**Karitu v Mwihike Farmers Company Limited & 3 others (Civil Appeal E397 of 2024) [2025] KECA 1127 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1127 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL E397 OF 2024**

**DK MUSINGA, M NGUGI & GV ODUNGA, JJA**

**JUNE 20, 2025**

**BETWEEN**

**FRANCIS KAIGUA KARITU ..... APPELLANT**

**AND**

**MWIHIKE FARMERS COMPANY LIMITED ..... 1ST RESPONDENT**

**GITHUNGURI NJIRU FARM (1996) LTD ..... 2ND RESPONDENT**

**OMEGA COMMERCIAL SERVICES LIMITED ..... 3RD RESPONDENT**

**JOEL N. ONCHWATI, CONSOLATA W. MUREITHI, JEREMIAH G. WAMBUGU (SUING AS THE OFFICIALS OF SPRINGFIELD 148 RESIDENTS WELFARE ASSOCIATION) ..... 4TH RESPONDENT**

***(Being an appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (Wabwoto, J.) dated 20th March, 2024 in ELC Case No. 1172 of 2016 (O.S))***

## JUDGMENT

1. The 1st respondent, Mwihike Farmers Company Limited, took out Originating Summons dated 26th September 2016 against the appellant, Francis Kaigua Karitu, and the 2nd respondent, Githunguri Njiru Farm (1996) Limited. The summons was subsequently amended on 28th February 2019 and further re-amended on 21st October 2021. The 1st respondent asserted ownership of four acres of land within LR No. 6845/148, located at Githunguri, Njiru Farm, in the Embakasi area (hereinafter referred to as "the suit land") by way of adverse possession.

2. The 1st respondent contended that in 1998, it entered into a land sale agreement with Peter Karitu Kaigua, the appellant's deceased father, for the purchase of four acres out of a 6.175 - acre parcel. It asserted that the full purchase price of Kshs.600,000/= was paid and duly acknowledged in writing by the deceased, and that possession of the land was subsequently granted. It further contended that

since 1998, together with its members, it had been in open, continuous, exclusive, and uninterrupted possession of the suit land which, upon purchase, it subdivided and allocated to its members, who went on to construct permanent residences and commercial buildings on their respective plots.

3. The two main orders sought in the Originating Summons were that the 1st respondent be declared to have acquired title to the suit land by adverse possession; a permanent injunction to restrain the appellant from interfering with the 1st respondent's or its members' possession and title to the suit land; and that the registration of the appellant as the proprietor of the suit land and/or any other persons deriving title from Peter Karitu Kaigua and the appellant out of the suit property be canceled forthwith, and the Registrar of Titles do rectify the register by entering and issuing a title in the name of the 1st respondent as the registered proprietor of the suit land.

4. The appellant opposed the suit, asserting that he was registered as a co-owner of LR No. 6845/148 under a tenancy in common with his father, Peter Karitu Kaigua, on 14th February 2014, holding 35% shares acquired from Githunguri Njiru Farmers Limited. He further contended that on 21st July 2015, he acquired an additional undivided half of his deceased father's 65% shares at a consideration of Kshs.10,000,000/=. He contended that he held a beneficial interest in the suit land even before formal registration, having acquired such interest directly from Githunguri Njiru Farmers Limited. He denied the validity of the alleged sale to the 1st respondent, and maintained that he had never offered his portion of the land for sale. He further asserted that he was a stranger to the purported sale agreement relied upon by the 1st respondent. He further contended that given the tenancy in common with his deceased father, his consent was necessary to determine which portion of the land could be excised. He argued that if any agreement did exist, the 1st respondent occupied the land merely as a licensee.

5. The appellant further alleged that there was no approved subdivision of the suit land; and denied the claim that the 1st respondent and its members had been in continuous and uninterrupted occupation of the land, contending instead that he had made several attempts to evict them and that he had actively restrained the 1st respondent's members from carrying out any developments on the property. On this basis, he argued that the claim for adverse possession was untenable.

6. On its part, the 2nd respondent contended that it no longer had any interest in the suit land on account of having transferred it to the appellant and his father, and therefore regarded itself as functus officio. It asserted that the land was initially owned by the appellant's deceased father, who subsequently transferred it to the appellant. It denied any knowledge of an intended transfer of the four acres from the appellant's deceased father to the 1st respondent.

