



**Presbyterian Church of East Africa (Uthiru Church) & another v Kihoro & 3 others
(Civil Appeal 303 of 2018) [2022] KECA 49 (KLR) (4 February 2022) (Judgment)**

Neutral citation: [2022] KECA 49 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 303 OF 2018
DK MUSINGA, W KARANJA & AK MURGOR, JJA
FEBRUARY 4, 2022**

BETWEEN

**PRESBYTERIAN CHURCH OF EAST AFRICA (UTHIRU
CHURCH) 1ST APPELLANT**

CHAIRPERSON - PCEA UTHIRU CHURCH 2ND APPELLANT

AND

WANYIRI KIHORO 1ST RESPONDENT

**MUGURE WANYIRI KIHORO (BOTH SUIING AS ADMINISTRATORS OF THE
ESTATE OF WANJIKU KIHORO 2ND RESPONDENT**

TOWN COUNCIL OF KIKUYU 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

*(An appeal from the Judgment and Decree of the Environment & Land Court
of Kenya at Nairobi (Obaga, J.) dated 9th April, 2018 in ELC No. 884 of 2018)*

JUDGMENT

1. The property in dispute in this appeal is L.R. No. Dagoretti/Uthiru/T.382, hereinafter referred to as “the suit property.” The dispute, which is over ownership of the suit property, is primarily between the two appellants and the 1st and 2nd respondents. Whereas the two appellants allege that they acquired legal possession of the suit property sometime in the year 1974 by way of allotment by the Kiambu County Council through the 3rd respondent, the 1st and 2nd respondents, who are the administrators of the Estate of the late Dr. Wanjiru Kihoro, (deceased), allege that the deceased purchased the suit property on 22nd January 1982 for valuable consideration from one Ndibo Nthenge and on 31st March 1983, the suit was registered in the deceased’s name



2. The 1st and 2nd respondents had, vide a plaint dated 22nd July 2013, instituted a suit against the two appellants herein, the Hon. Attorney General and the Town Council of Kikuyu at the Environment and Land Court at Nairobi seeking the following orders:
 - a. Judgment against the defendants jointly and severally and requisite orders for eviction and removal of the trespassers' goods and property;
 - b. Orders for the removal of the restriction and caution placed on the property by the 3rd and 4th respondents herein respectively and an order allowing the transmission of the property;
 - c. Orders for payment of general compensation to the 1st and 2nd respondents herein in respect of loss of use, rents and mesne profits from the property and apportionment thereof among the two appellants as well as the 3rd and 4th respondents herein;
 - d. An award of exemplary damages against the 1st appellant, the 3rd and 4th respondents herein respectively for cynical non-observance of clear statute and case law;
 - e. Interest on any award until payment in full;
 - f. Costs of the suit.
3. At the hearing of the suit, the 1st respondent testified as the only plaintiff's witness. He indicated that his deceased wife bought the suit property from one Ndibo Nthenge vide a Sale Agreement dated 22nd January 1982 at a consideration Kshs.60,000.00. The property was registered in the name of the deceased on 31st March 1983 and the deceased was issued with a Land Certificate. He testified that after purchasing the suit property, the deceased started some cultivation thereon but left the country for the United Kingdom immediately thereafter where she remained until the year 1987. It was the 1st respondent's testimony that at the time of the purchase, there were no structures erected on the suit property. The 1st respondent testified that he could not follow up on the status of the property for some time since he had been detained by the Government of the day and his deceased wife had travelled back to the United Kingdom. He testified that sometime in the year 1990, he caused a demand letter to be issued to the two appellants to cease from trespassing on the suit property.
4. The suit was opposed by the 3rd respondent through one Stephen Ng'ang'a Kiiru, its Sub-County Administrator, who testified as DW1. He testified that the suit property was procedurally allocated to the 1st appellant by the 3rd respondent through a letter dated 27th February 1974. He produced before the trial court extracts of minutes of the Finance, Staff and General-Purposes Committee of the 3rd respondent which deliberated and approved the allocation of the suit property to the 1st appellant. According to DW1, the appellants took possession of the suit property sometime in the year 1974 and as at the time of the purported acquisition of the suit property by the deceased in the year 1983, there was already a permanent structure erected thereon. It was argued that the 1st and 2nd respondents had not adduced any evidence of the 3rd respondent having allocated the suit property to the said Ndibo Nthenge.
5. DW1 further testified that official records of the suit property disclosed that Ndibo Nthenge was allocated land through a process known as rectification. The witnesses testified that under the repealed Trust *Land Act* and the Local Government Act, rectification could not be cited as a mode of allocation or transfer of any rights over land from one person to another. Therefore, the rectification conducted on 9th October 1981 was not proper and could not confer any rights over the suit property to Ndibo



