

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND OLAND COURT AT NYANDARUA

ELCLC NO. 24 OF 2023

ESTHER KABUI GITHINJI & ANOTHER.....PLAINTIFF'S

VERSUS

**WANDIA JANE KIIRU & 17
OTHERS.....DEFENDANTS**

JUDGMENT:

This is an old suit which was commenced by way of an Originating Summons dated 8/9/2003 in which the Plaintiffs, Esther Kabui Githinji and Chrispine Ngunjiri Githinji, suing on their own behalf and on behalf of the Estate of the late Isaac Githinji Ngunjiri sued Paul Kiiru Kibariku, Kigo Wachira, Peterson Wachira Githaiga, John Kihara Muchiri, Peter Maina Muchiri, Richard Mwangi Muchiri, Charles Ndonga Muchiri, Cristina Wangechi Muchiri and Wambugu Gachoya seeking for orders that the Title held by the Defendants herein in respect of their parcels of land as follows.:-

1. NYANDARUA/OLKALOU SOUTH/216 4.25 Ha, registered in the name of Paul Kiiru Kibariku and Kigo Urugari.
2. NYANDARUA/OLKALOU SOUTH/ 218 1.55 Ha, registered in the name of Lucy Wairimu Wachira & Teresia Wanjiru Githenga.
3. NYANDARUA/OLKALOU SOUTH/ 219 1.55 Ha, registered in the name of Peterson Wachira Githenga.
4. NYANDARUA/OLKALOU SOUTH/ 220 1.60 Ha, registered in the name of Wambugu Gachoya.

5. NYANDARUA/OLKALOU SOUTH/ 221 2.28 Ha. registered in the name of John Kihera Muchiri, Peter Maina Muchiri, Richard Mwangi Muchiri, Charles Ndonga Muchiri and Christine Wangechi Muchiri.
6. NYANDARUA/OLKALOU SOUTH/ 915 2.15 Ha. registered in the name of Wambugu Gachoya; and
7. NYANDARUA/OLKALOU SOUTH/ 916 0.81 Ha. registered in the name of Wambugu Gachoya,

which were all excised out of land parcel No. NYANDARUA/OLKALOU SOUTH/ 2 situate in Nyandarua County and occupied by the Plaintiffs and the estate of Isaac Githinji Muchiri have been extinguished by virtue of the Plaintiffs acquiring adverse possession thereof pursuant to the provisions of sections 7 and 17 of the limitation of Actions Act (Cap 22 Laws Of Kenya).

The ground upon which they base their suit is that: -

The Plaintiffs have been in open and uninterrupted occupation of Title Nos. NYANDARUA/OLKALOU SOUTH/ 216,218, 219, 220, 221, 915 and 916 previously comprised and excised out of land Title L.R No. NYANDARUA/OLKALOU SOUTH/ 2, since 1965 and continued occupying so, the said parcels even after the sub-division and transfer in 1984 to the Defendants, of the Defendants' respective parcels for a period in excess of 12 years and the Defendants' respective Titles thereof have been extinguished and the same vested in the Plaintiffs.

The summons above is supported by the Affidavit of Chrispine Ngunjiri Githinji of P.O Box 422, Ol-Kalou who is the second Plaintiff in the suit and who is also a son of the late Isaac Githinji Rubiru who

deponed on even date that they have acquired adverse possession of the 7 parcels of land which were previously and which were excised out of L.R No. NYANDARUA/OLKALOU/ 2 which is now extinguished. He also depones that the Plaintiffs have occupied the parcel of land openly and in uninterrupted occupation since 1965 and also when Title No. NYANDARUA/OL-KALOU/2 was subdivided and registered in the names of the Defendants, a period in excess of 19 years. Now 42 years. He depones that they have spent a lot of money to develop the parcel of land and it is therefore only meet and just that the Plaintiffs be registered as the proprietors of the parcel of land and be issued with Title Deeds by way of a vesting order for the said Titles which they urge the Court that they have acquired by way of adverse possession.

On 3/10/2003 all the Defendants save the 5th Defendant entered appearance through the firm of S.K Njuguna & Co. Advocates while the 5th Defendant did so on 15/10/20023 through the firm of Waweru Macharia & Karweru Advocates. On the same date the suit was filed i.e. 8/9/2003, the Plaintiffs applied to Court by way of a Chamber Summons urging the Court to restrain the Defendants from selling, transferring, sub-dividing, creating a charge over, developing or in any other form dealing with their respectively registered parcels of land i.e. NYANDARUA/OL-KALOU/216,218,219,220,221,915 and 916 respectively.

Later on, the suit was dismissed for want of prosecution on 26/10/2209 by Mr. Justice Makhadia (as he then was) but the orders were reviewed on 26/11/2013 by Mr. Justice A.O Ombwayo and the suit re-instated.

On 2/7/2004 the firm of Munyalo Muli & Co. Advocates took over from Waweru Macharia & Karweru Advocates in place of the 5th Defendant who had now died and was being substituted with Geoffrey Githaiga Wachira and David Muturi Wachira respectively. The latter firm had already sought leave of Court to come on record to act for the 5th Defendant vide a chamber summons Application dated 27/11/2003. And the 2 Representatives of the 5th Defendant had been granted letters of Administration intestate to take his place on the 20/10/2004.

Besides this, there have been countless change of Advocates. And although the suit against the 5th Defendant had abated, he was substituted by his present Representatives and Administrators through a Court Order dated 26/4/2007.

The 2nd Defendant, Kigo Urugari also died on 4/7/2006 and was substituted with David Muturi Kigo following an Application dated 10/8/2015. In a twist of events, the 1st Defendant, Paul Kiiru Kibariku suffered mental infirmity and was incapable of prosecuting his interest in Court and one Jane Wandia Kiiru successfully applied to Court to be appointed her guardian *ad litem* on 7/7/2015 but later died on 3/11/2015 before the Order of *ad litem* was granted and the Grant of letters of Administration was issued by the High Court at Nakuru on 3/3/2017. Wandia Jane Kiiru, John Macharia Kiiru and Solomon Gichuki Kiiru applied to replace her vide Application dated 20/7/2017. The Application was amended on 14/11/2017 due to the abatement of the suit against the 1st Defendant. This amendment was to enable the suit to be revived after its abatement. The orders were given by my sister Lady Justice L.W. Waithaka at Nyeri on 13/3/2018 and accordingly Wachira Jane Kiiru, John Macharia Kiiru

and Solomon Gichuki Kiiru were substituted in place of the 1st Defendant, the late Paul Kiiru Kibariku.

I have given this background to show that in this suit which is contained

in 2 big voluminous files, the first volume contains the Originating Summons, Applications for extension of time, Applications for substitutions, Applications and Orders of striking out the suit for want of prosecution, Applications for review and reinstatement of the suit, Affidavits of service, mention and hearing Notices and other pre-hearing stuff. This is very unfortunate because the Original parties in the suit did not live to see the outcome of the case. This is a case that has made millions of shillings be lost for lack of meaningful development as a result of uncertainty.

After the suit was filed on 8/9/2003 it was not until the 5/11/2018 that the 1st Defendant's Representative, Wandia Jane Kiiru filed a Replying Affidavit on behalf of her co-administrators, John Macharia and Solomon Gichuki. In the said Affidavit sworn on 2/11/2018, Ms. Wandia deponed that the land in dispute was initially owned by Simon Gichuki Rubiru who hailed from Karindi, Mukurweini where their ancestral land is. The said Gichuki took a loan and offered the ancestral land as security for the loan which he used to buy the suit land. He sub-divided the suit land into 4 portions and 14 people bought the land. This was done in order to enable him pay the loan so that the ancestral land could not be sold. However, she doesn't say how much the loan was. The Plaintiff's ancestral land is in Nyeri being GIKANDI/ KIIRUNGI /955 measuring 1.21 Hectares.

The Titles out of NYANDARUA/OL-KALOU SOUTH/2 were issued in 1984 after Isaacs's death and after the land was sold to the Defendants in 1977. NYANDARUA/OL-KALOU SOUTH /216 has since been sub-divided into 39 portions and other people have taken possession of their respective parcels of land which they are in possession of to date, have been farming and have developed the same over the years.

These families are

- D.M. Kigo – portions A7, A38, A2 RT and AB
- Nyangi Thumbi - portions A13, A32 and A2 LJ
- Muchuku Kariuki – portions A18, A27 and A20 LT.
- Gatiha Gituku – portions A10, A35 and A1CT.
- Chege Kabiru – portions A9, A36 and A21 RT.
- Samwel Muriithi Maina – portions A16, A29, A4 and A3 RT.
- Kahara Francis – portions A12, A33 and A22 LT.
- Taracisio Thumbi – portions A8, A37 and A3 LT.
- Kihiu Kiruma – portions A19, A26 and A 22BT.
- Runga Gituku - portions A15, A30 and A21LT.
- Family of Reul Kiiru – portions A14, A31, A20RT and A25
- Gichuki Rubiru – portions A11 and A39 and
- The family of Muchiri Gakuru – portions A23 RT, A17 and A28.

