



Gakumo & 2 others v Kamau (Being Sued as the Legal Representative of the Estate of Kariuki Kamau -Deceased) & 2 others (Environmental and Land Originating Summons E025 of 2021 & Environment & Land Case E053 of 2021 (Consolidated)) [2024] KEELC 3293 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2021
& ENVIRONMENT & LAND CASE E053 OF 2021 (CONSOLIDATED)**

LN GACHERU, J

APRIL 11, 2024

BETWEEN

FRANCISCA NJERI GAKUMO 1ST APPLICANT

VERONICA WANJIKU KUNGU ALIAS WANJIKU GAKUMO . 2ND APPLICANT

AND

CHARITY WAMBUI KAMAU (BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KARIUKI KAMAU - DECEASED) RESPONDENT

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E053 OF 2021**

BETWEEN

CHARITY WAMBUI KARIUKI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KARIUKI KAMAU) PLAINTIFF

AND

VERONICA WANJIKU 1ST DEFENDANT

FRANCISCA NJERI 2ND DEFENDANT



JUDGMENT

1. The matter for determination is the Originating Summons NO E025 of 2021, as consolidated with Muranga MCELC NO E053 of 2021, which suits were consolidated on 24th Jan 2022, as the Parties are the same and suit property is Makuyu/ Makuyu/ Block 2/992. The court directed the two suits to be heard together, and the lead file is OS E025 of 2021.
2. Vide the said Originating Summons dated 5th July 2021, the Plaintiffs/Applicants sought for the following Orders:
 1. A declaration that the title of the land parcel number Makuyu/Makuyu Block 2/992, has been extinguished by the plaintiffs' adverse possession thereof for a period of more than Twelve (12) years in terms of the [Limitation of Actions Act](#).
 2. . THAT the Plaintiffs have become entitled by adverse possession to the land parcel comprised in title number Makuyu/Makuyu Block 2/992 in Makuyu Location in Makuyu Division within Murang'a County and registered under the [Land Act](#) in the names of Kariuki Kamau (Deceased).
 3. An Order that the District Land Registrar Murang'a to register the Applicants as absolute proprietors jointly of the parcel of land measuring 0.884 Ha and known as Makuyu/Makuyu Block 2/992 in place of Kariuki Kamau (Deceased).
 4. That the District Land Registrar Murang'a be directed that the order herein shall be the instrument of transfer of ownership of the land parcel reference Number Makuyu/Makuyu Block 2/992 to the plaintiff.
3. The Respondent as a Plaintiff in E053 OF 2021, which suit is against the Applicants herein, as Defendants thereon sought for the following orders:
 1. That an eviction order to issue against the defendants Veronica Wanjiku and Francisca Njeri, their employees, servants, agents and /or anyone claiming through them, evicting them from Land parcel No. Makuyu/ Makuyu/ Block 2/ 992.
 2. That the OCS, Makuyu Police Station be directed to provide security during the eviction exercise on the land parcel no. Makuyu/ Makuyu/ Block 2/992.
 3. That the eviction orders be affected and/ or executed by the court bailiff.
 4. Costs of the suit.
 5. Any other relief the court may deem fit to grant.
4. This Originating Summons is supported by the grounds stated on the face of it and the Supporting Affidavit sworn jointly by FRANCISCA NJERI GAKUMO and VERONICA WANJIKU KUNGU alias WANJIKU GAKUMO sworn on 5th July 2021. The Applicants also filed a Further Affidavit sworn jointly by FRANCISCA NJERI GAKUMO and VERONICA WANJIKU KUNGU alias WANJIKU GAKUMO sworn on 6th May 2022.
5. In the Muranga Chief Magistrate MELC Case No. E053 of 2021, the Plaintiff who is the Respondent in the instant Originating Summons, averred that the Defendants, who are the Applicants in the Originating Summons, without any color of right entered and encroached on the Plaintiff's husband's



land parcel No. Makuyu/ Makuyu/ Block 2/ 992, causing the Plaintiff's family loss and damage. That despite notice to vacate having been issued and intention to sue, the Defendants have ignored and/ or neglected to vacate from the suit land.

6. In the instant Originating Summons, the Applicants claim is for a declaration that they have acquired the suit land by virtue of adverse possession. It was their averments that they have been in peaceful, open, continuous and uninterrupted occupation of the suit land for more than twelve (12) years, having resided thereon since 1982, and therefore, have- extinguished the Respondent's ownership of the suit property through adverse possession pursuant to the provisions of the [Limitation of Actions Act](#).
7. The Applicants alleged that the Respondent's husband Kariuki Kamau,(the registered proprietor of the suit land), was never registered as a member of Gathaite Farmers Co-operative Society, and therefore could not have balloted for the suit land; that the said Kariuki Kamau(deceased), never set foot on the suit land and was unknown to the Applicants at all material times prior to his demise in year 2017.
8. Further, the Applicants averred that in year 2016, they became aware for the first time that the suit land was registered in the name of KAMAU KARIUKI, who was unknown to them. That they only became aware of the Respondent herein in 2017, when she appeared with a Grant of Representation, and demanded the suit land from the Applicants.
9. The Respondent herein, Charity Wambui Kariuki, who is the Plaintiff in E053 OF 2021, vehemently opposed the instant Originating Summons, and averred that her husband, the late Kariuki Kamau, purchased the suit land from Gathaite Farmers Co-operative Society in 1988, and was shown the said parcel of land, which was then vacant, and upon completion of payment of Survey Fees, was issued with a title deed in year 2005.
10. She further averred that her husband took possession of the suit property in 1988, and immediately began cultivating thereon.
11. The Respondent further averred that her late husband fell ill and was unable to continue with farming activities on the suit land, and it is at that time that he allowed the 1st Applicant herein Francisca Njeri Gakumo, to move into the suit land and start farming thereon, as she was well known to him as a secretary at Gathaite Farmers Co-operative Society.
12. She further averred that her husband and the 1st Applicant herein reached an understanding to the effect that he would allow the 1st Applicant to cultivate on the suit land until such a time that he would recover his health and resume farming activities on the suit property.
13. The Respondent also stated that both Applicants herein were well-known to her husband, and therefore, it is curious and shocking to her that the Applicants now claim that her late husband was a total stranger to them, and that they had sought the assistance of the Directorate of Criminal Investigations and Private Investigators to track down her husband.
14. The Respondent urged the court to dismiss the Applicants' Originating Summons and allow her claim as contained in MCELC NO E053 OF 2021.
15. The suit proceeded by way of viva voce evidence with the Originating Summons serving as the Plaintiff and the Replying Affidavit being treated as the Defence.
16. The Applicants herein as Defendants in E053 of 2021, filed a Defence and Counter- claim dated 17th November 2021, and denied all the allegations made in the Plaintiff dated 27th July 2021.



