



Gitonga (Suing an Administrator of the estate of the Late Gideon Gitonga Nkaabu - Deceased) & 3 others v Kinyua (Sued as the Administratrix of the Estate of the Late Dionysius Maturuchiu Kinyua - Deceased) (Environment & Land Case E016 of 2021) [2025] KEELC 4041 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 4041 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E016 OF 2021**

CK YANO, J

FEBRUARY 27, 2025

BETWEEN

VICTOR MUTUIRI GITONGA (SUING AN ADMINISTRATOR OF THE ESTATE OF THE LATE GIDEON GITONGA NKAABU - DECEASED) 1ST PLAINTIFF

JACQUELINE NKIROTE GITONGA (SUING AN ADMINISTRATOR OF THE ESTATE OF THE LATE GIDEON GITONGA NKAABU - DECEASED) 2ND PLAINTIFF

VINCENT KIMATHI GITONGA (SUING AN ADMINISTRATOR OF THE ESTATE OF THE LATE GIDEON GITONGA NKAABU - DECEASED) 3RD PLAINTIFF

JASPER M'ARIMBA NGUTARI 4TH PLAINTIFF

AND

MERCY NYAWIRA KINYUA (SUED AS THE ADMINISTRATRIX OF THE ESTATE OF THE LATE DIONYSIUS MUTURUCHIU KINYUA - DECEASED) DEFENDANT

JUDGMENT

1. The Plaintiff instituted the instant suit vide an Originating Summons dated 20th May 2021, against the Defendant for a claim of adverse possession over the whole of parcel No. Abogeta/L-Kiungone/236, seeking a determination of the following questions;



- a. Whether the plaintiffs have been in open, continuous, unsanctioned and adverse possession of L.R. No. Abogeta/ Lower Kiungone/236 as against the defendant and the estate of the late Dionysius Muturuchiu Kinyua (Deceased) since 24/4/1989, a period of over 32 years.
- b. Whether the 1st, 2nd and 3rd plaintiffs claiming through the 4th plaintiff are entitled to be registered as the owners of the said L.R. No. Abogeta/ Lower Kiungone/236 under the doctrine of adverse possession.
- c. Whether the plaintiffs were in exclusive occupation of the suit land openly, continuously, without sanction of the late Dionysius Muturuchiu Kinyua (Deceased) and adverse to his title during his life time between 24/4/1989 and 14/11/1993 and the entire period thereafter to date.
- d. Whether the date of Administration of the estate of the Dionysius Muturuchiu Kinyua (Deceased) dates back to the date of his death by dint of section 16 of the Limitation of Actions Act, Cap.22
- e. Whether the deceased, the defendant or any of her successors in title hold L.R. No. Abogeta/ Lower Kiungone/236 as trustees for the benefit of the 1st, 2nd and 3rd plaintiffs.
- f. Whether the 1st, 2nd and 3rd plaintiffs should be registered as the proprietors of the suit land.
- g. Whether the register in respect of L.R. No. Abogeta/ Lower Kiungone/236 should be rectified by cancelling the name of the late Dionysius Muturuchiu Kinyua and/or the defendant herein, Mercy Nyawira Kinyua or any of her successors in title as the proprietor thereof and replacing them with the names of the 1st, 2nd and 3rd plaintiffs, Victor Muturi Gitonga, Jacqueline Nkirote Gitonga and Vincent Kimathi Gitonga as the proprietors thereof in common in equal shares.
- h. Whether the production of the original title deed should be dispensed with for purposes of the rectification.
- i. Whether the defendant should bear the costs of this suit.

