

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELCC/49/2019**

**KELVIN MUGWERU MUCHIRI & DAN MUNDIA**

**MUCHIRI (Suing as Legal Representatives of the**

**Estate of BENSON MUGWERU MUCHIRI) ..... PLAINTIFFS**

**VERSUS**

**LILIAN REGERIA KAGEENU..... 1<sup>ST</sup> DEFENDANT**

**CAROLINE NKATNA ..... 2ND DEFENDANT**

**JUDGMENT**

**Background**

1. On 30 May 2019, Benson Mugweru Muchiri moved this Court by way of an Originating Summons dated 27 May 2019 seeking various orders against the Defendants. Upon his death on 6 June 2020, Kelvin Mugweru Muchiri and Dan Mundia Muchiri assumed conduct of the proceedings as legal representatives of his estate, having been issued with a Limited Grant of Letters of Administration Ad Litem on 23 March 2021 in Kajiado High Court Ad Litem Cause No. E007 of 2021. By way of amended Originating Summons dated 17 January 2019, the Plaintiffs seek the following orders:

- a. A declaration that the estate of Benson Mugweru Muchiri has been in adverse possession for a period exceeding twelve (12) years over a portion measuring approximately 0.84 hectares comprised in L.R. No. KAJIADO/KITENGELA/8082.

- b. A declaration that, consequently, the Defendants' rights and title over L.R. No. KAJIADO/KITENGELA/8082 have been extinguished pursuant to Section 17 of the Limitation of Actions Act.
  - c. A declaration that the estate of Benson Mugweru Muchiri has acquired ownership of L.R. No. KAJIADO/KITENGELA/8082 under the Limitation of Actions Act and the doctrine of adverse possession, and that the Defendants hold the said title in trust for the estate.
  - d. A declaration that the estate is entitled to be registered as the bona fide proprietor of the parcel known as L.R. No. KAJIADO/KITENGELA/8082 measuring 0.84 hectares.
  - e. An order directing the District Land Registrar, Kajiado County, to transfer L.R. No. KAJIADO/KITENGELA/8082 to the estate of Benson Mugweru Muchiri.
  - f. Costs of the suit.
2. The Amended Originating Summons is supported by the affidavit of Kelvin Mugweru Muchiri sworn on 17 January 2022. He deposes that his late parents, Benson Mugweru Muchiri and Josephine Miringo Karongo, purchased the suit property from its registered owner, Elijah Lengete, at a consideration of Kshs. 500,000. Upon payment of the full purchase price, they took possession, fenced the land, and commenced farming activities in the genuine belief that the vendor would facilitate completion of the transaction and effect transfer of the property into their names. He further states that from 2002, his parents permanently settled on the suit property with their family and established their residence thereon.

3. The deponent further avers that over a period of more than twenty years of open and visible occupation, his parents exercised ownership over the land by constructing a three-bedroom residential house, installing electricity and water therein. Upon their demise, both parents were buried on the suit property on 28 November 2013 and 6 June 2020, respectively.
4. The Plaintiffs assert that in April 2019, agents of the Defendants forcefully entered the suit property, cut down the fence, transported construction materials onto the land, and erected temporary structures. Despite being confronted by his father, the intruders returned in May 2019, destroyed the live fence, replaced it with chicken wire mesh, and claimed to have been sent by the registered owner. The deponent maintains that the estate of his father is entitled to be registered as proprietor of the suit property since the Defendants' title, if any, was extinguished by reason of continuous and exclusive adverse possession for a period exceeding twelve years under the Limitation of Actions Act. He further states that the Defendants never asserted any ownership rights over the property nor granted permission for occupation, as they were unknown to the family. He adds that his family has continued to occupy and utilize the property without interruption and has no other place of residence.
5. The Defendants' response to the Plaintiffs' claim is set out in their Defence and Counterclaim dated 18 February 2021. While seeking dismissal of the Plaintiffs' claim with costs, the Defendants state that they became the registered proprietors of the suit property on 17 November 1999 after purchasing it from the registered owner, Elijah Lengete Sane, pursuant to an agreement dated 10 May 1999.

6. They contend that when the late Benson Mugweru Muchiri, who was their neighbour, commenced construction on the suit property, they initially believed that he was building on his own land. However, when they intended to construct a cottage or holiday home on the property in 2010, they discovered, after engaging a surveyor to identify the boundaries, that the Plaintiff had encroached onto a portion of their land, occupying less than one-quarter of the suit property while claiming ownership of the entire parcel. This discovery prompted them to report the matter to the area Assistant Chief for intervention. After hearing both sides, it was resolved that the Plaintiff would pursue the matter with the vendor's family, while the Defendants would proceed with their development plans on the property without interfering with the portion occupied by the Plaintiff. It is on that basis that the Defendants deposited building stones on the land.
7. They further state that due to the delay in resolving the dispute, they erected a chain-link fence around the property in 2018 but allowed the Plaintiff access through the gate after notifying him. Despite this arrangement, the Plaintiff lodged a complaint with the police regarding the fencing. The Defendants were summoned to the police station, where it was agreed that the dispute would remain pending until the return of Mrs. Ruth Sane from the United States in February 2019. During a subsequent meeting held at the police station on 3 July 2019, attended by members of the vendor's family, it was proposed that for a compromise to be reached, the Plaintiff would withdraw the present suit, while the vendor's family would excise one acre of land and transfer it either to the Defendants or the Plaintiff.
8. The Defendants further state that following the death of Benson Mugweru on 6 June 2020 during the pendency of the suit, the Plaintiffs proceeded to bury him on the suit property

without their consent or permission. They contend that the Plaintiffs cannot rely on the doctrine of adverse possession to claim the property because from 2010, they were permitted to occupy only a portion of the land pending resolution of the dispute with the vendor's family. They also assert that the Plaintiffs have not demonstrated continuous and uninterrupted adverse possession for a period of twelve years, nor have they clearly identified or described the specific portion they claim. The Defendants maintain that prior to Benson's death, the Plaintiffs occupied only a small portion of the property where their homestead stood, and that on 31 January 2022, they began ploughing a larger portion in an attempt to expand their claim.

9. In their counterclaim, the Defendants reiterate that they allowed the Plaintiffs to occupy only a limited portion of the suit property pending resolution of the dispute with the vendor's family, and that they objected to the burial of Benson on the land. On this basis, they seek judgment against the Plaintiffs for the following orders:
- a. A declaration that the Plaintiffs have trespassed on L.R. No. KAJIADO/KITENGELA/8082.
  - b. General damages for trespass.
  - c. An order for vacant possession of L.R. No. KAJIADO/KITENGELA/8082.
  - d. A permanent injunction restraining the Plaintiffs from trespassing on the property.
  - e. An order for exhumation of the remains of Benson Mugweru Muchiri for reburial elsewhere.
  - f. An order directing the Public Health Officer, Kajiado, to issue a permit for exhumation.

- g. An order directing the Officer Commanding Kajiado Police Station to supervise the exhumation.
  - h. An order restraining further burial on the property.
  - i. Costs and any other appropriate relief.
10. In their Reply to Defence and Defence to Counterclaim dated 16 December 2024, the Plaintiffs reiterate their earlier claim, refute the allegations made by the Defendants, and maintain that even if the Defendants are the registered proprietors of the suit property, their title and ownership were extinguished by virtue of the Plaintiffs' continuous use and occupation of the land since the year 2000 under the doctrine of adverse possession. The Plaintiffs assert that the manner in which the Defendants acquired title is not an issue for determination in this suit and does not alter the fact that their title was extinguished. They further contend that the Defendants' own admission that they never occupied or developed the land after purchase supports the Plaintiffs' claim that the Defendants' title has been extinguished.
11. The Plaintiffs deny ever having been reported to the chief for trespass or participating in any meeting or agreement as alleged by the Defendants. They maintain that by the time the Defendants entered the suit property in April 2019, the Defendants had no valid claim to possession, as their title had already been extinguished through adverse possession arising from the Plaintiffs' actual occupation for a period of seventeen years since 2002. They further state that the Defendants were summoned by the police following a complaint lodged by the Plaintiffs to prevent further interference with their proprietary interests. They assert that the filing of the present suit was necessitated by the Defendants' actions. Although the parties attempted to resolve the dispute amicably, the

Plaintiffs state that the efforts failed because the Defendants insisted on withdrawal of the suit as a precondition, which the Plaintiffs viewed as a strategy intended to mislead them into abandoning their claim and risking eviction.

12. With regard to the burial of Benson on the suit property, the Plaintiffs contend that the Defendants have no right to seek exhumation of his remains, as the burial was conducted openly without seeking their consent. While seeking dismissal of the Defence with costs, the Plaintiffs maintain that they have continuously occupied and utilized the entire suit property and have used it for subsistence farming.

13. In their Defence to the Counterclaim, the Plaintiffs oppose the prayer for exhumation, arguing that it is unwarranted since the court orders restraining the burial were issued after the burial had already taken place. They further rely on the Defendants' own admission that the Plaintiffs have occupied and constructed a home on the property. They deny trespass, asserting that their occupation is lawful under adverse possession. The Plaintiffs also argue that the Court cannot grant orders that would serve no practical purpose, as the Defendants' claims have already been overtaken by events. Accordingly, they urge the Court to dismiss the Counterclaim with costs and enter judgment in their favour as prayed.

#### **Analysis of Evidence**

14. PW1, Kelvin Mugweru Muchiri, who is an administrator of the estate of Benson Mugweru Muchiri, began his testimony by adopting his affidavit sworn on 17 January 2022 together with the annexures marked PE1–8 as his evidence in chief. He testified that the suit property has been their home for over twenty years, having been occupied since 2002 when his parents purchased it, constructed a permanent four-bedroom house, and

carried out other developments. He clarified that his parents did not acquire the property from the Defendants, in whose names it is registered. He further confirmed that both his mother and father were buried on the suit property in 2013 and 2020 respectively following their deaths.

15. During cross-examination, PW1 acknowledged that he was a minor at the time his parents allegedly purchased the suit property under an agreement dated 16 November 1998 and was therefore not a party to that agreement. He admitted that he did not possess documentary proof showing that the full purchase price of Kshs. 500,000 was paid, particularly as the agreement provided for payment of Kshs. 350,000 upon execution and the balance of Kshs. 150,000 within six months. He also confirmed that no evidence had been produced to demonstrate that consent for transfer of the property was obtained or that his father took any legal action when the vendor failed to transfer the land.