17. They averred that they are strangers to the averments made in the Plaint and did put the Plaintiff to strict proof thereof.
18. The Defendants, who are Applicants in the Originating Summons, further averred that they are the rightful owners of land parcel Makuyu/ Makuyu/ Block 2/ 992, the suit land herein, having bought a share from Gathaite Farmers' Co-operative Society, and thereafter they have lived thereon for over 40 years.
19. The Defendants prayed for dismissal of the Plaintiff's suit.
20. In their Counter- claim, the Defendants who are the Applicants herein alleged that they balloted for the suit land on 2/11/1982, wherein they were given ballot No 79, which translated to the suit land herein.
21. They claimed that they were shown the suit land in December 1982, and settled thereon immediately and have since extensively developed the said suit land.
22. They reiterated that the late Kariuki Kamau was not a member of Gathaite Farmers' Co-operative Society, and the said Kariuki Kamau(deceased) nor the beneficiaries have never set foot on the suit land.
23. The Defendants urged the court to enter judgment in their favour on the following terms: -
 - a. a declaration that the title to the land parcel no. Makuyu/ Makuyu/ Block 2/ 992, has been extinguished by the Defendants' adverse possession thereof for a period of more than 12 years in terms of the *Limitation of Actions Act*.
 - b. a declaration that the Defendants have become entitled to the suit land by adverse possession instead of Kariuki Kamau(deceased).
 - c. an order that the District Land Registrar Muranga do register the Defendants jointly as the absolute proprietors of the suit land.
 - d. That the order herein shall be instrument of transfer of ownership of the suit land.
 - e. costs and interests thereon.
24. The Plaintiff/ Respondent filed a Reply to Defence and Counter- Claim dated 7th December 2021, and denied all the contents of the Defence filed on and did put the Defendants to strict proof thereof.
25. In her Defence to the Counter- claim, the Plaintiff (Charity Wambui Kariuki), averred that the allotment and allocation of the portions of land by Gathaite Farmers' Cooperative Society, was done through Presidential Commission that was constituted in the year 1986, and it completed its mandate in 1990.
26. Further, she averred that if indeed the Defendants had balloted for the parcel of land and given ballot No. 79, then their names would have been indicated against the said land in the Presidential Commission's book, which is not the case.
27. It was her allegations that the Defendants have not linked ballot No. 79 to the suit land No. Makuyu/ Makuyu/ Block 2/ 992
28. It was also her allegations that the Defendants(Applicants in the Originating Summons), entry into the suit land was with permission of her late husband, and the said license was later terminated by her late husband in 2010, as the Defendants had illegally and without consent put up structures on the suit land.



29. She denied that the Defendants have been on the suit land since 1982, and did put them to strict proof.
30. Consequently, the Plaintiff prayed for judgement against the Defendants as prayed in her Plaint and for dismissal of the Defendants' Counter-claim.
31. The matter proceeded for hearing by way of viva voce evidence. The Applicants in the Originating Summons, who are the Defendants in E053 OF 2021, gave evidence for themselves and called two witnesses. The Respondent, who is the Plaintiff in E053 OF 2021, gave evidence for herself and called one witness to support her case. The court has considered and analyzed the available evidence as follows: -

The Applicants'/ Defendants' Case

32. PW 1: Francisca Njeri Gakumo, gave evidence and adopted her witness statement dated 6th May 2022. She also produced the list of documents contained in her bundle of documents marked P Exhibits 1-9. It was her further evidence that she lives on the suit property, and has resided thereon since 1982.
33. It was her further evidence that the suit land originally belonged to Gathaite Farmers Co-operative Society, and was part of a larger parcel of land that was sub-divided and allocated to members of the aforesaid Society. She testified that her mother and her sister Veronica Wanjiku are initial shareholders at Gathaite Farmers Co-operative Society, and Veronica balloted for the suit land in 1964.
34. PW1, further testified that her sister moved out of the suit land and relocated to Gatundu, when she contracted a marriage, leaving her on the suit property. She added that in 1982, following a balloting process, she settled on the suit land, and has carried out some developments and has resided thereon to date.
35. The 1st Applicant annexed as part of her evidence a Letter signed by the Chief, Makuyu Location dated 2nd November 2016, and addressed to the District Land Registrar, Murang'a wherein the said Chief stated that the Applicants have been residing on the suit land for long.
36. Further, the 1st Applicant annexed a copy of an extract from the Presidential Commission's book held at the Assistant County Commissioner's office in Makuyu, Murang'a County dated 22nd November 2016, which showed the phrase "Developed" entered against the suit land, Plot No 992. The said entry did not name the owner of the suit plot or his/her ID, as is the case with most of the other plots appearing on the face of the extract.
37. It was the PW1's, further evidence that they are the ones who carried out the developments noted in the extract from the Presidential Commission's book. It bears remark that there are sixteen (16) other entries on the same list where plot numbers are stated without the proprietors' names and ID numbers.
38. In the exhibits produced, PW1, confirmed that the Applicants had attached photographs which showed; a farm with a cattle-shed, banana groves, mature mango trees and a permanent house (bungalow) abutted by semi-permanent structures, which she claimed that they demonstrated the Applicants' occupation of the suit land since 1982.
39. Further through PW1, the Applicants produced a further Letter signed by the Chief of Makuyu Location dated 1st July 2021, which letter stated that the Applicants have been resident on the suit land since 1982.
40. In cross-examination by Ms. Mukami for the Respondent, PW1, stated that the suit land was paid for by her mother, and together with her mother and sister, they were registered as allottees of the



- suit property by the said Society. She also testified that around year 1964 or 65, her mother paid membership fees of Ksh.20 and was registered as a member of Gathaite Farmers Co-operative Society.
41. Further, that PW1, is member No. 84 of the said Society and that on 2nd November 1982, she balloted for and was allocated ballot No. 79, which refers to the suit property. She added that she paid other fees in respect of the suit land including Membership fees of Ksh. 1200/=; Coffee fees of Ksh. 2000/=; and, Survey fees, which altogether added up to Ksh. 4635/=.
 42. She further testified that she is familiar with a receipt dated 17th December 1981, which shows a payment of Ksh.100/=, as entrance fees. Further, that she never used to work at Gathaite Farmers Co-operative Society, but she is a Member of the Board of the same Society. She stated that she learnt that KAMAU KARIUKI(deceased), is the registered owner of the suit land in year 2009.
 43. It was her evidence that in year 2005, she had gotten information that the suit property was registered in another person's name. Further, that it is only in year 2016, that she found out that KAMAU KARIUKI (deceased), was the registered owner of the suit land. She referred to her Affidavit filed in Court in support of the foregoing statements. She also testified that the aforesaid Society had 113 original members, and an additional 37 members were added thereto, bringing the total membership to 150 members.
 44. It was her further evidence that the late KAMAU KARIUKI was never a member of the aforementioned Society. She admitted that it is not shown anywhere that member No.84 was allocated the suit property. She also testified that all members of the Society were allocated parcels of land. She added that the suit land was never declared the property of the Co-operative Tribunal and that the decision not to so declare was made deliberately.
 45. It was her further evidence that she was not aware that the suit land had been declared an asset belonging to the aforesaid Society. She added that she did not know when the suit property was sold to the late KARIUKI KAMAU .Further, she produced some photographs before the Court as her evidence, and that the photographs are undated. She testified that her sister Veronica Wanjiku balloted for the suit land, but does not live thereon, but only PW1 does.
 46. On re-examination, she testified that the suit land was paid for by her mother and was registered in the name of her sister (Veronica Wanjiku), and further that, during that time, PW 1 was very young. She added that she paid off the Survey Fees after completing payment of all other outstanding charges in respect of the suit land. She stated that she knew that the land had been sold to a different person in year 2005, but never found out the registered owner thereof until year 2016.
 47. She further testified that she was aware of a case before the Co-operative Tribunal involving members of the said Society whereby, the same officials listed the suit land as an asset of the tribunal. She added that her sister Veronica Wanjiku used to live on the suit land, but relocated to Gatundu upon getting married.
 48. PW 2 Veronica Wanjiku Gakumo, alias Veronica Wanjiku Kungu, who lives in Kamwangi, in Gatundu North adopted her Witness Statement as part of her evidence in chief. She further stated that she is the original allottee of the suit land, and that she concurred entirely with the evidence given by PW 1.
 49. On cross-examination by Counsel for the Respondent, she testified that she was born in Mang'u and that is where she resides. She stated that her name before marriage was Wanjiku Gakumo, but she is now known as Veronica Wanjiku Kungu. Further, that she does not know how to read and write, and was not aware of the plot number of the suit land. She testified that she handed over all documents in respect of the suit property to PW 1. She stated that together with her mother, they bought the suit land



- from the Gathaite Farmers Society. She also testified that the photos produced by PW 1, were taken at the suit land. She stated that she does not occupy the suit land and that her sister, PW 1, resides thereon.
50. On re-examination, she testified that upon contracting her marriage, she assumed the name Kungu and she is now known as Veronica Wanjiku Kungu. It was her further evidence that she entered into the suit land in year which she cannot recall.
51. PW 3 Isaac Mwose Mwaniki, testified that he is the area Chief of Makuyu location since 2019. He stated that he was serving as an Assistant Chief prior to 2019. He adopted his witness statement as his evidence in chief. He also produced two letters marked as P. Exhibits. 10 (a) and (b). He also testified that Francisca lives on the suit land with her children and further that, they entered the suit land in 1982. He added that he attended school together with the children of mama Gakumo, who is PW1, herein. Further, that he has no evidence to show that the Applicants were members of Gathaite Farmers Co-operative Society.
52. On cross-examination by Ms. Mukami for the Respondent, PW 3 stated that he was born in 1975. He also testified that he can provide a document to confirm that he is the Chief of Makuyu location. He stated that Francisca lives on the suit land, and she has resided thereon with her children since 1982. It was his further evidence that he was 7 years old in 1982. He added that he lives about 3 Kilometers from the suit land. Further, that he had no evidence to show that the Applicants were members of Gathaite Farmers Co-operative Society.
53. PW 4, Nicholas Kigo Ndungu, testified that he lives in Gatundu North and he adopted his Witness Statement dated 6th May 2022, as his evidence in chief. He also testified that the Applicants are members of Gathaite Farmers Co-operative Society whereby, he has served as the Chairman since year 2016. He added that he took over the chairmanship of the aforesaid Society from SAMUEL NDIRANGU NJOROGI (deceased).
54. It was his further evidence that the suit land has been occupied since 1992, and that Veronica Wanjiku, balloted for suit land in 1992. He testified further that the suit land was acquired from ballot number 79, which ballot belonged to Veronica Wanjiku. It was his further testimony that members of the Society would take possession of their respective parcels of land, and that he had personal knowledge that the Applicants took possession of the suit land.
55. He further testified that members would make payments gradually in respect of their parcels of land, which had been allocated to them by the said Society, beginning with the initial payment of Ksh.20/= and a later payment of Ksh.400/=. He stated that a Committee of the Society would show members their respective plots of land and facilitate with issuance of the titles thereof. It was his further testimony that he owns a piece of land near the suit property and had seen the 1st Applicant engaging in cultivation on the suit land.
56. In addition, he testified that the Respondent was never a member of the Gathaite Farmers' Cooperative Society, and furthermore that, no new members were added to the Society since 1979. He stated that a title to the suit land was issued in the name of KARIUKI KAMAU, who is unknown to him, and to other members of the aforesaid society. He added that the Society's former Chairman had put a caution on the suit land because its acquisition by KARIUKI KAMAU was fraudulent. He stated that he was not the Chairman at the time the caution was put over the suit property.
57. On cross-examination by Ms. Mukami for the Respondent, he testified that he had placed a document before the Court attesting that he was the Chairman of Gathaite Farmers Co-operative Society, and furthermore that the list which he produced in Court did not bear his name. He also testified that



- the Society was incorporated in 1965, and that members were required to pay Ksh.4635/- being the purchase price for a single plot.
58. It was his further testimony that the Applicants are members of the Society, but he did not know when they paid membership fees. He stated that he assumed the position of Chairman of the Society in 2016 and became a member of the said Society in 2002, following the death of his father. Further, that Francisca is listed as member number 84, which number belongs to both the 1st and 2nd Applicants herein. He added that he is familiar with the list of the Society's members, and that Francisca's name does not appear on that list. He repeated that the name of the 1st Applicant is not on that list.
 59. He also testified that their usual practice at the Society is to follow what is stated in the records and the receipts. He stated that from the receipts that he had seen, he could not tell which ballot belonged to the Applicants herein. He added that the Applicants received their ballot in 1979, which corresponds to Plot No 992. He reiterated that he had adopted his Written Statement and stood by it. He also stated that in his statement, that ballot No. 79, is cancelled, and did not have documents to show that ballot No. 79 eventually became Plot No.992.
 60. The witness also testified that member No 84 is Wanjiku Gakumo. He stated that on page 29 of his witness statement, the ballot No 79, shows that there was a replacement done on 10th January 2017. He stated that the replacement was in respect of a ballot issued in 1977. He testified that he had no documents to show that the ballot was issued in 1977. It was his further evidence that the document appearing on page 30 is a replacement of the lost ballot and is the same as the one on page 30 of the trial bundle.
 61. He also stated that he had no data to show the link between ballot No 79, and plot No. 992. Further, that he was not aware that the suit land was subject to Cooperative Tribunal proceedings in year 2001, and he was not a member of the Society then, and thus could not tell the verdict of the tribunal. He added that apart from a few cases, members would get two acres of land each, plus their title deeds thereof upon payment of Ksh.4635/- He stated that a caution was placed on the suit land, but he did not produce any document as exhibit to verify the same. Further, that the Green Card of the suit land does not show any caution registered thereon.
 62. It was his further testimony that Francisca Njeri works as a Secretary at the Society, and has served in that role for a long time. He stated that the previous Chairman was Samuel Ndirangu. He added that he was not aware whether some parcels of land were sold to non-members. He testified that he was not aware of fraudulent acquisition of the suit land. He stated that in year 1988, he was not involved in active leadership of the Society. He added that he was unaware when KARIUKI KAMAU, became a member of the Society.
 63. It was his further testimony that registration of titles commenced in year 1982, and that Francisca occupied the land from 1982. He stated that although he was not around at the time when Francisca took possession of the suit property, he owns a plot near the suit land. He added that he was already in occupation of his piece of land when the Applicants took possession of theirs.
 64. On re-examination, he testified that he is a nominee of his father, James Ndungu Kanyaka, one of the original members of the Society who bequeathed him the land on which he currently resides. He stated that most of the original members of the Society are now deceased. It was his testimony that most of the current members of the Society are nominees of the original membership. He stated that the mother to the Applicants was the original allottee of the suit land, but that upon her death, her daughter Wanjiku Gakumo replaced her.



