



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 223 OF 2017

(CONSOLIDATION OF NAIROBI ELC NO. 39 OF 2009 AND

NAIROBI ELC NO. 381 OF 2010)

ROSE NYAMBURA THUMBI(Administratrix of

the Estate of HEZEKIAH MATHARA GATHENDE (DECEASED),.....PLAINTIFF

VERSUS

MARY WANJIRU NJUGUNA DEFENDANT

JUDGMENT

The instant suit is a consolidation of two suits that were commenced by way of a Plaintiff and Originating Summons.

ELC No. 381 of 2010, was commenced by way of an Originating Summons dated **9th August 2010**, by the Defendant herein **Mary Wanjiru Njuguna**, who had sought for the determination of the following questions;

- 1) ***THAT MARY WANJIRU NJUGUNA be declared to have acquired title by Adverse Possession to the suit property known as L.R No. Gatamaiyu/Kagaa/272.***
- 2) ***THAT the registration of HEZEKIAH MATHARA GATHENDE (Deceased) as proprietor of L.R No. Gatamaiyu/Kagaa/272, and or any other persons deriving title from the said HEZEKIAH MATHARA GATHENDE (Deceased) based on the land known as L.R No. Gatamaiyu/Kagaa/272, be cancelled forthwith and the Land Registrar do rectify the register to enter the name of the Plaintiff as registered proprietor of the said property in the place of HEZEKIAH MATHARA GATHENDE (Deceased) or the Defendant herein or anyone deriving title from the Defendant or HEZEKIAH MATHARA GATHENDE (Deceased).***
- 3) ***The Costs of these proceedings be borne by the Defendant***

The Originating Summons was premised on the grounds that the said **Mary Wanjiru Njuguna** has been in actual, open, physical, and uninterrupted possession of the suit premises for a period in excess of **30 years**, thereby acquiring title by **adverse possession**. That any claims to title by any of the Defendants or anyone acquiring title from the **HEZEKIAH MATHARA GATHENDE** over the suit property has been extinguished by the adverse possession by **Mary Wanjiru Njuguna**, who is entitled to become registered as the proprietor of the suit property.

In her supporting Affidavit sworn on **9th August 2010**, the said **Mary Wanjiru Njuguna**, averred that she resides on the suit property which is registered in the name of **Hezekiah Mathara Gathende**, who died on **19th February 2002**, and that the Defendant (**Rose Nyambura Thumbi**) is the Administrator of his Estate. She contended that she has been living on the suit property since **1968**, and she moved into the said property together with her family and constructed a home thereon. That their original house got dilapidated in due course and she constructed a new one.

It was her contention that her entry, occupation and use of the land was open and without secrecy and has been peaceful for all the **42 years** and that it has never in anyway been interrupted by the deceased or the Defendant. Further that by the time **Hezekiah Mathara**, died in **2002**, she had already lived on the suit property for **34 years** and that the deceased and the Defendant were aware that she was living on the said property. That she had constructed a house and they never took any action to stop her occupation or use. That in **1971**, she planted tea bushes on a portion of the land measuring **1 acre**, which is a permanent cash crop and she has been tending it, picking it and has openly been in possession of the suit property.

She alleged that she lived on the suit property with her mother **Waruguru Petero**, until **6th July 2008**, when **Waruguru Petero** died and has

continued living thereon. That her mother filed **HCCC No 1132 of 1992**, against the late **Hezekiah Mathara Gathende**, seeking a declaration of trust in her favour over the suit property, but it was dismissed on a technicality as it was said to be time barred, and the said suit was never determined on merit. Further that the Defendant did not file any Counter claim in that suit for their eviction, and that it was only recently that the Defendant filed **HCCC 39 of 2009**, on **3rd February 2009**, seeking to evict her from the suit land.

The Originating Summons was contested and the Plaintiff herein **Rose Nyambura Thumbi**, swore a Replying Affidavit on the **27th October 2010**, and averred that the Defendant's mother **Waruguru Petero**, was the step mother to **Hezekiah Mathara Gathende**. That **Waruguru Petero's** husband was called **Mr. Petero Gathende**, who died around **1940**, and left her without a child. She alleged that **Waruguru Petero** had gone back to live with her parents before the state of emergency and that before his death, her husband directed **Mr. Hezekiah Mathara Gathende**, to personally pay dowry to the parents of **Waruguru Petero** and bring her back to **Kamaiya** and look after her as her only son.

That the said **Hezekiah** followed his father's instructions and paid the dowry for **Waruguru Petero**, and brought her back to **Kamaiya** around **1968**, and handed her, **L.R Gatamaiyu/ Kagua/333**, and built for her a homestead in **L.R Gatamaiyu/Kagua/272**, where she lived together with **Hezekiah** and his wives. That the said **Hezekiah** gave **Waruguru 1 acre** with fully grown tea bushes and that from **1968**, the Plaintiff stayed with her mother in the house that **Hezekiah Mathara Gathende**, built for her mother on the suit premises and that after the death of her mother, the Plaintiff has continued to live on the said suit premises. She further averred that **Hezekiah Mathara** built a granary in the homestead which had three doors for his two wives and that to date the Plaintiff uses one door and the other doors are used by the children of **Hezekiah Gathende**.

She contended that cows belonging to **Hezekiah Gathende's** children roam the compound unhindered and that his children, grandchildren and great grandchildren roam the entire compound unhindered and that they have **11 houses** scattered all over the compound. She also contended that the Defendant's cows are confined in a cattle shed within her mother's land. That the Defendant was educated by **Hezekiah** and was never at home to pick the tea that her mother was given, as she was always at school and also worked in Nairobi.

Further that except for the **one acre** of tea now picked by the Plaintiff and the house that **Hezekiah** built for the Defendant's mother which the Defendant now occupies, the rest of the **19.5 acres** is wholly presently occupied and cultivated by **Mr. Hezekiah's** children and grandchildren who grow crops, pick tea and harvest wattle and blue gum trees and thus the property has always been occupied by **Hezekiah's** family of **3 wives** and **16 children**. Further that when the Defendant's mother died on **6th July 2008**, the Defendant wanted to bury her on the suit property, but **Hezekiah family** protested and filed **Civil Suit No. 323 of 2008**. That **Mary Wanjiru Njuguna** Court ordered that the Defendant mother should be buried in her land. That the said suit was still pending in Court.

It was her contention that the Defendant's occupation of the suit property only became **adverse** after her mother's death on **6th July 2008**, and not before. That **Mary Wanjiru Njuguna** lived on the suit property with **Hezekiah's** permission and that she lives in the house constructed by **Hezekiah** and that in the **1970s**, Defendant's mother only built a kitchen of one room after the earlier one constructed by **Hezekiah Mathara** collapsed. That after the death of the Defendant's mother, **Hezekiah Mathara's** children took over the tea bushes in the one acre that **Waruguru Petero** had been picking on the suit property. That the said family of **Hezekiah** picked it for some time before they were stopped by the chief. That the tea bushes that were planted are on **Waruguru Petero's** land being **L.R 333**, which was around **1992 /1993**. She denied that **Hezekiah** held the suit property in trust for **Mary Wanjiru's** mother (**Waruguru Petero**). She contended that their occupation of the suit property was with the permission and blessings of **Mr. Hezekiah Mathara**.

The Plaintiff, **Mary Wanjiru Njuguna** filed a Supplementary Affidavit sworn on **28th January 2011** and averred that **Rose Nyambura Thumbi** cannot purport to depone to matters as at the time her father died in **1940**, she had not been born. She contended that she has built on the suit property which she occupies with her family, a portion measuring **6 acres**. She denied that **Hezekiah** built for her mother a house and that the granary was constructed jointly by **Waruguru Petero** and **Hezekiah Mathara** and her mother was therefore entitled to the use of the same in equal rights.

She further contended that although her cattle have their own shade, their grazing is not limited and the said cattle graze freely on the suit property. She denied that **Hezekiah** paid her school fees and also denied the letter purportedly written by her on **27th October 1977**. Further that the decision to bury her mother in **L.R 333**, was to save on unnecessary expenses and delay in burial. It was her contention that her occupation of the suit property has always been **adverse** to those of the late **Hezekiah Mathara** as she has been in occupation of the suit property since she was born. She denied that her occupation was undertaken with **Hezekiah's** permission and that his children took over the tea bushes in the suit property. She contended that she planted the said tea bushes and that there is no boundary between the two properties.

The 2nd suit **ELC No. 39 of 2009**, was commenced by an Amendment to Re Amended Plaint dated **23rd July 2012**, by the Plaintiff **Rose Nyambura Thumbi** herein against the Defendant **Mary Wanjiru Njuguna**, wherein the Plaintiff sought for the following orders:-

a) That the Defendant be evicted from the house and the tea area occupying $\frac{3}{4}$ acres that she picks in L.R Gatamaiyu/ Kagua/272 forthwith;

b) Mesne profits of Kshs.50,000/= per year from 2008, till she vacates from the land reference Number Gatamaiyu/ Kagua/272 and interest thereof at Courts rates.

The Plaintiff (**Rose Nyambura Thumbi**) averred that she is the Administratrix of the Estate of **Hezekiah Mathara**, who died on **19th February 2002**, being the registered owner of the suit property. It was her contention that before his death, **Hezekiah Mathara** had built for his step mother **Waruguru Petero**, a house and planted tea bushes for her on the suit property. That upon the death of **Waruguru Petero**, the Defendant has been living in the said house and picking tea that her mother used to pick before her death. That the Estate of **Hezekiah Mathara**, has been losing about **Kshs. 50,000/=** per year, due to non-occupation of the said land by the Defendant. She also contended that despite severally requesting the Defendant to vacate from her mother's house which is on the suit property, and stop picking tea, she has declined.

The suit is opposed and the Defendant (**Mary Wanjiru Njuguna**) filed an Amended Defence dated **16th June 2010**, and denied all the allegations made in the Plaintiff. She averred that the suit property in dispute was derived from the Estate of the late **Petero Gathende**. That upon her husband's death, her mother became entitled to **12 acres** of land which land was contained in two parcels of land being **L.R Gatamaiyu/ Kagaa/272** and **L.R 333** each measuring **6 acres**. That the late **Hezekiah Mathara**, transferred only one of the portions being **L.R 333** to her mother but wrongly retained the suit property in his name and which was registered in trust for **Waruguru Petero**. That in pursuance of her land, **Waruguru Petero** commenced **HCCC 1132 of 1992**, demanding **6 acres**, but the said suit was dismissed. However, an appeal is still pending and it was her contention that unless that **Appeal** is heard and determined, there can never be a finding on the dispute between the two. Further that despite the outcome, the Defendant is entitled to the suit property in her own right.

She further contended that she commenced her own suit on a claim for adverse possession and that **Waruguru Petero** lived on the suit property as a matter of right. That she planted tea bushes and continues to cultivate and live on the suit property and has thus acquired her own right as she has been in possession for over **30 years**. She denied that the Estate of the Late **Hezekiah Mathara** has been losing the alleged **Kshs. 50,000/=** per year in mesne profits as the tea and other income generating activities on the suit premise are for **Waruguru Petero** and the Defendant in her own right. Further that the suit against her is legally incompetent and unsustainable in law as it discloses no cause of action. That there is a pending suit being **C.A No. 8 of 2007**, over the same matter and that **HCCC No. 323 of 2008**, did not involve the issue of ownership of land. She further denied being served with any notice to vacate the said house and the suit premises.

The matter proceeded by way of **viva voce** evidence wherein the Plaintiff gave evidence for herself and called **five** witnesses while the Defendant also gave evidence for herself and called **one** witness.

PLAINTIFF'S CASE

PW1 Rose Nyambura Thumbi testified that their father was **Hezekiah Mathara Gathende**, who died on **19th February 2002**, and that she is the Administratrix of his Estate. It was her testimony that the suit property is registered in the name of her deceased father and that her father had a case with **Waruguru Petero** who died on **6th September 2008**. That the said **Waruguru Petero** was the Defendant's mother. She produced her list of documents as Exhibit 1.

That **Waruguru Petero**, lived on the suit property from the year **1968**. That she has lived on the suit property with her siblings as her father was polygamous. That they all used one toilet and there was only one point of drawing water. She produced photographs which showed **Waruguru's home**, where she lived with the Defendant, a common granary built by her father. That all her father's wives shared the granary and the Defendant's mother also used the said granary. Further that the area occupied by the house **Waruguru Petero** lived in was less than an **1/8th** of an acre. That there is a burial site and there is an adjacent land which is owned by **Waruguru Petero**. That the photographs show the different houses that are occupied by different persons. She told the Court that there is a fence between **L.R 272** and **L.R 333** and that **L.R 333** belongs to **Waruguru Petero**. That her father brought back **Waruguru Petero** in **1968**, from her maternal home and that **Hezekiah** paid to **Waruguru's** father dowry on behalf of his father **Peter Njuguna**. That when **Peter Njuguna** died, the Defendant had not yet been born.

That her father hived a small portion of the tea bushes for the late **Waruguru Petero** in **1971**. That the late **Waruguru Petero's** tea number was **GT 1714** and that her father tea number was **GT 102**. Further that the tea bushes given to Waruguru was about **½ acre**. That the late **Waruguru Petero** only occupied houses in the suit property, but did not own the land. Further that PW1 lived on the suit property when she was born upto **1986**, when she got married. That **Waruguru** filed a case in Court in **1992** demanding for **6 acres**, to be hived from the suit property but the said case was dismissed by the Court.

That after the death of **Waruguru**, the Plaintiff asked the Defendant to move out and when Defendant wanted to bury her mother on the said suit property, the Plaintiff and her family objected to the same necessitating the filing of a suit **Case No. 323 of 2008**, wherein a consent order was entered. She further testified that her family has suffered loss as the Defendant picks tea that is worth **Kshs. 50,000/=** per year. That the Defendant does not occupy the whole of the suit property, but occupies less than **½ acre** where she lived with her mother. That she now occupies the said portion of land without their consent. That the Defendant's mother lived on the suit property with consent of their father **Hezekiah Mathara**, and that he built a house for the late **Waruguru's** in **1968**.

Further that with regard to the events of **1940**, the said information was passed to her by other people. That **L.R 333** is **6 acres** and though in her suit **Waruguru** was claiming 6 acres, she was not occupying 6 acres. That she had given the Defendant a verbal notice to move out of the suit property after her mother's death. Further that before **Waruguru** died, there was a case before the **Land Disputes Tribunal (LDT)**, though she was not aware. She denied knowledge of her father stating that the late **Waruguru** was entitled to **12 acres** of the suit property. Further that her grandfather had **6 wives** and that his land was subdivided into **6 portions** with the late **Waruguru** getting a small portion of land while the others had 12 acres.

She further testified that in a case before the District Officer, her father confirmed that he retained 6 acres from the Defendant's mother because he had taken dowry to her parents and that the Plaintiff's father ended up with **19.5 acres**. That **annexure B** from her affidavit dated **27th October 2010**, is a statement from **Hezekiah Mathara**, but she did not wish to go by the said Affidavit as the case was dismissed.

That the late **Waruguru** had testified that she did not agree with her father taking her **6 acres** and her father had filed an Application to restrain the late **Waruguru** from putting up structures on the suit property. That though in her testimony, the Late **Waruguru** denied that her father did build a house for her, the Plaintiff saw her father building the said house for **Waruguru** as she was about **14 to 15 years** at that time and that the land was demarcated in **1958**. That her father did not seek to evict the Defendant's mother from the suit property and that upon the Defendant's mother's death, the Defendant became a trespasser and she still lives on the suit property.

That in the award by the Land Disputes Tribunal, the elders decided that **Waruguru** should not get more land than she had. She further testified that her father brought the **Late Waruguru Petero**, to the suit property and that he used to take care of her as his mother. She urged the Court to dismiss the case for adverse possession.

PW2 Christopher Kibe Kimani the Head teacher of **Kamaiya Primary school**, stated that student **No. 151** was **Wanjiru Mathara Hezekiah** and that she joined the school on **15th January 1962**, and she left in **1968**. That according to the register, her guardian was **Mathara Hezekiah**, and the letter contains the details that are in the register. That he was summoned through a letter to come to court and that the Education Act does not impose any conditions on the disclosure of information. He testified that he did not come from the said locality and that the guardian is the one who provides for the child but not necessarily the parent.

PW3 Bidan Ngumbi Gachie, the Headmaster of **Kagaa Secondary School** produced the register for the year **1969** to **March 2018** and stated that student **No. 56** was **Mary Wanjiru**, who was admitted on **3rd February 1970**, in Form 1. That she was born in **1956** and that her guardian was **Hezekiah Mathara**. It was his testimony that the guardian takes care of the child's needs. Further that it was not always that guardians pay school fees and he did not have evidence of who used to pay school fees for **Mary Wanjiru** as he did not have the receipts for payments of the school fees. It was his evidence that the name of **Waruguru Petero**, does not appear in the register either as a parent or guardian.

PW4 Romaras Kiamba, the school bursar of **Kabaa Girls Secondary School** in Kiambu County, stated that the register was opened on **27th January 1969**, and ended on **2nd February 2004**. He further testified that student no. **194** was **Mary Mathara** and was admitted in Form 3 in the year **1973**. That her guardian was **Hezekiah Mathara**. It was his testimony that the guardian is the one who is responsible for maintenance of the student whether by payment of fees and taking care of her needs.

That he keeps records for the payment of school fees and that the student was born in **1954**. It was his evidence that he did not know what **"W"** stood for and that the register carries the name **Mary W. Mathara** and that there is no evidence that **Hezekiah** paid school fees for the student.

PW5 Jane Wangare Njuguna, adopted her witness statement dated **14th July 2013** as part of her evidence. It was her testimony that she has **10** children and that they all live on the suit property and that she has built **5 houses** and also kept cattle and chicken. That she has utilized the land for so long and she had evidence that she is paid for the tea that she picks and sells. She denied that the Defendant **Mary Wanjiru Njuguna** utilizes **6 acres** but confirmed that the Defendant has $\frac{1}{4}$ acre of tea bushes which she was given by **Hezekiah Mathara**. Further that the Defendant has a temporary shelter and the said house was built by **Hezekiah Mathara**. She told the Court that they all live in one compound, and that the wives of **Hezekiah Mathara** also lived on the said compound. Further that she found the whole family living together and that there were feuds over ownership, but the Defendant's mother was buried in **L.R 333**.

It was her further testimony that the Defendant and her children and their family live on **L.R 333**. That she is **Hezekiah's daughter in law** and that she got married in 1983 and her husband died on **10th November 1983**. That she found the Defendant in the homestead and lived on the suit property. That **Waruguru Petero** was claiming land, but she did not know the acreage. She further testified that her husband told her that the whole tea bushes were planted by **Hezekiah Mathara**, but that she did not know why he did not plant the tea bushes on **L.R 333**.

PW6 Mary Wangui Mathara, the daughter of **Hezekiah Mathara**, adopted her witness statement dated **3rd August 2013**. It was her testimony that the Defendant has lived on the same compound with them, but she has her own parcel of land. She denied that the Defendant utilizes **6 acres** from the suit land. That she only utilizes about $\frac{1}{8}$ th of an acre. That the Defendant repaired the house and a kitchen which were first built by their father for the Defendant's mother. She further testified that their father allowed the Defendant to, live on the suit property and that the house was built for the Defendant and her mother as they awaited to move to their parcel of land. That their father (**Hezekiah**), brought the Defendant's mother from Runguri, because those were the wishes of **Hezekiah's** father. That all **Hezekiah's** children and wives lived on the suit property and they utilize the said land. Further that the Defendant has a small portion of tea bushes in the suit property **L.R 272** and the same had been given to her mother **Waruguru Petero** by her father **Hezekiah**.

That when she was born, **Waruguru Petero**, did not live on the suit property but was brought to that homestead later when **PW6** was young. That she grows tea bushes in about **1 acre** and also farms on the suit property. That they all have their distinct portions of land, but the land is yet to be subdivided. That there was always a land feud between their father and the Defendant's mother and their grandfather **Petero Gathendu** had **6 wives** and each wife had her parcel of land.

DEFENCE CASE

DW1 Joseph Mburu Njuguna, adopted his witness statement dated **13th March 2014**. It was his testimony that the Defendant is his step sister, and that his father had five wives and the Defendant is the daughter of the last wife. It was his evidence that his father had land that was approximately **84 acres**, and upon their father's death, the area chief released the late **Hezekiah Mathara**, who had been detained to take care of their father's land. That the said **Hezekiah** being the eldest son in the family took up the responsibility of managing the land and the family was called into a meeting and they agreed to share the land amongst his father's five wives. That each wife was to get **12 acres** amounting to **60 acres** and that the remaining **24 acres** were to remain with **Mathara** to settle any claims that belonged to his father. He further testified that the **12 acres** were then divided between **Hezekiah Mathara** and **Douglas Njuguna** and that the House of **Priscilla** got an extra **24 acres** thus got 36 acres.

That amongst the wives who got the 12 acres, was **Waruguru Petero** and she was shown the **12 acres**, she took possession and built her own house on her land, cultivated the said land and planted tea bushes, and had a certificate for the planted tea bushes. That each wife was to look for their own title for their respective land and that **Waruguru Petero** did not get her title as she came to learn that her land was **6 acres** only. It was his further testimony that **Hezekiah Mathara**, who was their Administrator took 6 acres from **Waruguru Petero**, and gave it to his brother **Paul Nyori**. That the late **Waruguru Petero** reported the matter to the family, and that they discussed and agreed that the **6 acres** was to be returned to **Waruguru Petero**. That she discovered that her **6 acres** that were missing had been taken by **Hezekiah**.

That the matter was also reported to the **District officer** and the late **Hezekiah** was ordered to return the **6 acres**, upon which **Waruguru** filed a case against **Hezekiah**. He further testified that **Mary Wanjiru Njuguna**, is his step sister and that she lives on the suit property.

Further that she has 6 acres and has a house in **L.R 272**, and that the land is in the name of **Hezekiah Mathara** and the acreage is about **20 acres**. That the said land is used by **Mary Wanjiru Njuguna** (Defendant herein) and was also used by the Defendant's mother and she had grown tea, vegetables livestock and other peasantry farming. It was his evidence that **Mary Wanjiru** has been on the suit land for over **30 years** and **Hezekiah** never attempted to get her out.

Further that when his father's land was shared, he was a grown up but that he did not know if **Hezekiah** was to take care of **Waruguru Petero**, but the said Hezekiah took Waruguru's 6 acres illegally.

DW 2 Mary Wanjiru Njuguna the Defendant herein and Plaintiff in the Originating Summons **No. 381 of 2010**, adopted her witness statement dated **14th March 2014**. She further produced her list of documents as Exhibits **1 to 5** and also a supplementary bundle as exhibit **No. 6**. She testified that she occupied some portion of **L.R 272**, and that she made a claim of 6 acres out of the same. That she had been in occupation of the suit property before she commenced the case and has lived there for over **12 years**. That the land is registered in the name of **Hezekiah**, and that he had not interfered with her occupation and has never taken her to Court asking her to get out.

That even though **Hezekiah Mathara** was her guardian in school, he never paid her school fees as her mother paid the same. That she started living in the suit property in **1968**, with her mother and that there was a dispute between her mother and **Hezekiah Mathara**, over the suit property. That her mother had been given **12 acres** from the suit property, but **Hezekiah** only gave her **6 acres**. She denied that Hezekiah built a home for her mother and that her mother had testified to that effect and that she had been enjoined from building the house.

It was her testimony that she lives on the suit property and has planted tea bushes and picks and sells the same to **Kagaa Tea Factory**, in her own name. That her occupation of the suit property has never been interfered with.

Further that the 6 acres that her mother was seeking were to come from **L.R 272**. It was her further evidence that the suit property has a title in the name of **Hezekiah Mathara**, and after the subdivision, the land has not been surveyed again and that she knows that her mother was to get **12 acres**, but was only given 6 acres. That when her mother was married to **Petero**, she had no child. That her mother was given land by the family of **Petero**, which was **12 acres** during the land demarcation period in **1958**. Further that by that time her mother had left the home of **Petero Njuguna** having been chased by **Hezekiah Mathara** and she was called for the land by the chief and that she got this information from her mother.

It was her testimony that **L.R 333**, which is **6 acres** belongs to **Waruguru Petero** and she was given the land because she was a wife of **Petero**. It was her further testimony that her mother built her house before she moved to **Petero's** home as she was a businesswoman. Further that she attended the Court case in **HCCC No. 1132 of 1992**, and in the said case, **Hezekiah** pleaded that he built a house for her mother and planted tea bushes and that he was fulfilling his father's wishes. It was her evidence that **Hezekiah** had two brothers **Douglas Njuguna** and **Paul Nyori** and that the brothers were bullies and they chased her mother away. Further that the three brothers were to each get **36 acres** in total and that **Hezekiah** had also paid some debts and so he had **19 acres**. That this information is what she heard in Court from some witnesses.

She acknowledged that there are other people who live in the suit property and who also grow crops. She further testified that the Plaintiff had filed a case seeking to stop her (the Defendant) from burying her mother on the suit property, but she buried her mother in **L.R 333**, and not **L.R 272**. Further that the suit property is bigger than 6 acres as it is **19.5 acres** and her claim is not over the Estate of Waruguru.

The parties filed their written submissions which the Court has now carefully read and considered. It is not in doubt that the late **Hezekiah Mathara** is the registered owner of **L.R 272**. It is further not in doubt that the said **Hezekiah Mathara** was the step brother to the Defendant and the Plaintiff herein is his daughter. It was averred that **Hezekiah's** father had **five** wives and that the Defendant's mother was the last wife. Further that, **Hezekiah's** father was the initial owner of a large portion of land and upon his death, the said property was divided amongst his wives and sons. That each of the five wives got a share amounting to **12 acres**.

However, it is the Defendant's contention that though her mother the late **Waruguru Petero** was entitled to **12 acres**, just like the other wives, she only got **6 acres** and that the late **Hezekiah Mathara** retained the other remaining **6 acres**. It is also not in doubt that over the years, there have been various cases involving the suit property, which cases were between **Hezekiah Mathara** and **Waruguru Petero**. Further it is not in doubt that before their death, **Hezekiah Mathara** and **Waruguru Petero** were embroiled in various disputes involving the suit property that saw the parties visit the Chief, the District Officer and even had a hearing at the Land Disputes Tribunal. Further the late **Waruguru Petero** filed a suit being **HCCC 1132 of 1992**, against the late **Hezekiah Mathara**, claiming ownership of the suit property which she alleged was held in trust for her. It is also not in doubt that vide Judgment dated **20th September 2005**, the said suit was dismissed.

After the Defendant's mother's death, the Plaintiff filed this suit seeking to evict the Defendant from the suit. However, the Defendant also filed her own suit and averred that she had acquired the suit property by way of **Adverse Possession**. It is thus clear that while the Plaintiff has sought for eviction of the Defendant from the suit property, the Defendant has laid a claim to the suit property by way of adverse possession. It is important to note that though the Defendant has laid a claim that her mother was entitled to **6 acres** of the suit property by reason of her being one of the wives of the late **Petero Njuguna** who was the father to **Hezekiah Mathara (deceased)**, the Defendant has also categorically stated that she is claiming her right over the suit property in her own right and not as an Administrator of her Mother's Estate. Further in her submissions, the Defendant has submitted that the suit is time barred by the **Limitations of Actions Act** as the cause of action occurred in **1968** and that **Section 42** of the **Limitation of Actions Act** provides that:-

“An action founded on tort may not be brought after the end of the three years from the date on which the cause of action accrued.”

The above being the undisputed facts, the Court finds the issues for determination are:-

1. *Whether the Plaintiff's suit is time barred*
2. *Whether the Defendant has acquired the suit property by way of Adverse possession*
3. *Whether the Defendant is entitled to the orders Sought*
4. *Whether the Plaintiff is entitled to the orders sought*
5. *Who should bear the costs of the suit*

1. Whether the Plaintiff's suit is time barred

The Defendant submitted that the Plaintiff's suit is time barred since the Defendant has been in the suit property for over **41 years**. However, the Plaintiff has averred that her suit is not time barred since it was filed in execution of a Judgment. To buttress this position, the Defendant has relied on **Section 42** of the Limitation of Actions Act. To the Court's understanding, the Defendant is claiming that the suit is based on tort.

Black's Law Dictionary (8th Ed.) defines tort as,

"a civil wrong, other than breach of contract, for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on persons on an employer to his employee is clearly a tort."

A cause of action based on tort is a case brought to court by someone seeking compensation for a **tort** (wrongful or unlawful injury or damage that is not the result of a crime or which is tried in the civil courts) that he/she may have suffered.

In this instant case the Plaintiff has sought for an eviction of the Defendant from the suit property. This is not a claim to land ownership, and therefore the number of years that the Defendant has been in possession of the suit property is not an issue. Further the Court holds and finds that the claim for eviction is **not a tort** as per the definition of a tort given above.

The Plaintiff has also sought for mesne profits from the year 2008. The suit herein was filed in 2009, and the Court finds and holds that **three** years had not lapsed hence the suit is not statute barred.

2. Whether the Defendant has acquired the suit property by way of Adverse possession

The Defendant has contended that she acquired the suit property by way of **Adverse Possession** and therefore she is entitled to be registered as the owner of the said suit property. It is her evidence that she has lived on the suit property for over **thirty years**, having lived thereon from the year **1968**. The Defendant further testified that her possession has been peaceful and has not been interfered with by either the Plaintiff nor her late father **Hezekiah Mathara**. That no one has interfered with her possession and that she has been in possession of over **6 acres** and is therefore entitled to ownership of the same by virtue of adverse possession.

The plaintiff has however contended that the Defendant's occupation of the suit property had always been with permission of her late father (**Hezekiah**) and that that occupation was given to Defendant's mother (**Waruguru Petero**) and upon the demise of the Defendant's mother, she became a trespasser. Therefore, the Defendant cannot have acquired the suit property by way of **adverse possession**, while she had permission to be in the said possession from **Hezekiah Mathara**, the Plaintiff's father.

It is not in doubt that the Defendant's is in occupation of a portion of the suit property and even lives on the said portion of land. Further she has planted tea bushes on the suit property, which she harvests and sells at **Kagaa Tea Factory**. However, there is contention as to whether the Defendant's mother built the house on the suit property or whether the Plaintiff's father built it for her (Defendant's Mother). Further there is contention as to whether the tea bushes planted on the suit property, (that the Defendants picks) was actually planted by the Defendant and her mother, or whether the same was planted by the Plaintiff's father (**Hezekiah Mathara**).

While it is not in doubt that the Defendant has been in occupation of the suit property for a period of over **12 years**, what is in doubt is whether the possession was peaceful, continuous, exclusive and that the title holder was dispossessed of the same.

In the case of **Celina Muthoni Kithinj...Vs... Safiya Binti Swaleh & 8 others [2018] eKLR** the Court held that ;,

"The law on Adverse Possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by the courts. In Wambugu -v- Njuguna (1983) KLR 173, the Court of Appeal held that Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would 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 or she has been in Possession for the requisite number of years."

In determining whether or not to declare that a party has acquired land by adverse possession, there is a certain threshold which must be met as quoted by **Honourable Justice Serگون**, in the case of **Gerald Muriithi ...Vs...Wamugunda Muriuki & Another (2010) eKLR** while referring to the case of **Wambugu ...Vs...Njuguna (1983) KLR page 172**, where the **Court of Appeal** held as follows;

“1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates 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 the claimant has proved that he has been in possession for the requisite number of years.

Therefore, it was incumbent upon the Defendant to prove that she has been in possession of the suit property for uninterrupted period of over **12 years**. She must also prove that the **possession** was **peaceful, exclusive** and that she **dispossessed** the owner of the suit property and **discontinued** his **possession**.

It is not in doubt, as has been testified by the witnesses that the Defendant has been in possession of the portion of land in **L.R 272**, the suit property for over 12 years. However, what is in doubt is whether the Defendant had a **peaceful** and **exclusive** possession and that she had discontinued the possession of the registered owner.

The witnesses for both the Plaintiff and the Defendant testified that there were disputes over the suit property between the late **Waruguru Petero** and the late **Hezekiah**. Though the Defendant submitted that the filing of **HCCC 1132 of 1992**, by her mother did not stop time from running, she also testified that the said **Hezekiah** had enjoined her mother from building on the suit property. Further, it is not clear as to when exactly the dispute over the suit property started, but it is not in doubt that the Defendant's possession over the suit property was not that peaceful.

Though the Defendant has sought to disassociate her possession of the suit property from that of her mother, it was her evidence that her late mother and herself had been living together, on the suit property. Therefore, the Court finds and holds that since the Defendant lived on the suit property by virtue of her mother presence on the said land, she cannot thereafter dissociate herself from her mother.

Further for a party to claim **Adverse Possession**, the party ought to prove **exclusive possession** and also **dispossesses** of the owner of the suit property. The Plaintiffs testified that the late **Hezekiah's** children, wives and grandchildren live on the suit property where they freely roam and graze their livestock. The Defendant has not controverted the said evidence and has even acknowledged that the families share the same granary, which according to her evidence was built by both her mother and the late **Hezekiah**.

From the above analysis of the available evidence, the Court finds and holds that the Defendant has **not** proved that she has been in **exclusive possession** of the suit property and that she has **dispossessed** the registered owner of the said property. It is evident that the Estate of **Hezekiah Mathara** is still in and has possession of the suit property. Therefore, the Court finds and holds that the Defendant has not proved a case of **Adverse Possession**, to warrant the Court grants her ownership of the whole suit property.

However, there is the area on which the Defendant has her tea bushes on the suit property. Though, it was the Plaintiff's contention that the said tea bushes were planted by her father, on behalf of the Defendant's mother, there is no evidence that has been produced before Court to support this evidence. Even if the Plaintiff's father indeed did plant the said tea bushes, it is not in doubt that it is the Defendant who has been picking, tending and selling the same over the years.

Further, while there has been a claim by the Plaintiff that the Defendant and her mother entered onto the suit property with the permission of the Plaintiff's father, this evidence has been denied by both the Plaintiff and PW2. It is thus not clear how the Defendant ended up on the suit property. Even if the Defendant entered onto the suit property with the permission of the late Hezekiah, the disputes that occurred over the years would mean that this permission was hostile.

It is not in doubt that the Defendant has been picking the tea bushes that are on the said part of the suit property for over a period of 12 years. In their evidence, it was acknowledged that the Defendant lived on the suit property and that the Plaintiff's family roamed around the suit property. However, there is no doubt that the Defendant and her mother had an exclusive possession over the area or portion of land that was covered by the tea bushes, that the Defendant picks and sell. It is clear that the Defendant and her mother had thus **dispossessed** the Plaintiff's father who is the registered owner off that area.

Though the Plaintiff claimed that after the Defendant's mother died, the Plaintiff's family took possession of the tea area, that evidence has been denied by the Defendant. It is trite that **he who alleges must prove** and in this regard the Plaintiff has failed to prove the said allegation. Therefore, this Court finds and holds that the Defendant's possession of the area occupied by the tea bushes that she picks was exclusive over the years and that she and her mother had **dispossessed** the owner and thus the Defendant has proved adverse possession over that area, or portion of land that has tea bushes that she picks and sells.

Having considered the evidence in totality, though the Defendant has failed to prove **Adverse Possession** over the area occupied by her house and the entire **6 acres** that she has claimed, the Court finds and holds that she has proved exclusive possession of the area that is occupied by the tea bushes which she picks and sells and she is therefore entitled to ownership of the same by virtue of adverse possession.

3. Whether the defendant is entitled to the orders Sought

The Defendant had sought to be declared as having acquired the suit property by way of **Adverse Possession** and that the registration of **Hezekiah Mathara** be cancelled. However, the Court has found and held that she has only acquired such possession to the area or portion of land which she grows tea and has acquired the same by **Adverse Possession** and that she is **only** entitled to that said portion. The Court

finds and holds that the Defendant is **only** entitled to the portion of land where she grows and picks tea.

4. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for the eviction of the Defendant from the suit property and further sought for **mesne profits** over the tea bushes. The Court has held and found that the area occupied by the tea bushes that the Defendant picks has been exclusively used by the Defendant, and the Defendant has thus acquired **Adverse Possession** over the said area. The Court therefore finds and holds that the said prayer for mesne profits over the tea bushes or the portion of land with tea that the Defendant picks is not merited.

The Defendant has categorically stated that she was not claiming the suit property on behalf of her mother and/or her mother's estate. The Court had already determined that the claim by the Defendant's mother over the **6 acres** was time barred and therefore any further claim with regard to the said **6 acres** cannot be entertained by this Court. Therefore, without any impeachment of the title held by the late **Hezekiah**, his Estate has all the rights and privileges that are appurtenant to the said property and that includes **peaceful enjoyment** of the said property.

For the above reasons, the Court holds and finds that the prayer for eviction of the Defendant as sought by the Plaintiff is merited. However, this eviction will not extend to the tea area used by the Defendant as the Court has held and found that the Defendant has proved that she has acquired the said portion of land by way of Adverse possession.

5. Who should bear the costs of the suit

Section 27 of the Civil Procedure Act gives the Court the discretion to grant Costs. However, costs usually follow the event. Given the circumstances of this case, the fact that parties are related and further that each party has partially succeeded in its claim, the Court finds and holds that each party should bear its own costs.

Having now carefully considered the available evidence, the written Submissions together with the cited authorities, the Court finds that the Plaintiff (**Rose Nyambura Thumbi**) has partially proved her case on the required standard of balance of probabilities and this Court will **partially** enter Judgment in her favour.

Further the Court finds that the Defendant (**Mary Wanjiru Njuguna**) has partially proved her case on the required standard of balance of probabilities and the Court will also **partially** enter judgment in her favour.

Consequently, the Court enters Judgment in favour of the parties in the following terms:-

1. That the Defendant (Mary Wanjiru Njuguna) has acquired by Adverse Possession to the area covered by the tea bushes that she picks and is therefore entitled to be registered as the owner with regards to that part or portion of land only which portion of land or part is in the property L.R Gatamaiyu/Kagaa/272.

2. Further, the Defendant herein Mary Wanjiru Njuguna should be evicted from the L.R Gatamaiyu/Kagaa/272 apart from the area that the Court has found that she has acquired by adverse possession, that is, tea bushes area.

3. The Parties to jointly survey the area that is occupied by the tea bushes being picked by the Defendant to ascertain the exact acreage that the Defendant is entitled to.

4. Each party to bear their own costs of the suit

It is so ordered.

Dated, signed and Delivered at Thika this 5th day of November 2020.

L. GACHERU

JUDGE

5/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

M/s Lynn Muchira for the Plaintiff

Mr. Kingara for the Defendant

L. GACHERU

JUDGE

5/11/2020