

**IN THE COURT OF
APPEAL AT NYERI**

(CORAM: KANTAI, LESIIT & ALI-ARONI, JJ.A.)

CIVIL APPEAL NO. 247 OF 2019

BETWEEN

MARY NCHEKEI PAUL.....APPELLANT

AND

FRANCIS MUNDIA RUGA.....RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land
Court at Meru (Mbugua, J.) delivered on 11th July 2018*

in

ELC Case No. 53 of 2005)

JUDGMENT OF ARONI J.A.

1. The appellant, **Mary Nchekei Paul**, initiated a suit by way of an originating summons dated the 18th of June 2005, seeking a declaration that, she is entitled to be registered as the owner of the entire **L.R. No. Nanyuki/Marura Block 8 (Nturukuma) 1590**), which measures 0.800 hectares, by way of adverse possession in place of the current registered owner, **Francis Mundia Ruga** (the respondent). She also sought an order requiring the respondent to sign all necessary documents to facilitate the transfer of the suit property and, in default, for the court's executive officer to sign them. Alternatively, she sought an order directed at the

Land Registrar, Laikipia, ordering him

to rectify the register of the suit property to give effect to the declaration sought above.

2. The appellant set for determination by the trial court the following questions:

i) Whether the appellant is the widow and the administrator of the estate of Paul Mugambi M'rukaria (deceased);

ii) Whether the deceased and the appellant have been in continuous, open, exclusive and undisturbed possession of the entire LR No. Nanyuki/Marura Block 8 (Nturukuma) 1590 for a period of 12 years;

iii) Whether the above-mentioned piece of land was formerly known as Plot No. 822 Mariara Farmers Nturukuma;

iv) Whether Nturukuma Farmers' Co-operative Society previously owned the suit land;

v) Whether, when the respondent was registered as the new owner of the suit land, the rights that the deceased had acquired on the land were extinguished;

vi) Whether the respondent's title in LR No. Nanyuki/Marura Block 8 (Nturukuma)/1590 was not subject to the appellant's overriding interests under section 36 (f) of the Registered Land Act;

vii) Whether the appellant, as the administrator of the deceased's estate, is not entitled to be registered on her

***behalf and on behalf of the deceased's
estate as***

**proprietor of the whole of LR
No. Nanyuki/Marura Block 8
(Nturukuma) 1590.**

3. The appellant's case is that she is the widow and administratrix of the estate of her late husband, Paul Mugambi M'rukaria, who passed away on 22nd January 2005. That Daniel Chabari Kiruja, was a shareholder of Mariara Farmers' Cooperative Society (Society) and an allottee of two (2) acres of land previously known as **Plot No. 822 Nturukuma**, now **Nanyuki/Marura Block 8 (Nturukuma) 1590**, (hereinafter referred to as the "suit property"), which he offered to sell to the appellant's husband, who accepted the offer and fully paid for the same. At the time of the sale, the Society had issued Daniel Chabari Kiruja a green card confirming his ownership of the suit property. Further it is her case that upon payment of the full purchase price, the appellant and her late husband took possession of the land, fully developed it, and have since lived therein with the rest of their family.
4. Further, the appellant averred that when her husband died on 25th January 2005, the respondent prevented her from burying the deceased on the suit property, claiming ownership. On reviewing the land registry records, she discovered that the respondent had registered himself as the owner of the suit property. She further stated that the respondent has never occupied the suit property nor owned anything on it. Yet, her family has continuously, openly, and exclusively possessed the suit property since 1981.

5. The respondent opposed the originating summons by filing a replying affidavit and a counter-claim. In his replying affidavit, sworn on 7th September 2005, he deposed that the appellant could not bring the suit against him on behalf of the estate of Paul Mugambi M'rukaria (deceased), as she had not obtained probate and/or letters of administration to the deceased's estate.
6. Further, he claimed to have purchased the suit property in 1995 from one Japhet Kimathi Chabari. He admitted that, before its registration, the suit property was known as Plot No. 822 in the records of the Co-operative Society, which initially purchased a larger portion, subdivided it, and distributed the plots to its members. Furthermore, he asserted that he had made the necessary payments to the Society to facilitate the transfer of the suit property in his name in their register and other records. He had obtained the requisite consent for the transfer, paid the necessary transfer fee in 2004, and had the title deed issued to him in 2005.
7. Further, the respondent contended that the appellant's claim of adverse possession cannot hold as she could not simultaneously allege to have purchased the suit property and at the same time claim ownership through adverse possession. He asserted that he became the registered owner of the land on 15th February 2005, and that a claim of adverse possession against him cannot thus succeed, rendering the appellant's claim against him frivolous,

vexatious, and a gross abuse of the court process.

8. The respondent asserted that the appellant's occupation of the suit property was not peaceful, as her deceased husband had been informed that the suit property did not belong to him and had been served with notices to vacate. Further, the respondent repeatedly told the appellant's husband (deceased) that he was illegally occupying the suit property.
9. In the counter-claim, the respondent reiterated that he bought the suit property in 1995; that the first registration of the suit property was in 2004, and he obtained title in 2005; thus he claimed the originating summons was incompetent; and that despite numerous demands the appellant had refused to vacate the suit property. He sought a declaration that he was the lawful proprietor of the suit property; an eviction order against the appellant within 30 days of the court's decision and; in default, the OCS Nanyuki Police Station to effect eviction and costs of the suit.
10. At the hearing of the case, the appellant produced a sale agreement, signed in 1981, between her deceased husband and the initial allottee of the suit property Daniel Chabari Kiruja, and testified that they took possession of the land in the same year and have been in occupation since then.
11. The appellant further testified that when her husband passed away and while she was preparing to bury him on the suit property, the chief of the area and the respondent instructed her not to proceed with the burial, which she halted and took the matter to court. The body of the deceased was still at

the

mortuary at the time of trial, as she had no other land to bury him. Further, she claimed that before her husband's death, no one ever claimed ownership of the suit property. That the respondent acquired title to the land after the appellant's husband passed away and while the case was already in court.

12. **PW2 Samuel Mugambi** testified that he knew the appellant and her late husband, Paul Mugambi (deceased), and the initial allottee of the suit property, Daniel Chabari. He is a surveyor and, at the time the appellant's husband and Daniel Chabari were transacting, he worked for a surveying company that the Society had contracted to subdivide its land. Daniel Chabari approached him in 1981 to help identify the property designated as Plot No. 822. He guided Daniel Chabari and his purchaser, Paul Mugambi, to the land. He became acquainted with Paul Mugambi, and was aware that he took possession and immediately built on the suit property, where his family has been living since then. He lives about 4 to 5 kilometres from the suit property.
13. On his part, the respondent testified that the first registered owner of the land was the Nturukuma Co-operative Society, which obtained ownership of the suit property on 10th April 2004 and it thereafter transferred the land to him. He became the registered owner of the land on 15th February 2005 and has the title deed to the suit property. Further, he testified that the appellant first sued him in Nanyuki Civil Case No. 15 of 2005, where she had sought orders to bury

her late husband on the
suit property, but the court dismissed the application. The

appellant subsequently withdrew that suit and filed the suit subject of this appeal, similarly seeking to bury her husband on the said property. The court declined to grant the prayers sought in its ruling delivered on 19th March 2007.

14. It was the respondent's further testimony that he purchased the suit property from Japhet Kimathi Chabari. There were no titles at the time he bought the property in 1995, as the register had not been officially opened, until 2004, when the Society obtained title in its name and thereafter provided him with the necessary documents which enabled him to obtain title to the suit property in 2005, and only one year had elapsed between the time the appellant filed suit and the issuance of the title in his name. He also maintained that when he bought the land, no one was in occupation. It was also his evidence that the Society had summoned him and the appellant's husband, where the deceased was asked to vacate the disputed property. He never met the original allottee of the suit property, nor did he know the plot number of the land he purchased.
15. After hearing the parties, the trial court was of the view that the issues for determination were: whether the appellant's claim for adverse possession in respect of the suit property had merit and whether to grant eviction orders as sought by the respondent in his counterclaim.
16. Regarding the claim for adverse possession, the trial court made a finding that the appellant was in occupation of the

suit property long before 1998. However, the court was of the view

that, before the title was issued, the suit property had no legal status; therefore, it could not be said that the appellant had dispossessed the owner before 2004.