Plaintiffs' Case;

2. It is the Plaintiffs' claim that they have been in open, exclusive and uninterrupted occupation of the suit property for a period of over 12 years. The suit land L.R No. Abogeta/Lower-Kiungone/ 236 was registered in the name of the Dionysius Muturuchiu Kinyua, the defendant's late father on 24/4/1989. However, prior to the said registration, the suit land was registered in the name of the 4th plaintiff.
3. That vide a sale agreement dated 7/7/1987, the 1st – 3rd plaintiffs' late father purchased a portion of the suit land measuring 3 Acres from the 4th plaintiff and he took immediate vacant possession. That the 4th plaintiff later sold the remaining portion of the suit land measuring 3 Acres, then described as parcel No. 875. Their late father thus took possession of the entire 6 Acres wherein he settled, extensively developed the suit land, building permanent structures.
4. It was their contention that the defendant's late father, Dionysius Muturuchiu Kinyua, fraudulently transferred the whole suit land into his name on 24/4/1989 without the consent of the 4th plaintiff. That despite the suit land being registered in his name, the defendant's late father never took possession thereof nor utilized the land until his death.



5. They thus urged the court to allow their claim and grant the orders sought in the originating summons by virtue of their open and uninterrupted occupation of the suit land for a period of over 32 years since the land was registered in the name of defendant's late father.
6. In their response to the Counter-claim, while referring to the transaction that led to the transfer of the suit land to the late Dionysius Maturuchiu Kinyua, the 1st plaintiff stated that he was duly informed by the 4th plaintiff that his intention was to transfer only a portion measuring 1 Acre, to be excised from parcel No. 236, as evident from the Application for LCB Consent dated 22/2/1989.
7. They dismissed the claims of possession and use of the suit land by the defendant's late father or any of his family members and maintained that the defendants have never used the land at all. He further averred that despite the numerous and protracted court cases, they have continued to use the suit land and have never been evicted and urged the court to strike out the counter-claim with costs for being time barred.
8. The Plaintiffs' case proceeded for hearing and they called 3 witnesses to testify in support of their case. PW1- Victor Mutuiri Gitonga, adopted his Supporting Affidavit sworn on 20/5/2021 and a supplementary affidavit in response to the Counter-claim sworn on 10/11/2021 as his evidence in chief. He stated that he had lived on the suit land for about 32 years together with their family. That in the beginning, their family occupied a portion measuring 3 acres but his late father later purchased an additional 3 acres. That they have been in peaceful occupation of the 6 acres of the suit land for a period of about 17 years, and have developed the land by building a permanent 7 roomed house put up in the year 2005.
9. He also produced the annexures attached to the said affidavits; annexures 1-6 in the Supporting Affidavit and annexure 1-3 in the Supplementary affidavit, and also produced the 2 documents in their supplementary list of documents. All the documents were marked as Pexhibits 1- 11 in support of their case.
10. On cross-examination, PW1 stated that the late Gideon Gitonga Nkaabu was the biological father of the 1st – 3rd plaintiffs but had no relationship with the 4th plaintiff. It was also his testimony that the 4th plaintiff was not entitled to any portion of the suit land.
11. It was his contention that other than the filing of the previous suit, there had never been any interruption. He was referred to the High Court Succ. Cause No. 166 of 1997 in respect to their father's estate, wherein the 4th plaintiff was the petitioner, the 1st -3rd plaintiffs were interested parties while the defendant was a protestor. He conceded that the judgment in the said succession cause made a finding that the interested parties and the petitioner had no interest in the suit land. The land was declared as forming part of the estate of the defendant's late father. The said decision was never appealed against.
12. He conceded that an order of inhibition was granted by the court in favor of the defendant. He confirmed receiving a letter dated 19/2/2019 from the defendant's advocate asking them to vacate the suit land. Both the application and the letter to vacate were done prior to the filing of the instant suit. He admitted that he cannot tell when his late father occupied the suit land since at the time of entry, he was a minor and he had nothing to show when the developments on the land were made.
13. On re-examination, he clarified that their late father bought both parcel No. 874 and 875 from the 4th plaintiff. That even though they were asked to vacate the suit land vide the letter from the defendant's advocate, they did not vacate and are still in possession and occupation of the suit land to date. He reiterated that they started using the land since 1987 for the first 3 acres and the year 2000 for both



parcels, and that their occupation and use was open and known to the defendant. That even though the 1st – 3rd plaintiffs live and work in Nairobi, they use the suit land for farming activities.

