

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**  
**ELC CASE NO. 1 OF 2024 (OS)**

**JULIUS KINYANJUI KANG'ETHE.....1<sup>ST</sup>**

**APPLICANT**

**SOSPETER NDUNG'U KANG'ETHE.....2<sup>ND</sup>**

**APPLICANT**

**VERSUS**

**MICHAEL MWANIKI MURIUKI.....1<sup>ST</sup>**

**RESPONDENT**

**MUTHIKE MBAARU NJAGI.....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

1. The Applicant commenced the instant suit by way of an Originating Summons dated 29<sup>th</sup> November 2023 seeking for the following orders:

**1) A declaration that land parcels Numbers Mutira/Kangai/4093 and 4094 (both formerly known as Mutira/Kangai/1159) belong to the deceased and forms part of his estate as a purchaser for value.**

**2) In the alternative, a declaration that land parcels Numbers Mutira/Kangai/4093 and**

**4094 belong to the deceased and forms part of his estate by dint of adverse possession.**

**3) An order revoking the subdivision of parcel Number Mutira/Kangai/1159 and subsequent cancellation of title Number Mutira/Kangai/4093 and 4094.**

**4) An order that the Land Registrar, Kerugoya do issue a title deed to parcel Number Mutira/Kangai/1159 to the Applicants herein in the name of Edward Kang'ethe.**

**5) Cost of the suit be provided for.**

2. The Originating Summons was predicated upon the grounds on the face of it and the supporting affidavit of Julius Kinyanjui Kang'ethe. He deponed that their late father, Edward Kang'ethe alias Edward Kang'ethe Karanja, purchased a land parcel, Mutira/Kangai/1159, from one Nyaga Ngothi in 1976 and completed the purchase in 1981. He averred that the land was originally part of Mutira/Kangai/353, which was later subdivided into parcels 1158 and 1159, with parcel 1159 allocated to their father.

3. He stated that their father took possession immediately upon purchase, developed the land, and settled his family thereon. He further averred that the vendor, Nyaga Ngothi, issued their father with completion documents and that the consent of the Land Control Board for subdivision and transfer was duly obtained, but the transfer documents lodged at the Kerugoya Lands Office were misplaced before registration.
4. The 1<sup>st</sup> Applicant deponed that in 2011, he registered a caution against the title to protect their family's interest. However, in 2015, the 1st Respondent, claiming to be the administrator of the estate of Nyaga Ngothi, caused the caution to be removed, subdivided the land into parcels 4093 and 4094, and transferred parcel 4094 to the 2<sup>nd</sup> Respondent. The Applicants maintain that these actions were fraudulent and unlawful, as their late father had already acquired ownership by purchase and long possession. They therefore seek declarations vesting parcel 1159 in their father's estate, cancellation of the subdivisions and transfers, and issuance of title in their deceased father's name.

5. Despite service of summons, the Respondents did not enter appearance or file any response. The Applicants' evidence therefore stands uncontroverted.

6. The matter was heard on 3<sup>rd</sup> June 2025 when the 1<sup>st</sup> Applicant, Julius Kinyanjui Kang'ethe, testified as PW1. He adopted his witness statement and documentary evidence filed on record. He told the Court that his late father purchased land from Nyaga Ngothi in 1976, took possession, and settled his family thereon. He stated that the land was subdivided with consent of the Land Control Board into parcels 1158 and 1159, with parcel 1159 going to his father.

7. PW1 testified that his brother, the 2<sup>nd</sup> Applicant, resides on the land together with his family and that there are several permanent houses occupied by their relatives constructed on the suit land. He testified that he discovered in 2011 that the land was still registered in the name of the vendor and therefore placed a caution. He later learnt that the

caution had been removed in 2015 and that the land had been subdivided and part transferred to the 2<sup>nd</sup> Respondent. He maintained that his family has been in uninterrupted occupation since 1976 under circumstances that amounted to adverse possession and in the premises urged the Court to find they had acquired title to the land by way of adverse possession.

8. The Applicants filed written submissions dated 17<sup>th</sup> June 2025 and it was their assertion that they had demonstrated that their late father, Edward Kang'ethe, purchased the suit property from the late Nyaga Ngothi in 1976, took possession, and has remained in occupation through his family to date. The Applicants contended that the vendor not only sold and received consideration but also facilitated the subdivision and obtained the necessary consent of the Land Control Board, thereby signifying his intention to transfer the land to the purchaser.

9. In their submissions dated 17<sup>th</sup> June 2025, the Applicant's Counsel submitted that the Applicant had proved that not

only did the late Nyaga Ngothi sell the suit land to their late father, he also gave him possession and also shared documents such as the Land Control Board consent. They argued that this demonstrated that he intended to transfer the suit land to their father thereby seizing himself of ownership of the suit land. The Applicants submitted they had lived for over 43 years in the suit land and had met the threshold for being declared the rightful owners by virtue of adverse possession. Counsel's position was that the subsequent subdivision and transfer by the 1<sup>st</sup> Respondent was illegal and of no consequence as the land had ceased to belong to the deceased estate, the title of the registered owner having been extinguished.

### **Analysis and Determination**

10. I have considered the pleadings, the evidence of the 1<sup>st</sup> Plaintiff and the documents produced in evidence, as well as the submissions filed on behalf of the Applicants. The Respondents, though duly served, did not enter

appearance and/or file any response. The Applicants' evidence therefore stands unchallenged, but the Court must still determine whether they have proved their case on a balance of probabilities.

11. The Applicants' claim is premised under two heads, firstly, that, their late father acquired parcel Mutira/Kangai/1159 as purchaser for value, and secondly, in the alternative, that he acquired ownership through adverse possession.

12. To ascertain these claims, this Court identifies three issues for determination. These are:

**1) Whether the Applicants' late father, Edward Kang'ethe, purchased land parcel Mutira/Kangai/1159 as a purchaser for value.**

**2) Whether the Applicants' late father acquired the additional one acre either as a purchaser or by adverse possession.**

**3) Whether the subdivision of parcel 1159 into parcels 4093 and 4094 and the transfer to the 2nd Respondent was lawful.**

**Whether the Applicants' late father, Edward Kang'ethe, purchased land parcel Mutira/Kangai/1159 as a purchaser for value.**

13. There is no dispute on the basis of the material placed before the Court that the suit land measured four acres, as shown in the mutation form. The sale agreement produced in evidence, however, was expressly for purchase of three acres at a consideration of Kshs. 14,100/-. The agreement acknowledged part-payment of Kshs. 6,500/- with the balance payable in instalments. Subsequent receipts and acknowledgments show that the balance was paid, and by the letter dated 17<sup>th</sup> November 1981 the vendor confirmed that the late purchaser had fully paid for the three acres.
14. It is in the same letter that the vendor went further to offer to sell an additional one acre at a consideration of Kshs. 15,000/-, and allowed the purchaser to take possession and to utilize the same pending payment. No evidence was produced to demonstrate that the additional purchase price was ever paid.

15. On the strength of the documents before the Court, it is therefore clear that the late Edward Kang'ethe only proved purchase of three acres, being the portion for which consideration was fully paid. As regards the additional one acre, the Court finds that payment of the full consideration was not proved and the purchaser's interest was therefore not perfected.

16. The Court accordingly holds that the Applicants' late father acquired three acres out of land parcel Mutira/Kangai/1159 as a purchaser for value.

**Whether the Applicants' late father acquired the additional one acre either as a purchaser or by adverse possession.**

17. The doctrine of adverse possession in Kenya is embodied in **Section 7 and Section 13 of the Limitation of Actions Act, CAP 22 Laws of Kenya**, which provide as follows:

**Section 7:**

**"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action**

accrued to him or, if it first accrued to some person through whom he claims, to that person.”

**Section 13:**

**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 (which possession is in this Act referred to as adverse possession), and, where undersections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

**Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.**

18. **Section 38 of the Act** provides for the procedure to be followed by a person claiming adverse possession and 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.(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”**

19. The doctrine of adverse possession has been articulated in multiple cases in Kenya with the essential elements being laid down by various Courts. The Court of Appeal in the Case of, **Mtana Lewa vs Kahindi Ngala**

**Mwagandi (2015) eKLR**, gave a definition of what the doctrine of adverse possession entailed and the circumstances that gives rise to it. In the case, the Court 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.”**

20. The Court of Appeal in the Case of **Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui (2017)**

**eKLR** while acknowledging that adverse possession is a common law principle reiterated the same by citing the India Supreme Court decision in the Case of **Kamataka Board of Wakf -vs- Government of India & Others (2004) 10 SCC 779** where the Court stated thus: -

**“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is *“nec vi, nec clam, nec precario”*, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual,**

**visible, exclusive, hostile and continued over the statutory period.”**

21. In the decision of the Environment and Land Court at Mombasa in the case of **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others (2018) eKLR**, the decision of the Court of Appeal in **Wambugu v Njuguna (1983) KLR 173** on what constitutes adverse possession was cited with approval. The requirements for adverse possession were also set out in the Case of **Mbira -v- Gachuhi (2002) IEALR 137** where the court held that:

**“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”.**

22. Therefore, a person claiming under the doctrine of adverse possession must demonstrate actual occupation or possession of another's land, without the consent of that other, and in such a way that the occupation or possession is open, peaceful and continuous for a period of 12 years and above. The Court of Appeal in the case of **Kweyu Versus Omutut (1990) eKLR** observed that:

**“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it**

**cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”**

23. In the Case of **Gabriel Mbui Vs Mukindia Maranya (1993) eKLR, Kuloba J** observed as follows:

**“a) The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.**

**b) 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.**

**c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.**

**d) The non-permissive actual possession hostile to the current owner must be unambiguously exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.**

**e) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for**

**notice to the owner and the community, of the exercise of dominion over the land,**

**f) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period.**

**g) 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.”**

24. From the above authorities, the position of the law on adverse possession is settled. To acquire land by limitation, the occupation must be open, continuous, exclusive, and adverse to the interests of the true owner. Possession that begins with the consent of the owner cannot be adverse until that consent is clearly terminated.

