

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ELCLC NO 102 OF 2023
(CONSOLIDATED WITH NYAHURURU ELC SUIT NO. 14 OF
2022).

JOHN MBURU KINYANJUI
T/A NYAKINYUA NDORUA KANINI KEGA FARERS CO LTD
(WITH MEMBERSHIP OF 580 PERSONS)FIRST PLAINTIFF.

MARTHA WANJIKU MACHARIA
ESTHER NYAKIO MUHORO
JOSEPH MWANGI MUHIHU
(AS OFFICIALS OF NYAKINYUA NDORUA KANINI
KEGA FARMERS CO. LTD)SECOND PLAINTIFF.

-VERSUS-

DORIS NYAMBURA KARIUKIFIRST DEFENDANT.
ESTHER MWIKALI KARIUKISECOND DEFENDANT.
TERRY WANJIRU KARIUKITHIRD DEFENDANT.
(As Administrators/Personal Representatives
of the Estate of Josiah Mwangi Kariuki (Deceased)).

JUDGMENT:

The dispute herein is more than half a century old. It started more than 51 years ago. The same year the registered proprietor of the suit lands, the parcels of land known as L.R. No. 3777/115, 3777/207 and 3777/279, Josiah Mwangi Kariuki died.

There were initially 2 suits which were consolidated i.e. Nyahururu ELC. No. 378 of 2017 and Nyandarua ELC No. 102 of 2023 with the lead file being Nyandarua ELC No. 102 of 2023.

The first case, formerly Nyahururu ELC. No. 378 of 2017, was commenced on 13/12/2002 by way of a Plaint filed by Wanjiru Ngechu T/A Nyakinyua Ndorua Kanini Kega Farmers Company against the Defendants herein Doris Nyambura Kariuki, Esther Mwikali Kariuki and Terry Wanjiku Kariuki. It was filed against the 3 as the legal Representatives of the Estate of the late Josiah Mwangi Kariuki. The Plaint is dated 18/7/2002. The same was first filed at Nakuru in High Court Civil Suit No. 279 of 2002. The prayers sought therein were:

- (a) A Declaration that the Plaintiff is the owner and/or entitled to all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279 as gift *inter vivos*.
- (b) In the alternative, a declaration that the Plaintiff is the owner of all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279 by adverse possession.
- (c) Costs of the suit.

The Plaint was then amended on 3/12/2022 which amended Plaint now substituted Wanjiku Ngechu with John Mburu Kinyanjui T/A Nyakinyua Ndorua Kanini Kega Farmers Company (with a

membership of 580 persons). Prayer Numbers (a) and (b) now read as follows:

- (a) A Declaration that the Plaintiff and all its 580 members are the owners and/or entitled to all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279 as gift *inter vivos*.
- (b) In the alternative, a Declaration that the Plaintiffs and all its 580 members are the owners of all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279 by adverse possession.

In the Plaint, the Plaintiff is described as a female adult (even after the amendment that brought John Mburu Kariuki on board in place of Wanjiku Ngechu) of sound mind bringing the action for and on behalf of Nyakinyua Ndorua Kanini Kega Farmers Company Limited with a membership of 580 persons, a partnership trading in the name and style aforementioned.

On 2/11/2023, following a chamber summons Application filed on behalf of Martha Wanjiku Macharia on 1/3/2023, Martha Wanjiku Macharia, Esther Nyakio Muhoro and Joseph Mwangi were added as the 2nd Plaintiff in the suit.

There was still a further Amended Plaintiff by the firm of Wangechi Wangari & Associates Advocates amended on 24/7/2022 with the following amendments in the Title:

~~“WANJIKU NGECHU
T/A NYAKINYUA NDORUA KANINI KEGA FARERS CO LTD~~
JOHN MBURU KINYANJUI
T/A NYAKINYUA NDORUA KANINI KEGA FARERS CO LTD
(WITH MEMBERSHIP OF 580 PERSONS) 1ST PLAINTIFF

MARTHA WANJIKU MACHARIA
ESTHER NYAKIO MUHORO
JOSEPH MWANGI MUHIHU
(AS OFFICIALS OF NYAKINYUA NDORUA KANINI
KEGA FARMERS CO. LTD) 2ND PLAINTIFF

-VERSUS-

DORIS NYAMBURA KARIUKI 1ST DEFENDANT
ESTHER MWIKALI KARIUKI 2ND DEFENDANT
TERRY WANJIRU KARIUKI3RD DEFENDANT
(AS ADMINISTRATORS/PERSONAL REPRESENTATIVES OF THE
ESTATE OF JOSIAH MWANGI KARIUKI (DECEASED))”

The same also has the following additional amendments in the body of the Plaintiff:

1. 1(a). The 2nd Plaintiff are the current officials of NYAKINYUA NDORUA KANINI KEGA FARMERS CO LTD a registered group of 580 members who are all residents of Riverside Farms Ol Kalou NO. 3777/115. 204 AND 203 whose address for service for the

purposes of this suit shall be care of C/O WANGECHI WANGARE & ASSOCIATES ADVOCATES, MAHINDA BUILDING, 1ST FLOOR, P.O. BOX 742-20300 NYAHURURU.

6.The Plaintiff and all the 580 members have been in uninterrupted occupation of the said land from 1973 to date and claims adverse possession. Further and/or in the alternative the Plaintiff claims that he and all the other members have acquired prescriptive rights over these parcels of land.

6.Despite the fact that the gift inter-vivos was not perfected during the lifetime of the late Josiah Mwangi Kariuki, the Plaintiffs have remained in possession, occupation and use of the said parcel of land without any interruption from the administrators to date.

The Plaintiffs finally added the following prayers:

c. A declaration that the Plaintiffs have acquired Title Deed over 300 Acres out of Riverside Farms Ol-Klaou No. 3777/115. 204 and 203 comprised by measurement of 800 Acres or thereabouts by way of adverse possession.

d. an order that 300 acres out of Riverside Farms Ol-Kalou No. 3777/115. 204 and 203 should forthwith be registered in the name of the Plaintiffs and the Defendant be ordered to execute all the necessary Transfer forms in the Plaintiff's favour and in default, the Deputy Registrar be authorized to sign the same.

e. An order that, Nyandarua County Land Registrar should dispense with the production of the original Title Deed for Riverside Farms Ol- Kalou No. 3777/115 204 and 203 while transferring the land to the Plaintiffs.

The Plaintiffs claim that in or around 1973, the late Josiah Mwangi Kariuki who was the registered owner of all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279 agreed to give to the Plaintiffs, Nyakinyua Ndorua Kanini Kega Farmers Company the above-mentioned parcels of land as a gift *inter vivos* and in addition and in consideration of their paying the loans owing to the Settlement Fund Trustees and to Agricultural Finance Corporation on the security of the said parcels of land. In furtherance of this, the Deceased together with the Plaintiffs made the requisite Application for consent to the Nyandarua North Land Control Board and on 22/5/1973 the said Board granted its consent. According to the Plaintiff, the Deceased wrote to the Director of Settlement on 9/5/1973 indicating that he had given the 580 members of the Plaintiff the suit parcels of land who have allegedly been in uninterrupted occupation of the land since 1973 to date. They therefore claim ownership by virtue of adverse possession and in the alternative, they claim they have acquired ownership by prescriptive rights over the parcels of land. They also admitted that there was Nakuru High Court Civil Suit No. 219 of 1989 over the same subject matter.

The 1st Defendant filed her Defence dated 13/5/2023 through the firm of Ogado & Co. Advocates and averred that she was a stranger to the alleged membership of 580 members. She also denied that the

late Josiah Mwangi Kariuki had given the Plaintiffs by way of a gift all the parcels of land referred to and known as Land Reference Nos. 3777/ 115, 3777/207 and 3777/279 and further denied that the Plaintiffs ever paid any sums of money due and owing to Settlement Trust Fund and/or Agricultural Finance Corporation. She equally averred that the Plaintiffs having been registered as a Business Name she does not enjoy the benefit of perpetual succession as a limited liability company nor does she have the capacity to have a membership of 580 persons at all. She denied that the alleged 580 members were in possession of the suit lands since 1973 or at all. And in the alternative, whoever was on the land was there with the consent or license of the Administrators of the Estate of Josiah Mwangi Kariuki and no prescriptive rights could have accrued over the suit property. She was also of the considered view that the suit was *Res judicata* as the dispute between the parties in this case or any other person claiming a right under them was determined by the Nakuru High Court in HCCC No. 114 of 1982 (OS) and the Court of Appeal in Nakuru Civil Appeal No. 107 of 1987. The suit property was still a subject of yet another suit in the High Court, Nakuru HCCC No. 219 of 1989 where Judgment was delivered on the 24/1/1995 and that the Plaintiff and her members, if any, are in contempt of court for disobeying and/or failing to honour/ comply with the eviction

orders issued by the High Court in Civil Case No. 291 of 1989 dated 2/7/1997 and have never been in possession with force or treat or use of force against the Administrators and/or the beneficiaries of the Estate of Josiah Mwangi Kariuki.

In the Statement of Defence by the 3rd Defendant dated 27/7/2009 and amended on 27/2/2023 with a counterclaim being preferred, the said Defendant denied the contents of the Plaintiff and even averred that the suit is *Res judicata* in view of Nakuru H.C.C.C. (O.S.) No. 114 of 1982, Nakuru H.C.C.C.(O.S.) No. 219 of 1989 and Civil Appeal No. 107 of 1987, Nakuru and that therefore this Court lacked jurisdiction to try the matter it is seized of. She averred that John Mburu Kinyanjui had no authority nor capacity to institute the suit for and on behalf of Nyakinyua Ndorua Kanini Kega Farmers Company and/or her members. And that the 2nd Defendant had already died and the suit against her abated. She denied that the said 580 squatters lived on the suit land save a few who lived on a small portion of the land and who were not members of Nyakinyua Ndorua Kanini Kega Farmers Company. She further said that the larger portion of the land is under the control of the beneficiaries of the late J.M. Kariuki which has been distributed in accordance with the confirmed Grant in Nairobi High Court Succession Cause No. 26 of 1985. She claimed that the squatters only occupied a quarter Acre each. In the counter-

claim, the 3rd Defendant said that there was already a Grant from the Court confirming the suit land to belong to the beneficiaries of the Deceased and that the 1st Plaintiff, John Mburu Kinyanjui has been trying to mobilize area residents to take over the entire parcels of land even the portions being occupied by the beneficiaries of the Estate of J.M. Kariuki in violation of the rights of the said beneficiaries. She prayed for the following orders from the Court:

(a) A permanent injunction restraining the Plaintiff by himself and/or the alleged Nyakinyua Ndorua Kanini Kega Farmers Company and its 580 members by themselves, their agents and servants, employees, or anyone authorized by them and acting on their behalf from trespassing (on portions not occupied by the squatters), transferring, intermeddling, advertising for sale, disposing of, letting, leasing, developing or interfering and/or dealing with all that parcel of land known as L.R. Nos. 3777/115, 3777/204 and 3777/279 in any manner whatsoever.

