



**Njuguna (Suing in his own capacity and in his capacity as the personal representative of the Estate of Monicah Wanjiku Thuo (Deceased) & another v Mwaura (Sued as the personal representative/administrator of the Estate of the Late Paul Mwaura Thuo (Deceased) (Environment & Land Case 201 of 2017) [2024] KEELC 3772 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3772 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 201 OF 2017**

**OA ANGOTE, J**

**APRIL 22, 2024**

**BETWEEN**

**JULIUS JOSEPH GITAU NJUGUNA (SUING IN HIS OWN CAPACITY AND IN HIS CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MONICAH WANJIKU THUO (DECEASED) ..... 1<sup>ST</sup> APPLICANT  
BEATRICE WAMBUI NJUGUNA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PATRICIA WANJIKU MWAURA (SUED AS THE PERSONAL REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF THE LATE PAUL MWAURA THUO (DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. The Applicants instituted this suit by way of an Originating Summons application dated 24<sup>th</sup> March 2017, which was amended on 24<sup>th</sup> July 2019. The Applicants claim to have acquired title to Nairobi/ Block 129/570 [previously Plot No. 593 in Ng'undu Farmers Limited], Plot No. L.R. No. 209/9754/53/ Mathare and Plot No. 466 (Nairobi Block 153/326) contained in Share Certificate No. 466 in Chieko Housing Company Limited respectively, by way of adverse possession. They assert that they are entitled to be registered as the proprietors in place of the Respondent.
2. The Applicants have sought the determination of the following questions:
  - i. Whether the Applicants herein have acquired titles to the suit properties herein known as Nairobi/Block 129/570 and contained in Share Certificate No. 593 in Ng'undu Farmers Co. Ltd, Plot No. L.R. No. 209/9754/53/ Mathare and Plot No. 466 (Nairobi Block 153/326)



and contained in Share Certificate No. 466 in Chieko Housing Company Limited respectively and thus become the proprietors by way of adverse possession.

- ii. Whether the Chief Land Registrar should be ordered/ directed to register the Applicants herein absolutely as the registered owner/ proprietors of the suit properties known as Nairobi/ Block 129/572 and contained in Share Certificate No. 593 in Ng'undu Farmers Co. Ltd, Plot No. L.R. No. 209/9754/53/ Mathare and Plot No. 466 (Nairobi Block 153/326) and contained in Share Certificate No. 466 in Chieko Housing Company Limited respectively.
  - iii. Who should bear the costs of this Originating Motion?
3. The application is supported by Affidavits sworn by the Applicants, Joseph Julius Gitau Njuguna and Beatrice Wambui Njuguna. Mr. Joseph Njuguna deponed that he is the appointed legal representative of the late Monicah Wanjiku Thuo (deceased), who died in 2017 and was buried on the suit property.
  4. In the Supporting Affidavits sworn by the Applicants, they assert that the three suit properties, Nairobi/Block 129/572 contained in Share Certificate No. 593 in Ng'undu Farmers Co. Ltd situated at Ruai, Kamulu (the Kamulu plot), Plot No. L.R. No. 209/9754/53/ Mathare (the Mathare plot) and Plot No. 466 (Nairobi Block 153/326) contained in Share Certificate No. 466 in Chieko Housing Company Limited in Sunton Kasarani (Sunton Kasarani plot), are all owned and under the name of the late Paul Mwaura Thuo.
  5. It is their case that the late Monicah Wanjiku Thuo has become entitled to the plot in Ruai Kamulu. Mr. Julius Gitau Njuguna asserts that between 1990 and 1994, the late Monicah Wanjiku Thuo used to live together with the deceased in the Kasarani plot and the late Paul Mwaura Thuo used to fully maintain her as she was fully dependant on him for upkeep and maintenance needs.
  6. The 1<sup>st</sup> Applicant averred that between 1990 and 1994, the late Paul Mwaura Thuo became sick and the late Monicah Wanjiku Thuo took up the role of looking after him and nursing him at his Kasarani home. He later passed away in early 1994.
  7. The 1<sup>st</sup> Applicant deposed that the late Monicah Wanjiku Thuo moved in and settled on the Ruai Kamulu plot, where the late Paul Mwaura Thuo was buried; that she lived in quiet uninterrupted possession of the suit property for twenty-three years until her death in 2017, and that the Respondent in her capacity as the administrator of the late Paul Mwaura Thuo never took any action to evict her or interfere with her possession.
  8. It is the 1<sup>st</sup> Applicant's claim that his late mother invested in the Kamulu property within the said twenty-three years by planting trees, erecting a fence around the property, sinking a borehole, connecting piped water to the property, and constructing a permanent residential house and that she also constructed semi-permanent structures for stores and livestock, and was in the process of connecting the premises on the property to electricity supply.
  9. The 1<sup>st</sup> Applicant claims that he has become entitled to the registration of the Mathare plot by way of adverse possession. He asserts that immediately after the death of Paul Mwaura Thuo, he moved onto the said property as a caretaker and has looked after the property and the welfare of the tenants therein ever since.
  10. According to the 1<sup>st</sup> Applicant, he has been in quiet and uninterrupted use, occupation and possession of the property in Mathare; that within the 23 years, he has invested in the said property by carrying out renovations and repairs to the premises, including repainting the premises, connecting the same to water and electricity and constructing an additional extended premises where a workshop and kiosk are housed.



11. The 2<sup>nd</sup> Applicant's claim for adverse possession is with respect to the Sunton Kasarani plot. She depones that the suit property was in the process of being transferred to the late Paul Mwaura Thuo from Bishop David Kamau Nganga on 8<sup>th</sup> January 1991, at a consideration of KShs. 55,000/-, prior to the death of Paul Mwaura Thuo.
12. The 2<sup>nd</sup> Applicant has deponed that the said David Kamau Nganga has agreed to complete the transfer of the said property to the late Paul Mwaura Thuo or his estate, as per the letter dated 28<sup>th</sup> March 2012.
13. The 2<sup>nd</sup> Applicant deponed that between 1991 and 1994, she used to live with her children on the deceased's property in Ruai where he was buried; that he had allowed her to live with her children, and he used to fully maintain them and provide for their upkeep and maintenance needs and that after the burial in 1994, he (the 2<sup>nd</sup> Applicant) moved out of the Ruai property and settled on the Kasarani Sunton Plot, while her late mother moved to occupy the Ruai plot.
14. The 2<sup>nd</sup> Applicant claims that she and her five children have been in quiet, uninterrupted use, occupation and possession of the Kasarani plot for over 23 years and that she has carried out renovations and repairs to the premises, constructed an additional extension house and repainted the entire premises over time.
15. The Respondent filed a Replying Affidavit in which she deponed that the matter at stake concerns the estate of her late father, Paul Mwaura Thuo, who died on 29<sup>th</sup> March 1994 intestate and that she was thereafter appointed the administrator of the estate of her late mother Annabel Wambui Mwaura on 6<sup>th</sup> May 2010 in High Court Succession Case 287 of 2010.
16. She deponed that the application is full of lies and falsehoods. She averred that the suit properties are in dispute in Succession Cause No. 1568 of 1994, and that the parties herein have since 1994 been in dispute over the subject matter and other properties of the deceased's estate.
17. On this basis, the Respondent deposed that the Applicants cannot become proprietors by way of adverse possession; that the suits have been concluded through succession cases but the Applicants have adamantly insisted that they be considered as dependants, which the court overruled and that the Applicants have not been able to prove their claim for dependency through numerous cases.
18. The Respondent deponed that the Applicants have not informed the court that they have filed an application in the Court of Appeal Civil Application No. 11 of 2017 dealing with the same subject matter; that the Applicants have similarly filed an application after the confirmation of grant to revoke the grant issued by Honourable Musyoka on 20<sup>th</sup> January 2017 and that the applicant's application raises issues that have been raised and determined by the same court in the past, making the suit res judicata.

### **Hearing and Evidence**

19. The 1<sup>st</sup> Applicant, PW1, relied on his statement dated 10<sup>th</sup> May 2023. He averred that he was appointed as the personal representative of his mother's estate on 25<sup>th</sup> January 2018 and that his mother, himself and his wife have satisfied the requirements of adverse possession, as they have occupied the Respondent's properties peacefully for 26 years for his mother and 31 years for himself.
20. PW1 stated that his mother was invited to assist his uncle as a casual in 1990 and then permanently in 1991 in the Kasarani plot; that he later joined her when his uncle became seriously sick and that they stayed on the suit property until his death on 29<sup>th</sup> March 1994, when his mother relocated to Plot No. 593 Ng'undu Farmers Co-operative Society Limited in Ruai in 1994.