14. PW2 was Florence Muthoni Kinyua, who adopted her witness statement dated 26/1/2022 as her evidence in chief. She said she was the daughter in-law of one Mukinda Murika, the registered owner of parcel No. 369 and which neighbours the suit land. She thus stated that she knows the person using the suit land.
15. On cross-examination, she conceded that no map was produced in court to show that her parcel No. 369 borders the suit parcel or any document from the surveyor of the land registrar.
16. She further stated that even though the 1st – 3rd plaintiffs lived in Nairobi, they visit home. That the late Gideon Gitonga Nkaabu was buried on the suit land. It was her testimony that there is a church-the Word Believers Church, on the suit land, which have used a small portion of the land for a period of about 7 years.
17. She confirmed that the 4th plaintiff does not reside on the suit land since he left about 20 years ago. She conceded that she did not have any sale agreement to show that the 4th plaintiff sold half of the suit land to the 1st – 3rd plaintiffs' late father nor was she aware of the purchase price. She also stated that one Kimathi, was employed by the late Gideon Gitonga to take care of a portion of the suit land while the church was using the remaining portion. That the said Kimathi later left due to some differences.
18. PW3 was Phineas Kimathi Kiaira. He adopted his witness statement dated 26/1/2022 as his evidence in chief. On cross-examination, he stated that he was employed by the late Gideon Gitonga Nkaabu sometimes in the year 1999 as a casual labourer during the construction of his residential house. He however conceded that he did not have any document to show that he was one of the labourers hired by Gideon.
19. He conceded that he did not know the parcel number or the size of the land where the house was being constructed on. He later stated that the house was constructed on parcel No. 875. When shown a copy of the green card, he confirmed that both plot Nos. 874 and 875 were registered in the name of Gideon; plot No. 874 was registered on 26/5/ (the year is not clear) while plot No. 875 was registered in 13/9/2000. He conceded that he was not aware that the land was registered in the name of the defendant's father sometimes in the year 2019.
20. He further stated that after construction of the house, the late Gideon employed him as a farm manager from the year 2000 until 2020 when he left, though he did not produce the agreement. That he remained on the land for about 20 years. That by the time he was leaving the suit land, the 4th plaintiff was not using any portion of the suit land. He denied knowledge of the eviction notice issued to the plaintiffs by the defendant.
21. On re-examination, he stated that from the green card produced by the plaintiffs, as at 24/4/1989, the land was in the name of the defendant's father. That there was a confirmation of grant which directed that the land No. 236 be shared between Gideon and Jasper. The same was reflected on the green card but were later cancelled vide a court order as shown in entry No. 4.
22. PW4 was Silas Kirimi Kairanya, a member of the Word of God Believers Church and a trustee. He adopted his witness statement dated 26/1/2022 as his evidence in chief.
23. On cross-examination, he stated that he did not know the parcel number of the land where the church is built. It was his testimony that the church leased the land in the year 2007 from the late Gideon and pays the requisite monthly rent. He however stated that he neither produced a copy of the lease



agreement nor receipts for payment or indicated the amount of rent payable. That after the demise of Gideon, they have continued to pay the monthly rent to the 2nd plaintiff.

24. He conceded that from the green card, the defendant's deceased father was registered as the proprietor of parcel No. 236 on 24/4/1989. That the said land was later subdivided into parcel Nos. 874 registered in the name of the late Gideon and 875 registered in the name of Jasper on 25/5/1999. That the two parcels of land have never been registered in the name of the defendant or her late father after subdivision.
25. He denied knowledge of the order by the Succession court directing that the two subdivisions be cancelled and the land to revert to the previous registration No. 236 in the name of the defendant's late father. He further stated that prior to his death, neither the 4th plaintiff nor his family were using the suit land. It was his testimony that he did not know the late Dionysius Muturuchiu Kinyua or his daughter, the defendant herein.
26. The plaintiffs thereafter closed their case.

Defendants' Case;

27. In response to the averments made by the Plaintiffs, the Defendant filed a Replying Affidavit and a Counter-claim both dated 21/6/2021. It was her claim that the 4th plaintiff freely and rightfully transferred the suit land in the name of her late father sometime in the year 1989. That her father took vacant possession of the land and started farming maize, beans, bananas, gravellier trees and continued to be in possession of the land until his death. That the 4th plaintiff never sued her late father during his lifetime for the alleged accusations of fraud at all.
28. She gave a brief background of the Meru Succession Cause No. 166 of 1997, filed in respect to the estate of her late father and which culminated in the judgment by Mabeya J. in her favor and whose effect was to order the revocation of the grant issued to the 4th plaintiff and to order that all the subsequent subdivisions and registrations be cancelled and the suit land to revert to the original number and registration of her late father's name.
29. She thus contends that the alleged continuous possession and use of the suit land by the 1st – 3rd plaintiffs (though denied) was interrupted by the filing of the succession cause and the various applications thereto. That further, she issued the 1st – 3rd plaintiffs an eviction notice dated 19/2/2019.
30. In her counter-claim, the defendant sought the following orders against the plaintiffs (in the main suit); an order compelling the 1st – 3rd plaintiffs and their families to vacate the suit land No. 236 and in default they be forcibly evicted and an order of permanent injunction restraining them from entering into, trespassing onto, farming or in any other way utilizing the suit land together with costs of the suit.
31. It was her claim that the suit land L.R No. 236 belongs to and is registered in the name of her late father, having acquired the land from the 4th plaintiff and the same was transferred to him in the year 1989 and the title deed thereto issued on 24/4/1989.
32. That her late father thereafter took vacant possession of the land and began farming maize, beans, bananas, gravellier trees thereon and continued being in exclusive possession and use of the said land.
33. That after the death of her father, her aunt, one Kathure continued using the land until sometime around September, 2014, when the 1st -3rd plaintiffs and their agents began utilizing the land despite the pendency of the succession case No. 166 of 1997 in court.



34. It was her contention that vide a judgment in the succession cause, the judge revoked the grant issued to the 4th plaintiff and ordered that the land do revert back to the original number and registration in the name of her late father. She therefore urged the court to allow her claim and grant the orders sought.
35. The Defence case proceeded for hearing on 6/11/2024 and called 1 witness to testify in support of her case. The defendant testified as DW1. She adopted the replying affidavit sworn on 21/6/2021, her counter-claim of even date and her further affidavit dated 22/4/2022 as her evidence in chief.
36. It was her testimony that until the Judgment by Mabeya J. delivered on 6/12/2018 in Succ. Cause No. 166 of 1997, the land was registered in the name of Gideon Gitonga Nkaabu, who is since deceased. That both the 1st – 3rd plaintiffs' late father and the 4th plaintiff were parties in the said succession cause.
37. She referred to the said judgment at paragraph 27 where the court ordered that the land should revert to her late father's name, that is, parcel No. 236, and which had been subdivided into parcel Nos. 874 and 875, which had both been registered in the name of the late Gideon in the year 1999 and 2000 respectively. She extracted the Decree thereto on 19/2/2019. She confirmed that both parcels had never been registered in the name of her late father. That parcel No. 875 was initially registered in the name of the 4th plaintiff on 13/9/2000 but the same was later transferred and registered in the name of the late Gideon. That the decision in the succession cause has never been challenged by the plaintiffs.
38. The two parcels of land, Nos. 874 and 875 were only registered in the name of the defendant's late father in the year 2019 upon execution of the decree issued in the succession case. She thus argues that the registration having been effected in the year 2019 and the suit herein having been filed in the year 2021, that is, 2 years later, which period is less than the cumulative 12 years' period.
39. She further stated that the plaintiffs did not adduce any evidence of the developments in the suit land. It was her claim that the 4th plaintiff was a caretaker of the suit land employed by her late father and after he was evicted, he never went back to the suit land.
40. It was her contention that the late Gideon Gitonga Nkaabu entered the suit land in the year 2014 and built a house on about 1/8 of an acre. She urged the court to grant an order of eviction against the plaintiffs and to demolish the said house. She further maintained that the plaintiffs have never utilized the remaining portion of the suit land other than where they have built. She denied that the late Gideon Gitonga Nkaabu was buried on the suit land as alleged by the plaintiffs or that there was a church on the suit land. She urged the court to dismiss the plaintiffs' claim and to allow the counter-claim as sought.
41. She produced the annexures attached to the affidavit as Dexhibits 1- 10 in further support of her case.
42. On cross-examination, she confirmed that from the Green Card produced by the plaintiffs in relation to parcel No. 874, the 1st and 2nd Entry are in the name of Gideon Gitonga and the title thereto issued. Entry No. 4 on the same Green Card shows that Entry No. 1 and 2 were cancelled by a court order.
43. Further the green in relation to parcel No. 875, also shows that the 1st and 2nd Entry are in the name of the 4th plaintiff and the title thereto issued. Again, entry No. 4 on the same Green Card shows that Entry No. 1 and 2 were cancelled by a court order in case No. 166 of 1997.
44. Entry No. 6 in the Green Card in relation to parcel No. 236 shows that the suit land is registered in the name of Dionysius Muturuchiu Kinyua. It was her claim that the order of 23/7/1999 has never been set aside and that the land is still in her father's name.
45. She further maintained that they are the ones carrying out the miraa farming on the suit land currently, though this fact was not mentioned in her affidavits. She gave a brief background of how her late father became entitled to a portion of the suit land, which originally belonged to the 4th plaintiff. She conceded



that on the application for the Land Control Board Consent, the same shows that the portion in question is 1 acre. However, the same is not clearly indicated in the Green Card in respect to the suit No. 236 and at entry No. 6, there is no mention that her late father was entitled to the whole land.

46. On re-examination, she clarified that she was not aware of the order dated 23/7/1999, whether the same was implemented, the parties in the case, the application which gave rise to the said order or the judge who signed the same. Further, that there has been no certificate of official search to confirm the implementation of the said order dated 24/4/1999.
47. She further stated that there was no indication in the originating summons that her late father was only entitled to a portion measuring 1 acre and argued that the said allegation is therefore an afterthought. That the 4th plaintiff never sued her late father for allegedly taking the whole parcel instead of 1 acre. Further, that there has been no document challenging the consent between her late father and the 4th plaintiff, whose effect was to transfer the whole land to her late father.
48. DW2 was Kathure M'turuchiu. She adopted the contents of her affidavit sworn on 21/6/2021. On cross-examination, she reiterated that on 23/7/1999, the court ordered that the suit land reverts to her late brother's name. The court issued similar orders on 8/3/2001. The defence thereafter closed their case.
49. Upon close of the defence, the court issued directions on the filing of submissions. The plaintiffs filed their submissions dated 16/11/2024 and Supplementary Submissions dated 9/12/2024 together with authorities while the defendant filed her submissions dated 26/11/2024.

Analysis and Determination;

50. Having considered and reviewed the pleadings filed in court, the respective exhibits and submissions in totality, the issues that arise for determination are as follows: -
 - a. Whether the Plaintiffs have proved their claim of Adverse Possession?
 - b. Whether the Plaintiffs are entitled to the reliefs sought
 - c. Whether the Defendant is entitled to the orders sought in the Counter-claim.

I. Whether the Plaintiffs have proved their claim on Adverse Possession

51. The legal framework for adverse possession is provided in sections 7, 13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* as read with section 28 (h) of the *Land Registration Act*.
52. A party claiming Adverse Possession must prove that his possession of the subject land is peaceful, open and continuous for a statutory period of 12 years and the said possession is adverse to the title of the land owner and is with the intention to dispossess the true owner thereof.
53. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and



in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act...*”

54. Thus, the elements to be proved in a claim for Adverse possession are; that the land in question must be registered in the name of a person other than the plaintiff, the plaintiff must demonstrate that it took possession of the suit land, asserted its rights over it in an adverse manner and the said title holder did not take any precipitate action against the plaintiff for a period of 12 years, the plaintiff must also demonstrate that his possession and occupation of the suit land was not by force or under the licence of the land owner and that the said possession was open, continuous and uninterrupted period of over 12 years.
55. The onus is on the plaintiffs to establish the date they took possession, the nature and duration of their possession, whether the same was with the intention to dispossess and whether the same was open and uninterrupted for the 12 years’ statutory period. See Court of Appeal decision in Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR).
56. The first element to be proved is that the suit parcel is registered in the name of a person other than the plaintiff. The circumstances of this case present a unique scenario. The plaintiffs contend that the suit land LR. No. Abogeta/Lower-Kiungone/236 was registered in the name of the defendant’s late father on 24/4/1989. A copy of the green card and title deed was adduced to by the plaintiffs and the defendant in support of the said assertions as pexh.3 and Dexh. 4 respectively.
57. I have critically perused the exhibits adduced by the rival parties, particularly copies of the Green Card in respect to parcel Nos. 236, 874 and 875 and the Dexh. 2, which is the judgment in the Meru Succession Cause No. 166 of 1997. It is imperative to point out that the original suit land No. 236 was at some point subdivided into parcel Nos. 874 and 875 and were registered in the name of the 1st -3rd plaintiffs’ deceased father, Gideon Gitonga Nkaabu sometimes in the year 1999 and 2000 respectively.
58. It is alleged that vide an order dated 23/7/1999, the grant issued to the 4th plaintiff was revoked and the subsequent resultant transactions including the subdivisions of parcel No. 236 to parcel 874 and 875 and registration in the name of the late Gideon Gitonga Nkaabu, were all cancelled and the land was to revert to the name of the defendant’s late father. The same was done and is evidenced by the Entries 4 on the Green Cards for parcel Nos. 874 and 875.
59. Interestingly to note is the fact that said order dated 23/7/1999 was quashed by Tuiyot J. in the year 2001. This is evident at paragraph 3 of Dexh. 2. The effect of the said order of certiorari meant that the subdivision and the subsequent registrations were still in force/effective. This is further supported by entry 5 and 6 in the green card of parcel no. 875, which show that even though entry 4 cancelled the earlier entries, in entry 5 the land was registered in the name of the late Gideon Gitonga Nkaabu and entry 6, title deed was issued thereto.
60. Dexh. 2, the judgment by Mabeya J. was delivered on 6/12/2018 and whose effect was to revoke the grant and cancel the resultant transactions, subdivisions and registrations. No documentary evidence was adduced to confirm the registration of the suit land post the decision in Dexh.2. and the Dexh. 3. This court is therefore unable to find this ground in favor of the plaintiffs. Part of the period under review for the Plaintiffs’ claim of adverse possession, the suit parcel was actually registered in the name of their late father.
61. The next element and which is at the core of a claim for adverse possession is that of possession/ occupation and use and whether the plaintiff acquired overriding interests capable of registration. As pointed hereinbefore, the onus is on the plaintiffs to demonstrate the duration and nature of their possession and whether the same accrued any prescriptive and overriding rights over the suit land.



