

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT EMBU

ELC CASE NO. E029 OF 2022 (O.S)

**EVANS KARIUKI NGARI PLAINTIFF
(Suing on behalf of Ngari Musembi)**

VERSUS

CHARITY NZIOKI DEFENDANT

JUDGEMENT

1. The plaintiff herein - EVANS KARIUKI NGARI - instituted this suit against the defendant - CHARITY NZIOKI - vide an originating summons dated 30/10/2022. He did so on behalf of his late father - NGARI MUSEMBI. The originating summons is expressed to be brought under Sections 37 and 38 of the Limitation of Actions Act, Section 28 of Land Registration Act and Order 37 of Civil Procedure Rules. The dispute is founded on the legal concepts of adverse possession and trust. It relates to land parcel No. Nthawa/Kirie/729 ("*disputed land*" hereafter) and the plaintiff is claiming ownership as an adverse possessor. He has also pleaded, as an alternative, that the defendant holds the land

in trust for him. The defendant is the registered owner of the disputed land.

2. More particularly, the plaintiff desires to get orders that he be declared to have become entitled by adverse possession of over twelve (12) years of the disputed land; that in the alternative, the court declares that the defendant holds the disputed land in trust for him; that he be registered as proprietor of the disputed land in place of the defendant; that the Land Registrar be ordered to effect such registration; and finally that the defendant be the one to pay costs of this suit.
3. From the supporting affidavit that came with the summons, the plaintiff stated that his father hailed from Iguna clan, with his great grandfather being Nthimu; that the disputed land was owned by Iguna clan and specifically belonged to Nthimu family of which the plaintiffs late father was a direct descendant; that his late father and he himself have always occupied the disputed land; that he still resides there and grows maize, millet, sorghum, cotton, vegetables, green grams, and is also keeping cows and goats; that he has done

that since 1993 to date; that the occupation and use has been exclusive, open, continuous and without the consent of the defendant.

4. Further that in the year 1995 the plaintiff's late father visited the Lands Office and discovered that the defendant got herself registered as owner in 1993 and that it's upon that discovery that the plaintiff's father lodged a caution to protect his interest. The plaintiff alleged that at the time, his late father didn't know who the defendant was and the caution was lodged in the hope that she would emerge. The plaintiff's late father intended to take legal action if the defendant emerged. But the defendant didn't emerge and she only became known after the plaintiff's late father had passed on. That is when she claimed the land as her own and wanted the caution placed on it removed.

5. The defendant responded to the suit via a replying affidavit dated 16/12/2022. She stated that she is the registered owner of the disputed land and that she became so by dint of first registration. She said that her title has never been challenged in court. The disputed land, she said, is mainly

used for growing indigenous trees and grazing. According to the defendant, the plaintiff does not live there and even his late father was not buried on the land when he died. She faulted the plaintiff for the way or manner he has brought this claim. The caution was said to have been placed by somebody claiming licensee interest. This claim itself was said to be based on adverse possession and trust. The claim was therefore said to be *“contradictory”* and *“inconsistent.”* The plaintiff was said to be a *“busybody”* who *“brought summons devoid of any triable issue.”* The summons were said to be *“... a total abuse of the court process.”*

6. The plaintiff's late father was said to be a caretaker for the defendant in relation to the disputed land and he was a person the defendant interacted with in various transactions. He was said to have accessed the disputed land with defendant's permission. The defendant also stated that she is not related to the plaintiff and there is no *“fiduciary capacity”* to hold the disputed land on his behalf.
7. After responding to the suit, the plaintiff also filed a counter-claim. In that counter claim, she reiterated that she is the

owner of the disputed land. Further, she said that she allowed the plaintiff's father to access the disputed land; that in fact the caution was placed by a person claiming licensee interest; that the plaintiff is not in possession of the disputed land; and that she had even initiated the process of the removal of caution but the cautioner passed on before the caution could be removed. She ultimately asked that the plaintiff's suit be dismissed; that the caution be removed; that a permanent injunction do issue against the plaintiff, his servants, agents or anybody acting under him from trespassing or interfering in any adverse manner with the disputed land; that she gets costs of the suit; and that the court grant any other fit or just relief.

