

**REPUBLIC OF KENYA**

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

**ELC CASE NO. E009 OF 2023 (OS)**

MWORIA MURITHI ZAVERIO MURIUNGI .....PLAINTIFF

**VERSUS**

JOSHUA KIMATHI M'INANAGA .....RESPONDENT

**JUDGMENT**

1. The Plaintiff herein approached the court *vide* Originating Summons [OS] dated **20<sup>th</sup> September 2023**; and wherein the Plaintiff sought various reliefs. The originating summons under reference was subsequently amended resting with the amended originating summons dated 13<sup>th</sup> December 2024. The reliefs sought at the foot of the amended originating summons are as hereunder;

- (i) That an order that the Plaintiff herein has become entitled by adverse possession of one acre out of L.R No. Nyaki/Giaki/1316 now subdivided into Nyaki/Giaki/3223 and Nyaki/Giaki/3324 which is registered in the name of the respondent Joshua Kimathi M'Inanaga.***
- (ii) An order that the Plaintiff be registered with one acre out of the said land which the plaintiff has occupied for a period of over 12 years above the 12-year limitation period.***
- (iii) Such other orders the court would deem just for ends of justice to be met.***
- (iv) Costs of this Application be provided for.***

2. The amended Originating summons is premised/anchored on the grounds which have been highlighted in the body thereof. In particular, it has been stated that the plaintiff herein entered into a land sale agreement in respect of L.R No. Nyaki/Giaki/1316 [now subdivided] and wherein the plaintiff purchased a portion measuring 1 acre. In addition, it has been averred that following the entry into and execution of the sale agreement, the plaintiff entered upon and took possession of the designated portion of the original parcel of land.
  
3. The amended originating summons is premised on the supporting affidavit sworn on 13<sup>th</sup> December 2024 and to which the deponent [namely plaintiff] has reiterated the grounds contained in the body of the summons. Moreover, the deponent has annexed two sets of documents, including a copy of the application for land control board consent and the certificates of official search confirming the subdivision of the original parcel of land.
  
4. The defendant herein was duly served with both the original summons as well as the amended originating summons. However, the defendant neither entered an appearance nor filed a statement of defence. For good measure, no response/defence is traceable to the court record.
  
5. The subject matter came up for directions on 23<sup>rd</sup> of July 2025; and whereupon learned counsel for the plaintiff intimated to the court that same was keen to proceed *vide* viva voce evidence. To this end, the court proceeded to and issued directions in line with the provisions of **Order 37 rules 16, 17 & 19 of the Civil Procedure Rules 2010.**

6. The Plaintiff's case is premised on the evidence of one witness, *namely*; Mworira Murithi, zaverio Muriungi. Same testified as PW 1.
7. It was the testimony of the witness [PW 1] that same is the plaintiff herein. Furthermore, the witness averred that same is conversant with the facts of the case. Moreover, the witness testified that same has sworn various affidavits namely; the supporting affidavit dated 20<sup>th</sup> September 2023 and the further affidavit sworn on 13<sup>th</sup> December 2024. The witness thereafter sought to adopt and rely on the contents of the two affidavits as his evidence in chief. In this regard, the deposition at the foot of the two affidavits were duly constituted and adopted as the evidence in chief of the witness.
8. The witness also adverted to the list and bundle of documents dated 20<sup>th</sup> September 2023 and wherein the witness has filed two documents. The witness thereafter sought to tender and produce the two documents as exhibits. Instructively, the documents under reference were duly produced and marked as exhibits P1 and P2, respectively.
9. On the other hand, the witness referenced the annexures attached to the supplementary affidavit sworn on 13<sup>th</sup> December 2024; and thereafter sought to produce same as further exhibits. The said annexures were duly produced and marked as exhibit P3 – P5, respectively.
10. It was the further testimony of the witness that same entered upon and took occupation of the designated portion of the original parcel of land. Furthermore, the witness averred that same entered upon the designated

portion in the year 2011. In addition, the witness testified that his occupation has been open, continuous and uninterrupted for a duration in excess of 12 years.

11. The witness further testified that on or about the year 2020, the defendant proceeded to and caused the original parcel of land to be subdivided into two portions. It was averred that the sub-division brought forth L.R No's Nyaki/Giaki/3223 and 3224, respectively. To this end, the witness referenced the two certificates of official search, which were annexed to the supplementary affidavit sworn on 13<sup>th</sup> December 2024.

12. Additionally, it was the testimony of the witness that even though the defendant sub-divided the original parcel of land, the defendant did not interfere with his occupation, possession and use. Moreover, the witness averred that his portion of land now falls within L.R No. Nyaki/Giaki/3223 measuring 0.405 ha.

13. Arising from the foregoing, the witness posited that his occupation, possession and use of the designated portion of the original parcel of land [now subdivided] has been adverse/hostile to the defendant's title. In this regard, the plaintiff implored the court to find and hold that same has acquired title to L.R No. Nyaki/Giaki/3223 by way of adverse possession.

14. At the close of the hearing, learned counsel Mrs. Mercy Kaume made brief submissions. In particular, learned counsel adopted the evidence tendered and thereafter invited the court to find and hold that the plaintiff has proved his claim in respect of the portion of the original parcel of land [now falling within L.R No. Nyaki/Giaki/3223]. In any event, counsel reiterated that the plaintiff's occupation and possession of the suit

property has been open, continuous and uninterrupted for a duration in excess of 12 years.

15. Having reviewed the amended originating summons; the various affidavits attached thereto and the evidence tendered; and upon consideration of the short oral submissions made on behalf of the plaintiff, I come to the conclusion that the determination of the subject matter turns on three key issues, *namely*; whether the plaintiff has proved occupation and possession of the suit property or otherwise; whether the plaintiff's occupation [if at all] has been hostile to the defendant's title; and whether the plaintiff is entitled to a declaration of adverse possession or otherwise.

16. Regarding the first issue, it is imperative to recall and reiterate that the plaintiff testified before the court and posited that same entered into a sale agreement with the defendant herein. Furthermore, the plaintiff tendered and produced before the court a copy of the sale agreement which was duly signed and executed by both the plaintiff [purchaser] and the defendant [vendor].

17. It was the further testimony of the plaintiff that immediately upon execution of the sale agreement, same entered upon and took possession of the designated one-acre portion out of L.R No. Nyaki/Giaki/1316 [original parcel of land]. The evidence of the plaintiff pertaining to entry upon and or occupation of the sold portion of land has neither been challenged nor controverted. In this regard, I find and hold that the plaintiff has placed before the court plausible and credible evidence to

demonstrate actual occupation, possession of the use of the designated portion.

18. Turning to the second issue, *namely*; whether the plaintiff's occupation and possession of the designated portion of land has been hostile to the defendant's title, it is important to highlight that the plaintiff's entry upon and occupation of the designated portion of the original parcel of land was anchored on the sale agreement. In this regard, it suffices to underscore that the initial entry was mutual; consensual; and predicated on the contractual terms of the sale agreement.

19. Put differently, the plaintiff's entry upon and or occupation of the designated portion of the original parcel of land was neither hostile to nor adverse to the interest over the defendant. However, it is not lost on me that the sale agreement under reference was not consummated. In particular, the sale agreement/contract was not actualized and thus no specific performance accrued.

20. Additionally, it is important to highlight that despite the fact that the sale agreement did not materialize, the defendant herein did not take any steps and or actions to recover the designated portions of land. Simply put, the defendant did not commence any proceedings for the purposes of evicting the plaintiff from the portion of the original parcel of land. Instructively, the defendant was obligated to commence any such proceedings within a duration of 12 years. **[See Section 7 of the Limitations of Actions Act Cap 22 Laws of Kenya].**

21. In so far as the Plaintiff continues to occupy and possess the designated portions of the original parcel of land [now subdivided] long after the lapse of the sale agreement, it is apparent that the continued occupation and the actions incidental thereto were adverse and hostile to the defendant's rights and interests.

22. In the case of **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR)**, the Court of Appeal discussed the ingredients of what makes occupation/possession adverse to the rights of the title holder.