65. It was his further evidence that the suit land is occupied by the 1st Applicant who is a sister to Wanjiku Gakumo, the 2nd Applicant. He confirmed that he is the one who issued the replacement ballot for ballot No. 79. He added that a committee of the Society approved the replacement of ballot No.79. Further, that on page 30 of the document tendered before the Court, the following information appears: the name of the member, money paid and the member number, and that the said information is essential to replace a ballot. He added that a committee of the Society deliberated on the matter and issued a replacement ballot.
66. It was his testimony that the Society has records of what ballot corresponds with what parcel of land and he was aware that ballot No. 79 corresponds to the suit land. He stated that the reference to ballot No. 779, in his statement was made in error. Further, that he was not aware of the tribunal's case or the verdict thereof. He stated that he had no document to show that a caution was placed on the suit land. He confirmed that the 1st Applicant has worked as a Secretary for the Society for a long time, and further that he found her in that position when he joined the Committee of the Society. He added that he knows that the Applicants reside on the suit land as he also lives nearby.

Respondent's/ Plaintiff's Case.

67. DW 1- Charity Wambui Kariuki, testified that she resides in Muchungucha area of Muranga County, and she adopted her Witness Statement dated 22nd June 2022. She confirmed that she is the Plaintiff in MCELC Case No. E053 of 2021, before the Chief Magistrates Court – Murang'a which suit was consolidated in the instant suit. She produced a list of documents marked D Exhibits 1-4. She urged the Court to dismiss the Applicants' claim and direct them to vacate her parcel of land.
68. The Respondent averred that sometimes in year 2010, while in the company of her husband and son, she visited the suit land whereupon she discovered that the 1st Applicant herein had constructed some structures on the suit land without her husband's approval and furthermore, that the 1st Applicant had invited the 2nd Applicant to settle on the suit property.
69. The Respondent produced as exhibit a copy of the title deed to the suit land dated 29th June 2005, which shows that KARIUKI KAMAU is the registered proprietor thereof
70. The Respondent testified that her late husband undertook the developments noted in the extract from the Presidential Commission's book dated 22nd November 2016.
71. The Respondent also relied on her Replying Affidavit dated 24th November 2021, a copy of a Grant of Letters of Administration dated 25TH January 2021, authorizing her to represent the estate of Kariuki Kamau (Deceased), the registered proprietor of the suit property.
72. The Respondent also produced the same extract from the Presidential Commission's book held at the Assistant County Commissioner's office in Makuyu, Murang'a County dated 22nd November 2016, which had also been produced as exhibit by the Applicants; the said extract has the phrase "DEVELOPED" entered against the suit land as Plot No. 992. It was her evidence that her late husband undertook the developments noted in the aforesaid extract.
73. Further, the Respondent annexed a copy of a Notice to Vacate the suit property dated 18th July 2010, signed by KARIUKI KAMAU, and was addressed to VERONICA WANJIKU and FRANCESCAH NJERI, the Applicants herein. The said Notice notified the addresses that the owner of the suit had revoked the permission which he had given them to occupy his land
74. On cross-examination by Mr. Mbugua for the Applicants, it was her testimony that her husband KARIUKI KAMAU, purchased the suit land in 1988, and was issued with a title deed thereof in 2005.



- She stated that she had nothing to show that her husband bought the suit land in 1988. She added that she could not recall the year that her husband died. It was her further testimony that her husband left her with the title deed to the suit property. She stated that she had no documents to show that her husband was a member of Gathaite Farmers Co-operative Society. She added that she could not produce the agreement demonstrating that her husband purchased the suit property.
75. She further testified that her husband balloted for the suit land, but she did not know his ballot number. She stated that her husband is not mentioned in the Presidential Commission's Book. It was her further testimony that she was not aware whether Veronica, the 2nd Applicant herein, was a member of the aforesaid Society or whether she entered the suit land in 1982. She added that her husband allowed the Applicants to enter into and utilize the suit land because one of the Applicants was an employee of the Society. She stated that she was not aware as to who between the two Applicants was allowed to utilize the suit land by her husband.
 76. She further testified that Veronica was introduced to her by her late husband, and that at that time Veronica was living on the suit land. She stated that when her husband tried to evict the said Veronica from the suit property, she refused to move out. She added that she was unsure whether Veronica was served with an eviction Notice by her husband in year 2010.
 77. She also testified that she could not tell whether her husband was able to write. She stated that she has tried to evict the Applicants from the suit land to no avail.
 78. On re-examination, she stated that her husband bought the suit land in 1988. She testified that she could not remember many issues related to the suit land.
 79. DW 2, JULIUS IRUNGU KARIUKI, testified that he is a son to the Respondent and resides in Muchungucha. He stated that the registered owner of the suit land, KARIUKI KAMAU, is his father, who had bought the suit land from Gathaite Farmers' Cooperative Society, in 1988.
 80. He adopted his witness statement dated 22nd June 2022. It was his further evidence that the Applicants are occupying the suit land with the permission of his late father. However, later his father attempted to evict the Applicants, but they declined to move out of the suit land.
 81. He further testified that when his father died in 2018, they reported the matter to the D.O, wherein the Applicants were summoned by the D.O, and they claimed the land was theirs. Thereafter, the Respondent filed a case against the Applicants/ Defendants for eviction.
 82. Further that his father had informed him all members of the Society who balloted and were allocated land had their names captured in the Presidential Commission's Book held at the District Commissioners Office at Makuyu. Further, that the plots that were sold to non- members of Gathaite Farmers Co-operative Society, were marked in the said book as developed, as the purchasers had already taken possession of them and started cultivating on them.
 83. It was his allegations that if it was true that the 2nd Applicant had balloted for ballot No. 79, as claimed, then, the Applicants' names would have been indicated against the suit land on the Presidential Commission's book.
 84. In cross exam by counsel for the Applicants, DW2, stated that his late father told him that he had bought the suit land, and he showed him the title deed, which title deed was issued in 2005.
 85. He also stated that the Applicants alleged that they had lived on the suit land since 1982. That he was present when his father allowed the Applicants to utilize the land in 2006. That eviction notice was