Nthenge. According to DW1, rectification could only have been relied on to correct typographical errors on the record.

6. The appellants on their part called one Beatrice Wanjiku Mugo, a church elder and the then chairperson of PCEA Uthiru Church, who testified as DW2. She testified that the church had approached the area councillor to assist them to get a plot where they could construct a church. The area councillor advised them to apply for allocation of a plot to the Kiambu County Council Finance, Staff and General-Purposes Committee; that at a meeting of the committee held on 14th December 1974, the 3rd respondent allocated the suit property to the appellants. She testified that the appellants constructed a semi-permanent structure on the suit property which served as a church and began plans for the construction of a permanent structure; that in the year 1981, a funds drive for the construction of the permanent church structure was held and was attended by among other persons, the then Attorney General of the Republic of Kenya, Sir Charles Njonjo. She produced photographic evidence of the said event.
7. The witness testified that on 14th December 1990, more than sixteen years from the time the appellants took possession of the suit property, the 1st respondent served them with a demand letter. It was the testimony of DW2 that the deceased or his estate has never taken possession or occupancy of the suit land. Further, that the suit herein had been filed 23 years after the date of the demand letter and 39 years from the date of possession by the appellants.
8. The appellants counterclaimed seeking to be registered as the lawful proprietors of the suit property by way of adverse possession.
9. Although the 4th respondent filed a defence, he did not present any witnesses before the trial Court.
10. The trial judge, having considered the evidence adduced by the respective parties, delivered judgment on 9th April 2018. He held, inter alia, that at the time the deceased purchased the property there were no temporary structures erected thereon and that the deceased was a bonafide purchaser who obtained good title from Ndibo Nthenge. Further, that the 1st appellant was not a lawful allottee of the suit property. The trial judge also held that there was no basis for registration of a restriction and caution against the title of the suit property. With regard to the appellants' claim of adverse possession, the trial judge held that the running of time could only have commenced in the year 1981 when the suit property was registered in the name of Ndibo Nthenge and that the demand letter issued by the 1st respondent's advocate sometime in the year 1990 interrupted the running of time for purposes of a claim for adverse possession.
11. Accordingly, the trial court issued the following orders:
 - a. That the appellants' claim for adverse possession fails and is hereby dismissed with costs to the 1st and 2nd respondents;
 - b. That judgment be and is hereby entered in favour of the 1st and 2nd respondents against the appellants, the 3rd and 4th respondents herein respectively as follows:
 - i. An order for eviction directed at the 1st and 2nd appellants herein from the suit property and removal of structures thereon within 90 days from the date of this judgment;
 - ii. An order directing the removal of the restriction and caution placed on the suit property forthwith;



