



**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 591 OF 2013**

**ROBERT MBOGO NJIRU.....PLAINTIFF**

**VERSUS**

**NJERU KAMWOCHERE.....1<sup>ST</sup> DEFENDANT**

**PHINEUS MUTEGI RUGANE.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

The delay occasioned to the parties in delivery of this judgment is highly regretted and has not been caused by any fault of either party, but due to a lapse in internal judicial processes. It has been 34 years since the institution of this suit. Hearing commenced on 6/6/1988 until 19/4/1989 when the Defence closed its case. Both parties filed submissions in June 1989 and the court file was subsequently ordered to be placed under lock and key. The court record reveals that there was no activity on the file since 1989 until July 2009, when an application for striking out the suit for want of prosecution came up for hearing. It was then discovered that judgment though reserved was never delivered because the Honourable Judge who was presiding over the matter was elevated to the Court of Appeal.

**The Suits by the Parties**

The Plaintiff originally instituted this suit in Nairobi High Court Civil Case No 450 of 1989 (O.S) by an Originating Summons dated 13/2/1980. The suit was later transferred to the Nairobi Environment and Land Court on 24<sup>th</sup> May 2013 and given its present case number. The Plaintiff is seeking the following orders in his Originating Summons:

1. The Land known as Gaturi/Nenmbure/1056 Embu be registered in the name of the Plaintiff.
2. The Defendant be ordered to:
  - a. Deliver an executed transfer free from all encumbrances thereon created by the Defendant or any other person claiming through the Defendant.
  - b. Failing compliance with order (i) above, an order be made vesting the suit property in the Plaintiff free from all encumbrances and authorizing officer of the court to sign the transfer and all the necessary papers to effect the transfer.

The Originating Summons was supported by an affidavit sworn by the Plaintiff on 12/1/1979, wherein he deponed that he is in possession of the land known as Gaturi/Nenmbure/1056 (hereinafter referred to as “the suit property”), whereby he has enjoyed quiet possession, uninterrupted and of right without secret or

force from 1961, and therefore that he has acquired prescriptive rights therein under the provisions of Limitation of Actions Act having been in adverse possession. The Plaintiff deponed that the Defendants' rights over the property having been extinguished by the provisions of the said Act, he thus holds title to the suit property as trustee.

The 1<sup>st</sup> Defendant swore a Replying Affidavit on 20/3/1980 in response to the Plaintiff's Originating Summons, wherein he deponed that he is the registered owner of the suit property having purchased the same for valuable consideration from the original owner, one Mugo Michino, on 15/2/1979. The 1<sup>st</sup> Defendant stated that he was not aware of the Plaintiff's claims regarding possession since 1961 or having acquired prescriptive rights over the land as claimed or at all. He refuted the claim that he held the title in trust for the Plaintiff, deposing that registration in his favour was beyond the Plaintiff's right, and consequently that the Plaintiff had no lawful claim over the property.

The 1<sup>st</sup> Defendant had also instituted an earlier suit against the Plaintiff in **Resident Magistrate's Court at Embu Civil Case No. 70 of 1979** which was filed on 5<sup>th</sup> December 1979. The said suit was upon an application by the Plaintiff consolidated with this suit. The 1<sup>st</sup> Defendant in the suit in the lower court claimed to have bought the suit property from one Mugo Micino in February 1979, and that consequent to the said purchase the Plaintiff had continued to occupy the said land with his consent. Further that in October 1979 he gave the Plaintiff notice to vacate within one month, but that the Plaintiff had failed, refused and/or neglected to vacate the said land. The 1<sup>st</sup> Defendant sought prayers for an order that the Plaintiff removes himself from the suit property and damages.

The Plaintiff filed a defence to the suit in the lower court on 20<sup>th</sup> December 1979, wherein he reiterated that he had been in possession of the suit property since 1961, and that when the said Mugo Micino purported to transfer the suit property to the 1<sup>st</sup> Defendant he had acquired the prescriptive rights over the land. Further, that the said Mugo Micino and the 1<sup>st</sup> Defendant held the suit property in trust for the Plaintiff.