17. The court further found that the appellant's occupation of the disputed property was not peaceful, as the appellant's family had received notices from the Society indicating that the land belonged to the respondent. Further, the court in Nanyuki SRM Civil Case No. 15 of 2005 acknowledged the dispute between the parties and declined the appellant's request to inter her deceased husband on the suit property. Ultimately, the court concluded that the appellant failed to prove her claim for adverse possession. In the judgment delivered on 11th July 2018, the respondent was declared the proprietor of the suit property, and an eviction order was issued against the appellant, with a two-month grace period to vacate the suit property.
18. Aggrieved by the trial court's judgment, the appellant preferred an appeal to this Court in a memorandum of appeal dated 28th August 2019, on four grounds, stating that the learned Judge erred in law and facts: by delivering a judgment against the weight of evidence; in failing to apply the relevant principles in respect of the matters at hand; in sustaining and upholding a counterclaim that was statute barred; and that the judgment was rendered *per incuriam*.
19. Submissions on behalf of the appellant are dated 23rd October 2024. Learned counsel submitted that the suit

property was

identifiable when the appellant took possession in 1981. Further, the law outlines the process for opening land registers following partition or subdivision, and requires that registers be established. Therefore, new registers originate from older ones that are closed in the process. Further counsel asserted that to state that land resulting from a subdivision process lacked legal status before that process was completed is erroneous.

20. Counsel further faulted the trial Judge for finding that the appellant's possession of the disputed land was not peaceful. Counsel argued that the court based this reasoning on the appellant's 2005 claim to bury her husband's remains on the suit property and failing to take into account that in 2005, she moved the court, claiming ownership and the right to bury her husband on the suit property.
21. Counsel further asserted that the period for which the respondent claims title to the land should begin with the right of the predecessor in title, and any claim of ejection should not be based on a title, but on a possessory right. Counsel asserted that the respondent and those who sold the suit property to him had lost the right to the property as the appellant and her family had been on the land for 24 years. Counsel relied on **section 7** of the Limitation of Action Act, which he submitted provides that no action for ejection should be brought after a period of 12 years.
22. Further counsel contended that it matters not under what

regime the land is registered when it comes to the right of

possession; the same is based on possessory rights. He also submitted that the counterclaim was time-barred, citing ***Iga vs. Makerere University [1972] EA 65***, contending that any claim barred by law is invalid and should be struck out or dismissed.

- 23.** On the part of the respondent, submissions and a list of authorities were filed on 25th October 2024. Learned counsel for the respondent affirmed the judgment and urged that the trial Judge correctly addressed the issues at hand and reached findings in the judgment that the respondent fully supports as sound and appropriate. Counsel urged that the trial Judge made no errors in the analysis of the evidence. Counsel further submitted that since the suit property was first registered in 2004 and was transferred to the respondent in 2005, the trial court was correct to find that the appellant could not invoke the doctrine of adverse possession before the twelve-year period had elapsed from registration. In support, counsel relied on the decision of this Court in ***Francis Gitonga Macharia vs. Muiruri Waitiaka [1998] eKLR***.
- 24.** Further, counsel referred to ***Kakindu vs. Abdalla (Land Case E009 of 2022) [2024] KEELC 4094 (KLR)***, where the court referred to the Supreme Court decision in ***Torino Enterprises vs. Attorney General (Petition 5(E006) of 2022 (2023) KESC 79 (KLR)***, where it was stated that an allotment letter is not a title until it is perfected by registration. The respondent submits that since the registration process was

perfected in 2004, and his title was issued on 15th February 2005, the appellant initiated the lawsuit within months of the title being issued, on 20th June

2005. Counsel also cited the case of **Titus Kigoro Munyi vs. Peter Mburu Kimani [2015] eKLR**, submitting that computation of time should begin from the registration date.

25. Learned counsel further contended that the learned Judge rightly determined that the appellant was unlawfully occupying the respondent's parcel of land and consequently upheld the counterclaim, declaring the respondent as the rightful owner and issuing an eviction order. Therefore, the appeal is without merit and ought to be dismissed.
26. This being a first appeal, it is our duty, in addition to considering submissions by the appellant and the respondent, to analyse and re-assess the evidence on record and reach our own independent conclusion. This approach was adopted in **Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR**, where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows:

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or

probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

27. Having looked at the pleadings, evidence placed before us, submissions by the parties, case law cited, and the law, my view is that this appeal turns on two issues: whether the trial court correctly applied the principles of the doctrine of adverse possession, and, secondly, whether the counterclaim was merited.
28. There is no dispute that the property initially belonged to the Society, which subdivided it into several plots and shared the same amongst its members. Further in the Society's records, the suit property referred to as Plot No. 822 was allocated to Daniel Chabari.
29. The appellant's case is based on a claim of adverse possession of Plot No. 822, now L.R. No. Nanyuki/Marura Block 8/1590 (Nturukuma), a property she and her family have occupied since 1981. From her testimony, they came into possession of the suit property following a sale transaction between Daniel Chabari and her deceased husband, Paul Mugambi M'rukaria, back in 1981, when the purchase price was paid in full, and they entered the suit property and developed it. Further, since Daniel Chabari did not effect a transfer as per the agreement, the appellant and her family acquired the right of adverse possession against the original owner and all those who were entitled under him.

30. On the part of the respondent, he claimed to have bought the suit property from Japhet Kimathi Chabari in 1995. He testified further to have paid the Society money to facilitate the transfer and issuance of title in 2004, and he eventually was issued the title in February 2005, the year the appellant took him to court for stopping her from burying her deceased husband on the suit property. He asserted, therefore, that the appellant's claim was not tenable, as the period of 12 years had not elapsed since the title deed issued.
31. The doctrine of adverse possession in Kenya is founded in **sections 7 and 13** of the Limitation of Actions Act which provide as follows:

Section 7:

Any person may not bring an action 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.

Section 13 states:

(1) A right of action to recover land does not accrue 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 sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse

possession of the land.

(2) 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.

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

32. This Court in **Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui**, Civil Appeal No. 95 of 2015 (UR) stated:

“We think, after examination of numerous decisions including Gatimu Kinguru v/s Muya Gathangi (1976) KLR 253, Hosea v/s Njiru (1974) E.A. 526, Sospeter Wanyoike v/s Waithaka Kahiri (1979) KLR 236, Wanje v/s Saikwa (No. 2) (1984) KLR 284, Githu v/s Ndeete (1984) KLR 778, Nguyai v/s Ngunayu (1984) KLR 606, Kisee Maweu v/s Kiu Ranching (1982-88) 1KAR 746, Amos Weru Murigu v/s Marata Wangari Kambi & District Land Registrar, Nyahururu (NBI HCCC 33 of 2002), Kasuve v/s Mwaani Investments Ltd & 4 Others (2004) KLR 184, Samuel Miki Waweru v/s Jane Njeri Richu (2007) eKLR, Muraguri Githitho v Mathenge Thiongo [2009] eKLR, and others that were cited before us, that the law is settled and is anchored on Sections 7, 13, 17 and 38 of the Limitation of Actions Act.”

33. In **Mate Gitabi vs. Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR**, on the issue at hand this Court stated as follows:

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’ (Emphasis added)

34. In the instant case, the appellant produced a Green Card as Exhibit MNP1 to prove that the property was allocated to Daniel Chabari. This card is acknowledged by the Society as will be seen later in the judgment. To demonstrate how they came to being in possession of the suit property the appellant produced an agreement for sale signed between her late husband and the initial allottee/share holder, Daniel Chabari for the purchase of the same for the price of Kshs. 9000, which was paid in full, and the payment was acknowledged. The vendor was to facilitate the transfer. This appears not to have happened, though the appellant and her husband took immediate possession and developed the

property. A letter from the Assistant Chief of the area and PW2's testimony confirmed possession. The respondent did not dispute this evidence of

possession seriously although he claimed the property was vacant when he purchased the same.

In ***Sisto Wambugu vs. Kamau Njuguna [1983] KECA 69 (KLR)***, where adverse possession was in issue **Hancox JA** in his judgement stated:

“There have been several cases, of which the Livingstone Ndeete case is one, in which the claimant of land puts his case in the alternative, that is to say by pleading the agreement under which he entered, and then asking for an order based on subsequent adverse possession. For instance in Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.” (Emphasis added)

In ***Mwangi Githu vs. Livinstone Ndeete Civil Appeal No. 24 of 1979***, Potter JA stated:

“The case of Gatimu Kinguru v Muya Gathangi High Court Civil Case No 176 of 1973, is an example of an adverse possessor obtaining title by adverse possession to an identifiable portion of an owner’s land. It is stated in volume 24 of Halsbury’s Laws of England, 3rd edition, at page 252:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing

off is the best evidence of possession of surface land;

but cultivation of the surface without fencing off has been held sufficient to prove possession.””

35. The evidence on record shows that the appellant’s deceased husband paid the purchase in full, and acknowledged, as seen in the sale agreement and the letter from the Society. There was indeed inaction on the part of the deceased initial owner of the suit property; he did not sign any transfer documents or write to the Society to assign his interest in the suit property to the appellant’s husband within a reasonable time. Since he had been paid in full and he had surrendered possession, it was expected that this would have been done within a reasonable time. He failed to do so, and the appellant and her family continued to stay on the suit property. The appellant and her family’s continued occupation became adverse to Daniel Chabari and any one claiming under him.
36. Daniel Chabari died at some point and the respondent claims to have bought the land from his son, Japhet Kimathi Chabari vide an agreement dated 29th May 1995. That agreement was not signed by the said Japhet Kimathi Chabari. The signature is that of one Cecilia Ruguru Chabari, who seems to claim to be Japheth’s mother, yet none of them had since 1981 attempted to evict the appellant or her family or asserted any right before the court, a period of 14 years. The family acquiesced the inaction of Daniel Chabari.

Even assuming that the process of adverse possession was

not

in motion, it was not demonstrated that Japhet Kimathi Chabari had the capacity in law to transact on behalf of Daniel

Chabari's estate, or that he had authorized anyone to sign an agreement on his behalf, so that even if the appellant had not by then acquired adverse possession, neither him nor his mother could pass any title to the respondent.

Notably, one of the receipts relied on by the respondent and purportedly issued by the Society has erasures without any evidence that the name of the respondent was rightly inserted on the same.

37. The trial court found that the appellant's occupation was not peaceful, this finding is not backed by any evidence. There is only one letter, dated 4th March 1998, purportedly written by the Society, asking the appellant's deceased husband to vacate. The Society had no interest in the property and had no business issuing the notice. The respondent did not, on his part, show any action Japheth Chabari or himself took against the appellant's occupation of the suit property. Even assuming that the Society had an interest in the land a mere notice to vacate is not enough in ***Mwangi Githu vs. Livinstone Ndeete*** (*supra*), **Potter JA** stated further regarding notice to vacate in a claim of adverse possession:

“Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping

the running of time

under the Limitation of Actions Act. The appellant did not assert his right to the whole suit plot until he commenced suit No 1056 of 1976 on April 30, 1976.”

38. It would also be remiss for this Court not to take judicial notice of the fact that land-buying companies and Cooperative Societies have, over the years, purchased chunks of land based on members' contributions or bought and subdivided land into affordable portions and shared and/or sold to their members. This exercise has enabled many Kenyans who would otherwise be unable to purchase land as solo buyers, either because owners choose to sell vast tracts of land or because land-buying companies or societies allow buyers/members to pay in instalments. The land-buying companies or Cooperatives would then subdivide land, allocate shares awaiting official subdivisions, and transfer to their members. In the meantime, they would be holding the portions as trustees of their members, having transferred interest to them awaiting subdivision and issuance of title.
39. There is no dispute that the transfer of plots to members was to be effected by the Society. Indeed, the respondent alluded to this fact. It is not disputed either that the original member of the Society was Daniel Chabari, and his interest in the suit property became extinct, as seen from the evidence above, by 1993 (a period of 12 years), having been dispossessed of his interest on the land by the appellant and her family who took possession in 1981 and continue to enjoy the suit

property,

including in 1995, when the property was purportedly sold to the respondent.

40. Indeed, the Society, in its letter of 27th February 2006, acknowledged that its initial allottee of the suit property, Daniel Chabari, had sold the land to the appellant's husband, who retained the green card. In the letter, the Society admitted it had no interest in the suit property and that the person with an interest was Daniel Chabari, who had already parted with that interest. In essence, it is an acknowledgement that its role was that of a trustee.
41. The respondent claimed to have bought the property from Japhet Kimathi Chabari, a son of the original allottee. However, it cannot be that Japheth did not know of the appellant and her family's occupation of the land. A neighbour including the chief of the area alluded to their presence on the suit property and despite their occupation, even if Japheth or the mother doubted the fact that the appellant and her family occupied the land, they were not heard of, neither did they take any action over the years to reclaim the suit property, and the appellant and her family continued to be on the land uninterrupted. I think it is right to say that the interest in the property held by Daniel Chabari and anyone who claimed through him was extinguished by 1993. So that even if his son, Japheth, had the capacity to transact on behalf of the father's estate, this particular title had been extinguished, and he could not have passed any interest to the respondent, as it is claimed

in 1995 or any other time. As for the Society, they had no

interest in the property, having allocated it to their member, Daniel Chabari. Their role was that of a trustee waiting to transfer at the opportune time.

42. In the end, the appeal succeeds. The judgment of the trial court is set aside; in its place, I order:

(a) That the Land Registrar, Laikipia, do rectify the Title for L.R. No. Nanyuki/Marura Block 8 (Nturukuma) 1590, by cancelling the name of the respondent FRANCIS MUNDIA RUGA and in its place register the appellant, MARY NCHEKEI PAUL as the proprietor.

(b) Costs of the trial and of this appeal are hereby awarded to the appellant.

Orders accordingly.

Dated and delivered at Nyeri this 11th day of December, 2025.

ALI-ARONI

REPUBLIC OF KENYA
.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR

**IN THE COURT OF APPEAL
AT NYERI
(CORAM: KANTAI, LESIIT & ALI - ARONI,
JJ.A.) CIVIL APPEAL NO. 247 OF 2019**

BETWEEN

MARY NCHEKEI PAUL.....APPELLANT

AND

FRANCIS MUNDIA RUGA.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court at Meru (L. Mbugua, J.) delivered on 11th July, 2018

in

E.L.C. Case No. 53 of 2005.)

JUDGMENT OF LESIIT, JA.

I have had the advantage of reading, in draft the judgment of my learned sister, **ALI - ARONI, JA.** in which the learned Judge has comprehensively set out the background of the case. I concur with the conclusion arrived at by the learned Judge.

Dated and delivered at Nyeri this 11th day of December, 2025.

J. LESIIT

.....
JUDGE OF APPEAL

**IN THE COURT OF APPEAL
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in

E.L.C. Case No. 53 of 2005.)

DISSENTING JUDGMENT OF KANTAI, JA.

I have read the judgment of my learned sister **Ali-Aroni, JA.** but I am unable to agree with the reasoning or conclusions reached.

The appellant, **Mary Nchekei Paul**, approached the High Court of Kenya at Meru in **Civil Case No. 53 of 2005** (later **Environment and Land Case No. 53 of 2005**) by Originating Summons brought under sections 7, 17, 18, 37 and 38 of the Limitation of Actions Act, Sections 126(1) and 143 of the Registered Land Act (since repealed) and the then Order XXXVI Rules 1, 3D and 7 Civil Procedure Rules praying that she as the administratrix of the estate of her deceased husband had become entitled to be registered as proprietor by adverse possession of the whole of **L.R No. Nanyuki/Marura Block**

8 (Nturukuma) 1590 measuring 0.800 hectare (the suit land) in place of the registered owner **Francis Mundia Ruga** (the respondent).

She prayed for an order that the respondent sign all requisite documents to effect transfer of the suit land to her or in default the Executive Officer of the court be ordered to do so or in the alternative the Land Registrar, Laikipia, be ordered to rectify the register of the suit land to reflect a change in her favour. Questions posed for determination of the trial court were whether the appellant was the widow and administratrix of the estate of **Paul Mugambi M'rukaria** (the deceased); whether the deceased and the appellant had been in continuous, open, exclusive and undisputed possession of the suit land for a period of 12 years; whether the suit land was formerly known as Plot No. 822 Mariara Farmers Nturukuma; whether the suit land was previously owned by the said Nturukuma Farmers' Cooperative Society; whether when the respondent was registered as the new owner of the suit land rights which the deceased had acquired on the land had been extinguished; whether the respondent's title to the suit land was not subject to the appellant's overriding interests under section 36 of the Registered Land Act (now repealed); whether the appellant as administratrix of the estate of the deceased was not entitled to be registered on her own behalf and on behalf of the estate of the deceased as proprietor of the suit land.

In the affidavit in support of the Summons the appellant stated amongst other things that her late husband had passed away on 22nd January, 2005; that one **David Chabari Kiruja** (deceased) was a shareholder of Mariara Farmers Company Limited (the company) and the company allocated Daniel Chabari plot No. 822 Nturukuma measuring 2 acres which thereafter

became Plot No. Nanyuki/Marura Block 7 (Nturukuma) 1590; that
the said Daniel
Chabari Kiruja had been issued with a green card by the
company;

that by an agreement made in writing on 25th August, 1981 the said Daniel Chabari Kiruja had sold the suit land to her deceased husband and the purchase price had been paid; that she and her late husband had taken possession of the land from the date of sale and had developed it and lived in the land; that the respondent had never occupied the land and that it was only when her husband died that the respondent came forward and prevented her from burying his body on the suit land claiming the suit land to be his; that after the death of her husband she checked records at the lands office and discovered that the respondent had caused himself to be registered as the owner of the suit land; that she and her family had been in continuous open, exclusive and undisturbed possession of the suit land. She prayed to be registered as the owner of the suit land.

The Originating Summons was dated 18th June, 2005. The appellant moved the High Court in an application for injunction and orders that the respondent be restrained from preventing her from burying her dead husband in the suit land. That application was unsuccessful and was dismissed. Attached to the application was a Certificate of Official Search which showed amongst other things that the respondent was first registered as the owner of the suit land on 15th February, 2005 when a title was issued to him.

That is to say that the Originating Summons (hereinafter "O.S.") was taken out about 4 months after the suit land was first registered.

In a replying affidavit to the Summons the respondent

questioned the appellant's capacity to sue: that:

“...the claim of adverse possession against me by the plaintiff cannot stand as it is not possible for her to

claim ownership by way of adverse possession and at the same time claim ownership by way of contract allegedly having had bought (sic) the same parcel of land.”

The respondent deponed that he was registered as owner of the suit land on 15th February, 2005:

“...and clearly 12 years have not yet lapsed since then to warrant anybody claim ownership of the said land by way of adverse possession (Attached is a copy of my title deed marked FMR “1”).”

The respondent further stated that requirements for the doctrine of adverse possession had not been met:

“THAT it is not true for the plaintiff to say that she and her late husband has been in a continuous open, exclusive and undisturbed possession of the said land since 1981 as even when the deceased was alive he was notified that the land does not belong to him and was issued with notices to vacate. I have always informed him that he was on my land illegally and that he was a trespasser thereon. (Attached is a copy of a demand to him to vacate marked FMR 2”).”

He asked that the O.S. be dismissed and the appellant be ordered to vacate the suit land. He filed a counter-claim where he stated that the suit land was registered in 2005; that he was the registered owner of the suit land; that the first registration of the suit land was in 2004 and the O.S. was incompetent; that he had made various demands to the appellant to vacate the suit land but the appellant had refused to vacate; that the appellant had filed Nanyuki SRMCC No. 15 of 2005 which was later withdrawn. He prayed that the suit be dismissed and that he be declared as

the owner of the suit land and an order be issued for eviction against the appellant.

The suit was heard by **Njuguna, J.** who framed issues for her determination to be whether the plaintiff's claim of adverse possession in respect of the suit land was merited and whether the defendant's claim for eviction of the plaintiff had merits. The Judge considered the case made by both sides and found the appellant's case to have no merit (the O.S. was dismissed) and found the counter-claim merited and allowed it.

Adverse possession according to **Black's Law Dictionary 11th Edition** by **Bryan A. Garner** is:

"The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious."

Section 38 of the **Limitation of Actions Act Cap 22 Laws of Kenya** provides:

"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." (Emphasis mine).

The case before the trial Judge was that the suit land was first registered on 15th February, 2005 when a title was issued in favour of the respondent. The O.S. was taken out by the appellant in June, 2005.

As clearly provided in the said **section 38** of the **Limitation of Actions Act** adverse possession can only apply to land registered under any of the Acts cited in the said Limitations of Actions Act.

This Court in **Wreck Motor Enterprises vs. Commissioner of Lands & 3 Others [1997] eKLR** was faced with the question where the appellant claimed a property on the basis that it had made an application to the Commissioner of Lands and the President had approved the same but a grant had been issued to another party. It was held:

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N.K. Arap Ng'ok v Justice Moiyo ole Keiwua & 4 Others, Civil Application No. NAI.60 of 1997 (unreported). Sections 23(1) of the Registration of Titles Act reads as follows:-

"Section 23 (1)

The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misinterpretation to which he is proved to be a party."

Title to the suit land having been issued to the respondent on

15th February, 2005 time for purposes of adverse possession began to run from that date and not any other date. O.S. was taken out in

June 2005, about 4 months after the suit land was registered and did not satisfy the requirements in the Limitations of Actions Act. A period of 12 years had not elapsed. There was evidence that the appellant and her deceased husband had been served notices to vacate the land and that was proof that the appellant's occupation of the land was not open, quiet and uninterrupted.

Another important consideration is that it was and is a legal requirement that a person applying to be registered as proprietor of land by adverse possession under the Limitations of Actions Act is required to annex an extract of title to the affidavit in support of the O.S. **Section 38** of that Act specifically provides that the Court be moved by an O.S. supported by affidavit:

“... to which a certified extract of the title to the land in question has been annexed.”

This enables the trial court to establish with exactitude that land is registered under a system of law and under which system of the law it is so registered as required by section 38 of the said Act as adverse possession cannot apply to unregistered land.

This Court in the case of ***Johnson Kinyua vs. Simon Gitura Rumuri [2011] eKLR*** quantified that position by stating that a Certificate of Official Search could stand in place of an extract of title. It was held:

"Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of

the entries set out in the certificate.”

For adverse possession to apply the land must not only be registered but must be identifiable. In the case of **Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR** this Court stated on that issue:

"The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old Civil Procedure Act and the rules made thereunder that when taking out an O.S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application. Indeed, the then Order XXXVI Rule 3D(2) specifically provided:

" ...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed..."

That requirement no doubt was couched in mandatory terms failing which it would render the O.S. incompetent. We have perused the entire O.S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission."

The current Order 37 Rule 7 Civil Procedure Rules is an exact replica of the former Order XXXVI Rule 3D of the said Civil Procedure Rules.

It is a requirement that an O.S. be supported by an affidavit with extract of title attached or at the very least, as we have seen in **Johnson Kinyua** (supra), a Certificate of Official Search.

If the appellant in the appeal had attached an extract of title (as required) or a Certificate of Official Search it would have shown that the suit land had been registered about 4 months before the O.S. was taken out. It would have been proof that the doctrine of adverse possession did not apply and the appellant was thus not entitled to any favourable orders.

As we have seen in **Katana & 101 Others** (supra) without attaching an extract of title to the O.S. the same was incompetent and was liable for striking out.

I would agree with the trial Judge that the O.S. had no merit and the Judge was right to dismiss it. I would dismiss the appeal. I am however travelling on a lonely path here and final orders will be as ordered by the majority.

Dated and delivered at Nyeri this 11th day of December, 2025.

S. ole KANTAI

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JUDGE OF APPEAL