

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCL CASE NO E017 OF 2024(OS)

SIMON IRERI NYAGA.....1ST
PLAINTIFF

CHARLES MBOGO NYAGA.....2ND
PLAINTIFF

VERSUS

NYAGA MUTHENGI.....1ST
DEFENDANT

MUTHENGI M'THEKA.....2ND
DEFENDANT

JUDGMENT

1. Vide the Originating Summons dated 01/07/2024, the Plaintiffs are seeking interalia, that the Plaintiffs have acquired title to land parcel No. Nthawa/Gitiburi/506 situate within Embu County by way of adverse possession; they also seek to have the said parcel of land registered in their names in place of the Defendants.
2. The application is based on grounds on the face of the Originating Summons and supported by the affidavit of the 1st Plaintiff, Simon Ireri Nyaga dated 01/07/2024. He deposed that the 1st Defendant is the registered proprietor of the suit land and that he sold the said land to their father in the year 1990 at an agreed sum of Kshs. 15,000. He averred that they entered into the said land in the same year and have

extensively developed the portion they occupy by planting 3,000 stems of miraa, mangoes, assorted trees and bananas without the Defendants consent. He averred further that they have been in full and continuous, uninterrupted occupation of the said land for over thirty years, and that their occupation has been adverse to the title of the Defendants, and therefore they have acquired the land by way of adverse possession. He stated that the 2nd Defendant had acquired title to the said land by way of transmission having filed a succession cause.

3. He attached to the supporting affidavit copy of the green card to the suit land, a copy of the sale agreement, a bundle of photos and a copy of a confirmed grant.
4. The Defendants despite being served did not enter an appearance or file a defence. The matter proceeded for hearing ex-parte on 18/02/2026 where the 1st Plaintiff testified as PW1. He adopted his written statement dated 23/09/2025 as his evidence in chief. He testified that their father purchased the suit land from the 2nd Defendant, and that he currently resides on the land together with his brother, Charles Mbogo. He further stated that they have developed the land by constructing houses and planting miraa, and that they have been in occupation of the land since 1990. He produced in evidence a copy of the green card for land parcel 506, a copy of a sale agreement dated 07/01/1990, photographs showing the developments on the suit land, a copy of the certificate of confirmation of grant and a surveyors report.

5. The Plaintiff filed written submissions dated 26/02/2026 through the firm of J. Ndana & Company Advocates. He submitted that there was no evidence to contradict their candid testimony that they have been in continuous occupation of the suit land since 1990 and have developed it. They relied on the case of *Mwangi Githu v Livingstone Ndeete* 1984 KLR 776, and argued that a mere change of ownership does not interrupt the 12-year period required for adverse possession. They also cited the case of *Jonah Muchoki Kariuki v Rahab Wanja Muca* Civil Appeal No. 196 of 2018, where the Court of Appeal set out the threshold for adverse possession, emphasizing that possession must be open, continuous, adequate, and without force, or permission of the owner. They submitted that their occupation has been open, continuous, and uninterrupted for over 30 years, and that the registered owners have taken no action against them despite their long possession, which was neither by force nor stealth.
6. The issue for determination is whether the Plaintiffs have acquired title to land parcel Nthawa/Gitiburi/506 by way of adverse possession.
7. The doctrine of adverse possession in Kenya is now well settled. A claimant must demonstrate, as held in *Samuel Kihamba v Mary Mbaisi* [2015] KECA 853 (KLR) that they have been in exclusive, continuous, open and uninterrupted possession of the land, adverse to the interests of the registered owner, for a period of at least twelve (12) years. The

possession must be nec vi, nec clam, nec precario that is, without force, secrecy, or permission. The additional requirement is that of animus possidendi, or intention to have the land”

8. In the present case, even though the Defendants did not enter appearance or defend the suit, the burden remained on the Plaintiffs to prove their case that they have acquired the suit land by way of adverse possession. From the onset, the Court notes a peculiarity in the Plaintiffs’ case. From the green card produced by the Plaintiffs, the suit land is registered in the name of Nyaga Muthengi, who was registered on 28/05/1984. The green card indicates that a restriction was placed on the land to the effect that it was not to be dealt with until the registered proprietor attained the age of 18 years. According to the sale agreement produced by the Plaintiffs dated 07/01/1990, the alleged sale of land parcel 506 was between Muthengi Murwathika and Jerevasio Nyaga for a consideration of Kshs. 15,000/= . The agreement is said to have been executed by the 2nd Defendant. However, what raises concern is that the summons for confirmation of grant indicate that Nyaga Muthengi died on 22/08/1973, long before the suit land was even registered in his name.
9. There is an affidavit in support of the summons for confirmation of grant, produced by the Plaintiffs and dated 13/01/2016, which indicates that at the time of the alleged sale of the suit land, the 2nd Defendant lacked the legal capacity to dispose of

the property, as the land formed part of a deceased person's estate and no grant had been confirmed in his favour as at 2016. This casts doubt on the legality and validity of the alleged sale transaction.

10. Nevertheless, it is settled law that where entry into land is pursuant to a sale agreement, occupation becomes adverse only upon payment of the full purchase price, or where payment is by instalments, upon payment of the last instalment. See *Gabriel Mbui v Mukindia Maranya* [1993] KEHC 161 (KLR) where it was held:

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

11. In the present case, the Plaintiffs asserted that the full purchase price was paid. However, the sale agreement on record indicates that only Kshs. 6,100/= was paid, and there is no evidence demonstrating payment of the balance of the alleged purchase price. This raises doubt as to whether the full

purchase price was paid so as to anchor the commencement of time for adverse possession.

12. The Court finds that the Plaintiffs have not been able to prove on a balance of probabilities that they have become entitled to the suit land by way of adverse possession.
13. The suit is hereby dismissed with no orders as to costs.

DATED, DELIVERED AND SIGNED AT EMBU THIS 30TH DAY OF APRIL, 2026

HON.EC CHERONO
ELC JUDGE, EMBU

In the presence of;

1. Plaintiff/Advocate-absent
2. Defendant/Advocate-absent
3. Diana Kemboi C/A