62. The plaintiffs adduced pexh. 5, a copy of the valuation report dated 2/4/2018 in support of the occupation and use claims, which I have carefully considered. Even though the defendant maintained that the plaintiffs have never been in occupation and use of the suit land at all, she did not adduce any contrary evidence to rebut the valuation report or the testimonies by PW1, 3 and 4 other than simply stating that she has been the one using the land.
63. However, the important question that arises herein is whether the 1st -3rd plaintiffs' possession, occupation and use of the suit land was in an adverse manner with the intention to dispossess the defendant as the true owner of the suit land
64. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR).
65. As earlier stated in paragraphs 62, 63 and 64 hereinabove, the contents of the various green cards of the original parcel No. 236, parcel Nos. 874 and 875 are significant in determining the nature of the plaintiffs' possession, occupation and use of the suit land. It is clear from the copies of the registers that at some point the late Gideon Gitonga was the registered as the proprietor of parcels Nos. 874 and 875, and which form the suit parcel No. 236.
66. It is not clear at what point the 1st – 3rd plaintiffs ceased occupying and using the suit land as the legal, beneficial and registered proprietors thereto and at what point their possession became adverse, owing to the decision by Tuiyot J. in the year 2001 and the decision by Mabeya J. dated 6/12/2018 in Succession Cause No. 166 of 1997.
67. The plaintiffs have not sufficiently demonstrated at what point their possession and use became adverse and the duration thereafter to ascertain when time started running for purposes of adverse and when the same crystallized. Duration and nature of possession and occupation are the important and critical elements to consider in a claim of adverse possession.
68. Further, I wish to point out that the plaintiffs are challenging the title of the defendant in respect to the entire suit land. It is their claim that the defendant was only entitled to a portion measuring 1 Acre out of the suit land No. 236 and that the late Dionysius Kinyua, fraudulently transferred the whole land in his favor against the wishes of the 4th plaintiff. They produced a copy of the Application for LCB Consent dated 22/2/1989 to support the allegations of the said 1 acre entitlement. These allegations were denied by the defendant who maintained that no consent or agreement was adduced by the 4th plaintiff to support the said claims of fraud.
69. The validity of the transfer and registration of the entire suit land in the year 1989 is not a subject for determination in the instant suit and this court will therefore not delve into the merits of the said issue.
70. It is well settled that a claimant under the doctrine of adverse possession should not challenge the title of the title holder or land owner, who he seeks to dispossess. You cannot challenge the title of the defendant on account of fraud and in the same vein seek to dispossess him of the said title and acquire prescriptive and overriding interests capable of registration.
71. In view of the foregoing, it is the finding of this court that the plaintiffs have not satisfactorily proved their claim on adverse possession to the required standard and they are consequently not entitled to the reliefs sought.



Whether the defendant is entitled to the reliefs sought in the Counter-claim;

72. The defendant in her counter-claim sought orders for eviction and permanent injunction against the plaintiffs. She majorly relied on decision of the High Court in Succ. Cause No. 166 of 1997 by Mabeya J. delivered on 6/12/2018.
73. The plaintiffs on their part, other than raising allegations of fraud, they did not discharge their burden of proof sufficiently that the transfer and registration in the name of the defendant's late father was fraudulent or any fraud on the part of the late Dionysius Maturuchiu Kinyua. Further, it is not clear from the record that the said decision in Succession Cause No. 166 of 2018 has ever been set aside, varied and or reviewed.
74. In the absence of any evidence to the contrary and having held that the plaintiffs' claim on adverse possession has not been sufficiently proved, I find no reason for the plaintiffs' continued possession and use of the suit land without any sufficient and justifiable reason.
75. Consequently, it is the finding of this court that the defendant has proved her claim as per the Counter-claim and she is entitled to the orders sought.

Costs:

76. Costs generally follow the event. In this case, having held that the defendant has proved her case against the plaintiffs, I find that she entitled to costs of the suit and the counter-claim.

Conclusion:

77. The upshot of the above is that the Plaintiffs have not proved their claim on adverse possession and I accordingly find that the Originating Summons dated 20th May, 2021 is not merited and is hereby dismissed with costs to the defendant.
78. Further, I find that the Defendant has proved her counter-claim and I accordingly allow the orders in the counter-claim as sought.
79. The plaintiffs are hereby directed to vacate the suit land within a period of 90 days from the date of this judgment. In default, the defendant/counter-claimer shall be at liberty to evict them without further reference to this court.
80. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON 27TH DAY OF FEBRUARY, 2025.

HON. C. K. YANO

ELC, JUDGE

In presence of; -

Mr. Mwenda Mwarania for the Plaintiffs

Mr. Mawira for the Defendant.

Court Assistant – Laban