The 2<sup>nd</sup> Defendant herein was joined as a party to this suit upon application by the Plaintiff and by an order given by Nyarangi J. (as he then was) on 25<sup>th</sup> November 1981 and issued on 20<sup>th</sup> April 1982. Upon perusal of the court record, there appears to be no replying affidavit filed by the 2<sup>nd</sup> Defendant to the Plaintiff's Originating Summons. However, the 2<sup>nd</sup> Defendant swore an affidavit on 28<sup>th</sup> November 1986 filed in Court on the same date in response to an application by the Plaintiff to set aside orders dismissing this suit, in which he stated that he purchased the suit property from the 1<sup>st</sup> Defendant in 1980 and paid Kshs 10,000/= for the same. Further, that the Plaintiff continues to occupy the said property in deprivation of the 2<sup>nd</sup> Defendant's rights and without justification.

### **The Plaintiff's Evidence**

In evidence, the Plaintiff (PW1) testified that he had been in possession of the suit property measuring 1.88 acres since 1961, which was at the time registered in the name of his cousin, Mugo Micino. He stated that his mother and Mugo Micino's father are siblings. It was his evidence that he was given the property by Mugo Micino's father as a gift in the presence of four witnesses, and that it was agreed that Mugo Micino would transfer the same to him. PW1 testified that he has been in possession of the suit property, cultivated coffee, bananas, yams, planted trees and constructed his homestead thereon. Further, that since commencement of his possession, he has never been told to vacate the premises.

On cross-examination, PW1 stated that he cultivated coffee on behalf of his mother who was the one who was registered as a member of the coffee society, and that she would deliver the coffee to the society to get an income. PW1 stated that the last of his sisters got married on 195, but before then she used to help with picking the coffee. It was his evidence that he was born in 1942 and lived with his mother on the suit property from 1961 until when he married in 1969, when he brought his wife to live on the land. PW1 stated that Mugo Micino did not transfer the property to him despite several requests, and also because at some point, Mugo Micino developed a mental illness. On re-examination, PW1 stated that Mugo Micino

was never in possession of the suit property neither did he plant any crops or trees thereon.

Mucino Chayga (PW2) stated that Mugo Micino and PW1 are his son and nephew, respectively. It was his testimony that he was at work in Lodwar and later Libya during the land demarcation and consolidation exercises, but that he purchased the suit property before he was sent to Libya. PW2 stated that the land was registered in the name of his son Mugo Micino because he was away. He testified that when he got back from Libya he gave the Plaintiff the suit property in the presence of clan members. On cross-examination, PW2 admitted that Mugo Micino had planted coffee on the suit property but that he did not reside thereon. It was his testimony that he was aware that the property was registered in the name of Mugo Micino but that he gave the same to the Plaintiff and his mother, to enable her cultivate and raise her children thereon, as she had no other parcel of land.

PW2 testified that his son Mugo Micino was mentally ill at the time he transferred the property to the 1<sup>st</sup> Defendant and therefore unaware of what he was doing, and that the property was transferred without his knowledge. PW2 stated that the suit property was not land belonging to the clan but property that he purchased but registered in the name of Mugo Micino because he was out of the country at the time. On re-examination, PW2 stated that the clan gave Mugo Micino 3 acres of the clan land but did not give any to the Plaintiff.

Njagi Karimugumo (PW3) testified that he was from the Embu and knew the Plaintiff, PW2 and Mugo Micino. It was his evidence that according to their custom, children of an unmarried woman belonged to her brother, therefore the Plaintiff culturally is considered as PW2's son. PW3 testified that during the land demarcation and consolidation exercise their clan had land which was divided among clan members when 3 acres was given to Mugo Micino since PW2 was out of the country. He testified that when PW2 got back to the country he found the Plaintiff and his mother without land and that is when he instructed Mugo Micino to uproot the coffee from the suit property and told the Plaintiff to take possession thereof.

On cross-examination, PW3 admitted that during the land demarcation and consolidation exercises, the Plaintiff was of school going age and living with his mother. It was his testimony that he was present when PW2 gave the Plaintiff and his mother the suit property. On further cross-examination by the court, PW3 stated that he belonged to the same clan with the PW2. He reiterated that the clan did not give the Plaintiff any land. It was also his evidence that though the suit property and the coffee planted thereon belonged to the Plaintiff's mother, it was still regarded as belonging to the Plaintiff. He testified further that since the suit property was personal property of PW2, the clan had nothing to do with it.

