

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. E006 OF 2024 (O.S)

WILSON GIOCHE MBARIA.....PLAINTIFF

(Suing for and on behalf of the estate of MBARIA NDERE-Deceased)

VERSUS

JAMES MURATHU MURAGURI.....1ST DEFENDANT

(Sued for and on behalf of the estate of MURAGURI MURATHU-Deceased)

JAMES MURATHU MURAGURI.....2ND DEFENDANT

JUDGMENT

[1] The plaintiff's suit seeks the determination of the following questions;

- (i) Whether the applicant suing for and on behalf of the estate of Mbaria Ndere is entitled to be registered as the proprietor of all that parcel of land known as LOC. 19/Gacharageini/735 measuring 14.3 acres or thereabouts under Section 38 of the Limitation of Actions Act on grounds that the applicant and his family being son to the deceased herein Mbaria Ndere have been openly, peacefully, notoriously and of right been in exclusive possession, use and occupation of the suit land for a period exceeding twelve (12) years immediately preceding the presentation of this summons in court.**
- (ii) Whether the respondent being the administrator of Muraguri Murathu, the previous registered owner of the said land should not be ordered to transfer the same land to the applicant as the title to the said land has been extinguished by the applicant's adverse possession thereof for a period of over twelve (12) years under Section 17 of the Limitation of Actions Act.**
- (iii) Whether the applicant should not be registered as the absolute proprietor of the suit land under Section 38 of the Limitation of Actions Act.**

(iv) Whether in case of default this court should not order that the Deputy Registrar to sign all the necessary documents and applications on behalf of the respondent to facilitate the transfer of the suit land to the applicant or in the alternative the District Land Registrar Murang'a be ordered to cancel the said title in the name of the respondent and register it in the name of the applicant Wilson Gioche Mbaria.

[2] The plaintiff's case is as follows; One, the suit land was consolidated on 11-3-1963 in the name of the defendant's father, Muraguri Murathu. The demarcation and consolidation was done by Mbaria Ndere, the plaintiff's father because the defendant's father had already migrated to Mirangine area of Nyandarua County. He delegated the role of consolidation of the suit land to the plaintiff's father. This was on the understanding that he would later sell the suit land to the plaintiff's father.

Two, as agreed and as expected, on 9-6-1970, the defendant's father sent Shadrack Mwangi to the plaintiff's father asking him to give the owner of the suit land what the clan had agreed. By then, the plaintiff's father was already in occupation of the suit land. The plaintiff's father paid Kshs.1,240/= and one goat to the defendant's father. Kshs.60/= was paid for the goat. The balance was captured as 88 goats and 2 rams. The agreement was reduced into writing and it was witnessed by Gioche Mwangi, Kamangara Thangu, Shadrack Mwangi, Borothi Chege, Edward Muchunu and Francis Karemeri who is still alive.

[3] Three, on 15-11-1973, a further sale agreement was reduced into writing by the plaintiff's father and defendant's father. It read as follows; "Muraguri Murathu has sold Muriithi Ndere his land at Gacharageini plot No. 735 for Kshs.16,000/= and was paid a sum of Kshs.12,000/= leaving a balance of Kshs.4,000/= which was to be paid in the year 1974." The second agreement was witnessed by Mwaro Kariuki, Chege Makumi, Muriithi Ndere, Borothi Chege, Mwangi Maina and A. Maina.

Four, on 7-11-2001, after the death of the defendant's father, the defendant himself acknowledged the sale in writing. The note read as follows; " Today the 7-11-2001, I Mwangi wa Maina and James Muriithi, we have talked about the land of Muraguri Murathu which is at Murang'a Ruru which is with John Mbaria Ndere and we have

talked that he should go to Murang'a so that he can come with the title deed of the land... and John Mbaria Ndere has left Kshs.4,000/= and the balance is Kshs.500/=." This memorandum was witnessed by John Mbaria Ndere, Mwangi Maina, James Murathu and Francis Maina.

Five, by a further family meeting held on 18-12-2012 at Mirangine Chief's office, it was resolved that the defendant do cooperate with the plaintiff's father and both of them to file a succession cause in respect of the suit land. The meeting was attended by Mbaria Ndere, the defendant, Francis Maina Mwangi, Francis Karemeri, Johana Mwangi Muraguri, Mercy Mweru Mwangi and the plaintiff. The chief's elders included Mercy Nyambura, Alice N. Macharia, Joseph Mathenge and Anthony Karanja Chege. Johana Mwangi Muraguri and Mercy Mweru Mwangi are brother and niece to the defendant. They were all at the meeting at the chief's office at Mirangine.

Six, the plaintiff's father occupied the suit land in 1963. At that time the plaintiff's father occupied the suit land with his wife Priscilla Wangari Mbaria, his daughter Dorcas Wanjiru and his mother Wanjiru Ndere. Later on three of his children were brought up on the land. They include Jane Wangari Mbaria, Benson Ndere Mbaria and Wilson Gioche Mbaria, the plaintiff.

At first, a hut was built on the land for the plaintiff's grandmother. A second four roomed house was later built. In 1973, the two buildings collapsed and a new house was built. Since then two timber houses and two external kitchens have been put up. The land has tea bushes first planted in 1978. There are food crops, fruit trees, electricity, and piped water among other developments. The following family members have been buried on the land; Wanjiru Ndere-1993, Jane Wangari Mbaria-1999 and Mbaria Ndere-2016. When the defendant's father died in 1982, he was buried at Mirangine in Nyandarua while his two sons Moses Kimarua and Johana Mwangi have been buried at Marmanet and Lanet areas respectively.

[4] Finally, the plaintiff filed Murang'a ELC Case No. 6 of 2020 seeking to be registered as the owner of the suit land by way of adverse possession but the suit was struck out on the ground that the defendant had no locus standi to be sued in the absence of letters of administration of the estate of Muraguri Murathu. In the year 2023, the defendant filed

Murang'a CM Succession Cause No. E158 of 2023 where he was issued with a grant which he used to get registered as the owner of the suit land on 15-8-2023.

[5] In support of the summons, the plaintiff filed the following evidence;

- (a) Supporting affidavit dated 15-3-2024
- (b) Witness statements by the plaintiff, Francis Karemeri Kamangara, Dismas Mbaria, Ithebu and Dorcas Wanjiku Mbaria.
- (c) Certificate of death for Mbaria Ndere.
- (d) Grants issued in Thika and Murang'a Magistrates Courts in Succession Causes Nos 86 of 2017 and E158 of 2023 respectively.
- (e) Copy of title deed for the suit land, certificate of official search dated 20-5-2013 and copy of green card.
- (f) Copies of the original agreements in Kikuyu language and English translation both dated 9-6-1970 and 15-11-1973.
- (g) Minutes of the meeting held on 18-12-2012 at Mirangine Chief's office.
- (h) Copy of valuation report dated 14-3-2020.
- (i) Copy of judgment in ELC Murang'a Case No. 6 of 2020(OS)

[6] The defendant filed a replying affidavit dated 11-4-2024 in which he avers as follows; Firstly, the summons does not meet the threshold for the grant of the orders of adverse possession. Secondly, the defendant is the registered owner of the suit land after he instituted a Succession Cause in Nakuru Succession Cause No. 506/2011 and Cause No. E158/2023. Thirdly, the defendant acquired the suit land through a legal process of transmission from the estate of his father having satisfied all the requirements of the law. Fourthly, the defendant's father allowed the plaintiff's family to use the suit land for their daily subsistence only and the defendant and his father would occasionally cultivate the suit land. Fifthly, the plaintiff's parents never instituted any suit claiming ownership thereof and their occupation has been out of the defendant's father benevolence. Lastly in the witness statement dated 28-6-2024, it is the defendant's case that the late Mbaria

Ndere and his family moved out of the suit and in 1991 when Wanjiru Ndere died. The suit land remained vacant until the plaintiff entered therein and erected a structure. It is for the above and other reasons that he prays for the dismissal of the originating summons.

[7] In support of his defence, the defendant filed the following evidence;

- (i) Replying affidavit dated 11-4-2024.
- (ii) Copy of title deed for the suit land dated 15-8-2023.
- (iii) Copy of certificate of confirmation of grant in Murang'a Succession Cause No. E158/2023 dated 9-8-2023.
- (iv) Witness statements by the defendant and Francis Maina Mwangi.
- (v) Copy of certificate of death for Muraguri Murathu.
- (vi) Copy of certificate of official search dated 20-5-2013.
- (vii) Copy of judgment in ELC Murang'a Case No. 6 of 2020 dated 6-10-2022.

At the trial on 18-2-2025, 7-4-2025 and 22-7-2025, a total of five (5) witnesses testified. They included the plaintiff and his three witnesses and the defendant. None of the parties deviated from the case as per the pleadings. The plaintiff reiterated that his late father Mbaria Ndere bought the suit land from defendant's father Muraguri Murathu and the purchase price was paid as agreed and only a balance of Kshs.500/= remains. The plaintiff's evidence was corroborated by that of his two witnesses namely Francis Karemeri and Mbaria Ithebu who said that it is the plaintiff's father who occupied the land in the sixties and the defendant's family has never occupied it.

On the other hand, the defendant reiterated what is in his pleadings that he is the registered owner of the suit land and he was registered through a lawful process and the plaintiff and his family occupied it with the permission of the defendant's father.

[8] Counsel for the parties filed written submissions dated 28-8-2025 and 10-9-2025. It is only the defendant's counsel who identified the issues for determination at page 3 of the written submissions as follows;

- (a) Whether the suit is res judicata?
- (b) Whether the plaintiff has met the threshold for grant of adverse possession against land parcel No. LOC. 19/Gacharageini 735.
- (c) Who should bear the costs of the suit.

The plaintiff's counsel responded to the issues as identified but did not raise any new issues.

I find that there is another issue which learned counsel did not raise but which goes to be core of the dispute.

- (d) Whether the plaintiff is otherwise entitled to the sit through any other legal doctrine.