- issued in 2010, and by 2018, when his father died, the Applicants were still on the suit land, as they had not moved out.
86. He also testified that they tried to follow the issue after his father's death, and thereafter filed an eviction case after this case had been filed. The witness had stated in his witness statement that his father informed him that he purchased the suit land in 1988, from Gathaite Farmers' Cooperative Society, and after payment of the survey fees, he was issued with the title deed in the year 2005.
87. In re-exam, he confirmed that he could not tell when the Applicants entered into the suit land, but he suspected that it could have been in the year 2006.
88. After the viva voce evidence, the parties filed and exchanged written submissions, as directed by the court. In compliance thereof, the Applicants through Charles Mbugua & Co Advocates filed their written submissions on 8th September 2023, and set out two issues for determination. On her part, the Respondent, filed her submissions on 2nd October 2023 through Kahiga, Mukami & Macharia Advocates, and also set out two issues for determination.
89. In their written submissions, the Applicants had sought an answer on whether they are entitled to the prayers sought in their Originating Summons. It was their submissions that they occupied the suit land in 1982, openly, without force or secrecy or permission of the owner, and with intention to own the land. It was their submissions that they knew the land had been registered in the name of another person in 2009, but got to know the name of the registered owner in 2016. That they did not know the Respondent prior to this suit.
90. It was also their submissions that the nature of occupation was adverse and amounted to dispossession of the Respondent, since they entered the suit land in 1982, while the land belonged to Gathaite Farmers Society. They denied that their occupation was with permission of the registered owner. They also submitted that the Respondent has never occupied the land at all.
91. The Applicants relied on a number of cases, among them: Richard Wefwafwa Songoi vs Ben Munyifwa Songoi(2020) eKLR: Gabriel Mbui vs; Gachuma Gacheru vs Maina Kabuchua (2016) eKLR: Peter Kamau Njau vs Emmanuel Charo Tinga(2016) eKLR: Joseph Macharia Kairu vs Kenneth Kimani Muturi (2021) eklr, and urged the court to allow their claim under the Originating Summons and dismiss the Respondent's/ Plaintiff's case.
92. The Respondent set out two issues for determination in her submissions being; -
- i. whether the Plaintiff claim for adverse possession over the suit land has accrued;
 - ii. whether the Respondent is entitled to eviction orders against the Plaintiffs, who are the Defendants in E053 OF 2021.
93. On whether the Applicants claim under Originating Summons has accrued, it was her submissions that the same has not crystalized and reliance was placed in the case of Richard Wefwafwa Songoi vs Ben Munyifwa Songoi(2020) eKLR, where the court set out the elements of adverse possession.
94. On the date of entry, it was submitted that though the Applicants alleged that they entered into the suit land in 1982, it was submitted that the Applicants never submitted evidence of such entry, and they only relied on the Chief's letter of 2nd November 2016, which alleged that the Applicants have been on the suit land since 1982. That the Applicants did not present any evidence of having taken possession in 1982.



95. Further, it was her submissions that the Applicants occupation of the suit land was permitted by the registered owner Kariuki Kamau. For this, reliance was placed in the case of Samuel Kihamba vs Mary Mbaisi (2015) eKLR, where the court 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 without force, without secrecy and without licence or permission of the land owner, with intention to have the land”
96. The Respondent also submitted that the registered owner had given the Applicants notice to vacate in 2010, and the Applicants did not take any action against her late husband as their occupation was with permission.
97. Further, that the Applicants never established any connection between ballot No 79 and the suit land, and that her late husband is the registered owner of the suit land and Applicants cannot challenge the said title and also claim adverse possession. That though the Applicants alleged that they entered into the suit land in 1982, her late husband bought the suit land in 1988, and therefore, their entry into the suit land was not with intention to dispossess the registered owner.
98. On whether the Respondent is entitled to the prayers sought in E053 of 2021, specifically the eviction of the Applicants from the suit land, she relied on section 26 of the [Land Registration Act](#), which states;
- “ The certificate of title issued by the Registrar upon registration, or a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.
99. It was her submissions that since the Applicants have not proved a claim for adverse possession and have not proved that her late husband acquired the title illegally, then the court should hold that the said Kariuki Kamau was the absolute and indefeasible owner of the suit land, and thus the Respondent as the legal representative is entitled to have quiet enjoyment of the suit land.
100. It was her submissions that the Applicants are illegally occupying the suit land as trespassers, and thus they should be evicted. Reliance was placed in the case of Peter Lavatsa Kabwoyo vs Nicholas G. Karira & Another (2021) eKLR, where the court ordered eviction against the Defendant who had failed to prove their claim of adverse possession.
101. The Respondent urged the Court to dismiss the Applicants OS with costs and allow her Claim as stated in the Plaint dated 27th July 2021, in E053 of 2021.
102. The above are the pleadings as filed by the parties herein, the evidence adduced in court, exhibits thereto and the summary of the written submissions which this court has carefully read and considered.
103. After consideration of the available evidence, the court finds as follows; There are two claims herein being; a claim for ownership through adverse possession and eviction of the occupancy of the suit



property; Further, there is no doubt the suit land is Makuyu/ Makuyu/ Block 2/ 992. The said suit land is in the name of Kariuki Kamau as from 5th December 1988, as is evident from the copy of Green Card produced by the Applicants, and a copy of title deed produced by the Respondent herein.

104. It is also evident that the title deed was issued on 29th June 2005, under the Registered Land Act, Cap 300 LOK(repealed), regime. Section 27 of the said Act, provides that the registration of a person as a proprietor of land vests in that person the absolute and indefeasible ownership, with all rights and privileges belonging or appurtenant thereto. The late Kariuki Kamau, is such a proprietor, and on the face value, he has the absolute ownership.
105. However, section 28 of the said Cap 300(repealed) states that the rights of such proprietor shall not be liable to be defeated except as provided in the Act. Therefore the rights of the registered owner herein Kariuki Kamau, can only be defeated as provided by the Act(Cap 300).
106. The instances when such rights of a registered owner can be defeated are provided for in Section 30 of the said Act. These rights can be defeated if there is evidence of existence of overriding interests, and such overriding interests includes right of ownership through adverse possession. See section 30g of Cap 300(repealed); which states; -
- “ 30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –
- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.
107. This right of ownership through adverse possession has now been captioned in section 28(h) of the Land Registration Act, which provide as follows; -
- “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”.
108. The Applicants herein are seeking to be declared absolute owners of the suit land through adverse possession. The Applicants are also questioning the Respondents ownership of the suit land on the ground that the late Kariuki Kamau was not a member of Gathaite Farmers Cooperative Society. On her part, the Respondent as a Plaintiff in E053 of 2021, is seeking a declaration that Kariuki Kamau acquired the suit land legally, and that the Applicants as Defendants in that suit are illegally in occupation of the suit land as trespassers, and therefore, they should be evicted.
109. It is not in doubt that the Applicants have alleged that they are in occupation of the suit right as of right, having purchasing the same from Gathaite Farmers’ Cooperative Society. It was their allegation that Kariuki Kamau acquired the title irregularly as he was not a member of the Society. They urged the court to allow their claim.
110. The above is the background of this case; the court finds the issues for determination are;
- i. whether the Applicants in the OS E025 of 2021, are entitled to the prayers sought;



- ii. whether the Plaintiff in E053 Of 2021, is entitled to the prayers sought in the Plaint;
 - iii. who should bear costs of the suit.
111. On whether the Applicants are entitled to their claim of adverse possession; this court finds that indeed the suit land is registered in the name of Kariuki Kamau, now deceased. The Applicants claim is founded under Sections 7, 17 and 38 of the [Limitation of Actions Act](#), Cap 22 LOK.
112. Adverse possession is one of the methods of ownership of land as provided by section 7(d) of the [Land Act](#). Further, adverse possession is a situation where one acquires title to another person's parcel of land by reason of having actual, open, continuous and exclusive possession of the registered owner's parcel of land for a period of 12years.
113. Halsbury's Laws of England 4th Edition Volume 28, para 768, provides as follows;
- “No right to recover land accrues unless the land is in possession of some person in whose favour the period of limitation can run. What constitutes such possession is the question of fact and degree. Time begins to run when the owner ceases to being possession of his land”
114. As submitted by the Applicants, the legal provisions that underpin the doctrine of adverse possession are found in the above-mentioned Sections 7, 13 and 38 of the [Limitation of Actions Act](#) Cap 22 (LOK), which provide as follows;-
- “7 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.

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- (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.

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- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in



section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
- (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
- (5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act”.

115. The Applicants have alleged that they entered into the suit land in 1982. The title deed was issued to Kariuki Kamau in 2005, under Cap 300(repealed); Therefore the applicable provision of law is section30(g) of the said repealed Cap 300, which states;-

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

- (g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed”.

116. For a claim of adverse possession to succeed, the claimant must prove that he/ she has been in occupation of the said suit land without permission, without force, without secrecy and with intention to acquire it for a period of 12 years. Therefore, the entry into the suit land must be without permission. See the case of Samuel Kihamba vs Mary Mbaisi (2015) eklr, Where the court held;-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.

117. See also the case of Mbira vs Gachuhi (2002) 1 EALR 137, where the court held; -

“ ... 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 statutorily prescribed period without interruption...”

118. The Applicants have alleged that they have acquired the suit land by adverse possession, and therefore, the burden of proof lies upon them as provided by section 107 of the *Evidence Act*. See also the case of *Gabriel Mbui vs Mukindia Maranya* (1993) KLR, where the court held; -

“The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by adverse possession (*Mamuji v Dar* [1935] 2 E A CA 111, *Bwana v Ibrahim* (1948) 15 EACA 7; and *Forbes, JA, in Abdulkarim and another v Member for Lands and Mines and another 1* [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner.”

119. For the Applicants herein to succeed in their claim of adverse possession, they must meet the threshold for prove of adverse possession, which threshold has been enumerated in a various decided case. See the case of *Kasuve vs Mwaani Investment Ltd & 4 others* 1 KLR 184, where the Court of Appeal held as follows;-

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’

120. As submitted by the Respondent, for this court to effectively determine whether the Applicants have acquired the suit land by adverse possession, the court must answer the following questions as stated in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi*(2020) eKLR;

- a) on what date he came into possession.
- b) what was the nature of his possession.
- c) whether the fact of his possession was known to the other party.
- d) for how long has his possession continued,
- e) that the possession was open and undisturbed for a requisite period of 12 years.

121. On the issue of what date the Applicants came into possession, in their evidence, they alleged that they entered into possession of the suit land in 1982, through purchase of the suit land from *Gathaite Farmers Cooperative Society*. Therefore, with the claim of purchase, the Applicants entry was permitted, by the said initial owner, *Gathaite Farmers Cooperative Society*.

122. Therefore, if the Applicants entered into the suit land in 1982, and the Green Card shows the suit land was registered in the name of *Kariuki Kamau* in 1988, then at the time of entry, the suit land did not belong to the current registered owner, the late *Kariuki Kamau*. If the suit land did not belong to *Kariuki Kamau* in 1982, time could not start running then.



123. The Applicants based their claim on the fact that the late Kariuki Kamau was not a member of Gathaite Farmers Cooperative Society, and therefore could not have balloted for the land and allocated any as he was not a member. However, their claim is for the registered owner title to be declared having been extinguished by dint of adverse possession.
124. Though the Applicants have challenged how the registered owner acquired his land and title, they have not sought for cancellation of the said certificate of ownership, for having been acquired illegally. This court finds that evidence of challenging how Kariuki Kamau acquired the title not relevant for Claim of adverse possession.
125. It was the Applicants evidence that they entered into the suit land in 1982, having balloted for the same, and with the believe that the suit land was theirs. Therefore, their initial entry was not to dispossess the owner, but to utilize their own parcel of land. The Applicants further testified that they were shown the suit land by the vendor, the aforesaid Society. Consequently, their entry into the suit land was with the permission of the owner.
126. Further, the Applicants testified that they learnt about the suit land having been registered in the name of another person in 2006. Before 2006, the Applicants believed the suit land was their own and therefore, their occupation was not adverse to the owner whom they did not know.
127. The Applicants further testified that they learnt that the suit land was registered in the name of Kariuki Kamau in 2016, when they carried out a search at the land's office. That they did not know who the said Kariuki Kamau was or lived until when they carried investigation through a private investigation company by the name of Sunrise Investigation Agencies.
128. From the above evidence, it is clear that if the Applicants entered into the suit land in 1982, and Kariuki Kamau got registered as the owner in 1988, then the Applicants were not aware of the registered owner, prior to 2016. For adverse possession to attach, the registered owner must be known, and he should also know that he has been dispossessed. See the case of Wambugu –v- Njuguna (1983) KLR 173, the Court of Appeal held thus:
- “ 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.
 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.”
129. If the Applicants got to learn of who the registered owner was in 2016, as per the evidence of PW1, then that is when time started to run. From 2016, a period of 12 years would lapse in 2028. However, the Respondents have asserted their right through the filing of MCELC No. E053 of 2021. This court would concur with the Respondent that a claim of adverse possession has not crystalized.



130. However, the Respondent alleged that her late husband acquired the suit land in 1988, and took possession and used to cultivate it. However, he allowed Pw1 to utilize it on a friendly basis after he acquired the title deed in 2005. It was her further evidence that in 2010, when the late Kariuki Kamau realized that Pw1 had built houses on the suit land, and invited her sister, he issued her a Notice to Vacate dated 18th July, 2010.
131. Though the Applicants alleged that they were never served with the said Notice and that the said notice could have been written after the case was filed, they did not avail any evidence to confirm that the said notice produced by the Respondent as their exhibit was a recent document.
132. If the court was to believe that the Applicants entered into the suit land after 2006, and that the registered owner issued a notice in 2010, then the said Notice disrupted time. However, the Respondent, DW1, testified that even after issuing the Notice to the Applicants, the registered owner did not do anything else as he fell sick.
133. With the issuance of the notice in 2010, then the occupation of the suit land became adverse to the registered owner as they were in possession and occupation without his permission. The period of 12 years was to end in 2022. But it is clear that this suit was filed in 2021, wherein 12 years had not elapsed, and a claim for adverse possession had not crystalized.
134. Though the Applicants had alleged that they took possession of the suit land in 1982, from their evidence, it is clear that they allegedly took possession in believe the suit land was owned by them. The court cannot hold and find that they entered into the suit land without permission of the owner. It is also evident that Kariuki Kamau got registered as the owner of the suit land in 1988. The Applicants testified that they were not aware of this registration. Therefore, their occupation of the suit land could not be adverse to the registered owner, whom they did not know, and they were not even aware that they had dispossessed the said registered owner with the intention of owning the said suit land.
135. The Applicants having gotten aware of the owner of the suit land in 2016, as can be seen from the exhibits produced in court, then that is when time started to run. This Originating Summons was filed in 2021, and by then 12 years were not yet over. Thus, this court finds and holds that a claim of adverse possession had not matured.
136. The Applicants have basically challenged the registered owner acquisition of the suit land. The claim for wrongful acquisition of land is quite different from a claim of adverse possession. The Applicants ought to have brought the appropriate claim maybe with an alternative claim of adverse possession. The available evidence did not support the claim as presented in the pleadings. See the case *Maweu vs. Liu Ranching and Farming Cooperative Society* 1985 KLR 430, where the Court of Appeal held;
- “Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstance...”
137. For the above reasons, the court finds and holds that a claim of adverse possession cannot stand with the available evidence. The Respondent had alleged that her late husband was known to Pw1, who was working for the Society, and that was the reasons why he allowed her to use the suit land. However, PW1 denied ever working for the Society, but PW4, the Chairman of the Society confirmed that PW1, works for the Society. Therefore, this court finds and holds that PW1, was not truthful and she denied the obvious.



138. On whether the Plaintiff in E053 Of 2021, is entitled to the prayers sought in the Plaint; the court finds as follows; The Plaintiff in the above suit is Charity Wambui Kariuki, who brought the suit as the Legal Representative of the estate of Kariuki Kamau, the registered owner of the suit land Makuyu/ Makuyu/ Block 2/ 992, as from 5th December 1988. A Grant of Letters of Representation was produced as exhibit, by both the Plaintiff and Defendants in this suit. As a legal representative, the Plaintiff has a duty to represent the estate in all matters involving the said estate. See Section 82 (a) & (b) of the Law of Succession Act, cap 160 LOK provides that; -

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- (b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best”

139. It is also evident that the Kariuki Kamau,(deceased) was issued with the title deed of the suit land on 29th June 2005, under The Registered Land Act, Cap 300 LOK(repealed). Under section 27 of the said Act, the said Kariuki Kamau is deemed to be the absolute proprietor of the suit land and has all the rights and privileges appurtenant thereto. Further, it also clear that under section 28 of the said Act, the rights of Kariuki Kamau, can only be defeated as provided by the Act. Such instances that can lead to defeat of a proprietor’s right are evidence of overriding interests such as adverse possession. However, this court has found and held that there is no evidence of acquisition of the suit property by Defendants herein through prescriptive rights or adverse possession.

140. Being the registered owner of the suit land, then the said Kariuki Kamau and/ or his estate are entitled to enjoy the rights appurtenant thereto, and such rights are enjoyment of quiet possession, occupation and use of the right as one wishes while respecting the rights of others.

141. In her claim, the Plaintiff (Charity Wambui Kariuki) averred that the Defendants thereon Veronica Wanjiku and Francisca Njeri, have unlawfully entered and encroached into the suit land without consent of the Plaintiff/ and or the estate of Kariuki Kamau (Deceased). That despite demand to vacate, the Defendants have failed to give vacant possession and thus the prayer for eviction.

142. The Defendants filed their Defence and denied the Plaintiff’s claim, but raised a Counter claim, where they admitted been in possession of the suit land, as of right as allottees of the said parcel of land by virtue of being members of Gathaite Farmers Cooperative Society, who balloted for the plot in 1977, and were allocated ballot No 79, which later became Makuyu / Makuyu/ Block 2/992, hereafter referred to as the suit land.

143. The Defendants urged the court to find and hold that the Plaintiff title has been extinguished by the Defendant’s adverse possession, and that they be declared to have acquired the land by adverse possession. This court has found and held that the Applicants have not met the threshold for grant of orders of adverse possession.

144. The question that the court must now answer is whether the Plaintiff herein is entitled to grant of orders of eviction of the Defendants from the suit land. It is evident that eviction order is an order that compel a person occupying a suit land that does not belong to him/ her to move out. It is therefore,



obvious that for an order of eviction to issue, the Claimant must prove ownership of the land and trespass by the Defendant.

145. It is evident that the Kariuki Kamau, represented by Charity Wambui Kariuki (the legal representative of the estate), is the registered owner as from 5th December 1988. It is also not in doubt that the Defendants are in occupation of the suit land. The Defendants have alleged that the Kariuki Kamau, got registered illegally as the owner of the suit land, as he was not a member of the Society, which Society was the initial owner of the suit land.
146. However, the Plaintiff have alleged that Kariuki Kamau, rightfully purchased the suit land from the Society in 1988, and he was issued with a title deed in 2005. There is no doubt that the Defendants herein have no title deed for the ownership of the suit land. Primafaciely, Kariuki Kamau is the absolute owner of the suit land.
147. However, as provided by Section 26 of *Land Registration Act*, the certificate of title issued to a proprietor by the Land Registrar is the primacie evidence that such proprietor is the absolute and the indefeasible owner of the suit land. Therefore, Kariuki Kamau is such an indefeasible and absolute owner. However, such certificate of title is subject to challenge if the same was acquired through fraud, misrepresentation, illegally, unprocedurally or through corrupt scheme. See section 26(1) a& b;-

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme”.

148. The Defendants herein having challenged the acquisition of the suit land by Kariuki Kamau, then they needed to avail evidence to confirm that such acquisition and registration was done through any of the means mentioned above. See the case of Elijah Makeri Nyangwara –vs- Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012, the Court held;

“...it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent



transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”