Nyaga Mugiri (PW4) testified that he is PW2's clansman. His evidence like that of PW2 and PW3 was that the Plaintiff and his mother entered into the suit property before the land consolidation exercise and have been residing thereon ever since. It was his evidence that Mugo Micino declined to surrender the title to the suit property to PW2 after the matter was reported to the area chief. PW4 testified that he was present when the Chief summoned Mugo Micino who refused to produce the title and subsequently sold the land. On cross-examination, PW4 testified that PW2 was employed even before independence and was away at work most of the times, only returning on leave when he purchased the suit property.

He further testified that the reason why Mugo Micino was asked to produce the title was so that PW2 could give the property to the Plaintiff's mother who was unmarried with children. PW4 echoed the evidence about the Embu customs of how children of an unmarried woman of a clan are regarding as those of the father or brother of the said woman. He testified that PW2 was not given land because he had purchased another parcel of land measuring 15 acres where he resides. It was also his testimony that PW2 decided to give his sister the suit property as he had his other property so did his son who had been given 3 acres of clan land.

Alice Mbeere (PW5) stated that she is the Plaintiff's mother and that PW2 is her older brother. She also stated that she never got married. Her evidence was a replica of the other Plaintiff's witnesses that PW2 worked away from home during the land consolidation exercise, but that he purchased the suit property. It was her evidence that she moved into the suit property with the Plaintiff, at the time a young lad, and where they have resided since then. PW5 testified that the Plaintiff subsequently married and lives on the

land with his wife and 9 children. Further, that the Plaintiff later constructed 5 huts including the one she occupies on the property and that they have cultivated maize, coffee, bananas, and planted trees.

PW5 admitted that Mugo Micino had planted coffee on the suit property but was told by his father to uproot the coffee because he had another parcel of land. PW5 testified that she did not know the year she went into the suit property but that by that time, her older children were already married and that she moved in with the Plaintiff and his sister called Wamina. On cross-examination PW5 contended that PW2 stood before the clan and gave her the suit property and that she was given the land because of her children and as a result, she has been able to cater for them. She stated that the Plaintiff, her only son, was not old enough to be given land but that upon her death she would leave the land to him. On re-examination PW5 testified that when Mugo Micino uprooted his coffee, he never returned to the suit property.

### **The Defendants' Evidence**

In evidence, the 1<sup>st</sup> Defendant (DW1) testified that he purchased the property measuring 1.85 acres from Mugo Micino and obtained consent from the Land Control Board. It was his evidence that he went to check out the property before he purchased it, and that there was nobody on the land other than Mugo Micino and his wife. DW1 testified that there were 300 stems of coffee on the suit property and a grass thatched house belonging to Mugo Micino which he sold to him together with the property. DW1 stated that at the time of purchasing the property, Mugo Micino disclosed that he had given 100 stems of coffee to Wamae, who was PW5's daughter. Further, that he had a choice of either purchasing the same from the said Wamae or uprooting them.

DW1 testified that he did not see the Plaintiff on the land until the planting season in September 1979, when the Plaintiff started to work on Wamae's coffee. DW1 stated that he warned the Plaintiff from working on the coffee and thereafter made a report to the area Chief and the police. And that the Plaintiff was arrested for defying his warning. DW1 testified that he sold the property to the 2<sup>nd</sup> Defendant for Kshs. 25,000/- as he needed money to educate his children. DW1 stated that no person placed an objection to the sale of the property at the Land Control Board. Further, that he got to learn that the Plaintiff had a claim over the property when he had already transferred the property. DW1 testified that at the time he sold the property, there was only coffee and banana plantations thereon as well as one hut left by Mugo Micino.

On cross-examination, DW1 contended that when he came to the suit property he did not find the Plaintiff, PW5 or any of the crops cultivated as alleged. Further, that had they been there, he would not have purchased the property and also that they would have objected to his purchase. DW1 reiterated that Mugo Micino was on the property during the purchase in 1979. On further cross-examination by the court, DW1 stated that he knew the Plaintiff and his relatives when they lived in the emergency village but that he left the village in 1962. That other people left the village in 1961 and others as late as 1964. On re-examination, DW1 stated that some other people remained in the village because they had no land. Also that at the time he purchased the suit property, the Plaintiff and his mother were still in the village.

Mugo Mucino (DW2) testified that he purchased the suit property for Ksh. 800/- from one Museke Kaukingu before the land demarcation exercise. DW2 refuted the claim that his father PW2 sent him money to purchase the property. It was his evidence that he was in occupation of the land from 1961 to 1979 when he sold the same to DW1. Further, that at the time he sold the property, PW5 and the Plaintiff was living in the village. He testified that he lived in different village from PW5 but within the same area until 1961 after the land consolidation exercise when he left the village and went to live in the suit property.

DW2 stated that after he sold the property in 1979 he went to live in the land that the clan gave him. It was his evidence that he sold off the property which comprised of 300 coffee plants, bananas, avocado and trees together with the section that he had given Wamae to plant her coffee. DW2 stated that despite Wamae having planted coffee on the suit property, she lived in Membwe village. Further, that PW5 took care of her daughter's coffee and harvested it but that other than Wamae's coffee, PW5 did not have

coffee of her own on the suit property. DW2 refuted the claim that he was told to uproot his coffee or give the land to the Plaintiff.

On cross-examination, DW2 testified that he was born in 1936, was circumcised in 1948 and got married in 1951. He reiterated that the property was not purchased by his father's money and also refuted the claim that he was registered as the proprietor of the suit property because his father was away. He also denied the claim that he uprooted his coffee in 1964 as alleged. DW1 stated that he started to make payments for the suit property in 1949 having obtained money from his businesses, but that the owner of the property died in the Mau Mau war before he could show him his portion, so he produced a document evidencing the purchase where upon the deceased's son showed him the portion. DW2 stated that he paid the purchase price in instalments until 1952.

In respect to Wamae, DW2 stated that she got married before the emergency in 1952 and that during the land demarcation she went to live with her mother, PW5, in the village as her husband had been detained. It was his evidence that she picked her coffee that she planted in 1961 for about 6 to 7 years. DW2 refuted the allegation that he was mentally ill. On re-examination, DW2 admitted that his father spent a lot of his time at work outside of Embu but that he would write letters and send money to his mother, and occasionally come home while on leave.

The 2<sup>nd</sup> Defendant (DW3) testified that he purchased the suit property in 1980 from DW1, and that before the purchase he confirmed that the title was under DW1's name and that no person was on the property. Thereafter, they proceeded to the Land Control Board and obtained consent. It was his evidence that he resided in a different place from the suit property and that he went away after purchasing it, and that it was DW1 who notified him that there were people cultivating thereon. Following that revelation, he filed a suit at the Magistrate's Court in Embu seeking eviction of the Plaintiff from the suit property.

On cross examination, DW3 stated that before he purchased the property, he visited it and saw a coffee plantation and one grass thatched house. It was his evidence that he did not see the Plaintiff on the suit property at the time of purchase neither did he know where the Plaintiff and his mother lived. He stated further that had he known the Plaintiff and PW5 resided thereon, he would not have purchased the property.

### **The Submissions**

J.K. Kibicho & Co. Advocates for the Plaintiff filed submissions dated 28/5/1989, wherein counsel submitted that the Plaintiff's claim was for adverse possession over the suit property. It was submitted that the Plaintiff had demonstrated having entered into possession of the property in 1961 and living thereon with his mother and enjoying quiet and uninterrupted possession for more than 12 years which was adverse to the Defendant's predecessor. Therefore, that he acquired legal rights in the land and was entitled to be registered as proprietor.

Counsel referred the Court to section 28(b) of the repealed Registered Land Act and submitted that a proprietor acquired land subject to interests declared at section 30 thereof, which recognized rights acquired or in the process of acquisition by Limitations of Actions Act. It was counsel's submission that the transfer of the suit property from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant was immaterial to the Plaintiff's claim of adverse possession.

In respect to the submission that the Plaintiff occupied the suit property as a dependent of his mother (PW5), counsel submitted that the Plaintiff's rights over the property cannot be limited to his mother's conduct of utilizing the property to generate income since the whole purpose was for the Plaintiff's maintenance. Counsel submitted that the Defendant had not adduced evidence to rebut the Plaintiff's claim of possession. Further, that the evidence adduced by DW2 was not supported, and that it was rebutted by all the Plaintiff's witnesses who testified that DW2 never built on the suit property save for having coffee plantations thereon which he was instructed to uproot by his father PW4 in 1964. Counsel urged the court to find that the Plaintiff had proved his case on a balance of probabilities and to order that the suit be registered in his favour.

Muriithi & Company Advocates for the Defendants filed submissions dated 15/5/1989. It was counsel's submission that the failure to join Mugo Micino as a Defendant in the suit is fatal to the Plaintiff's claim, for reasons that Mugo Micino was the registered owner of the suit property in 1961 before the transfer to the 1<sup>st</sup> Defendant in 1979 and later to the 2<sup>nd</sup> Defendant in 1980. It is counsel's view that if indeed the Plaintiff moved in to the property in 1961 as claimed, then Mugo Micino's right to the property would be extinguished in 1973. Thus, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants would have no rights to be extinguished so as to constitute either of them as the Plaintiff's trustees since the 12-year period had ran out.

It was submitted for the Defendants that for the Plaintiff to succeed in the claim for adverse possession, he must establish exclusive use of the land in a manner adverse to that of the registered owner or someone claiming under him. Counsel submitted that the Plaintiff had failed to establish exclusivity as it was clear from the evidence that his sister Wamae was given a license to utilize the land. It was counsel's view that the Plaintiff's mother having been granted permission to cultivate on the property or occupy the same, could not confer any right to the Plaintiff as he could not be in adverse possession of the property which his mother was claiming possession at the same time.

Counsel submitted that if any rights accrued by way of adverse possession, then the same would be in favour of the Plaintiff's mother, who was not a party to the suit. Counsel cited the authorities of **Wainaina v Murai & Others, (1976) KLR 227**; and **Gatimu Kinguru v Muya Gathanyi, (1976) KLR 253** and **Kimani Ruchine v Swift Rutherford & Co. Limited, (1980) KLR 10** where the courts held that possession must be open, notorious, and a complete ouster of the registered owner's title, and an assertion of hostile title to that of the owner.

### **The Issues and Determination**

The undisputed fact of the case is that the suit property was registered in favour of Mugo Micino (DW2) on 17/10/1961 who thereafter transferred it in 1979 to the 1<sup>st</sup> Defendant (DW1), who in turn later transferred it in 1980 to the 2<sup>nd</sup> Defendant (DW3). The main question arising is whether the Plaintiff has acquired ownership of the suit property by way of adverse possession, and to answer this question, the following three issues require determination:

1. Whether the Plaintiff has been in possession of the suit property.
2. If the Plaintiff has been in possession of the suit property, whether the said possession has been adverse.
3. Whether the parties are entitled to the remedies sought.

#### **a. Whether the Plaintiff has been in possession of the suit property**

A claimant seeking ownership of land by way of adverse possession must take possession of the land, either by dispossessing the owner, or by entering on the land after the owner has discontinued his own possession. There are two elements that are required to exist to prove possession. The first is that of factual possession in that the alleged possessor must show that he has been dealing with the land in question as an occupying owner might be expected to deal with it. Secondly, he or she must also show the intention to possess, which is the intention to exclude everyone else, including the owner with the paper title from possession of the land.

The Court of Appeal in **Wambugu v Njuguna (1983) KLR 172** held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that that he or she has been in possession for the requisite number of years.

In the present case, the Plaintiff's claim is that PW2 allowed him and his mother to enter into the suit property in 1961 to cultivate and live thereon. This claim is corroborated by the other Plaintiff's witnesses who aver that the Plaintiff and his mother resided in the emergency village, and since she was an unmarried woman with children, it was the responsibility of PW2, her brother to take care of her. PW2

testified that he returned from duty to find his sister and her children living in the village and without any land, therefore he instructed his son, DW2, to uproot his coffee and move out the suit property for his sister, PW5, and her children.

DW2 in response denied the allegations and testified that he left PW5 and the Plaintiff in the village in 1961 and that they never moved onto the land. It was his evidence that other than Wamae's 100 plants of coffee which he had allowed her to tender, the Plaintiff and his family did not reside thereon. The Court also noted certain inconsistencies in the evidence by DW1. He claimed to have planted the coffee plants on the suit property, yet at the same time stated that it was Wamae, PW5's daughter who planted the coffee plants thereon. In addition he did not bring any evidence of his alleged purchase of the suit property, nor that of its registration in anyone else's name.

It is also noteworthy in this respect that other than DW2 claiming to have been in possession, which evidence was not corroborated, neither the 1<sup>st</sup> and 2<sup>nd</sup> Defendant claimed or brought any evidence of possession of the suit property, although they admit that there was cultivation taking place thereon as well as a hut built thereon at the time of purchase. This Court therefore finds that the Plaintiff has brought evidence to show dispossession of the DW2 from the suit property and their possession of the same since 1961. The said possession was by their cultivation of the said property as well as by residing thereon.

**(b) Whether the Plaintiff's possession of the suit property was adverse.**

**Black's Law Dictionary, Ninth Edition** at page 62 defines adverse possession as "*the enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, hostile, open and notorious*". Section 7 of the Limitation of Actions Act sets the statutory threshold of be 12 years for such enjoyment and/or occupation by a claimant of land to give rise to adverse possession.

The requirements for adverse possession in the Kenyan situation have been set out in various judicial decisions. In **Mbira v. Gachuhi (2002) 1 EALR 137**, this court held thus:

**"... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption ...."**

Likewise, in **Jandu v Kirplal and Another (1975) EA 225** it was held as follows:

**".....to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual visible, exclusive, open and notorious. "**

Certain qualities are therefore required for the possession by a claimant to amount to adverse possession as described in the **Elements of Land Law, 5<sup>th</sup> Edition** by Kevin Gary and Susan Francis Gray at paragraphs 9.1.44 to 9.1.52. These are that there must be a complete and exclusive physical control over the land in dispute, the possession should be open meaning not secret, it must be peaceful and not by force, and lastly it must adverse and not be by consent of the true owner.

In the present case, the Plaintiff maintained that he has been in continuous occupation without any interruption from 1961 through to 1979 when the land was first transferred and even after the subsequent transfer in 1980. He also averred that they planted trees and cultivated crops including coffee which his mother would deliver to the society as a source of income. Further, that he went on to construct a total of five huts to house his mother and his family which he begot while in occupation. It was the Plaintiff's evidence that DW2 moved out of the property in 1964 never to return.

It is my view that the Plaintiff has established continuous use of the property, actual possession thereof

and use of the property to the exclusion of the original and subsequent owners. Further, PW5's membership to the coffee society and delivery of coffee to the society from the suit property is evidence that their possession was open and notorious. This Court also finds that the Plaintiff's evidence was not sufficiently rebutted by the Defendants.

Counsel for the Defendants also submitted that the Plaintiff's claim ought to have been filed in 1973 which would have been 12 years from 1961. Therefore, that failure to institute the suit after the lapse of 12 years, and DW2 having transferred the property to the Defendants in 1979, the Defendants' title therefore could not be extinguished. The question that arises is whether an adverse possessor can be declared time barred for not filing an application immediately after the expiration of the 12 years. From the provisions of the Limitations of Actions Act, time runs against the person claiming to recover land, that is, a title owner, and not the person who is claiming title by way of adverse possession. This was the holding in the case of **Nguyai – Vs – Ngunayu (1985) KLR 606** that under the Limitation of Actions Act the time of limitation will run against the person seeking to recover land from the date of accrual of the cause of action, and that the person who is in possession is not barred by limitation.

It is also trite law that transfer of the property to another title holder does not interrupt possession particularly where the new title holder does not do anything to interrupt the adverse possessor's acquisition of prescriptive title. See the case of **Kairu v Gacheru, Civil Appeal No 42 of 1987 [1988] eKLR** where the Court of Appeal held that the law relating to prescription affects not only present holders of title but their predecessors in title.

As at the time DW2 transferred the property to the 1<sup>st</sup> Defendant in 1979, his title to the suit property had already been extinguished after the lapse of 12 years in 1973. There is no evidence that DW2 did anything to assert his right either by taking legal proceedings against the Plaintiff or PW5 or making an effective entry onto the land. Reference is made to the decision in **Githu – Vs – Ndeete, (1984) KLR 776** in this regard. DW2 thus had no valid title to pass to the 1<sup>st</sup> Defendant. It follows therefore that the filing of a suit in 1979 and subsequent report to the police and by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant respectively were inconsequential, as the original owner's title had already been extinguished, and the Plaintiff has acquired prescriptive rights over the suit property.

Counsel for the Defendants further submitted that the Plaintiffs mother, PW5, and his sister Wamae were given the license to occupy and cultivate the suit property. Consequently that if there was claims of possession adverse to the Defendant's title then it would be made by PW5 and not the Plaintiff. In response to this submission, counsel for the Plaintiff submitted that cultivating coffee on the suit property was a source of income for the Plaintiff's maintenance. PW5 in her evidence stated that though she had been given the property, the same belonged to the Plaintiff by virtue of him being her son. Kuloba J. in the case of **Mbui – Vs – Maranya (1993) KLR 737** in discussing the doctrine of tacking or successive possessors, stated:

**Where there is continuous, uninterrupted possession of the land, but by different intruders, a claim for adverse possession can sustain provided that there is sufficient nexus between the successors, such as if a succeeding intruder is an heir of the preceding intruder and there is no interruption between them. This is because time runs as against the true owner from the time when the adverse possession began, and as long as adverse possession continues unbroken it makes no difference who continues it.**

In my view, both PW5 and the Plaintiff, by virtue of being possession of the property adversely as against the Defendants' title can succeed each other for as long as there is no interruption of possession as between them.

In addition, although the Plaintiff and PW5 were given permission to reside and cultivate on the suit property by PW2, such permission was not from DW2 who was the registered proprietor of the property at the time of such possession. I thus find that the Plaintiff has succeeded in proving on a balance of probabilities that he was in open, continuous and uninterrupted possession of the suit property for more than 12 years that was adverse to the Defendants title, and has thereby acquired the said property by way

of adverse possession.

**c. Whether the parties are entitled to the reliefs sought**

The arguments and findings made in the foregoing also apply to the prayers sought by the 1<sup>st</sup> Defendant for vacant possession of the suit property and damages, which cannot lie as the Plaintiff has been found to be in adverse possession of the same. The Defendants remedies in this regard is against their respective vendors, having purchased land that was already subject to prescriptive rights.

The Plaintiff is also accordingly entitled to the consequential orders arising from such ownership of the suit property by way of adverse possession. This Court however in this regard is cognisant of the inordinately long time it has taken to hear and determine this case, which I again reiterate is highly regretted, and that consequently the position as regards the title to the suit property may have changed since evidence of the said title was provided showing registration of the same in the 2<sup>nd</sup> Defendant' name. In the circumstances the Court will give appropriate consequential orders to cater for any such contingencies.

In addition, I note that as the Plaintiff is claiming adverse possession of property that the Defendants had purchased from the original owner, it would be unfair in the circumstances to condemn the Defendants to pay the costs of this suit.

This Court accordingly orders as follows:

1. That the Plaintiff herein, Robert Mbogo Njiru be and is hereby declared to have acquired title by adverse possession to the land parcel known as Gaturi/Nembure/1056 in Embu.
2. That the registration of Phinus Mutegi Rugane and all subsequent proprietors of Gaturi/Nembure/1056 in Embu be cancelled forthwith, and Robert Mbogo Njiru be registered as the proprietor of Gaturi/Nembure/1056 in Embu.
3. The Nairobi Environment and Land Court Deputy Registrar to execute the transfer documents and any other necessary forms, and a vesting order in respect of the parcel of land known as Gaturi/Nembure/1056 in Embu in favour of Robert Mbogo Njiru.
4. Each party shall bear their own costs of this suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_7<sup>th</sup>\_\_\_\_ day of  
\_\_\_\_October\_\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**