



**Mutiga v Kithaka & another (Environment & Land Case
143 of 2017) [2024] KEELC 3406 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3406 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE 143 OF 2017**

CK YANO, J

APRIL 25, 2024

BETWEEN

LUKE KITHURE MUTIGA PLAINTIFF

AND

CATHERINE CIEGOKI KITHAKA 1ST DEFENDANT

KATHANDIKA IGUNA 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated 7th November, 2011, the Plaintiff herein commenced these proceedings under the provisions of order 37 (4) of the civil Procedure Rules and Sections 7 & 17 of the *Limitation of Actions Act* claiming to have acquired title to the whole of L.R. No. S.Tharaka/Tunyai 'A'/479 through adverse possession. The body of the originating summons sets out the following questions for determination:
 - i. Whether the plaintiff has been in a continuous, exclusive and uninterrupted possession of LR. No. S.Tharaka/Tunyai 'A'/479 for a period of over 12 years.
 - ii. Whether the possession by the plaintiff is adverse to the defendants.
 - iii. Whether the plaintiff has through adverse possession acquired title to the LR No. S.Tharaka/Tunyai 'A' 479
 - iv. Whether the defendant's title to LR. No. S. Tharaka/Tunyai 'A'479 has been extinguished.
 - v. Whether the plaintiff should be registered as the absolute owner of LR. No. S. Tharaka/Tunyai 'A'479 in place of the defendants.
 - vi. Whether the defendants should pay the cost of the suit.



2. The summons is supported by the affidavit of Luke Kithure Mutiga, the plaintiff sworn on 9th November, 2011.
3. The Defendants answered the originating summons through their affidavit dated 16th February, 2012. The Defendants also filed a counter-claim dated 13th April, 2012.

The Plaintiff's Case

4. The Plaintiff averred that he was 50 years old and a resident of Tunyai Location, Tharaka South District. That in the year 1984 soon after he married, he settled on L.R S. THARAKA/TUNYAI 'A'/479 and took possession of the entire parcel of land.
5. The Plaintiff stated that he fenced the whole of the land and marked its boundaries. That he started farming the land by growing crops and grazing on parts of the same.
6. The Plaintiff averred that he has built his homestead on the land and there are developments therein including 5 houses, 7 mature mango trees and some trees.
7. It is the Plaintiff's contention that he has openly and continuously lived, occupied and farmed the land since 1984 and his occupation has been exclusive and that nobody has ever disturbed his possession.
8. The Plaintiff avers that none of the defendants has ever complained against his occupation or filed any suit seeking to dispossess him of the land at any given time.
9. The plaintiff stated that when his mother died in 1996, he openly buried her on the land and nobody ever interfered. That he also buried 3 of his brothers on the said land when they died and nobody tried to interrupt the same.
10. The plaintiff averred that he has for over 27 years enjoyed the land as if he was the registered owner without the defendant's interference, disturbance or attempts to remove him from the same.
11. The applicant contended that he has acquired title to the land by virtue of adverse possession for a period of well over 12 years, and seeks orders of the court to be registered as the owner of the suit land.
12. At the hearing Luke Kithure Mutiga testified as PW1 and was cross examined. The plaintiff testified that he comes from Tunyai Sub-location, Tunyai Location and he is a farmer.
13. The plaintiff adopted his statement dated 18th February, 2015 and filed in court on 20th February, 2015 as his evidence in chief. The plaintiff also produced a certificate of search and a letter dated 11th October, 2021 as P. Exhibits 1 and 2 respectively. The Plaintiff also produced ten photographs as P. Exhibits 3(a) – (k).
14. The Plaintiff stated that photograph marked P. Exhibit 3(a) was the house of his late brother's wife Mary Kambura and who he is staying with. The Plaintiff testified that his brother died in May 2011.
15. The Plaintiff identified the rest of the photographs to be a grown mango tree which he said was planted by his late mother who died in 1995, crops such as maize, bananas and trees, his home which he says has been there since 1984, although started living on the land in 1976, a house and trees he said belongs to his sister-in-law, trees, his house, kitchen, his children's houses and a grave which he said belongs to his late father who died in 1978, and a house of his late brother's son who was left when he was 3 years and still lives on the said land.



16. The plaintiff testified that he was born and brought up and has all along stayed on the suit land to date. The plaintiff testified further that he has never seen the defendants use the land and neither have they lived on the suit land.
17. The Plaintiff stated that the defendants are his neighbours who live on and cultivate on another land adjacent to the suit land. The plaintiff testified that they share a common boundary with the defendants.
18. The Plaintiff testified that he did not know one Fredrick Miriti whom the defendants alleged they purchased the land from and stated that he has never been on the land.
19. When he was shown the defendants' documents, the plaintiff stated that he remembers that he was called to the chief's meeting, but after deliberations, he declined the same and came to court. He stated that he declined to append his signature on the agreement.
20. The Plaintiff testified that other than the letter from the chief, he had never received any demand from the defendants or the said Fredrick Miriti asking him to vacate from the land. The Plaintiff testified that he has all the time used the land with his family.
21. The Plaintiff pointed out that the title deed in the defendants further list of documents dated 24th October 2023 is in the name of Catherine Kithaka who holds it in trust of herself and her children. The plaintiff further stated that Catherine Kithaka is the wife of Jonathan Kithaka, the original 1st defendant and the widow was substituted as a 1st defendant. The plaintiff stated that the said title deed was issued during the pendency of the suit and sought for orders in the Summons herein.
22. When he was cross-examined by Mrs. Maheli, learned counsel for the defendants, the plaintiff reiterated that he has houses, crops and trees to demonstrate that he has stayed on the land since he was born. He also referred to the photographs that he produced as exhibits. He admitted receiving demand letter from the defendants' advocate asking the plaintiff to vacate from the suit land. The plaintiff stated that by the time the defendants acquired the land, his occupation was apparent and they knew of the plaintiff being on the land. That they never inquired about what the plaintiff was doing on the land before buying it.
23. PW2 was John Mutegi. He knew the plaintiff since childhood in 1961. PW2 testified that he was aware of the suit land and stated that the plaintiff was brought up on the land and still lives there to date. That the plaintiff has never vacated from the suit land.
24. PW2 testified that he knew 1st defendant in 1972 when he was living in the land of Njeru Gituriundu, the first member of parliament for Tharaka. He testified that there is a road separating the land. PW2 stated that he has never seen the defendants on the suit land. He stated further that even the 2nd defendant was living in the land of Njeru Gituriundu. PW2 testified that he did not know one Fredrick Miriti, and had never seen him on the land.
25. PW2 adopted his statement dated 24th June 2014 as his evidence in chief and was cross-examined by Mrs. Maheli. He stated that the plaintiff's late father was living on the suit land and he left the plaintiff thereon.
26. PW3 was Andrew Kibira Murithi. He stated that he comes from Tunyai Sub-location. PW3 adopted his statement dated 16th November, 2023 and filed on 20th November 2023 as his evidence in chief, and was cross-examined
27. PW3 stated that the plaintiff was his uncle. That the plaintiff lives on the suit land and he lives on part of it. PW2 testified that the plaintiff took him in when he lost his father, Julius Murithi. He stated that



- they have lived on the land and cultivated it over the years. PW3 stated that he knew the defendants and where they lived. That the defendants also own land next to the suit land but which they only cultivate.
28. In his submissions dated 20th December 2023, filed by the firm of Murango Mwenda & Co. Advocates, the plaintiff submitted that it is trite law that a claim for adverse possession must be proved by establishing that the claimant's possession was actual, open continuous and exclusive for a period in excess of 12 years. The plaintiff submitted further that it must also be shown that the possession was uninterrupted, peaceful and without the consent of the registered owner.
 29. The plaintiff defined the term adverse possession and relied on the case of Gabriel Mbui –vs- Mukindia Maranya (1993) eKLR.
 30. The plaintiff submitted that the doctrine of adverse possession and the claim based on it accrues by operation of law where the main issue is that the registered owner's title has been extinguished and the claimant has acquired title to the land. The Plaintiff submitted that the doctrine is anchored by provisions of section 7, 13 and 38 of the Laws of Limitation Act which he cited.
 31. It is the Plaintiff's submission that the onus of proof obviously lies on the person claiming to be entitled to the relief of declaration of ownership of the land. The plaintiff relied on the case of Kimani Ruchine –vs- Swift Rutherford & Co. Ltd (1980) KLR 10.
 32. The plaintiff's counsel submitted that there is uncontroverted evidence that the defendants are the registered proprietors of the suit land and they got registered as such on the 7th September, 2011 after buying it for the 1st registered owner, Fredrick Miriti who was registered as proprietor on 12th August, 1988.
 33. The plaintiff's counsel further submitted that there was uncontroverted evidence that by the time the defendants bought the land from Fredrick Miriti (DW2), the plaintiff was still in possession of the land. That DW1 also admitted that the plaintiff was on the land and cultivated it.
 34. The plaintiff's counsel pointed out that the defendants admitted that the plaintiff is still on the land and has houses therein and that is uncontroverted and further that the defendants further admitted that they have never occupied the land since the time of purchase.
 35. The plaintiff's counsel submitted that the plaintiff still occupies the land with other relatives.
 36. The plaintiff submitted that the other consideration is whether the occupation has been continuous, open and uninterrupted. The plaintiff submitted that there is evidence that his occupation was open and he has been cultivating the land, has houses therein and planted many trees.
 37. The plaintiff pointed out that the defendants admit that they have a piece of land adjacent to the suit land which they cultivate and further that the defendants live just across the road and therefore they were fully aware of the plaintiff's occupation. That in any event, the defendants stated that they took the plaintiff to the chief demanding that he vacates, but the plaintiff refused and filed suit.
 38. The plaintiff submitted that his occupation of the land had spanned over 12 years by the time the defendants raised a complaint with the area chief. That the letter from the chief and the evidence by DW3 Mathews Kabira, the current chief of Tunyai Location does not in any way help the defendant's case. The plaintiff relied on the case of Joseph Ngahu Njigi & 3 others –vs- Zakayo Macharu Kariuki & 8 others (2010) eKLR.
 39. The plaintiff also submitted on when the entry started. It was the plaintiff's submission that time starts running in favour of the plaintiff from the date of entry. The plaintiff further submitted that in his evidence in chief he stated that he was born on the land in 1961 and has lived on the land since then.



40. The plaintiff submitted that he built his house on the land in 1984 and his first born was born therein. He stated that his occupation has been continuous since 1984 and therefore time started running in his favour from then.
41. The Plaintiff submitted that by the time DW2 was registered as proprietor of the land in 1988, the plaintiff was still on the land and that is why he has never used the land all those years.
42. The plaintiff submitted that the first registered owner (DW2) acquired proprietary interest in the land in 1988 when the plaintiff was still on the land and had the right to apply to remove him from the land but he did not. The plaintiff submitted that that is the date the right of action accrued in his favour and continued till the year 2000 when the twelve years expired and the defendants' right to recover the land got extinguished. It was submitted that this limitation applies to the defendants who acquired title from DW2. That by the time the defendants acquired the land, the plaintiff's right had crystallized.
43. The plaintiff's counsel submitted that there was an attempt by DW2 to show that the plaintiff's occupation was with his consent. However, the plaintiff submitted that his evidence is not credible, is inconsistent and unbelievable.
44. The plaintiff submitted that the evidence of DW2 is made up since there is evidence that the plaintiff's father died in 1978, some 10 years before DW2 got registered as the proprietor of the land and therefore he could not have had the alleged arrangement with the plaintiff's father when he had already died 10 years earlier. The plaintiff submitted that his entry on the land was without the consent of DW2 and continued to date.
45. The plaintiff's counsel urged the court to find that the plaintiff's possession on the land for 27 years was adverse and in reality disposed the owner of the land for a period in excess of 12 years, using the land openly to the exclusion of the registered owner who never took any step to exercise his right of action.
46. Regarding the counterclaim filed by the defendants on 16th April, 2012, the plaintiff submitted that the same was filed after two months after pleadings had closed and without leave of the court. The plaintiff submitted that under Order 2 Rule 13 of the Civil Procedure Rules, the defendants were obliged to apply for leave of the court to file the counter claim. It is the plaintiff's submissions that the defendants did not comply with the dictates of Order 8 of the Civil Procedure Rules and therefore the counterclaim on record is incompetent on that account.
47. The Plaintiff further submitted that even if the court were to consider the said counterclaim, the same is without merit. That the defendants are barred by the statute of limitation from seeking the reliefs sought herein in view of the plaintiff's submission herein above on adverse possession. It is the plaintiff's submission that the defendants are completely barred by the clear provisions of Section 7 of the *Limitation of Actions Act* and have no live cause of action against the plaintiff.
48. The plaintiff pointed out that during the hearing it emerged through the Defendant's Exhibit 6 that she is now registered as the proprietor in trust for some other persons. That this change of ownership took place during the pendency of this suit. The plaintiff submitted that the change does not affect the plaintiff's claim for adverse possession because as at the time the change took place, the owner's right of action had been extinguished by operations of law. The plaintiff submitted that for the defendants to purport to change the status of the land through succession during the pendency of this suit is an act of fraud and deceit which cannot be rewarded by the court.
49. The plaintiff submitted that he has established that his possession of the suit land is adverse to the registered owner whose right to action has been extinguished by operation of law. The plaintiff urged the court to order that the plaintiff has acquired title to the whole of LR No. Tharaka/Tunyai 'A'/479



and direct that he becomes the registered owner thereof. The plaintiff also prayed that the court makes an order that the Deputy Registrar of this court signs all the documents required to have the land transferred to the plaintiff. The plaintiff also prays for costs of the suit.

Defendants' Case

50. The defendants case is that they are the current owners of the suit land having purchased the same from the previous owner, one Fredrick Miriti M'Muguna. That when they learnt through his agent that the land was on sale, they visited the land and found the Plaintiff using both M'Muguna's land and his deceased father's land. The defendants aver that most of the suit land was not cultivated and was bushy.
51. The defendants aver that the plaintiff said that he was the overseer of the land and that he wanted to talk to the owner. The defendants further state that the previous owner explained to them the history and what had happened between him and the plaintiff as shown in the affidavit of Fredrick Miriti M'Muguna annexed and marked "JK1(a)". That the plaintiff wanted a portion of the land as payment but he did not agree with the previous owner.
52. The defendants aver that they got consent of the Land Control Board and the land was transferred to them on 7th September 2011. That the Plaintiff wanted time to wind up his activities on the land and on 5th October, 2011, they went to the Chief of Tunyai Location where the plaintiff asked to be given up to December 2011. That the agreement was reached before the chief and the elders. The defendants have annexed a copy of a letter from the chief marked "JK1(b)". The defendants aver that the plaintiff had recognized their title and promised to move out, but filed this case on 11th November, 2011. Relying on advice, the defendants believe that the Originating Summons is bad in law, incompetent and against the provisions of the Civil Procedure Rules and should be struck out.
53. On 16th April, 2012, the defendants filed a counterclaim dated 13th April, 2012 wherein they averred that they were the current registered proprietors of the suit land having been registered on 7th September, 2011 and Title Deed issued. The Defendants pleaded that the plaintiff was at all material times a licensee of the previous owner (Fredrick Miriti M'Muguna) and that the said license to occupy the said land was terminated by the said Fredrick Miriti M'Muguna. The defendants stated that on 5th October, 2011, the parties appeared before the chief of the area, his elders and witnesses and that the plaintiff recognized the defendant's title to the said land and agreed to move out, but later filed the Originating Summons herein. The defendants aver that under the circumstances, the Originating Summons is an afterthought and cannot lie. That the plaintiff has failed to be candid and disclose the aforementioned issues to the court.
54. The defendants averred that the plaintiff was extending the use of the land and had unlawfully invited more squatters to till the virgin land to help him ward off and fight the defendants. The defendants led that they have suffered and are suffering loss and damage. The defendants averred that under the circumstances, it is necessary to restrain the plaintiff from further use of the land and to issue orders of eviction to avoid abuse of the court process.
55. In their counterclaim, the defendants pray for judgment against the plaintiff for the following:
 - a. An order of eviction to remove the plaintiff, his family agents or any other person acting under him, and his belongings from L.R NO. SOUTH Tharaka/Tunyai 'A'/479.
 - b. An order of injunction restraining the plaintiff, whether by himself, servants, family members or agents or otherwise howsoever from interfering or/and dealing, cultivating, occupying or doing damage to land reference No. SOUTH Tharaka/Tunyai 'A'479.



- c. Costs of the suit and interest at court rates.
- d. Any further or better relief this Honourable Court may deem fit to grant.
56. At the hearing, Catherine Ciegoki Kithaka testified as DW1 and adopted her statement dated 24th June 2014 as her evidence-in-chief. She testified that the 1st defendant Jonathan Kithaka Iguana (deceased) was her husband who passed away on 2nd June 2012. That she applied and was issued with Grant of Letters of Administration on 1st March, 2013 and confirmation of Grant on 12th November, 2013 over the estate of her late husband.
57. DW1 stated that her late husband and 2nd defendant who is her brother-in-law are the registered proprietors of the suit land having bought the same from Fredrick Miriti M'Muguna. That at the time of buying the land, the plaintiff was in occupation of the same and was to vacate therefrom by December 2011 as agreed in a meeting before the chief of Tunyai Location and elders held on 5th October, 2011. That when the said period lapsed, the plaintiff refused to move out and despite being summoned by the chief and elders to appear and explain the reasons for his failure to vacate as agreed, the plaintiff disappeared and went to file a suit against the defendants claiming to be the owner of the land in dispute herein.
58. DW1 produced a copy of the register for L.R No. SOUTH Tharaka/Tunyai 'A'/479, a copy of the register for L.R. No. SOUTH Tharaka/Tunyai 'A'/172, map showing L.R. Nos. 172 AND 479, agreement dated 5th October, 2011 and two copies of the title deeds for the suit land as D. Exhibits 1 to 6 respectively.
59. When she was cross-examined by Mr. Murango Mwenda, learned counsel for the plaintiff, DW1 stated that her late husband and the 2nd defendant bought the suit land in September 2011 and that at that time, the plaintiff was using the land. That the land was given to Fredrick Miriti M'Muguna in 1988 and therefore by 2011, it was about 23 years. DW1 confirmed that the plaintiff was still on the suit land together with his family, including PW3. That there was a meeting before the chief, but the plaintiff did not agree with the deliberations made. DW1 stated that she was not living on the suit land. That the 2nd defendant has also never lived on the suit land.
60. DW1 admitted that she was issued with the title deed produced as D. Exhibit 6 during the pendency of this suit. DW1 also confirmed that the photographs produced by the plaintiff as exhibits shows houses on the suit land. She stated that before the plaintiff filed suit, her late husband had not filed suit against the plaintiff.
61. DW1 was also re-examined by Mrs. Maheli, leaned counsel for the defendants. She stated that when they purchased the land, the plaintiff invited his relatives into the land and leased out some portions to other people. That there was no injunction stopping the transfer of the land to her during the succession proceedings.
62. Fredrick Miriti M'Muguna testified as DW2. He adopted his statement dated 16th February, 2012 as his evidence-in-chief and was cross-examined and re-examined. His evidence was that the land was his before he sold it to the defendants. That the land was allocated to him before 1988 but the same was registered in August 1988, and title issued to him in the name of Miriti Muguna. DW2 stated that after acquiring the new generation identity card in which he used his full name Fredrick Miriti M'Muguna, he changed the title in 1989 to reflect the new name and was issued with a new title.
63. DW2 testified that at the time of acquiring the land in dispute, the same was a bush and virgin land, owing to which he was afraid that it would be invaded by squatters. That he therefore approached a neighbour, one Mutiga Igombe who owned land adjacent to the suit land and who introduced him to



- his young son, Kithure Mutiga, the plaintiff herein who agreed to take care of the land while cultivating it. That this arrangement with the Plaintiff lasted until DW2 decided to dispose of the land and the plaintiff resisted, arguing that under the custom, he was entitled to about 2 acres for protecting the said land. DW2 stated that he declined to grant the Plaintiff the wish since he had enjoyed the use of the land without paying rent. DW2 stated that he transferred the land to the defendants herein on 7th September 2011. That the defendants informed him that the plaintiff had taken them to court after being asked to move out of the suit land. DW2 reiterated that the plaintiff was on the land without (sic) his consent and his stay was never adverse. He was cross-examined and re-examined.
64. DW3 was Mathews Kabira, the Chief of Tunyai Location. He became chief in 2023. He produced the agreement dated 5th October 2011 made in a meeting before the former chief who was said to be deceased. He was cross-examined and re-examined.
65. The defendants filed submissions dated 20th February 2024 through the firm of Maitai Rimita & Co. Advocates wherein they gave a background of the case and identified eight issues for determination. The first issue is who is the owner of the suit land. It was submitted on behalf of the defendants that the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The defendants cited Section 24 of the said registration Act and relied on the case of Margaret Njeri Wachira –vs- Eliud Waweru Njenga [2018]eKLR. It is the defendant’s submission that the plaintiff was working on the suit land courtesy of Fredrick Miriti M’Muguna whose interests were guarded by the fact that he had the land registered as he ought to have done. That the defendants as innocent purchasers duly carried out their due diligence before purchasing the suit property, only to have a case instituted for violation of their right to quiet enjoyment as provided in law. That the plaintiff has failed to show evidence proving him as the proprietor unlike the defendants who have shown the court registration documents in form of title deeds.
66. On whether the 1st defendant’s deceased husband and the 2nd defendant bought the suit land, the defendants cited Section 26 of the [Land Registration Act](#) and submitted that they have certificates of title of the land and their proprietary rights should be guarded by this court. That the official search documents also show the defendants as the registered owners of the suit land.
67. On whether the plaintiff was at all times a licensee of the previous owner, Fredrick Midriti M’Miguna, the defendants cited the Black’s Law Dictionary and relied on the case of Samuel Miki Waweru – vs- Jane Njeru Richu Civil Appeal No. 122 of 2001 and cited Sections 24, 25 and 26 of the [Land Registration Act](#). The defendants also referred to the statement of Fredrick Miriti M’Muguna in which he alleged that he requested his neighbour to watch over the land to avoid encroachment from squatters and the said neighbour, Mutiga Igombe, introduced his son who is the plaintiff herein. It is the defendants’ submission that the plaintiff is now seeking to reap where he did not sow.
68. The defendants maintained that they were bonafide purchasers for value without notice and relied on the case of Katende –vs- Haridar & Company Limited (2008) 2 EA 173.
69. The defendants also submitted that the counter claim was filed on 16/4/2012 and the same was dismissed by the court, and since the matter was brought back to this court, the matter has not been heard nor given directions. The defendants faulted the plaintiff for not filing suit against the original registered owner and for waiting until that owner had passed good title of the land to the defendant. The defendants relied on the case of Wambugu –vs- Njuguna 1983 KLR 172 and submitted that they have established their interest in the suit land as registered proprietors. The defendants urged the court to order that they are the legal owners of the suit land and issue orders of eviction against the plaintiff from the land. The defendants also prayed for the dismissal of the plaintiff’s suit with costs.



Analysis And Determination

70. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to buttress their assertions. I have also taken into account the legal authorities proffered by the parties. The court identifies the following issues for determination:
- i. Whether the plaintiff has acquired title to the whole of LR No. S. Tharaka/Tunyai 'A'/479 by adverse possession.
 - ii. Whether the defendants are entitled to the eviction and injunctive orders sought against the plaintiff in their counter claim.
 - iii. Who should be awarded costs of the suit.
71. In deciding whether or not the plaintiff has proved his claim for adverse possession to the required standard in civil cases, the plaintiff must prove that he has been in occupation of the suit land for a period of over twelve (12) years; that such occupation was open, peaceful and continuous without interruption from the registered owners and that such occupation was adverse i.e. inconsistent with the right of the registered owners.
72. In the case of Peter Mbiri Michuki –vs- Samuel Mugo Michuki [2014] eKLR in which the court of Appeal referred to the case of Kimani –vs- Swift Rutherford & Co. Ltd (1980) KLR 10 at pg 16 Letter B Kneller J. stated 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 permission). So the Plaintiff must show that the company had knowledge (or means of knowing actual or constructive) of the possession and occupation. The possession must not be broken for any temporary purposes or any endeavors to interrupt it by way of current consideration.”
73. The court of Appeal in Wines & Spirits Kenya Ltd & Another –vs- George Mwachiru Mwangi [2018] eKLR, referred to the case of Benjamin Kamau Murima & Others –vs- Gladys Njeri CA No. 213 of 1996 where the court held that:
- “The combined effect of the relevant provisions of Section 7, 13 and 17 of the Limitations of Actions Act, Cap 22 Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”
74. In Wambugu –vs- Njuguna (1983) KLR 173, the Court of Appeal restated the principles of adverse possession and held as follows:
1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
 2. In order to acquire by the 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 having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The Respondent could and did not prove that the Appellant had either been dispossessed or had discontinued possession of the suit land for a continuous



statutory period of twelve years to enable him, the Respondent, to title to that land by adverse possession.

3. The *Limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

75. In the case of *Mtana Lewa –vs- Kahindi Mwangandi* [2015] EKLRL the Court of Appeal (Makhandia JA) stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

76. The doctrine of adverse possession is embodied in Section 7 of the *Limitation of Actions Act* which provides:

“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.”

77. Section 13 of the same Act further makes provision for adverse possession as follows:

- “(1) A right of action to recover land does not accrue unless the land is in 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 section 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 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.”

78. Section 38(1) of the *Limitation of Actions Act* provides that:

- “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.”



79. In the instant case, there is no dispute that land parcel No. S. Tharaka/Tunyai 'A'/479 is registered in the name of the defendants. It is also not in dispute that the suit land was first registered on 12/8/1988 in the name of Fredrick Miriti M'Muguna (DW2) who later transferred it to the defendants on 7th September 2011. DW2, and indeed the defendants admit that all this time, the plaintiff was in possession, occupation and use of the land. The plaintiff produced exhibits in the form of photographs showing the developments he has undertaken on the land. The plaintiff indicated that he built his first house on the land in 1984. He has also been cultivating the land ever since. The defendants admit that those developments were undertaken and belong to the plaintiff and his family members. Indeed the defendants have filed a counterclaim seeking to have the plaintiff evicted from the suit land.
80. DW2 who sold the land to the defendants in 2011 testified that he was given the land by the Government of Kenya in the 1970s and issued with title in 1988. Whereas DW2 stated that he allowed the plaintiff's family to take care of the land who in turn tasked the plaintiff to take care of the suit land, it is clear from the evidence that was adduced that the plaintiff was only a minor of about 10 years old. In my considered view, DW2 did not adduce sufficient evidence to prove that the plaintiff was on the land with his consent. It is clear from the material on record that the plaintiff's possession of the land was adverse and DW2 and defendants never took any step to remove him from the land before the expiry of 12 years. Even the alleged deliberations in a meeting before the Chief of Tunyai Location did not remove the plaintiff from the land. In any case, the same were ignored by the plaintiff. Legally, the defendants and DW2 could only have had the plaintiff removed through a court order. Instead, the defendants only filed a counterclaim seeking for the plaintiff's eviction after the plaintiff had filed his claim for adverse possession. Section 7 of the Law of *Limitation of Actions Act* is clear that an action may not be brought by any person to recover land after the end of 12 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. No doubt, the counterclaim that was filed by the defendants only on 16th April, 2012 was time barred pursuant to the provisions of Section 7 of the *Limitation of Actions Act*. Even the change of ownership, in my view, did not affect the plaintiff's claim under adverse possession because as at the time the change took place, the right of action that DW2 had over the suit land had been extinguished by the operation of law.
81. On the balance of probabilities, it is my finding and I so hold, that the plaintiff has proved to this court that he has been in possession of the suit land for over 12 years, and his possession has been open, exclusive, notorious and adverse. Consequently, all the questions for determination in the Originating Summons dated 7th November 2011 are hereby answered in the affirmative.
82. The upshot is that judgment is entered for the plaintiff against defendants in the following terms:
- a. A declaration is hereby made that the defendants' title to LR No. S.Tharaka/Tunyai 'A'/479 has been extinguished.
 - b. A declaration is hereby made that the plaintiff has acquired title No. S.Tharaka/Tunyai 'A'/479 through adverse possession, and should be registered as owner thereof in place of the defendants.
 - c. The defendants' counterclaim is dismissed.
 - d. The plaintiff shall have costs of the suit.
83. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH APRIL, 2024



In the presence of:

Court Assistant – Martha

Murango Mwenda for Plaintiff

No appearance for Rimita for Defendants

C.K YANO,

JUDGE