7. The Interested Parties representing the Springfield (148) Residents Welfare Association supported the 1st respondent's claim. The 1st Interested Party stated that plots had been acquired from the late Peter Karitu Kaigua and his sons, and that they were seeking protection of their beneficial interests in the suit land. The 2nd Interested Party, Consolata Mureithi, asserted that she and other members had occupied the land since 1998, constructed permanent structures, and were issued plot ownership certificates by the 1st respondent. She maintained that their occupation had been open, continuous, and unopposed. In addition, she contended that the appellant was aware of their presence and had even facilitated the provision of water to the residents.

8. The matter proceeded to hearing, during which various witnesses gave viva voce testimony. Kibanya Kimani, a director of the 1st respondent, testified as PW1. He stated that in 1998, the 1st respondent purchased the suit land from the appellant's deceased father, as evidenced by a sale agreement dated 27th February 1998. He further testified that full payment of the purchase price amounting to Kshs.600,000/= was made and acknowledged in an addendum to the agreement dated 19th March

1998, following which possession of the land was granted in the same year. At the time of purchase, the land did not have a registered title. It was his further testimony that upon acquisition, the land was subdivided into 40 sub-plots. He stated that the appellant was at all times aware of the transaction between his father and the 1st respondent. He reiterated that the 1st respondent and its members had occupied the suit land for more than 18 years without any eviction attempts by the appellant.

9. The appellant testified as DW1. He stated that he was unaware of the alleged sale of the four acres to the 1st respondent and denied that the signature on the agreement dated 11th March 1998 belonged to his deceased father. He asserted that he held a 35% stake in the suit land and had purchased his late father's remaining 65% shares for Kshs.10,000,000/=. However, he did not produce any documentary evidence to support the alleged transaction or the payment of the said amount. During cross- examination, he was unable to demonstrate any tangible steps taken to assert his ownership rights against the 1st respondent during the period of more than 18 years they had been in occupation of the suit land.

10. Joseph Karanja Wamuiyi and Consolata Wangui Mureithi testified on behalf of the Interested Parties, stating that they entered the suit land as buyers in 1998 and had been in continuous and uninterrupted occupation of portions of the land since that time, for a period exceeding 18 years.

11. After a full hearing, the trial court delivered judgment on 20th March 2024. The court considered in detail whether the 1st respondent had met the threshold for adverse possession under section 38 of the *Limitation of Actions Act*. The court cited several decisions, including; Kweyu v Omutut [1990] KLR 709, *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, *Patrick Magu Mwangi Kimunyu v Joreth Limited* [2015] eKLR, and *Samuel Kihamba v Mary Mbaisi* [2015] eKLR which set out the essential and mandatory ingredients that a claimant seeking ownership of land under the doctrine of adverse possession must establish.

12. The court held that the 1st respondent and its members had satisfied all the requisite conditions, having openly and uninterruptedly occupied and developed the land for over two decades. The court rejected the appellant's contention that the occupation was permissive, noting that he had not asserted any ownership rights during the statutory period, and that his conduct was inconsistent with an assertion of exclusive title.

13. Consequently, the court declared that the 1st respondent had acquired title to the suit land by adverse possession. It granted a permanent injunction against the appellant, restraining him from interfering with the 1st respondent's occupation of the suit land, and directed that the registration of the appellant and any other person deriving title from the appellant or his deceased father be cancelled. The Registrar of Titles was directed to issue a title in the 1st respondent's name.

14. Being dissatisfied with the decision of the trial court, Francis Kaigua Karitu preferred this appeal raising eight grounds of appeal. However, in his written submissions, he condensed them into two, namely, that the learned judge erred in law and in fact: by finding that the 1st respondent had been in possession of the suit property continuously for more than twelve years without force or interruption whereas the appellant had on several occasions tried to evict the 1st respondent and its members; and by holding that the 1st respondent had acquired title to the suit land by adverse possession when the statutory period had not lapsed from the time the appellant and his late father became the registered owners of the same.

15. At the hearing hereof, learned counsel Ms. Wanjiru Ng'ang'a appeared for the appellant, while the 1st respondent was represented by learned counsel Mr. King'ara. The 4th respondent was represented by learned counsel Mr. Nyakiangana. All the advocates relied on their respective clients' written submissions, save for Ms. Ng'ang'a, who made very brief oral highlights of her client's written submissions.

