



**Karuru v Njuguna (Environmental and Land Originating Summons  
11 of 2019) [2024] KEELC 3446 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3446 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 11 OF 2019**

**LN GACHERU, J**

**APRIL 25, 2024**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF  
THE LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ACQUIRING OF TITLE BY ADVERSE POSSESSION  
UNDER SECTION 28 OF THE LAND REGISTRATION ACT NO. 3 OF 2012**

**BETWEEN**

**JACKSON KABIRI KARURU ..... PLAINTIFF**

**AND**

**MARY NJOKI NJUGUNA ..... DEFENDANT**

**JUDGMENT**

1. By a Further Amended Originating Summons dated 10<sup>th</sup> June 2022, the Plaintiff herein, Jackson Kabiri Karuru, sought for the following orders against the Defendant/ Respondent;
  - a). That a temporary injunction does issue restraining the Defendant whether by herself, her assigns, agents, servants, employees, persons claiming under her authority, from interfering with the Plaintiff's ownership, quiet possession, enjoyment and or use of 0.17 hectares out of Loc 1/ Kiunyu/ 512, measuring 3.2 pending hearing and determination of this matter;
  - b). A declaration that Jackson Kabiri Karuru, the Plaintiff herein has become entitled by adverse possession to 0.17 hectares, out of Loc 1/ Kiunyu/ 512, measuring 3.2 or thereabout registered in the name of Mary Njoki Njuguna;
  - c). An order that Jackson Kabiri Karuru, be registered as the sole proprietor of the said 0.17 Hectares of the said parcel of land being Loc 1/ Kiunyu/ 512, in place of Mary Njoki;



- d). Such other further orders as may meet the ends of justice in this case.
2. This Originating Summons is supported by the grounds stated on the face of it, and on the Supporting Affidavit of Jackson Kabiri Karuru sworn on 10<sup>th</sup> June 2022. These grounds are;
- i. The Plaintiff is the absolute beneficial owner of 0.17 hectares out of Loc 1/ Kiunyu/ 512, measuring 3.2 acres or thereabout;
  - ii. That the Plaintiff, his mother Jane Wanja Karuru(deceased), and the family entered into occupation of the said portion of land from 1963 and have continued to be in open, continuous, exclusive, uninterrupted and adverse occupation of the use of loc 1/ Kiunyu/ 512;
  - iii. That the Defendant has now colluded with private surveyor, who has put beacons and claims that part of the suit Plaintiff's houses and structures are built on the Defendants parcel of land;
  - iv. That the Defendant is in the process of subdividing the parcel of land and the Plaintiff is apprehensive that if the process concludes, the Plaintiff will suffer irreparable loss as the house he lives with his family and other permanent structures will be demolished;
  - v. That the Defendant is destroying crops, coffee bushes and trees of great monetary value in the said 0.17 hectares belonging to the Plaintiff to the emotional trauma and detriment.
3. In his Supporting Affidavit, the Plaintiff herein, Jackson Kabiri Karuru, averred that he has been in continuous occupation of approx. 0.17 hectares out of land parcel No Loc 1/ Kiunyu/ 512, which measures about 3.2 acres since 1963. However, upon conducting an official search, he noted that the said parcel of land is registered in the name of Mary Njoki Njuguna, the Defendant herein as is evident from annexure JKK1
4. He contended that he was born in 1959, but his mother and himself entered into the suit land in 1963, where they have been in continuous and open occupation, as they have built permanent houses thereon.
5. Further that his mother passed on in 2017, and left him on the suit land, where he has continued to occupy the permanent house built thereon as is evident from JKK2, and he has planted coffee bushes, trees and he cultivates on the said parcel of land.
6. It was his contention that his family and himself have been in open, continuous, uninterrupted and exclusive occupation of the said land parcel for more than 40 years, and his claim is to acquire ownership by virtue of adverse possession of the 0.17 hectares out of the suit land Loc 1/ Kiunyu/512, measuring 3.2 acres.
7. He contended that the Defendant has colluded with the Private Surveyor, who has put beacons on the suit land and claims that his house is on part of the Defendant's land, and that the Defendant is in the process of subdividing the said parcel of land, and if the process is concluded, the Plaintiff will suffer irreparable loss as his house where he lives with his family will be demolished, leaving him homeless.
8. Further, that the Defendant and her family has invaded his land and have destroyed his crops such as coffee bushes, trees and other crops, and that has caused anguish to his family. He also contended that the Defendant is in the process of subdividing the Suitland, and he was apprehensive that if the process



is concluded, he stands to suffer irreparable loss as his house will be demolished, and thus he will be left homeless. Therefore, it was in the interest of justice that the court do declare that he has acquired the suit land by adverse possession and he should be registered as the owner of the said land.

9. The Originating Summons is opposed by the Defendant herein Mary Njoki Njuguna, who filed her Replying Affidavit dated 28<sup>th</sup> March 2022, and averred that the suit land was initially registered in the name of her husband Njuguna Karuru, and after the demise of her husband, she filed a succession cause at Thika CM P&A 59 OF 2014, and when the Grant was confirmed, on 26<sup>th</sup> March 2015, the suit land was transmitted to the beneficiaries being Mary Njoki Njuguna, Chege Karuru, Gladys Mumbi Njenga and Wambui Kiumbani, with each of the beneficiary getting 0.8 acres respectively.
10. It was her contention that the land parcel No Loc 1/ Kiunyu/ 512, was subdivided into four portions after consent was granted by Land Control Board, on 24<sup>th</sup> March 2016, as is evident from MNN 4(a) & (b). She also contended that the suit land was subdivided into Loc1/ Kiunyu/ 1555, 1556, 1557 and 1558, on 4<sup>th</sup> August 2018, and so land parcel no Loc 1/ Kiunyu/ 512, does not exist as at the time of filing this suit, and the Plaintiff did not disclose the above position
11. The deponent further deposed that the Plaintiff lives on land parcel No Loc 1/ Kiunyu/ 401, which does not even belong to him as he has no land of his own, and therefore has no locus standi to bring this claim, since he squats on his parents' land.
12. The Defendant denied ever cutting down the Plaintiff's trees and/ or crops, but alleged that the cut trees were on the suit land, and were cut down during the subdivision which gave rise to Loc1/ Kiunyu/ 1555- 1558. She also alleged that the Plaintiff had encroached on her parcel of land by about 0.1 acres, and not 0.17 ha, as alleged by him.
13. The Defendant urged the court to dismiss the Plaintiff's suit with costs to the Defendant.
14. The Plaintiff filed a Further Affidavit, and reiterated that the Defendant's land is 3.2 acres, and he occupies 0.17ha, out of this land, which he has acquired by virtue of adverse possession. It was his contention that even if Loc 1/ Kiunyu/ 512, has been subdivided, his portion of land 0.17 ha, which he has occupied for long and continues to occupy was not available for distribution in a Succession Cause, as he had acquired it by long occupation and possession for over 50 years.
15. It was his contention that the Defendant has not come to court with clean hands and should not benefit from equity, as she has concealed material facts during succession proceedings. That he came to court because the Defendant moved in to destroy his crops and threatened to demolish his house, where he had peacefully lived in open and continuous manner, without interruptions. He reiterated that he had occupied the 0.17 ha out of the suit land for long and has constructed his permanent house thereon. He urged the court to allow his claim.
16. After several interlocutory applications, the matter eventually proceeded for hearing via viva voce evidence on 20<sup>th</sup> February 2023, 4<sup>th</sup> July 2023 and 26<sup>th</sup> July 2023. The Plaintiff gave evidence for himself and called one witness. The Defendant gave evidence for herself and called no witness.

### **PLAINTIFF'S CASE.**

17. . PW1, Jackson Kabiri Karuru, the Plaintiff herein adopted his witness statement dated 29<sup>th</sup> July 2022, as his evidence in chief. He also produced the list of documents as P. Exhibits 1-4. It was his evidence that he lives on Loc 1/ Kiunyu/ 401, which borders Loc 1/ Kiunyu/ 512. He testified that he was claiming 0.17 ha from Loc 1/ Kiunyu/ 512, wherein he has occupied it for Long.



18. . He identified a Valuation Report from Zanconsult Valuers & Management Co Ltd, which shows the extent of his development on the said parcel of land, wherein he started occupying with his late mother Jane Wanjiku Karuru in 1963. It was his allegations that he has planted various crops including coffee bushes and trees. Further that he has built permanent buildings with rental rooms, which rental units he constructed in 1978 and 1988.
19. He asserted that he has lived on this parcel of land openly, and no one has raised any claim over the said parcel of land. Further, he testified that the Defendant is his neighbour and a distance relative, and that she has harvested her trees, and chased away her tenants. She claimed that the Defendant is trying to use unorthodox methods to chase him out of the suit land.
20. Upon cross exam by counsel for the Defendant, he stated that he lives on land parcel No. Loc 1/ Kiunyu/ 401, which is registered in the name of his mother Jane Wanja Karuru, and that he has sued the Defendant through his mother. He confirmed land parcel No. 401, is still in the name of his mother. He did not have a surveyor's report, but he was claiming 0.17 ha, from the Defendant. He also did not have a Police Report over the harassment that he had alleged.
21. He further claimed that land parcel No Loc 1/ Kiunyu/ 512, existed even at the time of filing the suit, and that he had no authority to sue on behalf of his mother, though his mother is the registered owner of land parcel No 401.
22. On re- exam, he confirmed that his suit is for adverse possession, and the claim is by him as an individual, but not for his mother. It was his evidence that he built his first house on the suit land in 1978 and later 1988, and he is the one claiming adverse possession.
23. He also confirmed that he has a certificate of official search showing that land parcel No Loc 1/ Kiunyu/ 512, is registered in the name of the Defendant herein, which search is dated 22<sup>nd</sup> March 2021, and he filed the case in 2019. He also stated that he had reported the matter to the Police, who did not take any action, as he did not have any title deed. Further, he testified that he was not claiming anything else from Loc 1/ Kiunyu/ 401, but 0.17 ha. from No. Loc,1/Kiunyu/512.
24. . PW2, David Njoroge Kiama, a Government land surveyor based in Muranga County, produced a Surveyor's Report dated 14/ 6/2023 as P. Exhibit No 5. He informed the court that he is the one who prepared the said Surveyor's Report, which relates to land parcels No. Loc 1/ Kiunyu/ 401 and 512.
25. It was his evidence that he visited the two parcels of land and the relevant parties were present when he carried out the survey work.
26. He testified that he visited the site on 30<sup>th</sup> May 2023, in the presence of both parties, and the area Chief, who called the meeting to order, and he then carried the exercise. That during the exercise, the appointed teams showed him the boundaries, and he was taken around the two parcels of land and he took measurements.
27. In his findings, he noted that all the boundaries had beacons intact, but there was encroachment by Loc 1/ Kiunyu/401, and the area affected was 0.17 ha. He produced the Surveyor's Report as exhibit P. EXHIBIT 5. He further testified that the person in occupation of this encroached area was the Plaintiff, which is almost ½ acre. He confirmed that the parties were present when he made the findings.
28. When cross examined by the counsel for the Defendant, he stated that land parcel No. Loc 1/ Kiunyu/ 512, was encroached by No. Loc 1/ Kiunyu/401, and he picked this from the boundaries shown by the parties. That the coffee bushes belonged to Pw1, and land parcel No. 512, had overlapped on land parcel No. 401, and the disputed area was 0.17ha. He further told the court that he did not know



what was the dispute or allegations. He confirmed that the Plaintiff's home is not on the disputed area, though there were other houses thereon.

29. On re exam, he confirmed that the shaded area which is the disputed one has permanent structures belonging to PW1, and there were stumps, which showed that the coffee bushes had been cut, and the magnitude of the encroachment was also shown.

#### **DEFENCE CASE.**

30. . DW1, Mary Njoki Njuguna, a peasant farmer who lives in Kiunyu area stated that she lives on land parcel No 512, which initially belonged to her husband Njuguna Karuru, and she got it by transmission. She also stated that the said land was to be distributed to the four beneficiaries thereafter. Further that the Plaintiff and her late husband are brothers, and so Plaintiff is related to her.
31. She further testified that they have lived on the suit land for long, and that the Plaintiff is the one who has encroached on her parcel of land, and has been doing it gradually. She adopted her witness statement as her evidence in chief, and claimed that the suit land No 512, is subdivided into four portions, and the Plaintiff encroached on her parcel of land and planted coffee bushes, which were later uprooted.
32. Upon cross exam by the counsel for the Plaintiff, she confirmed that her husband was the late Njuguna Karuru, who owned land parcel No 512, which parcel of land is now subdivided, but the Plaintiff has built some of his houses on her parcel of land. Further, it was her evidence that the coffee bushes that the PW1 had been picking was planted by her father in law, and the ones that were on her parcel of land were uprooted. She also confirmed that after confirmation of grant, the title was registered in her name, which she later distributed to the beneficiaries.
33. She also confirmed that the land was subdivide before the suit was filed, and it was not subdivided to defeat this suit, and that the relationship between Pw1 and herself is sour. She denied encroaching on the Plaintiff's parcel of land.
34. On re- exam, she confirmed that the parcel of land claimed by Pw1, is supposed to be hived from land parcel No 512, but he is not entitled to it, since he lives on land parcel No. 401.
35. After the close of viva voce evidence, the Parties filed and exchanged written submissions as directed by the court, which submissions the court has carefully considered, and finds as follows;
36. The Plaintiff filed his submissions on 4<sup>th</sup> October 2023, through the Law Firm of Daniel Henry & Co Advocates, and submitted that the Plaintiff has proved his case on the required standard of balance of probabilities. The Plaintiff raised five issues for determination.
37. On whether the Plaintiff has identified the parcel of land that he claim to by way of adverse possession, the Plaintiff relied on the case of Gabriel Mbui vs Mukindia Maranya (1993) eklr, where the court held;
- “ the land or portion of land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with clear boundary or identification”.
38. The Plaintiff submitted that he had established by way of documentary evidence that the Defendant herein is the registered owner of the suit property, and that the Plaintiff has encroached on it by 0.17 ha, as is evident from the surveyor's report. Therefore, the land encroached by the Plaintiff has been identified with its measurements, and thus the claim has been proved.
39. On whether the entry into the suit property if any was adverse, it was submitted that even the Defendant had admitted in her Defence that part of the Plaintiff's permanent house is on her parcel of



land. He further submitted that he has been in possession of this portion of 0.17 ha from 1963, without permission, and without licence from the Defendant. That this occupation has been continuous, notorious and uninterrupted and he attached photographs showing development thereon.

40. On computation of time, it was submitted that the Plaintiff entry was from 1963, and the same remained uncontroverted. It was submitted that entry into the suit land was in 1963, and this suit was filed in 2019, which was a period of over 50 years. That even by the time of filing the succession proceedings in 2014, the Plaintiff had been on the suit land for more than 12 years.
41. On whether the Plaintiff has been in actual occupation of the suit land for over 12 years, it was submitted that the Plaintiff did prove by calling evidence that he has been in open, continuous and uninterrupted occupation of the portion of land claimed. He relied on the case of *Abdirashid Adan Hassan Vs Estate of W HE Edgley (2022) eklr*, which cited the decision of the Court of Appeal in the case of *Maweu vs Liu Ranching & Farming Cooperative Society ( 1985) Klr 430*, where the court held;  

“ in law , possession is a matter of fact, depending on all circumstances...”
42. It was also submitted that in demonstrating that the Plaintiff occupation is adverse to that of the Defendant, he produced evidence of permanent houses built by him, and such action by the Plaintiff was hostile to the rights of the registered owner. Therefore, the Plaintiff submitted that he has met the threshold to demonstrate continuous possession by dint of building permanent structure and planting crops, such as coffee bushes and trees on the said portion of land.
43. On the issue of costs, the Plaintiff submitted that costs follow the event, and that courts have discretion to award costs, though it cannot deviate if there are no special circumstances warranting such deviation. Reliance was placed on the case of *George Kamau Njoroge & Another vs Patrick Kagotho Njonge & Another ( 2022) eklr*. He submitted that he should be granted costs of the suit.
44. The Defendant filed her written submissions through *Kanyi Kiruchi & Co Advocates*, and submitted on five issues. She urged the court to dismiss the Plaintiff suit with costs to the Defendant.
45. The Defendant also relied on sections 7 and 13 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, to support her Defence.
46. The Defendant submitted that though the Plaintiff claimed that he was in open and continuous occupation of land parcel No loc 1/ kiunyu/ 512, the said Land was subdivided to give rise to four other parcels of land, and therefore, that parcel of land does not exist, as they were transmitted to four beneficiaries, who are not parties to this Originating Summons.
47. Further, it was submitted that the Plaintiff lives on Land parcel No 401, which does not even belong to him, as it belonged to his mother who is now deceased. Reliance was placed on the case of *Samuel Kihamba vs Mary Mbaisi ( 2015) eklr*, where the court of Appeal in Kisumu held;  

“ strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is , that is , without force, without secrecy, and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. the additional requirement is that of *animus possidendi*, or “intention to have land”.



48. The Defendant further submitted that the Plaintiff is not in possession or occupation of land parcel No 512, or its subdivisions, or any part thereof, and that only a part of the Plaintiff's house had secretly encroached on the Defendant's parcel of land, and that does not constitute adverse possession.
49. The above are the Pleadings as filed by the parties, and their annexures thereto, the evidence as adduced in court, the rival written submissions and the cited authorities, which this court has carefully read and considered. Thereafter, the court renders itself as follows;
50. It is evident that the Plaintiff and the Defendant are related. The Defendant testified that the Plaintiff is a brother to her deceased husband. The Plaintiff did not deny that allegation, and therefore, this court holds and finds that the Plaintiff and the Defendant are relatives.
51. It was also the evidence of the parties that the Plaintiff lives in land parcel No. Loc 1/ Kiunyu/ 401, which is registered in the name of Jane Wanja Karuru, the mother to the Plaintiff and mother-in-law to the Defendant. The parties also testified that the two parcels of land border each other.
52. It was the Defendant's evidence and submissions that the Plaintiff has no locus standi to bring this suit, because he is a squatter in land parcel No. Loc 1/ Kiunyu/ 401, which does not belong to him. However, it is evident that the Plaintiff's claim is for adverse possession, which is a claim brought about by a claimant who alleges that he has acquired a registered owner's property by virtue of long occupation of the said parcel openly, without permission, without interruption and the said occupation and possession has dispossessed the owner. In Kenya, such occupation and possession must be for a period of 12 years, and the said occupation and possession should be with an intention to own the said parcel of land, and the owner must have ceased possession of the said land.
53. The fact that the Plaintiff is not the owner of the adjacent land does not disqualify him from bringing a claim for adverse possession. The Plaintiff has brought the suit for himself and not for the estate of his mother, and therefore, the Plaintiff has locus standi to institute the suit for himself.
54. The claim is for adverse possession, which claim if it succeeds then the Defendant herein, who is the registered owner, will have to cede the portion of land claimed by the Plaintiff. This is one method, where a parcel of land owned by a registered proprietor, is taken away, and given to the adverse possessor. Therefore, the claimant must avail sufficient evidence to prove his claim on the required standard of balance of probabilities.
55. The Plaintiff herein, who is a brother-in-law to the Defendant, has averred that he has acquired 0.17 Ha. out of her suit land Loc 1/ Kiunyu/ 512, by adverse possession. The Defendant has denied that allegation, and thus the Plaintiff herein, needed to call sufficient evidence to prove his claim.
56. Having considered the available evidence, and all annexures attached to the pleadings, the court finds the issue for determination is whether the Plaintiff has proved on the required standard that he has acquired 0.17 Ha out of No. Loc 1 / Kiunyu/ 512, by Adverse possession.
57. From various decisions made by courts in Kenya, it is clear that adverse possession is one of the methods of acquiring land in Kenya, as provided by Section 7 of the *Land Act*. Adverse possession is one of the overriding interests which attaches to land. See the case of Public Trustee Vs Wanduru Ndegwa [1984]KLR 314 @324, the Court held;

“In the instant case, the Plaintiff was in occupation of the suit property and his possessory rights are not only equitable rights but are an overriding interest binding on the land”



58. Further a claim for adverse possession is brought against the registered owner of a suit land. The Defendant had alleged that this suit cannot stand, since the land Parcel No. Loc 1/ Kiunyu/ 512, does not exist, since though it was inherited by the Defendant through transmission, she distributed it to the beneficiaries and therefore the said land parcel does not exist.
59. However, it is clear that adverse possession attaches to land, and not title, and the Plaintiff only needed to prove that his possession has been adverse, and if the court finds that his claim is valid, then subsequent subdivisions and new titles would not affect his right. However, the Plaintiff first needs to avail sufficient evidence to prove all the elements for adverse possession, before the court can hold and find that the subsequent transfer and/ or subdivision did not affect his right. See the case of Kimani Ruchire –v – Swift Rutherfords & Co. Ltd. (1980) KLR 10 at page 16 letter B, where Kneller J. held that:
- “The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration”.
60. Further this court has considered the Green Card, and has noted that the suit land was transmitted to the Defendant, Mary Wanja Njuguna on 18<sup>th</sup> December 2015, vide a Succession Cause No 59 of 2014. The said title remained in the name of the Defendant until 28<sup>th</sup> April 2022, when it was closed for subdivision. This suit was filed in the year 2019.
61. This suit having been filed in 2019, by then the title had not been closed upon subdivision, and though survey work, subdivision and paper work as per the Mutation Form had occurred, the title Loc 1/ Kiunyu/ 512, was still intact. Therefore, the Plaintiff was in order when he sued the registered owner of the suit property, who was the Defendant herein by then. Further, it has been held variously, that the right to own land through prescriptive right is an overriding interest which attaches to land, and can lead to defeat of an owner’s right over the said land.
62. The suit land was transmitted to the Defendant in 2015, under the regime of the [Land Registration Act](#), 2012, and Section 28(h) comes into play which states;
- “28. 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 acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
63. Having found that the Plaintiff has locus standi to institute the suit and that by the time the suit was filed, the Defendant was the registered owner of the suit land, and therefore, the title to Loc 1/ Kiunyu/ 512, existed, this court will turn to the available evidence, consider it to determine whether the Plaintiff has met the threshold to be declared to have acquired the Defendant’s portion of land by adverse possession, taking into account that the Defendant is his sister in law, and their parcels of land borders each other.
64. What is to be considered in a claim for adverse possession has been well settled and the requirements that the claimant must meet or prove in order to succeed in a claim for adverse possession have been discussed in various decided cases. Firstly, in the case of Wambugu vs Njuguna(1983) klr, 173,



- the Court of Appeal held that adverse possession contemplates; possession and discontinuance of possession, and that the proper way of proving adverse possession would be whether the title holder has been dispossessed or has discontinued his possession for a statutory period of 12 years, and not whether or not the claimant has proved that he or she has been in possession for a requisite number of years.
65. Secondly courts have held that adverse possession is proved by facts. See the case of Gabriel Mbui Vs Mukundi Maranya ( *supra*) where the court held;
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
66. The requirements for adverse possession were set out in the case of Mbira vs Gichuhi ( 2002) 1EALR 137, where the court held;
- “..... a person who seeks to acquire title by land by the method of adverse possession for 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 a statutory prescribed period without interruption...”
67. For adverse possession to attach, the occupation and possession by the claimant must be open and not in secrecy or discreet. This was held so in the case of Jandu vs Kirplal & Another (1975) E.A 225, where the court held;
- “ .. to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession, 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”
68. For a claim of adverse possession to succeed, the claimant must prove the required ingredients as was stated by the Court of Appeal in the case Mtana Lewa vs Kahindi Ngala Mwangandi( 2005) eklr, where the court held;
- “ ...I adverse possession is essentially a situation where a person takes possession of land , asserts right over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for a certain period, in Kenya 12 years” .
69. From the above decided cases, it is clear that a person claiming adverse possession ought to prove that his possession of the suit land is nec vi, nec clam, nec precario” that is to mean without force, without secrecy. And without permission of the owner. This possession and occupation should be open, continuous and peaceful.
70. The suit herein being a claim of adverse possession, the Plaintiff must prove all the above elements in order to succeed in his claim. It was his evidence that he entered the suit land in 1963, with his mother. The suit land was registered in the name of the Njuguna Karuru in 1963, who is a brother to the Plaintiff. If the Plaintiff entered into the suit land in 1963, with his mother, he must have been a young boy then, as he testified that he was born in 1959, and it cannot be said that he entered the suit land, and dispossessed his brother with intention of owning the said parcel of land and that his brother Njuguna Karuru discontinued possession.



71. The Defendant denied that the Plaintiff has been in adverse possession of the said portion of land. She asserted that the Plaintiff has encroached on her parcel of land. The Plaintiff averred that he brought the suit after the Defendant uprooted his coffee bushes, and harassed him. However, the Defendant reiterated that the coffee bushes were planted by her father in law, and that they were uprooted after the suit land was subdivided and distributed to the beneficiaries.
72. As the Court noted earlier and as was held in the case of Gabriel Mbui vs Mukundi Maranya( supra), adverse possession is proved by facts, that is by calling evidence to prove the allegation. The parties herein are related, and there are other relatives on the ground whom the Plaintiff should have called to prove that indeed he has occupied the alleged portion of land and had built permanent structures thereon.
73. The Plaintiff also alleged that he put up the permanent structures on the portion of land of 0.17ha from the suit land in 1978 and 1988. That allegation has been denied by the Defendant. With that denial, the Plaintiff ought to have called evidence to support his claim. Given that he had alleged that he entered into the suit land in 1963, with his mother, could it be the said structures were built by his mother? There was no tangible evidence to show that the alleged permanent structures were put up by the Plaintiff in 1978 and others in 1988.
74. The other element to be proved is that the claimant entered into the suit land without permission of the owner, without force, openly and with the knowledge of the rightful owner. The Government Surveyor alleged that land parcel No 512 has overlapped on Land parcel No 401, which was owned by the mother of the Plaintiff and mother in law to the Defendant.
75. If there is an overlap and thus encroachment of one parcel of land to the other, was this fact known to the rightful owners, that the late Njuguna Karuru, the initial owner of No. Loc 1/ Kiunyu/ 512, and Jane Wanja Karuru, the registered owner of No. Loc 1/Kiunyu/ 401?. Without evidence that the original owner knew that his parcel of land had been occupied by another, then this court cannot hold that the Plaintiff occupation and possession of the said portion of 0.17 Ha from land parcel No.512, was adverse to the rightful owner and that time started running for purpose of computation of statutory period.
76. Without evidence of any knowledge by Njuguna Karuru, the original owner of the suit land that his brother, the Plaintiff had openly and peaceful occupied the 0.17 ha from his parcel of land, this court cannot find and hold that such possession was continuous, and that it dispossessed the said original owner, and that the original owner discontinued possession, and that the Plaintiff possession was with the intention of permanently owning that portion of land.
77. It is evident that the Plaintiff brought the suit herein after the Defendant inherited the suit land through transmission, and thereafter the land was surveyed for subdivision so that each of the beneficiary could get his/ her parcel of land. If that subdivision had not been carried out, perhaps the overlap would not have been discovered, and the Defendant would not have known that the Plaintiff had encroached on her parcel of land.
78. From the surveyor's report, it is clear in finding No 4 of the said Report that Land parcel No Loc1/ Kiunyu/ 401, had encroached on land parcel No. Loc 1/ Kiunyu/ 512, by a magnitude of 0.17ha. With the said encroachment, the Plaintiff has been assuming that the encroached portion of land was rightfully on his parcel of land, but there is no evidence that he openly, peacefully and without permission of the owner entered into the said portion of land with intention of dispossessing the owner and owning the said portion. The available evidence points to a dispute on boundary encroachment



or boundary dispute, but not adverse possession, especially considering that the parties are related and the parcels of land border each other.

79. It is evident that the Defendant got registered as the owner of the whole of land parcel No. Loc 1/ Kiunyu/ 512, in 2015. Thereafter in 2016, she applied for consent from the Land Control Board, to subdivide the land, into four equal portions, which consent was granted on 24<sup>th</sup> March 2016. The said parcel of land was subdivided as per the Mutation Form and field sketch, dated 4<sup>th</sup> August 2018. There was no evidence that the Plaintiff herein opposed the said subdivision, which was done after the land was transmitted to the Defendant through Succession Cause or proceedings filed in respect to the estate of her late husband, Njuguna Karuru, the original registered owner of the suit land. Therefore, by the time of filing this suit, the suit land had been subdivided on the ground, but there is no evidence that individual title deeds for resultant subdivisions had been issued. The said subdivision might have prompted the Plaintiff to file the instant suit.
80. From the Defendant exhibits, there is a Surveyor Report, prepared by Lapezoh O, Abisai a licenced Government Surveyor, which report indicates that Land parcel No. Loc 1/ Kiunyu/ 512, upon re-survey was found to be partly occupied by land Parcel No Loc 1/ Kiunyu/ 401, by approx. 0.04 ha or 0.1 acres. This was almost similar findings of the Government Surveyor, PW2, who stated that land parcel No, 401 had encroached on land parcel No. 512, by 0.17 ha. This is clearly a boundary dispute, which cannot be resolved by declaring the Plaintiff as the owner of the disputed portion of land by virtue of adverse possession.
81. As at the time of filing the suit herein, the Defendant was the registered owner of the suit land and section 26 of the [Land Registration Act](#), gives her the absolute and indefeasible ownership, which ownership can only be defeated as provided by the Act. See section 25 of [Land Registration Act](#) which states;
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.
82. One such instances that can defeat the right of a title holder like the Defendant herein is prove of existence of overriding interests as provided by section 28 of [Land Registration Act](#). The Plaintiff has failed to prove existence of such overriding interest, and the court finds and holds that there is no evidence that the Plaintiff is entitled to 0.17 ha of the Defendant's parcel of land by dint of adverse possession.



83. From the Surveyors reports as produced as exhibits by both the Plaintiff and the Defendant, land parcel No Loc 1/ Kiunyu/ 401, has encroached on land parcel No. Loc 1/Kiunyu/ 512, by 0.17 ha, as per the evidence of Pw2, and by 0.04 ha, as per the Defendant's exhibit, which was not disputed by the Plaintiff. This court finds and holds that such an encroachment cannot equate to ownership by prescriptive right and/ or adverse possession.
84. Having now carefully considered the available evidence, and having analysed it as above, this court finds and holds that the Plaintiff has not proved his case against the Defendant herein on the required standard of balance of probabilities. For the above reasons, the court finds the Plaintiff's suit as contained in the Further Amended Originating Summons dated 10<sup>th</sup> June 2022, is not merited, and the same is dismissed entirely, with costs to the Defendant herein, who is the successful litigant.

**It is so ordered**

**Dated, Signed and Delivered virtually at Muranga this 25<sup>th</sup> Day of April 2024**

**L. Gacheru**

**Judge**

**25/4/2024**

**Delivered online in the presence of;**

**M/s Nyamu H/B for Mr Gachau for Plaintiff**

**M/s Muturi H/B for Mr Kanyi Kiruchi for Defendant**

**Joel Njonjo Court Assistant**

**L. Gacheru**

**Judge**

**25/4/2024**

TABLE

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