

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ELC CASE NO. 4 OF 2023

PETER MUGO
MURAGE.....PLAINTIFF/APPLICANT

VERSUS

SUSAN WANJIRA GICHANE.....1ST

DEFENDANT/RESPONDENT

PETER MWANGI WANJIRU.....2ND

DEFENDANT/RESPONDENT

POLINE WANGECI MUGO.....3RD

DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff/Applicant, **Peter Mugo Murage**, commenced this suit by way of an Originating Summons dated 11th August 2023 seeking, inter alia, declarations that the Respondents hold a portion of land parcel **Mutira/Kirimunge/1403** in constructive trust for him and

that he be registered as proprietor thereof by way of adverse possession.

2. The application is supported by his Supporting Affidavit, sworn contemporaneously with the Summons. The Applicant depones that on 15th January 2007, he entered into a written sale agreement with the late Gichane Gakunyi for the purchase of half (1/2) acre portion of land parcel Mutira/Kirimunge/1403 at an agreed consideration of Kshs. 115,000/-. He avers that he honoured the terms of the agreement by paying Kshs. 40,000/- at execution, Kshs. 20,000/- on 19th January 2007, and the balance of Kshs. 55,000/- on 14th July 2007, thereby completing payment of the purchase price.
3. The Applicant further states that upon execution of the agreement, he was granted vacant possession of the purchased portion measuring approximately 0.20 Ha, whereupon he embarked on extensive developments, including planting bananas trees, and engaging in subsistence farming. He contends that prior to his demise,

the said Gichane Gakunyi had even commenced the process of subdivision with the intention of transferring the 0.20 Ha portion to him.

4. The Plaintiff avers that he has been in open, exclusive, and uninterrupted possession of the said portion of land for a period in excess of twelve (12) years, thereby extinguishing the title of the deceased and vesting in him ownership by way of adverse possession. In the alternative, he argues that upon payment of the full purchase price and having been put into possession, a constructive trust arose in his favour, which the Respondents, as legal representatives of the deceased's estate, are bound to honour. He therefore prays that this Court declare him entitled to be registered as proprietor of 0.20 Ha comprised in land parcel Mutira/Kirimunge/1403.

5. The 2nd Defendant, through his Replying Affidavit sworn on 25th October 2023, opposes the Plaintiff's claim. The 2nd Defendant averred that the Plaintiff in Kerugoya CM Succession Cause No. 241 of 2019 the Plaintiff alleged

that he had purchased a quarter portion of land parcel Mutira/Kirimunge/1021 from their grandfather and that in order to resolve that contention, the family accommodated the Plaintiff, and upon confirmation of the grant, their sister, Mary Muthoni Wanjiru, transferred to him land parcel Mutira/Kirimunge/3931 measuring 0.1 Ha. According to the 2nd Defendant, the Plaintiff has since settled on that land, constructed his house thereon, and the photographs he annexed as PMM 5 bear testimony to that fact.

6. The 2nd Defendant asserts that the Plaintiff's current claim over Mutira/Kirimunge/1403 was unfounded. He averred that the sale agreement relied upon by the Plaintiff was a forgery and a fraudulent document.

7. The 2nd Defendant further averred that the Plaintiff had never been in occupation of the suit property, nor had he undertaken any cultivation or development thereon. He contended the Plaintiff all along has been residing and carrying out his activities on land parcel

Mutira/Kirimunge/3931, the land duly transferred to him through succession.

8. The Plaintiff filed a supplementary affidavit dated 28th November 2023 and deponed that land parcel Mutira/Kirimunge/1021 was registered in the defendants' late mother's name and that he bought it from the 2nd Defendant vide a sale agreement dated 3rd February 2003 in his capacity as the administrator of her estate. He averred that he completed payment of the purchase price and upon the completion of their mother's succession, the 2nd Defendant got 0.20 Ha, while his two sisters received 0.1 Ha each. The Plaintiff stated that since the 2nd Defendant had already sold his portion to a third party, his sister, Mary Muthoni Wanjiru decided to transfer her 0.1 Ha portion to him.

Plaintiff's evidence.

9. The Plaintiff, Peter Mugo Murage, testified as PW1. He stated that he instituted the suit against the Defendants in their capacity as administrators of the estate of the late

Gichana Gakunyi. He recounted that the deceased approached him for financial assistance and that the deceased offered to sell to him a half (1/2) acre portion of land parcel Mutira/Kirimunge/1403 for Kshs 115,000/-. They entered into a written sale agreement dated 15th January, 2007. He paid the full purchase price and was given possession and even attended the Land Control Board for consent.

10. The Plaintiff further testified that in addition to the suit property, he had dealings with the 2nd Defendant over land parcel, Mutira/Kirimunge/3931, from which he bought a portion. He clarified that while his original intention was to purchase half acre of the suit land, he was eventually allocated only a quarter, acre and the other quarter acre went to the 2nd Defendant's sister who, apparently, had no land of her own.

11. The Plaintiff explained that the two parcels, Nos. 3931 and 1403, are contiguous and that he has been utilizing both without any boundary separating them. He reiterated that he has been in possession of the suit land

since 2007, and has effected developments on the land. The Plaintiff stated that the deceased had demonstrated his intention to transfer the portion he had purchased to him as he caused the land to be subdivided into parcel numbers 1510 (intended for him) and 1511 (retained by the deceased). The Plaintiff therefore urged the Court to declare him entitled to half of Mutira/Kirimunge/1403.

12. In cross-examination, the Plaintiff confirmed that he purchased the land directly from the late Gichana, paid the full consideration, and that the deceased died before completing the transfer. He acknowledged that the deceased's two children and wife are also deceased. He maintained that his occupation of the land had been continuous and uninterrupted from 2007 and was adverse to the interest of the registered owner.

Defence Evidence.

13. The 2nd Defendant testified as DW1. He adopted his witness statement, bundle of documents, and Replying Affidavit sworn on 25th October 2023. He denied

knowledge of any sale transaction between the Plaintiff and the late Gichana and contended that the Plaintiff had only recently started making use of the suit land, for a period of less than three years. He therefore prayed that the suit be dismissed.

14. In cross-examination, the 2nd Defendant stated that he had not seen any valid sale agreement and if any existed, it was a forgery. He conceded, however, that he had not reported the matter to the police nor commenced any criminal proceedings against the Plaintiff for forgery. He stated that he had been leasing out part of the suit land, and insisted that the Plaintiff had not been in occupation of his portion.

15. The 2nd Defendant admitted that he had previously sold to the Plaintiff half acre (1/2) portion from his late mother's land. However, because he subsequently sold that half to another person, his sister agreed to transfer to the Plaintiff a quarter (1/4) portion instead. He further

affirmed that land parcel Mutira/Kirimunge/3931 borders the suit land.

Submissions of the Parties

16. The Plaintiff's Counsel filed her written submissions dated 26th May 2025 where she asserted that the evidence adduced by the Plaintiff clearly established that the Plaintiff had been in adverse possession of the suit land for a period in excess of 12 years. In the alternative Counsel submitted the Plaintiff having fully paid the full purchase price and taken possession the deceased and/or his beneficiaries held title to the land in constructive trust in the Plaintiff's favour.

17. The Plaintiff's Counsel in her submissions identified three issues that called for determination as follows:-

(i) Whether the Plaintiff has acquired the suit property by way of adverse possession?

(ii) Whether the Plaintiff is entitled to the suit property by virtue of constructive trust?

(iii) Whether the Plaintiff should be registered as the owner of ½ acre portion in place of the Respondents?

18. As concerns the first issue, Counsel relied on **Section 7, 13 and 38 of the Limitation of Action Act** to support the Plaintiffs claim. Counsel relied on the case of **Ruth Wangari Kantagia vs Josephine Muthoni Kinyanjui (2017) eKLR** and **Celine Muthoni Kithinji V Safiya Binti Swaleh & Others (2018) eKLR** in support of her submission Counsel argued that there was uncontroverted evidence that the Plaintiff took possession of the suit land in 2007 after the agreement and that there was acknowledgment by the deceased that he was paid the full purchase price.

19. Counsel submitted that on the basis of the evidence on record, there was no doubt that the deceased vendor and the plaintiff entered into an agreement that was valid. She further argued that the sale agreement became null and void under **Section 6 (1) of the Land Control Act** after the expiry of 6 months from 15th January 2007 and

therefore the possession and occupation of the suit land became adverse against the deceased vendor and by extension the Respondents.

20. As regards the second issue, Counsel argued that the actions of taking possession and paying the full purchase price created a constructive trust in favour of the Plaintiff. She noted that by the time the Defendants were filing the succession cause No. 241 of 2019, the deceased title over half of the suit land had already been extinguished. She urged the Court to make a finding that the Plaintiff had proved his case on a balance of probability and grant the reliefs prayed for.

21. The Defendants filed their submissions, arguing that the Plaintiff had failed to satisfy the threshold for adverse possession because he did not call any witnesses to corroborate his alleged occupation or establish that his presence was open and notorious. Counsel for the Defendants observed that the plaintiff's testimony and pleadings contradicted as in his OS he was claiming the

entire suit land, while in his testimony he was unequivocal about 0.20 Ha. Counsel further submitted the Plaintiff's entry onto the suit land was pursuant to an agreement and hence was with permission and could not therefore be adverse. Counsel additionally submitted that the Plaintiff's possession was neither visible nor continuous and hence contended the Plaintiff had not proved his case on a balance of probabilities.

Analysis and Determination

22. The issues arising are:

- 1) Whether the Plaintiff has proved entitlement to a portion of the suit land by adverse possession.**
- 2) Whether, in the alternative, a constructive trust arose in his favour.**

Whether the Plaintiff has proved entitlement to a portion of the suit land by adverse possession.

23. The doctrine of adverse possession in Kenya is embodied under **Section 7 and 13 of the Limitation of Actions Act, Cap 22 Laws of Kenya. Section 7** of the said Act

places a bar on actions to recover land after 12 years from the date on which the right accrued and provides as follows:-

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.

24. **Section 13 of the same Act** provides that adverse possession is the exception to this limitation:

A right of action to recover land does not 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 under Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse 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.

