



**Muriithi & another v Wambugu & another (Environmental and Land Originating Summons 105 of 2013) [2025] KEELC 874 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 874 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYERI**  
**ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 105 OF 2013**  
**JO OLOLA, J**  
**FEBRUARY 27, 2025**  
**IN THE MATTER OF: L.R. NO. MUHITO/MUYU/619**  
**AND**  
**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**BETWEEN**

**JOSEPH GITHIGA MURIITHI ..... 1<sup>ST</sup> PLAINTIFF**

**SAMUEL KAGURU MURIITHI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JAMES HILARY WAMBUGU ..... 1<sup>ST</sup> DEFENDANT**

**ESTHER WAIRIMU GITHIGA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Background:**

1. By an Originating Summons dated 28<sup>th</sup> May, 2013, Joseph Githiga Muriithi and Samuel Kaguru Muriithi (the Plaintiffs) sought for orders as follows:
  1. That the Plaintiffs have acquired title by adverse possession to the whole of L.R No. Muhito/Muyu/619 measuring 0.56 Ha (1.38 acres) situate in Mukurweni District, Nyeri County;
  2. That the said L.R No. Muhito/Muyu/619 be registered in the names of the Plaintiffs in trust for themselves, their mother's household and other family members in place of the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Defendant do sign all necessary papers of consent and transfer and in default, the Executive Officer of the Court do sign the same; and
  3. That the costs of this Suit be provided for.



2. The Originating Summons is supported by four (4) Affidavits sworn by the two Plaintiffs and two other witnesses. It is the Plaintiff's case that they have lived on the suit land which is now registered in the name of the 1<sup>st</sup> Defendant for a period in excess of 34 years. It is their case that they were born and brought up on the land where they have now built their homes, planted trees and grown coffee.
3. The Plaintiffs plead that the 2<sup>nd</sup> Defendant who is their maternal aunt was registered as proprietor of the suit property between 19<sup>th</sup> December, 1972 and 2<sup>nd</sup> April, 2013 when she secretly transferred the same to the 1<sup>st</sup> Defendant who has notice of their beneficial interest and adverse possession thereof.
4. James Hilary Wambugu (the 1<sup>st</sup> Defendant) is opposed to the grant of the orders sought. In his Replying Affidavit sworn on 3<sup>rd</sup> June, 2013, the 1<sup>st</sup> Defendant avers that on 31<sup>st</sup> October, 2012, they entered into a valid Sale Agreement whereupon the 2<sup>nd</sup> Defendant transferred the suit property to himself with no encumbrances. The 1<sup>st</sup> Defendant avers that following the sale, he took possession of the land, cleared the bushes, restored the fences and erected others around the homestead.
5. Esther Wairimu Gathigia (the 2<sup>nd</sup> Defendant) is equally opposed to the suit. She denies that the Plaintiffs and/or their siblings were born and/or reside on the suit property. It is her case that it is only the 2<sup>nd</sup> Plaintiff who has been residing on the land as her farm hand/caretaker for about 10 years.
6. The 2<sup>nd</sup> Defendant denies being related in any way to the Plaintiffs and accuses them of hatching a scheme and concocting lies in order to cause confusion and to inconvenience both herself and the 1<sup>st</sup> Defendant.

### **Analysis and Determination**

7. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties.
8. By their suit herein, the two Plaintiffs urge the Court to determine that they have acquired title to all that parcel of land known as L.R. No. Muhito/Muyu/619 measuring 0.56 Ha and situated in Mukuruweini Nyeri by adverse possession. As a consequence of that acquisition, the Plaintiffs further urge the court to cancel the name of the 1<sup>st</sup> Defendant who is currently registered as the proprietor of the suit property, and to instead cause the Plaintiffs' names to be registered as the proprietor in trust for their mother's household and other family members.
9. It was the Plaintiff's case that they have lived on the suit land for a period in excess of 34 years. They plead that they were born and brought up on the land where they have now built their houses, planted trees and grown coffee. According to the Plaintiffs, the suit property was on 19<sup>th</sup> December, 1972 registered in the name of the 2<sup>nd</sup> Defendant whom they describe as their maternal aunt. The Plaintiffs accuse the 2<sup>nd</sup> Defendant of secretly transferring the suit property to the 1<sup>st</sup> Defendant on 2<sup>nd</sup> April, 2013.
10. On her part, the 2<sup>nd</sup> Defendant denied being a maternal aunt of, or sharing any blood relationship with, the Plaintiffs. She further denied that the plaintiffs and/or their siblings were born and/or resided on the suit property. While conceding that she was the registered proprietor of the suit property before she transferred the same to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant asserted that she had only employed the 2<sup>nd</sup> Plaintiff as her farm hand and/or caretaker on the property for a period of 10 years. As it turned out the 2<sup>nd</sup> Defendant passed away on 28<sup>th</sup> December, 2021 and did not testify in these proceedings.



11. The 1<sup>st</sup> Defendant supported the position taken by the 2<sup>nd</sup> Defendant. He told the court that he had validly acquired the suit property after he purchased the same from the 2<sup>nd</sup> Defendant on 31<sup>st</sup> October, 2012. He told the court that upon the sale, he took possession of the land cleared the bushes and reinforced the fence around the homestead before the Plaintiffs brought this suit.
12. On matters of adverse possession Section 38(1) and (2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya provide as follows:
  - “38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those 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.
  - (2) An order made under subsection (1) of this section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”
13. As the Court of Appeal restated in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi* (2015) eKLR:

“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 owners, the essential prerequisite being that the possession of the adverse possessor 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.”
14. Considering a similar issue in *Kasuve –vs- Mwaani Investment Ltd. & 4 Others* (2004) KLR 184, the same court stated as follows:

“...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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition.”
15. In the matter before me, the Plaintiffs called a total of six (6) witnesses in support of their case that they have been in continuous and uninterrupted occupation of the suit land for a period in excess of 30 years. It was their case that their occupation and possession of the land was adverse to the title held by the Defendants respectively.
16. Testifying at the trial in support of that position, the 1<sup>st</sup> Plaintiff (PW1) told the court that the suit property initially belonged to his grandmother, one Janet Nduta Githiga. He further told the court that contrary to the 2<sup>nd</sup> Defendant’s assertions, his mother Gladys Nyawira Mureithi had not been a visitor or worker at the home but was married in the homestead.
17. According to PW1, his mother was married to one Mureithi who passed away in the year 1933. He told the court he was born much later in 1975 and that he and his 2<sup>nd</sup> Plaintiff brother had lived on the land since the time they were born. It was PW-1’s testimony that his grandmother gave the land to the 2<sup>nd</sup> Defendant because PW1’s mother and father were not there. He told the court that his grandmother had told his mother that the 2<sup>nd</sup> Defendant would hold the land in trust for their family.



18. While conceding that the 2<sup>nd</sup> Defendant had constructed a stone house on the property in 1980, it was PW1's position that thereafter the 2<sup>nd</sup> Defendant left for Sagana and did not ever get back to the land.
19. That was not the same position as that adopted by his younger brother, the 2<sup>nd</sup> Plaintiff (PW2). Testifying during his cross examination herein, PW2 asserted as follows:

“The stone house was constructed in 1979. The same was constructed by Esther Wairimu Githiga, my aunt. Nobody has been living in the house. Esther Wairimu has the keys. She took the keys in 2013. I had been having the keys for two years before they were taken. Before being given the keys, nobody was taking care of the house but when she would visit I (would) clean the house for her. She would come after 3-4 months. She took the keys from me because she had sold the land in 2013 and needed to give the keys to the person to whom she had sold the land.”
20. From the testimonies of the two Plaintiffs, I was left with no doubt that the suit property was solely the 2<sup>nd</sup> Defendant's home. The fact that she was working elsewhere and would return to her home every 3-4 months did not mean that she had discontinued her possession and/or use of the land to warrant the Plaintiffs' claim.
21. Indeed, from the material placed before the court, there was absolutely no evidence that the 1<sup>st</sup> Plaintiff had been on the land or had used the same for any continuous period. It was the 2<sup>nd</sup> Plaintiff who had been on the land longer. It was evident from the 2<sup>nd</sup> Plaintiff's testimony as seen above that his relationship with that of the 2<sup>nd</sup> Defendant was more of a master/servant relationship. That was the reason he admitted that he would clean the 2<sup>nd</sup> Defendant's house whenever she visited and would also cook for her when she was around.
22. That being the case, it was clear that the 2<sup>nd</sup> Defendant was in continuous possession, control and use of the land since the year 1972 when she acquired it. There is no single time she could be said to have omitted or neglected to assert her rights thereon as to warrant a claim of adverse possession. The Plaintiffs had not had exclusive use and occupation of the land at any single period and it was evident that the 2<sup>nd</sup> Plaintiff's stay thereon was with the 2<sup>nd</sup> Defendant's permission.
23. It was further evident from their testimonies and those of their witnesses that the Plaintiffs were not sure whether their claim lay on the basis of adverse possession or customary trust. Their pleadings and testimonies before the court were full of fundamental mix-ups and contradictions.
24. It was the Plaintiff's case that they were nephews of the 2<sup>nd</sup> Defendant whom they called their maternal aunt. At the same time, the Plaintiff's asserted that their mother, Gladys Nyawira was married to the 2<sup>nd</sup> Defendant's mother, namely Jane Nduta in 1979. At the same time, the Plaintiffs told the court that their father was one Mureithi who passed on in the year 1933 long before the two Plaintiffs were respectively born in 1979 and 1982.
25. As it were, both Plaintiffs acknowledged the fact that the 2<sup>nd</sup> Defendant has had title to the suit property since 19<sup>th</sup> December 1972. From their own documents and testimonies, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs were born in 1979 and 1982 respectively. While they asserted that their grandmother had told them that the suit property was registered in the name of the 2<sup>nd</sup> Defendant in trust for themselves, it was difficult to see how the property could have been registered in 1972 in the names of the 2<sup>nd</sup> Defendant in trust for them when even their own mother had not been married, if at all she was married in the home of their alleged grandmother.



26. Thus even where the Plaintiffs claim could be said to arise from a trust (which was not the case), the Plaintiffs had failed to prove that the suit property was family land and that they had any family ties with the 2<sup>nd</sup> Defendant to warrant any claim on the basis of a trust.
27. It follows that as at the time of the sale of the suit property to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant had a good and unencumbered title which she effectively sold and transferred to the 1<sup>st</sup> Defendant for valuable consideration. The Plaintiffs have no sustainable claim against the 2<sup>nd</sup> Defendant and hence they cannot sustain any claim against the 1<sup>st</sup> Defendant who was an innocent purchaser for value without notice of any defects in the title.
28. In the premises, I was not persuaded that there was any merit in the Plaintiffs' Case. The same is dismissed with costs to the 1<sup>st</sup> Defendant.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 27<sup>TH</sup> DAY OF FEBRUARY, 2025**

**J.O. OLOLA**

**JUDGE**

In the presence of:

Ms. Firdaus Court Assistant.

Ms. Njuguna holding brief for W. Gikonyo for the Plaintiff

No appearance for the Defendant

