



# THE JUDICIARY



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANG'A**  
**LAND DIVISION**  
**ELCLC E007 OF 2024(O.S)**  
**IN THE MATTER OF SECTIONS 37 AND 38 OF THE LIMITATION OF ACTIONS ACT (CAP**  
**22 LAWS OF KENYA)**  
**AND**  
**IN THE MATTER OF LAND TITLE NO. LOC.5/NGURUWEINI/891/13A**  
**BETWEEN**  
**ESTHER NJERI KIMANI suing as the legal representative of the**  
**estate of PETER KIMANI MWAURA(Deceased).....PLAINTIFF**  
**VERSUS**  
**LEAH WAMBUI KAGOTHO.....DEFENDANT**

## **JUDGMENT**

(1)The Plaintiff seeks the following reliefs against the Defendant in the Originating Summons dated 28-2-2024.

- (a) **The Court be pleased to declare that the Respondent’s title to land parcel No. Loc.5/Nguruweini/891/13A has become extinguished by operation of the law and that the Plaintiff herein has become entitled to the whole of the suit land through adverse possession.**
- (b) **The Court be pleased to order the whole of the suit land be registered in the name of Esther Njeri Kimani.**
- (c) **The Defendant do execute all the necessary documents to effectuate the transfer of the suit land to the Plaintiff and in default the Deputy Registrar of this Court be empowered to do so.**
- (d) **The costs hereof be borne by the Defendant.**

(2)The Plaintiff’s case is as follows. Firstly, the Defendant is the registered owner of the suit land. Before this, the registered owner was Kagotho Njui aka Ngigi Njui who was the husband to the Defendant. Secondly, before the year 1978, land parcel No. Loc.5/Nguruweini/891/13

was one plot. It was then subdivided into plots numbers 891/13A and 13B. The Plaintiff's husband was registered as the owner of 13B while the Defendant's husband, Kagotho Njui was registered as the owner of Plot No. 13A. The two men were good friends, neighbours and business associates. After the Plaintiff's husband got registered as the owner of parcel No. 13B, he constructed a commercial building thereon. The Defendant's husband did not construct on plot No. 13A. Thirdly, in the year 1980, the Plaintiff's husband purchased plot No 13A from the Defendant's husband vide a sale agreement which is undated. The purchase price was Kshs 4000/= . Soon after the purchase of plot No. 13A, the Plaintiff's husband took possession of the land and built a permanent commercial building thereon. He had been continuously, exclusively, openly, without force or secrecy utilizing the said plot No. 13A. In his lifetime the Defendant's husband never attempted to interrupt the Plaintiff's husband's occupation of the suit plot or evict him therefrom. Fourthly, on 5-2-2024, the Defendant served the Plaintiff with a notice to vacate plot 13A. The Plaintiff challenges this notice because under Section 28 of the Land Registration Act, she has acquired an overriding interest having occupied the suit land for over 40 years without interruption. For the above and other reasons, the Plaintiff prays that her prayers in the originating summons be allowed.

(3) In support of her case, the Plaintiff filed the following evidence.

- (i) Supporting affidavit dated 28-2-2024.**
- (ii) Witness statement dated 28-2-2024.**
- (iii) Further affidavit dated 18-1-2024.**
- (iv) Copies of certificates of official search for the suit parcel dated 24-5-2022 and 2-2-2024.**
- (v) Copy of certificate of confirmation of grant in HCCC Murang'a Succession Cause No. 901 of 2014 dated 4-4-2017.**
- (vi) Copy of certificate of translation of the sale agreement for the suit plot.**
- (vii) Copy of undated sale agreement in Kikuyu language.**
- (viii) Copy of lease agreement for the suit plot commencing 1-10-99 and its translation from Kikuyu language to English language.**
- (ix) Five (5) photographs showing the suit premises.**

**(x) Copy of notice to vacate the suit land dated 5-2-2024.**

(4)The Plaintiff's claim is opposed by the Defendant who has filed a replying affidavit dated 28-10-2024 and a witness statement dated 4-11-2025 in which she replies as follows. One, she is the wife of Kagotho Njui the initial owner of Plot No.13 before subdivision. Her husband subdivided the plot into the two plots in 1978. He sold 13B to the Plaintiff's husband. Two, he entered a second agreement with the Plaintiff's husband Peter Kimani Mwaura where he allowed him to enter plot 13A and use it in his business dealings as he was an astute businessman. Instead of paying rent to the Defendant's husband, he would complete the incomplete structure that the Defendant's husband had started. In fact the Defendant's husband had started developing both plots long before he sold one and leased the other to the Plaintiff's husband. The two plots are adjacent to each other. The Plaintiff's husband did not therefore pay any rent for plot No. 13A until the death of the Defendant's husband in 1997 because he was recouping his costs of improving the suit land as per their agreement. Three, neither the Plaintiff nor her late husband ever purchased the suit land from the Defendant's husband nor the Defendant.

The Plaintiff and her husband did not gain access to the suit land as adverse possessors but as tenants with an agreement to recoup their costs for the improvements by not paying rent for a determined period.

For the above and other reasons, the Defendant prays for the dismissal of the Plaintiff's suit.

(5)In support of her case, the Defendant filed the following evidence.

- (a) Replying affidavit dated 28-10-2024.**
- (b) Witness statement dated 4-11-2025.**
- (c) Certificate of official search dated 12-3-2024 and receipt**
- (d) Copy of notice to vacate the suit premises dated 5-2-2024.**

(6)At the trial on 17-3-2026 only the parties testified. A few details that are not in the replying affidavit, the witness statements and the supporting affidavit came out. One of the details is that the Defendant's husband was married to the Plaintiff's husband's sister. Two, the sale

agreement at page 26 of the Plaintiff's trial bundle is undated. Three, while the agreement for sale is not signed by Peter Kimani Mwaura, he has signed the one for the lease commencing on 1-10-1999. Four, plot No. 13A was originally owned by Kimani wa Njai. Five, the Plaintiff and her husband never paid land rates for plot No. 13A. They only paid rates for plot No. 13B.

(7) Counsel for the parties filed written submission dated 7-4-2026 (Defendant's) and 24-4-2026.

The issues identified by learned counsel for the parties were as follows.

- (a) Whether the Plaintiff has been in continuous, open, exclusive and uninterrupted possession of the suit land for the statutory period.**
- (b) Whether such possession was adverse to the Defendant's title (i.e without permission).**
- (c) Whether the Defendant's subsequent registration on succession interrupted the Plaintiff's accrued rights.**
- (d) Whether the Plaintiff is entitled to a declaration and consequential registration as proprietor.**
- (e) Whether the Plaintiff's suit of adverse possession against her close relatives is tenable in law.**
- (f) Whether the Plaintiff entered the suit land on the basis of a sale agreement.**
- (g) Whether the Plaintiff's occupation of the suit land constitutes adverse possession.**
- (h) Who should bear the costs.**

(8) I have carefully considered all the evidence adduced in this case by both sides including the supporting affidavits, the witness statements, the replying affidavit, the documents and the testimony at the trial. I have also considered the submissions by both sides, the issues identified and the law cited therein. I find that the issues as identified and framed will resolve the dispute.

(9) Regarding the first issue, I find the Plaintiff has been in occupation of the suit land since 1978.

This is evident from her and her husband's occupation which is not disputed by the

Defendant. It is therefore common ground that the occupation of the suit land by the Plaintiff and her husband has been since 1978 which is close to 50 years.

- (10) As to whether the possession of the suit land by the Plaintiff and her husband has been adverse to the Defendant's title, I find that it has not been. Even though the Plaintiff claims to have bought the suit land, her evidence lacks conviction in the absence of cogent documents to prove the sale. If there were indeed two sales, there should have been two sale agreements. The only sale agreement availed is undated. It could therefore have been the one for plot No.13B

and not necessarily for Plot No. 13A. A closer look at the agreement at the 3<sup>rd</sup> line shows that the letter "A" after the figure 13 is not at the same level with the figure 13. The letter "A" is at a higher level than the figure 13. Secondly, the evidence by the Plaintiff stands alone uncorroborated by any independent evidence. Thirdly, the evidence by the Defendant is very consistent and convincing. It gives a credible narrative of what the husbands of the parties agreed. This narrative could well be true. Finally on this issue, the Plaintiff is the one with the burden of proof, yet at the end of the day, it is the Defendant who comes out as the more credible witness. This means that the Plaintiff has not discharged the burden of proof placed upon her by the law.

- (11) Having made the finding in the above paragraph, I find that the other issues become somehow moot. It is not necessary to delve into the other issues because that single issue decides the suit. These other issues are auxiliary to the second issue.

It is trite law that for a claim for adverse possession to succeed, the claimant must prove that the entry to the land of the Defendant is neither by force or stealth nor under licence of the owner and the occupation is for at least 12 years. In the case of **Mtana Lewa vs. Kahindi Ngala Mwangadi [2014] eKLR** the Court of Appeal brought out the prerequisites clearly as follows;-

**“The essential prerequisites being that possession of the adverse possession is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”**

In this case the fact that there was an agreement to vacate the suit land after the recouping of the costs of the construction means that adverse possession is not available to the Plaintiff.

- (12) In conclusion and for the reasons given, I find **no merit** in the Plaintiff's claim which I **dismiss** with costs to the Defendant.

**It is so ordered.**

**Dated, Signed and Delivered virtually at Murang'a this 13<sup>th</sup> day of May, 2026.**

**M.N. GICHERU  
JUDGE.**

**Delivered online in the presence of; -**

**Court Assistant – Antony**

**Plaintiff's Counsel – Miss Ngari**

**Respondent's Counsel – Mr Wainaina**