru. PW3 stated that the 3<sup>rd</sup> plaintiff entered the suit property in 1959 and she joined him in 1967. She stated that they had occupied the suit property for over 50 years. She told the court that she was still in occupation of the suit property and that she was occupying a portion thereof measuring 0.025 acres which she was claiming.

The plaintiffs' last witness was the 4<sup>th</sup> plaintiff, David Muiruri (PW4) who testified as follows: He was staying at Dagoretti Market on Government land. He used to stay on the suit property with his family. After the Government gave them land, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and he moved out of the suit property leaving only two families in occupation. He had constructed a timber house with iron sheet roofing on the suit property in 1959. He used also to rear goats and pigs on the property. He corroborated the evidence of PW2 and PW3 that the money that was used to purchase the suit property came from the husband of their sister, Wanjiru. He stated that the deceased, Wainaina Kariuki, was registered as owner of the suit property because he was their eldest brother. He stated that their mother had told them that the suit property was to act as a nursery and that whoever got land elsewhere could move out. He told the court that he moved out of the suit property in 1995 and that he demolished the structures that he had constructed on the property gradually. He told the court that he was claiming the portion of the suit property which he used to occupy.

For the defendants, the 2<sup>nd</sup> defendant, Francis Muigai Wainaina (DW1) was the first to give evidence. He testified as follows: He was staying on Government land at Dagoretti Market. The suit property belonged to his father. His father purchased the suit property in 1958 while he was working at Brower Construction in Nairobi. The plaintiffs who were his uncles had nowhere to stay. His father allowed them to stay on the suit property on the understanding that they would move out upon acquiring their own land. After the death of his father in 1992, the plaintiffs started to vacate the suit property voluntarily. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs vacated the property and demolished the houses they had on the property. It was the deceased 3<sup>rd</sup> plaintiff who remained on the suit property. The 3<sup>rd</sup> plaintiff's widow (PW3) also vacated the suit property but did not demolish her house. The plaintiffs had filed a previous case at the Chief Magistrate's Court against them over the suit property namely, CMCC NO. 283 of 1997 which they lost. The plaintiffs proceeded to the High Court on appeal in Civil Appeal No. 651 of 2000 which they also lost. DW1 produced as a bundle the documents in the defendants' supplementary list of documents dated 3<sup>rd</sup> March, 2014 as D-Exh 1. He urged the court to restore the suit property back to them as it belonged to their father. He also asked the court to compel the 3<sup>rd</sup> plaintiff to remove his house from the suit property.

The 1<sup>st</sup> defendant, Teresia Waithera Wainaina (DW2) was the last to give evidence. She testified as follows: The suit property belonged to her deceased husband, Joseph Wainaina. The deceased allowed the plaintiffs to occupy the suit property when they were young on the understanding that when they became adults, each would get his own land and vacate the suit property. After the death of her husband, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs vacated the suit property. The 3<sup>rd</sup> plaintiff's widow, Rose Wairimu Mwaura (PW3) also vacated the property but left her daughter, Mary Muthoni on the property. DW2 urged the court to order Mary Muthoni to vacate the suit property. DW2 produced the defendants' amended bundle of documents filed in court on 9<sup>th</sup> April 2008 as D- Exh. 2.

### **The submissions by the parties:**

At the close of trial, the parties were directed to make closing submissions in writing. The plaintiffs filed their submission on 16<sup>th</sup> December, 2019 while the defendants filed their submissions on 23<sup>rd</sup> January, 2020. The plaintiffs reiterated that they had occupied the portions of the suit property which they were claiming as of right continuously without any interruption for various years ranging from 36 to 60 years from

the time they entered the property in 1959. The plaintiffs submitted that the evidence that they adduced regarding their occupation of the suit property was not rebutted. The plaintiffs submitted that they occupied the suit property peacefully until the death of Kariuki Wainaina in 1991. The plaintiffs submitted that there was no basis for the defendants' allegation that they were the deceased, Wainaina Kariuki's licensees. The plaintiffs wondered how their mother who had also occupied the suit property could be the deceased's licensee and more so, why the deceased did not terminate the alleged licence while he was alive. The plaintiffs submitted that the burden was upon the defendants to prove that the plaintiffs occupied the suit property with the consent or permission of the deceased which burden they failed to discharge. The plaintiffs submitted that they had established that they had acquired the portions of the suit property which they had occupied by adverse possession and that the deceased, Wainaina Kariuki was holding the said portions of the suit property in trust for them. In support of this submission, the plaintiffs relied on Wainaina v Murai & Others [1976]eKLR and Mwangi Githu v Livingstone Ndeete & others, Civil Appeal No. 24 of 1979. The plaintiffs submitted that the deceased, Wainaina Kariuki's right to evict them from the suit property came to an end in 1972. The plaintiffs urged the court to enter judgment in their favour as prayed in the Originating Summons together with costs.

In their submissions dated 22<sup>nd</sup> January, 2020, the defendants addressed three issues. On whether the plaintiffs had acquired the portions of the suit property which they were claiming by adverse possession, the defendants cited Ngati Farmers Cooperative Society Ltd. v John Ledidi & 15 Others, Nairobi Civil Appeal No. 64 of 2004, Ravindranath Dahyabhai Bhagat v Hamisi Harod & Others, Malindi ELC No 1124 of 2010 and Harod Yonda Juaje v Sadara Dzenzo Mbauro & Another, Malindi ELC No. 1 of 2016 and submitted that the plaintiffs had not proved the necessary elements of adverse possession. The defendants submitted that plaintiffs had occupied the suit property with express permission of the deceased, Wainaina Kariuki and as such the plaintiffs' adverse possession claim was untenable. In support of this submission, the defendant cited Wambua v Njuguna [1983] eKLR. The defendants submitted further that possession by the plaintiffs of the portions of the suit property which they were claiming was not continuous, exclusive, actual and uninterrupted. The defendants submitted that there were other persons apart from the plaintiffs who were in occupation and were also using the suit property. In further submission, the defendants cited Mm'baoni Mthaara v James Mbaka [2017] eKLR and argued that although long stay is an important ingredient in proving adverse possession, that alone does not entitle a plaintiff to acquire title through the doctrine of adverse possession.

On whether the suit was *res judicata*, the defendants cited Timotheo Makenge v Manunga Ngochi (1979) eKLR where the court stated that the essence of the doctrine of *res judicata* is to ensure that there is an end to litigation. The defendants submitted that the plaintiffs had instituted a suit against the defendants at the Chief Magistrates Court namely, Civil Case No. 283 of 1997 over the same subject matter which suit was heard and determined in favour of the defendants. The defendants submitted further that the plaintiffs appealed the decision of the Magistrates Court to the High Court in Civil Appeal No. 651 of 2000 which was also heard and determined in favour of the defendants. The defendants referred the court to the judgements in the two cases and submitted that they had shown on a balance of probabilities that this suit was *res judicata*. On the issue of costs, the defendants submitted that costs are at the discretion of the court in accordance with section 27 of the Civil Procedure Act and urged the court to exercise its discretion in favour of awarding cost to the defendants.

#### **Determination:**

I have considered the evidence adduced by the parties and the submissions by counsels. In my view, the main issue that the court has been called upon to determine in this suit is whether each of the plaintiffs has acquired 1/6<sup>th</sup> portion of the suit property by adverse possession. There is also the secondary issue of whether or not the suit is *res judicata*. On the issue of *res judicata*, I am of the view that the same was dealt with *in limine* and conclusively determined. Upon being served with the Originating Summons, the defendants filed grounds of opposition and a replying affidavit. In the grounds of opposition, the defendants contended that the suit herein was *res judicata* in that the plaintiffs had brought an earlier suit against the defendants over the same subject matter in the Chief Magistrates Court namely, Civil Case No. 283 of 1997 which suit was heard and determined in favour of the defendants. The defendants contended further that an appeal by the plaintiffs in the High Court in Civil Appeal No. 651 of 2000 against that decision by the Chief Magistrate's Court was also dismissed. The issue as to whether this suit was *res judicata* was heard as a preliminary objection by Aluoch J. After considering the pleadings that had been filed in the Magistrate's court and the judgment of that court, Aluoch J. found in a ruling that was delivered on 15<sup>th</sup> April, 2005 that the Magistrate's Court had no jurisdiction to determine the issue as to whether or not the plaintiffs herein had acquired portions of the suit property by adverse possession. She held in the circumstances that this suit in which the plaintiffs have sought a declaration that they have acquired portions of the suit property by adverse possession and for the said portions to be registered in their names is not *res judicata*. The defendants' preliminary objection based on *res judicata* was accordingly dismissed. There is no evidence on record that the defendants appealed that decision. The decision not having been reviewed or set aside is binding upon the parties. In the circumstances, I find no merit in the defendants' *res judicata* argument. It is not open for the defendants to raise the issue for the second time for the court's determination.

On the main issue, the following is my view: In Gabriel Mbui v Mukindia Maranya [1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- 1. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.**
- 2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.**
- 3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.**
- 4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.**
- 5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.**

6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.

7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.

8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.

9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.

10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

In Kimani Ruchine & Another v Swift, Rutherford Co. Ltd. & another [1977] KLR 10 Kneller J. stated as follows at page 16:

**“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necpccario (no force, no secrecy, no evasion) .....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

In Wambugu v Njuguna [1983] KLR 172 the court stated as follows:

**“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”**

In Dr Ojienda's, Principles of Conveyancing Hand Book, Law Africa Vol II at page 97 the learned author has stated that:

**“Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission, the occupation can only be either with permission or adverse, the two concepts cannot co-exist.”**

In Jandu v Kirpal [1975] E.A 225 Chanan Singh J. stated that:

**“The rule on ‘permissive possession’ is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land”.**

In Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwen & another [2015] e KLR, the Court of Appeal cited with approval its decision in the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001(UR), where it stated that:

**“...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 or in (accordance with) provisions of an agreement of sale lease or otherwise. Further as the High Court correctly held in Jandu vs. Kirpal [1975] E.A.225 possession does not become adverse before the end of the period for which permission to occupy has been granted....”**

In Githu v Ndeete [1984] KLR 776 it was held that:

**“Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.”**

It is on the foregoing principles that the Originating Summons before me falls for consideration. The burden was on the plaintiffs to establish the elements of adverse possession set out above. It was not disputed that the suit property is registered in the name of Wainaina Kariuki deceased whose estate is being administered by the defendants. The deceased was registered as the owner of the suit property on 27<sup>th</sup> July, 1959. The plaintiffs have claimed that they entered the suit property in 1959. In their affidavits in support of the Originating Summons, the plaintiffs have not stated how they entered the suit property. In their testimony, the plaintiffs claimed that the suit property belonged to their mother and that it was family property that the deceased held in trust for the family as the eldest son. I am of the view that the issue as to whether or not the suit property was family property held by the deceased in trust was laid to rest in the earlier cases between the parties. In the Chief Magistrate's Court Civil Case No. 283 of 1997, the court made a finding that the deceased was registered as the owner of the

suit property as of right and that he was not holding the property in trust. This finding was upheld by the High Court in High Court Civil Appeal No. 651 of 2000. It follows therefore that the plaintiffs could not have entered the suit property on account of the fact that it was family land.

The defendants had contended on their part that the plaintiffs who had no land of their own were permitted by the deceased to live on the suit property on the understanding that they would vacate once they acquired their own parcels of land. The defendants contended that this explains why the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs vacated the suit property voluntarily.

From the totality of the evidence before the court, I am persuaded by the defendants' contention that the plaintiffs were permitted by the deceased to live on the suit property. I can see no reason why the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants would have vacated the suit property voluntarily if they were occupying the property as of right. Since the plaintiffs were occupying the suit property with the consent of the deceased, all the activities that they carried out on the suit property were not adverse to the interest of the deceased as the same were permitted. As mere licensees on the suit property, the plaintiffs could not maintain an action for adverse possession until their licence was terminated or withdrawn. There is no evidence that as at the time the plaintiffs came to court, their licence to occupy the suit property had been terminated and that they had occupied the suit property for the statutory period after such termination.

I am also of the view that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs having vacated the suit property voluntarily could not maintain an action for adverse possession. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs brought this suit 8 years after they had voluntarily vacated the suit property. I am of the view that having vacated the suit property voluntarily before bringing this suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs could not be said to have occupied the suit property continuously without interruption as at the time of bringing the action. I am of the view that their occupation of the suit property was interrupted by their act of moving out of the suit property. Further, I am of the view that by moving out of the suit property voluntarily, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> plaintiffs admitted the deceased's title to the property which admission is inconsistent with their adverse possession claim.

For the foregoing reasons, I find no merit in the plaintiffs' claim. The same is dismissed with costs to the defendants.

**Delivered and Dated at Nairobi this 30<sup>th</sup> day of July 2020**

**S. OKONG'O**

**JUDGE**

**Judgment read through Microsoft Teams Video Conferencing platform in the presence of;**

Mr. Kinyanjui for the Plaintiffs

Ms. Wachira h/b for Mr. Njagi for the Respondents

Ms. C. Nyokabi-Court Assistant