She finally deponed that the Plaintiffs have never been in occupation of the above parcels of land and that it is only fair and in the wider interest of justice that the suit be dismissed.

The above Replying Affidavit was in addition to Reul Kiiru Kibariku's Replying Affidavit sworn on 27/10/2003 where she said that NYANDARUA/OL-KALOU SOUTH/2 ceased to exist in 1984 when the

same was sold to the 11th Defendant, Wambugu Gachoya and subdivided into 7 portions with distinct and separate Titles. She deponed that she is the registered proprietor of NYANDARUA/OL-KALOU SOUTH/216 jointly with the 2nd Defendant together with plot No. NYANDARUA/OL-KALOU SOUTH/220, 915 and 916 registered in the name of the 11th Defendant.

She further stated that in the Nyeri High Court Civil Appeal No. 13 of 1985 it was held that since NYANDARUA/OLKALOU SOUTH/2 was extinguished, the 2nd Plaintiff's father had no claim against the 11th Defendant in respect of the parcel of land and that therefore the suit against the 1st, 2nd and 11th Defendants is *Res Judicata*. She further says that if ever the late Isaac Githinji Rubiru was occupying the land NYANDARUA/OL-KALOU SOUTH/2 then he was so occupying as a licensee of his brother, Simon Gichuki Rubiru between 1965 and 1984 before it was sub-divided and transferred and that at the time of the sub-division and transfer of the land, the said Isaac Githinji Rubiru (Deceased) was not occupying the whole piece of land.

Following to the next world was the 11th Defendant who died on an unknown date during the pendency of this suit and the 1st Plaintiff, Esther Kabui Githinji on 19th July 2022 filed an Application to substitute him with Jackson Waigera Wambugu, Rose Wakiuru Wambugu, Humphrey Maina Wambugu, John Muturi Wambugu, Bilha Wangui Wambugu, Kennedy Kimathi Wambugu, Mary Wakarindi Kimathi and Dedan Kimathi Waigera, who were declined in Nyeri High Court Succession Cause No. 1018 of 2011 and in Nairobi High Court Succession Cause No. 2666 of 2014 as beneficiaries of the parcels of land previously or currently registered in the name of the

11th Defendant which included NYANDARUA/OL-KALOU SOUTH/915 and 220. The 2 Certificates of Confirmation of Grant are dated 20/12/2013 and 3/2/2016 respectively.

On 5/6/2023 , the Plaintiffs amended the Plaintiff to among other things replace the 18th Defendant Reul Kiiru Kabariku with Wandia Jane Kiiru, John Macharia Kiiru and Solomon Gichuki Kiiru, the 2nd Defendant Kigo Urugari with David Muturi Kigo, the 5th Defendant, Peterson Wachira Githaiga with David Muturi Wachira and the 11th Defendant with Jackson Waigera Wambugu, Rose Waigera Wambugu, Humphrey Maina Wambugu, John Muturi Wambugu, Bilha Wangui Wambugu, Kennedy Kimathi Wambugu, Mary Wakarindi Kimathi and Dedan Kimathi Waigera, to replace Nyandarua District at paragraph 3 with Nyandarua County and deleting the entire paragraphs 5.

There was then a joint Affidavit in support of the Amended Plaintiff sworn on 2/6/2023 by both Plaintiffs. The other amendment was that of new set of Advocates taking over from the previous Advocates viz. Gakuhi Chege Associates for the Plaintiffs, and for Defendants D.K Kaburu & Co. Advocates for the 1st and 2nd Defendants, Kebuka Wachira & Co Advocates for the 11th to 16th Defendants, Wanjohi Theuri & Co. for 5th to 9th Defendants and Nyaanga & Mugisha for the 17th and 18th Defendants.

Apparently, the 3rd and 5th Defendants act in person. The new amendment did not bring much change to the suit save that it made it clear that the Plaintiffs are the widow and son of the late Isaac Githinji Rubiru respectively. And that the late Wambugu Gachoya secretly bought the suit land from the late Gichuki Rubiru in 1977

and was then later registered the proprietor of the entire land on 6/12/1982 without involving Isaac Githinji Rubiru.

The Title Deed had been given to Gichuki Rubiru on 13/8/1974. Wambugu Gachoya then bought the land and sub-divided it into 6 portions as Title Nos. NYANDARUA/OL-KALOU SOUTH/216,217, 218,219,220 AND 221. Gichuki Rubiru died in 1983.

A suit was filed against Wambugu Gachoya in Nyahururu RMCC No. 270 of 1984 seeking the nullification of the sale but same was dismissed when a preliminary objection was raised. The Appeal from the suit was by Consent compromised with the result that the dismissal of the suit in the lower Court was now substituted with striking out on 24/10/1990. I believe to enable a fresh suit to be filed. But Isaac Githinji Rubiru died before filing another suit but his family continued living on the suit land openly, peacefully and without any interruption by the late Wambugu Gachoya. They then gave a list of the properties and their registered proprietors and also attached copies of certificates of official searches of the respective Titles.

They further claimed that prior to the institution of this suit, none of the Defendants had ever set foot or taken possession of the suit parcels of land but that in the pendency of this suit, the Defendants have embarked on further sub-divisions and sale of the various portions of the suit land against the Doctrine of "*lis pendens*". They therefore claim to have acquired Title by way of adverse possession of Titles Nos. NYANDARUA/OL-KALOU SOUTH/216, 218,219, 220, 221,915 and 916 all of which were sub-divisions of Title No. NYANDARUA OL-KALOU SOUTH/2 which is now extinguished. Their adverse possession is therefore traced from 1965, as they claim.

John Kihara Muchiri swore an Affidavit in Reply to the amended Originating Summons on the 9/10/2003 on behalf of himself, the 7th, 8th, 9th and 10th Defendants and which was filed in Court on the 23/10/2003 He said that the Defendants denied the claim by the Plaintiffs, the parcel of land L.R NO. NYANDARUA/OL-KALOU SOUTH/2 did not exist since it was extinguished in 1984 when the land was sold to Wambugu Gachoya and who sub-divided the land into 7 portions viz. NYANDARUA/OL-KALOU SOUTH/216, 218, 219, 220,221,915 and 916 and that Title No. NYANDARUA/OL-KALOU/221 was extinguished on 6/6/1995 upon closure of Title on sub-division into NYANDARUA / OL-KALOU/982 and 987 which have also been partitioned further. He further said that in view of High Court case No. 13 of 1985 Nyeri, this case is *res judicata*. Further, the deponent claimed that since they are respectively wife and son to the Deceased who died in 2007, the Plaintiffs are not entitled nor beneficiaries of the doctrine of adverse possession. Between 1965 and 1984, the late Isaac Githinji Rubiru was in occupation of the suit land as a licensee of his late brother, Simon Gichuki Rubiru.

Finally, he averred that in view of Nyahururu RMCC No. 270 of 1984 and Nyeri HCCA 15 of 1985 this suit is *res judicata* and therefore it should be dismissed.

On 4/6/2025 the 13th Defendant swore an Affidavit on behalf of the 11th, 12th,14th, 15th and 16th Defendants and on his own behalf who had now appointed the firm of Kamunya & Co. Advocates on 20/5/2025. He had been given authority by his Co- Defendants 11th, 12th,14th, 15th and 16th who together with himself were children of the late Wambugu Gachoya. He said it was not true that NYANDARUA/OL-KALOU/2 was not acquired through a family

partnership between Gichuki Rubiru and Githinji Rubiru and that the latter who was not very well to do was only allowed by Gichuki Rubiru to use the land and eke a living as he took care of it but that he did not co-own the land with Gichuki. The parcel of land measuring 35 Acres was sold to members of Mwiya Building company in 1975 and later registered in the name of their father, Wambugu Gachoya on their behalf on 28/9/1977 and that Githinji was aware of all this. NYANDARUA/OL-KALOU SOUTH/2 was subdivided into Nos. NYANDARUA/OL-KALOU SOUTH/217 and 220 and the latter was transferred from Gachoya to David Kimathi Waigera and Dedan Kimathi Waigera on 25/5/2003 during the lifetime of Wambugu Gachoya. 217 was subdivided into L.R NO. NYANDARUA/OL-KALOU SOUTH/915 and 916 was subdivided into 15 pieces into parcels Nos. L.R NO. NYANDARUA/OL-KALOU SOUTH/1997 to 2014 which were sold off. Only L.R NO. NYANDARUA/OL-KALOU SOUTH/915 is in the name of Wambugu Gachoya but the same is not occupied by the Plaintiffs.

He deposes that the Plaintiffs cannot plead trust and at the same time adverse possession and that the suit is untenable, unsubstantiated and does not meet the legal threshold for the grant of Orders of adverse possession.

On 2/10/2003 the 3rd Defendant also filed a Replying Affidavit on her own behalf and on behalf of the 4th Defendant and denied that the Plaintiff had acquired adverse possession of the suit land and in particular land parcel No. NYANDARUA/OL-KALOU SOUTH/218 or any of the other portions named in the Originating Summons. She says they inherited NYANDARUA/OL-KALOU/218 from their mother in Nairobi High Court Succession Cause No. 571 of 1997. She deposed

that until her death, her mother Loise Wahito Wachira was cultivating without any information from the Plaintiffs or any other person and after her death the 2 continued cultivating the land without any interruption.

She said that the Land Control Board, Ol-kalou granted them consent to sub-divide the land and the Plaintiffs did not raise any objection to the same and that the Plaintiffs have never been in occupation of the land. She says they got registered the owners of the land in the year 2003 and therefore the Plaintiffs cannot claim adverse possession since it is the same year the suit was filed. The case should therefore be dismissed.

Eventually, the Hearing of the matter took place on 29/11/2023 when Esther Kabui Githinji took to the witness stand and after introducing herself she said that she entered on the suit land in 1965 on the original plot, Ol-Kalou Settlement Scheme No. 2. She then adopted the Plaintiffs' joint Supporting Affidavit of 3/6/2023 and the witness statement dated 11/3/2013. The same have already been comprehensively brought out above. She then produced the 13 Documents in the said Affidavit as follows: -

1. Grant of letters of Administration in respect to the Estate of her late husband, Isaac Githinji Rubiru.
2. Copy of Title Abstract issued in the name of Gichuki Rubiru on 13/8/1974 in respect of L.R No. NYANDARUA/ OL-KALOU SOOUTH/2.
3. A copy of proceedings in Nyahururu RMCC. No. 270 of 1984.
4. Copy of the proceedings and current Judgment in NYERI HCCA No. 13 of 1985.

5. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/216.
6. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/217.
7. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/218.
8. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/219.
9. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/220.
10. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/221.
11. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/915.
12. Copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/916.
13. Certificate of Confirmation of Grant for the Estate of David Kimathi Waigera for the beneficial interest over ½ share of copy of Title Abstract and Copy of official search for NYANDARUA/OL-KALOU SOUTH/220.

She proceeded to testify that she has never been sued for occupying the suit land and that it was Simon Gichuki (her brother -in-law) who sold the land to Wambugu in 1977 but that the latter has never taken possession of the land. She also said that her late husband, Isaac Rubiru had a case with his brother, Simon Gichuki in Nyeri which was determined by the Court.

She testified that it was not Githinji Kibiru who sold the suit land and that there are certain claimants who have invaded the land. The

entire land was 35 Acres but that the invaders have only taken 10 Acres. She said that her husband was buried on the suit land. She said the “invaders” took possession of the land during the pendency of this suit.

On cross-examination by Mr. Kaburu, the witness said that she is claiming the land on account of her lengthy occupation and that the suit land was family land allocated to them by the Settlement Fund Trustees. She said she paid the S.F.T. loan but that the receipts were in the name of Gichuki and that is why she did not produce them in Court. She said that upon taking possession, she fenced the entire land with poles and that she is not aware that the same was ever sub-divided. She has built on the suit land. She claimed that in 2006 some purchasers came to the land and demolished some of her structures on the land and built theirs. She said that she is unable to tell on which parcel of land she buried her husband but it was near the homestead. He was buried in 1997.

On cross-examination by Ms. Maina for the 3rd and 4th Defendants, Esther Kabui Githinji said she entered the land as hers but not with Gichuki’s permission. She said that she occupies 25 Acres thereon.

On cross-examination by Mr. Olande for the 5th Defendant, the 1st Plaintiff testified that she is not aware where parcel NO. NYANDARUA/OL-KALOU SOUTH/219 is located and that she does not also know on which parcel number her home stands but that she occupies the parcel of land measuring about 25 Acres. Her husband and his brother bought the land and she came to develop it.

On cross-examination by Mr. Wanjohi for the 6th - 9th Defendants, Esther said she was not aware of L.R NOs. NYANDARUA/OL-KALOU

SOUTH/ 216,218,219,220,221, 915 or 916. She now changed and said she would show the Court where her husband was buried.

She entered the land in 1975 but came to know it had been sold in 1984 when she saw surveyors coming to the land and they objected to the sub-division at the Land Control Board. She later changed tune and said she entered the suit land in 1965. She admitted that when she cut down the trees on the 10 Acres in 2014 she paid the Defendants compensation of Kshs. 25,000/- so that she could be released from police custody.

Mr. Oira then cross-examined the 1st Plaintiff on behalf of the 11th and 18th Defendants. She said she did not have any documents to show the existence or registration of a trust but that her claim was based on adverse possession. Parcel No. NYANDARUA/OL-KALOU SOUTH/220 is part of the 25 Acres she occupies but that she doesn't know its boundaries. She again admitted that she could not tell on which parcel her house was nor on which parcel her late husband was buried.

On re-examination by Mr. Gakuhi Chege for the Plaintiffs, she said that at the time of filing this suit, one of the Defendants who she did not name was in occupation of the suit land and that she doesn't know whether there were beacons on the land. She said that the Defendants' structures were put up when the suit was pending in Court.

Finally, she said she paid the Kshs. 25,000/- compensation for the felled trees so that she could secure her freedom. When asked by the Court, Esther said she signed the Agreement dated 17/2/2014 (for compensation) in custody and not before the chief of Ol-kalou.

The second witness, Chrispine Ngunjiri Githinji, who is also the 2nd Plaintiff and son to the 1st Plaintiff and the late Isaac Githinji took to the witness box on 8/7/2024 and adopted the joint Affidavit in support of the Originating Summons on 2/6/2023. He pointed out that there was a mistake in the Affidavit in that the name of the person who sold the land was Simon Gichuki Rubiru who did sell the land to Wambugu but the Vendor never settled on the land just as the late Wambugu. Only his father settled thereon with his family. He said that it was his father who won in Nyahururu RMCC No. 270 of 1984. The Defendants were never evicted from the land at the time of filing suit and that he was not aware of any other sub-divisions save the 7. He said they have lodged restrictions and cautions on the 7 parcels of land and that none of the Defendants resides on the suit land. They are not utilizing the 35 Acres. But he contradicted himself when he said that he has noted that there are several constructions on the land during the pendency of the suit. He also said they do graze animals on the unoccupied areas and that they have been cultivating part of the land.

On cross-examination by Mr. Kaburu for the 1st and 2nd Defendants, Ngunjiri said it was true the suit land, plot No. 2 was not allocated to his late father by the Settlement Fund Trustees and that plot No. 216 is fenced and its boundaries secured. It is developed with trees and terraces and they have been using the land for grazing animals only and that the surveyor's Report of 26/2/2024 did not record all their developments.

In answering questions from Ms. Maina, the 2nd Plaintiff said that his father entered the land in 1965 and that his uncle, Simon was

holding the land as a Trustee. He said the Surveyor's Report at Page 3 indicates that his mother occupies parcel No. NYANDARUA/OL-KALOU SOUTH/ 915 and that is where his father is buried and that there is also construction on L.R NO. NYANDARUA/OL-KALOU SOUTH/ 918. He also denied knowledge of this suit having been dismissed and later on reinstated.

On cross-examination by Mr. Olande, the witness said that L.R. NO. NYANDARUA/OL-KALOU SOUTH/219 is currently occupied by other persons. He said it was not true the suit had been dismissed at some time and that they were in possession of parcel Nos. NYANDARUA/OL-KALOU SOUTH/915 and not 219.

On cross-examination by Mr. Wanjohi, he admitted that L.R NO. NYANDARUA/OL-KALOU SOUTH/ 2 was not in existence at the time of filing the first suit and that the limited Grant of Letters of Administration was limited to and for the purposes of filing suit for the recovery of L.R. NO. NYANDARUA/OL-KALOU SOUTH/2. But that there were 7 parcels at the time of filing suit but L.R. NO. NYANDARUA/OL-KALOU SOUTH/2 had already been extinguished. He admitted that entry No. 8 showed that the Title (2) was closed upon sub-division on 6/6/1995. The suit was filed in 2003. He said at some point in the past, they had fenced the entire parcel of land and that they were cultivating pyrethrum, maize and potatoes among other crops.

On Cross-examination from Mr. Mugisha, the witness admitted that it was true his father was not the owner of parcel No. NYANDARUA/OL-KALOU SOUTH/ 2. But that he was holding it in trust for Ngunjiri's father as well, but that he did not have documents to support this.

His uncle, Simon Gichuki sold the land secretly. His father died 11 years after terminating the first case in 2007 in Nyahururu but had not filed any other case even against Wambugu. He further said that at times they used L.R NO. NYANDARUA/OL-KALOU SOUTH/220 for grazing.

On re-examination by Mr. Chege, Mr. Ngunjiri said that the cultivation of the land is quite visible and that the Civil suit was pending in Court when his mother signed the agreement for compensation. He then said that the Plaintiffs are not pursuing Trust in this case.

On 4/2/2025 the Court visited the suit land in the presence of Ms. Ndegwa for the Plaintiffs, Mr. Kaburu for 1st and 2nd Defendants. Ms. Maina for 3rd and 4th Defendants, Mr. Wanjohi for the 6th to 9th Defendants and Mr. Mugisha for the 11th to 15th Defendants and in the absence of the 5th Defendant and 17th and 18th Defendants.

