



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**ELCLOS 15 OF 2023**

**JOHN MUNGA .....PLAINTIFF**

**VERSUS**

**TIMOTHY GITHEA KARUGA.....DEFENDANT**

## **JUDGMENT**

(1) The Plaintiff seeks the following reliefs against the Defendant in the Originating Summons dated 1-11-2023.

- (i) A declaration be issued that the title of the said Timothy Githea Karuga over a portion of land measuring one(1) acre or 0.405 hectares or thereabouts in L.R. No. Loc. 2/Gacharage/4609 situated in the middle of the land and lying next to a portion occupied by Philip Njuguna Mwangi and which was initially registered as L.R. No. Loc.2/Gacharage/3913 has been extinguished by way of adverse possession thereof for a period exceeding 12 years.
- (ii) A declaration be issued that the Plaintiff John Munga is now entitled to be registered as the absolute proprietor of that portion.
- (iii) An order be issued ordering the Defendant to subdivide L.R. No. Loc.2/Gacharage/4609 in such a manner that the portion of 1 acre or 0.405 hectares in possession of the Plaintiff is excised from the title and transferred and registered in the name of the Plaintiff John Munga.
- (iv) An order be issued ordering the Defendant to forthwith transfer the said portion to the Plaintiff and in default the Deputy Registrar of this court be authorized and directed to execute in place of the Defendant all documents necessary to effect the subdivision and transfer.
- (v) The Land registrar Murang'a be directed and authorized to register all such documents signed by the Deputy Registrar in that respect without requiring the production of the Defendant's title deed to land parcel No. Loc.2/Gacharage/4609 and cancel such title deed.

**(vi) The costs of this suit be borne by the Defendant.**

**(vii) Such further or other orders be made as are just.**

(2) The Plaintiffs' case is as follows. Firstly, in the year 1975 the Plaintiff's father bought 4 acres of L.R. No. Loc.2/Gacharage/936 from the then registered owner Crispus Maguru. The Plaintiff's father Karanja Munga occupied the 4 acres immediately upon purchase. The land measured 6.96 hectares which is equivalent to 17.1 acres. The Plaintiff's father was never registered as the owner of the four acres that he bought from Crispus Maguru. Secondly, Crispus Maguru died in the year 1978 and he was survived by among others his wife, Grace Wanjiru Maguru, who became the administratrix of his estate vide Kericho High Court Succession Cause No. 74 of 1999. Even as the Succession cause was ongoing, the Plaintiff was in occupation of the acre that he now claims. Thirdly, in the year 2017 the beneficiaries of land No. 936 partitioned it into seven portions running from numbers 3739 to 3745. The beneficiaries and the land sizes were as follows.

<b>a. Grace Wanjiru Maguru</b>	<b>6.4 acres</b>
<b>b. George Waweru Maguru Mwangi</b>	<b>1.75 acres</b>
<b>c. Cleophus Kangethe Mwangi</b>	<b>2.0 acres</b>
<b>d. Paul Gachuri Mwangi</b>	<b>1.75 acres</b>
<b>e. Paul Gachuri Mwangi</b>	<b>1.75 acres</b>
<b>f. Samuel Muriithi Mwangi</b>	<b>1.75 acres</b>
<b>g. Hannah Wanjiru Gitau</b>	<b>1.75 acres</b>
<b>h. David Mwaura Mwathi</b>	<b>2.0 acres</b>

Fourthly, Samuel Muriithi Mwangi subdivided his land parcel No. 3744 into two parcels No. 3912 and 3913. He even applied for the consent of the land control board and obtained the said consent. The land that the Plaintiff occupies is actually parcel No. 3913. However, on an unknown date Samuel Muriithi Mwangi sold L.R. No. 3913 to the Defendant who had also bought 3912. In addition to the above, the Defendant bought L.R. No. 3745 from Wanjiru Gitau. He combined all the three (3) parcels to form L.R. No. Loc.2/Gacharage/4609. The one(1) acre the subject of this suit is now physically in the middle of L.R. No. 4609. Fifthly, the Plaintiff has developed the one acre which has 3000 tea bushes, 1000 blue gum trees, 20

avocado trees and a residential house. He delivers the tea at Ikumbi Tea Factory. The Defendant has not interfered with the Plaintiff's quiet possession of the suit land.

For the above and other reasons, the Plaintiff prays for the seven orders in paragraph [1] above.

(3) In support of his case, the Plaintiff filed the following evidence.

- (i) Supporting affidavit dated 1-11-2023.**
- (ii) Copies of register for L.R. Loc. 2/Gacharage/4609, 936 and 3744.**
- (iii) Copy of Ikumbi Tea Factory share certificate dated 27-2-2006.**
- (iv) Copy of letter of consent for transfer of L.R. No. 3913 from Samuel Muriithi Mwangi to John Munga dated 12/11/2013.**
- (v) Witness statements by the Plaintiff, Mwangi M. Njuguna, Joseph Macharia Wanderi, John Ndegwa Githinji and Paul Mwangi Njoroge all dated 9-2-2024.**
- (vi) Other relevant documents.**

(4) The summons is opposed by the Defendant who has sworn a replying affidavit dated 4-12-2023 in which he replies as follows. One, he is the registered owner of land parcel No. Loc.2/Gacharage/4609 which measures 1.416 hectares or 3.49 acres since 6-10-2020. The land is a combination of 3 parcels as per the Plaintiffs' evidence. Two, the Plaintiff's father bought L.R. No. Loc. /Gacharage/3743 and not the suit. He is buried on the land that he bought. Three, the Defendant denies that the Plaintiff was put in possession of part of L.R. No. 4609 by his father as his father never owned it. Also denied is the averment that the Plaintiff put up and established a tea plantation on the land. Instead, it was the Defendant who actually planted the tea on the parcels shown to him by Samuel Muriithi and Hannah Wanjiru Gitau after he purchased them. Four, after the partition of the original land in 2017, the Defendant was moved to the far side of the land and away from the original portion that he had been occupying. He denies that the suit land or any portions thereof were ever to be sold to the Plaintiff or his brother by Samuel Muriithi. Five, the Plaintiff has used force to occupy the land that he claims and the Defendant has tried for many years to evict him from the land through the offices of the chief and the Deputy County Commissioner. He has been

summoned by those offices but he has replied to honour the summons: The Plaintiff has been served with eviction notices and letters but he has refused to obey them. He has also threatened to kill the Defendant if he dares step on the land. Finally, the Plaintiff is not entitled to any of the orders sought and his case ought to be dismissed with costs.

(5) In support of his case, the Defendant filed the following evidence.

- (i) Replying affidavit dated 4-12-2023.**
- (ii) Copies of title deed for L.R. Nos. Loc. 2/Gacharage/4609, 3912 and 3745.**
- (iii) Copy of order dated 7-7-2011 issued in Kericho High Court Succession Cause No. 74 of 1999.**
- (iv) Acknowledgment dated 24-11-2015 signed by Samuel Muriithi Mwangi and the Defendant.**
- (v) Copy of mutation form for L.R. Nos. 3912,3913 and 3745.**
- (vi) Eviction notices dated 20-11-2020, 27-3-2023 and 10-9-2023.**
- (vii) Witness statements by the Defendant, Hannah Wanjiru and Samuel Muriithi Mwangi all dated 7-3-2024.**
- (viii) Copy of certificate of official search which is not clear.**
- (ix) Copy of mutation form for L.R. No. 936 having various dates in the year 2011 and 2012.**

(6) At the trial on 19-3-2025, 7-5-2025 and 24-6-2025 the Plaintiff and the Defendant testified as per their respective pleadings and testimonies. The Plaintiff called Paul Mwangi Njoroge, John Ndegwa Githinji and Joseph Macharia Wanderi as his witnesses. On the other hand the Defendant called Hannah Wanjiru Gitau as the only witness. The witnesses did not deviate from the positions that they have taken in their witness statements even in the face of intense cross-examination by counsel for the adverse party.

(7) Counsel for the parties filed written submissions dated 17-7-2025 and 24-7-2025 respectively. The Defendant's counsel identified three (3) issues for determination as follows.

- (a) Whether the Plaintiff has been in continuous, open and exclusive possession of the suit property for a period exceeding 12 years.**
- (b) Whether the Plaintiff's occupation, if any, was adverse to the Defendant's title.**
- (c) Whether the Defendant is entitled to an order of eviction and mesne profits.**

On the part of the Plaintiffs' counsel, he did not identify any extra issues but commented in seven(7) areas of the submissions. The areas include the following.

- (i) Defendant's denial of the Plaintiff's occupation of the suit land yet using the provincial administration to seek to evict him.**
- (ii) Defendant's failure to call Samuel Muriithi Mwangi, the alleged seller of the suit land and the inference to be drawn from such failure.**
- (iii) Defendant's blowing hot and cold on the issue of the Plaintiff's possession of the land.**

(8) I have carefully considered all the evidence adduced in this case including the affidavits, the witnesses statements, the documents and the testimony at the trial. I have also considered the written submissions by both sides, the issues raised thereon as well as the law cited therein. I make the following findings on the issues raised by the learned counsel for the parties.

(9) On the first of the Plaintiff's issues, I find that the Defendant does not deny that the Plaintiff is in occupation of the land. What he and witnesses say in their evidence is that he has no house on the land and that even his father is buried on a separate parcel of land. They also say that he is not the one who planted the tea bushes on the land.

(10) On the second of the Plaintiff issues, I agree with the Plaintiff's counsel that failure to call Samuel Muriithi Mwangi as a defence witness when his witness statement is on record is noticeable and in ordinary circumstances such failure may justify the inference that such evidence would have been adverse to the Defendant.

However, there is no dispute that Samuel Muriithi Mwangi sold the suit land to the Defendant. The Plaintiff himself has admitted it in paragraph 15 of his supporting affidavit dated 1-11-2023 where he states as follows.