- iii. Compensatory damages for Kshs.5,000,000.00 wherein the 3rd respondent herein was supposed to pay Kshs.2,000,000.00 and the balance of Kshs.3,000,000.00 to be paid by the 1st and 2nd appellant herein jointly and severally;
 - iv. Exemplary damages of Kshs.2,000,000.00 wherein the 3rd respondent was supposed to pay Kshs.500,000.00 and the balance of Kshs.1,500,000.00 to be paid by the 1st and 2nd appellants herein jointly and severally;
 - v. Interest on (iii) and (iv) to be apportioned in the manner already stipulated;
 - vi. Costs of the suit to be apportioned in the manner already stipulated.
12. Aggrieved by the decision of the learned trial judge, the 1st and 2nd appellants have lodged the instant appeal. The appellants' memorandum of appeal raises 9 grounds of appeal which, according to the appellants' counsel, may be consolidated to two grounds namely:
- i. That the learned judge erred both in law and fact in finding that the running of time for purposes of the appellants' claim for adverse possession was interrupted by the issuance of a demand letter from the registered proprietor;
 - ii. That the learned judge erred in both law and fact in finding that the registered proprietor's predecessor in title had a good title acquired through rectification in 1981 without the consent and knowledge of the 3rd respondent who was then the registered proprietor and thereby divested of title.
13. The 3rd respondent also filed a notice of cross-appeal faulting the learned judge for finding that the appellants were not lawful allottees of the suit property yet there was sufficient evidence to the contrary.
14. When the appeal came up for hearing before this Court on 9th June 2021, learned counsel Mr. Mbugua appeared for the appellants while Mr. Kihoro appeared in person on his own behalf and on behalf of the 2nd appellant. The 3rd respondent was represented by Mrs. Gichohi, learned counsel, while Mr. Eredi, Deputy Chief State Counsel appeared for the 4th respondent.
15. On the issue of whether a demand letter interrupts time for purposes of a claim for adverse possession, it was submitted by Mr. Mbugua that the doctrine of adverse possession is premised on possession of land for a statutory prescribed period of time and that the events which can interrupt time from running do not include what counsel referred to as mundane acts, such as a demand for the adverse possessor to vacate from the suit land.
16. Reliance was placed on the decisions of this Court in *Joseph Gabumi Kiritu vs. Lawrence Munyambu Kabura, Civil Appeal No. 20 of 1993* and *Benson Mukuwa Wachira v. Assumption Sisters of Nairobi Registered Trustees [2016] eKLR* where it was held that a letter by a land proprietor does not amount to assertion of title in law and cannot interrupt the passage of time for the purpose of computing the period of adverse possession, and that institution of a suit against a trespasser does interrupt and stop time from running.
17. On whether rectification of the register can confer rights on a person over a property, it was submitted that under section 152 of the repealed Registered Lands Act rectification is only conducted to correct errors or omissions materially affecting the interest of any proprietor or where all the persons interested have consented.



18. In the present case, it was submitted that rectification could not have conferred title on Ndibo Nthenge which he could subsequently pass to the deceased. The appellants cited the cases of *The County Government of Migori vs. The Registered Trustees of Catholic Diocese of Homabay & 2 others; ELC Petition No. 36 of 2014*; *Republic vs. the Land Registrar Kisii & Another ex Parte Alloys Mataya Moseti, Environment & Land Misc. App No. 30 of 2012* and *Denis Noel Mukbulo & Another vs. Elizabeth Murungari Njoroge & Another, Civil Appeal No. 298 of 2014* to demonstrate the circumstances under which rectification would be conducted and what various courts have held with regards to the issue of rectification of the register and the powers of the land registrar on rectification.
19. Mrs. Gichohi, learned counsel for the 3rd respondent, associated herself with the submissions of the two appellants. She submitted that the process through which the appellants came into possession of the suit property was sufficiently laid down before the trial court; that since coming into possession of the suit property in the year 1974, the appellants have enjoyed quiet possession of the same. The 3rd respondent took issue with the long delay by the 1st and 2nd respondent in instituting the suit against the appellants for trespass. On the issue of rectification, it was submitted that one cannot acquire title over a property by way of rectification of an existing title. It was further submitted that no evidence was tendered before the trial court to show how Ndibo Nthenge acquired title over the suit property. It was submitted that the process of registering the suit property in the name of Ndibo Nthenge was highly irregular, illegal and marred with fraud.
20. The 1st and 2nd respondents on their part through Mr. Kihoro submitted that the findings of the trial Court on the issue of adverse possession was sound. He submitted that neither the appellants nor the 3rd respondent had produced in evidence a letter of allotment allotting the suit property to the appellants. He submitted that his deceased wife bought the land from a person who had a good and clean title to the property. It was his argument that the appellants had interfered with the records at the land's registry such that the Green Card had unexplained insertions. On the issue of rectification, it was submitted that Ndibo Nthenge exchanged an excision of half acre of his land at a place called Ndumbu-ini with the 3rd respondent for the suit land. The entry referred to as rectification in the register was therefore in reference to this exchange which the 3rd respondent apparently sanctioned.
21. The 4th respondent, through Mr. Eredi, submitted that the issue of rectification was a new issue not raised before the trial Court. He urged this Court to dismiss the appeal with costs.
22. We have considered the rival submissions by counsel and examined the record of appeal. This being a first appeal, we are conscious of our duty to re-evaluate the evidence before the trial Court and determine the matter afresh with the usual caveat that we did not hear or see the witnesses testify. See the case of *Selle v. Associated Motor Boat Company [1968] EA 123*, where it was held:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif -v -Ali Mohamed Sholan (1955), 22 E. A. C. A. 270).”



23. In our considered view, the following two issues commend themselves for determination in this matter:
- i. Whether the appellants acquired lawful interest over the suit property by adverse possession and whether the running of time for purposes of the appellant's claim for adverse possession was interrupted by the demand letter issued by the 1st and 2nd respondents; and
 - ii. Whether Ndibo Nthenge acquired good title by way of rectification which he could pass on to the deceased.
24. On the first issue, the appellants acknowledge that the suit property is registered in the name of Dr. Wanjiru Kihoro, the deceased wife of the 1st respondent. The appellants allege that they have been in open, continuous, peaceful and uninterrupted possession of the suit property since the year 1974. On the other hand, the 1st respondent alleges that his deceased wife was the absolute owner of the suit property, having bought it from one Ndibo Nthenge, and the same registered in her name on 31st March 1983.
25. The suit land was registered in the name of Ndibo Nthenge sometime in the year 1981. Before that date, the suit land belonged to and was registered in the name of the Native Land Trust Board; the predecessor of the 3rd respondent. It follows therefore that computation of time for purposes of a claim over the suit property by way of adverse possession only commenced in 1981.
26. Adverse possession is anchored on specific sections of the Limitations of Actions Act Cap 22 and the *Land Registration Act*, 2012. Section 7 of the *Limitation of Actions Act* states 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.”
27. Section 13 of the same Act states that:
- (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”



28. Section 17 on the other hand states as follows:
- “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”
29. Finally, section 38(1) and (2) states:
- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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 on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
30. The combined effect of the above sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor at the expiry of 12 years in adverse possession of the property in question.
31. The law and requirements for adverse possession was laid down by this Court in *Titus Mutuku Kasuve v. Mwaani Investments Limited & 4 Others [2004] eKLR* where the 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 without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”
32. In *Mbira v. Gachubi [2002] IE ALR 137* it was 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 statutory prescribed period without interruption....”
33. Similarly, in *Sisto Wambugu v Kamau Njuguna [1983] eKLR*, this Court cited with approval the findings of *Lord Lindley in Littledale vs. Liverpool College [1900] 1 Ch 19, 21* thus:
- “...In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having discontinued his possession of it... The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession...”
34. We have stated earlier that a claim for adverse possession could only begin to run in the year 1981 when the suit property was registered in the name of Ndibo Nthenge. What the appellants need to prove was that their occupation of the suit property was continuous, open, peaceful and without permission of the registered owner.
35. The 1st respondent’s deceased wife became the registered owner of the suit property on 31st March 1983. There was no sufficient evidence by the 1st and 2nd respondents that the deceased after acquiring



title to the suit property took possession and or occupation of the same. But even if she briefly occupied the suit property or a part thereof, the deceased went to the United Kingdom in 1987 and since then did not have any presence on the property. The appellants on the other hand demonstrated that they took possession of the suit property in the year 1974 and constructed a semi- permanent structure thereon which served as a church before construction of a permanent church which is presently erected on the suit property. By the time the 1st and 2nd respondent filed suit; to wit, 22nd July 2013, the appellants had been in possession and occupation of the suit property for about 39 years.

36. In *Alfred Welimo v. Mulaa Sumba Barasa, CA No 186 of 2011*, this Court expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his *Megarry’s manual of the Law of Property*, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalul scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”

37. It is our opinion that by entering the suit property and erecting a semi-permanent church thereon, the appellants demonstrated their intention to possess the same. The appellants’ use and occupation of the suit property was inconsistent with the interests of the registered owner. They erected a permanent church building on the suit property which was still in existence even as at the date of the hearing of the appeal.

38. The trial Court addressed itself to the issue of whether or not the appellant’s possession and occupation of the suit land had been interrupted by the demand letter issued in the year 1990. The trial judge noted as follows at paragraphs 32 and 33 of the impugned judgment:

“ 32. If any period for purposes of adverse possession can be computed, it has to start from 9th October 1981 when the suit property was registered in the name of Ndibo Nthenge who later transferred it to the deceased. The question which then arises is whether the running of time was ever interrupted before the expiry of 12 years. There is evidence that on 14th December 1990 the deceased through the firm of Murimi & Co. Advocates wrote a letter addressed to the moderator of Presbyterian Church of East Africa (PCEA) asking that the third defendant moves out of the suit property. There was a response to this letter written on 1st February 1991 in which the third defendant through its lawyers contended that they could not move out of the suit property which they had occupied for 16 years and in any case were entitled to it through prescription.

33. I have pointed out that time would not have started running in favour of the third respondent in 1974 even if they were found to have entered the suit property at the time. Time started running in third defendants’ favour in 1981. In 1990, a demand was made by the deceased who wanted the third defendant to move out of the suit property. This action was one way of peacefully trying to re-enter the suit property. This demand therefore interrupted time from



running. Thereafter the plaintiffs particularly the first plaintiff made sustained efforts to have the third defendant relinquish possession of the suit property.”

39. The appellants contest the finding of the trial court that the demand letter issued by the 1st respondent in the year 1990 interrupted the running of time for purposes of their claim for adverse possession.

40. This Court has previously addressed itself on the issue of interruption of time for purposes of a claim of adverse possession. In *Mwangi Githu v. Livingstone Ndeete* [1980] eKLR, the Court held 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]

41. In *Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura; Civil Appeal No. 20 of 1993* (unreported) (a decision cited by the appellants); this Court held that:

“Time which has begun to run under the Act is stopped 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. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him... He must therefore make a peaceable and effective entry, or sue for recovery of land.”

42. Kwach, J.A. in his judgment in *Kiritu v. Kabura* (supra) stated thus:

“The passage from Cheshire’s *Modern Law of Real property* to which Potter JA made reference in *Githua v Ndeete* is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says-

“Time which has begun to run under the Act is stopped 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. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the *Real Property Limitation Act 1833*, in a section which has been repeated in the *Limitation Act 1939*, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA



in *Githu v Ndeete*, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in *Muthoni v Wanduru* does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways, I am free to decide which way to go. And on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."

43. It is our position that time stopped running against the appellants in the year 2013 when the 1st and 2nd respondents filed suit at the Environment and Land Court in Nairobi. This is the only time the 1st respondent could be said to have taken the first step to assert his right over the suit property. By this time, the appellants had been in continuous and uninterrupted possession and occupation of the suit property for more than 30 years. The trial judge therefore erred in holding that the demand letter by the 1st respondent in the year 1990 amounted to interruption of the appellants' possession and occupation of the suit property.
44. The appellants' interest on the suit property was, for purposes of adverse possession, protected as an overriding interest pursuant to the provisions of section 30 (f) of the Registered *Land Act* (repealed) and presently section 28 (h) of the *Land Registration Act*, 2012. The section reads as follows:
- “28. Overriding interests
- Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-
- h. rights acquire or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”
45. On the second issue, the appellants as well as the 3rd respondent argue that Ndibo Nthenge, the person alleged to have sold the suit property to the 1st respondent's deceased wife, acquired title to the suit property through a process known as rectification. According to the appellants as well as the 3rd respondent, rectification cannot confer title to land on any person.
46. We have perused a copy of the Green Card produced before the trial court and note that on 9th October 1981, title to the suit property was conferred on Ndibo Nthenge by what is indicated on the Green Card as 'Rectification' and a Land Certificate issued in his name on 22nd October 1981. Before that date, it is indicated that title to the suit property belonged to the Native Land Trust Board, the predecessor of the 3rd respondent. There are other entries in the Green Card which show that on 31st March 1983, the suit property was registered in the name of Wanjiru Kihoro and title documents issued on the same date.
47. The 1st and 2nd respondents submitted that Ndibo Nthenge had exchanged his property at Ndumbuni area with the 3rd respondent for the suit property and that the rectification appearing in the land register was in respect of this transaction. The general rule in civil matters is that he who alleges must prove. The 1st and 2nd respondent did not lead any evidence to support this claim and therefore it remained a mere allegation.



48. Section 142 of the Registered [Land Act](#) (repealed) dealt with the issue of rectification. It read as follows:

“ 142.

- (1) The Registrar may rectify the register or any instrument presented for registration in the following cases –
 - a. in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;
 - b. in any case and at any time with the consent of all persons interested;
 - c. where, upon resurvey, a dimension or area shown in the register is found to be incorrect, but in such case the Registrar shall first give notice to all persons appearing by the register to be interested or affected of his intention so to rectify.”

49. Our interpretation of that section is that a Land Registrar cannot confer title to any person by way of rectification of the register. In [County Government of Migori v Registered Trustees of Catholic Diocese of Homabay & 2 others \[2015\] eKLR](#) (cited by the appellants), Okong’o, J. expressed himself thus:

“...the land registrar had no power under section 79 of the [Land Registration Act, 2012](#) to transfer land from one proprietor to another through rectification of the register. As correctly submitted by the petitioner, the land registrar’s powers to rectify the register are limited to specific situations. The land registrar has power to correct errors and omissions in the register only in formal matters and in cases where such correction does not materially affect the interest of any proprietor of land and, where all the affected parties consent to the correction. It has been submitted by the 1st respondent that the council was registered as proprietor of the suit property erroneously and that the land registrar was simply correcting an error by cancelling the name of council and replacing it with that of the 1st respondent. This is an outrageous submission. What the land registrar was engaged in here was an act of impunity and abuse of public office in its raw form.”

50. The learned judge went on to state that:

“The land registrar had no power to cancel a title that was in the name of the council and purport to transfer or to register the suit property in the name of the 1st respondent in the guise of correcting an error in the register. The transaction was an absolute nullity.”

51. We respectfully agree with the learned judge’s summation of the law. In the matter that gave rise to this appeal, the Land Registrar did not have power to transfer ownership of the suit property from the Native Land Trust Board to Ndibo Nthenge. A new title to land cannot be conferred by way of a rectification.”

52. The trial Court ignored the arguments by the 3rd respondent that the acquisition of the suit property by Ndibo Nthenge was irregular, unprocedural and unlawful and therefore could not have passed any title or proprietary right to the said Ndibo Nthenge. In light of the evidence presented before us, it is our finding that the 1st respondent’s deceased wife did not acquire a valid title over the suit property from Ndibo Nthenge. Ndibo Nthenge had no valid title and as such had none that he could convey to the 1st respondent’s deceased wife.



53. In the upshot, we find that the appeal is merited. Accordingly, we hereby set aside the judgment and decree of the trial court dated 9th April 2018 in its entirety and substitute therefor an order dismissing the 1st and 2nd respondents' suit. The appellants' counter-claim dated 13th August 2013 is hereby allowed in its entirety. The 3rd respondent's cross-appeal has merit and is hereby allowed. As regards costs, we order that each party bears its own costs of the appeal as well as the costs of the matter that gave rise to this appeal. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