21. PW1 stated that his mother was in peaceful occupation and possession of the property until her death on 27<sup>th</sup> October 2017 and after her demise, she was buried on the Kamulu property, next to her brother's burial site and that his wife and children relocated to the Kasarani plot where they have enjoyed peaceful, quiet and continuous occupation of the suit property to date for 29 years.
22. It was the testimony of PW1 that he also relocated to the Mathare plot where he has been in peaceful occupation to date; that they have put in efforts to maintain, preserve, conduct repairs and refurbish the suit properties; that his mother fenced the land, planted trees, finished the permanent 4 roomed house and drilled a borehole and that the Respondent mysteriously transferred the disputed plot no. 209/9754/53 Huruma Estate, which was owned by Mathare United Farmers Company Limited on 24<sup>th</sup> March 2017 when this application was filed.
23. It was the evidence of PW1 that he continues to preserve and maintain plot no. 209/9754/53 in Huruma Estate and that he has built a permanent workshop and an additional semi-permanent kiosk structure thereon. The Plaintiff produced a bundle of documents which include sale agreements for the Kasarani and Kamulu properties and a copy of the title deed of the Mathare plot.
24. During cross-examination, PW1 testified that although he has filed other cases, this is the only case he has filed for adverse possession; that he filed Succession Cause No. 1568 of 1994 Nairobi High Court which was concluded and he has appealed against the decision and that his mother was the main party in that case while he was a witness.
25. He stated that the succession matter involved many properties including the properties herein; that the issue of adverse possession was never raised and that his late uncle never had a family.
26. PW2, the 2<sup>nd</sup> Applicant, adopted her statement dated 10<sup>th</sup> May 2023 as her evidence in chief. She stated that she joined her mother-in-law and husband in the Kasarani plot, which belonged to her late uncle in law Paul Mwaura Thuo; that she later relocated to the Kamulu plot and that after her uncle in law passed away, she relocated back to the Kasarani plot with her family.
27. PW2 asserted that she has been in quiet possession of the Kasarani plot without interruption; that she was married to the 1<sup>st</sup> Applicant in 1981 and that they initially lived in Starehe in a house which her mother-in-law had been given by her employer. According to PW2, they were sued by Wambui, who claimed to be the daughter of the deceased.
28. The Respondent, DW1, relied on her statement dated 1<sup>st</sup> November 2019. In her statement, she averred that she is the administrator of the estate of her late mother who died on 6<sup>th</sup> May 2010 and that the suit properties herein are some of the properties of her late father, which properties are also subject to Succession Cause 1568 of 1994.
29. DW1 stated that the parties to this suit have been in court for the last twenty-three years over the suit properties and that the Applicants have been unable to prove their claim for dependency despite taking the Respondent's estate through numerous court cases.
30. DW1 produced in evidence a copy of the certificate of confirmation of grant dated 20<sup>th</sup> January 2017; a copy of the grant of Letters of Administration intestate dated 16<sup>th</sup> December 2011; a copy of the title deed of plot number LR 209/9754/53 Mathare United Farmers Company Ltd in the Respondent's name and a copy of the title deed for Ngenda/ Gituru/ 81 in the Respondent's name.
31. In cross-examination, DW1 stated that the Applicants moved into her father's property in 1994 after he died; that she could not evict them as they filed one case after the other; that the rent is being collected



from the Kasarani and Huruma houses by the 1<sup>st</sup> Applicant, who has always collected rent from those properties and that she is the one who takes care of her parent's property as they are both dead.

## Submissions

32. The Applicants' Counsel submitted that the amended Originating Summon in this case is unopposed as the Respondent failed to file a response to it.
33. Counsel relied on Section 7 of the *Limitation of Actions Act* which prescribes the doctrine of adverse possession; Section 16 of the said Act on recovery of land by the administrator of the estate of a deceased person and Section 17 on the extinguishing of a registered owner's title in favor of an adverse possessor at the expiration of twelve years.
34. Counsel also relied on Section 28(h) of the *Land Registration Act* which provides that all registered land is subject to overriding interests which include rights acquired by virtue of any written law relating to limitation of actions or by prescription.
35. They also relied on the Court of Appeal case of Titus Mutuku Kasuve vs Mwaani Investments Ltd & 4 Others [2004] eKLR which set out the test for a claim of adverse possession and the Court of Appeal case of Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another [2015] eKLR.
36. Counsel submitted that the Applicants have established by producing documentary evidence that the three properties are registered in the name of Paul Mwaura Thuo (deceased); that they have established that the Applicants have been in exclusive, quiet, continuous and uninterrupted possession of the suit properties and that since 1994, and for twenty-three years, Monica Wanjiku Thuo was in occupation of the Ruai Kamulu plot, Julius Joseph Gitau Njuguna was in occupation of the Mathare plot as a caretaker, and Beatrice Wambui Njuguna was in possession of the Sunton Kasarani plot.
37. Counsel submitted that the Respondent in her oral testimony admitted that the possession took place in 1994; that the Respondent has never taken any legal or physical measures to evict any of the Applicants from the suit properties and that the actions of the Applicants were injurious to the estate of Paul Mwaura Thuo (Deceased).
38. Counsel submitted that the Applicants have carried out various activities on the suit properties including building a four-bedroom stone house on the Ruai property, erecting fences around the property; rearing poultry and livestock, sinking a borehole, among others.
39. With respect to the Mathare property, it is Counsel's submission that the 1<sup>st</sup> Applicant has been the de facto landlord; that he has been receiving the rent thereof and has been using his personal resources to renovate and carry out repairs on the suit property.
40. According to the Applicants' Counsel, the above activities have been adversarial, hostile and antithetical to the proprietary interests of the Estate of Paul Mwaura Thuo (deceased). They further submitted that under Section 45 of the *Law of Succession Act*, these actions would amount to intermeddling with the free property of the deceased's estate, which is prohibited.
41. Counsel submitted that as the Applicants took possession of the suit property in 1994, and have been in continuous possession for twenty-three years, the title and beneficial ownership of the Respondent Estate was extinguished in 2006, when the 12 years lapsed and that succession proceedings for the Estate of Paul Mwaura Thuo (Deceased) were initiated in 1994 in Nairobi Succession Cause No. 1568 of 1994.
42. It was Counsel's submission that this court ought to order that the Chief Land Registrar do register their names or effect a transfer over the suit properties in the Applicants' names.



43. Counsel for the Respondent submitted that the burden of proof in this matter rests on the Applicants. Counsel relied on the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR where the Court of Appeal stated the general aspects of adverse possession. Counsel also relied on the case of *Gladwell Muthoni Njoroge vs Wangaruro Mbugua & 16 Others* [2018] eKLR and the Court of Appeal case of *Mwangi Githu vs Livingstone Ndeete* [1980] eKLR.
44. It was the Respondent's Counsel's submission that the Applicants are irreverent and vexatious litigants who have kept the Respondent in court for thirty years, from 1994 and that the Applicants have abused the court process over the years to deny the Respondent a chance to administer the said estate by filing frivolous objections and applications in the High Court Succession Case No. 1568 of 1994.
45. Counsel for the Respondent submitted that the late Monicah Wanjiku Thuo by cross-petition in the Succession Cause, claimed to be the sole executor and trustee of a Will relating to the estate of the late Paul Mwaura Thuo (Deceased); that the Will was invalidated by Justice George Dulu on 16<sup>th</sup> December 2011 and that the Applicants thereafter sought to stop the confirmation of grant through an affidavit of protest sworn on 28<sup>th</sup> October 2015 and also sought to be granted the properties as gifts in contemplation of death.
46. It was submitted that the Applicants' application was dismissed by Justice Musyoka in his ruling dated 20<sup>th</sup> January 2017 and that the Applicants later filed an appeal against this ruling in the Court of Appeal, where the Court of Appeal declined to grant the request for interim relief.
47. It was Counsel's submission that the contest in respect of the said properties in High Court Succession Case No. 1568 of 1994, at the instance of the Applicants, satisfied the threshold of taking legal proceedings and at no time has the 12-year period began running. Counsel relied on the cases of *In re Estate of Samuel Mundati Gatabaki (deceased)* eKLR, *In re Estate of M'Ngarithi M'miriti* [2017] eKLR and *In re Estate of Edward Mutuku Mwando (deceased)* [2022] eKLR.
48. Counsel submitted that the claim for adverse possession is *res judicata* and that the issues raised in this matter have been conclusively determined by the High Court in Succession Case No. 1568 of 1994. They relied on the case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another* [2016] eKLR and *John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others* [2021] eKLR.
49. Counsel also submitted that the claim for adverse possession is *sub judice*; that the Applicants have filed an appeal against the decision of the succession court and that the Applicants are guilty of non-disclosure of material facts because they did not notify this court of the multiple suits and applications from the courts.