**15 “ That I learnt that on an unknown date Samuel Muriithi had sold land parcel No. Loc. 2/Gacharage/3913 to the Defendant herein and that the Defendant had also purchased land parcel No. Loc.2/Gacharage/3745 from Wanjiru Gitau and Loc.2/Gacharage/3912 from Samuel Muriithi and had combined all three parcels to form land parcel No. Loc.2/Gacharage/4609.”**

Since the sale of the suit land by Samuel Muriithi to the Defendant is not disputed, then failure to call this witness cannot therefore result in drawing the inference that had he been called, he would have given adverse evidence.

The only thing that would have arisen is why he had to change his mind and sell land to the Defendant and not transfer it to the Plaintiff and his brother. Further to the above, there is no allegation of fraud on the part of the Defendant or Samuel Muriithi in the sale of the land. Had there been allegations of fraud, then Samuel Muriithi’s failure to appear as a witness would have drawn serious inference about his absence to deny such fraud.

- (11) The third of the Plaintiff’s issue is covered in the finding in paragraph [8] of this judgment. The Plaintiff’s possession of the suit land is not denied. What is denied is that he has a house on the land and that he planted the tea thereon.
- (12) I find that the Plaintiff has been in occupation of the suit land for a period exceeding twelve years. From the history of the land, it seems that the family of Francis Maguru did not occupy the land for long and did not plant the tea bushes on the land as they were away in Londiani. The Defendant in his evidence said that he planted tea on the part shown to him by Samuel Muriithi and Hannah Wanjiru Gitau after he purchased the land. However after the partition of the original land in 2017, he was moved to the far side of the land and away from the portion that he had been occupying. That may explain how the land that the Plaintiff had occupied all the time came up to be the Defendant’s land.
- (13) It is also my finding that the Plaintiff occupied the suit land with the permission of the late Crispus Maguru and there was hope that the land would be transferred to him. This is to be

found in paragraph 12 of the supporting affidavit date 1-11-2023 where he depones as follows.

**“ 12. That on 4-11-2023 Samuel Muriithi subdivided land parcel No. Locl 2/Gacharage/3744 into two portions which were registered as Loc.2/Gacharage/3912 and 3913 with the intention of transferring No. 3912 to my brother Philip Mwangi Njuguna and No. 3913 to me.”**

If indeed the Plaintiff’s father had bought any land from the family of Crispus Murugu, then the land would have been distributed to his family at the same time with the other beneficiaries of the estate of the deceased. The family of the Plaintiff’s father would not have waited to be at the mercy of one of the beneficiaries of the estate to transfer his share of the estate to them. They would have gone as far as filing an application to revoke the grant and get their fair share of the estate. The inference to be drawn from their conduct is that their father did not buy any land from Crispus Maguru and they occupied the land with the permission of Crispus Maguru’s family. For a claim of adverse possession to succeed the Plaintiff must prove occupation for a period of 12 years or more, without force, without permission and as of right.

In the case of **Wilson Kazungu Katana and 101 others vs. Salim Abdalla Bakshwein**, the Court of Appeal citing the cause citing the case of **Samuel Miki Waweru vs. Jane Njeri Richu** Civil Appeal No.122 of 2021 said,

**“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner...”**

In this case, occupation by the Plaintiff was with the permission/consent of the owner. The claim by the Plaintiff cannot succeed because of this one reason.

- (14) On the issue of whether the Defendant is entitled to an order of eviction of the Plaintiff from the suit land and to mesne profits, I find that the **Order 37 rule 19** of the **Civil Procedure Rules** provides for the conversion of an originating summons into a plaint. It provides.

**19 (1) “ Where, as an Originating Summons under this order; if it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a Plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavit filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.**

**(2) Where the court makes an order under subrule (1) , Order 11 of the Civil Procedure Rules shall apply.**

**(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.”**

The Defendant had a chance to apply that the originating summons be treated as a plaint and file a defence and counterclaim but chose not to. Instead he chose to reserve it to the 25<sup>th</sup> and 26<sup>th</sup> paragraphs of this replying affidavit dated 4-12-2023.

(15) Section 25 of the Land Registration Act provides as follows.

**“ The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever...”**

It is inconsistent with the Defendant’s ownership of the suit land that the Plaintiff should be allowed to remain thereon when his claim for adverse possession has failed and when the Defendant is the registered owner.

(16) In conclusion and for the reasons already given I dismiss the Plaintiff’s summons with costs. Secondly, I order that the Plaintiff be evicted from the suit land within **90 days** from the date hereof if he does not vacate voluntarily.

**It is so ordered.**

**Dated, signed and Delivered virtually at Murang’a this 3<sup>rd</sup> day of February, 2026.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of; -**

**Court Assistant – Mwangi Njonjo**

**Plaintiff’s Counsel – Mr Gichuki**

**Defendant’s Counsel – Absent**