For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3), the land in reversion is taken to be adverse possession of the land.

25. **Section 38 of the Act** provides the procedure for a claimant to apply to the Court to be registered as owner where he has been in adverse possession of land for the prescribed period. It provides thus:-

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.

26. The doctrine of adverse possession was aptly defined in the case of **Mtana Lewa vs Kahindi Ngala Mwangandi (2015)eKLR** where the Court of Appeal held that:-

“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 of stealth nor 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. In the case of **Peter Mbiru Michuki vs Samuel Mugo Michuki (2014) eKLR**, the Court of Appeal held that:-

“32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of Public Trustee -v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

28. Similarly, In the case of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR** the court explained that:-

“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the

date of the payment of the last installment of the purchase price (Todd, J, in Wanyoike v Kahiri [1979] Kenya LR 236 at 239; also see among others, Simpson J (as he then was), in Hosea v Njiru and others [1974] E A 526 at 529, 530).”

29. In the instant case there is evidence that the Plaintiff and Gichane Gakunyi (deceased) entered into a sale agreement dated 15th January 2007 where the deceased agreed to sell to the Plaintiff $\frac{1}{2}$ (half) acre portion of land parcel Mutira/Kirimunge/1403 for Kshs 115,000/-. The Plaintiff was granted possession upon execution of the sale agreement and the deceased was paid the balance of the purchase price of Kshs 44,000/- on 14th July 2007 which he duly acknowledged. It is a fact that the Plaintiff entered the suit land with the permission of the deceased pursuant to the sale agreement which under clause 5 permitted the Plaintiff to take immediate possession. The sale agreement contemplated under clause 3 and 4 that the parties would seek and obtain the consent of the Land Control Board. While the consent of the Land Control Board for subdivision may have been sought as there is on

record an exhibited Mutation Form in respect of land parcel Mutira/Kirimunge/1403 showing the land had been subdivided into land parcels 1510 and 1511 there was no evidence presented to demonstrate any consent of the Land Control Board for transfer was ever sought or obtained. The sale agreement therefore entered into between the Plaintiff and the deceased became null and void for all purposes under the provisions of **Section 6(1) and 8 of the Land Control Act, Cap 302 Laws of Kenya**, as no consent was obtained within the prescribed period of six months.

30. The permission granted for entry into possession lapsed after the expiry of six months from the date of the sale agreement and thereafter the Plaintiffs possession of the land became adverse and the period of adversity in the instant case started running from 15th July 2007 after the last instalment of the purchase price was paid to the deceased. After the period of adversity started to run, it could only be interrupted by the owner retaking possession of the land and/or initiating of eviction proceedings against the Plaintiff. None of those events

took place and consequently the Plaintiff continued in adverse possession and by 15th July 2019, the Plaintiff had acquired title to the half (1/2) acre portion of land he had occupied by virtue of being in adverse possession. The registered owner's titles had become extinguished by operation of the law.

31. The Defendants' allegations that the sale agreement and documents exhibited by the Plaintiff were forgeries were not proved by any evidence and the Court dismisses the allegations for want of proof. The succession proceedings undertaken by the Defendants as the beneficiaries of Gichane Gakunji (deceased) were subject to the Plaintiff's accrued or accruing interest in land parcel Mutira/Kirimunge/1403 as the title of the deceased to the ½ acre portion that the Plaintiff held adversely had become extinguished and could not be available to form part of his estate. The subdivision and transmission pursuant to the succession proceedings was therefore of no legal effect.

32. On the whole and upon evaluation and analysis of the evidence the Plaintiff has proved that he purchased $\frac{1}{2}$ acre portion of land parcel Mutira/Kirimunge/1403 and had paid the full purchase price to the deceased. Upon payment of the full purchase price and having been put in possession of the $\frac{1}{2}$ acre portion by the deceased, the deceased and thereafter his beneficiaries, held title to the $\frac{1}{2}$ acre portion in constructive trust on behalf of the Plaintiff. The $\frac{1}{2}$ acre portion was clearly delineated and the Plaintiff utilised the portion of land exclusively and the possession was adverse to the interest of the registered owner. It is my determination that the Plaintiff's claim succeeds both under the doctrine of adverse possession and under the doctrine of constructive trust.

33. In consequence therefore the Court enters Judgment in favour of the Plaintiff and makes the following consequential orders:-

- (i) That the subdivision emanating from land parcel MUTIRA/KIRIMUNGE/1403 be and are hereby ordered to be cancelled and land parcel**

MUTIRA/KIRIMUNGE/1403 be restored to the name of GICHANE GAKUNYI (Deceased).

(ii) That one half (1/2) acre portion to be excised out of land parcel MUTIRA/KIRIMUNGE/1403 and to be transferred to PETER MUGO MURAGE, the Plaintiff herein on account of having acquired title to the same by way of adverse possession/constructive trust.

(iii) The Deputy Registrar of the Court be and is hereby authorised to execute such documents as may be necessary to give effect to the Judgment.

(iv) Parties to bear their own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 13TH DAY OF NOVEMBER 2025.

J. M. MUTUNGI
ELC - JUDGE