

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 24 OF 2019 (O.S)**

**WILSON WANGAI THUKU ..... PLAINTIFF**

**VERSUS**

**JAMES NDEGWA KARIUKI (Sued as the Legal Representative of the Estate of the Late JACKSON KARIUKI WACHIRA ..... DEFENDANT**

**JUDGMENT**

**Background**

1. By an Originating Summons dated 6<sup>th</sup> August 2019, Wilson Wangai Thuku (hereinafter “the Plaintiff”) prays for the determination of the following issues:

- 1) Whether the Defendant’s title to 3 acres of land Parcel No. Gethi/Igana/1574 has been extinguished by the Plaintiff’s adverse possession thereof for a period of more than 12 years in terms of Section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya;**
  
- 2) Whether the Plaintiff has acquired title to 3 acres of land parcel No. Gethi/Igana/1574 by his adverse**

**possession thereof for a period of more than 12 years;**

- 3) Whether the Plaintiff ought now to be registered as absolute proprietor of the said portion of land;**
  - 4) Whether the National Land Commission and Land Registrar Nyeri should now be ordered to register the said portion of land in the name of the Plaintiff as absolute proprietor;**
  - 5) Whether the Defendant should be condemned to pay the costs of this suit; and**
  - 6) In all the circumstances of this case which orders are just and expedient to make.**
2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff and is premised on the grounds:
- a) That the Plaintiff has been on 3 acres of Land Parcel No. Gethi/Igana/1574 since 1988 and has used the said portion of land as his property;**
  - b) That the Plaintiff himself is personally in occupation of a portion measuring 3 acres of the said land and**

**has so occupied openly without force and without interference from the Defendants or his servants, agents or any other person claiming under him;**

- c) That the total period of occupation and utilization of the said portion of land by the Plaintiff is now in excess of 12 years and the Plaintiff has therefore acquired title thereto by adverse possession; and**
- d) That it is mete and just that the Plaintiff is now registered as the absolute proprietor of the said portion of land.**

3. James Ndegwa Kariuki sued as the Legal Representative of the Estate of the late Jackson Kariuki Wachira (the Defendant) is opposed to the Plaintiff's claim. In his Replying Affidavit sworn on 11<sup>th</sup> September 2019, the Defendant avers that he is not aware that land parcel No. Gethi/Igana/1574 is registered in the names of his father, the late Jackson Kariuki Wachira. The Defendant asserts that due to that lack of awareness, the parcel of land did not form part of Succession proceedings in regard to the estate of his late father.

4. The Defendant further avers that even if the suit property is so registered, the claim does not meet the twelve (12) year threshold as the claim can only be against the registered owner who is dead. He further avers that the period should only run against him after the property is registered in his name and that the existence of the suit land has never been within his knowledge.
5. At the trial herein the Plaintiff testified as the sole witness in support of his case. The Defendant equally testified as the sole witness for the defence.

### **Analysis and Determination**

6. I have carefully perused and considered the pleadings filed herein, the testimonies of the two witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Counsel representing the Plaintiff. The Defendant did not file any submissions.
7. By the Originating Summons as filed herein the Plaintiff wants the court to determine whether or not he has acquired title to some 3 acres of land comprised in the parcel of land known as

Gethi/Igana/1574 by adverse possession. It is the Plaintiff's case that he has lived in and utilised the said portion of land since the year 1988.

8. It was the Plaintiff's case that the said parcel of land was registered in the name of one Jackson Kariuki Wachira (now deceased) after the deceased exchanged his parcel of land for the purpose of building a School known as Kinuri Primary School. He told the court that he has since enjoyed peaceful and uninterrupted occupation of the land and hence his quest to be registered as the proprietor thereof.
9. The Defendant who is sued in his capacity as the Legal Representative of the said Jackson Kariuki Wachira does not deny that the Plaintiff is in occupation of the said portion of land. While conceding that the suit property was given to his father after the father exchanged his parcel of land with another for purposes of building a school, it is his case that the suit land is unregistered and as such he did not know of its existence and the same was not considered as part of his father's property during the succession proceedings for his estate.

10. As Makhandia J.A. stated in ***Mtana Lewa -vs- Kahindi Ngala Mwangandi (2015) eKLR:***

**“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 owners, the essential prerequisite being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”**

11. Speaking to the same matter in ***Mombasa Teachers Co-Operative Savings and Credit Society Limited -vs- Robert Muhambi Katana & 15 Others (2018) eKLR***, the Court of Appeal held thus:

**“Likewise, it is settled that a person seeking to acquire title to land by way of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the**

**land in question for an uninterrupted period of 12 years as espoused in the Latin *maxim, nec vi nec clam nec precario.*”**

12. Arising from the foregoing, it is clear that for one to succeed in a claim of adverse possession he or she has to prove that his entry into the disputed land was without the permission of the registered owner, that he or she occupied the land to the exclusion of the registered owner or any other person and that his or her occupation was open and continuous for a period of twelve (12) years.
13. In the matter before me, the Plaintiff asserts that he entered the suit property wherein he has since built his home in the year 1988. It is further the Plaintiff's case that the suit property was registered in the name of the Defendant's father the late Jackson Kariuki Wachira. In support of that position, the Plaintiff has produced an extract of a schedule of Gethu/Igana Mweru Village said to have been prepared by the National Land Commission (the 2<sup>nd</sup> Defendant). That schedule which appears to be a mapping of the land in the said village shows the late

Jackson Kairuki Wachira as the beneficiary of parcel No. 1574 measuring 2.1894 Ha.

14. While the said schedule could not be equated with a certified extract of title as envisaged under Order 37 Rule 2 of the Civil Procedure Rules 2010, there was no doubt that both the Plaintiff and the Defendant were utilising portions of the land. Testifying at the trial herein, the Defendant testified that the suit land was exchanged between his deceased father and the County Government of Nyeri which wanted to build a School. He went on to testify that Kinuri Primary School was built on his father's land.
15. Responding to questions put to him about the land during cross-examination, the Defendant testified as follows:

**“I am the Administrator of my father's estate. My father was compensated with a 6.5 acre parcel of land. The Plaintiff lives on a portion of the land. There are no other people using the land. I however cultivate a portion.**

**It is true the Plaintiff also cultivates a portion of the land. I know his wife died. She was buried on the land.**

**It is true the Plaintiff has constructed a permanent house on the land. I think the land was given to my father in 1974. It is not true that the Plaintiff has been on the land for long. I don't remember when he entered the land."**

16. Arising from the foregoing, it is clear to me that the Defendant knew that the suit property belonged to his father and that the Plaintiff occupied and utilized a portion of it without their permission. From his own evidence before the court, it was clear that his father Jackson Kariuki Wachira passed away on 30<sup>th</sup> July 1979. In the year 2006, the Defendant instituted Nyeri High Court Succession Cause No. 219 of 2006. He was thereafter issued with a Grant of Letters of Administration Intestate on 16<sup>th</sup> July 2010. Given his knowledge that the father was given the suit property in 1974, it was not clear why he did not include the same in the schedule of the properties for distribution.
17. Whereas the late Jackson Kariuki Wachira was not issued with a Certificate of Title in his name I did not think that that could constitute a bar to the Plaintiff's claim of adverse possession

against the estate. Despite being issued with a Grant, the Administrator of the estate had remained dispossessed of the same and was only utilising a portion of the land.

18. In support of his case the Plaintiff has annexed photographs of the developments that he has carried out on the suit land, a fact that was confirmed by the Defendant himself. The Defendant has not mentioned any particular time when any beneficiary of the estate including himself did try to evict the Plaintiff. This confirms that indeed the Plaintiff has enjoyed an open, peaceful and uninterrupted possession of the portion of land he occupies without the permission of the actual owners of the land.
19. In the premises, I am satisfied that the Plaintiff has proved his case on a balance of probabilities and that he is entitled to the portion of the land he occupies.
20. Accordingly, I allow the suit and make orders as follows:
  - (a) **The Defendant's title to 3 acres of land parcel No. Gethi/Igana/1574 has been extinguished by the Plaintiff's adverse possession thereof and the Plaintiff has acquired title to the said 3 acres.**

**(b) The Land Registrar Nyeri is hereby directed to register the said portion of land measuring 3 acres in the name of the Plaintiff as the absolute proprietor thereof.**

**(c) Each party shall bear their own costs.**

**Judgment dated, signed and delivered in open court and virtually at Mombasa this 4<sup>th</sup> day of December, 2025**

.....  
**J.O. OLOLA  
JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Ms. Ngugi holding brief for Kahiga Advocate for the Plaintiff
- c) Mr. Kamwenji Advocate for the Defendant