The Government Surveyor, Mr. David Maina Ndirangu then produced his Report dated 26/2/2024 to which nobody had any objection and all Counsel said they were satisfied with it. The Plaintiff's case was then closed with the production of the Report by the said Government Surveyor being PW3.

The Defendant's case commenced on 4/3/2025 when David Muturi Kigo, the 2nd Defendant, a teacher who lives in Nakuru, testified by adopting his statement dated 12/10/2020 as his evidence in Chief as well as that of the 1st Defendant. In the said statement, Mr. Kigo, the legal representative of the Estate of Kigo Urugari who died on 4/7/2006 said that he was well versed with the facts of the case in which the late Simon Gichuki Rubiru was allocated Plot No. NYANDARUA/OL-KALOU SOUTH/ 2 in Ol-Kalou South Scheme by the

Settlement Fund Trustees in the 1960's. Due to financial challenges he was facing, he decided to sell the land to any willing buyer(s). The 2nd Defendant's father and 13 others did buy the land and had it registered in the name of Wambugu Gachoya who later sub-divided it in 1984. The 1st and 2nd Defendants got Title No. NYANDARUA/OL-KALOU SOUTH/216 for themselves and 12 others. It was not until Simon Gichuki died in 1983 that Isaac Githinji filed a suit in Nyeri, being High Court Civil Appeal No. 13 of 1985 claiming ownership of NYANDARUA/OL-KALOU SOUTH/2 which by then had already been sub-divided into 39 portions and all of them occupied.

The 2nd Defendant's family had taken possession and are still in occupation. The family of Reul Kiiru Kibariku had also taken possession of $\frac{3}{4}$ Acre and are on the land to date.

Mr. Kigo's father said that the Plaintiffs have never occupied the land the 1st and 2nd Defendants families occupy. But that the latter tried to enter on the land in June 2020 but were repulsed by the police and chief. The claim of adverse possession is therefore unsustainable. He then produced a status and valuation Report dated 10/10/2020 from the firm of Mbugua & Associates, a copy of Land Certificate of NYANDARUA/OL-KALOU/216 showing the 1st and 2ND Defendants as its registered proprietors since 31/7/1984, map of the land which is between L.R NO. NYANDARUA/OL-KALOU SOUTH/215, 217 and 213. There are also photographs of the land which is undeveloped.

The 2nd Defendant, Lucy Wairimu Wachira, and the 5th Defendant, Geoffrey Githinji Wachira had no questions in cross-examination. But while answering questions from Mr. Wanjohi for the 6th to 9th Defendants, the Witness said there was nobody occupying L.R NO.

NYANDARUA/OL-KALOU SOUTH/216 nor was there any farming thereon. It is open ground but that occasionally they have found people grazing on the land and that the Plaintiff has never occupied that portion of the land. And in answer to cross-examination for Mr. Mugisha for the 11th to 18th Defendants, Mr. Kigo said that the land was purchased long time ago by their parents and that their parcel of land has not been developed.

Then on cross-examination by Mr. Gakuhi Chege for the Plaintiffs, the 2nd Defendant said he was born in 1965 and raised in Mukurweini in Nyeri where he also schooled and where also his parents died. He said the land was sold to his parents after it was hived of L.R. NO. NYANDARUA/OL-KALOU SOUTH/, acquired by Wambugu Gachoya. He couldn't remember when he first visited the land but it was before his father died in 2007. The Surveyor placed beacons on the land and that the Plaintiffs are settled on a portion of what was parcel No. 2.

The family of Githinji has put up a house in the neighborhood but not on L.R NO. NYANDARUA/OL-KALOU SOUTH/216 and that when the Court visited the land there were no animals. He said they have even felled and sold trees therefrom but that when they wanted to sell the land, this could not be since the Plaintiffs had cautioned the land.

On re-examination by Mr. Kaburu, Kigo said the registered proprietors of L.R NO. NYANDARUA/OL-KALOU SOUTH/216 were Kigo Urugari and Reul Kiiru Kibariku and that the Plaintiffs occupy another portion of land and not L.R NO. NYANDARUA/OL-KALOU SOUTH/ 216 and that the Kigo's have sub-divided 216 to 14 people and that they therefore hold the land in trust for the 14.

Next to testify was Lucy Wairimu Wachira, the 3rd Defendant who adopted her Statement which was by way of a Replying Affidavit sworn on 2/10/2003 and a witness Statement dated 5/2/2019 whose contents I have already divulged above, she then produced the following documents on her behalf and that of the 4th Defendants.

1. Application for Consent for the sub-division of L.R NYANDARUA /OL-KALOU SOUTH/2.
2. A Copy of Title Deed for L.R No. NYANDARUA/OL-KALOU SOUTH/218 in the name of Loice Wahito Wachira.
3. Letter dated 2/7/1992.
4. Letter dated 19/1/1996.
5. A copy of the Green Card for L.R GIKONDI/KARINDI/670 in the name of Isaac Githinji Rubiru.
6. Certificate of Confirmation of Grant in respect to the Estate of Loice Wahito Wachira HC Succession Cause 571 of 1997 dated 23/4/1999.
7. Copy of the Title Deed for L.R NYANDARUA/ OL-KALOU SOUTH/218 in the names of Lucy Wairimu Wachira and Teresia Wanjiru Wachira.
8. Mutation form in respect of L.R NYANDARUA/OL-KALOU SOUTH/218.
9. Letter of Consent for sub-division of L.R No. NYANDARUA/OL-KALOU SOUTH/218.
10. Extract of map for Ol-kalou South Settlement Scheme.
11. Certificate of official search for L.R NYANDARUA/OL-KALOU SOUTH/2052.

Mr. Kaburu for 1st and 2nd Defendants and the 5th Defendant did not have any questions for this witness. But Mr. Wanjohi asked him

questions whose answers were that her evidence was limited to parcel No. 218 which is developed and not part of the Plaintiffs' land and which is surrounded with a fence put up by the seller and not the Plaintiffs. She further said that they sold the area where there are homes.

When cross-examined by Mr. Mugisha, Wairimu Wachira said that the area occupied by the Plaintiffs was L.R NO. NYANDARUA/OL-KALOU SOUTH/217 and that the Plaintiffs have never occupied any other portion save that they were cultivating parcel No. L.R. NYANDARUA/OL-KALOU SOUTH/ 218 until they were stopped in 2003.

When Mr. Chege's turn to cross-examine the 2nd Defendant came, Ms. Wachira said she lives in Nyeri and has never lived on parcel L.R. NO. NYANDARUA/OL-KALOU SOUTH/218 which was initially registered in her mother's name on 23/5/1984. In the Register the same is sub-divided today. She said her mother died in 1996 the same year Githinji was told to vacate the land. She added that in 2009 when they completed the sub-divisions is when the Plaintiffs started raising issues because they found surveyors on the land. The Plaintiffs then destroyed the fence but the 3rd Defendant and family re-fenced it. She said that nobody objected to the sub-divisions or transfer at the Land Control Board, Ol-kalou. She said they could not act against the Githinji's because the latter never occupied L.R. NO. NYANDARUA/OL-KALOU SOUTH/218.

As said, not even an inch of it. It is now divided into 2.

On cross-examination by the 5th Defendant, Geoffrey Githaiga Wachira, the 3rd Defendant said that this suit had been dismissed for want of prosecution and then re-instated.

DW3, Charles Ndonga Muchiri the 9th Defendant, a retired teacher was the 4th to testify on the part of the Defendants and did so on behalf of himself and the 6th, 7th and 10th Defendants. He adopted his statement dated 15/5/2015 which is similar to the joint statement of other Defendants and also the Replying Affidavit of John Kihara Muchiri, the 6th Defendant. He testified that on 21/3/1984 his father, Muchiri Gakuru bought land Title No. L.R NYANDARUA/OL-KALOU SOUTH / 221 measuring 2.28 Hectares from Wambugu Gachoya before he died in 1990. Their mother Christina Wangechi Muchiri then obtained letters of Administration which was registered in the Register on 1/10/1993.

This Title was later closed on 6/8/1995 on sub-division into L.R. NO. NYANDARUA/OL-KALOU SOUTH/982, 983, 984, 985,986 and 987 and that as at the time of filing this suit on 9/9/2003, parcel No. NYANDARUA/OL-KALOU SOUTH/221 did not exist. She also said that when Nyahururu PMCC No. 270 of 1984 and Nyeri HCA No. 15 of 1985 were filed between Wambugu Gachoya and Isaac Githinji Rubiru L.R No. NYANDARUA/OL-KALOU SOUTH/2 did not exist as well. He said that Title No. NYANDARUA/OL-KALOU SOUTH/ 221 did not exist at the time of filing this suit since it was closed on 1/10/1993. He also testified that the Plaintiffs encroached Title Nos. NYANDARUA/OL-KALOU SOUTH/ 915 and 916 in the name of Wambugu Gachoya. He said that the above 2 cases interrupted any adverse possession that may have existed before partition Nos. NYANDARUA/OL-KALOU SOUTH/982 to 987 (inclusive) had been closed on further subdivisions. He said that the Plaintiffs' time of occupation could only have started in 2001 upon the death of their husband/father and therefore it would not have crystalized in 2003.

The Plaintiffs felled trees on 17/2/2014 on the parcel of land owned by the 6th, 7th, 8th, 9th and 10th Defendants but they agreed to pay compensation of Kshs. 27,000/-. He then produced the following Documents.

1. Copies of proceedings of case No. Civil Appeal 13 of 1985 Nyeri.
2. Green card in respect to NYANDARUA/OL-KALOU SOUTH/221 measuring 2.28 Hectares.
3. Transfer forms in respect to L.R NYANDARUA/OL-KALOU SOUTH 221 from Wambugu Gachoya to Muchiri Gakuru dated 21/3/1984.
4. Plan for subdivision Mutation dated 29/3/1999 for L.R. NOs. NYANDARUA/OL-KALOU SOUTH/982, 983,984,985,986 and 987.
5. Green Card dated 7/3/1996 for L.R NYANDARUA/OL-KALOU/1030 measuring 0.046 Hectares being a sub-division of NYANDARUA/OL-KALOU SOUTH/987 in the name of Christine Wangechi Muchiri.
6. Copy of Title Deed No. NYANDARUA/OL-KALOU SOUTH/963 measuring 0.36 Hectares in the name of Peter Maina Muchiri.
7. Copy of Title Deed No. NYANDARUA/OL-KALOU SOUTH/963 MEASURING 0.36 Hectares in the name of Peter Maina Muchiri.
8. Title Deed for LR NYANDARUA/OL Kalou South 984 measuring 0.36 Ha CHARLES NDONGA MUCHIRI.
9. Title Deed for LR NYANDARUA/OL Kalou South 1020 measuring 0.0460 Ha JOHN MUCHIRI MWAI.
10. Title Deed for LR NYANDARUA/OL Kalou South 982 measuring 0.36 Ha JOHN KIHARA MUCHIRI.

11. Title Deed for LR NYANDARUA/OL Kalou south 1934 measuring 0.046 Ha CHRISTINA WANGECHI Muchiri.
12. Title Deed for LR NYANDARUA/OL Kalou south 1033 measuring 0.046 Ha CHRISTINA WANGECHI MUCHIRI.
13. Title Deed for LR NYANDARUA/OL Kalou south 1032 measuring 0.078 Ha CHRISTINA WANGECHI MUCHIRI.
14. Title LR NYANDARUA/OL Kalou south 987 measuring 0.36 Ha CHRISTINA WANGECHI MUCHIRI.
15. Title Deed for LR NYANDARUA/OL Kalou south 1031 measuring 0.046 Ha CHRISTINA WANGECHI MUCHIRI.
16. Title Deed for LR NYANDARUA/OL Kalou south 1021 measuring 0.046 Ha John Kihara Muchiri.
17. Title Deed for LR NYANDARUA/OL Kalou South 1022 measuring 0.046 Ha JOHN KIHARA MUCHIRI.
18. Title Deed for LR NYANDARUA/OL Kalou south 1085 measuring 0.046 Ha CHRISTINA WANGECHI MUCHIRI.
19. Title Deed for LR NYANDARUA/OL Kalou south 1086 measuring 0.046 Ha CHRISTINA WANGECHI MUCHIRI.
20. Title Deed for LR NYANDARUA/OL kalou south 1087 measuring 0.046 Ha CHRISTINA WANGECHI MUCHIRI.
21. Title LR NYANDARUA/OL Kalou south 986 measuring 0.36 Ha CHRISTINA WANGECHI MUCHIRI.
22. Title Deed for LR NYANDARUA/OL Kalou south 1023, JOHN KIHARA MUCHIRI.
23. Title Deed for LR NYANDARUA/OL kalou south 1024 measuring 0.046 HA JOHN KIHARA MUCHIRI.
24. Title LR Nyandarua/OL KALOU SOUTH 1025 measuring 0.046 Ha JOHN KIHARA MUCHIRI.

25. Title Deed for LR NYANDARUA/OL KALOU SOUTH 1019 measuring 0.084 Ha JOHN KIHARA MUCHIRI.
26. Letter Ref MM.NY.198.1.2014 dated 27/1/2014.
27. Agreement dated 17.2.2014 for illegal felling of trees.
28. Letter dated 17.2.14 from Ol-kalou police station.
29. Letter dated 17.2.2014 by Sub-County Forest office.
30. Plan for Ol-kalou South settlement scheme.

There were no questions from any of the other Defendants save from Counsel for the Plaintiffs, Mr. Chege. He said that none of his siblings lives on the suit land, not even himself. The land is 5 Acres.

The Plaintiffs live on L.R. NO. NYANDARUA/OL-KALOU SOUTH/915. His father bought the land L.R. NO. NYANDARUA/OL-KALOU SOUTH/ 221 in 1984 and the transfer was executed on 21/3/1984 and that even his father never settled on the land most of which has commercial and residential buildings belonging to people who bought it from the family - about 40 families, with the first portion having been sold in 1995. After the sale to other people, the family retained approximately $\frac{1}{4}$ of an Acre.

On re-examination, he said that Title No. NYANDARUA/OL-KALOU SOUTH/ 221 was not in existence when the suit was filed.

Mary Wakarindi Kimathi followed Charles Ndonga Muchiri as a witness (17th Defendant). She referred to her Replying Affidavit dated 1/11/2023 and adopted it as her evidence in chief and also produced the annexures thereto as the Documents he relied upon in the case. She said that the parcel of land, L.R. NO. NYANDARUA/OL-KALOU SOUTH/ 220 belongs to her late husband, who died in 2011. She had taken the Letters of Administration in respect to his Estate and she

knew where the land is since she had visited it severally. She further added that next to it is a field with goats grazing thereon and a road nearby and nobody cultivates the land. Likewise, for this witness, nobody had questions for her save Counsel for the Plaintiffs. She said that her late husband bought the land from Wambugu Gachoya and that before they bought it the Githinji's were using part of it but she has never seen the first Plaintiff. On re-examination, she said that she has never seen the first Plaintiff. She further said that she had no other land save that one and where she stays today in Mukurweini. That concluded her case and that of the 18th Defendant in favour of who she was tendering evidence as well.

Mr. Geoffrey Githaiga Wachira who had earlier on in the year been allowed to file a statement adopted the statement dated 10/3/2025. He, being the 5th Defendant said he inherited the land from his late father, Peterson Wachira Githaiga for whose Estate he had obtained letters of administration on 24/10/2024 and which were confirmed on 16/2/2005 (I believe 2025). He testified that his father bought parcel No. 219 on 12/10/1984 from David Kimathi Wachira with a loan from Kenya Commercial Bank after seeking the consent of the Land Control Board on 14/9/1984. He then visited the land in the company of his father, Peterson Wachira Githaiga in December 1987 where he used to cultivate crops and that Peterson used to visit the land every year thereafter until he died in 2004. He said that all this time the Plaintiffs used to live in the neighbourhood and never raised any issue until this case was filed. He then transferred the L.R. NO. NYANDARUA/OL-KALOU SOUTH/219 to himself on 9/1/2007 before sub-dividing the 1.55 Hectares into 23 different parcels of land. He sold 22 parcels and retained one where he built a three-bedroom

mansion with a detached servant's quarter on NYANDARUA/OL-KALOU SOUTH/ 2151. This is where he lived for 9 years before relocating elsewhere in Nakuru. And that the Plaintiffs have never settled on NYANDARUA/OL-KALOU SOUTH/219. He then produced the following documents: -

- a. A copy of Transfer form in respect of L.R No. NYANDARUA/OL-KALOU SOUTH/219 from David Kimathi Wachira to Peterson Wachira Githaiga for Kshs. 40,000/- dated 12/10/1984.
- b. A copy of the Title Deed in respect of the said land issued on 9/1/2007 to himself.

With Mr. Kaburu not cross-examining him, Mr. Wanjohi cross-examined the witness on his own behalf and on behalf of Mr. Mugisha for the 17th and 18th Defendants. He said that he visited the land for the first time on 23/12/1987. He said that when he built his permanent home, a 3-bedroom house with a servant's quarter, there was no objection from any quarter. Not even from the Plaintiffs. Nobody utilized his land, not even grazing thereon. For the 9 years he stayed there, the Plaintiffs were not using any other land save the one they are on, L.R. NO. NYANDARUA/OL-KALOU SOUTH/915. There was cordial relationship between his family and the Plaintiffs and that the latter had no animals to graze. Not even chickens.

On cross-examination from Mr Kamunya, Mr. Wachira said that the Report by the Surveyor dated 26/2/2024 observed that the Plaintiffs practice farming on plot No. NYANDARUA/OL-KALOU SOUTH/915 which is approximately 1 Acre.

And when asked questions by Ms. Ndegwa for the Plaintiffs, the witness said his father lived in Nairobi prior to owning this land, L.R. NO. NYANDARUA/OL-KALOU SOUTH/219 on which he has never lived. He said he put up his house thereon when this case was ongoing in Court. The home had a red roof. When he visited it, it had no trees and since the Githinji's were on an adjacent parcel he never filed an eviction suit.

The last witness in the case, the 13th Defendant was Humphrey Maina

Wambugu, a businessman from Mukurweini. He referred to his Replying Affidavit sworn on 4/7/2025 which he relied on and the annexures attached thereto. He gave this evidence on his own behalf and that of his siblings, the 12th, 14th, 15th and 16th Defendants respectively whose authority to prosecute the case he had already obtained from them. He said they were all sons of the late Wambugu Gachoya who was the registered proprietor of the land- NYANDARUA/OL-KALOU SOUTH/2 and who bought it from Gichuki Rubiru - 35 Acres and was holding it on behalf of members of Mwienderi Building Company. All searches and documents from the land's office showed that the land belonged to Gichuki Rubiru alone. He said that Gichuki's brother, Githinji Rubiru who was husband to the 1st Plaintiff was taking care of the land. The land was transferred to Wambugu in 1976 and that L.R. NO. NYANDARUA/OL-KALOU SOUTH/915 was still in the name of his father on which Esther Kabui Githinji has put up a house, a semi-permanent one on less than an Acre and that the rest of the land is vacant i.e. out of 2.15 Hectares. He then produced in Court: -

1. Authority to act on behalf of the 11th, 12th,14th and 15th Defendants.
2. Acknowledgement of purchase price by Gichuki Rubiru from Wambugu Gachoya, Muchiri Gakuru, Reul Kiiru and Kigo Urugari.
3. Transfer of plot No. 2 to Wambugu Gachoya.
4. Consent to transfer.
5. A copy of the Title Deed.
6. Mutation form for L.R. NOs. NYANDARUA/OL-KALOU SOUTH/916 (1997 to 2014)
7. Copies of Title Deeds for L.R. NO. NYANDARUA/OL-KALOU SOUTH/1997 to 2014 (inclusive).

He said that all transactions were known to Isaac Githinji Rubiru, husband to the 1st Plaintiff. He said that it is not true the Githinji's have had exclusive possession of the entire land and that the true owners of the land have been in possession of their distinct parcels.

Their father became the registered owner of the resultant NYANDARUA/OL-KALOU SOUTH/217 and 220 respectively and the latter was transferred to David Kimathi Waigera and Dedan Kimathi Waigera on 25/8/2005 during the lifetime of Wambugu Gachoya. Parcel No. NYANDARUA/OL-KALOU SOUTH/217 was also sub-divided into 91 L.R. NO. NYANDARUA/OL-KALOU SOUTH/5 and 916 and that L.R. NO. NYANDARUA/OL-KALOU SOUTH/915 is intact but L.R. NO. NYANDARUA/OL-KALOU SOUTH/916 was sub-divided into 18 parcels with resultant numbers L.R. NO. NYANDARUA/OL-KALOU SOUTH/1997 to 2014 (inclusive) and sold with the new owners taking possession thereof. Even plot No. 915 in the name of Gachoya is not in exclusive use by the Githinji's. The case of adverse possession in

respect to NYANDARUA/OL-KALOU SOUTH/220, 915 and 916 is therefore untenable, unsubstantiated and does not meet the legal threshold for grant of orders of adverse possession.

He further said you cannot bring a claim of adverse possession and trust in the same suit. He asked the Court to dismiss the suit.

After the evidence in chief, there were no questions from Mr. Kaburu for 1st and 2nd Defendants and Mr. Geoffrey Githinji Wachira, the 5th Defendant. In answer to a question from the 3rd Defendant, Wairimu Wachira, the witness said that nobody objected to the sub-division of their land. And in a question from Mr. Wanjohi for 6th, 7th, 8th and 9th Defendants, Mr. Maina Wambugu said that his father later sub-divided the land and transferred it to fellow shareholders of the Mwiya company.

When cross-examined by Ms. Eunice Ndegwa, the 59-year-old Humphrey said Githinji was living on the land when it was parcel No. 2 and before further sub-divisions and that he could not tell whether his father ever told Githinji to vacate. He said he did not know whether the land belonged to Settlement Fund Trustees. He also admitted that the mutation form for L.R. NO. NYANDARUA/OL-KALOU SOUTH/ 916 has not been signed by the Land Registrar. In 2022, parcel No. NYANDARUA/OL-KALOU SOUTH/ 916 was in the name of Wambugu Gachoya but has now changed and that he has never filed an eviction case against the Githinji's. He said he at one time told his Aunt, Mrs. Githinji that he could give her the land she is in occupation of.

On re-examination by Mr Kimunya, the last witness said that the Surveyor's Report dated 26/2/2025 shows that land parcel No. 916 has already been sub-divided with 18 plots resulting therefrom.

On the re-calling of Geoffrey Githaiga Wachira by Lucy Wairimu Wachira, 3rd Defendant, the said Githinji Wachira said there was a temporary structure in 1986 which he renovated before he started putting up the permanent home in January 2013 and that the Plaintiffs never interfered.

This then marked the close of the case. I then allowed the parties to put in their written submissions before I started writing my Judgment and from the outset I must say that this case must have had several casualties before the same came to a close. As I said earlier on, the number of Affidavits of Service in the file is unsurmountable and unbelievable.

The case involved several other parties besides the initial brothers Githinji and Gichuki who ought to have sorted their family problems instead of handing them over to other people who did not understand and may never understand the source of the problem or the source of the sibling rivalry.

Coming now to the Surveyor's Report dated 26/2/2024 which Report had been ordered by my brother Justice Yuvinalis Angima, the Report by David Maina Ndirangu gave the following summary: -

1. NYANDARUA/OL-KALOU SOUTH/2 had been sub-divided with resultant sub-titles being L.R. NO. NYANDARUA/OL-KALOU SOUTH/216/217/218,219,220 and 221.
2. Parcel No. 216 is unregistered with no development at all and no occupation. It is intermittently bushy.

3. NYANDARUA/OL-KALOU SOUTH/ 217 has been sub-divided into L.R. NO. NYANDARUA/OL-KALOU SOUTH/915 and 916.
4. NYANDARUA/OL-KALOU SOUTH /916 has been further sub-divided into L.R. NO. NYANDARUA/OL-KALOU SOUTH/ 1997 to 2014 (18 plots).
5. There is occupation and developments on parcel L.R. NO. NYANDARUA/OL-KALOU SOUTH/ 915 occupied by the 1st Plaintiff who practices small scale agriculture thereon. Thereon is a grave.
6. L.R. NO. NYANDARUA/OL-KALOU SOUTH/916 (1997 to 2014) has town houses, residentials for rentals and commercial buildings. It has an encroachment by a single dwelling developed building on parcel No. NYANDARUA/OL-KALOU SOUTH/ 915.
7. L.R. NO. NYANDARUA/OL-KALOU SOUTH/218 has been sub-divided into 2052 to 2076 with developments of residential, town houses and single dwellings for rental.
8. L.R. NO. NYANDARUA/OL-KALOU SOUTH/219 has been sub-divided into 2150 to 2171 with residentials, town houses and single dwellings for rental.
9. L.R. NO. NYANDARUA/OL-KALOU SOUTH/220 not sub-divided - no development, no apparent occupation.
10. L.R. NO. NYANDARUA/OL-KALOU SOUTH/221 sub-divided into 982 to 987.
11. L.R. NO. NYANDARUA/OL-KALOU SOUTH/982 sub-divided into 1019 to 1025.
12. L.R. NO. NYANDARUA/OL-KALOU SOUTH/983 sub-divided into 3026 - 3032.

13. L.R. NO. NYANDARUA/OL-KALOU SOUTH/987 sub-divided into 1026 - 1031 with residentials, town houses and single dwelling rentals on some of them.

From this Report, it is clear that the land which was initially NYANDARUA/OLKALOU SOUTH/2 has been sub-divided severally.

Having heard all the witnesses in this case, as to the joint ownership, no tangible or credible evidence was tendered to show that the parcel of land L.R. NO. NYANDARUA/OL KALOU SOUTH/2 was jointly bought by Isaac Githinji Muchiri and Simon Gichuki Rubiru. There were no receipts produced from the family of Isaac Githinji Muchiri and although his widow said they were all in the name of Gichuki, at least she should have been left with them or copies to prove that she or her family paid for the loan or to show that they contributed to the payment of the loan from the S.F.T. or letter of allotment bearing both names. Further, even the 2nd Plaintiff on cross-examination by Mr. Mugisha admitted that his father had not purchased the suit land i.e. NYANDARUA/OL-KALOU SOUTH/2. This is what he said:

“.....it is true my father was not the owner of parcel No. 2”

If Githinji ever occupied L.R NYANDARUA/OLKALOU SOUTH/2 then he was so occupying as a licensee of Simon Gichuki. In the Court of Appeal case of Waweru -vs-Richu (C.A.122of 2001) it was held at page 406 that:

“it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise;”

In the case of Wanje -vs-Saikwa (no.2) Civil appeal Number 72 of 1982 [1984] KLR Justice Chesoni JA, as he then was, at page 288 quoting Megarry's manual of the laws of real property held that: -

"If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title.....in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

Justice Chesoni went on to say at page 289:

"A person who occupies another person's land with that other person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of his land and the possession is not illegal. Again, there is no adverse possession when land is occupied under a license until the license has been determined".

In the same case at page 293 Justice Nyarangi Ag. JA as he then was said: -

"..... the Appellants have been cultivating the land and reside on the land and those activities, constitute adverse possession. However, the cultivation and the residence was with express permissive possession and did not become adverse during the time the Appellants were allowed to occupy the land."

In Mbira vs Gachuhi Nairobi HCCC No. 2826 of 1997 Kuloba J. held: -

".....It is also an elementary principle that possession and use of land for the requisite statutory period do not in themselves give rise to the Defence or claim of adverse possession. It has always been the law that permissive or consensual occupation is not adverse possession. The

possession must be adverse. Adverse possession is occupation inconsistent with the title of the true owner; inconsistent with and in denial of the right of the true owner of the premises. If one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse.....I hold that possession arising from permissive or consensual entry, occupation and user by virtue of lineal consanguinity and affinity, does not give rise to adverse possession after the statutory period of limitation. If you enter and occupy my land on kinship grounds you do not turn around after the statutory period and claim adverse possession.....”

Even if it was to be true that there was adverse possession which I have concluded was not there due to permission having been granted to Githinji by Simon Gichuki, the same was interrupted when the parties took each other to Court in 1985. The land was subdivided and Titles issued to Wambugu Gachoya in 1982 and later in 1984 and even further sub-divided on 6/6/1995 and 25/5/2003. There was further interruption and extinction of adverse possession (if any existed) in 1982 when a suit was filed against the owner, Wambugu Gachoya by Githinji Rubiru in 1984 being Nyahururu RMCC No. 270 of 1984 seeking the nullification of the sale of the Title NOs. NYANDARUA/OL-KALOU SOUTH/216, 217 218,219,220 and 221 all of which had been hived of L.R. No. NYANDARUA/OL-KALOU SOUTH/2 since 1965. This again interrupted the quiet possession by the Plaintiffs and the same was also done by Nyeri High Court when it held that the 2nd Plaintiffs father, Isaac Githinji Rubiru had no claim against the 11th Defendant herein in respect of the parcel of land in

Nyeri High Court Succession Cause No. 1018 of 2011 and Nairobi High Court Succession Cause No. 2666 of 2014.

The issue of beneficiaries of the parcels previously or currently registered in the name of the 11th Defendant which included NYANDARUA/OL-KALOU SOUTH/915 and 220 was again in Court further bringing to a halt any existence of adverse possession. But more importantly NYANDARUA/OL-KALOU SOUTH/2.

I am also not able to believe the 1st Plaintiff who claims that her husband who died in 1997 was buried on plot No. 219 but she cannot tell the actual place he was buried. It is also not true that she occupies about 25 Acres because when this Court visited the locus in Quo on 4/2/2025, it was evident that the portion she occupied was much smaller and the Defendants were able to identify their portions of land. Although later on further cross-examination she said she could now recall where her husband was buried. And the fact that when she cut down trees on land occupied by the Defendants on the land she agreed to compensate them in 2014 was an admission that the trees were on the land belonging to other people and not herself. She once again said she did not know where her husband was buried nor where her home was.

The 1st Plaintiff admitted that at the time of filing this suit, one of the Defendants who she did not name was in occupation of the suit land and that she didn't know whether as at that time there were beacons. I should believe this was the family of Wambugu Gachoya who had bought the land from Gichuki Rubiru. But whoever it is, this is clear evidence that she was not in exclusive possession of the land and this negates the doctrine of adverse possession.

As has been adduced by the 1st Plaintiff, the Plaintiffs were not exclusively on the suit land. In the case of Mbira vs Gachuhi Nairobi HCCC No. 2826 of 1997 Kuloba J. held: -

“Another key fact in the evidence, is that the plaintiff and the Defendant enjoyed in common the use of the land owned by the Defendant. On this last mentioned fact, I take it to be the law, that if there are two persons in a piece of land having one of the persons as the registered proprietor, and each asserting that the piece of land is his, and each doing some act in the assertion of the right of possession, if the question is, which of those two is in actual possession, the person who has the title is in actual possession, and the other person is a trespasser. This has been the law at least since Jones v Chapman 2 Ex 803 at 821, Maule J.

The 2nd Plaintiff contradicted his mother by saying that none of the Defendants lives on the land yet the 1st Plaintiff had testified that even at the time of filing this suit, there was one of the Defendants living on the suit land. When the Court visited the suit land, it was evident that the Defendants’ families or people claiming their Title were in occupation. He also claimed that they do cultivate part of the land. This was not evident during the visit by the Court. He admitted that the Surveyor’s Report indicates that his mother occupies parcel No. 915 and that that is where his father was buried. This witness also lied to Court by saying that there was construction on parcel No. 918 which the Court found was not occupied nor developed. And since even the 2nd Plaintiff admitted that Title No. NYANDARUA/OL-KALOU SOUTH/2 was closed on 6/6/1995 and that the suit was filed in

2003 and further that the Grant *ad litem* given to them was in respect of filing suit in respect to NYANDARU/OL-KALOU SOUTH/2, then 12 years were not yet ripe from the time there was interruption of quiet possession. Only 8 years had lapsed. This is not enough to found a claim of adverse possession. Therefore, adverse possession cannot stand. He also admitted on cross-examination by Mr. Mugisha for the 11th to 15th Defendants that it was true his father was not the owner of parcel No. NYANDARUA/OL-KALOU SOUTH/2. As to the actual date that registration for L.R No. NYANDARUA/ OL-KALOU/2 which the Plaintiffs are hanging was closed, the Application for consent to the chairman, Ol-Kalou Division Land Control Board is dated 16/2/1983 and Titles therefrom started coming out on 23/5/1984. And it is on record that the late Isaac Githinji had started receiving Demand Notices to vacate NYANDARUA/OL-KALOU SOUTH/218. This is an actual interruption to the quiet possession. I am referring to a Demand letter from the firm of P.K. Njuguna and Co. Advocates addressed to Isaac Githinji Rubiru and the instructions are from Loice Wahito Wachira, proprietor of NYANDARUA/OL-KALOU SOUTH/218. And on 19/1/1996, the 2 were in the chief's Office (Ol-kalou Location) over the parcel of land and Mr. Isaac Githinji agreed to vacate the said land. From 1996 to 2003 is only 7 years and therefore adverse possession could not have matured.

I also wish to state that in the Replying Affidavit to the amended Originating Summons sworn on the 4/7/2025 by one Humphrey Maina Wambugu, the 13th Defendant, there is attached an acknowledgement of money received from Mwienderi building company and paid to Gichuki Rubiru Kshs. 18,711.45 being part payment of the purchase price of the 35 Acres, the total being Kshs.

60,000/= in respect of L.R. NO. NYANDARUA/OL-KALOU SOUTH/2, Olkalou South. This was way back on 6/5/1976. The same is executed before an Advocate. There was a letter from the commissioner of lands inviting Mr. Wambugu Gachoya to his office to execute "legal documents in respect of your above plot" the same is dated 28/9/1977 and there was also a letter of Consent dated 6/5/1977 and a transfer to him dated 10/10/1979. Even in the Green Card produced by the Plaintiffs, the same shows that NYANDARUA/OL-KALOU SOUTH/2 was transferred to Wambugu Gachoya and then the Title was closed on 16/2/1984 on sub-division.

It is trite law that to succeed in a case of adverse possession, the case must be very clear and one has to show that he lived on the suit land *nec claim, nec pervi* and *nec precario* for a period of over 12 years before filing the suit. He lived on the suit land uninterruptedly, exclusively, without permission or consent and openly, as of right, that the Applicant had knowledge (or the means of knowing, actual or constructive) of the possession or occupation and that the possession must be continuous and uninterrupted. In *Mbira vs Gachuhi Nairobi HCCC No. 2826 of 1997*

Kuloba J. held: -

To hold that adverse possession can arise between persons living together as kindred, whether by blood or marriage relationship, would open flood-gates of litigation. Such a holding would be portentous of calamitous practical consequence on cherished positive cultural practice consequence and usages amongst our people, meant to provide social and economic security in the event of misfortune befalling a member of the community..... The doctrine of adverse possession was not intended to be used by those who enter or remain on another's land on kinship title, whether by blood or by

marriage.....You enter or remain on my land under lineal consanguinity or by affinity; you must remain there as such under the presumed or actual permissive or consensual entry and accommodation, and occupation remains permissive and consensual for whatever period I am disposed to allow you to be thereAs it is common knowledge within the legal profession, a person who seeks to acquire title to land by the method of adverse possession by possession for the applicable statutory period, must prove nonconsensual actual , open, notorious, exclusive and adverse use by him or those under whom he claims, for the statutorily prescribed period without interruption.Clearly, the occupier must have “adverse “, as distinct from “permissive” or “consensual”, must be in possession which is inconsistent with and in denial of the title and right of the true owner of the land If occupation originally taken with the permission or agreement or license of the true owner, then you must show that on a certain (stated)specific date after the permissive or consensual entry or occupation, the possession began to become adverse; or that on such and such a date, the proprietor deliberately abandoned the land..... The fact that a person whom I permit to use a part of my land cultivates it or builds on it during the time I have no need for that particular site does not mean dispossession or discontinuance. An owner of land may at one time leave one side to lie fallow or to be temporarily used by someone else. When the need arises, he may then put the other portion to use. But it would be dangerous to suggest that any part which he does not presently use becomes someone else’s land. Here, the Plaintiff used a portion of the Defendant’s land with his permission for as long as he did not need that portion. She did not dispossess him of it, and he did not discontinue his possession of it. There has been no absence of possession by the Defendant..... As I said earlier in this judgment ,if there are two persons in the piece of land (as it is being asserted in relation to the portion of the suit land in this case),and each doing some act in the assertion of the right of possession, and the question arises as to which of those two rival claimants is in actual possession ,the person who has the title is in actual possession , and the other person is a trespasser or a possessor with permission of the title holder.. That way, the

doctrine of adverse possession did not come into play. Kinship, more than anything else, is what arises here. There was never a repudiation of the Defendant's true owner's title.....A suit founded on adverse possession is inappropriate in the circumstances and on the fact of this case. All that has been proved is long permissive or consensual possession by kindred. That alone is not sufficient. The suit fails, and it is dismissed."

In Mbui vs Maranya Meru HCCC No. 283 of 1990, Justice Kuloba went to great heights to explain the circumstances and conditions that found a claim for adverse possession by stating as follows: -

"It is possible to define "adverse possession "more fully, as the non-permissive physical control over land coupled with the intention of doing so , by a stranger having actual occupation solely on his own behalf or some other person , in opposition to, and to the exclusion of all others including the true owner out of possession and that land , the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes of which the owner intended to use it.

*..... If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, it cannot be presumed adverse..... The non-permissive actual possession hostile to the current owner must be **unequivocally exclusive**, and with an evidence unmistakable animus possidendi , that is to say, occupation with the clear intention of excluding the owners as well as the other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the deceased owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against **the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection***

of the statute has been in possession with an animus possidendi for the requisite time. An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession..... **The adverse possession must make out a case of an unequivocal exclusive possession,** sufficient to deprive the owner of the soil.....**Where it cannot be said that the possession was exclusive, where the true owner and others were free to use the ground in question, and there was no assertion of title, a case of adverse possession is not made out. It is not sufficient that there should be an actual possession by the person claiming title by adverse possession; there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by incoming person.** A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. **It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in title against the past twelve or more years.** It is not enough to show a mere going out of the possession by the owner. There must also be exclusive possession for the statutory period by the person to be protected.....It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, **but also that it has all the time been in open conflict with the title on which the owner relies.** He must show that his possession was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the owner of the land, as to give the owner occasion to dispute that possession.**And it has been held many times that acts done under license or permitted by the owner do not give a licensee a title under the limitation** Time therefore, does not run against a true owner whose purpose are not prejudiced by the

*intruder's acts possession may be interrupted
Throughout the decided cases, the recurrent theme is that possession to be adverse must be actual, open, notorious regular, continuously uninterrupted, hostile, exclusive occupancy held with a cherished animus possidendi under a claim or right held in good faith, without any form of permission from a knowing rightful owner entitled to immediate possession, for the statutory period. Out of these cases, the typical formulation of rules as to the nature of the interest conferred by adverse possession have also been judicially stated.
For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain.....
This proposition means that the plea of adverse possession is always based on facts, and the facts must be asserted, pleaded and proved. The factual proof requires the person who claims adverse possession to show on what date he took occupation of the premises, the nature of his possession or the possessory acts, whether the factum of his possession was known to the owner of the land, how long the possession went on, whether his possession was open and undisturbed. All these are questions of fact and unless they are asserted and proved a plea of adverse possession must fail. a cause of action accrues when there is, in existence, a person who can sue and another who can be sued. The question always is this: when could the owner have first maintained an action to a successful result to repel the actual possession with a notorious hostile claim of exclusive title?*

The 1st Plaintiff also failed the test of exclusivity. She told the Court on re-examination by her Counsel and that of her co-Plaintiff Mr. Gakuhi Chege:

“..... at the time of filing this suit one of the Defendants who I cannot remember was in occupation of the suit land and that I don't know whether there were beacons on the land.....”

As Kuloba J. stated in the case of Mbira -vs- Gachuhi (H.C.C.C.2826 OF 1997) Mr. Isaac Githinji Rubiru's occupation of L.R. NYANDARUA /OL KALOU SOUTH/2, must have been as a licensee of Simon Gichuki Rubiru since he entered there with the latter's permission as a caretaker of the land. This was a case of a person, Githinji, being shown generosity but later turns around to want to benefit from the common law principle of adverse possession when in actual fact he never put in motion any circumstances or facts that were adverse to the actual owner.

And as explained in the above cases, lack of exclusivity negates adverse possession. From the evidence of both parties, the Plaintiffs occupied the suit land NYANDARUA/OL-KALOU SOUTH/2 alongside the Defendants. The Plaintiff's possession was not inconsistent with the subsistence of ownership at its commencement and neither did it contradict Simon Gichuki Rubiru's ownership. There was nothing amounting to ouster of the persons against whom adverse possession is claimed.

In a case for adverse possession the tussle is between the holder of a Title and an adverse possessor. If the Title holder has to lose his property because another has dispossessed him, then there must be water tight evidence of such dispossession and that the same is legally sound. As I have said above the case must be clearly brought out.

This position of common law was also espoused in the case of **AMOS WERU MURIGU v. MARATA WANGARI KAMBI and another** [NBI H.C.C. SUIT NO.33 OF 2002 (O.S.) where Justice G. B. M. KARIUKI (as he then was) had the following to say with regard to Adverse Possession and interruption of time: -

“.....he (the Respondent’s) bases his claim, inter alia, on section 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya which entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be so registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered proprietor for a period of 12 years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy

the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of Adverse Possession means. Where the period of 12 years is not continuous or is interrupted, the period of Adverse Possession is broken and must start all over again.”

Earlier, the **Court of Appeal in Gabriel Mbui V Mukindia Maranya (1993) eKLR held that: -**

“..... The possession must be continuous, uninterrupted, unbroken for the necessary statutory period. The possession by the adverse possessor must continue without significant interruption for a solid block of time at least so long as the period of limitation being at the moment 12 years before filing of the suit..... There are a number of ways in which Adverse Possession which has begun to grow may be interrupted. Possession may be interrupted: -

a) By the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.

b) By the institution of legal proceedings by the rightful owner to assert his right to the land; or

c) By any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.

In view of the fact that there is clear evidence that the late Isaac Githinji Rubiru, husband to the 1st Plaintiff and father to the 2nd Plaintiff (on whose strength the two have come to Court) entered on the suit land with permission from the late Simon Gichuki, no case of adverse possession has been proved and this case must fail.

However, Humphrey Maina Wambugu told the Court that they, the family of Wambugu Gachoya, had assured his Aunt, the 1st Plaintiff, that they would give her the land she occupies and in the strength of that assurance the 1st Plaintiff developed the said land as was witnessed when the Court visited the locus in Quo. And in the same breath, the family buried the 1st Plaintiff's husband, Isaac Githinji Rubiru thereon. People must be held accountable for their promises. This assurance came from Humphrey himself. And since all the witnesses herein have identified the land occupied by the Plaintiffs as L.R. NO. NYANDARUA/ OLKALOU SOUTH /915 it is only fair that this assurance is realized and I hereby order that Title NO. L.R. NYANDARUA/OL KALOU SOUTH /915 registered in the name of Wambugu Gachoya be cancelled and the land be transferred and registered in the name of **ESTHER KABUI GITHINJI**. But as for all other parcels of land, I hereby order that the same remain the properties of the people they are registered in and all the cautions and restrictions against any of the parcels of land herein be forthwith lifted.

I also order that each party bears his own costs.

Judgment dated, signed and delivered at Nyandarua this 12th Day of March, 2026.

MUGO KAMAU

JUDGE

In the presence of: -

C/A-Samson.

For the Plaintiff..... Mr. Gakuhi Chege.

For 1st and 2nd Defendants.....Mr. Kaburu.

For 3rd and 4th Defendants.....N/A.

For 5th Defendant.....In person.

For 6th, 7th, 8th and 9th Defendants.....Mr. Wanjohil.

For the 10th Defendant.....N/A.

For the 11th to 16th Defendants.....Mr. Kamunya.

For the 17th and 18th Defendants.....Mr. Mugisha.