



Nganga & another v Gichuhi (Environmental and Land Originating Summons E016 of 2022) [2024] KEELC 6184 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E016 OF 2022
LN GACHERU, J
SEPTEMBER 26, 2024**

BETWEEN

JAMES WAWERU NGANGA 1ST PLAINTIFF

ALICE NYAMBURA WAWERU 2ND PLAINTIFF

AND

KABURA GICHUHI DEFENDANT

JUDGMENT

1. By an Originating Summons dated October 7, 2022, and filed before the court on 22nd August, 2023, the Plaintiffs/Applicants have sought for the following reliefs against the Defendant/Respondent, Kabura Gichuhi.
 1. That a Declaration be issued that the Plaintiffs/ Applicants have become entitled to Loc.7/Gakoigo/282 by way of adverse possession of over twelve (12) years and that the Plaintiffs/Applicants be registered as the owners of the said Loc.7/Gakoigo/282
 2. That the Court be pleased to grant any other order it may deem fit and just to grant.
 3. That the costs of this Application be in the cause.
2. This Originating Summons is supported by the Verifying Affidavits of James Waweru Nganga (the 1st Plaintiff/applicant herein) and Alice Nyambura Waweru the 2nd Plaintiff/applicant herein), both sworn on 7th October, 2022.
3. The 1st Plaintiff/Applicant contended that he has lived on land parcel number Loc.7/Gakoigo/282 (the suit property) since 1967, without interruption and has constructed a house thereon where he lives together with his family. He also averred that the suit property is family land, and it belongs to his family. Further, that he is entitled to be registered as the proprietor of the suit property herein on the basis of his occupation of the same since 1967.



4. The 2nd Plaintiff/Applicant also averred that the suit property has been her home ever since she contracted a marriage with the 1st Plaintiff/Applicant. That her husband's family, in particular, her father-in-law Nganga Waweru (deceased), has been in occupation of the suit land since 1967. It was her further averment that upon contracting a marriage with the 1st Plaintiff/Applicant herein, they built their family home on the suit property. She urged the Court to declare that the Plaintiffs/Applicants are entitled to be registered as the owners of the suit land.

The Defendant/respondent's Response

5. The Defendant/Respondent opposed the instant Originating Summons vide the Grounds of Opposition dated 9th May, 2023, and averred that she was not served with the Summons in respect of the instant suit, and she urged the court to strike out the suit herein for non-service. She also filed her Response (Under Protest) and Counter-Claim dated 6th June, 2023.
6. The Defendant characterized the instant suit as fatally defective, incompetent, most frivolous, vexatious and an abuse of the due process of the Court. She further averred that the Plaintiffs/Applicants lack the necessary locus standi to institute this Originating Summons, as they are claiming through their father and kin Ng'ang'a Waweru.
7. The Defendant/Respondent further averred that the suit land was the subject of the proceedings in Succession Cause No. 167 Of2018 (Kigumo Law Court) wherein the 1st and 2nd Plaintiffs/Applicants were parties to the said suit. It was her further contention that the issue as to who is entitled to the suit property was conclusively resolved by the Court in Succession Cause No. 167 of 2018(Kigumo Law Court), thus rendering the instant suit res judicata.
8. It was her further contention that the present suit cannot operate as an Appeal against the decision of the Court rendered in Succession Cause No. 167 of 2018(Kigumo Law Court).
9. It was her further allegations that the 1st Plaintiff/Applicant lodged Appeal No. E031 of 2021: The Estate of Ng'ang'a Wachira (Muranga Law Courts), which Appeal is pending before the High Court at Murang'a, and which Appeal concerns the suit land. She averred that in view of the pending Appeal, the current suit amounts to an abuse of the due process of the law and Court.
10. It was the Defendant/Respondent's further contention that this Court in ELC Case No. 12 of 2022, entered a Consent Judgment, which touched on the suit land, which decision resolved with finality the question if proprietorship of the suit property. Further, that in view of the foregoing Judgment of this Court, the present suit is incompetent, misconceived and an abuse of the due process of law and Court.
11. In response, the 1st and 2nd Plaintiffs/Applicants jointly filed a Further Affidavit dated 15th August, 2023, and annexed photographs of their alleged homes, and farming activities , which were marked "JWN1 (a), (b) and (c)" showing the following images: their residence, a freshly-tilled land, mature trees, banana groves and 16 individuals both adults and children standing in front of a goat-shed.
12. Further they annexed photographs marked "JWN 2" showing the 1st and 2nd Plaintiffs/Applicants close to a wooden plaque carrying inter alia the following description: "grace Wanjiru Waweru Sunrise: 2002-Sunset: 25-6-2017". The 1st and 2nd Plaintiffs/Applicants stated that the said Grace Wanjiru Waweru was their daughter, who was buried on the suit land.
13. The 1st and 2nd Plaintiffs/Applicants further annexed a photograph marked "JWN 3" depicting banana groves and freshly-tilled land abutting patches of grass and a mature mango tree in the background.