### **Analysis and Determination**

50. The Applicants herein have made a claim of adverse possession of the suit properties known as Nairobi/ Block 129/570 [previously Plot No. 593 in Ng'undu Farmers Limited], Plot No. L.R. No. 209/9754/53/ Mathare and Plot No. 466 (Nairobi Block 153/326) contained in Share Certificate No. 466 in Chieko Housing Company Limited.
51. The Respondent has, on her part, claimed that this suit is both *res judicata* and *sub judice* due to the Succession Suit No. 1568 of 1994 and the appeal pending before the Court of Appeal Civil Application No. 11 of 2017, respectively, which they allege deal with the same subject matter as this case.



52. Upon consideration of the pleadings and evidence herein, the following issues arise for this court's determination:
- a. Whether this suit is res judicata
  - b. Whether this suit is sub judice
  - c. Whether the Applicants have obtained title to the suit properties by way of adverse possession.
53. The legal framework of res judicata is set out in Section 7 of the *Civil Procedure Act* as follows:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
54. The Supreme Court case of *John Florence Maritime Services Limited & another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR delimited the operation of the doctrine of res judicata as follows:
- “We reaffirm our position as in the *Muiri Coffee* case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”
55. The Supreme Court in the above suit further laid out the elements of res judicata in a civil suit as follows:
- “For res judicata to be invoked in a civil matter the following elements must be demonstrated:
- a) There is a former Judgment or order which was final;
  - b) The Judgment or order was on merit;
  - c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and
  - d) There must be between the first and the second action identical parties, subject matter and cause of action. (See *Uhuru Highway Developers Limited v Central Bank of Kenya & others* [1999] eKLR and See the decision of the Court of Appeal in *Nicholas Njeru v Attorney General & 8 others* Civil Appeal 110 of 2011 [2013] eKLR).”
56. According to the Respondent, this suit is res judicata because the same properties were the subject matter of Succession Case No. 1568 of 1994, which concerned the Estate of Paul Mwaura Thuo (deceased).
57. While concurrent jurisdiction arises between the jurisdiction of the Environment and Land Court and the Succession courts, “the Practice Directions on Proceedings in the Environment and Land



Court, and on Proceedings relating to the environment and the use and occupation of, and title to land and proceedings in other Courts,” gazetted in December 2013 provide a clear delineation on the jurisdiction of the ELC and probate courts as follows:

“All cases touching on inheritance, succession and distribution of land under the Law of Succession Act, Cap. 160 Laws of Kenya shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.”

58. Courts have also delineated the jurisdiction of these two courts. The jurisdiction of the Environment and Land Court vis a vis succession matters was considered by Nyamweya J. in *Mbula Muoki Ndolo & Another v Kenya Power and Lighting Company Limited* [2017] eKLR as follows:

“In *Salome Wambui Njau* (suing as Administratrix of the Estate of Peter Kiguru Njuguna (Deceased) v *Caroline Wangui Kiguru*, ELC (2013) eKLR, I held that in matters of succession disputes touching on land, Environment and Land Court Pursuant to Article 162(2) of the Constitution and the High Court as the Succession Court under Section 47 of the Law of Succession Act would appear to have a concurrent jurisdiction. It would thus depend on the circumstances of each case which court is best suited to hear and determine the dispute.”

59. Mbugua, J clarified that succession matters do not fall under the ambit of the Environment and Land Court in *Isaac Kinyua & 3 Others vs Hellen Kaigongi* [2018] eKLR:

“...Succession matters do not fall under the ambit of the jurisdiction of the ELC court. If this court was to grant stay orders in respect of the succession cause, it would in essence amount to straying in a field where the court has no jurisdiction.”

60. Indeed, while a probate court has jurisdiction in intestate or testamentary succession to the estates of deceased persons derived from Section 2 of the Law of Succession Act, the Environment and Land Court jurisdiction is limited to hearing and determining disputes relating to the environment, use and occupation of and title to land. It is therefore apparent that the Succession Cause No. 1568 of 1994 was heard by a court with different jurisdiction from this court.

61. Further, the parties to this suit can not be said to be identical to those in the Succession Cause. The Petitioners in the Succession Case were Annabel Wambui Mwaura (deceased) and Patricia Wanjiku Mwaura, the Respondent herein, while the objectors were Monicah Wanjiku Thuo and Paul Muchuku Muriuki. In that case, the 1<sup>st</sup> Applicant was not party to the suit. He only gave testimony as a witness. The 2<sup>nd</sup> Applicant was also not party to the Succession Cause.

62. On this basis, this suit, which seeks to assert title to the suit property by way of adverse possession, is not res judicata.

63. The law on sub judice is set out in Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”



64. The rationale of the sub-judice rule is to diminish the chances of courts of equal jurisdiction issuing conflicting decisions over the same subject matter. This was stated by the Supreme Court in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) [2020] eKLR as follows:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

65. The High Court in Republic vs Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya [2020] eKLR also highlighted that the rule of sub-judice is critical to prevent wastage of resources as well as frivolous litigation.

66. On the basis of the above laws and cases, the Respondent who sought to invoke the doctrine of sub-judice, ought to have established that there is more than one suit over the subject matter herein; that both suits are pending before courts of competent jurisdiction and that the suits are between the same parties, or parties litigating under one title. He failed to do so.

67. From the ruling of the Court of Appeal dated 24<sup>th</sup> November 2017, the Applicants have appealed against the decision of the succession court in finding inter alia, that the Respondent herein was the sole heir of the deceased and that the Applicants were strangers to the estate.

68. On the other hand, this suit, as stated above, seeks to determine if indeed the Applicants are entitled to the suit property by way of adverse possession. The subject matter before the Court of Appeal is therefore distinct from the matter before this court.

69. Indeed, in its ruling, the Court of Appeal acknowledges the existence of this suit in which the Applicants are claiming ownership of some of the deceased properties by adverse possession, under Section 38 of the *Limitation of Actions Act*. On this basis, this matter is not sub-judice. This court has the necessary jurisdiction to determine this suit on its merits.

70. Adverse possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it, to the exclusion of its true owner for the period prescribed by law. Section 7 of the *Limitation of Actions Act* prescribes as follows:

“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.”



71. Section 38(1) of the Limitations of Actions Act provides for the doctrine of Adverse Possession. It provides as follows:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

72. Therefore, at the expiration of the twelve-year period, the proprietor’s title will be extinguished by operation of the law and Section 38 of the Act permits the adverse possessor to apply to the High Court (ELC) for an order that he be registered as the proprietor of the land.

73. The ingredients of adverse possession were discussed by the court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015]eKLR where 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 of stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

74. The requirements for adverse possession are set out in *Mbira vs Gachuhi* (2002) IEALR 137 in which the court held as follows:

“...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...”

75. In *Haro Yonda Juaje v Sadaka Dzengo Mbauro & Another* [2014] eKLR, this Court outlined the elements that a Claimant must prove on a balance of probability for a claim of adverse possession:

- i. that he has made physical entry on the land and is in actual possession or occupancy of the land for the statutory period.
- ii. the occupation of the land by the claimant must be non-permissive.
- iii. The occupation by the claimant must be with the clear intention of excluding the owner from the property (*animus possidendi*)
- iv. The acts done by the claimants are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it.
- v. Possession by the person seeking to prove title by adverse possession must be visible, open and notorious.
- vi. Possession must be continuous, uninterrupted and unbroken for the required statutory period.



