

**IN THE COURT OF  
APPEAL AT NYERI**

**(CORAM: KANTAI, MUMBI-NGUGI & ALI-ARONI,**

**JJ.A.) CIVIL APPEAL NO. E029 OF 2021**

**BETWEEN**

**ISHMAEL JORAM.....APPELLANT**

**AND**

**EPHANTUS MURIITHI OBADIAH.....RESPONDENT**

*(Being an appeal against the Judgment of the Environment and Land Court at Embu (Angima, J.) delivered on 4<sup>th</sup> October, 2018*

*in*

***E.L.C. No. 243 of  
2014 Formerly  
Kerugoya ELC No.312 of 2013.)***  
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**JUDGMENT OF THE COURT**

This is a first appeal from the judgment of the Environment and Land Court (“ELC”), Kerugoya, in which the Court allowed the respondent’s suit for adverse possession and granted the prayer that the respondent be registered as the sole owner of **LR Ngandori/Kiriari/1010** (hereinafter “the suit property”) in place of the appellant.

Being a first appeal, our mandate requires us to re-evaluate the evidence and to draw inferences of facts and to retry the case as provided by **rule 31** of the **Court of Appeal Rules, 2022**. We shall therefore set out the facts and evidence as we carry out the said mandate.

The respondent herein is the son and legal administrator of the estate of the late Obadiah Kathanjagui who was the plaintiff in the original suit, Nyeri High Court Originating Summons (“OS”) No.

12 of 1978. Obadiah Kathanjagui (hereinafter “Obadiah”) initially sued Joram Gaciithire and Ishmael Joram as 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively, seeking to be registered as the owner of the suit property in place of Ishmael Joram (the appellant). By consent recorded in court in 1989, the parties agreed to refer the matter to the District Officer for arbitration but the arbitration never took off. The matter appears to have stagnated until October 2008, when the court directed that the file be returned to court for determination. Joram Gaciithire passed on and the claim against him abated. The claim therefore proceeded against the appellant.

The late Obadiah’s case was that he bought the suit property from Joram and Ishmael sometime in 1961, paid Ksh.1000 out of the agreed purchase price of Kshs.1350 and took possession of the suit land immediately. However, he stated that consent of the Land Control Board was not obtained and the transfer process was never concluded because the Land Control Act had not yet been enacted. Obadiah stated that he had occupied the suit land for more than 16 years and ought to be registered as the owner by virtue of adverse possession. He said that he entered the suit property when it was a bush but had undertaken extensive developments of the land and planted coffee bushes thereon.

On the other hand, the appellant is the son and legal administrator of the estate of the late Joram Gaciithire. His case

was that he had been allocated the suit property by his clan in 1960 but did not utilize it as he was working in Nairobi. He said that he did not know when exactly when Obadiah settled on the suit property as he was not around but he asked his father to tell Obadiah to leave the land. The appellant conceded that there were some houses, coffee and tea bushes on the property.

In the judgment delivered on 4<sup>th</sup> October, 2018, the ELC held that the respondent had proved open, continuous and adverse possession of the suit property and was entitled to the prayers in the OS. He was awarded costs of the suit.

The appellant was unhappy with the decision of the ELC and filed this appeal. His memorandum of appeal is undated but was lodged on 12<sup>th</sup> March, 2021. It seeks to have the judgment dated 4<sup>th</sup> October, 2018 set aside and for the suit land to remain registered in his name. The appellant's grounds of appeal are that the court failed to consider that the amended OS was defective and did not establish any cause of action against him. He also argues that there was no evidence that the respondent and his family were in occupation of the suit property from 1961 or that the respondent's father had bought the land. The appellant contends that the trial court ignored several disputes between the parties and that there was no peaceful possession of the suit property. He also argues that the court did not give due regard to his evidence and submissions. He has filed submissions dated 4<sup>th</sup> November, 2025 in support of his appeal and asks the court to allow the appeal and dismiss the OS at the ELC. He submits

that the entry of Obadiah into the

property lacked legal basis as there was no Land Control Board consent and that the court was one-sided in the way it considered the evidence on record.

The respondent filed submissions dated 10<sup>th</sup> November, 2025 where he submits that the time for purposes of adverse possession began to run in 1961 and crystallized in 1973. It is his submission that the appellant was always away in Nairobi and was not able to say when the respondent entered the suit property.

This appeal was heard on 11<sup>th</sup> November, 2025 on the Court's virtual platform. Learned counsel **Mr. Mbogo** appeared for the appellant while learned counsel **Miss. Mukami** appeared for the respondent. Both counsel highlighted their submissions in support of their respective cases.

We have considered the record of appeal, the submissions by the parties and the relevant law.

As earlier stated, the late Obadiah filed the OS seeking to have himself registered as the owner of the suit property in place of the appellant, by virtue of adverse possession. Counsel for the appellant termed the OS as fatally defective based its form. However, in our view, this argument is coming rather late in the day as no preliminary objection was filed since the suit began in 1978, that the entire proceedings were well understood and defended and that no party was prejudiced due to any want of form of the said OS. Looking at the amended OS which was said to be brought under the then Order XXXVI rules 3D and 3F of the

## Civil Procedure Rules we

can see no want of form in the same. The same complied with the law and that attack on want of form has no merit and is dismissed.

Counsel for the appellant also argued that there was no evidence of a sale agreement demonstrating that the late Obadiah bought the land, and that if any existed, it would have been null and void because the seller was not the appellant, who was the registered owner. We confirm that no sale agreement exists on the record, and that the respondent's father was not registered as the proprietor to have authority to sell the property. However, the case by the respondent was not based on the sale agreement at all. His case was one of adverse possession where he claimed that he quietly and peacefully and without any resistance entered the suit property in 1960 and continued in occupation and possession of the same; that he had developed the suit property where he lived with his family, constructed houses and planted crops for more than 12 years.

This Court in the case of **Thaitumu vs. Iguathu & 8 Others** **KECA 1084 (KLR)** stated that:

***“17. The elements to be proved in a claim of adverse possession have been aptly stated by various decisions of this Court. In Samuel Kihamba v. Mary Mbaisi [2015] eKLR, this Court observed thus:***

**“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission**

**of the land owner, with the intention to have the land.**

**There must be an apparent dispossession of the land from the land owner.”**

***18. In essence, a party claiming adverse possession has to prove that they have occupied the land in question openly without license or permission of the land owner, with the intention to have the land, and that they have dispossessed the registered owner of the suit property for the statutory period, as opposed to merely establishing that they have been in possession of the land for twelve years. The onus of proving these elements remains on the party claiming such rights.”***

A look at the record of appeal shows that the appellant testified and told the court that he worked in Nairobi from 1961 and used to visit the land occasionally and that it was empty. He reportedly only discovered in 1974 that the land had been cautioned and one Obadiah had settled on it. Throughout the record, the recurring theme is that the respondent did not have any permission to occupy the suit property. This in itself proves the first element in favour of the claim for adverse possession.

In his grounds of appeal, the appellant claims that the court ignored evidence that he had attempted to evict the respondent and that the possession by the respondent had not been peaceful. We note that the appellant told the court that he first saw a hut on the suit property in 1974 and told his late father to ask Obadiah to leave the property. It seems he did not take any further action until when he wrote a demand letter dated 8<sup>th</sup> July, 2002 complaining about the trespass. He would thereafter file a suit PMCC No.463 of 1993. However, this suit was notably only

seeking damages for the

destruction of trees and did not attempt to evict the owner of the said hut, which he had observed in 1974.

We are in agreement with the ELC Judge that the appellant took a back seat in enforcing his property rights from 1960 when it was registered to him. He admitted in cross-examination that there were houses on the land, coffee and tea bushes, yet he himself was not the owner of those developments. The respondent also told the court during his testimony that his wife and 3 children are buried on the suit property, which evidence was not disputed. We therefore find that indeed the respondent proved on a balance of probabilities that he and his late father dispossessed the appellant of the suit property in 1960, and that the appellant did not take much interest in the said property.

In our considered view, none of the actions by the appellant effectively interrupted the possession of the suit property by the respondent. The verbal warnings, the demand letter and the suit for the cost of damaged trees, cannot be said to have interrupted the use of the land by the respondent. This is what this Court stated on that issue in the case of **Joseph Gachumi Kiritu vs. Lawrence Munyambu Kabura [1996] eKLR:**

***“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him.*”**

***...He must therefore make a peaceable and effective entry, or sue for recovery of land."***

We therefore find that the ELC Judge rightly considered the evidence and the facts and rightly held that the respondent proved the claim for adverse possession against the suit property while the appellant did not assert his rights over the suit property. Our conclusion is that this appeal is unmerited and is dismissed with costs.

**Dated and delivered in Nyeri this 25<sup>th</sup> day of March, 2026.**

**S. ole KANTAI**

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**JUDGE OF APPEAL  
MUMBI-NGUGI**

.....  
**JUDGE OF APPEAL  
ALI - ARONI**

.....  
**JUDGE OF APPEAL**

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