25. The letter of 17<sup>th</sup> November 1981 is unambiguous; the vendor permitted the purchaser to occupy the additional one acre pending payment. That occupation was therefore permissive. The Applicants did not show that this permission was ever withdrawn, that the purchaser or his

successors repudiated the sale, or that the occupation became hostile to the rights of the vendor or his estate at any identifiable point.

26. The Applicants indeed registered a caution in 2011, thereby asserting an interest, but that act, taken decades after entry, does not by itself transform permissive use into adverse possession. Indeed, the subsequent removal of that caution by the 1st Respondent and the subdivision and transfer in 2015 demonstrate that the vendor's estate continued to assert ownership. Such contested conduct negates any suggestion that the Applicants enjoyed a full, unchallenged period of hostile possession as required by law.

27. The Court is therefore not persuaded that the Applicants' late father acquired the additional one acre either by purchase or by adverse possession. His proven entitlement remains limited to the three acres for which the purchase price was paid and acknowledged.

28. It is my determination therefore that the Applicants have proved their late father purchased a portion of three (3) acres out of the original land parcel Mutira/Kangai/353 which measured 6.10 Acres. This land parcel was subdivided to create land parcels Mutira/Kangai/1159 measuring 1.62 Ha or approximately 4 Acres and land parcel Mutira/Kangai/1158 measuring 0.85 Ha or approximately 2.1 acres. The portion of 3 acres that the Applicants late father purchased was comprised in land parcel Mutira/Kangai/1159. Although there was intention to sell the additional one (1) acre to the Applicants' father, there was no clear evidence that he fully paid the consideration for the additional one (1) acre. The possession of the additional one acre was with the permission of the seller. It has not been shown that such permission was withdrawn.

29. The Applicants late father fully paid for the three acres that he purchased from the seller and was granted possession of the same pursuant to the sale agreement. As no consent of the Land Control Board was obtained for the

subdivision and transfer of the 3 acres, the possession of the 3 acres became adverse after 6 months of the payment of the last instalment of the purchase price. The registered owner from the date of the last instalment payment, continued to hold the portion of the Applicants deceased father as a trustee. As relates to the additional 1 acre in respect of which the purchase price had not been paid the Applicants late father continued to possess the same under permission and adverse possession could not arise.

30. The subdivision and transmission of portions of land parcel Mutira/Kangai/1159 into land parcels Mutira/Kangai/4093 and 4094 was subject to the accrued interest and rights of the Applicants deceased father. The subdivision was unlawful and of no legal effect. The estate of the late Nyaga Ngothi had no title to the portion of 3 acres out of and land parcel Mutira/Kangai/1159 as the same had become extinguished through the doctrine of adverse possession. The transfers of land parcel Mutira/Kangai/4093 and 4094 to the 1<sup>st</sup> and 2<sup>nd</sup>

Respondents respectively were null and void and are for cancellation.

31. The upshot and after careful analysis of the evidence and the applicable law is that I hold and find the Applicants have proved on a balance of probabilities that their late father Edward Kangethe purchased and occupied a portion of 3 acres out of land parcel Mutira/Kangai/353. That the Applicants deceased further consequently acquired title to the portion of 3 acres which was comprised in land parcel Mutira/Kangai/1159 after the original title was subdivided. In the premises I enter Judgment in favour of the Applicants and make the following consequential orders:-

**1. A declaration be and is hereby made that the subdivision of land parcel Mutira/Kangai/1159 to create land parcel Mutira/Kangai/4093 and 4094 was unlawful.**

**2. That the subdivision was subject to the accrued right of ownership of a portion 3 acres out of land parcel Mutira/Kangai/1159 by Edward Kangethe (deceased) by virtue of being an adverse possessor.**

**3. The subdivision of land parcel Mutira/Kangai/1159 to create parcels Mutira/Kangai/4093 and 4094 and the titles issued thereof is hereby cancelled and the Land Registrar, Kerugoya is ordered to revert the original title Mutira/Kangai/1159 to the name of Nyaga Ngothi (deceased).**

**4. That land parcel Mutira/Kangai/1159 be subdivided to hive off the portion of 3 acres adversely possessed by the Applicants family and the same to be registered in the names of Edward Kangethe (deceased) to await formal succession.**

**5. I make no order for the costs of the suit.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY  
AT KERUGOYA THIS 13<sup>TH</sup> DAY OF NOVEMBER 2025.**

**J. M. MUTUNGI**

**ELC - JUDGE**