16. He testified that when the family moved onto the property in 2002, the land was vacant, and they initially lived in a semi-permanent structure made of mabati until 2010 when they constructed a permanent house. Although he acknowledged that the suit property is registered in the names of the Defendants, he stated that he was unaware of when the property was sold to his parents by Elijah. He further indicated that he did not know whether the Defendants had engaged a surveyor, brought building materials onto the land, or whether his father had been summoned by the Assistant Chief or attended meetings regarding the dispute.

17. Upon being referred to the Court's ruling of 7 May 2020, which indicated that the Plaintiffs' occupation was limited to a specific portion of the land measuring approximately  $2\frac{1}{3}$  acres, he confirmed that no appeal had been lodged against that ruling.

He admitted that the Defendants' entry onto the land in 2019 and their construction activities disrupted their occupation. He maintained that his father had only informed him about the existence of the case and not about any alleged meetings, and he denied that his father had agreed to withdraw the suit in exchange for alternative land.

18. PW1 further testified that neither he nor his uncle sought permission from the Defendants before burying his father on the suit property. He stated that he became aware of the court order restraining the burial four to five days after the burial had already taken place. In conclusion, he urged the Court to declare the Plaintiffs as owners of the suit property through adverse possession, stating that his father had purchased the land and established a home there.

19. During re-examination, PW1 maintained that they had utilized the entire suit property for construction, farming, and livestock keeping, and that they had never been evicted by the Defendants. He also reiterated that the court order restraining burial had not been served on them at the time of the burial.

20. PW2, George Mwanja Njenga, a neighbour of the Plaintiffs, adopted his witness statement dated 16 December 2024 as his evidence in chief. He testified that when he moved onto his land adjacent to the suit property in 2003, he found the Plaintiffs in occupation of the entire property, where they had constructed a mabati house, engaged in farming, planted trees, and kept livestock. He further stated that in 2006, they constructed a permanent house. He confirmed that both Benson and his wife were buried on the property in 2020 and 2013 respectively, and that the property is currently occupied by Kelvin. He maintained that the Plaintiffs have been in open occupation of the land since 2003.

21. During cross-examination, PW2 admitted that he had no documentary evidence to prove that he had been contracted by Benson to supply building materials or supervise construction of the permanent house. He also acknowledged that he had no knowledge of events prior to 2003 and had never seen the title deed of the suit property. He further stated that he was unaware of any court ruling limiting the Plaintiffs' occupation to a specific portion of the land. He indicated that he only became aware of the dispute in 2019 when individuals entered the property and destroyed the Plaintiffs' fence.
22. DW1, Lilian Regeria Kageenu, adopted her witness statement and the Defendants' bundle of documents dated 18 February 2020, except for the photographic evidence.
23. Under cross-examination, she confirmed that she and her daughter, Caroline Nkatha, became the registered joint owners of the suit property in 1999. She acknowledged that the Plaintiffs have lived on the property without permission, constructed permanent structures, and buried their relatives there. She testified that after a survey conducted in 2010 confirmed that the Plaintiffs had encroached onto their land, they reported the matter to the chief, who advised them to resolve the issue with the vendor rather than evict the Plaintiffs. She added that they deposited building materials on the land in 2010 and later fenced it with a chain link and constructed a chicken house in 2018, which led to the Plaintiffs reporting them to the police.
24. She maintained that although they did not grant permission for occupation, she was uncertain of the exact portion occupied by the Plaintiffs, whether Benson's wife was buried on the land, or whether any agreement was reached for withdrawal of the suit. She also confirmed that the court order restraining burial of the late Benson was not served on the Plaintiffs in time to restrain the family from conducting the burial in the suit property.

25. During re-examination, she reiterated that the Plaintiffs had occupied a portion of the land since 2010 and that a resolution had been reached before the chief allowing them to remain pending resolution with the vendor. She further confirmed that the Defendants were summoned to the police station in 2018 after fencing the property and that access to the road was still allowed. She maintained that she had objected to the burial of Benson prior to its occurrence.
26. DW2, Justus Gateti Kageenu, presented his evidence in chief by adopting his witness statement dated 18 February 2022.
27. During cross-examination, he testified that from 2002, the Plaintiff had been in open occupation of less than one-quarter of the suit property, which is jointly owned by his wife and daughter, without their consent, having constructed a permanent residence thereon in which they lived. He further stated that since 1999, only his employees had been residing on the property. He explained that prior to commencing any development in 2010, including depositing building materials, the Defendants engaged a surveyor to identify the land boundaries. It was through this survey that they discovered that the late Benson, who was their neighbour, had been occupying a portion of their land. This led them to report the matter to the area chief, after which it was agreed that the Plaintiff would remain on the land pending resolution of the dispute with the vendor from whom he had purportedly purchased the property. DW2 acknowledged that he did not possess a power of attorney authorizing him to act on behalf of his wife and daughter during the meeting at the chief's office. He also confirmed that there were no minutes or written agreements documenting the resolutions reached at that meeting.

28. The Court was informed that the Plaintiff was not removed from the land in 2010, and that the Defendants only undertook their initial development on the property in 2018 by erecting a chain-link fence and placing a caretaker thereon. It was further stated that during a meeting held in 2019 at Ongata Rongai Police Station involving Benson, it was agreed that he would withdraw the present suit. Following his death, his brother and son approached DW2 seeking consent to bury him on the property. DW2 testified that by the time court orders restraining the burial were served, the burial had already taken place. He also indicated that he was uncertain whether a letter dated 6 June 2020, written by his wife to the OCS Rongai and Kitengela Police Stations and the Twala Chief objecting to the burial, had been received.

29. Upon re-examination, DW2 stated that his son personally delivered the letter dated 6 June 2020 to Rongai Police Station and to the Plaintiff's family. He reiterated that the Defendants did not evict the Plaintiff or interfere with his homestead, as they were pursuing an amicable resolution of the dispute. He also restated that his workers entered the suit property in 2018.

### **Analysis of Submissions**

#### **Plaintiffs' Submissions**

30. The Plaintiffs' submissions, filed in support of the Amended Originating Summons dated 17th January 2022, invite this Court to determine whether the estate of the late Benson Mugweru Muchiri has acquired title to the suit property, Land Reference Number Kajiado/Kitengela/8082, by virtue of the doctrine of adverse possession. The Plaintiffs' case is anchored on the assertion that the deceased and his family maintained actual, open, and uninterrupted occupation of the entire 0.84-hectare (approximately 2 acres)

parcel from 2002 until the commencement of this litigation in 2019—a period exceeding the statutory threshold of twelve years.

31. The Plaintiffs submit that the legal requirements for a successful claim of adverse possession are encapsulated in the Latin maxim *nec vi, nec clam, nec precario*—meaning possession must be without force, without secrecy, and without the license or permission of the registered owner. In articulating this standard, the Plaintiff relies heavily on the Court of Appeal decision in ***Abdulkhalik Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J. Mtila & another [2021] KECA 653 (KLR)***, which dictates that a claimant must demonstrate, on a balance of probabilities, that their possession was adverse, open, and peaceful for an uninterrupted period of twelve years. This is further supported by the authority of ***R. vs. Oxfordshire County Council ex p. Sunningwell Parish Council [2000] 1AC 335***, which emphasizes that such possession must not occur by stealth or under the license of the owner.
32. Furthermore, the Plaintiffs argue that a claimant must demonstrate *animus possidendi*, or the specific intention to possess the land to the exclusion of others. Reliance is placed on ***Samuel Kihamba vs. Mary Mbaisi [2015] eKLR*** and ***Eliva Nyongesa Lusenaka & Anor v Nathan Wekesa Omacha Kisumu Civil Appeal No. 134 of 1993 (ur)*** to assert that there must be an apparent dispossession of the land from the registered owner. To demonstrate this intention, the Plaintiff points to substantive developments on the land, including the construction of a permanent three-bedroom home in 2010, the installation of electricity and water, general farming, and the establishment of family burial sites. The Plaintiff contends that these acts are inherently inconsistent with the owner’s enjoyment of the soil, citing ***Littledale v Liverpool College (1900) 1 Ch. 19***.

33. The Plaintiffs further invoke the precedent in *Mate Gitabi vs. Jane Kabubu Muga alias Jane Kaburu Muga & 3 others [2017] eKLR* to reiterate the necessity of open occupation without secrecy. It is submitted that since the Defendants admitted to having acquired the title in 1999 but failing to occupy or develop the land until 2018 or 2019, they effectively allowed the Plaintiff's possession to crystallize into a legal right. Following the logic in *Wilson Njoroge Kamau v Nganga Muceru Kamau [2020] eKLR*, the Plaintiff urges the Court to draw a legal conclusion of adverse possession from these proven facts.
34. The Plaintiffs' submissions emphasize that by operation of law, specifically **Section 17 of the Limitation of Actions Act**, the Defendants' right and title to the suit property were extinguished upon the expiration of the twelve-years' period of adverse occupation. This position is bolstered by **Section 7 of the Limitation of Actions Act**, which prohibits any person from bringing an action to recover land after the end of twelve years from the date the right of action accrued.
35. The Plaintiffs maintain that **Section 38 of the Limitation of Actions Act** provides the necessary legal avenue for an adverse possessor to be registered as the proprietor once the statutory period has lapsed. The Court of Appeal's findings in *Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR* are cited to confirm that the proprietor's title is extinguished automatically at the end of the twelve years, permitting the adverse possessor to seek a formal vesting order.
36. Regarding the specific size of the land occupied, the Plaintiffs assert that they maintained possession of the entire 2-acres' parcel. While the Defendants alleged that the Plaintiff occupied only a 1/8th portion, the Plaintiffs argue that this claim was speculative and

unsubstantiated by any survey. To this end, the Plaintiffs relies on the Evidence Act, Cap. 80, specifically **Section 107** regarding the general burden of proof, **Section 108** on the incidence of that burden, and **Section 109** regarding the proof of particular facts. The Plaintiffs submit that the onus fell upon the Defendants to prove the existence of a smaller occupied portion, a burden they failed to discharge.

37. The Plaintiffs submit that the Defendants' counterclaim for trespass and vacant possession is legally untenable because their title has already been extinguished. On the specific prayer for the exhumation of the late Benson Mugweru Muchiri, the Plaintiffs argue that the application is premature and violates the principle of exhaustion. Under **Section 146 of the Public Health Act**, the power to grant permits for exhumation is vested in the Minister or relevant public health authority, not the Court as a "first port of call". The Plaintiff cites *Milanga v Attorney General (Miscellaneous Civil Case E030 of 2022) [2022] KEHC 16654 (KLR)* to argue that the Court should not invoke its jurisdiction in this matter until the applicant has first sought relief from the authorized administrative offices.

#### **Defendants' Submissions**

38. The Defendants' submissions, filed in vehement opposition to the Amended Originating Summons and in support of their Counterclaim, present a multifaceted defense predicated on the assertion that the Plaintiffs' occupation of the suit property, **Land Reference Number Kajiado/Kitengela/8082**, lacks the essential legal characteristics of adverse possession. The Defendants maintain that the Plaintiffs' entry and stay on the land were either permissive, contested, or legally inconsistent with the doctrine of adverse

possession, and that the Defendants remain the indefeasible registered proprietors of the land.

39. The cornerstone of the Defendants' defense is that any occupation by the late Benson Mugweru Muchiri and his family was not "adverse" but was instead a "permissive occupation" or a "license" which defeats a claim of adverse possession. The Defendants submit that upon discovering the encroachment by the late Benson Mugweru Muchiri and his family in 2010, they sought the intervention of the local administration, resulting in a temporary arrangement where the Plaintiffs were allowed to remain on a small portion of the land pending resolution of the dispute.

40. In support of the argument that permissive occupation cannot ripen into title, the Defendants rely on the following authorities:

- a. ***Gabriel Mbui v Maranya [1993] KEHC 161 (KLR)***: Cited for the proposition that a licensee or a person occupying land with the owner's permission does not possess the land adversely.
- b. ***Jandu v Kirpal & Another [1975] EA 225***: Used to argue that the limitation period only begins to run once the permission or license is revoked and the occupant continues to stay in open defiance of the owner.
- c. ***Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR***: To emphasize that the claimant must prove possession was not under the "licence of the owner."
- d. ***Wanje v Saikwa (No. 2) [1984] KLR 284***: Regarding the necessity of proving that the owner was dispossessed or has abandoned the land.
- e. ***Githu v Itindi [1984] KLR 1***: To demonstrate that the mere presence on land is insufficient; there must be a clear intention to exclude the true owner.

41. The Defendants further contend that the Plaintiffs lacked *animus possidendi* (the intention to possess to the exclusion of the owner). They rely on ***Samuel Kihamba vs. Mary Mbaisi [2015] eKLR*** to argue that if the occupant recognizes the owner's title or is in negotiations to purchase the land, their possession cannot be adverse.
42. A significant legal objection raised by the Defendants is that the Plaintiffs' case is "inherently contradictory" and constitutes an abuse of the court process. The Defendants point out that the Plaintiffs initially claimed the land through an alleged lawful purchase from a third party (Elijah Lengete Sane) while simultaneously seeking to extinguish the Defendants' title via adverse possession.
43. The Defendants submit that a party cannot rely on a derivative title (purchase) and an original title (adverse possession) at the same time. To support this "approbate and reprobate" argument, they place reliance on the case of ***Industrial and Commercial Development Corporation v Kariuki Gatheca [1977] KLR 52***: establishing that a litigant cannot take two inconsistent positions based on the same set of facts. They further cite the case of ***Dr. Sunny Samuel v Simon M. Mbwika & Another [1998] eKLR***: reinforcing the principle that a party who claims land by right of purchase cannot, in the alternative, claim that the same land was acquired by adverse possession.
44. The Defendants challenge the Plaintiffs' claim to the entire 0.84-hectare parcel, arguing that at most, the Plaintiff occupied a small, demarcated portion of approximately 1/8th of an acre. They submit that the Plaintiffs failed to discharge the burden of proof required to identify the specific area of adverse occupation. In this regard, the Defendants rely on the **Evidence Act (Cap 80)**, specifically: **Section 107**: On the general burden of proof.;

**Section 108:** On the incidence of the burden of proof. **Section 109:** On the burden of proving particular facts.

45. The Defendants maintain that the Plaintiffs' failure to provide a survey map or specific dimensions of the area occupied is fatal to the claim, citing the Court of Appeal decision in *Kimanani v. Drayton [2005] 1 EA 213*, which underscores the necessity of precise identification in adverse possession claims.
46. In their Counterclaim, the Defendants seek orders for vacant possession and a permanent injunction. They argue that as the registered owners under **Article 40 of the Constitution of Kenya** and the **Land Registration Act**, their rights are protected against trespassers. A central component of their prayer is the demand for the **exhumation** of the remains of Benson Mugweru Muchiri. The Defendants argue that the burial was an act of "calculated trespass" carried out in defiance of a court order. Regarding the legal procedure for exhumation, the Defendants refer to: **Section 146 of the Public Health Act**: Which governs the exhumation of bodies and the requirement for permits.
47. *Milanga v. Attorney General (Miscellaneous Civil Case E030 of 2022) [2022] KEHC 16654 (KLR)*: While the Plaintiff used this case to argue for administrative exhaustion, the Defendants use it to argue that the Court has the inherent power to order the correction of a wrong (illegal burial) once trespass is established.
48. The Defendants conclude by invoking the protection of **Sections 24, 25, and 26 of the Land Registration Act**, which vest absolute and indefeasible title in the registered proprietor. They argue that **Section 7 and 17 of the Limitation of Actions Act** are inapplicable because the Plaintiff's occupation was interrupted by the Defendants' assertions of ownership and the intervention of the police and local authorities in 2010

and 2019. Consequently, the Defendants urge the Court to dismiss the Plaintiffs' suit with costs and grant the prayers in the Counterclaim.

**Issues for Determination**

49. Having carefully considered the pleadings, the evidence presented by the parties, and the rival submissions, this Court finds that the central dispute revolves around the competing claims of ownership by prescription versus the sanctity of a registered title. Consequently, the following issues are identified for determination:

- i. Whether the Plaintiffs have met the legal and evidentiary threshold for the claim of adverse possession in respect of the suit property.*
- ii. Whether the Plaintiffs' continued occupation and development of the suit property, including the burial of the deceased, constitutes trespass.*
- iii. Whether the Defendants are entitled to the reliefs sought in their Counterclaim.*
- iv. Who shall bear the costs of the main suit and the Counterclaim?*

**Analysis and Determination**

*i. Whether the Plaintiffs have met the legal and evidentiary threshold for the claim of adverse possession in respect of the suit property.*

50. The Plaintiffs seek a declaration that the Estate of Benson Mugweru Muchiri has acquired title to Land Reference Number **KAJIADO/KITENGELA/8082** by way of prescription. The Plaintiffs' case is anchored on the assertion that the deceased and his family have been in open, continuous, and exclusive occupation of the suit property for a period exceeding twelve (12) years, thereby extinguishing the Defendants' title by operation of **Section 17** of the **Limitation of Actions Act (Cap. 22)**.

51. To successfully establish a claim for adverse possession, a party must satisfy the requirements set out in **Sections 7, 13, and 38(1)** of the **Limitation of Actions Act (Cap.**

**22)**. The Act provides as follows:

**Section 7:** “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

**Section 13(1):** “A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

**Section 38(1):** “Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act... he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

42. The judicial interpretation of these provisions was succinctly captured by the Court of Appeal in *Lewa v Mwangandi [2015] KECA 532 (KLR)*, where the Court held:

*“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it*

*omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”*

43. Furthermore, in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR)*, the Court of Appeal outlined the evidentiary burden on a claimant, stating that a person claiming adverse possession must inter alia show:

*“(a) on what date he came into possession.*

*(b) what was the nature of his possession?*

*(c) whether the fact of his possession was known to the other party.*

*(d) for how long his possession has continued and*

*(e) that the possession was open and undisturbed for the requisite 12 years.”*

44. In the present case, the Plaintiffs’ claim arises from a specific historical context: an alleged sale agreement dated **16th November 1998** between the late Benson Mugweru Muchiri and the then-registered owner, **Elijah Lengete Sane**. The Plaintiff contends that upon paying a deposit of Kshs. 350,000/= and eventually the balance, they took possession of the suit property in **2002** genuinely believing it would be transferred to them.

45. Where a claim of adverse possession originates from a sale agreement, a unique legal standard applies regarding when the limitation period begins to run. The Court of Appeal in *Mbui v Maranya [1993] KEHC 161 (KLR)* established that:

*“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by instalments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last instalment of the purchase price.”*

46. This principle was further reinforced in *Peter Mbiri Michuki v Samuel Mugo Michuki [2014] KECA 342 (KLR)*, which cited the dictum in *Public Trustee – v- Wanduru, (1984) KLR 314 at 319*:

*“...adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”*

47. Tying this law to the facts, PW1 (Kelvin Mugweru Muchiri) admitted during cross-examination that he did not possess documentary proof that the full purchase price of Kshs. 500,000 was ever paid to Elijah Lengete. He acknowledged that while Kshs. 350,000 was to be paid upon execution, no evidence of payment of the final balance of

Kshs. 150,000 was produced. Under the rule in *Mbui v Maranya*, the limitation period cannot commence in favor of a purchaser who has not completed payment, as their possession remains permissive under the contract.

48. The Supreme Court in *Sehmi & another v Tarabana Company Limited & 5 others* [2025] KESC 21 (KLR) emphasized the definition of a purchaser for value:

***“Purchase for value means that consideration in money or money’s worth was paid by the claimant in return for the land. The purchaser must actually pay all the money before receiving notice of the existence of the equitable interest over the suit land. Mere execution of the instrument of conveyance... without payment of money, will not avail to the claimant the defence of innocent purchaser.”***

47. The evidence before the court confirms that the Defendants became registered owners of the suit property on **17 November 1999**, having purchased it from the same vendor (as the Plaintiffs) via an agreement dated 10 May 1999. The Plaintiffs' parents did not challenge this transfer nor seek specific performance against the vendor's estate during the intervening years.

48. Regarding the "undisturbed" nature of the possession, the Court of Appeal in *Lewa v Mwangandi* [2015] KECA 532 (KLR) held that:

***“The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”***

49. The facts reveal that the possession was not undisturbed. The Defendants engaged a surveyor in 2010, reported the encroachment to the Assistant Chief, and subsequently entered the land to deposit materials and erect a chain-link fence in 2018. DW1 and DW2 testified that a resolution was reached in 2010 before the Chief, where the Plaintiff was permitted to stay *precario* (by license) pending a resolution with the vendor's family. While PW1 denied knowledge of this meeting, the Defendants' active assertions of ownership in 2010 and 2018 served to interrupt any potential "peaceful" occupation.

50. The Plaintiffs also failed to provide a precise description or survey of the portion they occupied. While PW1 claimed the entire 0.84 hectares, the evidence of DW1 and DW2, corroborated by the survey discovery in 2010, suggested the homestead occupied only a fraction of the land. A claim for adverse possession must be specific as to the "extent" of possession, as noted in *Lewa v Mwagandi*.

51. In view of the Plaintiff's failure to prove full payment of the purchase price, thereby failing to trigger the limitation period, the interruption of occupation by the Defendants in 2010 and 2018, and the permissive nature of the stay following the Chief's intervention, this Court finds that the legal and evidentiary threshold for adverse possession has not been met. The Defendants' title was not extinguished. The Plaintiffs' remedy, if any, lay in an action for breach of contract against the estate of Elijah Lengete Sane, not in a claim for adverse possession against the Defendants who hold a valid, registered title.

48. Accordingly, the Court determines this issue in the negative. The Plaintiffs have not met the legal or evidentiary threshold for the claim of adverse possession.

***ii. Whether the Plaintiffs' continued occupation and development of the suit property, including the burial of the deceased, constitutes an actionable Trespass.***

52. Having determined that the Plaintiffs have not established a claim for adverse possession, and that the Defendants' title over **L.R. No. KAJIADO/KITENGELA/8082** remains extant and un-extinguished, the Court now turns to the question of whether the Plaintiffs' presence on the land constitutes trespass.

53. The statutory definition of trespass is provided under **Section 3(1)** of the **Trespass Act (Cap. 294, Laws of Kenya)**:

*“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”*

56. In the context of civil liability, the Court of Appeal in *Mwinyi v Bhai & another [2025] KECA 1309 (KLR)*, citing *Winfield & Jolowicz on Tort*, defined the nature of this tort as follows:

*“Trespass to land... consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”*

57. Applying this law to the facts, it is undisputed that the Defendants are the registered proprietors of the suit property, having been issued with a title deed on **17 November 1999**. Pursuant to the principle in *Mwinyi v Bhai*, the Defendants are deemed to be in legal possession of the land by virtue of their paper title. The Plaintiffs' entry and continued stay on the land, therefore, constitutes a prima facie interference with that possession unless a "reasonable excuse" or "consent" is established.
58. The Plaintiffs argue that their occupation was lawful under the doctrine of adverse possession. However, this Court has already found that their entry was based on an unperfected contract with a third party (the vendor) and that they failed to prove the crystallization of their claim. Consequently, the shield of "adverse possession" does not avail them a defense against a claim of trespass.
59. The evidence of DW1 and DW2 indicates that in 2010, after discovering the encroachment, they sought the intervention of the area Assistant Chief. A meeting was held where it was agreed that the Plaintiffs would occupy only a limited portion of the land (the homestead) pending a resolution with the vendor's family. Despite this conditional tolerance, the Plaintiffs' own evidence (PW1 and PW2) confirms that they expanded their occupation to include the construction of a permanent four-bedroom house and the utilization of the entire 0.84-hectare parcel for farming and livestock.
60. Furthermore, the Plaintiffs admitted to burying the deceased, Benson Mugweru Muchiri, on the land on **9 June 2020**. The Defendants have demonstrated through a letter dated **6 June 2020** addressed to the OCS Rongai and the area Chief, as well as the filing of an urgent application for an injunction, that they expressly withheld consent for this burial.

The act of interring remains on land against the express wishes of the registered owner is a profound and permanent interference with possessory rights.

61. The Plaintiffs' contention that they only received the court order restraining the burial four to five days after it occurred does not mitigate the fact of trespass. Trespass is a tort of strict liability; the lack of a formal court order at the exact hour of the burial does not grant a party the right to utilize another person's private land for a cemetery without the owner's consent.

62. Additionally, the evidence shows that as recently as **31 January 2022**, the Plaintiffs began ploughing a larger portion of the property in an attempt to expand their claim during the pendency of this suit. This conduct, occurring while the legal rights to the land were *sub judice*, further reinforces the finding of a continuous and willful trespass.

63. It is the finding of this Court that once the "permissive" nature of the stay (as agreed before the Chief in 2010) was exceeded by the Plaintiffs' expansion of farming and the unauthorized burial, the Plaintiffs became trespassers *ab initio* or, at the very least, trespassers from the moment they asserted a hostile claim over the entire parcel.

64. The Plaintiffs' continued occupation, the construction of permanent structures, the expansion of agricultural activities, and the unauthorized burial of the deceased on **L.R. No. KAJIADO/KITENGELA/8082** constitute an actionable trespass against the Defendants' proprietary interests.

***iii. Whether the Defendants are entitled to the reliefs sought in their Counterclaim.***

65. Having found that the Plaintiffs committed an actionable trespass and failed to prove the extinguishment of the Defendants' title, the Court now evaluates the specific prayers sought in the Counterclaim.

66. The purpose of damages in trespass is compensatory. The Court of Appeal in ***Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & another [2013] KEHC 6408 (KLR)*** established the guiding principle:

***“The general principles as regards the measure of damages to be awarded in cases of trespass to land where damage has been occasioned to the land is the amount of diminution in value or the cost of reinstatement of the land, and not both. The overriding principle is to put the claimant in the position he was prior to the infliction of the harm.”***

67. In this case, the trespass was not a one-off event but a persistent occupation that culminated in the unauthorized construction of a permanent residence and the burial of remains. This has significantly diminished the Defendants' ability to use the land for their intended "holiday home" or cottage. Given the duration of the trespass and the deliberate expansion of activities during the pendency of the suit, the Court finds that an award of **Kshs. 500,000/=** is reasonable and sufficient to compensate the defendants.

68. The Defendants are the registered owners. Under **Section 24(a)** and **25** of the **Land Registration Act**, registration vests in the proprietor the absolute ownership of the land. Having established that the Plaintiffs have no legal right to remain on the land, the Court is duty-bound to protect the Defendants' proprietary rights by granting an order for vacant possession and a permanent injunction to prevent further interference.

69. The Defendants too seek the exhumation of the deceased on the grounds that the burial was a "trespassory act" conducted without consent and in defiance of their protests.

70. The Court notes that the burial of Benson Mugweru Muchiri took place on **9 June 2020**. While the Plaintiffs argue that the court order was served late, the Defendants had already

signaled their objection through formal letters to the Police and the Chief on **6 June 2020**. As the land is private property and the Plaintiffs have no title, the presence of a grave constitutes a permanent trespass.

71. To facilitate this relief, the Court must ensure compliance with the **Public Health Act (Cap. 242)**. **Section 146** of the Act provides the administrative standard for such procedures:

*“It shall be lawful for the Minister, whenever he may deem it expedient for the execution of any powers or duties conferred or imposed upon him by this Act... to order the exhumation of any body.”*

72. While the Act typically involves ministerial or public health oversight, where a burial is an act of trespass on private land, the Court has the jurisdiction to order exhumation to restore the owner to their full property rights.

***iv. Who shall bear the costs of the main suit and the Counterclaim?***

73. **Section 27(1)** of the **Civil Procedure Act (Cap. 21)** provides that costs follow the event unless the Court for good reason directs otherwise. The Defendants have successfully defended the main suit and proven their Counterclaim.

74. In *Party of Independent Candidate of Kenya & Another vs. Mutula Kilonzo & 2 Others HCEP No. 6 of 2013*, it was held:

*“It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the*

*second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”*

75. There are no extraordinary circumstances or good grounds in this case to warrant departure from the general rule. Consequently, the Plaintiffs shall bear the costs of both the main suit and the Counterclaim.

76. For the reasons set out in this judgment, the Court finds that the Plaintiffs’ claim for adverse possession is unmerited, and the Defendants’ Counterclaim for trespass is proved. Accordingly, judgment is hereby entered in favor of the Defendants against the Plaintiffs in the following terms:

- a) The Plaintiffs’ suit against the Defendants is dismissed in its entirety.*
- b) A DECLARATION be and is hereby made that the Plaintiffs committed trespass on the Defendants’ property, L.R. No. KAJIADO/KITENGELA/8082.*
- c) GENERAL DAMAGES for trespass are hereby awarded to the Defendants in the sum of Kshs. 500,000/= with interest at court rates from the date of this judgment until payment in full.*
- d) AN ORDER is hereby issued directing the Plaintiffs to forthwith, and in any event within Ninety (90) days from the date of this judgement, give to the Defendants vacant possession of L.R. No. KAJIADO/KITENGELA/8082 failing which the Defendants shall be at liberty to evict the Plaintiffs from the suit property, L.R. No.*

*KAJIADO/KITENGELA/8082, without any further reference to this court.*

- e) A PERMANENT INJUNCTION is hereby issued restraining the Plaintiffs, whether by themselves, their agents, and/or servants, from further trespassing on, or interfering with, the Defendants' property, L.R. No. KAJIADO/KITENGELA/8082.*
- f) AN ORDER is hereby issued for the exhumation of the remains of the late Benson Mugweru Muchiri, buried on 9 June 2020 in L.R. No. KAJIADO/KITENGELA/8082, for reburial at a place of the deceased's family choice within the period of ninety (90) days from the date of this judgement.*
- g) THE EXHUMATION shall be undertaken in strict compliance with Section 146 of the Public Health Act (Cap. 242) and under the supervision of the Public Health Officer, Kajiado County.*
- h) THE OFFICER COMMANDING STATION (OCS), Kajiado Police Station, is hereby directed to provide security and supervise the exhumation process to ensure the maintenance of law and order during the eviction.*
- i) COSTS of the suit and the Counterclaim are awarded to the Defendants against the Plaintiffs.*

Ordered accordingly.

Dated, Signed and Delivered Virtually this 23<sup>rd</sup> Day of April, 2026.

M.D. MWANGI

**JUDGE**

**In the virtual presence of:**

Mr. Ongeru for the Plaintiff

Mr. Ndungu Kuria for the Defendant

Court Assistant: Peninah

**M.D. MWANGI**

**JUDGE**

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