

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC NO. E008 OF 2021 (OS)**

**MARGARET MUTHONI**

**NJUGUNA.....PLAINTIFF**

**VERSUS**

**JOSEPH MWANGI BAKINDU.....1<sup>ST</sup>**

**DEFENDANT**

**GLADYS WANYERI NJARI.....2<sup>ND</sup>**

**DEFENDANT**

**JUDGMENT**

**1.** The plaintiff instituted this suit by way of an Originating Summons filed on 16.8.2021. The plaintiff was claiming 5 acres out of land parcel no. L.R.SIPILI/NDONYOLOIP BLOCK 1/1058 by way of adverse possession. The suit was opposed by the 2<sup>nd</sup> defendant via a replying affidavit filed on 22.6.2022. On 5.10.2022, the court gave directions whereby the Originating summons was converted to a plaint while the replying affidavit became a defence. The plaintiff was granted leave to amend her

pleading while the 2<sup>nd</sup> defendant was granted leave to lodge a counterclaim.

2. To this end, the pleading of the plaintiff is the amended plaint filed on 1.12.2022 where she avers that she got married to one Stephen Mwangi Mathiru and they were blessed with 7 children. They settled on the ancestral land, SIPILI/NDONYOLOIP BLOCK 1/1088, (the suit land) as from year 1984. She avers that the 1<sup>st</sup> defendant who is a cousin of Stephen Mwangi Mathiru secretly procured title documents of the suit land in his name, and he then started threatening to sell the suit land to the 2<sup>nd</sup> defendant.

3. The plaintiff thus prays for judgment against the defendants in the following terms;

**“a) The plaintiff be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1984 ALL THAT PROPERTY KNOWN AS SIPILI/DONYOLOIP BLOCK 1/1058.**

- b) The plaintiff be registered as the sole proprietor of the said parcel of land namely ALL THAT PROPERTY KNOWN AS SIPILI/DONYOLOIP BLOCK 1/1058 in place of the above named 1<sup>st</sup> defendant in whose favour the land is currently registered.**
- c) An order of permanent injunction to restrain the defendants, themselves or through their servants, agents or employees from entering, occupying, evicting, the plaintiff from or in any other way interfering with the plaintiff's occupation and enjoyment of ALL THAT PROPERTY KNOWN AS SIPILI/DONYOLOIP BLOCK 1/1058.**
- d) An order of eviction from the said premises.**
- e) Interest thereon.**
- f) Costs of this suit.**

4. The pleading of the 2<sup>nd</sup> defendant is the amended statement of defence and counter claim filed on 17.1.2023. She denies the claim of the plaintiff, averring that on 17.9.2015, she purchased 3 acres from the 1<sup>st</sup> defendant which land was to be excised from the suit land. That she took possession thereof and has been occupying the land since year 2017. In her counterclaim, the 2<sup>nd</sup> defendant has named the 1<sup>st</sup> defendant and the plaintiff in the main suit as the respective 1<sup>st</sup> and 2<sup>nd</sup> defendants. She reiterates that she purchased the suit land from the 1<sup>st</sup> defendant, and that the plaintiff has often attempted to occupy her portion forcefully. She seeks for judgment in the following terms;

**“a) An order of specific performance of the agreement dated 17/9/2015 directing the 1<sup>st</sup> defendant to transfer a portion of 3 acres out of SIPILI/DONYOLOIP BLOCK 1/1058.**

**b) In the alternative and without prejudice to prayer (a) above, an order directing the 1<sup>st</sup> defendant to pay the plaintiff the full**

**value of the said portion of 3 acre at the market value.**

**c) A permanent injunction restraining the 2<sup>nd</sup> defendant by herself, her servants, employees, agents and/or any person acting under her authority or claiming through her from entering, using, keeping possession, encroaching or in any manner dealing with the plaintiff's portion of 3 acres out of SIPILI/DONYOLOIP BLOCK 1/1058.**

**d) Costs of the suit with interest.**

**e) Any other relief that this honourable court may deem just and fair to order”.**

**5.** The 1<sup>st</sup> defendant was served with summons to enter appearance as per the Affidavit of Service dated 6.4.2022, but he never entered appearance, thus the matter proceeded as a formal proof against the said defendant. The 2<sup>nd</sup> defendant was represented by Kariuki Mwangi advocates who eventually filed an application dated 21.3.2024 to cease acting for the 2<sup>nd</sup> defendant.

The application was allowed on 19.9.2024. The matter proceeded for hearing on 26.5.2025 in absence of the 2<sup>nd</sup> defendant who had been duly served in person.

6. At the trial, the plaintiff MARGARET MUTHONI NJUGUNA testified as PW1. She adopted her witness statement dated 7.2.2023 as her evidence. She also produced the 4 documents in her list dated 7.2.2023 as her exhibits 1-4. Her evidence mirrors the contents of her pleadings.
7. PW2 is one JOSEPH NJUGUNA MWANGI who also adopted his witness statement dated 7.2.2023 as his evidence. He introduced himself as a son of the plaintiff, while the 1<sup>st</sup> defendant is his paternal uncle. He contends that he was born and raised on the suit land. The other contents of his witness statement are similar to what his mother has stated.
8. The plaintiff filed submissions on 16.7.2025 where she relies on the case of **Mtana Lewa vs Kahindi Ngala Mwangangi (2015) ekr** to buttress the adverse possession claim. It is argued that the family of the plaintiff has been on the suit land for the last 37 years,

the same being their ancestral land as well as matrimonial home.

### **DETERMINATION**

**9.** The issue falling for determination is whether the plaintiff has met the threshold in an adverse possession claim. It is noted that the defendants did not tender any evidence, nevertheless, the plaintiff is duty bound to prove her case in terms of the provisions of Section 107 of the Evidence Act. In the case of **Gichinga Kibutha v Caroline Nduku [2018] eKLR**, the Court held that;

**“It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”**

**10.** In the case of **Mistry Valji v Janendra Raichand & 2 others [2016] eKLR**, the Court of Appeal set out some

of the principles to be considered in a claim of adverse possession as follows;

**“i) Adverse possession is not available to a party who is on the registered owner’s land with his consent or where the entry and occupation was lawful and based on some agreement. In other words where the title of the owner is admitted there can be no claim for adverse possession. See Samuel Miki Jane v Jane Njeri Richu Civil Appeal No. 122 of 2001.**

**(ii) The occupation of the land must be *nec vi, nec clam, nec precario*. See Mtana Lewa v Kahindi Ngala, Civil Appeal No. 56 of 2014.**

**iii. The adverse possessor must prove that through his occupation, the true owner has been dispossessed or his possession**

**discontinued. See Wambugu v Njuguna (1983) KLR 172.**

**iv. It is equally established that adverse possession does not arise merely by occupation and use. See Alfred Warimo v Mulaa Sumba Baraza, Civil Appeal No. 186 of 2011 (Ksm)**

**v. The filing of a suit for recovery of land or any other recognized assertion of title to the land by the owner stops time from running for purposes of section 38 of the Limitation of Actions Act. See William Gatuhi Murathe v Gakuru Gathumbi, Civil Appeal No. 49 of 1996”.**

**11.** In the case at hand, the plaintiff contends that her family came to occupy the suit land as their ancestral land, but her husband’s cousin, the 1<sup>st</sup> defendant caused the land to be registered in his name, then purported to sell the said land to the 2<sup>nd</sup> defendant.

**12.** In such circumstances, can the claim of adverse possession succeed? In the case of **Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja [2013] eKLR** , the Court of Appeal was dealing with a situation whereby the claimant on adverse possession happened to be a child of the original owners of the ancestral land. The court allowed the claim while stating as follows;

**“In this case before us, there was no dispute that Eunice was in possession, indeed according to her, and her witnesses she always lived on the suit land with her parents since she was not married but according to the respondent, she returned to the land in 1965 after she was divorced by one Stephen M'Ringera, due to lack of children. Whichever the case, whether she was married or not, by the time she filed this case, she was in exclusive possession of the suit land, this was also openly and as of**

**right and without any interruption for a period of over 12 years. She was also in open occupation and as of right because she participated and paid for the adjudication fees for the suit land to be registered in the name of the respondent then a minor in 1963. She continued in occupation without interruption, developed the suit land and the members of the clan deliberated on her case and decided that she should be given 5 acres. Unfortunately the determination by clan elders had no legal force and Eunice had to pursue her claim in Court.”**

Also see; **Charles Muriuki M’mwari v M’mbogori M’ambutu [2017] eKLR**

**13.** Similarly in the case at hand, I am inclined to find that from the time the 1<sup>st</sup> defendant acquired the title to the suit parcel, then time started running for purposes of an adverse possession claim. The copies of the green

card and the search indicate that the 1<sup>st</sup> Defendant was registered as the owner of the suit land on 4.4.2007. Thus, the statutory period of 12 years matured on 4.4.2019. This suit was filed on 16.8.2021 which means that the plaintiff has met the requisite criteria in an adverse possession claim. It matters not that the 1<sup>st</sup> defendant had tried to sell the land, even if the sale had been achieved, that would still not have affected the plaintiffs claim.

### **Final Orders**

**14.** In the end, I find that the plaintiff has proved the claim of adverse possession on a balance of probabilities and I proceed to give orders as follows;

**I. It is hereby declared that the plaintiff is entitled to the suit land SIPILI/NDONYOLOIP BLOCK 1/1058 by way of adverse possession.**

**II. An order is hereby issued for the plaintiff to be registered as the owner of parcel**

**SIPILI/NDONYOLOIP BLOCK 1/1058 instead of the 1<sup>st</sup> defendant.**

**III. The 1<sup>st</sup> defendant is hereby directed to facilitate the transfer of the suit land from himself to the plaintiff within 60 days.**

**IV. In the event of none compliance on the part of the 1<sup>st</sup> defendant, the Deputy Registrar of this court is hereby authorized to execute all the necessary documents to facilitate the transfer as set out in this judgment, and in that regard the production of the original title of parcel SIPILI/NDONYOLOIP BLOCK 1/1058, as well as the consent from the land control board shall be dispensed with.**

**V. A permanent injunction is hereby issued restraining the defendants, themselves or through their servants, agents or employees from entering, occupying, evicting, the plaintiff from or in any other way interfering with the plaintiff's**

**occupation and enjoyment of ALL THAT  
PROPERTY KNOWN AS SIPILI/DONYOLOIP  
BLOCK 1/1058.**

**VI. Each party shall bear their own costs of the  
suit.**

**DATED, SIGNED AND DELIVERED AT NYAHURURU  
THIS 1<sup>ST</sup> DAY OF DECEMBER 2025 THROUGH  
MICROSOFT TEAMS.**

**LUCY N. MBUGUA  
JUDGE**

**In the presence of:**

Court Assistant - Vanessa

Nyambura Macharia for Plaintiff

No appearance for Defendants

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