8. The plaintiff responded to the counter claim via a defence dated 28/3/2023. The counter claim was denied and the prayers sought were said not to be grantable as the plaintiff acquired the land long ago by way of adverse possession.

9. The court started hearing the matter on 30/4/2024. The plaintiff testified as PW1. After introducing himself, he sought to rely on his witness statement dated 30/10/2022

and the supporting affidavit that came with the originating summons as his evidence. The court accepted this and as the substance of the supporting affidavit have already been highlighted while introducing the originating summons, what is necessary now is to give an overview of the written statement.

10. In the written statement, the plaintiff introduced himself as the son of the late Ngari Musembi who died in the year 2021 aged 81 years. He is clear that he has filed the case on behalf of his late father. According to the plaintiff, the family of his late father has all along lived and used the disputed land. He was born there, he said, and the family occupied or lived on the disputed land knowing it is clan land to which they were entitled by virtue of tracing their family line to Nthimu, their great grandfather.

11. During Land Adjudication, the disputed land was said to have been awarded to the plaintiff's late father owing to his ancestral and family ties to Iguna clan. The plaintiff said that his late father visited the Lands Office in 1995 and discovered that the defendant was registered as its owner.

The defendant was a person the father did not know and had not seen and was therefore a stranger. The father placed a caution on the land register to protect his interest hoping that the registered owner would show up and get known. The defendant was said to have never set foot on the disputed land and she only surfaced after the death of the plaintiff's father. She came asking for removal of the caution. The plaintiff averred that from 1993 when the plaintiff became registered owner, they have all been on the land and have acquired it as adverse possessors. The occupation was said to be open, exclusive, and notorious and has all along taken place to the exclusion of everyone including the defendant.

12. In the course of hearing, the plaintiffs made available the following exhibits:

- (1) *Limited Grant Ad Litem which allowed him to file this suit on behalf of his late father - P Exhibit No. 1.*
- (2) *Copy of the register of the disputed land - P Exhibit No. 2.*
- (3) *Official letter dated 27/9/2022 from the area Assistant Chief meant to give the necessary information to*

enable the court to issue the plaintiff with grant Ad Litem - P Exhibit No. 3.

(4) *Copy of Death Certificate for the plaintiff's late father - P Exhibit No. 4.*

(5) *Copy of Identity Card for the plaintiff's late father - P Exhibit No. 5.*

(6) *Proceedings of citation process conducted at Siakago Law Courts - P Exhibit No. 6.*

13. In his evidence too, the plaintiff denied the defendants counter-claim and disputed the averment that his late father was the defendant's caretaker. He also said he was opposed to the prayers sought by the defendant.

14. During cross-examination, several questions were posed to the plaintiff and in answer to some of them, he is shown saying that the disputed land was allotted to his father by the clan; that he wants the land to be treated as his as he has lived there for 29 years; that he only got to see the defendant in the year 2021; that his late father placed the caution on the land register with a view to taking legal action if the registered owner emerged; that his late father was not on the disputed land with the defendant's permission; that his parents were using the disputed land

even before he was born; and that he was not aware that his father had lodged an objection during Land Adjudication which was rejected.

15. PW2 was Virginia Nduma Ngari Musembi. She introduced herself as the wife of the plaintiff's late father. This essentially means she is the plaintiff's mother. She adopted her written statement dated 30/10/2024 as her evidence. In her statement, she stated, inter alia, that her late husband was given the land by his late father; that he later got to learn that the disputed land was registered in the name of the defendant; that he didn't know the defendant and he placed a caution on the land register hoping to take action if the defendant emerged; that the defendant only emerged to claim the land after PW2's husband death; and that they use the disputed land and have cultivated crops like sorghum, cotton, green grams and vegetables.

16. During cross-examination, this witness said she does not live on the disputed land but her home is near there; that she got to know the defendant in the year 2021; that the

disputed land was given to her late husband by his parents; and that she is not aware that her husband placed the caution on the disputed land as a licensee.

17. Samuel Gichuki (PW3) was the third witness to testify. Like the other two witnesses before him, he adopted his written statement as his evidence. He also said that the late father of the plaintiff was his uncle and that he was using the land from 1993 to year 2021 when he died. According to this witness, the disputed land belonged to Nthimu family and the family gave it to the plaintiff's father. The witness said that the plaintiff's father once told him that the disputed land was registered in the name of another person and that he had placed a caution on it. The defendant was said to be a stranger to Nthimu family and this witness said he had not seen her before the year 2021. The plaintiff's father was said to have been using the disputed land all along.

18. This witness was subjected to cross-examination and he is shown telling the court that the house or home of the plaintiff's father is about 300 meters away from the disputed land; that the disputed land is family land; and that

he was surprised at how the defendant became the registered owner of the disputed land.

19. Justa Gaconi Urugiru (PW4) was the final witness on the plaintiff's side. He said he lives on the disputed land. It is the plaintiff who has allowed him to live there and to use it. He said also he has never seen the defendant on the land. His written statement shows him saying that the disputed land was given to the plaintiff's late father by Nthimu family. The late plaintiff's father, he stated, leased him the disputed land in 1979 and he has been living there all along. PW 4 said he lives in the houses on the land and he grows on it maize, millet, cowpeas, sorghum, cotton, vegetables, and green grams. He also uses it for grazing cows and goats.

20. When put to cross-examination, PW 4 reiterated that the disputed land was leased to him by the plaintiff's late father; that the lease was oral; and that he used to pay Kshs. 1,000/= per year, which he still continues to pay to the family of the plaintiff's late father.

21. The court started taking defence evidence on 23/9/2024. The defendant testified as DW 1. After introducing herself,

she adopted her written statement and the replying affidavit she filed in response to the suit as her evidence. She made reference too to the counter-claim she filed and asked that the caution placed on the register of the disputed land be removed. According to DW1, the plaintiff does not live on the disputed land. She said also that the plaintiff's late father placed the caution on the disputed land as a licensee and that he was actually her caretaker. Further, the plaintiff said she tried to get the caution removed by the plaintiff's late father but died before doing so.

22. In the written statement, she stated, inter alia, that she became owner through first registration; that the plaintiff's father has been her caretaker; that in the year 2021, while conducting a search at the Lands Office, she discovered that the plaintiff's deceased father had placed a caution on the disputed land; that all that had been concealed from her for all the years she had interacted with the plaintiff's deceased father; that she reported this to the area Assistant Chief; and that the plaintiff's late father promised to remove the caution but died before doing so.

23.DW 1 further said that when the plaintiff's father died, she followed up the issue of caution with the plaintiff's mother; the mother promised to get back to her but didn't; that she continued to engage and even filed citation proceedings at Siakago; and finally that the mother delegated the matter to her Son, the plaintiff herein, who decided to institute this suit. The defendant said the deceased father of the plaintiff had no dispute with her and that he was even willing to withdraw the caution. The claim brought here was said to be an afterthought and a gamble aimed at defrauding the plaintiff of her land. The court was asked to dismiss the plaintiff's case with costs.

24.This witness was cross-examined. In answer to some of the questions, she said she got title to the land in 1993; that the plaintiff's late father was on the disputed land as her caretaker; that there was no written agreement of caretaking; that the caution was placed on the disputed land in 1995; that it is not true that the plaintiff and his family having been using the land all along; that the plaintiff

was lying when he said there are houses on the land; and that the disputed land is not in use even now.

25.Njeru Magana testified on the defendant's side as DW2. He said he is a neighbor where the disputed land is situated. He adopted his written statement as his evidence. In the statement, the witness said that his land parcel in the area is Nthawa/Kirue/733; that the disputed land was sold to plaintiff by Musembi Kiboye and that at the time of adjudication, it was recorded in the plaintiff's name; and further that neither the plaintiff's late father nor the plaintiff or his family lived on the disputed land.

26.When cross-examined, DW 2 reiterated that the plaintiff does not use the land. He also said the plaintiff's late father was only using the land by cutting trees and selling them. Further, he said there is a house on the disputed land and there is a woman who lives there.

27.After all the evidence was in, both sides filed written submissions. The plaintiff's submissions are dated 4/10/2024. After giving an overview of the plaintiff's case, the plaintiff submitted that his evidence and the evidence of

his witness show that he and his family members have been in occupation of the disputed land since 1993 when it was first registered. That occupation was said to have been uninterrupted for over 12 years. The plaintiff also submitted that there are houses on the land and that he has been growing various crops on it. The position of the plaintiff is that *“his occupation has been as of right and without permission or consent of the registered proprietor.”*

28. The defendant’s averments that the plaintiff’s late father was her caretaker was said to be unsubstantiated as she never showed written evidence or terms or conditions of the alleged caretaking. The court was urged to find that the plaintiff’s father *“has been in adverse occupation of suit land from 1995 upto his death in 2021 and that such occupation and use has been open as of right, uninterrupted, continuous from 1993 upto his death in 2021.”*

29. The plaintiff then delineated the issues for determination thus:

(A) Whether the plaintiff has demonstrated his claim for adverse possession with respect to the suit property.

(B) Whether the caution lodged on suit property in 1995 was lawful.

(C) Who shall be (sic) or costs of the suit.

30. The cases of Wambugu -vs- Njuguna [1983] KLR 172, Githu -vs- Ndeete [1984] KLR 776, Kimani Ruchine - vs- Swift Ruther Fords Co. Ltd. [1980] KLR 10 & Samuel Ngari Kigoro -vs- Njuki Kigor, ELC No. 299 of 2015 (OS) were cited to demonstrate the parameters and requirements of adverse possession. It was then submitted that the plaintiff has met the requirements. The plaintiff's father was said not to have been dispossessed of the disputed land and the plaintiff and/or his family have adversely possessed the land from 1993 up to the time of plaintiff's father's death in the year 2021.

31. The respondent's submissions are dated 22/10/2024. In the submissions both the plaintiff and the defendant's cases were highlighted. After that the focus shifted to

analysis, with the issues for determination being identified as follows:

- (a) Whether the applicant (plaintiff) is entitled as the legal owner of the suit properly by virtue of adverse possession.**
- (b) Whether the applicant (plaintiff) is entitled as the legal owner of the suit properly by virtue of trust.**
- (c) Whether the court has jurisdiction.**
- (d) Whether the caution should be removed.**
- (e) Who bears the cost of the suit?**

32. On adverse possession, the case of **George Ogake Pius - vs- Esther Nyasani Makori & 2 others [2018] eKLR** was cited and quoted for definition of the concept. It was then submitted that for the required threshold to be met, the land must be registered in the name of a person other than the plaintiff; that the plaintiff must be in open and exclusive possession of the land in adverse manner to the title of the registered owner; and that the plaintiff must have been in occupation and/or possession for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

33. In the case on hand, the plaintiff is said to be living about 300 meters away from the disputed land. He was therefore said not to be in occupation or possession. It was submitted that the defendant was not dispossessed of the land and that while the plaintiff is claiming land the size of 2 acres he has not demonstrated how he arrived at that size.

34. The plaintiff was also faulted for not bringing out the real character of the adverse possession he is claiming and the case of **Kweyu -vs- Omutut [1990] KLR 709** was cited and quoted to emphasize the need to demonstrate the true nature of the adverse possession. The plaintiff was said to have indicated that the disputed land belonged to his father right from the beginning. It was also pointed out that he lodged a caution as a licensee. The defendant said that the plaintiff should have shown how and when he entered the land and the nature of his possession. Placing a caution on the land was said not to be a demonstration of possession or discontinuance of possession. According to the defendant *"... the plaintiff had no intention to dispossessing (sic) respondent but his intention was to take legal action."*

It was further submitted that “... *The applicant has not testified before this court on when intentions shifted from legal action to adverse possession or trust.*”

The defendant submitted that the plaintiff’s evidence should have been clearer and the case of Peter Njau Kairu -vs- Stephen Ndung’u Njenga & Another: CA 57 of 1997 was cited and quoted to illustrate the need to give clear evidence. Adverse possession in the matter on hand was said not to be proved.

35. It seems like the defendant understood the plaintiff to be saying that her title was fraudulently obtained. The defendant has submitted on this and said that fraud and adverse possession cannot co-exist in law. According to the defendant, she permitted the plaintiff’s late father to watch over her land from 1976 to year 2021. The father lived about 300 meters away on land parcel Nthawa/Kirie/727. The defendant said that the plaintiff has never occupied her land. It was emphasized that the plaintiff’s late father had permission from the defendant to do what he was doing. He couldn’t then turn around to say he owned the land. The

cases of **Samuel Miki -vs- Jane Njeri Richu: C.A No. 122 of 2001, and Mwundu -vs- John & Another (ELC No. 1 of 2020) [2023] KE ELC 18965 (KLR)**, among others, were cited and quoted to reinforce the defendant's position.

36. The defendant also submitted on the issue of trust. It appears clear also that the defendant understood the trust mentioned in the plaintiff's pleadings to be a customary trust. She said she bought the suit land in 1976. It underwent the process of adjudication and she became its first registered owner in 1993. The Supreme Court Case of **Kieba M'Inanga -vs- Isaaya Theuri M'Lintari & Another [2018] eKLR** was cited to show what a customary trust is and the threshold necessary to demonstrate it. The defendant said that the land is her own in absolute terms and she does not hold it in trust for the plaintiff. The defendant was said to have her ancestry elsewhere. She is not descended from the plaintiffs Nthimu family and she cannot therefore be said to hold the land in trust for the plaintiff.

37. The cases of **Njenga Chogera -vs- Maria Wanjira Kimani & 2 others: [2005] eKLR, Peter Ndung'u: [2000] eKLR and Juletabi African Adventure Limited & Another -vs- Christopher Michael Lockey [2017] eKLR** were cited and also quoted to emphasize the need to give good evidence where one is claiming land on the basis of trust. The plaintiff was said to have failed to give evidence and he was also said to have failed to submit on the issue of trust because it allegedly does not exist.

38. Then there was the issue of jurisdiction. On this, the court was said to have original and appellate jurisdiction to handle the entire matter. Jurisdiction was said to be covered under Article 162 (2) (b) of the Constitution, Section 13 of the Environment and Land Court Act, 2011, and Land Registration Act at Sections 2 and 73 thereof.

39. The defendant is asking for the removal of the caution placed on the Land Register and she proffered the case of **Ireru -vs- Kasimu (ELCA No. 10 of 2018) [2023], KE ELC 15931 (KLR)** to guide the court on the issue.

40. Finally, there is the issue of costs. Section 27 of Civil Procedure Act (Cap 21) was cited. The section says, inter alia, that the award of costs should follow the event although the court enjoys a discretion to give a different order. Two cases - **Haraf Traders Limited -vs- Narok County Government [2022] eKLR and Republic -vs- Rosemary Wairimu Munene, Ex Parte Applicant: JR. No. 6 of 2014**, were cited to guide the court.

41. Ultimately, the court was urged to dismiss the plaintiff's suit, allow the defendant's counter claim, and award costs to the defendant.

42. I have considered all the pleadings in this matter, the evidence proffered by both sides, and the rival submissions. As initially filed, the plaintiff's suit was based both on adverse possession and trust. When the defendant responded to the suit and lodged a counter-claim, the defence to the counter-claim also raised the issue of jurisdiction, among other things. The concern raised about jurisdiction related to the alleged fact that the defendant's counter-claim was time-barred. There was even an

intimation that a preliminary objection would be raised to that effect.

43. Along the way however, the issue of trust and the issue of jurisdiction seem to have been quietly abandoned by the plaintiff. These two issues were not addressed during hearing and do not feature anywhere in the plaintiff's submissions. Even the preliminary objection promised to be raised was never raised. The defendant however, probably out of the need not to leave anything to chance, addressed these two issues in the submissions.

44. I would like to point out that as these two issues were not addressed at all by the plaintiff, the outcome of this judgement does not turn on them and both are hereby rejected and/or dismissed. That leaves us with only one aspect of the plaintiff's case: Adverse possession. The court will be considering whether merits of the plaintiff's case on the issue of adverse possession have been demonstrated.

45. The defendant filed a counterclaim in which she asked that the caution placed on the land register be removed and also

that she gets a permanent injunction to restrain the plaintiff and/or others through him or at his behest from trespassing or interfering with the disputed land. The court will be considering this too.

46. Let me now turn to the issue of adverse possession. In **Mtana Lewa -vs- Kahindi Ngala Mwagandi [2015] KECA 532 (KLR)**, the Court of Appeal defined adverse possession as a doctrine of law whereby a person obtains a legal title to land by virtue of ACTUAL, OPEN, NOTORIOUS, and CONTINUOUS OCCUPATION of it to the exclusion of the registered owner for a prescribed period which is twelve (12) years in Kenya.

47. From the existing case law – see for instance Mtana Lewa’s case (supra) and/or **Johnson Muigai Njami -vs- Lolise Mutura Njami: (Civil Appeal No. 34 of 2018) [2025] KECE 492 (KLR)** – the key ingredients for adverse possession are as follows:

(a) The 12 year Rule: It is required that there must be actual or physical possession for a continuous uninterrupted period of at least 12 years.

- (b) The nature or character of the possession must be open and/or notorious. This invariably means that possession should be obvious, not secretive, thus enabling the rightful or registered owner to discover or become aware of it.**
- (c) The possession and/or take-over of the land must be hostile or without permission. This essentially implies that possession must be without the owners' consent, agreement, or lease.**
- (d) The possession must also be exclusive: The adverse possessor must exclude the rightful owner and others. He must use the land as if he is the owner.**

48. The case of Richard Wefwafwa Songoi -vs- Ben Munyifwa Songo [2020] eKLR gave useful indicators as to what a person claiming land as an adverse possessor should prove. The court held that such person must show:

- (a) On what date he went into possession.**
- (b) What was the nature of his possession.**
- (c) Whether the fact of his possession was known to the other party.**
- (d) For how long the possession has continued.**
- (e) That the possession was open and undisturbed for the requisite 12 years.**

49. The statutory or legislative back-up for adverse possession in Kenya is to be found mainly in Limitation of Actions Act (Cap 22) and the Land Registration Act, 2012. The relevant provision in the Limitation of Actions Act (Cap 22) are Sections 7, 13, and 38. The appropriate provision in Land Registration Act is Section 28 (h).

50. The applicable sections of the Limitation of Actions Act are as follows:

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

“Section 13

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

date, a right of action does not accrue unless and until some person takes adverse possession of the land.

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until same person again takes adverse possession of the land.”***

“Section 38

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts, he may apply to the High Court for an order that he be roistered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.***
- (2) An order made under sub section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”***

51. The Land Registration Act (Cap 300) on its part recognizes adverse possession as an overriding interest and in its list of overriding interests under Section 28, at sub-section (h) thereof the Act recognizes them as *“rights acquired or in*

the process of being acquired by virtue of any written law relating to the Limitation of Actions or by prescription.”

52. It is now necessary to turn to this case to establish whether adverse possession has been proved. The plaintiff's evidence was that his late father and his family, himself included, has been using and occupying the disputed land both before and after the plaintiff became the registered owner. He said there are houses on the land and that he also grows various crops on it. This version of his story was backed -up - by his own mother (PW 2) and his cousin (PW 3). But there is a twist when it comes to the evidence of PW 4 - Justa Gaconi. This witness said he is the one using the land and also lives there. He talked of a lease arrangement between him and the plaintiff's late father. It is an arrangement that still exists. He talked of paying an annual lease amount of 1,000/= to the plaintiff's family.

53. The defendant on her part denied that the disputed land is being used or even that the plaintiff is on the land. She further said the plaintiff's own father was her caretaker and any activities or dealings relating to the land by the

plaintiff's late father were conducted in his capacity as a caretaker. It was further pointed out that the caution placed on the land register shows that the plaintiff's late father placed it there as licensee. The defendant also produced photographs (D exhibit No. 9 (a), (b) and (c)) to show that the disputed land is not being used.

54. The plaintiff was duty-bound to demonstrate compliance with a tripartite test encapsulated in the Latin Phraseology: NEC VIM, NEC CLAM, NEC PRECARIO, which essentially means without force, without secrecy, and without permission. One glaring weakness obviously noticeable in the plaintiff's case is the fact that his late father is shown to have placed a caution on the disputed land register as a licensee. This essentially connotes permissive arrangement between the plaintiff's late father and the defendant. When the defendant therefore says that the plaintiff's late father was her caretaker, that makes sense to the court.

55. Further, the plaintiff said he uses the land and has houses there. Then he called a witness - PW 4 - who said the disputed land is leased to him. There is obviously a

difference between using the land yourself and leasing it to be used by somebody else. This aspect of evidence on the plaintiff's side was obviously not helpful to the plaintiff's case. Add this to the fact that when the plaintiff averred that he uses the disputed land, the defendant denied it and backed her position by providing photographs (See D exhibit 9 (a) (b) and (c,)) to show that the disputed land was not in use. One would have expected that when it became clear to the plaintiff that the defendant had photographs to produce in court, he himself would make available pictorial or photographic evidence to show his alleged houses on the disputed land and/or some of the crops he alleges to be growing there. As things stand now, the defendant position seems more convincing.

56. When all is considered, the plaintiff's evidence falls short of demonstrating possession, occupation and/or use of the disputed land. The defendant mounted a rebuttal that more convincingly showed that the land is not being used. The plaintiff even seemed to score an own goal by first saying he uses the land by growing various crops and then bringing

evidence to show that the land is leased and is being used by a person other than himself. More crucially, the plaintiff was not able to displace the fact that the caution on the land register shows his late father as a licensee. One other weakness with the plaintiff's case is that he does not seem to recognize the plaintiff's title. In **Catherine Kariko & 3 others -vs- Evaline Rose [2020] eKLR**, the Court of Appeal observed thus:

“In Haro Yonda Juaje -vs- Sadaka Ozengo Mbauro & Kenya Commercial Bank [2014] eKLR it was stated:

(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

In the matter at hand, the plaintiff herein seems to suggest that his late father was shortchanged during adjudication and registration as the disputed land has all along been

clan, family or ancestral land but the defendant, a total stranger, was registered as owner.

57. My finding therefore is that adverse possession is not proved. This finding essentially means that plaintiff's entire claim fails. It is hereby dismissed.

58. I now turn to the defendant's counter-claim. The defendant wants the caution placed on the disputed land removed. A caution is usually placed to protect an interest that a person has in a piece of land. With the dismissal of the plaintiff's case, the *raison detre* for the continued placement of the caution on the land register has dissipated. In any case, it is clear that the person who placed the caution on the land register as a licensee is now deceased. The prayer for the removal of the caution is therefore deserved and is hereby granted.

59. The defendant's other prayer is that of a permanent injunction. The defendant would wish that the plaintiff and/or other through him are permanently restrained from interfering with or trespassing into the disputed land. In

Watson Wahome Njuru -vs- Co-operative Bank of

Kenya Ltd: HCC No. 67 of 2006 [2010] eKLR, the court held, *inter alia*, that before granting an order of permanent injunction, the plaintiff must show first that he has a legal right to protect and secondly that there is a probability of future serious injury.

60. This kind of injunction is usually granted at the end of a suit and is basically meant to prevent future harm. It is granted where monetary compensation is deemed insufficient or inappropriate. Courts usually grant it following a trial that finds that there is violation of property rights.

61. In the matter at hand, it is clear that the defendant has had to institute a counter-claim in order to remove a caution placed by the plaintiff's late father as a licensee. The plaintiff disregarded the licensee status and claimed that the father was an adverse possessor. The evidence also showed that the plaintiff views the property as family or ancestral land. The plaintiff has lost the case and in my view, a restraining order is necessary in order to prevent trespass or other kind of interference. I realize that this kind of injunction issues where monetary compensation is

deemed inadequate or unsuitable. But I also appreciate that it is not an inexorable rule of law that an injunction cannot issue where damages are an adequate remedy. Having regard to the prevailing circumstances of this case, my considered view is that a permanent injunction is a more appropriate remedy. The defendant obviously has property rights to protect and it is not farfetched to hold the view that the plaintiff can breach those rights. He views the disputed land as clan or family land and would probably be prepared to continue claiming ownership. I therefore grant a permanent injunction as prayed.

62. I now come to the issue of costs. The applicable law – see Section 27 of the Civil Procedure Act (Cap 21) – is that costs follow the event. Of course the court has discretion on the issue but where there is departure from the established rule, there must be good reasons proffered and the law requires that the reasons be recorded. I see no reason to depart from the established rules. Accordingly, the plaintiff is ordered to pay the costs of the suit and the counter-claim.

JUDGEMENT DATED, SIGNED and DELIVERED in open at
KITUI this **28th day of April, 2026** pursuant to notice dated
21/4/2026.

In the presence of,

Court Assistant - *Musyoki*

Plaintiff - absent

Defendant - absent

No counsel present

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI