

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELC CASE NO. 49 OF 2019 (OS).**

**MERCY GACERI MURITHI.....**  
**PLAINTIFF**

**VERSUS**

**ALBERT IRERI MBARIRE ..... 1<sup>ST</sup>**  
**DEFENDANT**

**PHILIP NJAGI GODFREY NYAGA..... 2<sup>ND</sup>**  
**DEFENDANT**

**PATRICIA RWAMBA NYAGA ..... 3<sup>RD</sup>**  
**DEFENDANT**

**JUDGMENT**

1. The Plaintiff brought the Originating Summons dated 6/12/2019 seeking to have the court determine questions as to whether she has been in open, continuous, uninterrupted and exclusive use and occupation of the land known as Kagaari/Kigaa 5971 (the suit land) for a period exceeding 12 years; whether she had extensively developed the suit land; whether title over the suit land occupied and utilized by the Plaintiff has been extinguished and whether she has acquired title over the suit land through adverse possession and ought to be registered as its proprietor.
2. The Plaintiff swore the supporting affidavit and deponed that the suit land is registered in the name of the late Godfrey Nyaga Kamunyori (Godfrey). Godfrey died and the Defendants are the

legal representatives of his estate. The Plaintiff averred that she occupies and utilizes the whole suit land measuring approximately  $\frac{1}{2}$  acre. She stated that she has been in open, continuous and exclusive occupation of the suit land since 2006. She added that she had extensively developed the land by constructing a permanent house, planting mature grevillea trees, mature bananas and plants seasonal crops on the suit land.

3. The Plaintiff averred that neither the registered proprietor nor the beneficiaries of his estate have ever entered into the suit land nor utilised it from 2006 when she took possession, and added that she had been in exclusive possession of the land to the exclusion of the Defendants who are the legal representatives of the estate of the registered proprietor. Further, that the registered proprietor has not interrupted her occupation of the suit land since she took possession in 2006. She urged that the Defendants' title over the land had become extinguished due to her long, continuous and exclusive occupation and use of the land. She prayed for the name of Godfrey Nyaga Kamunyori to be cancelled from the land register so that she can be registered as proprietor of the suit land.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants swore the replying affidavit in opposition to the Plaintiff's claim, in which they stated that their father, Godfrey Nyaga Kamunyori was polygamous and had six wives. That he died intestate on 28/8/2001. Due to the large family he left, it took time for the family to file the succession cause. They averred that their father left behind two parcels of

land namely Kagaari/Kigaa/5971 and 5972 as well as a plot at Kigumo.

5. All along, they knew that Kagaari/Kigaa 5971 was sold to Moses Njeru Njamiu (Moses). They did not know why the land was not transferred to Moses. After filing the succession cause, it emerged that Moses had not paid the full purchase price to their father. They understood that Moses would only become the purchaser after he completes the payment of the suit land so that it could be transferred to him legally.
6. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants deponed that they know the Plaintiff as the wife of David Murithi Njue (David) and that David bought a piece of land from Godfrey Nyaga Kamunyori in 1998 through a deal that was finalised. By the time David died, they did not know of him or his wife having bought any piece of land from Godfrey Nyaga Kamunyori who had died before. They received a notice on 5/8/2016 requiring them to appear before the Embu High Court for the hearing of an application filed by the Plaintiff, which sought to amend and rectify the grant to include her name in the certificate of grant. According to them, she did not show any valid reason in her supporting affidavit as to why she was to be included in the grant not being either a member of the family or a dependant of Godfrey.
7. To their great surprise, she produced an agreement between Moses and Godfrey. That is when they discovered that Moses had not fully paid what was due to their father. They stated that in the further affidavit which the Plaintiff swore on 13/9/2016, she

deponed that David, her husband bought parcel numbers 5971 and 5972. They maintained that David Murithi Njue did not enter into any agreement with their father Godfrey for the sale of a piece of land. They urged that the Plaintiff's affidavit was filled with contradictions and pointed out that the agreement produced by the Plaintiff was between Moses and Godfrey and did not mention David or the Plaintiff. They urged that the Plaintiff and David were strangers to them and invited the court to dismiss the claim.

8. The hearing of the suit commenced on 13/10/2022 before Justice Kaniaru, when the Plaintiff gave evidence. She stated that she was currently occupying the suit land, which is registered in the name of Godfrey Nyaga Kamunyori. The land resulted from the subdivision of parcel no. 5522. That vide a sale agreement dated 5/4/2001, the late Godfrey sold a portion measuring 0.20 hectares to Moses. That she and her late husband bought the suit land from Moses in 2005 and they took possession of the land in 2006. On taking possession, she started cultivating the land and constructed a permanent house on the suit land. She maintained that she had been in open, continuous and exclusive occupation of the suit land and was emphatic that the registered owner's title had been extinguished.
9. She clarified that her late husband bought the suit land from Moses who purchased it from the original owner, Godfrey. She entered the land in 2007 and started living there with her husband. She produced photographs of her home where she

lives with her children. She told the court that she built the house in 2010. She produced photographs showing the crops she had planted on the land. By the time they bought the land, Godfrey was dead. She produced receipts in evidence to show they paid the sum agreed in full.

10. She told the court that the Defendants included her husband's name in the succession proceedings but they erroneously wrote David Muriithi Nyaga instead of David Muriithi Njue. She wanted to correct the name in the High Court during the succession proceedings. Her husband died on 11/11/2012. She produced the copy of the grant. She maintained that she was an adverse possessor having lived on the land over 12 years. The Defendants were her neighbours. She pointed out that the Defendant did not object to her husband's name being rectified in the High Court.
11. On cross examination, she told the court that Moses and her late husband were cousins, and that the original land owner died before transferring the suit land to Moses. She conceded that the receipts which she produced showed payment of Kshs. 134,000/= leaving a balance of Kshs. 36,000/= yet according to the agreement the purchase price was Kshs. 170,000/=. Moses showed her the sale agreement confirming that he bought the land from Nyaga Kamunyori. In 2001, Godfrey approached her late husband to purchase the suit land and he introduced Moses to Godfrey. Godfrey died before transferring the suit land to her late husband.

12. She filed an application challenging the grant in 2015. The High Court ruled in Succession Cause No. 612 of 2009 that it was the Environment and Land Court (ELC) to determine the issue of ownership hence this suit. They could not find Moses earlier. She went to court for rectification of the grant in 2015. Her husband put up their house and was buried on the suit land.
13. According to her, the Defendants were aware of the sale of the suit land based on the fact that her husband contributed money towards the filing of the succession cause but the Defendants misspelt her late husband's name in the succession cause. She stated that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not live near the suit land. Her husband had bought a different parcel of land from Godfrey in 1997. That land is adjacent to the suit land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants were aware that they had built a house on the suit land. She pointed out that the confirmed grant gave one of the beneficiaries as David Murithi Nyaga who was her husband but his name was not written properly.
14. Moses Njeru Njamiu gave evidence. He recalled entering into an agreement with Nyaga Kamunyori in April, 2001 vide which he was buying 0.20 ha out of parcel No. 1522. He was required to pay Kshs. 140,000/= exclusive of survey fees and the cost of processing the title. He paid Kshs. 70,000/= on 5/4/2001, and a further sum of Kshs. 10,000/= on 26/6/2001 for the subdivision. He paid Kshs. 54,000/= on 18/6/2001 and Kshs. 170,000/= including Kshs. 36,000/= which catered for the vendor's hospital bill when he was admitted at St. Michael Hospital Runyenjes.

The vendor died before the transfer was completed. When the completion delayed, he approached his cousin David to refund him the purchase money so that he could acquire the suit land through the succession process. They met Ileri Mbarire with David and agreed that Ileri would facilitate the transfer of the suit land to David through succession.

15. On cross examination, he maintained that the suit land belonged to the Plaintiff's husband. She placed a caution against the suit land in 2014. He insisted that the Plaintiff's husband bought the suit land, which he was buying from the 1<sup>st</sup> Defendant's father. On re-examination, he clarified that the Plaintiff's husband had earlier bought another piece of land from the Defendants' father. He informed Moses that the Defendants' father was selling another piece of land. He took him to the Defendant's father and they agreed that he would buy half an acre. The land was costing Kshs. 140,000/= and he was to pay Kshs. 30,000 for survey.
16. The Defendants' father subdivided the land so that he could get his portion. After subdividing the land, Godfrey got more sick and required more money for treatment. Moses paid additional sums and fenced the suit land. When the Defendant's father died, the family assured him that he would be included in the succession. By then he had bought another piece of land and decided to sell the suit land to the Plaintiff's husband.
17. The court allowed the Defendant to file a counterclaim. The Defendants filed a document entitled "1<sup>st</sup> and 2<sup>nd</sup> Defendants' Further Replying Affidavit and Counterclaim" dated 9/1/2025.

The Defendants urged that the claim for adverse possession was not ripe when the Plaintiff lodged her claim in the succession cause. They contended that the Plaintiff was illegally occupying the suit land and ought to be evicted. They invited the court to remove the caution placed by the Plaintiff and sought mesne profits against the Plaintiff for the time she has occupied the suit land together with costs for the suit and the counterclaim.

18. The 1<sup>st</sup> Defendant gave evidence on 24/4/2025. He told the court that the children of the late Godfrey delegated the role of dealing with the distribution of his estate to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Their father had two parcels of land adjacent to each other. They knew that their father sold the suit land to Moses Njeru Njamiu. When they filed the succession cause, Moses did not show up. They saw David Murithi occupy the suit land and believed that there was an agreement between Moses and David. The Plaintiff filed an application on 5/8/2016 to rectify the grant issued to them. On perusing the papers filed by the Plaintiff, they discovered that Moses failed to pay the balance of Kshs. 70,000/= due to their father. The High Court directed that the Plaintiff was to pursue the claim before the ELC. He was emphatic that Moses was the true purchaser of the suit land and not the Plaintiff or her husband David.
19. He conceded during cross-examination that he did not give the land reference in the counterclaim or witness statement. He denied that the Plaintiff had lived on the land for over 12 years. He later conceded that she started living on the land in 2006 but

was quick to add that there had been cases over the land. He did not live on the suit land. He explained that they lived there while growing up but later moved out. He stated that the Plaintiff moved into the suit land in 2006 without their knowledge as a family.

20. Upon conclusion of the hearing, the court directed parties to file and exchange written submissions, which it has considered. The Plaintiff submitted that the issue for determination was whether she had acquired the suit land through adverse possession, which she defined it as a situation where a person takes possession of land and asserts rights over it and the person having the title to it omits or neglects to take action against such person by asserting his title for 12 years. The process springs into action by default or inaction of the owner. The prerequisites are that the possession was not by force, stealth or under licence of the owner. Such possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the title owner.
21. The Plaintiff relied on Section 7 of the Limitation of Actions Act which provides that an action may not be brought by any person to recover land after the end of 12 years from the date the right of action accrued to him or to some other person through whom he claims.
22. The Plaintiff submitted that her husband bought the suit land in 2006 and they immediately occupied it. That they had been in exclusive possession and had fenced the land. They constructed

a permanent home on the land, planted trees and crops and she had buried her late husband and son on the land. When all these activities and developments were taking place, the Defendants did not complain or stop the activities.

23. The Plaintiff relied on **Mbira v Gachuhi (2002) EALR 137** and **Richard Wefwafwa Songoi v. Ben Munyitwa Songoi [2020] KECA 942 (KLR)** on the prerequisites for one to succeed in a claim of adverse possession. She urged that she had proved her claim and was entitled to be registered as the owner of the suit land.
24. The Defendants submitted that the owner of the suit land died in 2000 and yet the Plaintiff's claim was that she settled on the land in 2006. They questioned who authorized her to occupy the suit land since its owner had died six years before. They submitted that in an earlier affidavit, the Plaintiff claimed that she bought the suit land from Godfrey yet in this suit, she claimed to have purchased it from Moses. They questioned how she could have bought the same piece of land from two different people. They pointed out that no relationship existed between them and the Plaintiff by blood or otherwise. They were emphatic that the Plaintiff's occupation of the suit land was through court cases as shown in the Defendant's statement and counterclaim. They urged the court to dismiss the claim and award them costs.
25. The issue for determination is whether the Plaintiff has proved her case for adverse possession of the suit land on a balance of probabilities. The Plaintiff's claim is that her late husband bought

the suit land from Moses, who in turn purchased it from Godfrey during his lifetime. The Plaintiff claimed that she had lived on the land since 2006 and had constructed a permanent house on the land and farmed on it. She claimed that she buried her husband and son without any contestation from the Defendants.

26. The Defendants claimed that all along they believed that there must have been an agreement between Moses and the Plaintiff's husband when they saw the Plaintiff's husband occupy the suit land. The Defendants admitted that their father sold the suit land to Moses. The sale to Moses took place before Godfrey died in 2000.
27. The fact that the Defendants included the Plaintiff's husband's name in the succession proceedings but erroneously wrote David Muriithi Nyaga instead of David Muriithi Njue shows that they acknowledged the Plaintiff's interest over the suit land. The Plaintiff joined the succession proceedings in a bid to have her husband's name corrected.
28. The Plaintiff entered the suit land in 2006 and has been in exclusive possession of the land with the knowledge of the Defendants. She filed suit in 2019. The Defendants filed their counterclaim in 2025, by which time the 12 year period under Section 7 of the Limitation of Actions Act for asserting their rights of possession of the suit land had expired.
29. On a balance of probabilities, the court is satisfied that the Plaintiff has proved that she has acquired title over the suit land

by adverse possession. The Defendants failed to prove their counterclaim. It is dismissed.

30. The Plaintiff has proved her claim on a balance of probabilities. The court grants prayers (a) to (d) of the Originating Summons dated 6/12/2019. Each party will bear its costs.

Delivered virtually at Bungoma this 3<sup>rd</sup> day of February 2026.

**K. BOR  
JUDGE**

**In the presence of: -**

Ms. C. Wanjiku holding brief for Mr. N. Mbogo for the Plaintiff

Mr. Albert Mbarire - the 1<sup>st</sup> Defendant

Mr. Philip Nyaga- 2<sup>nd</sup> Defendant

No appearance for the 3<sup>rd</sup> Defendant