



Kasarani No. 4 Mathare Dancers ((Suing as Through Its Officials Ndungu Nduati, David Wang'ang'a)) v Seven Self Help Group (Through Its Officials Eliud Mbugua, Peter Muchiri and Moses Muchiri) & 7 others (Environment & Land Case 62 of 2019) [2024] KEELC 4424 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4424 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 62 OF 2019**

**A OMBWAYO, J
MAY 30, 2024**

BETWEEN

**KASARANI NO. 4 MATHARE DANCERS PLAINTIFF
(SUING AS THROUGH ITS OFFICIALS NDUNGU NDUATI, DAVID
WANG'ANG'A)**

AND

**SEVEN SELF HELP GROUP (THROUGH ITS OFFICIALS ELIUD MBUGUA,
PETER MUCHIRI AND MOSES MUCHIRI) 1ST DEFENDANT
ELIMONA SELF HELP GROUP (THROUGH ITS OFFICIALS
GEORGE GICHUKI, GACHUHI KARIUKI AND ALFRED
KINYANJUI) 2ND DEFENDANT
DEREK KIHUGI NGANGA 3RD DEFENDANT
MARK WAGATHIRU CHEGE 4TH DEFENDANT
FREDRICK MACHARIA WAIKAO 5TH DEFENDANT
AGRICULTURAL & INDUSTRIAL HOLDINGS LIMITED 6TH DEFENDANT
LAND REGISTRAR, NAIVASHA 7TH DEFENDANT
ATTORNEY GENERAL 8TH DEFENDANT**

JUDGMENT

1. The Plaintiffs commenced this suit vide Originating Summons dated 21st June, 2022 against the Defendants seeking the following orders:



- a. Declaring that the Plaintiff herein has acquired an overriding right over Land Parcel Numbers Gilgil/Gilgil Block 1/ 3048, Gilgil/Gilgil Block 1/3051, Gilgil/Gilgil Block 1/3053, Gilgil/Gilgil Block 1/3054, Gilgil/Gilgil Block 1/3055, Gilgil/Gilgil Block 1/3056, Gilgil/Gilgil Block 1/3057 and Gilgil/Gilgil Block 1/39767 (herein after called the suit lands) under the [Land Registration Act](#) and Section 37 and 38 of the Limitations of Actions Act.
 - b. Injunction to issue against any dealings on the suit lands pending hearing and determination of the Originating Summons herein.
 - c. Directing the Land Registrar Naivasha to register the Plaintiff herein as the proprietor of Land Parcel Numbers Gilgil/Gilgil Block 1/3048, Gilgil/Gilgil Block 1/3051, Gilgil/Gilgil Block 1/ 3053, Gilgil / Gilgil Block 1/ 3054. Gilgil/Gilgil Block 1/3055, Gilgil / Gilgil Block 1/ 3056, Gilgil/Gilgil Block 1/3057 and Gilgil/Gilgil Block 1/39767.
 - d. Such further orders as this Honourable Court may deem fit and just to grant.
 - e. Costs.
2. The 1st and 2nd Defendants filed their Replying Affidavits dated 10th September, 2019 and 25th July, 2019 respectively. The 3rd Defendant also filed his Replying Affidavit dated 25th July, 2019 while the 4th Defendant filed his dated 29th August, 2019. The 5th and 6th Defendants filed their Replying Affidavit dated 14th July, 2021 and 21st November, 2023 respectively.

Plaintiffs' Case

3. David Muchai Wang'ang'a testified as PW1. He testified that he is the vice chair of the plaintiff and has the authority to represent the officials. He produced his Supporting affidavit dated 21/6/2019 which was adopted as his evidence-in-chief. He produced the following from his list of documents:
 1. Note dated 10/7/1987 -PEx1
 2. Letter dated 29/11/2012-PEx2
 3. Title for Gilgil/Gilgil Block 1/5579 Kekopey-PEx3
 4. Mutation form-PMFI-4
 5. Letter dated 13/9/2018-PMFI-5
 6. Certified copies of green cards for Gilgil/Gilgil/Block 1/3048, 3055,3051, 3054, 3053, 3976, 3976/7- PEx6(a) – 6(h).
 7. List dated 19/10/2021 at page 326 for Gilgil/Gilgil/1/3056, 3057-PEx7(a) & 7(b).
4. PW1 produced a further affidavit sworn on 4/2/2020 which was adopted as evidence in chief. He testified that the land they occupy is being claimed by other people but no one has evicted them. He further testified that they occupied the land in 1972 and added that the only time there was a challenge was in 2019.
5. Upon cross examination by Mr. Ngure for the 1st Defendant, PW1 stated that he knows Block No. 32 which measures 18 acres. He confirmed that there was no sale agreement between the plaintiffs and the 6th defendant. He further confirmed that there are permanent and temporary houses on Block No. 32 with the owner being Johnstone Kenyoro. He stated that they bought 128 acres and denied having sold 110 acres and added that the 6th Defendant never claimed 18 acres. He confirmed that the 1st Defendant was claiming parcel number 3048 which property it bought from Boniface Kangure who had bought



- it from Joseph Kinyanjui. He stated that there was a case in Naivasha involving Boniface which was held against him but no decree had been issued. He further stated that by the time the group bought the land, there was no restriction. He added that seven of the members visited the land but admitted that they never conducted due diligence. He denied that there was any subdivision, removal of any beacons or any dispute. He stated that they intended to buy more land where they paid the purchase price but added that there was no agreement. He stated that they were given title for 110 acres yet they were entitled to 128 acres. PW1 was shown PEx2 where he stated that 3048 was amended by Joseph Kinyanjui Kagura and that he was not aware that the 1st Defendant ploughed the land in 2012. He stated that they have never encroached on the land.
6. On cross examination by Njuguna for the 2nd and 3rd Defendant, PW1 stated that he is an official of the plaintiff but admitted that he did not have the register of members. He further stated that authority to swear the affidavit had been agreed by only 5 people which he also confirmed that he had no evidence that they were in fact members. He stated that he became a member in 1989 and added that the group was first registered on 22/2/1986. He further stated that in order for one to be a member he/she had to pay. He admitted that he had no receipt and denied having seen the letter dated 20/08/2014. He stated that there were splinter groups hence there was some discrepancy. He further stated that they have been occupying the parcels of land and they also put caution. He denied that the 3rd Defendant was occupying the land and added that 3051 was occupied by Johnstone Kiyoro. He confirmed that their members were charged with forcing entry into the Defendant's land. He stated that they claimed to have bought the land and added that there was a case on adverse possession.
 7. Upon cross examination by Ndubi for the 8th Defendant, PW1 stated that the Plaintiff is a self-help group with a constitution with 93 members. He confirmed that a resolution was passed to have the summit in 2019 but admitted that he did not have the minutes for the same. He urged the court that it be declared that they have acquired the land by adverse possession. He stated that they bought the land from Gema Holdings. He further stated that out of 110 acres, the group acquired title for Block 40 and he got titles for 3046, 80A, 8 acres. He went on to state that as a group they were given 3 titles and added that the 40 acres was issued in 1993. He stated that they didn't agree with the 6th Defendant. He also stated that they had been settled where they were being asked to leave and added that that they protested that same orally. He confirmed that title No. 3054 issued on 25/6/1996 was in the 5th Defendant's name. He further confirmed that there was a charge on the same title registered on 15/5/1998 and discharged on 30/3/2011. He states that the group had put markings on the said land. PW1 confirmed that Mwewe camp is one kilometer from 3054 and owned by Mr. Chuma Mburu an advocate while 3037 belonged to Makau. He stated that Chuma Mburu was ordered to vacate. He further stated that they have never advertised the property for sale. He confirmed that the surveyor showed the group their land and added that they have fenced their property and it has a title.
 8. On cross examination by Kariuki for the 4th Defendant, PW1 stated that the group occupied the land in 1984 after purchasing it from Gema. He stated that he did not have a share certificate and added that he occupied the land vide permission from the 6th defendant. He stated that the Kshs. 10,000 was for the 18 acres and confirmed that they owned the land as of right. PW1 stated that they purchased the land. He admitted that he did not have membership of the plaintiff. He further admitted that there was no record of the group and that he did not have the resolution to file suit. He confirmed that parcel number 39767 originated from 3052 who later sold it to another lady. He stated that the Defendants found them in possession of the land and added that he filed the case in 2019. He stated that the court cannot know the location of the plots and added that he did not have the surveyors report. He confirmed that there were no survey beacons but they only have markings. He further confirmed that they did balloting but admitted that he did not have documents. He stated that 309767 should be allocated to Francis Mwangi Macharia as it is within the 18-acre plot.



9. On cross examination by Gikonyo for the 6th Defendant, he confirmed that the plaintiff had 40 members but that the number kept on increasing with time to now 93 members. He confirmed that he bought the share in 1989 and admitted that he did not have any documents. He stated that he occupied the 40 acre-block and admitted that there was no land agreement. He further stated that they paid all sums in 1993 after which they were issued with an allocation letter for 110 acres. He also stated that despite paying for the survey fees by 8/12/1993, the land had not been surveyed. He stated that the land was subdivided to 17 portions so as to align with the allocation and issuance of title. He stated that he got title number 5230 but added that he could not recall when. He further stated that the 40-acre block was subdivided earlier than survey. He stated that members were allocated according to shareholding and added that he paid the 1st Defendant for 18 acres in 1998 while the receipt is dated 2009.
10. Upon reexamination, PW1 stated that on the 18 acres they have both permanent and temporary structures. He further stated that Kasarani number 4 Mathare Dancers was registered in 1980 and the certificate was issued in 1986. He stated that on 10/7/1987 the Surveyor surveyed the area and stated that they had exceeded their occupation by 18.85 acres. He also stated that as at 1987, they had occupied 128 acres and they expressed their interest of buying the 18 acres at block 32. He added that they did not enter into any agreement. He stated that the receipt at page 52 was for completion of 110 acres.
11. The witness was referred to PEx2, letter dated 29/11/2012 where he stated that as at 2012, GEMA had not rectified the purchase of the 18.85 acres and that they were in occupation of the property. He stated that owners of the land came to evict them in 2019. He further stated that regarding 3048, claimed by the 1st Defendant, they never visited the land otherwise they could have found that the land was cultivated and occupied. He stated that parcel number 3051 was occupied by Johnstone Keyoro their secretary with a permanent house. He stated that he was aware of the court case in Naivasha of forcible detainer and added that there was no AGM or SGM to discuss the suit. He further stated that as at 1993, there was no dispute over the land as they were already in occupation. He also stated that in 1993, he had been allocated 110 acres and added that they occupied 128 acres in respect to 3048 which was registered on 9/2/1994. He stated that there was no complaint by Joseph Kinyanjui in respect of 3048. He also stated that it was registered in the 1st Defendant's name and that no dispute arose. He stated that he occupied 3054 without the owner's authority. He stated that Mwewe camp was not part of 3054 and added that 3052 was subdivided into two parcels.
12. Ware Isacho, the sub-county Social Services officer Ruaraka testified as PW2. He testified that he knew the Plaintiff as they registered their group in Ruaraka Sub-county and were issued with a certificate number 3807408 in 1986. He testified that their certificate was later replaced on 21/11/2018. He testified that they are to submit returns and revenue records every year and added that they received the records on 18/10/2023. It was his testimony that the total number of members was 60 with the chairman as Samuel Nduati, secretary Johnstone Kiyoro and treasurer Francis Macharia. He added that the vice chairman was David Wanganga, the vice secretary Mary Karama and Lawrence Kinyanjui, and Rael Mwinyi as members. He testified that he has been in the office since 2017 and confirmed that the same name could not be registered in the sub-county but could be registered in a different county.
13. Upon cross examination by Njuguna, he admitted that he had not provided his job card and that the documents were signed by his predecessor. He confirmed that he came to the said office in 2019 and added that he did not have any records dated to the 1980s. He admitted that he did not have the receipt of payment in the file. He stated that there was a minute that showed lost certificate and admitted that the said minutes did not bare any stamp. He stated that their office received the said minutes but they did not stamp it. He confirmed that he did not know the origin of the letter dated 30/6/2021. He further confirmed that he did not know whether elections were done or how much land they have. He also confirmed that he was not aware of another group in Gilgil.



14. On cross examination by Kariuki, he stated that the certificate was received on 18/10/2023. He confirmed that he had a letter dated 16/10/2023 from the plaintiff's advocate.
15. On cross examination by Ndubi, He stated that the report they received was on loss of certificate. He also stated that the replacement certificate had a receipt and added that the group was registered under Group Registration Act. He stated that a Community Based Organization operates within county while Self-help groups operate within the location. He confirmed that Kikopey Gilgil was not in Ruaraka. He also stated that it was possible that the groups could be registered in different counties.
16. On cross examination by Gikonyo, PW2 confirmed that the application dated 13/11/2018 for replacement was submitted by the applicant. He stated that the land was 80 acres and added that the certificate number indicated was 3546237 issued in 2014. He confirmed that there was no certificate issued in the 80's. He also confirmed that the certificate was received on 18/10/2023 and added that they did not present any minutes of the last meeting.
17. Upon reexamination, he stated that the file was there but confirmed that he did not have it. He stated that the certificate was part of his records and that Patricia was his superior. He also stated that they followed the guidelines and that after registration the titles together with the files were put in the drawer while the receipts retained by the officials. He confirmed that he never attended to Francis Macharia.
18. This marked the close of the Plaintiff's case.

2nd Defendant's case

19. Alfred Kinyanjui Wainaina testified that he is the chairman of the 2nd Defendant while George is the vice chair. He testified that the land in dispute is Gilgil/Gilgil/Block 13055 measuring 2 acres. He testified that they have the title to the suit land. He produced his replying affidavit sworn on 25/7/2019 which was adopted as evidence-in-chief. He testified that he has a title in the name of Joyce Wairimu Waruru and that he had filed in court case number 2542/2018 in Naivasha. He testified that the accused persons were Silas Gitonga Wahome and Paul Mucheru Mwinyi. It was his testimony that they had found the house in 2018 and that the land had live fence. He testified that the accused had claimed that the land belonged to Mathare 4 dancers. He produced the charge sheet as 2DEx10(a), charge from page 129 – 131 PEx10(b), his statement of page 136 2DEx12 and other statements 2nd DMFI13(a), 2nd DMFI13(b), sale agreement 2nd DMFI14, letter dated 14/3/2019 2nd DEx15. He testified that he is aware of the current status of the land as he had pictures. He testified that the 1st photo showed growing grass with 3 people as taken by George Gachuhi Kariuki on 7/08/2019. He testified that the photo showed their land Gilgil/Gilgil/Block 1/3055. It shows the extend of suit land. He testified that he purchased it as 2nd DEx16(a). It was his testimony that the 2nd photo showed a temporary house– 2DEx16(b). He added that the Plaintiff illegally constructed the house in 2018. He testified that he did not know whether the land was occupied and added that the cultivated place is ½ an acre while the rest is grass. It was also his testimony that in 2014 there was no house. In conclusion he testified that they could not divide the land among its members since in 2016 they were told to vacate.
20. On cross examination by Kariuki, he confirmed that he was at the site with the surveyor in 2016. He further confirmed that there was a hospital around.
21. On cross examination by Ndubi, he stated that their land is 3055 and that the people who have constructed and occupied the land are the purchasers. He stated that they allegedly purchased plot No. 129 and 140 on 29/22/2013. He confirmed that they bought the land and that they have their title. He stated that the occupation of the land was not peaceful and that in 2014 he was on the ground.



22. On cross examination by Wairegi, he stated that their land is Gilgil/Gilgil Block 1/3055 which they acquired vide the agreement dated 29/1/2013. He admitted that the agreement did not mention 3055. He further admitted that the land was fenced and that there was no distinguishing factor. He stated that 2nd DEx16 was taken from the road and added that the two acres were surrounded by live fence. He stated that they bought the land in 2012. He further stated that he did not know the land and that they never went with the surveyor. He stated that he went to the land for the first time in April 2012 after the process of transfer. He stated that the surveyor did not do anything because of the people's resistance. The work of the surveyor is not done. He confirmed that he owns the land and that he found the house in 2018. He further confirmed that the charge sheet showed that they entered the land in 2012. He stated that the title read 27/7/2012 while the charge sheet read 17/4/2012. He stated that the people who built the house purchased the property in 2013 which showed that he was a part purchaser.
23. Upon re-examination, he stated that the charge sheet was drafted by the police. He confirmed that he did not give them the directions. He admitted that he I did not see beacons but that he saw the fence. He further admitted that he did not meet the surveyor or seen the survey report produced by the plaintiff showing that the land is occupied. He confirmed that there was a fence on 3055 but no one was in occupation.
24. Henry Thomas Kinyanjui produced his affidavit dated 25/7/2019 at page 213 which was adopted as evidence-in-chief. He testified that at page 223 was a letter dated 10/08/2014 issued as 2nd DMFI-17. He produced a letter at page 225 which was marked as DMFI 18. He testified that a group of people went and did their work and that they were masquerading as officials. He testified that the masqueraders were Johnstone Keyoro, Nduati Francis Macharia, Wang'ang'a Patrick Wainaina Githae, Mr. Kariuki. It was his testimony that they had been elected to pursue a lost document which was a title for Gilgil/Gilgil/Block 1/3046 Kikopey that belonged to the Plaintiff. He testified that they got a replacement of the old title, subdivided it and gave every member a title deed. He testified that he knew Mr. Wang'ang'a and added that he had never been a vice chair of the group or a member of that piece of land. He testified that he was a member of block 40 and that they were mandated to pursue 3046. He stated that members of 3046 were to elect their officials. He added that there were two parcels of land and that with regard to Block 31/3046, they were called by the chief to elect our members.
25. On cross examination by Ndubi, he stated that they had a constitution and a list of members. He stated that there was a consent and that they never settled their people on 3054. He confirmed that there was nothing contrary to land No. 3046 and added that block 32 did not belong to Kasarani. He added that at the moment, one part is cultivated by members of Kasarani 4 Mathare Dancers while the other he didn't know.
26. On cross examination by Gikonyo, he stated that he was a member of the Plaintiff. He stated that they were given 110 acres of land in Kikopey but that they exceeded its occupation by 18 acres. He stated that he was elected on 9/8/2014 and by 2014, they had entered the land 3046. He stated that he knew Mwahaki Karata who claimed that he sold land. He also stated that he knew Wagitungu and added that he had never refunded her money. He stated that they all have their title deeds.
27. On reexamination, he stated that Wang'ang'a was never an official. He stated that he could not tell where the plaintiffs are settled.

3rd Defendant's case

28. Derick Kihugi Ng'ang'a testified that he is the owner of Gilgil Block 1/3051/3053 Kikopey. He produced the affidavit dated 25/7/2019 which was adopted as evidence in chief. He urged the court to dismiss the Plaintiff's case.



4th Defendant's case

29. Mark Wagathiru Chege produced his replying affidavit dated 29/8/2019 which was adopted as evidence-in-chief. The documents annexed in the replying affidavit were marked and produced as 4DEx1. He testified that he occupied the land in 2013 and that the Plaintiffs attacked him. He further testified that he went to the Registrar of Lands. It was his testimony that before March he was already in possession. He added that Gilgil/Gilgil/1/3052 was later subdivided.
30. On cross examination by Ndubi, he stated that his land was No. 3052.
31. On cross examination by Wairegi, he stated that he bought the land from the original shareholder of some holdings. He further stated that Ngugi applied in 1976 and added that he bought his in 2009. He also stated that the transfer was by Mr. Ngugi and that the 1st title was rectified after selling a portion. He stated that his title was to be rectified which rectification took place on 14/5/2010. He stated that the land had beacons and added that he does not utilize the land because of violence. He stated that he never gave any permission.
32. Upon reexamination, he stated that no one lived on the land.
33. That marked the close of 4th Defendant's case.

1st Defendant's case

34. Eliud Mbugua produced his replying affidavit filed on 10/9/2019 which was adopted as evidence-in-chief together with the documents attached as exhibits which were marked as 4DEx1. He testified that they bought the land and that his was parcel 3048. He further testified that when he visited the ground, the land was fallow with grass. It was his testimony that they visited the land in July 2011 and added that there was no restriction. He stated that the owner was Boniface Kagure. He also testified that he was issued with his title deed in 2011 and that the suit was filed in 2019.
35. On cross examination by Kariuki, he confirmed that he occupied the area in 2012. He stated that the Plaintiff has no right on the land as they interfered with the land in 2012. He stated that they had put beacons but they were uprooted.
36. On cross examination by Wairegi, he stated that the self-group was not the registered owner and added they bought the land from Boniface Kagura. He stated that the 1st owner was Joseph Kinyanjui Kabura and that the title was issued on 1/8/1994. He confirmed that he was the current chair and admitted that he did not have the minutes for balloting. He stated that the land was not subdivided and added that the Plaintiff has encroached on their land. He confirmed that he visited the land in 2012 and stated that the search showed the land belonged to him. He stated that he bought the land in 2011 but admitted that he did not have the sale agreement.
37. Upon reexamination, he stated that beacons were put on the ground but later uprooted.
38. That marked the close of 1st defendant's case.

5th Defendant's case

39. Fredrick Macharia Waikao testified that he donated a power of Attorney to his wife authorizing her to file a response. Her replying affidavit (Page 251 of the bundle) was adopted as evidence-in-chief together with the bundle of documents produced and marked as 5DEx1. Her witness statement dated 15/11/2023 and filed on 14/11/2023 was also adopted as evidence-in-chief. She produced a certificate of official search which was marked as 5DEx2. He testified that he had acquired his property through



- shares with GEMA together with his father who had been allocated 3037. He testified that there was no structure on his property. He testified that 3037 had been taken by someone who built a hotel. He testified that they have never utilized the land.
40. On cross examination by Wairegi, he admitted that he had never fenced nor constructed the land as he has been residing in USA since 2001 together with his family. He stated that he acquired the title in 1996.
41. That marked the close of the 5th defendant's case.
42. The 3rd Defendant's case was reopened for cross-examination by Wairegi where DW2 stated that he got his title from one Mwaura Gitahi who had bought it from Gema. He stated that the title was directly issued in his name and that Gitahi signed the transfer. He stated that he was not a member of the Plaintiffs group and added that there was no dispute at the time. He confirmed that he started using the land in the year 2008 but stated that he had not constructed as he was paying in instalments. He further stated that he never cultivated and that the maize on the land was planted by the Plaintiff.
43. On reexamination, he denied having been sentenced for fraud and added that no one claimed the maize.

Submissions

44. The 1st Defendant filed its submissions dated 4th April, 2024 where it identified one issue for determination being whether the Plaintiff has proved a case for adverse possession against it. It submitted that it is the registered owner of GILGIL/GILGIL BLOCK 1/3048 having purchased it from Boniface Kaguura Kinyanjui. It reiterated the contents of its replying affidavit dated 10th September, 2019 sworn by Eliud Mbugua. It submitted that the Plaintiff has not proved that possession claimed was adequate, in continuity, in public and in extent adverse to the registered owner.
45. The 1st Defendant submitted that the Plaintiff could only prove occasional activity on the land. It argued that there is no proof of change of the state of the land to the exclusion of its true owner. It relied on the case of Samuel Miki Waweru V Jane Njeru Richu, Civil Appeal No. 122 of 2001 and urged the court to dismiss the Plaintiffs case.
46. The 5th Defendant filed his submissions dated 7th April, 2024 where he gave a summary of the case and identified two issues for determination:
- i. Whether the Plaintiff's suit is competent.
 - ii. Whether the Plaintiff has established its claim for adverse possession against the title of the 5th Defendant LR Gilgil/Gilgil Block 1/3054 (Kikopey).
47. On the first issue, he submitted that the Plaintiff has no legal capacity to sue in its name. He argued that it is not disclosed which positions Ndungu Nduati and David Wangángá hold in the Plaintiff's group as they are only referred to as officials. He further submitted that the Plaintiff did not tender in evidence minutes of a meeting by members of the group that passed a resolution mandating the two to institute this suit. He submitted that the Plaintiff did not produce the register of list of members together with the group's constitution. He relied on the case of Kipsiwo Community Self Help Group V Attorney General & 6 Others (2013) eKLR and submitted that there was serious contensation as to whether David Wangángá was the group official. The 5th Defendant submitted that David Wangángá on cross examination stated that Ndungu Nduati and Johnstone Kiyuro are deceased yet they were listed as amongst those who authorized David to sign the documents on behalf of the group. He urged the court to dismiss the suit for being incompetent.



48. On the second issue, the 5th Defendant submitted that no evidence was tendered by the Plaintiff that they were in actual possession of L.R Gilgil/Gilgil Block 1/3054 (Kikopey). He submitted that the land was vacant and that he has lived on the said land from 2001. The 5th Defendant submitted that from the Plaintiff's pleadings, the claim was that of a purchaser which they bought from the 6th Defendant. He argued that the claim for adverse possession could only commence after the year 2009 against the 6th Defendant. He further submitted that the Plaintiff's claim should be that of specific performance against the 6th Defendant. He relied on the case of *Ruth Wangari Kanyagia V Josephine Muthoni Kinyanjui* (2017) eKLR and submitted that for a claim for adverse possession to succeed, one had to meet the conditions as set down by law. In conclusion, he submitted that the Plaintiff failed to prove adverse possession of the 5th Defendant's parcel and all the suit properties.

Analysis and Determination

49. I have considered the pleadings and the evidence on record and I am of the view that the following issues need to be determined:
- a. Whether the Plaintiffs' have the locus standi to file the instant suit.
 - b. Whether occupation and possession by the Plaintiff over the suit properties constituted adverse possession.
 - c. Who should bear the costs of the suit.
50. On the first issue for determination, it is trite law that Societies are not legal entities capable of suing and being sued in their own names. It is this court's view that unincorporated bodies registered under the [Societies Act](#) have no legal capacity to institute proceedings in any court in their own names and cannot maintain such proceedings. The registered societies can only sue through trustees, or in the names of their officials in a representative capacity.
51. In the case of *Eritrea Orthodox Church vs. Wariwax Generation Ltd.* [2007] eKLR the court held as follows:
- There is no doubt that the plaintiff is non-incorporated body of many members registered under the [Societies Act](#), Cap 108 of the laws of Kenya. That is how it has indeed described itself in paragraph 1 of the plaint. Nor does the plaint clothe the plaintiff in any other way or with any other name or capacity. It will therefore be so treated. It is now trite law that a society registered under the said Act is not an incorporated body which can assume capacity to sue or be sued in its own name in any legal proceedings. It is an ordinary society whose members, if they wish to sue, can do so only under a representative capacity under Order 1 rule 8 of Civil Procedure Rules.”
52. In the instant case, it is the Plaintiff's case that one David Wangángá is an official of the Plaintiff's group with the members authority to represent them. From the Affidavit in support of the Originating Summons sworn by him under paragraph 1, he deposed that he is “the Plaintiff's vice chair” and has the mandate of the Plaintiff to swear the Affidavit. This court has also taken the liberty to peruse the court records and it is clear from the letter dated 30th June, 2021(PEx8(c)) from the Ministry of Labour and Social Protection that David Wangángá is the vice chairperson of the group therefore an official. I therefore find that David Wangángá is indeed an official of the Plaintiff's group with the requisite locus standi to institute the present suit.



53. Going to the second issue for determination, the law on adverse possession provided for under the Limitation of Actions Act under Section 7 of the Act provides as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 13 “(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”.

54. PW1 testified that they occupied the suit land in 1984. It was his case that they purchased 128 acres that was to be excised from Blocks 40, 8A, 31 and 32. Upon cross examination by the 8th and 4th Defendant’s he confirmed that they bought the land from GEMA Holdings and that it occupied the land vide the 6th Defendant’s permission. It was the Plaintiff’s case that they made payments for the land to the 6th Defendant. The Plaintiff in its supporting affidavit to the originating summons annexed copies of receipts of payment it made to the 6th Defendant as proof of payment for purchase of the suit properties.

55. In the case of Sisto Wambugu -vs- Kamu Njuguna (1983) eKLR and Samuel Miki Waweru -vs- Jane Njeri Richu (2007) eKLR. The court of Appeal in the latter case expressed itself as follows: -

It is 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 or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in Jandu -vs- Kilpa (1975) EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The Principle to be extracted from the case of Sisto Wambugu -vs- Kamau Njuguna (1982-88) IKAR 217 relied on by Mr Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from the date of the termination of the contract.”

56. It was also the Plaintiffs case that it has been in peaceful possession of the suit property for more than 12 years and that disputes begun in 2019 when they were evicted by the owners. The defendants demonstrated through oral evidence and documents that the plaintiffs members were charged in a court of law for trespass and therefore their occupation cannot be described as quiet and peaceful.



57. In *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right 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”.

58. It is trite law that he who alleges must prove as provided under Sections 107 and 109 of the *Evidence Act*.
59. The law on adverse possession is hinged on five basic maximums the first being open and notorious use of the property. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. The plaintiffs did not demonstrate this element as no concrete evidence of construction and use of property was demonstrated.
60. The second element is continuous use of the property in this case, the adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor’s time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. The plaintiff did not prove continuous use of the property adverse to the defendant’s titles.
61. The plaintiffs must proof exclusive use of the property. In this case, the adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a granary on the owner’s property, and the owner then uses the granary, the adverse party cannot claim exclusive use. The plaintiff failed to prove that the property was used to the exclusion of the defendants and the defendants demonstrated that they occupied parts of the property but were in constant fights with the plaintiffs.

The plaintiff must demonstrate actual possession of the property.

62. The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The plaintiff in this case has not demonstrated actual possession of the property. He merely put up some structures but nobody knows what he does in the structures.
63. For the plaintiff to succeed the possession must be non-permissive possession. The owner of the property should not have given his permission for the possession of the property. In this case, the 6th defendant gave the plaintiffs permission to take possession.
64. It is this court’s view that the Plaintiff did not provide evidence as to when it took occupation of the suit properties. That being so, it is the finding of this court that the Plaintiff has not proved its case of adverse possession. In the upshot, the Plaintiff’s suit is dismissed with costs. It is so ordered.



**JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY ON THE 30TH DAY OF MAY
2024.**

A.O.OMBWAYO

JUDGE

