



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT EMBU**  
**ELC CASE NO. 128 OF 2014**  
**IN THE MATTER OF THE PROPERTY TITLE NUMBER KYENI/MUFU/3060**  
**BETWEEN**  
**THE ESTATE OF NYAGA RUANDERI (DECEASED).....1<sup>ST</sup> PLAINTIFF**  
**CIAKUTHII NJOROGE.....2<sup>ND</sup> PLAINTIFF**  
**AND**  
**THE ESTATE OF**  
**MARIKO KANYAKIRI GAKUTHI (DECEASED).....1<sup>ST</sup> DEFENDANT**  
**ONARAT VUKO MARIKO.....2<sup>ND</sup> DEFENDANT**  
**GABRIEL NYAGA NJOROGE.....3<sup>RD</sup> DEFENDANT**  
**JOHN NJOKA KANYAKIRI.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

Land parcel No. NYENI/MUFU/3060 (the suit land) is registered in the names of **MARIKO KANYAKIRI GAKUTHI** (the deceased) who died on 20th January 1996. On 12th May 2011, a petition for the grant of letters of administration in respect of the deceased's Estate was lodged at the **SENIOR RESIDENT MAGISTRATE'S COURT RUNYENJES** being **SUCCESSION CAUSE No. 76 of 2011** and were issued to his wife **ONARAT VUKO MARIKO** the 2nd defendant. The grant was confirmed by **MAJANJA J.** in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012** via a ruling delivered on **29TH MAY 2014**. In that ruling, **MAJANJA J.** confirmed the distribution of the suit land among the beneficiaries as follows:

*'Land parcel KYENI/MUFU/3060 to be inherited as follows:*

- a) CIAKUTHII NJOROGE to get 2.0 acres*
- b) VIDEA WARUE to get 1.0 acres*
- c) ONARAT VUKO MARIKO to get 1.0 acres"*

This distribution was as per the summons for confirmation of grant filed by the 2nd defendant **ONARAT VUKO MARIKO. CIAKUTHII NJOROGÉ** is the 2nd plaintiff and is the wife of **NYAGA RUANDARI** (also deceased) whose Estate is the 1st plaintiff. She was the 1st protestor in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012**. The other two protestors are not parties to this suit. I shall revert to **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012** later in this judgment.

By an Originating Summons dated 22nd October 2014 and filed on 23rd October 2014, the 2nd plaintiff **CIAKUTHII NJOROGÉ** claiming to have acquired title to the suit land by way of adverse possession sought the determination of the following questions:

- 1. Whether the 2nd plaintiff's occupation of the suit land No. KYENI/MUFU/3060 amounts to adverse possession.**
- 2. Whether consequently the 2nd plaintiff has acquired title to the suit land by adverse possession against the current registered owners.**

The Originating Summons to which is annexed the 2nd plaintiff's supporting affidavit, the green card to the suit land, a transfer of the suit land dated 17th June 1988 from the deceased to **NYAGA RUANDARI** at a consideration of Ksh. 14,000, a copy of the title deed to the suit land in the names of the deceased and a copy of the confirmed grant issued in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012** among other annexures (see annexures **A1 to A8**) seeks the following orders:

- 1. That the 2nd plaintiff CIAKUTHII NJOROGÉ be registered as the proprietor of the title No. KYENI/MUFU/3060 measuring approximately 1.62 Hectares in place of the current registered owners.**
- 2. That the defendants bear the costs of this application.**

In her supporting affidavit, the 2nd plaintiff has averred, inter alia, that the deceased is the registered proprietor of the suit land but her late husband **NYAGA RUANDARI** entered the same in the sixties but in 1988, the suit land was transferred to him by the registered owners at a consideration of Ksh. 14,000 and a transfer was duly executed at the Lands office in Embu and was witnessed by the Land Registrar in the presence of the 2nd defendant. However, her husband died the same year before he could transfer the title into her names. The 2nd plaintiff has continued to occupy the suit land from 1988 and even buried her husband thereon. That the 2nd plaintiff has built a semi-permanent house on the suit land where she lives with her children and the registered owner never interfered with her occupation of the suit land upto the time that he died on 19th January 1996. That in December 2000 after the death of the registered owner of the suit land, someone purported to obtain a title deed to the suit land in order to defeat her occupation thereof and on 29th May 2014, the 2nd defendant purported to obtain a certificate of confirmation of grant and distributed the suit land to herself and another person and only gave her two (2) acres out of the four (4) acres comprising the suit land. That she is now threatened with eviction by the defendants who are destroying her tea, coffee and other crops. That she has been in continued, open, exclusive and un-interrupted occupation of the suit land for more than twelve (12) years with the knowledge of the defendants hence this suit.

The Originating Summons is opposed and the 4th defendant (**JOHN NJOKA KANYAKIRI**) has sworn a replying affidavit on behalf of the 2nd and 3rd defendants in which he has stated that the 2nd plaintiff was in occupation of the suit land upto 13th June 2014 when it was sub-divided into three portions of 2 acres. 1 acre and 1 acre respectively following the confirmation of grant issued in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012**. That the 2nd plaintiff had instituted Criminal proceedings against the 2nd and 4th defendants and others for malicious damage to property in **RUNYENJES PRINCIPAL MAGISTRATE'S COURT CRIMINAL CASE No. 369 of 2014** but they were acquitted. Thereafter, the 2nd plaintiff incited her sons **DAVID NJIRU NJOROGÉ** and **JOHN IRERI NJOROGÉ** to register a caution on the suit land. That during the hearing of **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012**, the 2nd plaintiff who was the 1st protestor

raised the issue that the deceased had sold them the suit land at Ksh. 14,000 but that was overruled by the Judge and this Originating Summons is therefore an abuse of the process of the Court and is res-judicata. That the 2nd plaintiff cannot allege that she was in occupation of the whole suit land because as from 13th June 2014, the beneficiaries have occupied their respective portions and the 2nd plaintiff is only in occupation of two (2) acres. That the transfer by which the deceased is alleged to have transferred the suit land to the 2nd plaintiff's husband is fake as it was not registered at all and there is no way that such transfer could be executed without the consent of the Land Control Board. That **VIDEA WARUE** a step-daughter to the 2nd plaintiff is a beneficiary of one (1) acre out of the suit land which she occupies and yet she has not been enjoined in this suit and if there was any sale transaction over the suit land, **NYAGA RUANDARI** who died in 1988 ought to have pursued the issue with the deceased who died in 1996. That this suit is frivolous and an abuse of the Court process and should be dismissed. Annexed to that replying affidavit are a copy of the confirmed grant in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012**, the proceedings and ruling in **RUNYENJES PRINCIPAL MAGISTRATE'S CRIMINAL CASE No. 369 of 2014**, ruling in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012**, certificate of search showing that the suit land is registered in the names of the deceased and an application seeking the removal of cautions placed on the suit land – annexures **JK 1 to JK 5**.

In a supplementary affidavit, the 2nd plaintiff averred, inter alia, that the 4th defendant has confirmed her occupation of the suit land where the 2nd plaintiff first occupied with her husband in the sixties and then in her own right since 1988 which occupation has been open and continuous. That the title deed to the suit land dated 19th December 2000 was fraudulently obtained in the names of the deceased who had died four (4) years earlier and further, that the 4th defendant tricked her and obtained from her Ksh. 20,000 allegedly as fees to have the suit land registered in her names only to register it in the names of the deceased.

The suit was originally placed before **BWONWONGA J.** who heard various applications before downing his tools in the matter no doubt as a result of the decision of the Court of Appeal in the case of **KARISA CHENGO & OTHERS VS REPUBLIC CRIMINAL APPEAL No. 44, 45 and 76 of 2014 (MALINDI)**. I thereafter became seized of the matter when I started visiting the Embu Court in March 2016 to handle Environment and Land cases. Before downing his tools, **BWONWONGA J.** had on 4th November 2014 directed the Deputy Registrar Embu to visit the suit land and file a report showing the following:

1. ***“Whether the 2nd, 3rd and 4th defendants are in occupation of the suit land***
2. ***to record any statement that is necessary and incidental to item (1) from the parties”***

The Deputy Registrar did visit the suit land and filed a report dated 7th November 2014 which I shall revert to later in this judgment.

When the matter was placed before me on 9th March 2016, it was agreed with the consent of the parties that the suit be determined on the basis of the pleadings and other documents herein and that submissions be filed. Submissions were thereafter filed both by **MR. J.K.N. KAMUNYORI instructed by KAMUNYORI & COMPANY ADVOCATES** for the plaintiffs and **MS MUTHONI instructed by MUTHONI, NDEKE & COMPANY ADVOCATES** for the 2nd, 3rd and 4th defendants.

I have considered the pleadings herein, the annexures thereto and the submissions by counsel.

This is the time to revisit the ruling of **MAJANJA J.** delivered on 29th May 2014 in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012** and also determine whether this suit is in fact res-judicata. Counsel for the 2nd, 3rd and 4th defendants has submitted that this suit is res-judicata on the basis that the same issues were raised in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012** where the 2nd plaintiff as a protestor averred that her late husband had bought the suit land from the deceased but **MAJANJA J.** dismissed that claim and distributed the Estate from which no appeal was filed and therefore this suit is an appeal through the back-door and an abuse of the Court process which should therefore be dismissed. Counsel for the plaintiffs has however submitted that **EMBU HIGH**

**COURT SUCCESSION CAUSE No. 435 of 2012** in which the 2nd plaintiff was a protestor was a matter dealing with intestate succession but this suit relates to title to property through adverse possession and therefore res-judicata does not apply.

The doctrine of res-judicata is provided for in Section 7 of the Civil Procedure Rules in the following terms:

***“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 them 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”.***

From the above, it is clear that before res-judicata can be invoked, the following must be proved:

- 1. The issue in dispute in the former suit must be directly and substantially in dispute in the suit where the doctrine of res-judicata is pleaded***
- 2. The former suit must be between the same parties or those under whom they or any of them claim litigating under the same title***
- 3. The former suit must have been heard and finally decided***
- 4. The Court or Tribunal which determined the former suit must have been competent.***

See **KARIA & ANOTHER VS ATTORNEY GENERAL (2005) 1 E.A 83** and also **KAMUNYE & OTHERS VS PIONEER GENERAL ASSURANCE SOCIETY LTD (1971) E.A 263**. Res-judicata is basically a bar to subsequent proceedings involving an issue that has been heard and determined by a competent Court involving the same parties or those litigating under them. Its rationale is based on the principle that there must be an end to litigation.

It is clear that in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012, MAJANJA J.** was dealing with the issue of succession in relation to the Estate of the deceased and could not have determined an issue touching on ownership of the suit land by way of adverse possession or any civil dispute over land for that matter. This was clear in the mind of the Judge because he made the following remarks at page five (5) of his ruling:

***“It is not in dispute that KYENI/MUFU/3060 is registered in the names of the deceased. Ciakuthii testified that the deceased sold the land to her husband for Ksh. 14,000 but did not pursue the matter. Her husband died in 1988 while the deceased died in 1996. Although the title is in the names of the deceased, it is in her possession. If the protestor’s case is that the deceased sold the property to Ruandari, it was open for the Estate of Ruandari to file a suit for specific performance to enforce the sale as a contractual matter. Issues concerning the validity of sale are matters to be determined in other proceedings”.***

**MAJANJA J.** therefore clearly steered off issues of sale of the suit land, and he would certainly have done the same if the issue of adverse possession of the suit land, which is the subject in this suit, would have been raised by the 2nd plaintiff in the Succession Cause. That is because, an issue of adverse possession cannot be a matter for a Court handling a Succession dispute whose mandate is limited under the Law of Succession Act. A claim for land by adverse possession can only be determined through a substantive suit filed in this Court which is what the plaintiffs have now done. This suit is therefore not res-judicata and this Court must reject that plea.

I shall now examine the merits or otherwise of the 2nd plaintiff’s claim to the suit land by way of adverse possession.

It is now well established that the combined effect of the provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of twelve (12) years of the adverse possessor of that land – **BENJAMIN KAMAU & OTHERS VS GLADYS NJERI C.A CIVIL APPEAL No. 2132 of 1996.** Similarly, the new **Land Laws** enacted after 2010 recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** recognizes some of the overriding interests in land 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”.***

**Section 7 (d) of the Land Act 2012 provides as follows:**

***“Title to land may be acquired through:***

- a)
- b)
- c)
- d) Prescription”.***

Finally, **Section 38 (1) of the Limitation of Actions Act** which is among the provisions cited by the plaintiffs in this suit provides that:

***“When a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the land comprised in a lease registered under any of these Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.***

In **KASUVE VS MWAANI INVESTMENT LTD & FOUR OTHERS 2004 1 K.L.R 184**, the Court re-stated what a party claiming land by adverse possession must prove and said:

***“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition”.***

The 2nd plaintiff has annexed to the Originating Summons a copy of the Green Card to the suit land which shows that as at 16th June 1988, the registered proprietor thereof was the deceased – see annexure **A 1**. Although there is also a title deed dated 19th December 2000 issued in the names of the deceased, that can only have been obtained fraudulently and for purposes of filing Succession proceedings because the deceased had died four (4) years earlier on 20th January 1996 which is not in dispute. The 2nd plaintiff’s occupation of the suit land is similarly not in dispute. Indeed it is conceded by the 2nd, 3rd and 4th defendants. In paragraph 3 to 15 of her supporting affidavit, the 2nd plaintiff has deposed as follows:

**3: “That the late MARIKO KANYAKIRI GAKUTHI (herein after referred to as “the original owner”) was the registered proprietor of the property registered as KYENI/MUFU/3060 (herein after called “the suit property”). Annexed hereto is a true copy of the record at Embu Land Registry of ownership of the said property (popularly referred to as “the Green Card”) marked A 1”.**

**4: “That one NYAGA RUANDERI (I.D NO. 3512039/66) now deceased, entered and occupied the suit property from the sixties with the permission and knowledge of the original owner”**

- 5: ***“That I am the legal wife of the said NYAGA RUANDERI. I attach a copy of a letter from the Father In-Charge KYENI CATHOLIC PARISH confirming this and marked A 2”.***
- 6: ***That in 1988, the original owner transferred to my said husband the suit property for a consideration of Ksh. 14,000. Annnexed hereto is a true copy of the said transfer dated 17th June 1988 and marked A 3”.***
- 7: ***“That the transaction took place at Embu Lands office and as can be seen from the said copy of the transfer, was witnessed inter alia by the Land Registrar”.***
- 8: ***“That the 2nd defendant was present at the said function and therefore had first had knowledge thereof”.***
- 9: ***“That unfortunately my late husband died the same year in 1988 before he could acquire the title deed as evidence of the change of ownership”.***
- 10: ***“That I buried my late husband on the suit property with the full knowledge of the said original owner who did not object in any way or at all, presumably because, as far as he was concerned, the property belonged to my deceased husband”.***
- 11: ***“That I was financially unable to follow up the matter of the Title deed and so the suit property continued to be and is still registered in the name of the original owner”.***
- 12: ***“That however I continuously occupied the suit property from 1988 when my husband died todate”.***
- 13: ***“That I have planted cash crops including tea, coffee, macadamia and bananas and built a semi-permanent dwelling house to live in with my children”.***
- 14: ***“That the original owner did not interfere with my occupation and/or utilization of the suit property after my husband’s death in 1988 until he (the original owner) died on 19th January 1996”.***
- 15: ***“That in December 2000, i.e. after the death of the original owner, someone purported to obtain a title deed to the suit property in the name of the late original owner with a mind to defeat my occupation of the suit property. Annnexed is a true copy of the purported title deed aforesaid marked A 4”.***

In paragraph 4 of the replying affidavit of the 4th defendant sworn also on behalf of the 2nd and 3rd defendants, it is deponed as follows:

***“That it is true that the 2nd plaintiff and her family used to be in occupation of the whole of land parcel No. KYENI/MUFU/3060 which is my father’s land until 13th June 2014 when my family sub-divided the same into 3 portions of 2 acres, 1 acre and 1 acre respectively”.***

The entry of the 2nd plaintiff and her late husband onto the suit land is clearly not in doubt although the 2nd, 3rd, and 4th defendants dispute the transfer thereof to the 2nd defendant’s late husband terming it as ***“fake and is not registered at all”***. What I make out of those rival averments is that from the 1960’s upto 17th June 1988, the 2nd plaintiff, her late husband and their family were on the suit land with the consent of the deceased and therefore any claim for the suit land by way of adverse possession cannot be up-held by this Court. However, on 17th June 1988, the deceased and the 2nd plaintiff’s late husband entered into an agreement whereby the suit land was transferred to the 2nd plaintiff’s late husband at a consideration of Ksh. 14,000. All this time, the 2nd plaintiff and her family remained in possession of the suit land and as no consent was obtained from the Land Control Board as provided under **Section 8 (1) of the Land Control Act**, that transfer became void six (6) months after 17th June 1988 and the 2nd plaintiff and her family’s occupation thereof became adverse and time started to run for purposes of **Section 38 (1) of the**

**Limitation of Actions Act.** The only way in which that occupation could be interrupted by the defendants in this case would have been by making an effective entry or filing a suit – **GITHU VS NDEETE 1984 K.L.R 776.** The defendants did none of the above yet they had knowledge of the occupation of the suit land by the 2nd plaintiff and her family. It was not until 2011 that the 2nd defendant filed at the **SENIOR MAGISTRATE’S COURT RUNYENJES, SUCCESSION CAUSE No. 76 of 2011** seeking grant of letters of administration in respect of the deceased’s Estate which was subsequently confirmed by **MAJANJA J.** on **29TH MAY 2014.** That Succession Cause cannot be considered as action by the defendant towards asserting their right to the suit land through legal action or making an effective entry as per the **GITHU** case (supra). In any case, I have already found that the occupation of the suit land by the 2nd plaintiff and her family became adverse in 1988 when the transaction between the deceased and the 2nd plaintiff’s husband became void and time started running and therefore even by the time the Succession Cause was being filed in the subordinate Court in 2011, the deceased’s title to the suit land had long been extinguished because the 2nd plaintiff and her family had been in continuous, open and un-interrupted occupation thereof for a period well in excess of the statutory twelve (12) years and with the knowledge of the defendants who had taken no action to assert their ownership.

The 2nd, 3rd and 4th defendants have by their replying affidavit averred that the 2nd plaintiff and here family are only in occupation of two (2) acres out of the four (4) acres comprised in the suit land. Indeed in his report dated 7th November 2014 and which is part of the record herein, the Deputy Registrar made a finding that the 2nd defendant currently occupies one (1) acre of the suit land while one **VIDEA WARUE** who is not a party to this case also occupies one (1) acre while the 2nd and 4th defendants do not occupy any part of the suit land but have their different portions adjacent to the suit land. The Deputy Registrar also makes the following finding which is relevant to this dispute:

***“The total acreage of the suit land is four (4) acres.***

***The suit land was sub-divided as per the grant issued by Embu High Court on 29th May 2014 which was later on followed by the sub-division by the surveyors. The dispute in question arose as a result of the new boundaries”.***

The significance of this finding by the Deputy Registrar is that the entry or assertion of ownership to the suit land or a portion thereof was only made by the 2nd defendant and one **VIDEA WARUE** after 29th May 2014 following the orders of **MAJANJA J.** in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012.** That was too late because, as I have already found above, time for purposes of adverse possession started running in 1988 and so the deceased’s title to the suit land was extinguished in 2000 and therefore what the 2nd defendant did in 2014 was obviously too little too late and was not capable of defeating nor interrupting the 2nd plaintiff’s claim to the suit land by way of adverse possession. I am therefore satisfied from the evidence on record that the 2nd plaintiff has proved that she is entitled to orders that she be registered as the proprietor of the suit land having acquired it by way of adverse possession.

Although the Estate of **NYAGA RUANDERI** is named as the 1st plaintiff in this suit, the orders sought in the Originating Summons are only in respect of the 2nd plaintiff and therefore, this Court can only make orders in respect to the 2nd plaintiff. In any case, the 2nd plaintiff did not adduce any evidence that she is the administratrix of the Estate of the said **NYAGA RUANDERI.** On the other hand, the 2nd defendant is the administratrix of the Estate of her deceased husband **MARIKO KANYAKIRI GAKUTHI** in whose names the suit land is still registered. She obtained the grant via orders made in **EMBU HIGH COURT SUCCESSION CAUSE No. 435 of 2012** as I have already found above. It is clear from the provisions of **Section 28 (h) of the Land Registration Act** which I have already referred to above that a claim for adverse possession of land survives a deceased person. Therefore **Section 28 (h) of the Land Registration Act** preserves rights acquired or being acquired by virtue of **Limitation of Actions.** Similarly, **Section 2 (1) of the Law Reform Act** stipulates that on the death of any person, all causes of action subsisting against or vested in him shall survive against or, as the case may be, for the benefit of his Estate. The 1st defendant which is represented by the 2nd defendant is therefore properly sued in this case and it is also clear from the proviso to **Section 2 (1) of the Law Reform Act** that this is not among the claims excluded against or for the Estate of a deceased person. While there can be no proper cause of

action against the 2nd defendant in her own capacity, she however represents the 1st defendant.

There can also be no proper claim against the 3rd and 4th defendants in this case. It is trite that a claim for adverse possession of land can only be against the registered proprietor thereof or his legal representative. The 3rd and 4th defendants are neither the registered proprietors of the suit land nor do they represent the Estate of the registered proprietor. The case against them must therefore be dismissed which I hereby do.

Ultimately therefore and after considering all the evidence herein, I am satisfied that the 2nd plaintiff has proved that she is entitled to the orders sought in her Originating Summons filed herein on 23rd October 2014. I enter judgment for her in the following terms:

***1. An order that CIAKUTHI NJOROGE be registered as the proprietor of the property No. KYENI/MUFU/3060 measuring approximately 1.62 Hectares in place of the current registered owners.***

***2. Each party to meet their own costs.***

**B.N. OLAO**

**JUDGE**

**6<sup>TH</sup> OCTOBER, 2017**

Judgment delivered, dated and signed in open Court at Kerugoya this 6<sup>th</sup> day of October 2017

Mr. Munene for Mr. Kamunyori for the Plaintiffs present

Ms Muthoni for the Defendants absent

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**6<sup>TH</sup> OCTOBER, 2017**