14. The parties took direction under Order 37 of the [Civil Procedure Rules](#) and opted to proceed with the suit by way of *viva voce* evidence.

The 1st And 2nd Plaintiffs/applicants Case

15. PW1 James Waweru Nganga), from Mathuthini area, which is a village adjacent to Maragua Town in Murang'a County, stated that he is a peasant farmer. He affirmed that the 2nd Plaintiff/Applicant is his wife, and adopted his Verifying Affidavit sworn on 7th October, 2022, and joint Further Affidavit dated 15th August, 2023, as his evidence in chief.
16. On cross-examination by Mr. Mwangi Ben for the Defendant, he stated that the Defendant is his auntie, and that the suit land was registered in the name of Ng'ang'a Wachira ,who was his uncle by virtue of being a step-brother to his father. He further affirmed that the Defendant is a sister to Ng'ang'a Wachira ,and that the two were the only siblings in their household.
17. The 1st Plaintiff/Applicant further testified that his father was named Charles Nganga Waweru, who died in the year 2023. He further testified that Ng'ang'a Wachira was married and had a family, and Ng'ang'a Wachira 's wife is also deceased. He also testified that a Succession Cause was filed before the Kigumo Law Court in respect of the suit land, and that case was resolved with finality by the Court. That he was the administrator of the estate in question and that his testimony to the Court was truthful. He affirmed that the Kigumo Succession Court allocated the suit property to the Defendant.
18. The 1st Plaintiff/Applicant further testified that he has been a resident on the suit land for a long time, and he was one of the Appellants against the decision of the Kigumo Succession Court, which Appeal was dismissed by the Court. It was his further testimony that he filed the instant suit following the dismissal of his Appeal. Further, that the Court granted the suit land to a different person, and that the present suit is the fourth case concerning the suit property.
19. It was his further testimony that the land which is registered in his father's name is situated at Kamuiru,and he also reiterated that his father died in the previous year, that is, year 2023.
20. The 1st Plaintiff/Applicant admitted that he advanced the same claims made in the instant suit at the Succession Court in Kigumo, and his claim over the suit property is founded on the doctrine of Adverse Possession. That he entered into the suit property on the permission of the wife of Ng'ang'a Wachira , who was buried in Mombasa.
21. Pw1 also added that the suit property belonged to Ng'ang'a Wachira , and he was given the same by Dorcas (Ng'ang'a Wachira 's wife). He admitted that he did not file a Succession Cause in respect of the estate of the aforesaid Dorcas, and he admitted that Succession proceedings were filed before both the High Court and the Magistrate's Court at Kigumoin respect of the suit land, and no injunction was issued by the Court against him. He reiterated that he has been living on the suit property for a long time.
22. The 1st Plaintiff/Applicant further admitted that he did not present a Valuation report to show his occupation of the suit land. He affirmed that the suit property is registered in the Defendant's name, and also admitted to not having perused the Defendant's documents filed in Court in the present suit. He further admitted that he did not contest the Orders of the Court and that together with the 2nd Plaintiff/Applicant, who is his wife, they did not record Witness Statements in respect of the present suit but only filed Affidavits.
23. On re-examination, he testified that he did not file a Valuation report, and that he attached photographs attesting to his occupation of the suit property and that he buried his daughter on the suit land. He



further testified that in the Succession Cause at Kigumo Law Court, over the suit land, his father laid claim to the suit land. That the Defendant claimed ownership the suit property following the death of Dorcas.

24. He also testified that the Defendant was succeeded by another person, and he admitted not being conversant with the issues in contention in the Succession Cause before the Kigumo Law Court because his father was the one who was a party to the said suit.
25. He further admitted that the Succession Cause before the Kigumo Law Court was finalized, and no Appeal was lodged against the said judgement. It was his further testimony that no Court Order in respect of the Succession Cause before the Kigumo Law Court was ever served upon him.