[9] I have carefully considered all the evidence adduced by the parties in this case including the witness statements, documents and the evidence at the trial. I have also considered the written submissions by the parties, the issues raised therein and the law cited. I make the following findings on the issues raised.

[10] On the first issue, I find that this suit is not res judicata because in ELC case No. 6 of 2020 the court did not deal with the issue of adverse possession. At page 12 of the judgment dated 6-10-2022, the court had this to say;

“Having found that the defendant lacks locus to be sued on behalf of the estate of Muraguri Murathu, this courts sees no reason at all to proceed with the other issues outlined...”

There is no doubt that the court did not make any determination on adverse possession. Had that been the case, it would be somewhere in the judgment and I see nothing at all.

[11] As for the second issue, I find that the occupation of the suit land by the plaintiff and his father before him is with the permission of the defendant's father. From the certificate of death No. 675096 Muraguri Murathu died on 7-12-1982. All along from 1963, he had authorized the plaintiff's father to occupy the suit land. After the death of Muraguri

Murathu, the plaintiff's father and his family continued occupying the suit land with the knowledge of the family of the deceased.

I am convinced by the submission by the defendant's counsel that the three ingredients of adverse possession are occupation for a period of exceeding twelve (12) years without force, without permission and as of right. The three prerequisites are summarized in the Latin legal term "*Nec vi, nec clam, nec precario*" which means without force, without secrecy and without permission."

The case of **Gabriel Mbui Vs Mukindia Muranya [1992] eKLR** aptly captures the principle as follows;

"The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, ie without permission from the true owner of the land occupied."

From the foregoing it is obvious that the plaintiff's father's occupation of the suit land and the later occupation by the plaintiff himself was with the permission of the registered owner. This being the case, the three prerequisites to the doctrine of adverse possession do not exist in this case together. The occupation for 12 years exists as does the one of use of the land without force.

[12] Under Order 15 Rule 2 of the Civil Procedure Rules, the court may frame issues from (c) the contents of documents produced by either party. Proceeding under the above provision, I find that it is pertinent to consider if the plaintiff is entitled to the suit land under any other law.

[13] The totality of the evidence adduced in this case leaves no doubt at all that the late Muraguri Murathu for all intents and purposes sold the suit land to the late Mbaria Ndere. There is overwhelming evidence from the sale agreements dated 9-6-1970 and 15-11-1973. There is further evidence from the minutes of the meeting held on 18-12-2012 at Mirangine Chief's office that the defendant had the same intention. I say the evidence is overwhelming because all the said agreements were witnessed by family members from both sides in this case. This evidence is corroborated by credible and consistent witnesses like Francis Karemeri whom I believed.

I do not believe the evidence by the defendant that the occupation was temporary and there was no intention to sell. This is not credible in view of the overwhelming evidence of payment of purchase price in 1970 and 1973. Secondly, the burial of the plaintiff's relatives on the suit land and the planting of thousands of tea bushes is clear evidence of sale and not mere permission to occupy for a while.

[14] Section 30 (g) of the Registered Land Act (Cap 300) recognized a person in actual possession of land as enjoying an overriding interest over the registered owner. Section 28(b) of the Land Registration Act recognizes "trust including customary trusts" as interests that override registration.

In the case of **Willy Kimutai Kitilit Vs Michael Kibet Civil Appeal No. 51 of 2015** Eldoret, the facts were similar to the ones in this case. The seller accepted the buyers Kshs.300,000/= and put him in possession. The seller later sought to nullify the agreement on the ground that there was no consent of the Land Control Board.

In deciding the case in favour of the buyer, the Court of Appeal held that the doctrines of constructive trust and proprietary estoppel supersede the Land Control Act where a transaction relating to an interest in land is void and unenforceable for lack of consent of the Land Control Board. This is so because equity is now a national value and principle of governance that binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the constitution; enacts, applies or interprets any law; or makes or implements public policy decision.

Further to the above, the requirement for a written sale agreement is not necessary in a case such as this because under the proviso to Section 3(3) of the Law of Contract Act it is provided as follows;

“Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

This being a case where the doctrine of constructive trust applies, no sale agreement was necessary and the trust was created way back in the early sixties when the plaintiff's

father Mbaria Ndere was put in possession by the defendant's father Muraguri Murathu and it was cemented when the plaintiff's father paid the purchase price in 1970 and 1973 to the defendant's father.

[15] For the above stated reasons, I find that the plaintiff is entitled to the suit land through the equitable doctrines of constructive trust and equitable estoppel. I order that the defendant's title to the suit land be canceled and the suit land be registered in the name of the plaintiff. The Deputy Registrar of this court to execute any documents and instruments necessary to have the plaintiff registered as the owner of the suit land.

To foster harmony between the parties whose parents have been friends for many years, there will be no order as to costs.

It is so ordered.

Judgment dated, signed and delivered this 25th day of November, 2025

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M. N. GICHERU

JUDGE

In the presence of:

Plaintiff's Counsel-Mr. Kirubi

Defendant's Counsel- Miss Maina holding brief.

Mohamed Dabar-Court assistant