



**Muchene v Kinuthia & 2 others (Environment & Land Case  
788 of 2015) [2024] KEELC 3939 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3939 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 788 OF 2015**

**MD MWANGI, J  
APRIL 11, 2024**

**BETWEEN**

**PATRICK KABUE MUCHENE ..... PLAINTIFF**

**AND**

**HANNAH WANGARI KINUTHIA ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL MWAURA FELIX KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**MICHAEL MUHIA NGAE ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff in this case claims 0.180 hectares of L.R. No. 164/72 and
0. 2238 hectares of L.R. No. 164/73 by way of adverse possession. He claims to have peacefully and openly occupied and used the two portions since 1999 without interruption. He therefore prays for the determination of the questions:
  - a. Whether the Plaintiff has under the *Limitation of Actions Act* become entitled to 0.180 ha in L.R. No. 164/72 and 0.2238 ha in L.R. No. 164/73 by way of adverse possession on the grounds that he has openly, peacefully and as of right been in adverse possession of the said parcels of land since year 1999 to date.
  - b. Whether the Plaintiff is entitled to be registered as the proprietor of 0.180 ha in L.R. No. 164/72 and 0.2238 ha in L.R. No. 164/73 absolutely in place of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
  - c. Who should meet the costs of this summons?
2. The Plaintiff's Originating Summons is supported by the Plaintiff's own affidavit deposed on 14<sup>th</sup> October, 2021.



3. In the said affidavit, the Plaintiff deposes that he bought a portion of L.R. No. 164/9 measuring one (1) acre which was to be excised therefrom in 1999. He has attached an agreement in support of that allegation dated 20<sup>th</sup> February, 1999.
4. The Plaintiff however does not seek to enforce the agreement in this suit. What he seeks is a declaration that he has acquired the portions of L.R. 164/72 and L.R. 164/73 by way of adverse possession. This point is critical in the final determination of this suit.
5. The subject matter of the agreement of 20<sup>th</sup> February, 1999 was plot No. 37 Ndumberi shopping Centre, together with all the developments therein.
6. Apparently, there was a Court case involving the subject property – (plot No. 37) because the parties agreed that, “if the judgment in respect to the said plot is against the vendor (1<sup>st</sup> Defendant) then the vendor is to give the purchaser one hectare of her Limuru Land registered in the vendor’s name- title No. Limuru/Kabuku/164/9.”
7. Subsequently, on 25<sup>th</sup> July, 1999, the parties entered into another agreement. In the second agreement, it is stated that the seller has agreed to sell one acre to be carved out of Kabuku/Limuru/164/9 and 164/20.
8. Again, I must point out that the Plaintiff does not seek to enforce this agreement in this suit. His remains a claim for adverse possession only.
9. Keenly looking at the agreement, I note that the parties duly noted the status of the vendor, in the following words:

“The seller is entitled under the will of her late father Mwangi Mbothu made on 21<sup>st</sup> January, 1991 to inherit five acres from a property known as L.R. No. Kabuku/Limuru/164/9 and 164/20. The grant of Probate issued to Stephen Njuguna Mwangi, the executor has not been confirmed and consequently, the seller’s five acres have not been transferred to her.”
10. The parties therefore agreed that: “Upon the transfer by the executor of the will of the said Mwangi Mbothu (deceased) of the five acres to the seller, the latter shall apply to the Land Control Board for the consent to subdivide the said parcel. The seller and the purchaser shall jointly apply for the Land Control Board’s consent to the sale to the purchaser of the one acre.”
11. The Plaintiff in his plaint asserts that he took possession of the suit premises way back in 1999 and constructed a residential house and has spent a lot of time, money and efforts in developing the suit premises. He insists that he has been in open, quiet and uninterrupted possession of the suit premises for over 12 years hence entitled to the claim for adverse possession.
12. The Plaintiff states that the 1<sup>st</sup> Defendant surveyed her several parcels of land and deliberately shifted boundaries casting the Plaintiff’s portion into two parcels, i.e. L.R. 164/72 and L.R. 164/73 registered in the names of the 3<sup>rd</sup> and 2<sup>nd</sup> Defendants respectively.
13. The Plaintiff’s case is supported by his own affidavit sworn on 14<sup>th</sup> October, 2021 in which it was deposed that:
  - a. That the Plaintiff has openly and peacefully been in exclusive and uninterrupted possession of LR. No. Limuru/Kabuku/164/26/4, 0.180 hectares in LR. No.164/72 and 0.2238 hectares in LR. No. 164/73 the suit premises since year 1999.



- b. The Plaintiff has developed the suit premises substantially and has erected thereon a residential house, planted trees and also substantially spent a lot of money, time and effort in developing the suit land.
14. It was the Plaintiff's case that in the year 1999, he bought from the 1<sup>st</sup> Defendant, a portion of land L.R. No. 164/9 measuring one acre previously registered in the name of Mwangi Mbothu (deceased) and later registered in the name of Hannah Wangari Kinuthia (the 1<sup>st</sup> Defendant herein).
  15. The Plaintiff testified that he paid the full purchase price and signed a sale agreement with the 1<sup>st</sup> Defendant. He took possession of the said land way back in 1999 and constructed a residential house on the land.
  16. The Plaintiff averred that he has expended a lot of time, money and effort in developing the suit premises. He also stated that he has been in open, quiet and uninterrupted possession of the suit premises against the Defendants or anyone else to date which is over twelve (12) years.
  17. The Plaintiff alleged that despite his occupation and use of the suit premises being well known by the residents of the area, the 1<sup>st</sup> Defendant surveyed her several parcels of land and deliberately shifted boundaries, casting his one-acre portion of land into two newly created titles L.R. No. 164/72 and L. R No. 164/73.
  18. It was the Plaintiff's testimony that the 1<sup>st</sup> Defendant went further and transferred L.R. No. 164/72 to Michael Muhia Ngae (the 3<sup>rd</sup> Defendant herein) and L.R. No. 164/73 to Samuel Mwaura Felix Kariuki (the 2<sup>nd</sup> Defendant herein).
  19. The Plaintiff attached a copy of the Surveyor's Report dated 11th September 2020, with a sketch map showing the extent of boundaries of the one-acre portion.
  20. The Plaintiff faulted the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for accepting the transfer of the land in their favour from the 1<sup>st</sup> Defendant, while they were well aware of the Plaintiff's possession and presence in the suit property.
  21. He contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were not innocent purchasers for value without notice and hence, cannot claim good title to the respective portions constituting his one-acre plot. He urged the Court to allow his prayers as sought in the further amended originating summons and grant him the reliefs sought.

