

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 75 OF 2016 (OS)**

**IN THE MATTER OF: SECTION 27 & 28 OF THE LIMITATION  
OF ACTIONS ACT  
AND**

**IN THE MATTER OF: THE ADMINISTRATION OF THE ESTATE  
OF GATHII THIGE (DECEASED)  
AND**

**IN THE MATTER OF: L.R NO.EUASONYIRO/SUGUROI/VIII/  
266  
AND**

**IN THE MATTER OF: DECLARATION OF A TRUST AND /OR  
ACQUISITION OF TITLE BY ADVERSE  
POSSESSION**

**JAMES MWANGI MUCHIRI ..... APPLICANT**

**VERSUS**

**MARY WANGUI ..... 1<sup>ST</sup> RESPONDENT**

**MUCHEMI THIGE ..... 2<sup>ND</sup> RESPONDENT**

**KIBOI THIGE ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Background**

1. By an Originating Summons dated 26<sup>th</sup> April 2016, James Mwangi Muchiri (the Applicant) prays for orders as follows:

- 1) That the parcel of land LR No. Ngobit/Supuko Block VI/266 is held in trust for the benefit of the Applicant to the extent of four (4) acres thereof;**
- 2) In the alternative, a declaration that the Applicant has acquired by adverse possession four (4) acres out of LR No. Euasonyiro/Suguroi VIII/266;**
- 3) That the administration of the Estate of Gathii Thige (deceased) be done subject to the pleaded trust and/or parcel of land LR No. Euasonyiro/Suguroi VIII/266 in favour of the Applicant (sic); and**
- 4) That costs be provided for.**

2. The Originating Summons is supported by an Affidavit sworn by the Applicant wherein he depones that sometime in the year 1991, the 1<sup>st</sup> Respondent and her husband, Peter Mwangi approached him to pay for a Bank loan secured with their parcel of land being LR No. Euasonyiro/Suguroi VIII/21 on an agreement that four (4) acres of the said parcel of land would be transferred to the Applicant.
3. It is the Applicant's case that subsequent to that agreement, the Respondents' mother substituted the agreed four acres

from LR No. Euasonyiro/Suguroi VIII/21 with an equal portion of land in LR No. Euasonyiro/Suguroi VIII/266 which comprised of shares due to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. The Applicant further avers that on 20<sup>th</sup> August 1991, he was put in exclusive possession of the substituted parcel of land and that he has since made extensive developments thereon.

4. Mary Wangui (the 1<sup>st</sup> Respondent) is opposed to the Applicant's claim. In her Replying Affidavit sworn on 25<sup>th</sup> July 2016, the 1<sup>st</sup> Respondent avers that contrary to the Applicant's averments, she is the one who had paid the loan. The 1<sup>st</sup> Respondent denies that her mother did at any point in time put the Applicant in possession of any portion of the parcel of land known as LR No. Euasonyiro/Suguroi VIII/266 as claimed or at all.
5. Muchemi Thige and Kiboi Thige (the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively) are equally opposed to the Applicant's claim. In a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent on their behalf, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents aver that Euasonyiro/Suguroi VIII/266 is registered in the name of their mother who died in the year 2005 and that the agreement entered into pertaining to the said parcel of land was executed by a stranger who had

no authority or proprietary interest to enter into the said transaction.

6. At the trial herein, the Applicant called two (2) witnesses in support of his case. The Respondents equally called two (2) witnesses in support of their case. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence offered at the trial herein.

### **Analysis and Determination**

7. The Applicant has instituted this suit seeking for an order that four acres out of the parcel of land known as Ngobit/Supuko Block VI/266 is held in trust for himself. In the alternative he prays for a declaration that he has acquired by adverse possession four acres out of the parcel of land known as Euasonyiro/Suguroi VIII/266.
8. The genesis of this suit is a hand-written sale agreement executed between one Peter Mwangi and the Applicant herein dated 21<sup>st</sup> August 1991. By the said agreement the said Peter Mwangi who is said to be the 1<sup>st</sup> Respondent's husband agreed to sell a parcel of land described therein as No. 266 to the Applicant for the sum of Kshs. 40,000/= . The purchase price according to that agreement was to be paid in instalments

commencing from the date of the agreement until 30<sup>th</sup> December 1992 when the Applicant was to pay the last instalment to a specified loan account at an undisclosed Bank. By the said agreement, the Applicant's family was allowed to occupy the said land parcel No. 266 during the period that the instalments were being paid.

9. According to the Applicant, the 1<sup>st</sup> Respondent and her husband the said Peter Mwangi had approached him to purchase the land to enable the couple to offset a Bank loan that was then due and outstanding after the Bank threatened to auction the couple's parcel of land known as Euasonyiro/Suguroi VIII/21.
10. It was the Applicant's case that after he paid the agreed amount the 1<sup>st</sup> Respondent's mother substituted the initial four acres which were to be hived off from Euasonyiro/Suguroi VIII/21 with four acres in Euasonyiro/Suguroi VIII/266.
11. From the material placed before the court, it was not clear on what basis the said Peter Mwangi had executed the agreement with the Applicant. A perusal of the Green Card of the parcel of land known as Euasonyiro/Suguroi VIII/266 reveals that the same was on 16<sup>th</sup> June 1987 registered in the name of one

Rudita Gathii Thige and that she was issued with a title deed for the same on the same date.

12. While the Applicant referred to the said Rudita Gathii Thige as the mother of the 1<sup>st</sup> Respondent, it was evident that that was not the case. Rudita was the mother to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and a paternal aunt to the 1<sup>st</sup> Respondent. Arising from the foregoing, it was apparent to me that the said Peter Mwangi had no legal capacity to deal with Euasonyiro/Suguroi VIII/266 that was registered in Rudita's name as he had purported to do in the sale agreement dated 21<sup>st</sup> August 1991.
13. That notwithstanding, it was apparent that as a result of the dubious sale agreement, the Applicant had gained entry into the said parcel of land known as Euasonyiro/Suguroi VIII/266 and had taken possession and remained in occupation to-date. In support of his case, the Applicant has provided photographs of his homestead, a maize plantation and other developments on the suit land. A perusal of the same reveals that the Applicant's occupation of the land has been open and uninterrupted by the Respondents.

14. In his testimony before the court, the 2<sup>nd</sup> Respondent – Andrew Muchemi Thige (DW2) confirmed that the said Euasonyiro/ Suguroi VIII/266 was registered in the name of his mother Rudita Gathii Thige who passed away in the year 2005. In cross examination, the 2<sup>nd</sup> Respondent confirmed that neither himself nor his mother had ever occupied the suit property.
15. Arising from the foregoing, it was evident that the Applicant had from the year 1991 enjoyed exclusive occupation and possession of the disputed portion of land to the exclusion of the registered proprietor.
16. As was stated by the Court of Appeal in ***Mtana Lewa -vs- Kahindi Ngala Mwagandi (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.”**

17. In the circumstances herein, I was persuaded that the Applicant had demonstrated that he had been in actual, open and exclusive possession of the suit property for a period in excess of 12 years and that he had acquired adverse possession thereof.
18. Accordingly, a declaration is hereby made in terms of prayer No. 2 of the Originating Summons dated 26<sup>th</sup> April 2016.
19. Each party shall bear their own costs.

**Judgment dated, signed and delivered in open court and virtually at Mombasa this 29<sup>th</sup> day of January, 2026**

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

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) No Appearance for the Applicants
- c) Mr. Muhoho Advocate for the Respondents