

**REPUBLIC OF KENYA**

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

**ELC. CASE NO. E001 OF 2024(OS)**

**DIANA MWENDE KINGORI:::::::::::::::::::::PLAINTIFF/APPLICANT**

**VERSUS**

**JOSEPH NDONE MUTHUSI**

*(Sued in his capacity as personal representative in the Estate of*

**JOHN**

**MUTHUSI**

**KATHENGE:::::::::::::::::::::DEFENDANT/RESPONDENT**

**JUDGEMENT**

The Plaintiff vide the originating summons dated 22<sup>nd</sup> February 2021 sought the following orders;

1. A declaration that the Applicant is and has been in occupancy of 6.25 acres out of land parcel KITHIMANI/KITHIMANI 'A'/142 which is registered in the names of the late JOHN MUTHUSI KATHENGE (Deceased) and that her occupation has been open, public, exclusive, continuous and without interruption since the year 2003 and has thus acquired ownership, all rights and title over the 6.25 acres of the property known as KITHIMANI/KITHIMANI 'A'/142 by way of adverse possession.

2. Alternatively, and without prejudice to the foregoing, that the deceased's Estate holds 6.25 acres out of land parcel KITHIMANI/KITHIMANI 'A'/142 in trust for the Applicant.
3. An Order that a portion measuring 6.25 acres out of KITHIMANI/KITHIMANI 'A'/142 be excised and registered in the names of DIANA MWENDE KINGORI, the Applicant herein, and a valid title over 6.25 acres be issued in favour of the Applicant.
4. An Order authorizing the legal representative of the JOHN MUTHUSI KATHENGE (Deceased) or the Deputy Registrar of the Court to execute all the requisite documents including a valid transfer instrument for 6.25 acres out of land parcel KITHIMANI/KITHIMANI 'A'/142 to facilitate the registration of 6.25 acres in favour of the Applicant, DIANA MWENDE KINGORI.
5. An Order that the Consent of the Land Control Board be dispensed with in the implementation of the Court Orders herein.
6. An order that the Estate of the JOHN MUTHUSI KATHENGE (Deceased) and anyone claiming under or through the said Estate be restrained from interfering with the Applicant's quiet enjoyment over the 6.25 acres.
7. Costs of this suit and any other relief that the Court may deem fit and expedient to issue.

PW1, testified that around the year 2003 the Applicant entered KITHIMANI/KITHIMANI 'A'/142 with the consent of the Estate of JOHN MUTHUSI KATHENGE (Deceased) and has had open, exclusive, peaceful continuous and uninterrupted possession of 6.25 acres of KITHIMANI/KITHIMANI 'A'/142 for more than 12 years. She produced the Land sale agreement dated 2003 with the translation in English and took possession immediately. That she has been in actual possession and occupation of 6.25 acres of the property known as KITHIMANI/KITHIMANI 'A'/142 exclusively and without any interruption for a period in excess of years. That she has occupied, possessed and made use of 6.25 acres out of KITHIMANI/KITHIMANI 'A'/142 by making improvements and developments which include a residential premises and the facilities that accompany the same. Plantations including trees. A fence over the 6.25 acres of the property. That the Plaintiff has acquired the said 6.25 acres out of KITHIMANI/KITHIMANI 'A'/142 by way of adverse possession and whether the Applicant should be registered as the owner of the said 6.25 acres that form part of KITHIMANI/KITHIMANI 'A'/142. That the Estate of the late John Muthusi Kathenge is holding 6.25 acres of the property known as KITHIMANI/KITHIMANI 'A'/142 under a constructive trust in favour of the Plaintiff.

The Defendant was served by way of substituted service but failed to file any response or attend court and the matter proceeded ex parte. After considering the originating summons application, the replying affidavit and submissions therein, I have found that the issues for determination are as follows;

- i. Whether the plaintiffs have met the threshold for adverse possession?
- ii. Who will bear the costs?

The provision of law concerned with adverse possession is section 38 (1) and (2) of the Limitations of Actions Act Cap 22 which states as follows;

*“(1) 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.”*

The law in respect to adverse possession is now settled. For a party to succeed in a claim of adverse possession he/she must satisfy the following criteria stated

in the case of Maweu vs Liu Ranching and Farming Cooperative Society 1985 KLR 430 where the Court held;

*“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.*

I am also guided by Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

*“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”*

The certificate of title of the suit land was never produced as evidence. This court cannot determine the registered owner of the suit land. The Plaintiff did not produce any evidence showing when she took open, exclusive and uninterrupted possession save for a sale agreement dated 5<sup>th</sup> September 2003. It behooves this court to also register its doubt as to whether the said agreement is

valid. The reason being that none of the witnesses and/or signatories therein were called to testify. No evidence documentary or otherwise, was adduced linking the Defendant, Joseph Ndone Muthusi to the Estate of the late John Muthusi Kathenge the alleged proprietor of the suit land. For these reasons I find that the Plaintiff has failed to prove her case on a balance of probabilities and I dismiss it. There will be no orders as to costs as the same was undefended. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 16<sup>TH</sup> DAY  
OF DECEMBER 2025.**

**N.A. MATHEKA  
JUDGE**