### **Response by the 1<sup>st</sup> Defendant**

22. The 1<sup>st</sup> Defendant (Hannah Wangari Kinuthia) who testified as DWI in this matter filed a statement of defence in response dated 16<sup>th</sup> May, 2023 in which she admitted having entered into a Sale Agreement dated 20<sup>th</sup> February, 1999 with the Plaintiff for the purchase of Plot No.37 situate in Ndumberi and/ or one (1) in LR NO. LIMURU/KABUKU/164/9.
23. The 1<sup>st</sup> Defendant's testimony corroborated the Plaintiff's testimony that as at the time of signing the Sale Agreement with the Plaintiff, LR NO. LIMURU/KABUKU/164/9 was not registered in her name and that the Plaintiff was well aware of this fact.
24. The 1<sup>st</sup> Defendant stated that the Purchase price for Plot No.37. Ndumberi and/ or One (1) acre in LR NO. LIMURU/KABUKU/164/9 was Kshs 700.000/= and that the Plaintiff has only paid her Kshs 500,000/= leaving a balance of Kshs 200,000/= which remains unpaid to date.



25. It was the 1<sup>st</sup> Defendant's testimony that because she knew the Plaintiff personally, she allowed and gave him permission to take possession of the one (1) acre in LR NO, LIMURU/KABUKU/164/9 before paying the full purchase price and that it was pursuant to that permission that the Plaintiff is still in occupation of the said land, although she claims to have revoked that permission in September, 2014.
26. The 1<sup>st</sup> Defendant stated further that in September 2014, her Advocate wrote a demand letter to the Plaintiff demanding that the Plaintiff vacates the One (1) acre portion of land that he occupied and that in return, the 1<sup>st</sup> Defendant would refund to him Kshs 500,000/- which he had paid as part of the purchase price together with interest at 20% as provided under clause 8 of the Sale Agreement executed on the 20th February 1999.
27. The 1<sup>st</sup> Defendant averred that although it was the Plaintiff who breached the Sale Agreement by failing to pay the full purchase price as per the sale agreement, she had agreed out of goodwill to refund the Plaintiff part of the purchase price which he had paid to her.
28. The 1<sup>st</sup> Defendant further stated that, she later on subdivided LR No. 164/26 into two titles and sold LR. NO.164/72 to the 3<sup>rd</sup> Defendant and LR NO. 164/73 to the 2<sup>nd</sup> Defendant.
29. She averred that as at the date of Sale of LR NO.164/72 and 164/73, she was the registered proprietor of the parcels of land and that no caveat or encumbrance had been registered against the said titles.

### **Response by the 2<sup>nd</sup> Respondent**

30. In his response, the 2<sup>nd</sup> Defendant (Samuel Mwaura Felix Kariuki) who testified as DW2 in this case, swore an affidavit in response to the Plaintiff's claim on 17<sup>th</sup> July, 2017. He too lodged a counter-claim dated 28<sup>th</sup> October, 2021 in which he stated that he was the registered owner of the land known as land reference number 164/73 originally comprised in land reference number 164/26/4 and that land reference number 164/73 is a resultant portion of the sub division of land reference number 164/26/4.
31. He further stated that he was a bona fide purchaser for value without notice and that his interests as the registered owner were registered on 5th August, 2015 and registered as Volume N 116/ Folio No. 8/1 File No 30832. He averred that the Plaintiff's claim for adverse possession doesn't meet the test for adverse possession.
32. The 2<sup>nd</sup> Defendant also stated that if at all the Plaintiff has any recourse, it is against the 1<sup>st</sup> Defendant. It is provided for under clause 8 of the sale agreement dated 20<sup>th</sup> February 1999 which provides that the Plaintiff/Applicant is entitled to a refund of purchase paid in addition to twenty per cent interest in case of default.
33. The 2<sup>nd</sup> Defendant denied the allegation that the transfer of title was done after the institution of this suit. On the contrary, he stated that the transfer of title was undertaken on 5th August, 2015 while the Originating summons was filed in the court's registry on 14<sup>th</sup> August 2015, more than a week later.
34. The 2<sup>nd</sup> Defendant therefore prayed for the dismissal of the amended originating summons with costs alleging that he is a bona fide purchaser for value without notice of any past conduct between the Plaintiff and the 1<sup>st</sup> Defendant.
35. In his counter-claim, the 2<sup>nd</sup> Defendant urged the Court to enter judgment in his favour against the Plaintiff and grant him the reliefs sought as follow:
  - a. That the Honourable Court do issue a mandatory Order directed at the Plaintiff, his servants, employees, representatives, agents and/or any other person claiming through or under the



Plaintiff to vacate Land Reference Number 164/73 and immediately remove all the structures erected thereon within 30 days of the order being issued;

- b. That if the Plaintiff do not comply with the Order in 1 above the 2<sup>nd</sup> Defendant be at liberty to evict the Plaintiff from Land Reference Number 164/73 under the supervision of the Officer Commanding Police Station, Tigoni Police Station, Kiambu County;
- c. An order directed at the Plaintiff to furnish this Honourable Court with an account of the rental proceeds and other financial benefits derived from use of Land Reference Number 164/73 and judgment be entered in favour of the 2<sup>nd</sup> Defendant and against the Plaintiff for the said sums;
- d. An order directed at the Plaintiff to pay the 2<sup>nd</sup> Defendant mesne profits from August, 2015 to the date of the Judgment;
- e. Interest on (c) and (d) above at court rates from the due date until payment in full;
- f. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant, and
- g. Any such other relief that this Honourable Court may deem appropriate and fit.
- h. That it is in the interest of fairness and justice that his counterclaim herein be allowed as prayed.