The Defendant's Case

26. The Court took cognizance of the fact that the Defendant was born in 1917 and was too advanced in terms of age to properly give evidence. The Defendant filed a Power of Attorney dated 16th October, 2023, wherein, she appointed one John Kimani Wathiga ID No. 23XXXX, to represent her the suit. Accordingly, the Court allowed the above mentioned donee of the Defendant's vide the Power of Attorney to testify on her behalf.
27. DW1 John Kimani Wathigo, who resides in Maragua adopted his Witness Statement dated 5th June, 2023, as his evidence in chief and also produced his list of documents as D. Exhibits. It was his testimony that the Defendant is his grandmother, and that his father was Peter Wathiga Gichuhi, who died in 1992. He added that his mother was also a witness in the instant suit.
28. On cross-examination, by Mr. Ng'ang'a for the Plaintiffs/ Applicants, DW1 reiterated that the Defendant is his grandmother by virtue of being step-mother to his father. That the Defendant did not have children of her own, and she is the one who raised up DW1's father. It was his further testimony that he resides in Kamuiru, together with the Defendant, and not in Maragua Town.
29. Further, that the Defendant is not resident of Mathuthunivillage, and that the Defendant utilizes the suit land. He disclaimed knowledge of one Julius Mungi, and affirmed awareness of a previous case concerning the suit land, However, he denied knowledge of any suit involving the said Julius Mungi.
30. It was his testimony that Julius Mungidoes not live on this suit property, and that the 1st Plaintiff/ Applicant occupied the suit land for a period of time which he could not ascertain. He added that the 1st Plaintiff/ Applicant recently built his home on a different parcel of land from the suit property, and that there is only one (1) house built on the suit property. He stated that he did not recognize the house appearing in the photographs produced by the Plaintiffs/ Applicants. He added that he is conversant with the features of the suit land.
31. On re-examination, he testified that the Defendant is his grandmother with whom he resides in Kamuiru. He testified that his father is now deceased, and that he was allocated a portion of the suit land by the Defendant. He further testified that the Succession Court allocated the suit property to the Defendant, and he admitted knowledge of the suit before the Succession Court.
32. DW1 further testified that some houses were built on the suit property in year 2005 and prior to the Succession case which came about in year 2010. He added that the Defendant allocated a portion of the suit land to himself. He urged the court to consider the evidence tendered by the Defendant. He also stated that the 1st Plaintiff/ Applicant's father was the beneficiary of a separate parcel of land, and is not buried on the suit land..
33. Thereafter, the Court directed the parties to file and exchange written submissions.



The Plaintiffs/applicants' Submissions

34. The 1st and 2nd Plaintiffs/Applicants filed written submission dated 23rd May, 2024, through the Law Firm of Njoroge Ng'ang'a & Company Advocates. They identified two issues for determination by the Court as follows:
- a. Whether the Plaintiffs/Applicants have met the threshold for grant of orders for Adverse Possession.
 - b. Who should bear the costs of the suit?
35. In their submissions, the Plaintiffs/ Applicants reiterated that they have occupied the suit land since 1967, in excess of the statutory period of 12 years. It was their further submission that the element of time is crucial for purposes of proving Adverse Possession. It was their further submission that they have built a permanent house on the suit property in which they have raised all their children.
36. Reliance was placed in the holding of the Court in the case of *John Omuse v Sifiroa Akumu Oburon (Being the Administratrix of the Estate of Obarasa Matiengi)* [2021] eKLR concerning the elements that need to be proved to establish a claim founded on the doctrine of Adverse Possession.
37. Further reliance was sought in the decision of the Court in the case *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in his capacity as the Administrator of the Estate of Kimingi Wairera(Deceased) and Mwangi Kimingi(Deceased)* 2022 eKLR whereby, the Court referenced the reasoning of the Court in the case of Mbira v Gachuhi [2002] 1 EALR 137.
38. The 1st and 2nd Plaintiffs/Applicants also submitted that they have established on a balance of probabilities that they meet the threshold for the grant of Orders of Adverse Possession thus entitling them to be registered as the owners of the suit property. They referred to the photographs produced as part of their exhibits in the suit as attesting to their occupation of the suit land.
39. On the question of costs, it was their submission that costs are always awarded to the successful party in a suit. Reliance was sought in the decision of the court in the aforementioned case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in his capacity as the Administrator of the Estate of Kimingi Wairera(Deceased)and Mwangi Kimingi(Deceased)* 2022 eKLR. They urged the Court to award them the costs of the subject suit.

The Defendant/respondent's Submissions

40. The Defendant filed her written submissions dated 2nd May, 2024, through the Law Firm of Mwangi Kirubi Ben & