REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NANYUKI

ELC APPEAL NO.20 OF 2023

ESTHER WAIRIMU THUITA……

APPELLANT

VERSUS

WILLIAM WAMBUGU

NGATIA……RESPONDENT

(Being an appeal from the judgement of Hon KITHINJI A.R. (CM) delivered in NANYUKI CMELC No.23 of 2022 ON 28.10.2023)

JUDGMENT

1. This suit was initially filed in Nyeri High Court in the Originating Summons no. 7 of 2019 dated 18.2.2019. It appears to have been transferred to the Environment and Land Court in Nyeri, and was thereafter transferred to Nanyuki ELC sometime in year 2021. Then on 5.5.2022, the matter was transferred to the Magistrates court at Nanyuki on account of the value of the land, the same being Kshs. 3 000 000 where it was registered as

CMELC NO 23 OF 2022. The matter is now back in Nanyuki ELC on appeal.

2. The Originating summons dated 18.2.2019 was filed by the current respondent (the plaintiff) where he was claiming entitlement to parcel NANYUKI WEST TIMAU BLOCK 2/941 (MATANYA MARURA) by way of adverse possession against the current appellant (the then defendant). In his supporting affidavit to the Originating summons, the plaintiff was claiming that he bought the suit land as plot no. 2290 from a land buying company known as Matanya Estate Limited (hereinafter the company) in 1972. He was issued with a clearance certificate and his family settled on the said land since 1972. That when surveying was done, he retained the same suit plot. He did not have money to process his title. However, in year 2009 he went to the land registry for a follow up and found that the title to his land had been issued to the defendant.

3. In opposition thereof, the defendant filed a Replying affidavit dated 14.6.2022 contending that she is the

registered owner of the suit land as from 26.11.1998. She averred that she is the widow of the late Samuel Thuita Waruingi who purchased shares from one Samuel Kihara Gakuha vide an agreement dated 22.5.1990.

4. That at the time of sale, the parcel of land had not been registered and was known as plot No. 2286 Matanya Estate Limited. It was realized that plots No. 2286 and 2290 were transposed on the ground. That as a result of this transposition she is actually registered for the plot which was 2286 whereas the plot her husband ought to take is 2290. That the lands office is aware and on 2.3.2012 she was summoned with a view to regularize this transposition. Thus the occupation by the plaintiff has been open with her consent and that of her family.

5. At the trial before the magistrate's court, the plaintiff reiterated the averments set out in his pleadings, while producing the documents in his bundle as exhibits.

6. On cross-examination, He stated that his father, one Kariuki Wahome was a member of Matanya Estates. He settled on the suit land in 1972 and there were no titles

by then. He admits that there were wrangles in regard to allocations. 2009 is the year he discovered that the title to the suit land was issued to the defendant. He concedes that his ballot bears a cancellation.

7. The defendant advanced her case as DW1 and she adopted the averments set out in her replying affidavit as her evidence.

8. On cross examination, Dw1 reiterated that her husband bought the suit land from Samuel in 1990. She never went back to the land but she has the title.

9. In the judgment delivered on 28.10.2023, the trial court affirmed plaintiffs claim of adverse possession in respect of the suit land.

10. Aggrieved by the aforesaid decision, the appellant filed his memorandum of appeal dated 23.11.2023 averring that the trail magistrate erred in law and fact in misapprehending the doctrine of adverse possession, as well as misdirecting himself on pleadings as weighed against the evidence.

11. The appellant therefore prays for the dismissal of the suit before the trial court.

12. The appeal before this court was canvassed through written submissions. In her submissions dated 7.5.2025, the appellant contends that the respondent had no intention of dispossessing the appellant off the suit land until year 2009 as that is when he discovered that the title was in the name of the appellant. Thus all along, the respondent had believed that he was the rightful owner of the suit land since 1972.

13. To this end, it was argued that the court failed to address the element of "animus possindedi". Reference was made to the Court of Appeal case in Nyeri; **Chairman Board of Governors Murang'a College of Technology Primary School vs Julius Ngigi Munjuga [2018] Eklr** which quoted with approval the case of **Alfred Welimo vs Mulaa Sumba Barasa, CA No. 186 of 2011,** where it was held that;

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it……The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land”.

14. Reference was also made to the cases of **Richard Wefwafwa Songoi v Munyifwa Songoi (2020) eKLR** and **Samuel Kihamba v Mary Mbaisi (2015) Eklr** to buttress the point that the respondent had not met the elements required for adverse possession that is uninterrupted, continuous and open occupation of the suit land for 12 years. It is argued that the claim of adverse possession brought in year 2019 was premature as time could only run from year 2009.

15. The submissions of the respondent are dated 16.5.2025 where he denies that he had pleaded a cause of action based on adverse possession but proved a different claim, adding that the issue of transposition was not a major fact in issue during the trial.

16. The respondent cited various case law including **Gachuna Gacheru v Maina Kabuchwa (2016) eKLR** and **Samuel Kihamba v Mary Mbaisi (2015) eKLR** to buttress his arguments that he had proved a case of adverse possession before the trial court. He averred that a claim of adverse possession is attached to the land, and in the case at hand, he had occupied the suit land for a period of over 35 years.

DETERMINATION

17. This being a first appeal, the court reminds itself of its primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the evidence and then determine whether the conclusions reached by the learned magistrate are to stand and give reasons either

way as was pronounced in the case of **Abok James Odera t/a A.J Odera & Associates Vs John Patrick Machira t/a Machira & Co. Advocates (2013) eKLR** and **Selle and Another Versus Associated Motor Boat Company Ltd & Others [1968] Ea 123.**

18. Having regard to the pleadings and the evidence as well as the submissions proffered by the rival parties, I find that there seems to be no controversy that the suit land is occupied by the respondent while the title is in the name of the appellant. The respondent apparently occupied the suit land in 1972 but discovered that the title was in appellants name in 2009. The crux of the dispute turns on one element of adverse possession, that is; When does time run;

19. The provisions of Section 13 (1) of the Limitation of Actions Act provides that;

> **"a right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run,"**

20. The import of the proviso is that time starts to run from the date that an adverse possessor dispossesses the title holder the land in question. This calls for a discussion on the definition of "Animus Possidendi", a latin phare which means;

> **"an intention to treat the property as your own to the exclusion of all others including the true owner". The doctrine runs closely with the phrase "Corpus possesionis" another latin phrase meaning "Factual or actual control or physical occupation of the land".**

21. The above definition was also expounded by Sir Robert Megarry and Sir William Wade (**The Law of Real Property, 6th Ed**) where they stated that animus possidendi entails; an intention to exclude the world in the squatter's own name and on his own behalf, an intention to possess and not an intention to dispossess- Accordingly, the *animus* can be sufficiently established even if both the true owner and the squatter mistakenly

believe that the land belongs to the latter or where a squatter did not realize that he was trespassing on another's land. The intention to possess must be manifestly clear, so that it is apparent that the squatter was not merely a persistent trespasser, but was seeking to dispossess the true owner of the land.

22. In **Wambugu v Njuguna [1983] KLR 172**, the Court of Appeal held that for adverse possession to succeed, the claimant must prove both actual possession and intention to possess the land to the exclusion of the true owner. While in **Kasuve v Mwaani Investments Ltd & 4 others [2004] KLR 184**, the court emphasized that mere occupation is insufficient unless it is accompanied by animus possidendi.

23. In **Maweu v Liu Ranching & Farming Cooperative Society [1985] KECA 72 (KLR)**, the Court of Appeal stated that;

> "**As the learned judge in this case correctly appreciated, the Registered Land Act, cap 300, provides for a just such a situation as**

this, for in section 30(f) it states that the acquisition of land by a registered proprietor is subject to rights acquired, <u>or in the process of being acquired, by prescription, as an overriding interest"</u> <u>Empasize added.</u>

24. In the case at hand, the appellant was registered as the owner of the suit land on 26.11.1998 going by the certificate of official search. The registration status of the land before that date are unknown as no evidence was tendered to that effect before the trial court.

25. During cross examination the appellant had stated as follows before the trial court.

"My husband bought the land from Samuel. I was shown the plot in 1990. …I did not go back again. I never went back, but I have the title".

26. The import of that evidence is that 12 years from November 1998, time started to run as the respondent had manifested all intentions to possess that land to

the exclusion of all others. To this end, I find that no evidence was adduced by either party relating to discussions on transposition of the suit plots.

27. In the circumstances, I find that the only fault to be found in the judgment of the trial court is the computation of time for a period of 35 years, or rather, not being precise on when time started to run. This however does not in anyway affect the judgment that the respondent was within the 12 years period on open uninterrupted occupation of the suit property from 1998 up to the time the case was filed in year 2019.

28. I must also add that the dictates of justice demand that a lawful owner of land ought not to be condemned to pay costs when he is losing land through the doctrine of adverse possession unless there are good reasons to do so. In the circumstances, I proceed to give the following orders.

1) This appeal is hereby dismissed.

2) Each party shall bear their own costs both in the appeal as well as before the trial court.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 8TH DAY OF OCTOBER 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA
JUDGE

In the presence of:

M/S Ngari holding brief for Nderi for appellant.

Kirimi for respondent.

Nancy Mwangi – Court Assistant.