### **Response by the 3<sup>rd</sup> Defendant**

36. On his part, the 3<sup>rd</sup> Defendant (Michael Muhia Ngae) testified as DW3 in this matter and filed written submissions dated 2<sup>nd</sup> February, 2024 in which he stated that he was the registered proprietor of the parcel or piece of land known as land Reference Number 164/72 containing by measurements nought decimal four nought five (0.4005) of a hectare or thereabouts situate in Kabuku area in Limuru sub-county, Kiambu County in the Republic of Kenya by dint of a Conveyance dated 4<sup>th</sup> December 2013 and registered as Presentation Number 2975 in Volume N108 Folio 240/1 File 29483.
37. The 3<sup>rd</sup> Defendant stated that the suit property was a resultant subdivision of Land Reference Number 164/26/3 which he purchased from the 1<sup>st</sup> Defendant in two portions that is, 0.75 of an acre or 0.303 of a hectare through an agreement dated 12<sup>th</sup> January, 2006 and 0.25 of an acre or 0.101 of a hectare pursuant to an agreement dated 14<sup>th</sup> December, 2007.
38. The 3<sup>rd</sup> Defendant averred that the two portions were consolidated by dint of Recital D of the Agreement for Sale dated 14<sup>th</sup> December 2007 after completion of subdivision of Land Reference Number 164/26/3, which gave rise to, among other parcels, Land Reference Number 164/72 measuring 0.4005 of a hectare or thereabouts.
39. It was the testimony of the 3<sup>rd</sup> Defendant that he visited the suit property before entering into the agreements to purchase and that when he bought the suit property, it was vacant, and nobody lived therein; not even the Plaintiff. He alleged that he bought the land from the 1<sup>st</sup> Defendant openly and transparently.
40. The 3<sup>rd</sup> Defendant stated further that after purchasing the suit property in December 2007, he took possession and has been in actual possession and occupation since then. He also stated that he has built a residential house on the suit property and has been living there with his family. He added that he took possession and occupation of the suit property while waiting for the title processing, which took several years.



41. He also avers that he is a bona fide purchaser for valuable consideration of the suit property known as land reference Number 164/72 without notice of any adverse claim and hence, he has a good title to the land.
42. The 3<sup>rd</sup> Defendant further contends that after the boundaries to the suit property (L. R. No. 164/72) were fixed and conveyance registered in his favour, the Plaintiff attempted to trespass on his property by building makeshift structures in 2014. He averred that the Plaintiff only emerged after the surveyor placed the beacons during the subdivision of L. R. No. 164/26/3. The Plaintiff built the makeshift structure in his bid to lay a claim on the portion of L. R. No 164/72.
43. It was the 3<sup>rd</sup> Defendant's further testimony that when the Plaintiff built the makeshift structures on the part of L. R. No. 164/72 sometime in the year 2014, he served him with a notice to vacate and remove the structures vide a letter dated 21<sup>st</sup> June 2014. He stated that the Plaintiff together with his agents (son) have been threatening to cause violence and the 3<sup>rd</sup> Defendant had reported the matter to the area Chief.
44. The 3<sup>rd</sup> Defendant alleged that as a result of the attempted encroachment on the suit property by the Plaintiff, he filed suit against him in Limuru being SRM Civil Case No. 2 of 2015 for trespass or interfering with the boundaries on the land L.R No. 164/72 but the suit was dismissed on a technicality being a boundary dispute which ought to have been lodged before the Land Registrar first.
45. He stated that the case was prompted by the violent uprooting of the beacons on the suit property by the Plaintiff's son in the company of machete-wielding goons.
46. Regarding the Survey Reports filed by PW1, the 3<sup>rd</sup> Defendant stated that he did not authorize any surveyor to survey or verify the boundaries on the suit properties. He stated that the surveyor was instructed by the Plaintiff's Advocate and that the report demonstrates the said encroachment anyway or trespass on L.R. No. 164/72 but has no other probative value.
47. The 3<sup>rd</sup> Defendant also filed a counterclaim for trespass against the Plaintiff. He asserts that the portion trespassed upon by the Plaintiff is about 0.10 of a hectare and he seeks compensation since June 2014 and has filed an affidavit dated 7<sup>th</sup> December 2021 in support of his claim for compensation for the trespass.
48. In his Counterclaim, the 3<sup>rd</sup> Defendant has sought an eviction Order against the Plaintiff from the suit property illegally trespassed upon and payment of the mesne profits since 21<sup>st</sup> June 2014.

#### **Evidence adduced for the Plaintiff**

49. On 5<sup>th</sup> June, 2023, when the matter came up for plenary hearing, Joseph Muchanga, the County Surveyor of Kiambu County testified for the Plaintiff as PW1 regarding L.R. No. 164/72 and 164/73.
50. According to PW1, they received a letter requiring them to confirm the land occupied by the Plaintiff and indeed, they went to the ground to confirm after which he prepared a report dated 11<sup>th</sup> September, 2020.
51. According to the said report, the Plaintiff occupied a total area of 1 acre on L.R. No. 164/72 and L.R. No. 164/73. He attached a sketch map to his report showing the area which the Plaintiff occupied and stated that the survey of the said parcels of land was done in 2011.
52. PW1 averred that the owner of the said parcel of land is Hannah Wangari Kinuthia who subdivided her land into 5 portions out of which the Plaintiff was occupying a portion lying on both L.R. No.



- 164/72 and 164/73. He added that even the other occupants of that land do not occupy their specific parcels of land. He produced his report and sketch map marked as PExh. (a) and (b).
53. PW1 also prepared a report dated 8<sup>th</sup> November, 2019 regarding L.R. 164/74 and L.R. 164/75 upon request by Francis K. Njenga to point out the position of his land on the ground. His findings were that the ground positions were different from the survey plans and that the fencing did not correspond with the survey plans. He also produced the report and the sketch maps in respect to L.R. No. 164/74 and L.R. 164/75 which were marked as PExh. 2(a) and (b).
  54. Responding to questions by the Advocate for the 1<sup>st</sup> Defendant, Mr. Shairi, PW1 stated that he had carried out the survey before 11<sup>th</sup> September, 2020 even though he did not indicate the date on his report (PExh1(a)). He was accompanied by some of his assistants to the ground and he did not inform either the owner of L.R. No. 164/72 or the owner of L.R. 164/73 of his visit/survey to the land.
  55. PW1 stated that the survey plan had indicated Hannah Wangari Kinuthia as the proprietor of the original block, that is L.R. 164/26. He admitted that he was not the one who prepared the particular survey plan.
  56. Upon cross-examination by Mr. Kimani, learned counsel for the 2<sup>nd</sup> Defendant, PW1 could not recall the Plaintiff's interest on the land as he did not have his letter in court. He asserted that for him to act upon instructions to carry out a survey, he must have had a letter, received payments and that the instructing client must have shown him his ownership documents.
  57. PW1 admitted he was not shown any documents in this case and that the Advocate only requested him to confirm the acreage occupied on L.R. 164/73 since his client had an interest on the land. He stated that there was a semi-permanent structure on the land but there were no structures on L.R. 164/72. He had no idea about the Plaintiff's case or the outcome of the case by Francis K. Njenga.
  58. PW1 stated further that he did not survey L.R. 164/9 and L.R. 164/20. He also stated that L.R. 164/71-5 came from L.R. 164/26. He admitted that it was possible that L.R. 164/9 and 164/20 were different plots as they had fixed boundaries. He therefore only needed to establish their respective co-ordinates.
  59. Still on cross-examination, PW1 stated he had been informed that the owners of other parcels of land would be present during the survey. He had invited the Area Chief to attend the occasion of identification of beacons but the Chief did not attend. He however did not have a copy of the letter sent to the chief in Court.
  60. PW1 stated that a representative of the Plaintiff by the name John was present during survey and he is the one who showed them the area which the Plaintiff was allegedly occupying.
  61. PW1 also asserted that the Plaintiff had told them that he bought the land although he did not show them any title documents. He admitted that he did not know whether L.R. 164/72 and 164/73 had titles.
  62. In responding to a question by the Court, PW1 stated that the Plaintiff had showed him a life fence marking the area he was occupying.
  63. Patrick Kabue Muchene, the (Plaintiff herein) testified as PW2 adopting his sworn affidavits dated 14<sup>th</sup> October, 2021, a further affidavit sworn on 16<sup>th</sup> November, 2021 and yet a further affidavit sworn on 14<sup>th</sup> December, 2021 as his evidence in chief.
  64. PW2 also relied upon the annexures to his affidavits which the Court marked as PExh 3-6 save for PKM 6 and 7.



65. The Plaintiff, (PW2) testified that he was the one who took the photographs that he had attached to his supporting affidavit and urged the Court to grant his prayers as prayed in his further amended originating summons further amended on 14<sup>th</sup> October, 2021.
66. It was the Plaintiff's testimony that he has been in occupation of the subject parcel of land enjoying quiet possession since the year 1999.
67. He urged the court to dismiss the Counter-claims by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and to declare him the owner of the portion that he occupies.
68. Upon cross-examination by Mr. Shairi, learned counsel for the 1<sup>st</sup> Defendant, PW2 stated that he bought the land from Hannah Wangari Kinuthia pursuant to an agreement dated 20<sup>th</sup> February, 1999. He stated that the land was by then known as Limuru/Kabuku/164/9 according to Paragraph 6 of the said agreement and that was the number given to him by the Vendor.
69. According to PW2, he did not conduct any search before he purchased the land because the Vendor (the 1<sup>st</sup> Defendant herein) did not have a title to the land in his name by then.
70. It was PW2's testimony that the 1<sup>st</sup> Defendant had inherited the land from his father Mwangi Mbothu who was deceased by then and that as at that time, the land was still in the name of Mwangi Mbothu (deceased) but in the hands of the Administrator of the Estate of the deceased.
71. PW2 averred that he had paid the full purchase price of Kshs 700,000/= and that it was Hannah Wangari Kinuthia (1<sup>st</sup> Defendant) who allowed him entry into the land.
72. PW2 contended that even though the 1<sup>st</sup> Defendant denies that he had not paid her the full purchase price for the property, there was no time that the 1<sup>st</sup> Defendant offered to refund him the purchase price paid to her with 20% interest pursuant to the default Clause (Clause 8) of the sale agreement.
73. However, the Plaintiff avers that he wouldn't have agreed to a refund of the purchase price anyway. He is seeking the land where he stays and occupies. He denied being aware that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants had bought the land or when they bought it.
74. The Plaintiff asserted that he entered into the land in 1999. He took possession of it and even fenced it. He could however, not recall when he cleared the balance of the purchase price.
75. While responding to a question by Mr. Kimani, learned counsel for the 2<sup>nd</sup> Defendant, the Plaintiff stated that he bought the land in 1999 and that he has been in occupation since then. He did not have an agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
76. The Plaintiff insisted that he had an agreement with the 1<sup>st</sup> Defendant and the purchase price was Kshs 700,000/=. He admitted that the documents which he has produced in Court showed a balance of Kshs 54,000/= as unpaid.
77. The Plaintiff admitted that although Clause 7 of the agreement of 20<sup>th</sup> February, 1999 provided that the balance of Kshs 200,000/= be paid within 6 months from the date of transfer of the plot to the purchaser, the Plaintiff paid money to the 1<sup>st</sup> Defendant only when the 1<sup>st</sup> Defendant was in need of money and requested him to. He insisted that his claim against the 1<sup>st</sup> Defendant was one of adverse possession.
78. The Plaintiff stated that he had filed his case on 11<sup>th</sup> August 2015. He accused the 2<sup>nd</sup> Defendant of fraud claiming that the 2<sup>nd</sup> Defendant had conspired with the 1<sup>st</sup> Defendant to illegally obtain title to



- L.R. 164/72. He stated he has built a house on the land which is connected with electricity. He alleged that there is a well and a fence with cedar posts and barbed wire (seng'enge).
79. The Plaintiff stated that his agreement with the 1<sup>st</sup> Defendant dated 20<sup>th</sup> February 1999 was in regard to Plot No. 37 which apparently had a dispute in Court and that it was agreed that in the event that the 1<sup>st</sup> Defendant lost the case, then she was to give him one acre of her land in Limuru being title No. Limuru/Kabuku/164/9.
80. The Plaintiff asserted that the 1<sup>st</sup> Defendant did not show him any documents confirming ownership of the Land that she was purportedly selling to him. He insisted that his claim against the 1<sup>st</sup> Defendant was one of adverse possession and not a claim to enforce the agreement.
81. While responding to a question by Mr. Gathumbi, learned counsel for the 3<sup>rd</sup> Defendant, the Plaintiff stated that he had been in occupation of the suit land since 1999 up to date.
82. The Plaintiff confirmed that he knew the 3<sup>rd</sup> Defendant (Michael Muhia Ngae) who was introduced to him by the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant had told him that she had sold land to the 3<sup>rd</sup> Defendant next to his land (Plaintiff's).
83. The Plaintiff acknowledged that the 3<sup>rd</sup> Defendant was his neighbour but he did not know the size of the land that the 1<sup>st</sup> Defendant had sold to him. He alleged that there were no physical beacons on the ground and that the 3<sup>rd</sup> Defendant had entered his land in 2006 and even fenced it. He averred that he was claiming part of the 3<sup>rd</sup> Defendant's land though.
84. In re-examination, the Plaintiff stated that the basis of his claim against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was adverse possession because they obtained titles to the land while he was in occupation and possession of his one-acre portion of land.
85. The Plaintiff asserted further that at the time when the 1<sup>st</sup> Defendant introduced the 3<sup>rd</sup> Defendant to him, she showed him (3<sup>rd</sup> Defendant) the boundaries between the portion of land that she wanted the 3<sup>rd</sup> Defendant to buy and the portion of land that the Plaintiff was occupying then.
86. The Plaintiff stated further that according to the Map held by the 3<sup>rd</sup> Defendant, his land now extends to include the Plaintiff's portion of land. He averred that he had paid the 1<sup>st</sup> Defendant the full purchase price and that she has not demanded any balance from him.
87. While responding to a question by the Court, the Plaintiff stated that he had no information when the grant of Letters of Administration of the Estate of Mwangi Mbothu was confirmed. The Plaintiff averred it was the 1<sup>st</sup> Defendant who came up with land reference numbers L.R. 164/9 and 164/20. He insisted that he was still in occupation of the space that the 1<sup>st</sup> Defendant had shown him. He also stated that he lives on the land and that he keeps livestock on that land. He stated further that the land is agricultural and that is where he has built his home.

### **Evidence for the Defendants**

88. For the Defendants' cases, three witnesses testified for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as DW1, DW2 and DW3 respectively.
89. Advocate for the 1<sup>st</sup> Defendant, Mr. Mwaura, learned counsel began with an opening statement explaining that although the 1<sup>st</sup> Defendant had entered into an agreement with the Plaintiff, the Plaintiff did not perform his part of the bargain fully. The 1<sup>st</sup> Defendant nevertheless permitted the Plaintiff's occupation of the Land. She only ordered the Plaintiff to vacate the Land sometimes in 2014



- but he defied her and filed this suit in Court. The 1<sup>st</sup> Defendant's Defence is that the Plaintiff can only claim adverse possession from the 13<sup>th</sup> November, 2014 until the date of filing of the suit in 2015.
90. DW1 (Hannah Wangari Kinuthia) confirmed her knowledge of the Plaintiff (Patrick Kabue Muchene) as well as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as she had previously had a relationship with all of them where she had sold them land.
  91. While relying on her witness statement dated 6<sup>th</sup> July, 2023, DW1 stated that the Plaintiff (Patrick Kabue) had only paid her Kshs 500,000/= of the purchase price leaving a balance of Kshs 200,000/= which he had not paid since 1999.
  92. It was DW1's testimony that the land that she was to sell to the Plaintiff was no longer in existence since it had already been sold to another person after the Plaintiff had failed to pay her the balance of the purchase price. She relied on her witness statement, a statement of defence and her list of documents which were produced and adopted by the Court as DW1's evidence in chief.
  93. DW1 admitted that she had allowed the Plaintiff to enter into her land in 1999. She also confirmed having entered into a sale agreement with the Plaintiff, the first of which was dated 20<sup>th</sup> February, 1999 and a second one dated 25<sup>th</sup> July, 1999 which was executed by Mr. Gibson Kamau Kuria Advocate. Her intention had been to sell one-acre of land to Patrick Muchene. The one-acre land she wanted to sell to the Plaintiff was to be excised from L.R. No. Limuru/Kabuku/169/9 which comprised of 5 acres.
  94. DW1 confirmed her Demand Letter (DW1 E1) which gave the Plaintiff 60 days to vacate the land. It was in that letter where DW1 claimed the balance of the purchase price of Kshs 200,000/= from the Plaintiff. She denied that the Plaintiff is in possession of the land that she was to sell to him. The Demand letter DW1 E1 was addressed to the Plaintiff through the address of his former place of work.
  95. It was DW1's further testimony that she had sold Michael Muhia Ngae (the 3<sup>rd</sup> Defendant herein)  $\frac{3}{4}$  of an acre pursuant to an agreement dated 12<sup>th</sup> January, 2006 and  $\frac{1}{4}$  of an acre through a second agreement dated 14<sup>th</sup> December, 2007. She could however not recall when survey on the land was done for sub-division.
  96. DW1 also sold land to Samuel Mwaura Felix (the 2<sup>nd</sup> Defendant herein) although she could not remember the purchase price or the date of agreement in that regard. However, she stated that the 2<sup>nd</sup> Defendant paid her a substantial amount of the purchase price leaving a small balance. She averred that a small portion of the land that she was to sell to the Plaintiff falls on the land that she had sold to the 2<sup>nd</sup> Defendant.
  97. DW1 admitted she was aware of a case pending in Thika Law Courts where one of the buyers had a complaint but she had not taken any action to remove the Plaintiff from the land other than the demand letter earlier mentioned which was sent through her Lawyer.
  98. Upon cross-examination by Mr. Kimani, learned counsel for the 2<sup>nd</sup> Defendant, DW1 confirmed having sold one-acre of land to the 2<sup>nd</sup> Defendant in 2015. She stated that the 2<sup>nd</sup> Defendant has not yet cleared the balance of the purchase price. She was also aware that the Environment and Land Case at Thika High Court had been determined. She has no issue whatsoever with the 2<sup>nd</sup> Defendant (Samuel Mwaura Felix Kariuki).
  99. In response to questions by Mr. Gathumbi, learned counsel for the 3<sup>rd</sup> Defendant, DW1 confirmed that she sold  $\frac{3}{4}$  of an acre of land to him and  $\frac{1}{4}$  of an acre subsequently thus making a total of one acre.
  100. DW1 also stated that she is the one who took the 3<sup>rd</sup> Defendant (Michael Muhia Ngae) to the land and that there was no one in occupation by then. She averred that the 3<sup>rd</sup> Defendant had paid him the



- entire purchase price and she therefore transferred the two parcels of land to him. She stated that the two portions are co-joined to make one acre and that the 3<sup>rd</sup> Defendant lives on the land.
101. She alleged that the Plaintiff was claiming a portion of the 3<sup>rd</sup> Defendant's land. She averred that at the time when she sold the said land to the 3<sup>rd</sup> Defendant, the Plaintiff was not in possession of that land and that he has never been in possession. She also averred that she had no claim against the 3<sup>rd</sup> Defendant.
  102. In response to questions by the Court, DW1 stated that she had always been ready to refund Patrick Kabue (the Plaintiff) money paid to her and that she had even instructed her advocate to refund him the money but that the Plaintiff had refused to collect the money from the Advocate. However, she could not remember the year when she instructed her Advocate to refund the Plaintiff's money.
  103. DW1 asserted that she still remains with  $\frac{1}{4}$  of an acre out of the 5 acres of land where she lives with her children and that she has title in her name for the  $\frac{1}{4}$  acre.
  104. The 2<sup>nd</sup> Defendant's adopted his replying affidavit as his evidence in chief together with annexures thereto. He confirmed his Counter-claim dated 28<sup>th</sup> October, 2021.
  105. It was the 2<sup>nd</sup> Defendant's case that he bought land L.R. No. 164/73 (Limuru East) from the 1<sup>st</sup> Defendant (Hannah Wangari) in 2015. It was his case that the land was free from encumbrances at the time of purchase.
  106. DW2 stated that he followed due process and paid the purchase price leaving a small balance. He stated that it was after he was served with summons from Court that he decided not to pay the remaining balance of the purchase price until the determination of the case in court.
  107. It was DW2's testimony that by the time he was served with Court summons, he had transferred title of the land to his name but he could not take possession since the Plaintiff who was occupying the land and had erected a small structure which occupied a portion of his land.
  108. DW2 alleged that the Plaintiff does not live on the land. He asserted that nobody lives on that land. He denied the Plaintiff's claim alleging that it does not hold water since he bought the land free of any encumbrances and he has title to the land which he got in August, 2015. He also alleged that he was served with Court summons just one week after acquiring title to his land.
  109. Upon cross-examination by Mr. Baiya for the Plaintiff, DW2 stated that the purchase price was Kshs 6.0 million and that he has paid the same save for a balance of Kshs 500,000/=.
  110. DW2 averred that he had paid the purchase price for the land both in cash and through bank transfers. He could however not tell how much money was paid by cash and how much was paid through bank transfers to the Vendor's bank account.
  111. DW2 prayed for an eviction order against the Plaintiff. He averred that at the time of purchase of the said land, he was not aware that the Plaintiff was occupying part of the land and that he only became aware after purchasing the land.
  112. DW2 stated that the sale agreement with the Vendor was executed by Mwaura Shairi Advocate who acted for both the Vendor and the himself in June, 2015 but he could not remember the exact date. He also stated that the Plaintiff was a stranger to him and still remains a stranger.
  113. It was DW2's testimony that his claim was based on a Valuation report by Fidelity Valuers Ltd. He stated that he was the one who commissioned the valuation of the land by Fidelity Valuers Limited but he did not wish to call them as witnesses in his case.



114. Though DW2 admitted seeing trees and structures erected on the land when he first visited, he said he did not know when the Plaintiff started occupying the land and whether there was electricity installed on those structures. He said he could not have paid for the land if at all he knew that someone else was claiming part of the land. He stated that part of his land was the subject of a case in the ELC Court at Thika.
115. On re-examination by his Advocate Mr. Kimani, DW2 stated that there was no dispute between himself and the vendor of the land about payment of part of the purchase price. He also stated that he saw the trees along the fence and the house that was on the land but he did not ask who the owner of the house was. According to him, the house was not occupied. He was only served with Court pleadings just one week after registering his conveyance.
116. The 3<sup>rd</sup> Defendant Michael Muhia Ngae too testified as DW3. It was his testimony that he was joined into this case in the year 2021. He had filed a replying affidavit dated 18<sup>th</sup> November, 2021 and a Counter-claim dated 7<sup>th</sup> December, 2021. He adopted the replying affidavit together with annexures as his evidence in Chief. The annexures thereto were marked as DW3Exh.1-13.
117. DW3 alleged that he bought  $\frac{3}{4}$  of an acre in 2006 and an additional  $\frac{1}{4}$  in 2007 from the 1<sup>st</sup> Defendant making up one acre. He acquired title to the amalgamated portions through conveyance on 4<sup>th</sup> December, 2013.
118. DW3 alleged that he conducted due diligence before he bought the land and that the Plaintiff was not in occupation when he bought the land. He lives on the land and according to him, the Plaintiff only came to the scene in 2013 when beacons were fixed and that is when the dispute arose.
119. It was DW3's testimony that when beacons were fixed, the Plaintiff sent his agents to uproot them and as a result, there was a case in Limuru Law Courts. DW3 asserts that there were attempts to resolve the matter amicably out of court but the Plaintiff declined to assent to it. DW3 stated further that the case in Limuru Law Courts was however dismissed. He alleged that the Plaintiff has encroached into his land by almost half an acre.
120. In his Counter-claim, DW3 is seeking an eviction order against the Plaintiff and Mesne profits as tabulated in the valuation report. DW3 asserted that the portion of land that the Plaintiff is claiming from his land L.R. No. 164/72 and from L.R. No. 164/73 totals to one acre of land. He urged the Court to dismiss the Plaintiff's case against him and allow his Counter-claim.
121. While responding to questions from Mr. Baiya for the Plaintiff in cross-examination, DW3 stated that the Vendor did not introduce him to the Plaintiff and that his first encounter with the Plaintiff was when the Plaintiff together with his sons uprooted his beacons.
122. According to DW3, the structures on the land that the Plaintiff claims ownership over were erected in 2014 and there is electricity connected thereto. DW3 stated that the connection of electricity into the Plaintiff's house was without his consent but he did not raise any issues with the KPLC because there was already a case in Limuru Law Courts. DW3 did not wish to call the land valuer as a witness in his case. He averred that the case in Limuru Law Courts was struck out without being heard on merits.
123. In answer to a question by Mr. Kimani for the 2<sup>nd</sup> Respondent, DW3 stated that the Plaintiff was not in occupation when he bought the land. He stated that the Plaintiff only showed up after beacons had been fixed in 2014.
124. According to DW3 the Plaintiff's case for adverse possession cannot hold. He stated that he has not been able to utilize the  $\frac{1}{2}$  acre of his land because of threats from the Plaintiff's agents.



125. Upon re-examination, DW3 stated that he did not know who planted the trees on the land; that at the time of purchasing the land, it was vacant and that the Plaintiff only showed up in 2014.

### **Court's directions**

126. The Court at the close of the trial gave directions for the parties to file their written submissions. The parties complied with the court's directions and the court has had the opportunity to read and consider the said submissions which form part of the record of the court.

### **Issues for Determination**

127. Having considered the pleadings and the claim by the Plaintiff and the responses and counter-claims by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, the evidence adduced at the hearing and the submissions filed herein, the issues for determination are first and foremost the questions framed by the Plaintiff in his Originating Summons. Additionally, the court will have to determine whether the counterclaims by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants against the Plaintiff are merited. The issues therefore are:
- a. Whether the Plaintiff Patrick Kabue Muchene has under the *limitation of actions Act* (chapter 22 laws of Kenya) become entitled to Land Reference Number-LIMURU/KABUKU/164/9 0.180 hectares in L.R. No. 164/72 and 0.2238 hectares in L.R. No. 164/23 by way of adverse possession on the grounds that the Plaintiff has openly, peacefully and as of right become being in adverse possession of the said parcels of land since year 1999 to date?
  - b. Whether the Plaintiff PATRICK KABUE MUCHENE is entitled to be registered as the proprietor of Land Reference No. 164/26/4 0,180 hectare in LR. No. 164/72 and 0.2238 hectares in L.R. No. 164/73 absolutely in place of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants?
  - c. Whether the counterclaims by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants against the Plaintiff are merited.
  - d. Who should bear the costs of the suit and the counter-claims?

### **Analysis and Determination**

128. Adverse possession is one principle of law that one may confidently say is well settled. There is a plethora of decisions on adverse possession by the Superior courts of this country as well as other commonwealth jurisdictions.
129. In the case of Peter Okoth vs Ambrose Ochido Andajo and Benedict Odhiambo Oketch (2021) eKLR, the court in defining what amounts to adverse possession referred to the Court of Appeal decision in Wilson Kazungu Katana & 101 others vs Abdalla Bakshwein & another (2015) eKLR, where the court had stated that for a claim of adverse possession to succeed:-
- i. The subject parcel of land must be registered in the name of a person other than the Applicant;
  - ii. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner; and
  - iii. The Applicant must have been in occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner.
130. The Court of Appeal in the Wilson Kazungu Katana case (supra), had discussed other decided cases on the concept of adverse possession including the case of Kasuve Vs Mwaani Investments & Wanje Vs Saikwa.



131. The court elaborated that for a claimant to succeed in a claim of adverse possession, he must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of not less than 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.
132. In the Wanje case, the court expressed the view that in order to acquire 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 constitutes of acts done which are inconsistent with the proprietor's enjoyment of the soil for the purpose for which it was intended to be used. Therefore, a person who occupies another person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and his possession is not illegal (adverse).
133. The persuasive decision of the Indian Supreme Court in the case of Kamataka Board of Wakf vs Government of India & Others (2004) 10 SCC 779, emphasized the well settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario" meaning, peaceful, open and continuous.
134. Similarly, in the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR Kuloba J (as he then was) enumerated the elements that need to be proved by a party invoking the doctrine of adverse possession as follows:
- a. The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
  - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
  - c. The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
  - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
  - e. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
  - f. The possession must be continuous uninterrupted, unbroken, for the necessary statutory period.
  - g. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
135. The Court of Appeal in the case of Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui [2017] eKLR while acknowledging adverse possession as a common law doctrine restated the above passion citing the India Supreme Court decision in the case of Kamataka Board of Wakf vs Government of India & Others [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't



affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

136. It is therefore trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner.
137. Kuloba J (as he then was) in the above cited case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, tacitly elaborated the issue in the following words:

“The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with leave of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called “adverse”. Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner’s will accompanied the occupier’s possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession....”



138. It is not in dispute that the Plaintiff took possession of the land he now claims under adverse possession with the express permission of the owner, the 1<sup>st</sup> Defendant pursuant to the agreements entered into between them in 1999. The Plaintiff's entry into the land was therefore permissive. The Plaintiff admitted as much in his testimony. The 1<sup>st</sup> Defendant was explicit that she was the one who allowed the Plaintiff access of the land.
139. It was therefore incumbent upon the Plaintiff to prove when and how his occupation of the land became adverse to that of the 1<sup>st</sup> Defendant, the original owner, as he refers to her in his pleadings and submissions.
140. I have carefully considered the evidence adduced by the Plaintiff and keenly perused his submissions as well. I find nothing at all to demonstrate when and how his occupation of the land became adverse to that of the 1<sup>st</sup> Defendant. That is a critical element to establish adverse possession. Without that proof, the Plaintiff's claim for adverse possession cannot succeed. The Plaintiff testified as if his claim was for enforcement of the agreement with the 1<sup>st</sup> Defendant. However, as I categorically noted at the beginning of this judgement, the Plaintiff does not seek to enforce the agreement(s) with the 1<sup>st</sup> Defendant in this suit. What he seeks is a declaration that he has acquired the portions of L.R. 164/72 and L.R 164/73 by way of adverse possession.
141. The burden of proof was on the Plaintiff as the Claimant to prove his case. Section 107 of the *Evidence Act*, Cap 80 of the laws of Kenya provides that: -
- “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
142. In the case of *Kirugi and Another –vs- Kabiya & 3 others* (1987) KLR 347, the Court of Appeal held that:
- “The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof.”
143. My finding is that the Plaintiff has not proved his case of adverse possession as by law required. His possession, if at all, was by leave and licence of the owner and therefore not adverse. His claim against the Defendants therefore fails.
144. I need to add that the Plaintiff did not also prove possession of the specific portions claimed for the statutory period of not less than 12 years. The evidence of the surveyor who was allegedly sent to the ground by the Plaintiff was not conclusive as to how he actually established where exactly the Plaintiff was allegedly occupying.
145. I now turn to the counter-claims by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
146. By filing a claim of adverse possession against them, the Plaintiff was affirming their ownership of their specific parcels of land. In his claim he is categorical that they are the registered proprietors of their respective parcels of land. One can therefore confidently say that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' ownership of their respective parcels of land is undisputed. The 1<sup>st</sup> Defendant confirmed selling the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants their respective parcels of land and transferring the title to them. I therefore need not overemphasize the point. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are the legal owners of their respective Parcels of land.



147. That being the position, I grant the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants eviction orders against the Plaintiff and order the Plaintiff to forthwith vacate and remove all his structures from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respective parcels of land in the next thirty (30) days from the date of this judgement failing which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will be at liberty to evict the Plaintiff from their respective parcels of land under the supervision of the Officer Commanding Police Station, Tigoni Police Station, Kiambu County and without any further reference to this court.
148. Both the 2<sup>nd</sup> Defendant and 3<sup>rd</sup> Defendant made claims for mesne profits. The 2<sup>nd</sup> Defendant however had an additional claim whereby she was seeking an order directed at the Plaintiff to furnish this Honourable Court with an account of the rental proceeds and other financial benefits derived from use of Land Reference Number 164/73 and judgment be entered in favour of the 2<sup>nd</sup> Defendant and against the Plaintiff for the said sums.
149. The 2<sup>nd</sup> Defendant did not surely prosecute this second claim for rental proceeds. In any event, there is nowhere that it has been alleged that the Plaintiff had rented out the portion of land he was claiming from the 2<sup>nd</sup> Defendant. That claim must fail.
150. On the claim for mesne profits, I must state that Mesne profits are special damages that must not only be specifically pleaded but strictly proved.
151. Nyamweya J (as she then was) in the case of *Karanja Mbugua & another -vs- Marybin Holding Co. Ltd* [2014] eKLR stated as follows with regard to mesne profits: -
- “This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of [Civil Procedure Act](#)”.
152. The Court of Appeal in the case of *Attorney General -vs- Halal Meat Products Limited* [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -
- “It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See *McGregor on Damages*, 18<sup>th</sup>Ed. para 34-42.”
153. Although the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants claimed for an order of mesne profits no basis of grant of such an award was made. They did not specifically plead the same. Their basis was a valuation report whose maker was not called as a witness to explain his expert opinion. The claim of mesne profits was therefore not proved as by law required. The claim therefore fails.
154. Finally, I come to the issue of costs. The general rule is that costs follow the event.
155. Section 27 of the [Civil Procedure Act](#) provides that costs shall follow the event unless the court or judge shall for good reasons otherwise direct. The section states that:
- “Subject to such conditions and Limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to exercise of those powers. Provided that the costs



of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reasons otherwise direct.”

156. In the case of DMG -vs- EWG [2021] eKLR, the Court held that:

“While exercising its discretion as provided under Section 27, the court is among other issues called upon to look at the following factors:

- a. The subject of the suit;
- b. Circumstances that led to the institution of the suit;
- c. Events which constituted the termination;
- d. The stage at which they were terminated; and
- e. The relationship between the parties and the need for reconciliation amongst the parties.

157. In the case of Republic –vs- Rosemary Wairimu Munene, Exparte Applicant -vs- Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review Application No. 6 of 2014, the Court stated that:

“The issue of costs is the discretion of the Court as provided under the above section (Section 27 of the *Civil Procedure Act*). The basic rule on attribution of costs is that costs follow the event. It is well recognized that the principle that costs follow the event is to be used for compensating the successful party for the trouble taken in prosecuting or defending the case.”

158. The ‘trouble taken in prosecuting or defending the suit’, as stated in the case of Haraf Traders Ltd – versus- Narok County Government [2023], eKLR, refers to:

“... the various lawful and legitimate steps taken by the parties in the case in pursuit of remedy.”

159. Costs are at the discretion of the court, yet, follow the event. See the Halsbury’s Laws of England; 4<sup>th</sup> Edition (Re-issue), {2010}, Vol.10.

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice” (Emphasis added).

160. See also the writing by Justice (Retired) Kuloba Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, (Nairobi) Law Africa) 2011, Page 94 that: -

“Costs are {awarded at} the unfettered discretion of the court, subject to such conditions and limitations as may be prescribed and to the provisions of any law for the time being in force, but they must follow the event unless the court has good reason to order otherwise...”



161. The Plaintiff's case against the Defendants having failed, I grant the Defendants costs of the suit. However, since the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' counter-claims against the Plaintiff only succeeded partially, my decision is that each party should bear its own costs in respect of the counter-claims.

### **Conclusion**

162. The conclusion of this matter is that:-

- A. The Plaintiffs case against the Defendants is dismissed.
- B. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are hereby granted eviction orders against the Plaintiff and the Plaintiff is hereby ordered to forthwith vacate and remove all his structures from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respective parcels of land L.R. No. 164/72 and L.R. No. 164/73, in the next thirty (30) days from the date of this judgement, failing which the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants will be at liberty to evict the Plaintiff from their respective parcels of land L.R. No. 164/72 and L.R. No. 164/73, under the supervision of the Officer Commanding Police Station, Tigon Police Station, Kiambu County and without any further reference to this court.
- C. The Defendants are granted costs of the main suit only against the Plaintiff. Each party to bear its own costs in respect of the counter-claims.

It is so ordered.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF APRIL, 2024.**

**M.D. MWANGI**

**JUDGE.**

In the virtual presence of:

Mr. Baiya for the Plaintiff

Mr. Gathumbi for the 3<sup>rd</sup> Defendant

Ms. Mwaura holding brief for Mr. Mwaura for the 1<sup>st</sup> Defendant

Mr. Kimani for the 2<sup>nd</sup> Defendant

Court Assistant: Yvette

**M.D. MWANGI**

**JUDGE**