76. Order 37 Rule 7 of the Civil Procedure Rules prescribes that a claim for adverse possession shall be made through Originating Summons, to which the extract of title to the land ought to be annexed.
77. It is therefore a requirement that the property against which a party is claiming adverse possession ought to be registered, and a copy of the title ought to be annexed to the Originating Summons. The rationale for this requirement was considered by the Court of Appeal in *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR, as follows:
- “If the suit land is not registered, then compliance with Section 38 (1) may be problematic not least because, a litigant may be unable to show the court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1).”
78. In the same vein, this court in *Mary Stephen Muthiani Kilaka v Julius Nzioka Vini* [2018] eKLR stated that:
- “Even if the Respondent’s claim was predicated on the claim of adverse possession, the claim could still not have succeeded because the suit land was not registered under the then Registered *Land Act* or the Registration of Titles Act... From the above provision of the Act and Order 37 of the Civil Procedure Rules, one can only succeed in a claim for adverse possession in respect of registered land.”
79. In this case, the Applicants have asserted that the late Paul Mwaura Thuo had title to the three suit properties. The Applicants have presented a transfer with respect to Plot No. 466 in Chieko Housing Company (the Kasarani plot) dated 8<sup>th</sup> January 1991. They also adduced in evidence a letter from the former proprietor of that property, dated 28<sup>th</sup> March 2012, in which he indicated that he sold the property to the late Paul Mwaura Thuo. As admitted by the Applicants, the transfer is yet to be registered.
80. With respect to the Ruai Kamulu property, the Applicants have presented a Share Certificate in the name of Stephen Mbugua Njuguna. They have also presented a share transfer form dated 13<sup>th</sup> February 1990, transferring Plot No. 593 in Ngundu Farmers Co from the latter to the late Paul Mwaura Thuo and an agreement between Stephen Mbugua Njuguna and the late Paul Mwaura Thuo dated 25<sup>th</sup> November 1989.
81. As to the Mathare plot, the Applicants have annexed a copy of the title LR No.209/9754/53 in favour of Paul Mwaura Thuo dated 9<sup>th</sup> April 1998. Time for the purpose of adverse possession started running on 9<sup>th</sup> April, 1998 when the title was issued.
82. While the Applicants have claimed adverse possession with respect to three properties, they have only produced the title to one property, which is the Mathare plot. This court can therefore only consider whether Applicants are entitled to the title for the Mathare Plot, LR No. 209/9754/147 by way of adverse possession, and not the other two.
83. The 1<sup>st</sup> Applicant averred that immediately after the death of Paul Mwaura Thuo, he moved onto the said property as a caretaker and he has looked after the property and the welfare of the tenants therein ever since.
84. According to the 1<sup>st</sup> Applicant, he has been in quiet and uninterrupted use, occupation and possession of the property in Mathare; that within the 23 years, he has invested in the said property by carrying



out renovations and repairs to the premises, including repainting the premises, connecting the same to water and electricity and constructing an additional extended premises where a workshop and kiosk are housed.

85. The Respondent has opposed the Applicants' case on grounds that the succession cause was filed in 1994 and satisfied the requirement for assertion of rights by the property holder.
86. The Applicants have relied on the decision in *Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau* (Suing in her capacity as the administrator of the estates of *Kimingi Wariera (Deceased)* and of *Mwangi Kimmingi (Deceased)* [2022] eKLR, where the court persuasively stated that a succession cause did not amount to assertion of rights that could stop time from running. The court held as follows:

“The filing of succession case did not amount to assertion of rights that could stop time from running. As to the civil case, the suit was commenced by the Applicant, and there is no evidence of assertion of rights by the Respondent. This Court finds no reason to infer that the filing of the Succession cause and Civil case stopped time from running. The Court of Appeal in Civil Appeal No. 121 of 2006; - *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR affirmed the sentiments of the Court in *Amos Weru Murigu v. Marata Wangari Kambi & Another* where the Court held:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”

87. The court above further relied on the case of *Isaac Cypriano Shingore vs Kipketer Togom* [2016] eKLR, where in similar circumstances to the case herein, the Court held that objection proceedings did not have the effect of interrupting the possession of the person claiming adverse possession. It held as follows:

“By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.

As the Court held in *Githu v Ndeete* [1984]KLR 776 “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”).”

88. In this matter, this court is persuaded by the above decisions and finds that the objector proceedings filed by the Applicants in the succession case did not amount to assertion of rights that could stop time from running.



89. The fact of the Applicants' occupation and possession of the Mathare plot was admitted by the Respondent during cross-examination. This was undoubtedly adverse to the rights and interests of the Respondent.
90. This court is satisfied that the 1<sup>st</sup> Applicant has proved that he has been in non-consensual actual, open, notorious, exclusive and adverse use of the Mathare Plot for the statutory prescribed period without interruption. However, to the extent that the other two properties have not been registered, the claim for adverse possession cannot arise.
91. Consequently, the Applicants' suit partially succeeds and the following orders are hereby issued:
- a. The 1st Applicant has acquired title to the suit property herein known as, Plot No. L.R. No. 209/9754/53/ Mathare by way of adverse possession.
  - b. The Chief Land Registrar is herewith directed to register the 1st Applicant herein absolutely as the registered proprietor of the suit property known as Plot No. L.R. No. 209/9754/53/ Mathare.
  - c. The rest of the prayers in the Originating Summons are dismissed.
  - d. Each party shall bear his/her own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF APRIL, 2024.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**Mr. Muruiki for Respondent**

**Mr. Wagesho for Applicant**

**Court Assistant - Tracy**