16. In his written submissions, the appellant contended that the learned judge erred both in law and fact by finding that the 1st respondent had acquired title to the suit property through adverse possession, despite the 1st respondent having failed to satisfy the essential ingredients for such a claim. He relied on the provisions of section 38 of the *Limitation of Actions Act* and case law, including *Kilimo Shutu & 6 Others v Godfrey Karume* [2017] eKLR, which require a claimant to demonstrate, inter alia, actual, open, continuous, exclusive and hostile possession of the property, adverse to the interests of the true owner, for a period of at least twelve years. The appellant contended that no credible evidence was presented to show that the 1st respondent and/or its purported members had been in such possession; that while the 1st respondent alleged that it entered the suit land pursuant to a sale agreement with the appellant's deceased father dated 19th March 1998, and that it remained in occupation for over 18 years, the nature of that occupation was never shown to be exclusive or hostile to that of the registered proprietor.

17. Secondly, the appellant contended that there was no evidence of any relationship between the 1st respondent and the 4th respondents, who were said to be its members; that the 1st respondent failed to prove that the individuals in occupation of the suit property were its bona fide members, or that their possession was exercised on behalf of the 1st respondent in a manner capable of sustaining a claim for adverse possession. In the absence of such proof, the 1st respondent did not satisfy the legal threshold required under the doctrine of adverse possession, the appellant submitted.

18. The appellant therefore urged this Court to find that the learned trial judge erred in law and fact by granting title to the 1st respondent and urged us to allow the appeal and set aside the trial court's judgment.

19. On its part, the 1st respondent submitted that the appellant's claim that the trial judge erred by disregarding evidence of joint ownership of LR. 6845/148 between the appellant and his late father is without merit. It submitted that the title deed produced in court by the appellant clearly showed that he and his deceased father were registered as tenants in common, with defined shares of 35% and 65% respectively. That registration occurred on 14th February 2014, a fact that was acknowledged by the trial judge in the impugned judgment. The 1st respondent further submitted that the appellant's late father owned four acres out of the total 6.175 acres and that he sold only his portion to the 1st respondent, and that at no time did the 1st respondent claim any interest in the appellant's 2.17 acres; that the transaction between the deceased and the 1st respondent is supported by the sale agreement which clearly confirms that the sale involved only the appellant's deceased father's portion. In the circumstances, it submitted that since the shares of the ownership were established before the title was issued, and since the sale did not affect the appellant's share, the trial court had no business addressing itself to the issue of dual registration as the tenancy in common arrangement allowed each party to independently manage their respective shares in the property.

20. Regarding the claim that the statutory period for adverse possession had not been achieved by 2014, it was submitted that the sale agreement between the appellant's late father and the 1st respondent was completed on 19th March 1998, and the 1st respondent duly took full possession of the four acres upon payment of the purchase price. The appellant's deceased father signed the transfer documents and sought consent of the area Land Control Board, and the proposed subdivision was documented. According to the 1st respondent, several witnesses confirmed that it occupied the four acres continuously from 1998 until the suit was filed in 2016, a period of about eighteen years.

21. Regarding sufficiency of evidence in proof of adverse possession, it was contended that it was overwhelming and unchallenged; that the appellant's own admission that he attempted to evict the

occupants from the suit land confirmed that the 1st respondent and its members were in actual possession of the suit land, but the appellant did not initiate any legal proceedings to effect their removal, and in the absence of any formal legal and/or court action, any alleged attempts to evict the occupants could not interrupt the running of time for purposes of a claim premised on adverse possession.

22. In sum, the 1st respondent contended that the trial court's findings were well-founded as they were based on uncontroverted evidence and correct legal principles.

23. On their part, the 4th respondents submitted that the trial court duly addressed the issue of the suit land having been held under a tenancy in common between the appellant and his deceased father; that each co-owner could sell or bequeath their share independently; and that the matter before the trial court concerned only the specific four acres allegedly sold by the appellant's father, which was the subject of the claim under the doctrine of adverse possession.

24. As to whether adverse possession had been established by 2014 when the suit land was registered in the names of the appellant and his deceased father, the 4th respondents submitted that the four-acre parcel was purchased in 1998 from the appellant's father for Kshs.600,000/=. This sale was supported by written agreements that were presented in court; that possession was granted to the respondents by the appellant's father on 27th February 1998; that after the full purchase price was paid in March 1998, the respondents took possession and subdivided the land into 40 sub-plots, which have since been developed by individual members. The 4th respondents added that although their initial entry onto the suit land was with permission, that permission ceased upon full payment and the grant of possession, which took place in March 1998. They cited *Public Trustees v Wanduru Ndegwa* (1994) eKLR to support the position that time for adverse possession begins to run once the purchaser has completed payment and taken possession.

25. The 4th respondents reiterated that they have been in open, continuous, and exclusive occupation of the suit land; that the site visit by the Deputy Registrar confirmed existence of several permanent structures built by the respondents, as well as trees planted, fencing, roads, a school, electricity and water installations, and cultivated crops; that these developments demonstrated a clear intention to dispossess the appellant and to assert ownership of the suit land, citing the decisions in *James Maina Kinya v Gerald Kwamboka* (2018) eKLR and *Samuel Kihamba v Mary Mbaisi* (2015) eKLR.

26. We have considered the issues raised in this appeal. This being a first appeal, this Court's mandate is to re-evaluate, re-assess and re-analyze the evidence on the record and determine whether the conclusions reached by the trial judge should stand, and give reasons either way. See *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, Kiruga v Kiruga & Another [1988] KLR 348 and *Peters v Sunday Post Ltd* [1958] EA 424.

27. Having re-evaluated the record of appeal as well as submissions by parties, the sole issue for our determination is whether the trial court erred by finding that the 1st respondent had sufficiently proved its claim of adverse possession with respect to the suit land.

28. The doctrine of adverse possession is governed by sections 7 and 38(1) of the *Limitation of Actions Act*. Section 7 of the said Act stipulates that:

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

29. Section 38(1) provides instances when a person is entitled to apply for adverse possession and states that:

> " 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."

30. A party claiming adverse possession must prove that they have occupied the land openly, without license or permission of the registered owner, with the intention to possess it, and that such occupation has resulted in the dispossession of the owner for the statutory period. It is not sufficient merely to show possession for twelve years. This Court, in *Bakari Sheban & 39 Others v Said Bin Rashid Khamis* [2017] eKLR held thus:

> " Like any other civil claim, the burden was on the appellants to prove on a preponderance of evidence that their occupation of the suit property was adverse, in the sense that occupation was hostile, open, actual, uninterrupted, notorious, exclusive and continuous for a period of 12 years. See *Kweyu v Omutut* (1990) KLR 709.
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> In that decision the Court also stated that;
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> > " The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely...the intention of the dispossessor is to appropriate and use the land as his own, to the exclusion of all others, irrespective of any semblance or shadow of actual title or right."

31. It is therefore essential that in a claim for adverse possession, the adverse nature of the applicant's occupation be clearly established as a matter of fact. The question that arises then, is when did the 1st respondent's occupation of the suit land become adverse?

32. It is undisputed that the suit land was held by the appellant and his deceased father under a tenancy in common. The certificate of title produced before the trial court clearly indicated that the appellant and his deceased father were the registered proprietors of the suit land as tenants in common, holding 35% and 65% shares respectively. On the concept of tenancy in common, Sir Robert Megarry and Sir William Wade, in *The Law of Real Property* (Sweet & Maxwell, 8th Edition, pp. 496–503), state as follows:

> " ...In a tenancy in common, the two or more holders hold the property in equal undivided shares. Each tenant has a distinct share in the property which has not yet been divided among the co-tenants. In other words, they have separate interests only that it remains undivided and they hold the interest together. The largest factor that distinguishes a joint tenancy from a tenancy in common is the absence of the doctrine of survivorship in the latter. The share of one tenant is not affected by the death of one of the co-owners. The share of the deceased, devolves not to the other co-owner, but to the estate of the deceased co-owner. Although the four unities required for a joint-tenancy may be present, only one, the unity of possession is essential."

33. Whereas the respondents do not appear to dispute that the suit land was held under a tenancy in common between the appellant and his deceased father, they contend that the four-acre portion of land which they purchased belonged solely to the appellant's deceased father. They assert that the entire land measured approximately 6.175 acres, with about two acres belonging to the appellant. Indeed, the handwritten agreement of sale entered into between the appellant's deceased father and the 1st respondent on 27th February 1998, the terms of which were later replicated in a typed agreement dated 19th March 1998, clearly indicated that the subject of the sale was a portion of land measuring four acres out of the larger parcel. It follows, therefore, that the application before the trial court did not relate to the entire parcel measuring 6.175 acres but only to the specific four-acre portion alleged to have belonged to the appellant's deceased father.

34. The agreement clearly identified the parties involved, the subject matter, the consideration, the completion terms, and other conditions mutually agreed upon. It was duly executed and witnessed. It therefore, for all intents and purposes, created a binding relationship between the parties.

35. The respondents contended that upon payment of the deposit, the appellant's father granted them permission to take possession of the suit land as of 27th February 1998. They further stated that in March 1998 they took possession of the four-acre portion and proceeded to subdivide it into 40 sub-plots, which were allocated to their members.

36. The respondents further contended that through an addendum to the agreement signed by the appellant's father on 14th September 1998, he acknowledged receipt of the full purchase price for the four-acre portion. In the same addendum, he informed them that they were free to undertake any developments they deemed appropriate on the sub-plots and also confirmed that he had granted them full possession of the four-acre portion. On that basis, the respondents asserted that they and their members proceeded to develop, occupy, and use the sub-plots continuously and without interruption from 1998 to the time of filing the suit, a period exceeding 18 years.

37. We have examined the sale agreement between the appellant's father and the respondents and find that there was a clear intention on the part of the appellant's father to be bound by its terms. Furthermore, having acknowledged receipt of the full purchase price, the appellant's father relinquished any interest in the suit land. In essence therefore, upon full payment of the purchase price, the respondents' occupation of the suit land was no longer by permission granted to them by the appellant's late father.

38. This Court in *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR held that:

> " Where adverse possession arose out of a sale of(sic) agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in *Wanyoike v Kahiri* [1979] Kenya LR 236 at 239; also see among others, Simpson J (as he then was), in *Hosea v Njiru and others* [1974] EA 526 at 529, 530)."

39. Similarly, in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] KECA 342 (KLR) this Court held thus:

> " Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of *Public Trustee v Wanduru*, (1984) KLR 314 at

319 Madan, JA stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed of possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run."

40. The above decisions clearly establish that an applicant must pay the entire purchase price before the statutory period for adverse possession begins to run. Where the purchase price is paid in installments, the period commences only after the final installment has been paid. In the present circumstances, time began to run on 14th September 1998 when the appellant's deceased father formally acknowledged receipt of the full purchase price and granted the respondents full possession of the four-acre portion of land. Therefore, by 2014 when a certificate of title was issued in favor of the appellant and his deceased father, the 1st respondent's' title under the doctrine of adverse possession had already crystallized, having been in open, continuous, and exclusive occupation of the four acres for more than twelve years from 1998.

41. The respondents' contention that they had been in open, continuous, and exclusive occupation of the four acres is supported by the report that was prepared by the Deputy Registrar of the trial court and the photographs admitted in evidence. That evidence showed several permanent structures erected by the respondents, trees planted, fencing installed, roads constructed, a school established, as well as electricity and water installations, alongside crops and livestock. Such developments, in our view, clearly demonstrate the respondents' intention to dispossess the appellant and assert ownership of the land, to the exclusion of the appellant.

42. Although the appellant alleged having attempted to evict the respondents from the suit land, there was no evidence of any effective entry thereon. This Court in *Mwangi Githu v Livingstone Ndeete* [1980] eKLR observed thus:

> " Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire's Modern Law of Real Property, 11th edition at p 894. In my view, the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*." [Emphasis added]

43. In the circumstances, we fully agree with the learned judge's finding that the respondents clearly established title to the suit land by way of adverse possession. We find no grounds to fault or set aside the decision of the learned judge.

44. This appeal is without merit. We hereby dismiss it with costs to the 1st and 4th respondents.

**DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF JUNE 2025.**

**D. K. MUSINGA (PRESIDENT)**

**.....**

**JUDGE OF APPEAL**

**MUMBI NGUGI**

**.....**

**JUDGE OF APPEAL**

**G . V. ODUNGA**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR**