



THE JUDICIARY



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANG'A
ELCLOS E025 OF 2024

BONIFACE MBURU KARIUKI..... APPELLANT
VERSUS
STEPHEN WANYOIKE KANGATHI RESPONDENT

JUDGMENT

(1) The Plaintiff seeks the following reliefs from the Defendant in the originating summons dated 3-12-2024.

- 1. That the Applicant has by way of adverse possession acquired land title of 0.5 acres out of land reference No. 6/Giathaini/584, the suit land herein be registered in the name of Boniface Mburu Kariuki.**
- 2. That the Land Registrar Murang'a be ordered to transfer 0.5 acres out of the suit land to the Applicant.**
- 3. That the Deputy Registrar of this court do sign the application for the land control board consent, transfer form, documents and any other necessary papers to facilitate the transfer of 0.5 acres of the suitland to the Plaintiff.**
- 4. That the Court do order the Land Registrar to dispense with the production of the original title deed of the suit land when registering the decree herein for the transfer of 0.5 acres.**
- 5. That the OCS Muthithi Police Station do supervise the execution of this Court's decree if necessary.**
- 6. That the Respondents do pay the costs of this suit.**

(2) The Plaintiff's case is as follows. Firstly in the year 2004, he bought 0.5 acres which was to be excised from L.R. No. Loc.6/Giathaini/584 from the Defendant. The total purchase price was Kshs 90,000/=. A deposit of Kshs. 10,000/= was paid on 19-8-2004. The balance was paid in instalments until 6-5-2006 when the final instalment was paid to the Respondent.

Secondly, the suit land was registered in the name of Ngugi Mukabi who was a brother to the Defendant's father. Thirdly, the Defendant put the Plaintiff in possession immediately after the agreement was signed and he has been in occupation since then. Fourthly, the Respondent filed a succession cause at Murang'a being CMCC Succession cause no. 36 of 2007 where he was issued with a grant but he failed to prosecute the suit to conclusion as a result of which it was struck out on 16-12-2016.

(3) In support of his case, the Plaintiff filed the following evidence.

- (i) **Supporting affidavit dated 3-12-2024.**
- (ii) **Witness statements by himself, Benard Muiruri Ng'ang'a and Joseph Murigi.**
- (iii) **Copy of agreement for sale dated 18/8/2004.**
- (iv) **Copy of certificate of official search for the suit land dated 3-12-2024.**
- (v) **Copy of grant in Murang'a CMCC Succession Cause No. 36 of 2007.**
- (vi) **Copies of letters written in Kikuyu language and their transactions in English.**
- (vii) **Copy of photograph showing some crops on a parcel of land.**
- (viii) **A breakdown of cash payments between 12-9-2004 and 6-5-2006 which totals to Kshs 73,000/=.**

(4) The summons is opposed by the Respondent who has filed a replying affidavit and a witness statement dated 25-2-2025 and 27-3-2025 in which he replies as follows. Firstly, the registered owner of the land is Ngugi Mukumbi who is deceased now. Secondly, the Plaintiff participated in Murang'a CM Succession cause No. 36 of 2007 as a beneficiary of the estate of the deceased Ngugi Mukumbi by virtue of being his relative. Having claimed the suit as a beneficiary, he cannot claim it again as an adverse possessor. Thirdly, it is not correct to say that the Plaintiff has been in possession of the portion of the suit land for 12 years and more because the Defendant's children have been utilizing the whole of it. They have planted mangoes which they harvest. Fourthly, the Defendant is not the legal representative of the estate of Ngugi Mukumbi since the grant issued in P&A 36 of 2007 has abated. Fifthly, the alleged sale agreement annexed to the supporting affidavit is not dated and it is therefore a manufactured document.

(5) In support of the defence, the Defendant filed the following evidence.

- (i) **Replying affidavit dated 25-2-2023.**
- (ii) **Witness statement dated 27-3-25.**
- (iii) **Pleadings in Murang'a Succession case No. 367/2007 in the estate of Ngugi Mukumbi.**
- (iv) **Copy of grant of letters of administration issued on 20-6-2007.**
- (v) **Order issued on 6-12-2016.**

(6) At the trial on 23/7/2025, the Plaintiff testified and adopted the evidence on record. He then called his two witness Joseph Murigi and Benard Muiruri. While Murigi said that the Plaintiff occupies part of the suit land, Muiruri;s evidence is that he witnessed the sale agreement.

On the other hand, the Defendant's testimony is simply that he is the one who allowed the Plaintiff to occupy the land and he has not chased him. He was willing to transfer the land to the Plaintiff but he fell sick. He is no longer willing to transfer the land. In cross-examination, the Defendant said that the Plaintiff is in occupation of the suit land.

(7) Counsel for the parties filed written submissions dated 13-8-2025 and 23-7-2025 respectively. Counsel for the Defendant identified the following issues for determination.

- (i) **When did possession become adverse.**
- (ii) **Legal representation of the deceased Ngugi Mukumbi.**

Unfortunately, the Plaintiff's counsel filed his submissions before the Defendant's counsel. This is contrary to the directions given on 23/7/2025 and also contrary to Order 18 rule 2 Civil Procedure Rules. The Plaintiff's counsel did not respond to the issues raised by the Defendant's counsel.

(8) Having carefully considered all the evidence on record including the witness statements, documents, testimony of the trial, written submissions, the law cited therein and the issues raised, I find that in addition to the issues identified, I will add the following.

- (i) **Whether the Plaintiff is otherwise entitled to the suit land if his claim for adverse possession fails.**
- (ii) **Whether the Plaintiff paid the entire purchase price of Kshs. 90,000/=.**

(iii) Whether the Defendant’s testimony is credible and corroborated.

(9) On the two issues raised by the learned Counsel for the Defendant, I find that the Plaintiff’s claim for adverse possession is problematic but only because the Defendant is not the registered owner of the suit land as required by Section 38(1) of the Limitation of Actions Act. It provides as follows.

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

The fact that the Defendant is not the registered owner of the land means that the case for adverse possession cannot succeed. This finding covers the second issue raised by the Counsel for the Defendant.

(10) On the Defendant’s credibility, I find that he has little or none. In the replying affidavit at paragraph 6, he states as follows.

“ That it is not true that Boniface Mburu Kariuki has been in possession of a portion of the suit land in excess of 12 years. My children and I have been utilizing the whole of the suit land exclusively. We harvest mangoes and plant crops on the land to date. The land is not settled and no one lives on it.”

When the Defendant testified on 23-7-2025, this is what he said at page 15 of the handwritten record while under cross-examination by Mr. Njoroge for the Plaintiff.

“ I sold the land to the Plaintiff. The agreement was before Gacheru Advocate. The size was 0.5 acres. I allowed him to occupy the land. He is still on the land. I am ready to transfer. It is the Plaintiff who is in occupation of 0.5 acres. In the statement dated 27-3-2025 I have not said otherwise.”

From what the Defendant has deponed in the affidavit and what he told the Court in cross-examination, it is obvious that he is not being truthful in his replying affidavit. The fact that his affidavit evidence is uncorroborated by any other independent evidence and disproved by the credible evidence by the Plaintiff which is corroborated sufficiently in material particulars by independent evidence by Joseph Murigi makes me find that it is the Plaintiff who is truthful on the evidence of occupation.

I find that the Plaintiff occupies 0.5 acres of the suit land while the Defendant occupies 0.3 acres.

(11) The breakdown of the 28 items running from 12-9-04 to 6-5-06 adds up to Kshs 73,000/=. This is the amount that I find proved by the Plaintiff. This means that he did not pay the full purchase price and if he did, his mathematics do not add up because he has not proved it.

(12) In the case of **Willy Kimutai Kitilit vs. Michael Kibett**, the Court of Appeal Eldoret in **Civil Appeal No. 51 of 2015** it was held that where a seller of land puts the buyer in possession of land, the seller creates a constructive trust in favour of the buyer and the equitable doctrines of constructive trust and proprietary estoppel override the Land Control Act primarily because equity is one of the natural values which binds the courts in interpreting any law.

The facts of the case were similar to the ones in this case. By a plaint filed on 28-3-2013, the Appellant averred among other things that, in August 2008, he intended to sell 2 acres of his land to the Respondent at a price of Kshs. 150,000/= per acre, that the Respondent took possession of the land; that the Respondent breached the agreement by failing to pay the purchase price as agreed; that no consent of the land control board was obtained and the agreement was null and void, and that the Respondent had continued to claim the land although he had no property rights. He sought a declaration that the Respondent had no proprietary right over the land and a temporary injunction restraining the Respondent from trespassing upon or interfering with the suit land. In dismissing the appeal the Court of Appeal had the following to say in part,

“...By the time the Appellant caused himself to be registered as the proprietor of the whole land he was a constructive trustee for the Respondent and it would be unjust and unequitable to allow the Appellant to retain the 2 acres that he had sold to the Respondent in the circumstances of the case.

As we have held in essence that, the lack of the consent of the Land Control Board does not preclude the Court from giving effect to equitable principles, in particular the doctrine of Constructive trust, we find that the trial Court reached the correct decision and therefore the appeal has no merit.”

The facts of this case are similar to those in Kitilit's case because the Defendant took the Plaintiff's money and put him in possession of 0.5 acres of the suit land. In so doing he created a constructive trust in favour of the Plaintiff. He cannot go back on his word because he is caught up by this equitable doctrine. Under Section 28 (b) of the Land Registration Act, trusts including customary trusts and overriding interests and the title in favour of Ngugi Mukabi or Mukambi is subject to this trust.

- (13) Since the Plaintiff did not pay the full purchase price of Kshs. 90,000/= and only paid Kshs. 73,000/=, I will prorate the land he is entitled to the amount of money paid.

$$\frac{73,000/=}{90,000/=} \times 0.5 \text{ acres} = 0.405 \text{ acres}$$

The Plaintiff is therefore entitled to 0.4 acres of the suit land.

- (14) In conclusion and for the reasons already given I enter judgment for the Plaintiff against the Defendant for 0.4 acres of the suit land.

Secondly, the Land Registrar Murang'a to excise the said 0.4 acres from the suit land and register the same in the name of the Plaintiff. Thirdly, the Deputy Registrar of this Court to execute all the necessary instruments to effect the transfer of 0.4 acres to the Plaintiff. Finally, if the Defendant does not cooperate, the Land Registrar to effect registration of the 0.4 acres of the suit land to the Plaintiff notwithstanding any hindrance by the Defendant. Costs to the Plaintiff.

It is so ordered.

Dated, signed and Delivered virtually at Murang'a this 18th day of November, 2025.

**M.N. GICHERU
JUDGE.**

Delivered online in the presence of; -
Court Assistant – Mwangi Njonjo
Plaintiff's Counsel – Mr T.M. Njoroge
Defendant's Counsel - Absent