149. The Plaintiff has a certificate of title, and the Defendants have none. The court cannot find that there are two competing title deeds herein, and that the court has a duty to determine which one of them is valid. However, the court has a duty to determine whether the Defendants’ claim is valid or not, since they are in occupation of the suit land, and the Plaintiff is in possession of the certificate of title. Ownership of land is confirmed through production of certificate of registration, or title, but as stated above, a certificate of title that is acquired fraudulently is a candidate of cancellation.
150. The Defendants have alleged that their mother was the initial member of Gathaite Farmers Cooperative Society, who purchased the suit land for Veronica Wanjiku, alias Wanjiku Gakumo.
151. The Defendants testified that Wanjiku Gakumo, whom they alleged is the 2nd Defendant, was member no 84, and after balloting in 1977, she acquired ballot No. 79, which later became Plot no. 992, the suit land. The Defendants produced various receipts to show that they paid all the necessary dues for the said ballot no 79, and thereafter, they were shown the suit land and they occupied it from 1982.
152. The receipts are in the name of Wanjiku Gakumo, and member No 84, was initially Wanjiku Gakumo. It was the Defendants evidence that Wanjiku Gakumo is the 2nd Defendant also Known as Veronica Wanjiku. That she acquired the name Veronica after baptism. The Defendants produced a Baptism Card for Veronica Wanjiku Gakumo, which shows that she was born on 16th June 1959. They also produced a copy of ID CARD for Veronica Wanjiku Kungu, which shows the year of birth as 1944. Certainly, the ID card for Veronica Wanjiku Kungu, who gave evidence cannot be said to belong to the holder of the Baptism Card produced in court for VERONICA WANJIKU GAKUMO, who was born in 1959. Therefore, this court cannot hold and find that Veronica Wanjiku Kungu of ID NO. 3061632, who gave evidence as PW2, is the same as Veronica Wanjiku Gakumo, referred to in the Baptismal Card produced in court as exhibit.
153. Be that as it may, the Defendants had testified that Ballot No. 79, which they paid for fully, later became land Parcel No. Makuyu/ Makuyu/ Block 2/992, the suit land. The Plaintiff denied that claim and alleged that there was no link between Ballot No. 79, and the suit land. The Defendants are the ones who have alleged that ballot No. 79 was the same as the suit land, which allegation was vehemently denied by the Plaintiff.
154. In support of their claim, the Defendants called the PW3 and PW4. PW3, is the current chief of the area who was born in 1975. Apart from confirming that the Defendants occupies the suit land, he did not have any other evidence to link Ballot No. 79, with the suit land.
155. Equally, PW4, the current Chairman of the Society since 2019, only stated that the Defendants were holder of ballot No 79, which was later translated to Plot No 992, the suit land. apart from confirming that he issued a replacement of the ballot No 79 in 2021, he did not avail any other evidence to link plot 992, to ballot No 79, that was allegedly held by the Defendants.
156. At least the Defendants should have availed the documentary evidence to link Ballot No 79, to the suit land. The available evidence is just the oral evidence availed by the Defendants and their witnesses that after balloting and they got ballot no 79, they were shown the suit land as the one corresponding with the said ballot.
157. Both parties produced the Presidential Commissions Book, which showed that Plot no 992, was developed. Though the Defendants alleged that they were members of the Society who balloted in 1977, their names were not indicated against the suit plot, like all the others. Further, there were



- proceedings of the Cooperative Tribunal, for 2001, which shows that plot No 992, was an asset of the tribunal. If the Defendants had acquired the suit land in 1982, as alleged by them, why was it indicated as an asset of the tribunal?
158. This court finds and holds that the available evidence had not sufficiently linked Ballot No 79, to the suit land, and therefore, the court cannot hold that the suit land belongs to the Defendants herein.
159. Having found that there is no evidence to link the Defendants ballot no 79, with the suit land; this court finds and holds that the suit land cannot be connected to the Defendants herein and the process of balloting that was done in 1977 or thereabout.
160. It is evident that the suit land is in the name of Kariuki Kamau, whom the Defendants have alleged was not a member of the Society. However, there was no evidence from the said Society to the effect that none members were not eligible to purchase land that belonged to the Society. From the Green Card, the suit land was initially in the name of the GOK. Pw4, the current chairman of the Society was not an Official in 1988, when the suit land was registered in the name of the Kariuki Kamau. Prior to filing of the suit herein in 2021, there was no complaint from the Society that non-members had illegally acquired titles for parcels of land that belonged to the society and or its members.
161. The title deed in the name of Kariuki Kamau(deceased) has not been challenged by the officials of the Society or the Land Registrar. There was no evidence from the Muranga Land Registry to confirm how the suit land got registered in the name of Kariuki Kamau, and whether the said registration was valid or was done irregularly.
162. Without any evidence to challenge the title deed held by Kariuki Kamau, the court finds and holds that he is the absolute and indefeasible owner of the suit land; Therefore, his estate is entitled to enjoy quiet possession of the suit land. The Defendants are thus occupying the suit land illegally as they are not the registered owners. Their occupation is thus an encroachment, which action has denied the Plaintiff enjoyment of rights of a proprietor as provided by section 24 of LRA, and thus they are trespassers.
163. Having found that the Defendants are trespassers, this court finds and holds that they have no reasons to remain on the suit land and they should give vacant possessions of the suit land the rightful owner, the estate of Kariuki Kamau, the Plaintiff herein.
164. For the above reasons, the court finds and holds that the Plaintiff in E053 of 2021 has proved on the required standard of balance of probabilities that she is the rightful owner of the suit property and is entitled to vacant possession, which the Defendants herein should give it to her.
165. Consequently, the Defendants are directed to give vacant possession of the suit land to the Plaintiffs within the next 120 days from the date hereof; failure of which eviction order should issue in the usual manner prescribed by the law.
166. On the issue of who should bear costs of the suit; the court finds that as provided by Section 27 of the *Civil Procedure Act*, cost of the suit is ordinarily granted at the discretion of the court. However, costs normally follow the event, and is thus granted to the successful litigant unless there are circumstances that dictates otherwise. See the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd[2], this court held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it



is for compensating the successful party for the trouble taken in prosecuting or defending the case”.

167. Consequently, this court finds and holds that the Respondent in the Originating Summons dated 5th July 2021, in E025 OF 2021, who is the Plaintiff in MCECL NO E053 OF 2021, is the successful litigant. This court finds no circumstances prevailing to warrant denial of costs of the suit to the successful litigant. Thus, the Respondent/Plaintiff (Charity Wambui Kariuki, suing as legal representative of the estate of Kariuki Kamau) is entitled to costs of the instant Originating Summons, the Claim and Counter claim in MCELC E053 OF 2021.
168. Ultimately the court finds and holds that the Applicants in the instant Originating Summons dated 5th July 2021, have failed to prove their case on the required standard of balance of probabilities. Consequently, the said Originating Summons is dismissed entirely with costs to the Respondent. Further, the court finds and holds that the Plaintiff in MCELC NO E053 OF 2021, has proved her case on the required standard of balance of probabilities. However, the Counter- claim by the Defendants thereon was not proved on the required standard and is dismissed entirely with costs to the Plaintiff (Charity Wambui Kariuki).
169. The final orders are; the Defendants in MCELC No E053 OF 2021, Veronica Wanjiku And Francisca Njeri, are directed to vacate the suit land and give the Plaintiff (Charity Wambui Kariuki, suing as legal representative of the estate of Kariuki Kamau (Deceased) vacate possession of the suit land; Makuyu/ Makuyu/ Block 2 /992, within a period of 120 days ,from the date hereof; failure of which eviction order to issue in the manner prescribed by the law in section 152 of the [Land Act](#).
170. Costs of the suits as stated above.

It is so ordered.

DATED, SIGNED AND DELIVERED ONLINE THIS 11TH APRIL 2024

L. GACHERU

JUDGE.

Delivered online in the presence of;-

Absent for the Applicants/ Defendants.

Absent for the Respondent/ Plaintiff

Joel Njonjo, Court Assistant.

L. GACHERU

JUDGE.

TABLE

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