23. For coherence, the court stated as hereunder;

*36. For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.*

*37. In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was nec vi, nec clam, nec precario. (See Kimani Ruchine -v- Swift, Rutherfords Co. Ltd. [1980] KLR 1500 and Karnataka Board of Wakf -v- Government of India & Others [2004] 10 SCC 779).*

*38. In this appeal, the learned judge held that the appellant's occupation of the suit property was interrupted in 1992 when he filed suit before the Bungoma Principal Magistrate's Court.*

*39. In Wambugu -v- Njuguna, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is 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.*

*40. A person who claims adverse possession must inter alia show:*

*(a) on what date he came into possession.*

*(b) what was the nature of his possession?*

*(c) whether the fact of his possession was known to the other party.*

*(d) for how long his possession has continued and*

*(e) that the possession was open and undisturbed for the requisite 12 years.*

24. Flowing from the evidence that was tendered by and on behalf of the Plaintiff, I come to the conclusion that the plaintiff's occupation, possession and use of the suit property has been hostile to the defendant's title to and in respect of L.R No. Nyaki/Giaki/3223 [which is a subdivision of the original parcel of land].

25. Next is the issue as to whether the plaintiff is entitled to a declaration of adverse possession. To start with, adverse possession springs into effect by virtue of continuous and uninterrupted occupation of the land belonging to another, albeit without the consent, permission or authority of the land owner.

26. The Court of appeal in the case of *Mtana Lewa v Kahindi Ngala Mwagandi [2015] KECA 532 (KLR)* stated thus;

*Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.*

27. While addressing issue number one elsewhere herein before, I have found and held that the plaintiff has tendered and produced evidence to demonstrate open, continuous and uninterrupted occupation of a portion of the original parcel of land, now L.R No. Nyaki/Giaki/3223. For good measure, the plaintiff's testimony was uncontroverted.

28. Furthermore, I have also found and held that though the plaintiff's entry into and occupation of the portion of the original parcel of land, was anchored on contract; however, the contract in question did not materialize and therefore the plaintiff remained in occupation on the land without the consent, permission and or authority of the defendant. This aspect denotes hostility and adversity to the defendant's title.

29. In view of the foregoing, and taking into account the longevity of occupation, the publicity/ notoriety thereof and the failure by the defendant to take remedial measures to recover possession, I find and hold that the plaintiff herein has duly proved his claim as pertains to adverse possession over and in respect of L.R No. Nyaki/Giaki/3223 [a subdivision of the original parcel of land].

**FINAL DISPOSITION.**

30. Having analysed the thematic issues that were highlighted in the body of the Judgment, it must have become apparent that the Plaintiff has duly proved and established his claim. *Simply put*, the plaintiff's suit is meritorious.

31. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder;

- (i) A declaration be and is hereby issued that the Plaintiff has acquired title to and in respect of L.R Nyaki/Giaki/3223 [a subdivision of the original L.R No. Nyaki/Giaki/1316] by way of adverse possession.**
- (ii) A declaration that the defendant's title to and in respect of L.R Nyaki/Giaki/3223 has been extinguished by effluxion of time.**
- (iii) A declaration be and is hereby issued that the defendant continues to hold the title in respect of L.R Nyaki/Giaki/3223 on trust for the plaintiff herein.**
- (iv) That the defendant's title to be and is hereby revoked and in lieu thereof, the register of the property namely; L.R Nyaki/Giaki/3223 shall be rectified to reflect the name of**

the Plaintiff [Mworia Murithi Zaverio Muriungi] as the lawful owner.

- (v) The defendant be and is hereby ordered to execute the relevant instruments of transfer to facilitate the transfer and registration of L.R No. Nyaki/Giaki/3223 to the defendant.
- (vi) In default by the defendant to execute the transfer instrument in terms of clause (v) above, the deputy registrar of the court shall be at liberty to execute same on behalf of the defendant.
- (vii) Finally, the Plaintiff be and is hereby awarded costs of the suit.

32.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].  
JUDGE**

**In the presence of:**

Hussein – Court Assistant

Mrs. Mercy Kaume for the Plaintiff

No appearance for the Defendant