(b) Costs of this suit and of the counter-claim.

The second Suit against Doris Nyambura Kariuki, Terry Wanjiku Kariuki and Mark Kariuki Mwangi through the firm of Wangechi Wangare & Associates Advocates was filed by way of an Originating

Summons dated 21/7/2022 formerly as ELCOS No. E014 of 2022 for a determination of the following issues:

- (a) Whether the Plaintiff has acquired Title Deed over a portion of 300 Acres out of Riverside Farms Ol Kalou L.R. No. 3777/115, 3777/204 and 3777/279 by adverse possession.
- (b) Whether a portion of 300 Acres out of Riverside Farms Ol Kalou L.R. No. 3777/115, 3777/204 and 3777/279 should forthwith be registered in the name of Nyakinyua Ndorua Kanini Kega Farmers Company and the Defendant be ordered to execute all the necessary Transfer forms in the Plaintiff's favour and in default, the Deputy Registrar be authorized to sign the same.
- (c) Whether the County Land Registrar, Nyandarua should dispense with the production of the original Title Deed for Riverside Farms Ol Kalou L.R. No. 3777/115, 3777/204 and 3777/279 while transferring the land to the Plaintiff.
- (d) Who should pay the costs of this suit.

The suit is supported by the Affidavit of one Martha Wanjiku Macharia, the chairperson of the Plaintiff group sworn on even date which the deponent explained was in support of the main prayers in the Originating Summons as well as the Interim orders of injunction. The Deponent rightly said that the Plaintiff is registered under the

Registration of Business Names Act with the Certificate of Registration issued on 18/9/1972. She went on to say that the late Josiah Mwangi Kariuki, the registered owner of the parcels of land known and described as RIVERSIDE FARMS OL KALOU L.R. NO. 3777/115, 3777/204 and 3777/279, agreed to gift the Plaintiffs the land on condition that the Plaintiffs would settle the Settlement Fund Trustees and Agricultural Finance Corporation's outstanding loans and an Application for consent of the Land Control Board dated 31/1/1973 was filled and signed. The deponent attached copies of Application for and a purported letter of consent from the Land Control Board, Nyandarua North, a letter confirming payment of the loan to A.F.C. and a Receipt for payment of Stamp Duty, Rent, Conveyance fee amounting to Kshs. 754,400/=, their one-way correspondences to Presidents Moi, Kibaki and Uhuru Kenyatta respectively seeking the latters' interventions to mediate over this issue.

The deponent further attached a copy of an internal Memo dated 5/6/2017 from the National Land Commission County Coordinator, Nyandarua which recommended that:

“.....the Government buys the suit land from the J.M. family through the SFT and resettle the 'squatters' on the ground.....”.

She also said that,

“.....the Respondents continue to invade, encroach and/or trespass upon the suit parcel of land thereby disturbing our rights to quiet and peaceful possession, occupation and use of private land.....”

She also quoted from J. M Kariuki's Book, *J.M. SPEAKS HIS MIND* where the late J.M. Kariuki is said to have given them the land. She further admits in a press release that for the last 30 years, the late MP's kin had tried to evict them from the land.

When, as shown under paragraphs 16 and 17 of the Affidavit of Martha Macharia respectively, J.M. Waiganjo & Co. Advocates for the Respondents wrote to the Plaintiffs advising the latter that the family was willing to give them part of the land and asked them to register, the Plaintiffs wrote back on 22/3/2022 through Wangechi Wangare & Associates Advocates complaining that the J.M. family had been interfering with their peaceful occupation of the land. The succeeding paragraph contradicts this by stating that the Plaintiffs have been in continuous, uninterrupted occupation of the suit land from the year 1973 and have thus acquired Title by Adverse possession. And finally, paragraph 19 repeats what is deponed to under paragraphs 16 and 17 of the said Affidavit viz. a plea that the

Respondents be restrained from further interference of the suit property.

In the Supplementary Affidavit of Martha Macharia sworn on 26/7/2023 in response to the Replying Affidavit of John Mburu Kinyanjui, “on behalf of the entire group of 580 members of the group”, Martha said that whereas she represented the interests of the 580 members, Kinyanjui only represented his own interests and that the said Kinyanjui had already sold his plot in the land and has therefore nothing to gain or lose in the suit. She further deponed that this is an exclusive women group and that Kinyanjui cannot therefore be a member of the group since he is not a woman.

The above depositions are repeated in the witness statement of Martha Wanjiku Macharia of the same date in the Affidavit in support of the Motion as well as the said Notice of Motion Application word for word.

Before the Suit was heard, the 2nd Defendant, Esther Mwikali had passed on on 4/4/2021 and was substituted with Mark Kariuki Mwangi who also died on 11/6/2024 and before the case was heard, predeceasing the 3rd Defendant, Terry Wanjiru Kariuki who died on 30/10/2025. The last 2 were substituted with Anne Marie Wanjiku and Jane Wangari Kariuki respectively on 27/2/2026 vide Application dated 25/2/2026.

When the Hearing of the suit commenced, Mike Njoroge Ndung'u was the 1st Witness for the Plaintiffs, taking the place of and substituting John Mburu Kinyanjui who had recorded a statement dated 17/12/2021. Kinyanjui had just passed on before the Hearing of the case in October 2025. Ndung'u took to the witness box on 27/2/2026 and adopted his statement of 11/10/2024. He testified that he had resided on the suit land since 1973 on a ¼ Acre Plot. He said that he was testifying on behalf of 580 people who were in 5 groups and who used to dance for the late Honourable J.M. Kariuki since 1972. The groups came from Shamata, Leshau, Ol jororok and Ndunduri. He said that the group called itself Nyakinyua Ndorua Kanini Kega Farmers Company with a membership of 350 and was purely an outfit for the elderly Kikuyu women. The number had risen to 580 because of the descendants of the original members who were cultural and traditional dancers. His mother, Lucia Wambui Nderitu was a member on whose account he came to the land in January 1973. He added that in total, 300 people had settled on the land. M. George Wainaina was the Group secretary because he was literate, unlike the other officials of the Group. He went on to say that in May 1973, the late Kariuki wrote to the District Commissioner, Nyandarua applying for consent of the Land Control Board. On 22/5/1973. The consent was deliberated on by the Board and passed.

The members were given a go ahead to pay the outstanding A.F.C. loan which had an accrued interest of Kshs. 78,000/= and which they had paid in full by 1975. The DC granted the consent and a letter was written to the A.F.C. and the S.F.T. offices in Nairobi. On 15/6/1983, the members were given a Title Deed by the Lands office. This was before the land was sub-divided. The parcels were now 4336/18, 6634 /29 and 676/730. All totaling to 808 Acres. Before they brought the surveyor to the land to sub-divide it, the J.M. Kariuki family told them to vacate. He said that they got into the land in 1973 while others even got into the land earlier in 1972 and they are all there to date. He said they got into the land when J.M. Kariuki was still alive and who never evicted them from the land. He said each of them was on a $\frac{1}{4}$ Acre. And the gift *inter vivos* given to them was unconditional. But the same was not in writing. He then produced the following documents: -

- i Certificate of Registration in respect of Nyakinyua Ndorua Kanini Kega Farmers Company dated 8/9/1972.
- ii. Copy of Application for Consent of the Land Control Board.
- iii. Consent of the Land Control Board dated 25th May, 1973.
- iv. Copy of letter dated 17/7/1981 from Agricultural Finance Corporation.

- v. Copy of an undated letter by Nyakinyua Ndorua Kanini Kega Farmers Company to President Moi.
- vi. Copy of receipt dated 29/6/2009 from Department of Lands.
- vii. Copy of the Certificate of Confirmation of Grant for the Estate of Josiah Mwangi Kariuki.
- viii. Letter dated 24/2/2005 from the then area Member of Parliament to President Kibaki.
- ix. Letter dated 12/2/2016 from Nyakinyua Ndorua Kanini Kega Farmers Company to President Uhuru Kenyatta.
- x. Copy of internal memo dated 5/6/2017 from the County Coordinator, N.L.C, Nyandarua.
- xi. Copy of blank Certificate for ownership of unidentified plots from Riverside Commercial Agents.
- xii. Extract of a Book titled " J.M. Kariuki speaks his mind".
- xiii. Copies of letters dated 6/3/2018 and 17/3/2022 from J.M. Waiganjo & Co. Advocates addressed to Muthoni Ndung'u & Co. Advocates and Wangechi Wangari & Associates Advocates respectively.
- xiv. Letter dated 22/3/2022 from Wangechi Wangari & Associates Advocates to J.M. Waiganjo & Co. Advocates.

After adducing his evidence in chief, the witness was then cross-examined by Mr. Chege. He said he could not tell who the people to be given 70 Acres in the certificate of confirmation of the Estate of Josiah Mwangi Kariuki were. He further said that Nyakinyua Ndorua

Kanini Kega Farmers Company was an exclusively women's group but that the women brought their children on board who should therefore be given land as well since they were members of the Group. He was categorical that the initial Nyakinyua group comprised of 350 women. He said they were demanding the entire 808 Acres. He said that he himself was on a $\frac{3}{4}$ Acre plot. But that he could not tell what acreage the others were on and that they were not allowed to use the other 600 Acres part of which was even leased out to a "white man". He said that he could not tell whether the entire acreage they occupied was 200 Acres because the land has never been surveyed. In answer to a Question from Mr. Gakuhi Chege, the witness described himself as a Director of Nyakinyua Ndorua Kanini Kega Farmers Company but that he did not have any document to prove this. He further said that the "company" was incorporated to enable them sub-divide the suit land. He then admitted that the original members of the Group were all dead. He said they have never filed the annual returns of the Group which he attributed to the case in Court.

On cross-examination by Mr. Ogado for the 1st and 2nd Defendants, Mr. Ndung'u said that he did not have any authority to represent the other members in Court nor anything to show that he was or is a member of Nyakinyua Ndorua Kanini Kega Farmers Company. He

also did not have the list of the members which he said he had left at home. He equally admitted he did not have the list or any document to show the additional members. He said that the phrase, “Nyakinyua” refers to special women and that not every Kikuyu woman qualifies to be called a Nyakinyua. He admitted that the certificate of registration of Nyakinyua Ndorua Kanini Kega Farmers Company dated 8/9/1972 is under the Registration of Business Names. But he still insisted the Group was a company. He gave the names of the proprietors of the Group all of whom he said were dead as Wangechi Kihoto, Wanjiru Ngechu, Wangui Kirugumi, Wanjiru Mwangi, Wanjiru Wainaina, Wanja Mathenge, Kagure Maina, Wangui Kahura, Wangari Muranga and Nyaching’a Tiri, 10 in number. He said these were the members on the ground. ALL WERE DEAD. He said he was not able to produce in Court the Application for consent to the Land Control Board. He admitted he or any of them did not have a letter from J. M. Kariuki authorizing them to pay the outstanding loan to A.F.C. He did not know how much was the loan because he was not a member then and that he was only told by word of mouth that there was a loan. He further said the loan was paid by those who were members at the time of making the payments. He didn’t have any receipt to show payment nor clearance letter. The witness admitted that the undated Judgment in Nakuru HCCC No. 114 of

1982 between Nyakinyua Ndorua Kanini Kega Farmers Company on one part against the Defendants herein that had declared **3777/115, 37777/207 and 3777/279 the property of Nyakinyua Ndorua Kanini Kega Farmers Company courtesy of a gift from J.M. Kariuki** had been overturned by the Court of Appeal in Nakuru Court of Appeal Case No. 107 of 1987 on 28/9/1988, Nyarangi, Gachuhi, Apaloo JJA. in the following words in verbatim:

“There was no administrator appointed to represent the Estate of Josiah Mwangi Kariuki. The Estate was not represented during the material proceedings - there was no Defendant in law to the originating summons filed in Court on 10th August, 1982. The proceedings are a nullity and the Judgment of Masime J. in Miscellaneous Civil Case No. 114 of 1982 undated is void and is accordingly set aside. Costs thrown away to the Respondent.”

In yet another case viz. Nakuru HCCC. No. 219 of 1989 between the same parties **the gift of the 3 parcels of land was declared as incomplete and was therefore unenforceable in law.** This (Plaintiffs’) case was equally dismissed on 24/1/1997. The witness said that the Appeal against that Judgment whose number he did not

give was still pending in Court but that there was an order of stay of execution given in 2007 allowing them to remain on the land.

When answering Questions from Mr. Waiganjo for the 3rd Defendant, Mr. Ndung'u said he was on the parcel of land L. R. No. 3777/279 and with the permission of J.M. Kariuki and so was the case with all the other claimants. He said he had not seen any of the Title Deeds and could therefore not tell who the registered owner of the same was.

When shown a copy of the Title Deed, he read that Entry No. 7 was a transfer to J.M. Kariuki for Kshs. 140,000/= and Entry No. 10 a vesting order- Trustees of the Plaintiff. Entry No. 13 was a Court order in Nakuru HCC Civil Suit No. 219 of 1989 dated 2/7/1997. He said that he did not bring the inventory of the members to Court nor the list of the 580 members. He said the dispute before the Court was over the parcels of land Numbers 3777/115, 3777/207 and 3777/279.

PW2, Martha Wanjiku Macharia was the second to testify. She introduced herself as the chairlady of Nyakinyua Ndorua Kanini Kega Farmers Company which had 5 groups. She belonged to Ol Kalou group. She adopted her witness statement dated 21/7/2022. She was quick to say that Nyakinyua Ndorua Kanini Kega Farmers Company did not have men as members save Ndeithi wa Kinyua from Ol jororok and Mwangi wa Muhihu who used to accompany the women

as the latter went to dance for J.M. Kariuki. She pointed out that Wangechi wa Kihoro was their leader, deputized by Wangari Muiga. Their secretary was Wanjiru Ngechu. But there were several leaders of the sub-groups. She explained that the late J.M. Kariuki took the group to Ol jororok Land Control Board and they were given the land by the Deceased. But unfortunately, on the eve of the day they were to go back to the Board, they heard that J.M. Kariuki had disappeared and therefore they did not obtain the Land Control Board consent since the registered owner was never seen again alive to apply for the consent. Although the witness said they were told to pay the loan attached to the land, they were not told how much it was. She then produced the Documents vide list of documents dated 21/7/2022 save the Internal Memo which was objected to by the Defendant's counsel. She said there had been several cases in Court and also various attempts by the J.M. Kariuki's family to evict them from the land, particularly during cultivation time. The documents are as follows:

1. Certificate of Registration of NYAKINYUA NDORUA KANINI KEGA FARMERS CO. LTD (Certificate No. 53616) issued by the Registrar of Business names on 8th September, 1972.
2. Letter of Consent of the Land Control Board – North Nyandarua Land Control Board issued on 25th May, 1973 in respect of land parcel Numbers 3777/115, 3777/207,

3777/279 (I.R No 4336/18, 6634/27and 676730/11) for the transfer of the above parcels of land from the late HON J.M KARIUKI to M/S NYAKINYUA NDORUA KANINI KEGA FARMERS CO. LTD as a gift, absolutely, subject to the Donee/Transferee clearing all the A.F.C (Agricultural Finance Corporations) loans and/or mortgages over these parcels of land.

3. A copy of Title Deed in respect of L.R. No. 3777/207.

She told the Court that the acreage of the land is 808 Acres but that they stayed on 306 Acres. Showing the Court a photograph they took with J.M. Kariuki as proof that they were Nyakinyua women, Martha told the Court that the group was exclusively women. She said that she would not want to go against the wishes of Doris, the 1st Defendant. Whatever she gave them, they would be content. She said that only the women who used to dance for J.M. Kariuki should be given a place to stay since that was what he promised and this was also his wish. Not every Tom, Dick and Harry. She added that besides, only 2 men were in the group. She further added that they were not after the whole land. They also wanted a place for a Nursery school and a police station/post.

In answer to Questions in cross-examination from Mr. Waiganjo, Martha said that the women had also been involved in the Succession Cause of the Estate of J.M. Kariuki where they even hired a lawyer by the name Igembe to represent them and file an

Objection. But the lawyer was not allowed to represent them for want of a practicing Certificate. She said she has put up a modern house on the suit land and 4 other people have put up similar houses but there were another 300 temporary houses most of which had fallen down. He said that although PW1 has also put up a house on the land, he is not a Nyakinyua and that there were 350 Nyakinyua women recognised by J.M. Kariuki. She told the Court that by the time J.M. Kariuki died he had not transferred the land to them and she blamed their woes to the pre-mature death of J.M. Kariuki. PW2 said the land had been transferred to them by J.M. Kariuki. She further emphasized that they were all on the land with the express permission of J.M. Kariuki. She lamented that members of the J.M. Kariuki family had burned down their houses on the suit land. She denied that the Group had a Director. She distanced her group that came to Court by way of an Originating Summons from that of Njoroge that moved the Court by way of a Plaint. This is because her group is exclusively women. She also told the Court that her name was not registered as a member of Nyakinyua Ndorua Kanini Kega Farmers Company because the other members did not like her. She said that she did not bring to the Court the list of the members of the Group.

On cross-examination by Mr. Ogada for the 1st and 2nd Defendants, Ms. Macharia said there was only one Nyakinyua Ndorua Kanini Kega Farmers Company and which had filed several cases in Nakuru High Court. She said that when they appeared at the Land Control Board, they told the latter that they wanted to grow wheat on 100 Acres of the suit land and that they had money for that purpose. She said she could not recall when she was elected but having been elected chair of the group, she was to remain at the helm till death. She admitted that they lost the case at Nakuru High Court. She did admit that they each stayed on a $\frac{1}{4}$ Acre plot. She said the group of Nyakinyua Ndorua Kanini Kega Farmers Company belonged to her camp and not that of PW1. She explained that John Mburu Kinyanjui who swore the Affidavit verifying the Amended Plaintiff was son to one of the original Nyakinyua women, Wangari Kinyanjui, who was not one of the 10 registered proprietors of the group. She finally said that of the kinsmen of the proprietors of the group only Wangechi Kihoro's son, James Maina David and 2 grandchildren of Nyachinga Tiri, Simon Maina Njenga and Francis Njenga Kahiga were in Court.

On re-examination from Ms. Wangechi, the witness said they were quite a number whose names were not included in the certificate of registration of Nyakinyua Ndorua Kanini Kega Farmers Company. She

finally said she was the undisputed leader of the Group and that nobody had any objection to her leadership.

This marked the close of the Plaintiffs' case paving way for the Defendants' case.

Doris Nyambura Kariuki, the eldest and the only surviving widow of the late J.M. Kariuki took to the witness box on behalf of herself and that of the other Defendants. She referred to the Defence dated 13/5/2023 in ELC Case No. 378 of 2017 and the Objection she filed dated 21/10/2022 in ELC. case No. 14 of 2022. She also referred to the Defence filed on 6/10/2010 by the Second Defendant in ELC case No. 378 of 2017 and a witness statement of the said Defendant dated 4/4/2022. She referred herself as a joint Administratrix of the Estate of the late J.M. Kariuki. Ms. Doris Kariuki admitted that her late husband, J.M. Kariuki had initiated the process of giving 350 members of Nyakinyua land but died before the same could be actualized. The invaders stayed on part of plot No. 3777/207 which measures approximately 748 Acres. J.M. Kariuki's family is exclusively on 3777/115 measuring approximately 10 Acres and on the other side of the river is plot No. 3777/279 measuring 50 Acres or thereabout where J.M.'s. family also lives. She said that the JM's family is not willing to give the Plaintiffs land although she herself was willing to give the 350 Nyakinyua members $\frac{1}{4}$ of an Acre each so

that they could settle the matter out of Court but they declined and insisted on filing in Court multiples of suits and even chased the family members away from their (the family's) land. She said that surprisingly, whereas it is 350 women who were promised land, the claimants are now men.

On cross-examination by Mr. Karanja Mbugua, Doris Kariuki repeated that the land that was promised by the Deceased was only promised to women but not to men. And that it is the J.M's family that occupies a bigger part of plot Number 3777/207 whereas the invaders have occupied a small portion thereof. She denied any knowledge of payment of any loan to A.F.C. by the Plaintiffs and that part of the loan is still outstanding. There were only 2 men, Mwangi wa Muhihu and Ndeithi wa Kinyua in the group. She admitted that the people entered the land from different places in 1972 and have been evicted severally in the past but would later come back to the land. Doris admitted that sometime in 2009 in the Succession Cause Number 26 of 1985 some members of the J.M. family had agreed to give the squatters 70 Acres but that she was not a party to nor involved in the proposal yet she was and still is an Administratrix of the Estate. This was with a view to ending the feud. But although this was included in the certificate of confirmation of the Grant it didn't state the names of the beneficiaries of the 70 Acres. But this

entitlement has also been contested by some family members. Ms. Kariuki bemoaned that she cannot keep pleading with the Plaintiffs to take what she is giving them. To add salt to injury, there are some of the invaders who had shamelessly started selling part of the land yet the family has never given anybody any land thereby giving them the right to pass a good Title to the purchasers. When the family invited members of the Nyakinyua group to come and sign sale agreements so that they could be given land, $\frac{1}{4}$ Acre each, most of them declined. She said that in her estimation, only 48 families were settled on the land. She produced a copy of an order of eviction dated 2/7/1997 but said that the claimants still came back to the land.

On cross-examination by Ms. Wangechi Wangare, Doris said that she had been very friendly to the Nyakinyua women and could even gift some with her own clothes. She said she could now not give the Plaintiffs any land on her own because it was not exclusively hers and the family had dissociated themselves from the offer when the Plaintiffs demanded more than they were given. She said the Title Deeds were all in the name of Josiah Mwangi Kariuki and that they needed the whole land because J.M's family was very big.

On further cross-examination by Mr. Chege, also for the Plaintiffs, Ms. Kariuki said that Nyakinyua Ndorua Kanini Kega Farmers Company is

a group she did not understand. The Nyakinyua women dancing for J.M. Kariuki were only 350 in number and they were not given all the 3 parcels of land. J.M. Kariuki gave them only a portion and even in the Application for the Land Control Board consent it was not indicated which parcels he was giving the Plaintiffs. And because of the loan secured by the land, consent of the Land Control Board was not and could not be lawfully obtained. She was surprised to learn in Court that her husband, J.M. Kariuki, was to attend the Land Control Board one day before he went missing. She also disputed the signature shown to her on the Application for consent of the Land Control Board as the Deceased's.

On re-examination by Mr. Ogado for the 1st and 2nd Defendants, Ms. Kariuki told the Court that the Land Control Board refused to give consent to transfer the land to the late J.M. Kariuki with one of the reasons being that it was not indicated the acreage the Nyakinyua were to get. She said the ¼ Acre she wanted to give to the genuine Nyakinyua women was her wish but not that of the entire family or other beneficiaries. Esther Mwikali was in agreement but the other widow, Terry Wanjiru Kariuki refused. She denied knowledge of Nakuru High Court Miscellaneous Case Number 114 of 1982 as well as the Appeal therefrom, Court of Appeal Civil Case No. 107 of 1987.

Immediately after the close of the case at midday on 5/3/2026, the Court visited the locus in Quo on the same date at 2.30 pm. in the presence of the Area Chief and the Deputy Officer Commanding Ol Kalou Police Station where the Court made the following observations:

- (a) Most of the land is intact and part of it was said to be leased out. But what is discernable is that L.R. Nos. 3777/115 and 3777/279 are not occupied though the Plaintiffs did lay claim of the 2.
- (b) Those in possession of the land occupy only part of L.R. No. 3777/207.
- (c) They each occupy approximately $\frac{1}{4}$ of an Acre.
- (d) The occupiers have left plenty of land/space in between the said $\frac{1}{4}$ Acre portions.
- (e) The occupiers have taken the part that is closest to Ol Kalou town.
- (f) The houses are also sparsely and sporadically built.
- (g) Almost all the houses are non-permanent. Only very few are permanent.

The Court gave the Parties one more last chance for negotiations before it resumed on 18/3/2026 when the 2 sets of Advocates for the

Plaintiffs told the Court that they had not harmonized the 2 different sets of the members' lists.

On their part, the Defendants informed the Court through their Counsel Mr. Waiganjo that they, the Administrators, the family and beneficiaries of the Estate of the late Josiah Mwangi Kariuki had resolved to give the genuine members of Nyakinyua Ndorua Kanini Kega Farmers Company a total of 90 Acres, **MORE THAN 10 % OF THE 3 PARCELS OF LAND.** The gift was on condition that the beneficiaries will all have to move out of the portions they currently occupy and take the part the family will point out to them failure to which they should be evicted from the land. In addition, the beneficiaries will also have to meet the Surveyor's fees and any other costs attendant thereto.

Since this was only an offer and not a consent, I allowed the parties to file respective submissions which I have considered before retiring to interweave this Judgment.

To begin with, I will deal with the issue of *Res judicata*. The issue of the Plaintiffs having been given the suit land as a gift was dismissed by Lady Justice R.N. Nambuye in Nakuru High Court Civil Suit No. 219 of 1989 where the parties were the same as herein and in the same order, ranks and capacities. Her ladyship pronounced herself as follows:

“.....In conclusion, I find that in this case from the correspondences emanating from the late J.M. Kariuki it is evident that he had acknowledged in writing that he had given out the suit lands to the Plaintiffs as a gift but he did not create this by way of a written deed.....It is also not in dispute that the suit lands were subject to loans from A.F.C. and S.F.T. who had interest in the suit lands. As long as these loans remained outstanding and unpaid the deceased had no clear Title to pass on to the Plaintiffs by way of a gift or otherwise. He was told to clear the loans before effecting transfer. He instead made attempts to have the loan taken over by the Plaintiffs but this move did not materialize... .. The gift was subject to payment of the loans. It is on record that these loans were not paid during the life time of the Deceased by the Plaintiffs who paid only the A.F.C. loan. The S.F.T. loan was not paid. Upon the deceased’s death the duty to transfer fell on the Administrator of the Estate. There is nothing on record to show that the matter was taken up by the Plaintiffs with the administrators in order to commence payment of the loan as there was a change of

circumstances. The Plaintiffs could not move to bind the deceased when dead. Their activities could only bind him while alive. As at the time of trial it is evident that the Plaintiffs have not paid the S.F.T. loan. Unlike the A.F.C. loan the same had not been paid as at the time of the death of the deceased. The foregoing facts go to show that there was an intention to give a gift which was not possible due to the fact that these 2 parties, namely A.F.C. and S.F.T. had an interest in the suit lands to the extent of their loans to the deceased and as such the deceased did not have a clean Title to pass on to the Plaintiffs by way of a gift. Without transfer or declaration of trust by way of deed an intention to give a gift is void for all purposes and is not enforceable in law.the property subject of a void gift forms part of the Estate.....In this case the intended gift from the deceased to the Plaintiffs was incomplete and is not enforceable in law and as such the property in question forms part of the Estate.....In the premises the suit filed herein is dismissed with costs to the Defendants.....”

I could not agree with her ladyship more.

Although the Plaintiffs claimed to have appealed against this Judgment, all I have seen in the Court file is the Notice of Appeal dated 9/3/1995. Nothing more. This is not tantamount to an Appeal, let alone a successful Appeal. I fail to understand what Appeal will be filed after more than 30 years.

Does the Judgment of Lady Justice R.N. Nambuye on 24/1/1995 make the first suit (Civil Suit No. 378 of 2017, Nyahururu ELC) *Res Judicata* in as far as the claim of ownership is concerned? The issue of *Res judicata* was raised in the instant suit before Justice Musinga (as he then was) vide Preliminary Objection dated 16/7/2003 to the effect that the Suit (and the Application dated 24/4/2003) violated the mandatory provisions of Sections 6 and 7 of Chapter 21, Laws of Kenya but since the Defendants did not place before the Court the material to show the similarities between the 2 cases, on 2/2/2004 the Preliminary Objection was dismissed with costs with the following rider:

“.....if there will be sufficient material to disclose otherwise, it can be availed during the Hearing of the Plaintiff’s Application (I believe suit).....
.....”.

Since this duty was placed on me, I will address the same profoundly.

Res judicata is a matter properly to be addressed *in limine* as it does possess jurisdictional consequences because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from **Section 7** of the Civil Procedure Act, 2010;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, certain elements must be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

In ***Okiya Omtatah Okoiti & another v Attorney General and another*** Petition No. 593 of 2013 [2014] eKLR Lenaola J. (as he then was) held as follows:

“For *res judicata* to be invoked in a civil matter therefore, the issue in a current suit must have been decided by a competent court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties

under whom they or any of them claim, litigating under the same title. It therefore follows that the essence of the doctrine of res judicata is to bring an end to litigation and a party should not be vexed twice over the same cause.....”

These elements are hence summarized as follows:

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

The **Black’s law Dictionary 10th Edition** defines **“res judicata”** as

“An issue that has been definitely settled by judicial decision.....the three essentials are: -

- (1) an earlier decision on the issue,**
- (2) a final Judgment on the merits; and**
- (3) the involvement of same parties, or parties in privity with the original parties...”**

A person may not commence more than one action in respect of the same or a substantially similar causes of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

In order therefore to decide as to whether an issue in a subsequent Suit is *res judicata*, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Suit and the instant

Suit to ascertain;

- i. what issues were really determined in the previous Suit;
- ii. whether they are the same in the subsequent Suit and were covered by the Decision.
- iii. whether the parties are the same or are litigating under the same Title and that the previous Suit was determined by a court of competent jurisdiction.

In E.T vs Attorney General & Another (2012) eKLR it was held that:

“The courts must always be vigilant to guard litigants evading

the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177* the court held that,

‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated,

‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’

The rationale of the doctrine was pronounced in John Florence Maritime Services Ltd. VS Cabinet Secretary for Transport & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) where the Supreme Court of Kenya held that:

“..... the doctrine is anchored in constitutional values of certainty, finality and efficient use of precious judicial resources and time.....”

The Court quoted with approval the well-known Decision of Wigram VC in ***Henderson vs Henderson*** [1843] 3 Hare 100 at page 115 where the Court held as follows:

“.....where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon the court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.....”

Parties cannot be allowed to litigate in piecemeals or by instalments. A judgment in a previous suit acts as a bar to a subsequent suit if the same matter, parties, and title were involved. It bars not only points specifically decided but also matters that *ought* to have been brought

forward in the previous suit.

As to whether this suit is *Res Judicata* by virtue of Nakuru High Court Civil Suit No. 219 of 1989, the parties were the same as herein and in the same order and capacities with the Plaintiff being JOHN MBURU KINYANJUI T/A NYAKINYUA NDORUA KANINI KEGA FARMERS CO LTD.

Only 3 other Plaintiffs were added in the further amendment of 24/7/2022 viz. Martha Wanjiku Macharia, Esther Nyakio Muhoro and Joseph Mwangi Muhihu (as Officials of Nyakinyua Ndorua Kanini Kega Farmers Co. Ltd.). The Defendants were in both cases Doris Nyambura Kariuki, Esther Mwikali Kariuki and Terry Wanjiku Kariuki.

The parties before the Court now appeared as they were with the Defendants herein as the Defendants therein and the Plaintiffs herein as the Plaintiffs in the former. The issue in the earlier suit i.e. Nakuru High Court Civil Suit No. 219 of 1989 was whether the Court ought to issue a Declaration that the Plaintiffs were the owners of L.R. Nos.

3777/115, 3777/207 and 3777/279 being gifts from the late Josiah Mwangi Kariuki, while in the current case, the prayer is for:

“A Declaration that the Plaintiff is the owner and/or entitled to all that parcel of land known as L.R. Nos. 3777/115, 3777/207 and 3777/279”.

The issue in the Originating Summons is also ownership of L.R. Nos. 3777/115, 3777/207 and 3777/279;

- (a) Whether the Plaintiff has acquired Title Deed over a portion of 300 Acres out of Riverside Farms Ol Kalou L.R. No. 3777/115, 3777/204 and 3777/279 by adverse possession.
- (b) Whether a portion of 300 Acres out of Riverside Farms Ol Kalou L.R. No. 3777/115, 3777/204 and 3777/279 should forthwith be registered in the name of Nyakinyua Ndorua Kanini Kega Farmers Company and the Defendant be ordered to execute all the necessary Transfer forms in the Plaintiff's favour and in default, the Deputy Registrar be authorized to sign the same.

Likewise, in the first suit, Nakuru High Court Civil Suit No. 279 of 2002 which was later transferred to Nyahururu and was then given serial Number Nyahururu ELC. No. 378 of 2017 was between Wanjiru Ngechu T/A Nyakinyua Ndorua Kanini Kega Farmers Company

against Doris Nyambura Kariuki, Esther Mwikali Kariuki and Terry Wanjiku Kariuki on 13/12/2002 and the first prayer is for:

- a. A Declaration that the Plaintiff is the owner and/or entitled to all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279.

Under section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya particularly explanation No. (4);

“Any matter which might and ought to have been made ground of Defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

All the cases herein are on the Question of the ownership of L.R. Nos. 3777/115, 3777/207 and 3777/279 which issue was determined in Nakuru High Court Civil Suit No. 219 of 1989 and also this issue was a matter before Nakuru HCCC No. 114 of 1982 between Nyakinyua Ndorua Kanini Kega Farmers Company on one part against the Defendants herein where the undated Judgment had declared: -

3777/115, 3777/207 and 3777/279 the property of Nyakinyua Ndorua Kanini Kega Farmers Company courtesy of a gift from J.M. Kariuki.

and which Judgment was overturned by the Court of Appeal in Nakuru Court of Appeal Case No. 107 of 1987 on 28/9/1988, as **void and accordingly set aside**. Again, the parties herein were the same.

The issue was therefore directly, substantially and fundamentally in issue in the former suits- whether L.R. Nos. 3777/115, 3777/207 and 3777/279 should be declared the property of Nyakinyua Ndorua Kanini Kega Farmers Company.

Additionally, the prayer of Adverse Possession would have perfectly fell under explanation No. (4) of Section 7 of the Civil Procedure Act;

“Any matter which might and ought to have been made ground of the former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The prayer of Adverse Possession could have been an additional and/or alternative prayer in the Plaint since it has everything to do with the ownership of the property in Question in this case.

As shown above, the former suit was between the same parties as the current ones litigating under the same Title. Save that some of the parties in the current suit have substituted some Deceased parties in the earlier suits.

Thirdly, the issue of ownership through gift was heard and finally

determined in Nakuru High Court Civil Suit No. 219 of 1989 which was seized of land matters before this Court was borne in 2012 and therefore the Courts that formerly heard and determined the issue of ownership were competent to try the earlier suit or the suit in which the issue is raised. Consequently, I find that this suit is *Res judicata* and should not have been accommodated between the 4 walls of this Court.

Assuming this Suit was not *Res judicata*, this is how I would have gone ahead to determine it with the evidence placed before me.

First of all, who is or are the Plaintiff(s) before the Court?

From the certificate of registration, Nyakinyua Ndorua Kanini Kega Farmers Company is registered under the Registration of Business Names Act (Section 14 of CAP 499 Laws of Kenya) with the Certificate of Registration issued on 18/9/1972. A business name is not a separate legal person. It is merely a trading name for an individual or partners, not a distinct legal entity. It is not a "juristic person." A business name is merely a trade name of natural persons and therefore registration of a business name does not create a legal person separate from the persons who have fronted the business name. A business name does not exist separately from its owner(s). A business name (sole proprietorship or partnership) does **not** have the legal personality or *locus standi* to own property, hold Title, buy,

or sell property in her own name. A business name or partnership cannot have more than 20 partners. Claiming that Nyakinyua Ndorua Kanini Kega Farmers Company had 580 members is legally untenable. If over 20, it must be registered as a Company or LLP. The 31/1/1973 Land Control Board Application and consent allegedly obtained on 25/5/1973 listed the group as the Transferee. Since she lacks legal personality, she cannot legally have the land transferred to her. And therefore, the Application for consent dated 31/1/1973 as well as the consent allegedly issued on 25th May, 1973 were both flawed and of no legal consequences since the land could not be legally transferred to the intended Transferee.

Correspondingly, an unincorporated body cannot sue in its own name. In the High Court Decision (Ibrahim, J. as he then was) in *Simu Vendors Association v. The Town Clerk, City Council of Nairobi & Another*, Nairobi H.C. Misc. Appl. No. 427 of 2005 [2005] eKLR the following observation appears:

“This is a case where the Applicant (Kenya Transport Association) could not in law bring any proceedings in its name. The institution of the proceedings was null and void, ab initio.....”

It is also strange and untenable in law that a business name has 580 members. A business name in Kenya, registered as a partnership or a sole proprietorship generally allows for a maximum of **20**

partners. Both sole proprietorships and partnerships are registered under the Business Names Act. A sole proprietorship is formed by only one person whereas a partnership will consist of at least two persons and a maximum of 20 persons. In any case, the membership of Nyakinyua Ndorua Kanini Kega Farmers Company is as shown in the Certificate of Registration issued on 18/9/1972. The certificate is worded:

CERTIFICATE OF REGISTRATION:

“I CERTIFY that Wangece Kihoto, Wanjiru Ngechu, Wangui Kirugumi, Wanjiru Mwangi, Wanjiru Wainaina, Wanja Mathenge, Kagure Maina, Wangui Kahura, Wangari Muranga and Nyaching’a Tiri carrying on business under the business name of Nyakinyua Ndorua Kanini Kega Farmers Company at L.R. No. 3777/115/3777/207/279, Ol Kalou Division, Nyandarua District have been duly registered under Number 53616 pursuant to and in accordance with the provisions of the Registration of Business Names Act and Rules made thereunder.”

These are only 10 members. Where did the other 580 come from? Why were their names not included? Of course, there was room for only 10 more. How do they then come in as Nyakinyua Ndorua Kanini Kega Farmers Company? In any event, the business name is not a legal person capable of being allocated land or any interest in land. The Title Deed would invariably be registered in **personal name(s)**. And if the owner dies, the business name technically ceases to exist, and the property is handled through the owner's personal estate.

Consequently, the alleged consent dated 22/5/1973 - from Nyandarua

North Land Control Board is questionable and could only be termed as phony and having been prepared for purposes of this case. On this issue, I will pose this Question:

Is it permissible that a body of no true juridical status, Nyakinyua Ndorua Kanini Kega Farmers Company, can come to Court wielding a letter of consent from Nyandarua North Land Control Board in its own name? That would defeat the recognized mode of legal reasoning. Although the frontiers of legal ingenuity, in the creation of legal personality, may not yet be completely exhausted, it takes weighty legal argument to demonstrate that the said Nyakinyua Ndorua Kanini Kega Farmers Company has validly become the beneficiary of the consent to have L.R. Nos. L.R. No. 3777/ 115/3777/207/279 transferred to her. Learned counsel for the plaintiffs, however, were, and with much respect, distinctly laconic in their submissions on the applicable law on juristic status.

The Plaintiffs do not and cannot win on this ground, and it is the Defendant's contentions that carry validity.

There is also the other issue of men being members of Nyakinyua

Ndorua Kanini Kega Farmers Company. If the men in Court are descendants of Nyakinyua, how do we identify them? Where are the letters of administration to the Estates of their respective mothers? Technically, there are no Plaintiffs in Court. We are told that the 10 are dead. We are not told when they died. It could even be before the suit was filed and the Court has not been told of any substitution done. John Mburu Kinyanjui, shown as the one trading as Nyakinyua Ndorua Kanini Kega Farers Co Ltd in the Title of the Plaint, was not even one of the 10 partners of the firm. Secondly, he died in October 2025 before the Hearing of the suit commenced. He was not substituted.

The only people I can recognize in Court are the Advocates and the Defendants. I know not how the latter are communicating with their dead clients. What is the medium of communication? If their Counsel are able to communicate with the 10 duly registered women in the name Nyakinyua Ndorua Kanini Kega Farers Co Ltd under Number 53616 pursuant to and in accordance with the provisions of the Registration of Business Names Act and Rule made thereunder, I am afraid I can neither see them nor hear them myself.

Further, whoever is on the suit land cannot fit the description given to the Plaintiffs herein. The 580 are unknown. How would the court identify them? And why do they want to remain anonymous and

nameless? Are they adults? Are they male or female? Are they of sound mind? All these Questions remain unanswered. Nowhere was there indicated who the 580 members are. The Court would have expected the names of the 580 persons to be listed at least in the first pleading i.e. the Complaint and the Originating Summons. Nothing prevented or barred the Plaintiffs from appearing and being named as Plaintiffs under the provisions of the Civil Procedure Rules.

Thereafter, they can be referred to as “& 580 others”. On this point, I am guided by Order 1 Rule 13 of the Civil Procedure Rules under the Title, **Appearance of one of several plaintiffs or defendants for others,**

(1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more Defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) **The authority shall be in writing signed by the party giving it and shall be filed in the case.**

I never came across such authorization by the 580 people mentioned as members of the Plaintiff Group which the Court has established cannot all be members of the Group, Nyakinyua Ndorua Kanini Kega Farmers Company, a partnership.

I believe this case ought to end at this point because there are no Plaintiffs before me.

Secondly, the Plaintiffs in the 2 sets of suits cannot agree on who are the rightful members of the Group or who are the rightful Plaintiffs.

Martha Wanjiku Macharia in her Supplementary Affidavit sworn on 26/7/2023 had this to say on this issue:

“I represent the interests of the 580 members. Kinyanjui (John Mburu Kinyanjui) only represents his own interests and the said Kinyanjui has already sold his plot in the land and has therefore nothing to gain or lose in the suit. This is an exclusive women group and Kinyanjui cannot therefore be a member of the group since he is not a woman.....

Nyakinyua Ndorua Kanini Kega Farmers Company did not have men as members save Ndeithi wa Kinyua from Ol jororok and Mwangi wa Muhihu who used to accompany the women as they went to dance for J.M. Kariuki. I wish to show to the Court a photograph we took with J.M. Kariuki as proof,

.....The group was exclusively women. Only the women who used to dance for J.M. Kariuki should be given a place to stay since that was what he promised and this was also his wish. Not every Tom, Dick and

Harry. Besides, only 2 men were in the group.....

.....”

This further casts doubt as to the genuineness and authenticity of the Plaintiffs.

Turning now to the issue of Adverse Possession, since the promulgation of the Constitution of Kenya, 2010, Parliament, as explained above, has enacted two statutes that expressly recognize the doctrine of adverse possession. The first is the Land Registration Act, No. 3 of 2012. Section 28 thereof provides that unless the contrary is expressed in the register, all registered land is subject to specified overriding interests. One of the overriding interests recognised by section 28(h) are “rights acquired or in the process of being acquired by virtue of any written law relating to limitation of actions or by prescription.”

The second legislation is the Land Act, No. 6 of 2012. Section 7 thereof stipulates the methods of acquisition of Title to land in Kenya. By section 7(d), it is provided that Title to land may be acquired through prescription.

It is not one of the rights, which under Article 25 cannot be limited. In appropriate circumstances therefore, the right to property may be legitimately limited in terms of Article 24 of the Constitution, so long as the requirements of that provision are satisfied.

Article 68 of the Constitution of Kenya, envisages that Parliament will revise and rationalize existing land laws by enacting legislation “to provide for any other matter necessary to give effect to the provisions” relating to land, guided by the principles of equitable access to land and security of land rights in terms of Article 60.

The Land Registration Act, 2012 reiterates the doctrine in Section 24, to the effect that the registration of a person as the proprietor of land vests in that person the absolute ownership of the land, subject to overriding interests enumerated under Section 28 of the said Act which includes;

(h) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Similarly, Section 7 (d) of the Land Act, 2012 recognizes prescription as a method of acquiring Title to land. Interestingly, the Act does not provide how this acquisition is to be realized. I believe this goes back to the [Limitation of Actions Act](#), adverse possession.

By dint of Section 38 of the Limitation of Actions Act, where a person claims to have become entitled by adverse possession to land he must apply to the Court for an order that he be registered as the new proprietor of the land in place of the registered owner. It is not automatic that once all the elements of adverse possession have

been met the possessor, without more, becomes the new owner. The elaborate procedure of moving the Court is provided for in Order 38 Rule 7 of the Civil Procedure Rules as follows;

7(1) An application under Section 38 of the [Limitation of Actions Act](#) shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.

(3) The Court shall direct on whom and in what manner

the summons shall be served.”

The registered owner or any person who may have an interest in the property the subject of the summons must be served with it.

The Limitation of Actions Act does in fact provide protection of the right to property by the Application of specific rules that ensure due process before Title can be lost to a third party.

The acquisition of land under the doctrine of adverse possession is recognized in all the civil and common law jurisdictions.

The main justification for the law of adverse possession has variously been given as the need to discourage land owners against, as it

were, sitting or sleeping on their land-related rights hence the maxim *vigilantibus non dormientibus, jura subveniunt*, an equivalent to the maxim that equity aids the vigilant. It is a Latin legal maxim meaning "the law assists the vigilant, not those who sleep on their rights". It dictates that legal remedies are time-sensitive; failing to act promptly, such as delaying a lawsuit beyond the statute of limitations, can cause a loss of rights.

The other rationale is to discourage cases where people own large tracts of land which lie fallow maybe for speculative purposes while millions of people have no land even for subsistence farming. Paper owners of land are encouraged to utilize their land or else a squatter would be prepared to make use of it, invoke the equitable Defence of laches and the law will protect him. But it is equally erroneous to think of adverse possession as a means by which the landless (squatters) acquire land.

The origins of adverse possession law can be traced to medieval England, where it developed as a practical way to establish land ownership in the absence of formal Title Deeds, with possession being the primary evidence of a claim. Over time, to address issues of lengthy and difficult-to-prove claims, and to encourage the use of unused land, statutes of limitations were introduced, requiring a claimant to possess land openly and continuously for a defined

period in order to gain ownership. The Supreme Court of India discussed the essentials of adverse possession in *Karnataka Board of Wakf V. Government of India & Others* (2004) 10 SCC 779 and stated as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his Title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile Title in denial of the Title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

In *Lewa v Mwangandi* (Civil Appeal 56 of 2014) [2015] KECA 532 (KLR)

(17 July 2015) it was held by the Court of Appeal:

“It is in the public interest and indeed in the interest of justice that an absentee landlord should not be allowed to hang the sword of Damocles over the heads of landless squatters in such times when the commodity is so scarce. Limitation of time for land claims as with claims of any other nature exist for three main reasons which are: A plaintiff with a good cause of action ought to pursue it with reasonable diligence (equity does not aid the indolent); A defendant might have lost evidence over time to disprove a stale claim; and long dormant claims have more cruelty than justice in them (Halsbury’s Laws of England, 4th Edition.) Every limitation of actions, including adverse possession, does come with certain exceptions and extensions to ensure justice and fairness as far as possible. Opening the litigation door on this principle would be akin to opening Pandora’s Box. Section 38 of the Limitation of Actions Act cannot be read in isolation. Declaring it unconstitutional in the manner suggested by the appellant in this case would not only be lacking in good

reason, but would pose the danger of exposing the entire statute and principle of limitations to challenge with undesirable effects and consequences. For instance, what will stop a litigant from challenging Defences of limitation in cases of torts and contracts as being unconstitutional for the reason that they are an impediment to his constitutional right to access justice? It may be admitted that adverse possession in its present form in Kenyan law may occasion unsavory results for land owners, but such is the position in law even within the new constitutional dispensation. The proper recourse would be for the statutes to be carefully researched and developed to cover the mischief of unscrupulous squatters in the current state of affairs.”

The Court of Appeal in *Lewa v Mwangandi* (Civil Appeal 56 of 2014) [2015] KECA 532 (KLR) (17 July 2015) held as follows:

“..... Article 40 aforesaid does not specifically state that the right to own property can be limited by any law, neither does it state that such law cannot be enacted thereby holding that the acquisition of property by adverse possession does not amount to an arbitrary deprivation of property; that such acquisition is based

on reasonable foundation that is acceptable in an open and democratic society demanding that persons with causes of action should pursue them with reasonable diligence; that it is against public interest and the Constitution to allow land, a scarce resource to lie abandoned in perpetuity; that although the Constitution protects property rights, such rights must be qualified by regulation in the use of land, which includes how long the owner of the land can abandon it without utilizing it, because the Constitution provides in Article 60(1) that land must be held, used and managed in a manner that is equitable, efficient, productive and sustainable.”

The learned Judge concluded that;

“The law of limitation therefore cannot be equated with a law which arbitrarily deprives one of his land because it protects individuals and the society at large from stale claims; prevents land from falling into disuse; facilitates conveyancing, an important component in the growth of the economy of an agrarian society like ours and prevents disturbance

or deprivation of what may have been acquired in equity and justice by long use and enjoyment”

In *J.A. Pye (Oxford Limited v Graham)* in the Chancery Division of the High Court of Justice in the United Kingdom, the Grahams claimed 25 Hectares of agricultural land belonging to J.A Pye by operation of Section 15 of the English Limitation Act, 1980, the equivalent of our Section 7(d) of the Land Act, 2012. The High Court, Neuberger, J held that since the Grahams had enjoyed factual possession of the land for more than 12 years, J.A Pye’s Title was extinguished and the Grahams were entitled to be registered as proprietors of the entire 25 hectares of land in dispute. The learned Judge while appreciating the controversy in the application of the doctrine of adverse possession and the need for reform expressed his misgivings stating that;

“A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely, and that is a proposition to which at least in general nobody could take exception. However, if as in the present case the owner of land has no immediate use for it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the

land for nothing from the owner simply because he has been permitted to remain there for 12 years. To say that in such circumstances the owner who has sat on his rights should therefore be deprived of his land appears to me to be illogical and disproportionate. Illogical because the only reason that the owner can be said to have sat on his rights is because of the existence of the 12-year limitation period in the first place; if no limitation period existed he would be entitled to claim possession whenever he actually wanted the land. Of course, one can well see the justification for saying that the owner should not be entitled to recover damages for trespass going back more than six years; that involves rather different considerations. I believe that the result is disproportionate because, particularly in a climate of increasing awareness of human rights including the right to enjoy one's own property, it does seem draconian to the owner and a windfall for the squatter that, just because the owner has taken no steps to evict a squatter for 12 years, the owner should lose 25 hectares of land to the squatter with no compensation whatsoever."

However, in some quarters the law of adverse possession has been viewed as theft of land and described in very harsh terms. No statement depicts this view with greatest disdain as the words employed by EAPNOW – End Adverse Possession Now – an organization championing the abolition of adverse possession in the United States of America. In 2011 it introduced the House Bill 1026 intended to introduce a public policy for legislative change that would lead to the reforms of the law of adverse possession. This is how the movement describes the doctrine:

“most outdated, unnecessary and unfair law. Unchanged in Washington since the 1890’s, adverse possession allows anyone to legally take land from another for free provided they meet certain requirements.....the bill would help eliminate the practice of legalized land theft known as adverse possession Washington is no longer in the wild-wild-west Adverse possession laws have already been changed in Colorado & New York, making it much harder for squatters and thieves to take land for free.....much like laws of slavery, dowry and other laws that society has found to be repugnant, the

justification for having adverse possession no longer applies today.

The Supreme Court of India recently handed down a judgment that could force a re-look at the law of adverse possession in that country in the case cited earlier, State of Haryana v Mukesh Kumar & others, Petition for Special Leave to Appeal (Civil) No.28034 of 2011 in which Bhandari, J opened his judgment WITH the following statement;

“..... People are often astonished to learn that a trespasser may take the Title of a building or land from the true owner on certain conditions and such theft is even authorized by law.....”.

In the instant consolidated cases, the suit for adverse possession was first filed on 24/7/2022. This was after several other suits between the parties herein as follows:

- (a) Nakuru High Court Civil Suit No. 114 of 1982
- (b) Nakuru Civil Appeal No. 107 of 1987.
- (c) Nakuru High Court Civil Suit No. 219 of 1989 where an order of stay of execution was granted by the Court on 26/4/1995 and another one on 2/7/1997.
- (d) Nakuru High Court Civil Suit No. 279 of 2002.

As to whether the Plaintiffs have been able to establish Adverse Possession which has been pleaded as an alternative prayer in the

first suit and as the main prayer in the latter, the issue for determination is:

“Are the Plaintiffs entitled to Title of the suit land by way of Adverse possession?”

For adverse possession to be proved, first and foremost, the Applicant must show that he did not have permissive possession of the registered owner.

As long as you obtained the land with the owner’s permission it does not matter how long you have been in possession of the land.

Possession arising from permissive entry, occupation and use by virtue of mutual understanding does not give rise to adverse possession even after the statutory period of limitation is realized.

The doctrine of adverse possession was not intended to be used by those who enter or remain on another’s land with authorization. If you enter or remain on a person’s land under mutual understanding, 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 the owner is disposed to allow you to be there. Clearly the occupier must have “adverse” as distinct from “permissive” or “consensual” possession which is inconsistent with and in denial of the Title and right of the

true owner of the land. The Court of Appeal held in the case of Waweru -vs-Richu (C.A.122 of 2001) 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 Wanje -vs-Saikwa (No.2) Civil appeal Number 72 of 1982 [1984] KLR Justice Chesoni said 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.”

On this issue, all the witnesses that testified in this case were in agreement that the people in occupation of the suit land entered on the same with the permission of the proprietor of the said land, the late Josiah Mwangi Kariuki. PW1 Mike Njoroge Ndung'u said:

“.....in May 1973 the late Kariuki wrote to the District Commissioner, Nyandarua applying for consent of the Land Control Board. On 22/5/1973, the consent was deliberated on by the Board and passed. The members were given a go ahead to pay the outstanding A.F.C. loan which had an interest of Kshs. 78,000/=. The DC allowed it and a letter was written to the A.F.C. and the S.F.T. office in Nairobi.....”

Further, on cross-examination by Mr. Ogado for the 1st and 2nd Defendants, PW1 Mr. Ndung'u emphasized that:

“.....we got into the land with the permission of the owner, J.M. Kariuki.”

In further cross-examination by Mr. Waiganjo for the 3rd Defendant, Mr. Ndung'u repeated that he was on the parcel of land 3777/279 with the permission of J.M. Kariuki.

In addition, PW2, Martha Wanjiku Macharia emphasized this point of taking possession with permission. On cross-examination from Mr. Waiganjo, she said that: -

“.....we are all on the land with the express permission of J.M. Kariuki. the land was transferred to us by J.M.....”

The Plaintiffs therefore failed the test of “without permission”.

Adverse possession is also negated by the element of interruption. A person who seeks to acquire Title to land through the doctrine of adverse possession by way of occupation of the suit land for the applicable statutory period of at least 12 years must establish that he has been in occupation ***nec per vim, nec clam, nec precario***, a Latin legal term meaning 'without force, without secrecy, without permission' i.e. nonconsensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims, for the statutorily prescribed period without interruption. In the case of Mwangi ***Githu*** vs Livingstone ***Ndeete*** [1980] eKLR the court addressed the issue of interruption as follows:

“.....Time ceases to run under the Limitation of Actions Act 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. See *Cheshire’s Modern Law of Real Property*, 11th Edition at p. 894.....”

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 had 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**
- b) 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 the same vein, in **Kimani Ruchine v Swift Rutherford & Co. Ltd**

(1980) KLR it was stated that:

“The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration.....”

In the current suit, and long before either of these suits was filed, there have been several interruptions to the Plaintiffs' use of and occupation of the suit land and which the Plaintiffs themselves have confirmed. PW 2 in her Affidavit quoted from J. M's Book, *J.M. SPEAKS HIS MIND* where the late J.M. Kariuki is said to have given them the land. She further admits in a press release that for the last 30 years, the late MP's kin had tried to evict them from the land. By this admission, the Plaintiffs shot themselves in the foot. Further, PW1 Mike Njoroge Ndung'u said that before the Plaintiffs brought the surveyor to the land to sub-divide it, the J.M. family told them to vacate. The second witness testified that there had been several cases in Court and also various attempts by the J.M. Kariuki's family to always evict them from the land, particularly during cultivation time. She admitted that the people entered the land from different places in 1972 and have been evicted severally in the past but would later come back to the land. Doris also produced a copy of an order of eviction dated 2/7/1997.

Accordingly, the claim of ownership through adverse possession must fail just as that of ownership by way of a gift *inter vivos* and it so does. In fact whereas the rationale of adverse possession is to discourage cases where people own large tracts of land which lie fallow, it is quite clear as revealed by our visit to the locus in quo

that were it not for the people on the ground, the Defendants would have either leased the entire land or cultivated it themselves because whatever portion that was not occupied by the Plaintiffs, they made use of it.

The landless Plaintiffs herein should, as citizens of this country, have been considered under Part IX of the Land Act which provides for the establishment of Settlement Schemes to facilitate access to land, shelter and livelihood. The said part provides for settlement programs to provide for access to land to squatters such as the Plaintiffs and internally displaced persons to establish land settlement schemes to be applied in the provision of access to land for displaced persons and squatters. And the National Land Commission County Coordinator, Nyandarua through his internal Memo dated 5/6/2017 was right when he recommended that the Government buys the suit land from the J.M. family using the Settlement Fund and resettle the 'squatters' on the ground. This well thought idea and recommendation would have sorted out this issue once and for all. But nobody took it seriously. Not even the Plaintiffs who were to be the sole beneficiaries. This was a very good invitation from a Government officer in charge of all the settlement land in Nyandarua county. He cannot have been talking out of obliviousness. He knew what he was talking about. It is the Plaintiffs

who brought that internal memo to Court. Either someone from the office of the National Land Commission County Coordinator, Nyandarua, the National Land Commission County Coordinator himself or someone from the office leaked the same and gave it to them. But whatever the case, the memo was loaded. With a solution to the Plaintiffs' needs. But they never followed it up. This leaves me wondering whether the Plaintiffs had any other motive than the quest and thirst for land. They would certainly have got more from the Government than what they have been clinging to in someone's private land for years. I hope this offer from the Government is still subsisting.

Establishment of settlement schemes is provided for under Section 134 of the Land Act. The said Section places a legal obligation on the National Land Commission on behalf of the National and County Governments, to implement settlement programmes to provide access to land for shelter and livelihood. The settlement programmes are aimed at providing access to land to squatters, persons displaced by natural causes, development projects, conservation, internal conflicts or other such causes that may lead to movement and displacement.

Personally, I hold the view that the justification that a squatter has a right of owning private land if the paper owner "abandons" it and the

squatter occupies it for a period of 12 years needs further interrogation in order to harmonize it with Criminal Law. To begin with, it is a criminal offence under Section 3 of the Trespass Act (CAP 294 Laws of Kenya) to trespass on somebody's land,

(1) 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.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

Why should a stranger be permitted to invade private land regardless of the law of trespass, specifically Section 3 of the Trespass Act, and even after that he be rewarded with it for free after 12 years. But as things stand today, this is not the position in law. The doctrine of adverse possession is firmly anchored in law and I must apply it to the letter. But as held above, the Plaintiffs have failed to prove it in this case.

Adverse possession allows a trespasser-a person guilty of a tort, or even a crime, in the eyes of law-to gain legal Title to land which he has illegally possessed for 12 years. How 12 years of illegality can

suddenly be converted to legal Title is, logically and morally speaking, baffling.

This outmoded law essentially asks the Judiciary to place its stamp of approval upon conduct that the ordinary citizen would find reprehensible.

The protection of the right to property, guaranteeing every person's right to acquire and own property of any description, either individually or in association with others and the strict prohibition of arbitrary deprivation of property means that every property owner is entitled to the Government assurance that nobody should invade his land for whatever reason and it is unfortunate that 5 successive Governments have folded their hands while people from all over have invaded the Defendants' land and even with some shamelessly selling the land they have invaded to others in the name of looking for funds to pay "the loan" owed to Agricultural Finance Corporation but when asked to produce receipts for such payment, they had none. These people who included John Mburu Kinyanjui sold land they had allocated to themselves. How can someone disguising himself as a squatter have the guts to sell the same land he is occupying? It is unfortunate that some of the Plaintiffs seem to be opportunists who have land elsewhere but moved to the suit land so

that they could be considered as beneficiaries of land that was not completely gifted. Most of the people who are settled there are not Nyakinyua. The true Nyakinyua families are still on their old ancestral lands. The leaders of this group used the opportunity to extort money from ignorant people in the name of settling a loan and which money they could not account for. They could not even explain how much the loan was or how much they received from “their members”. Such people should face the law and I hope the County Criminal Investigations Officer will investigate the perpetrators of this extortion with a view of charging the people behind the crime.

I now turn to the last prayer by the Plaintiffs:

A Declaration that the Plaintiff is the owner and/or entitled to all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279.

Article 40 of the Constitution of Kenya, 2010 reads as follows:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a).....

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

One of the rights to be enjoyed by a land owner is to freely dispose of his land to a person of his own choice and at a price to be mutually agreed upon. A land owner cannot be forced to dispose of his land under whatever conditions save under the compulsory acquisition of land by the state subject to prompt and adequate compensation.

In the first suit, Nakuru High Court Civil Suit No. 279 of 2002 which was later transferred to Nyahururu and was then given serial Number Nyahururu ELC. No. 378 of 2017 between Wanjiru Ngechu T/A Nyakinyua Ndorua Kanini Kega Farmers Company against Doris Nyambura Kariuki, Esther Mwikali Kariuki and Terry Wanjiku Kariuki on 13/12/2002 the first prayer is for:

- b. A Declaration that the Plaintiff is the owner and/or entitled to all that parcel of land known as L.R. No. 3777/115, 3777/207 and 3777/279.

The 3 parcels of land viz: L.R. No. 3777/115, 3777/207 and 3777/279 are all registered in the name of Josiah Mwangi Kariuki. At no time were they transferred to the Plaintiffs. In fact, PW2 Martha Wanjiku Macharia admitted that:

“.....unfortunately, on the eve of the day when we were to go back to the Board, we heard that J.M. Kariuki had disappeared and therefore we did not obtain the Land Control Board consent since the registered owner was not there to apply for the consent.....”

PW1's insinuation that on 15/6/1983, the members were given a Title Deed by the Lands office before the land was sub-divided, the parcels being 4336/18, 6634 /29 and 676/730 all totaling 808 Acres is a lie because the current Title Abstracts show that the 3 parcels of land have never been sub-divided and the mother Titles are still intact. Even the Official search testifies to this fact. I do not know from where Ndung'u got this information which is deceptive, fallacious, disingenuous, dishonest, deceitful and misleading, to say the least.

Further, PW2 testified that by the time J.M. Kariuki died he had not transferred the land to them and she blamed their woes to the premature death of J.M. Kariuki. The Plaintiffs can therefore not force or coerce the Defendants to sell to them the suit lands by claiming that

they settled the loans owed to A.F.C. and S.F.T. by the registered owner.

In addition, Section 6 of the Land Control Board, CAP 302 Laws of Kenya under the sub-heading, Transactions affecting agricultural land provides that: -

- (1) Each of the following transactions, that is to say—**
- (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;**
 - (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;**
 - (c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,**
- is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.**

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

The 3 Titles, L.R. No. 3777/115, 3777/207 and 3777/279, the subject of this suit are all agricultural lands and are not exempt from the provisions of Section 6 sub-section (3) of the Land Control Act which provides that:

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles;

Or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party.

Whatever transfer that the Plaintiffs are insinuating, it cannot be a transmission since when they objected to the Succession Cause in Nairobi High Court Succession Cause Number 26 of 1985 - **Estate of Josiah Mwangi Kariuki**, the same was not granted and the Estate has since been distributed in accordingly.

Secondly, neither was the Government, settlement Fund Trustees or a local council a party to the alleged Transfer in order to qualify

under the proviso in Section 6 sub-section (3). The Plaintiffs therefore must fail on this prayer as well.

The Plaintiffs' witness PW2 said there was an outstanding loan that had not been cleared before the late Kariuki died. She said that it was unfortunate that on the eve of the day they were to go back to the Land Control Board, they heard that J.M. Kariuki had disappeared and therefore they did not obtain the Land Control Board consent since the registered owner never came back to life to apply for the same. Doris was categorical that because of the loan secured by the land, consent of the Land Control Board could not be obtained. This is the position in law. Doris also doubted the signature shown to her in Court on the Application for consent of the Land Control Board as the Deceased's. Further, the Land Control Board, Nyandarua North as testified by PW2 refused to give consent to transfer the land to the late J.M. Kariuki with one of the reasons being that it was not indicated the acreage the Nyakinyua Group was to get.

Furthermore, this issue was a matter before Nakuru HCCC No. 114 of 1982 between Nyakinyua Ndorua Kanini Kega Farmers Company on one part against the Defendants herein where the undated Judgment had declared: -

3777/115, 37777/207 and 3777/279 the property

of

Nyakinyua Ndorua Kanini Kega Farmers Company
courtesy of a gift from J.M. Kariuki.

However, as earlier held in this Judgment, the same was overturned by the Court of Appeal in Nakuru Court of Appeal Case No. 107 of 1987 on 28/9/1988.

Likewise, the Honourable Lady Justice R.N. Nambuye having dismissed the intended gift from the deceased to the Plaintiffs for being incomplete and therefore not enforceable in law in Nakuru High Court Civil Suit No. 219 of 1989 the Application for consent which indicated that the transfer was a gift, and the said consent were of no consequence at all. The Plaintiffs should have either sought stay of execution and appealed and in the absence of such a stay of execution, the Plaintiffs became Trespassers.

As to the 2 remaining prayers in the second suit,

- (e) Whether a portion of 300 Acres out of Riverside Farms OI Kalou L.R. No. 3777/115, 3777/204 and 3777/279 should forthwith be registered in the name of Nyakinyua Ndorua Kanini Kega Farmers Company and the Defendant be ordered to execute all the necessary Transfer forms in the Plaintiff's favour and in default, the Deputy Registrar be authorized to sign the same.

- (f) Whether the County Land Registrar, Nyandarua should dispense with the production of the original Title Deed for Riverside Farms Ol Kalou L.R. No. 3777/115, 3777/204 and (g) 3777/279 while transferring the land to the Plaintiff

in view of all the foregoing, the same are untenable.

As soon as the Judgment in Court of Appeal in Nakuru Court of Appeal Case No. 107 of 1987 was delivered on 28/9/1988 and the moment the Plaintiffs were told to move out and refused, they became trespassers under Section 3 of the Trespass Act.

Article 40 of the Constitution of Kenya, 2010 protects the right to property, guaranteeing every person's right to acquire, own, and dispose of property of any description, either individually or in association with others. It strictly prohibits arbitrary deprivation of property, requiring that any acquisition by the State be for public interest and accompanied by prompt, adequate and fair compensation.

The said Article reads as follows:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person--

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27

(4).

(3) The State shall not deprive a person of property of any

description, or of any interest in, or right over, property of any description, unless the deprivation--

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that--

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause

(3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

The sanctity of Title to property under Article 40 of the Constitution was enunciated in the Supreme Court Decision in Rutongot Farm Ltd -vs- Kenya Forest Service & 3 others [2018] eKLR, where the Court held that:

“..... once proprietary interest has been lawfully acquired, the guarantee to protection of the right to property under Article 40 of the Constitution is then expressed in the terms that no person shall be arbitrarily deprived of property.”

In the Indian case of State of Haryana v Mukesh Kumar & others, Petition for Special Leave to Appeal (Civil) No.28034 of 2011 Bhandari, J. had the following to say on the right to property:

“..... The right to property is now considered to be not only constitutional or statutory right but also a human right. Human rights have already been

considered in realm of individual rights such as right to health, right to livelihood, right to shelter...etc. But now human rights are gaining a multi-faceted dimension. Right to property is also considered very much a part of the new dimension.....”

This is also the position in Kenya where under Chapter 4 of the Constitution of Kenya, 2010 Right to Land is a human Right.

In respect to the 3rd Defendant’s Counter-claim dated 27/2/2023 where the prayers were for:

- a. A permanent injunction restraining the Plaintiff by himself and/or the alleged Nyakinyua Ndorua Kanini Kega Farmers Company and its 580 members by themselves, their agents and servants, employees, or anyone authorized by them and acting on their behalf from trespassing on (portions not occupied by the squatters), transferring, intermeddling, advertising for sale, disposing of, letting, leasing, developing or interfering and/or dealing with all that parcel of land known as L.R. Nos. 3777/115, 3777/204 and 3777/279 in any manner whatsoever.
- b. Costs of this suit and of the counter-claim

the fact that the Plaintiffs have not proved their claim, the beneficiaries of the Estate of Josiah Mwangi Kariuki must be allowed to enjoy their

constitutional rights, benefits and privileges appurtenant to their ownership of L.R. Nos. 3777/115, 3777/207 and 3777/279 including entitlement to a Declaration that a permanent injunction be and is hereby issued restraining the Plaintiffs and/or the alleged Nyakinyua Ndorua Kanini Kega Farmers Company and its alleged and nameless 580 members either by themselves, their agents, servants and employees, or anyone authorized by them and acting on their behalf from trespassing on portions occupied by the squatters, transferring, intermeddling, advertising for sale, disposing of, letting, leasing, developing or interfering and/or dealing with all that parcel of land known as L.R. Nos. 3777/115, 3777/207 and 3777/279 or any portion thereof in any manner whatsoever.

In addition, the Defendants will also have the Costs of these 2 suits and that of the counter-claim by the 3rd Defendant.

Judgment read and delivered at Nyandarua this 22nd Day of April 2026.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Samson.

1st Plaintiff's Counsel: Mr. Karanja.

2nd Plaintiff's Counsel: Mr. Gakuhi Chege, Ms. Wangechi Wangari &

Ms. Catherine Muigai.

1st & 2nd Defendant's Counsel: Mr. Gordon Ogado.

3rd Defendant's Counsel: Mr. Waiganjo.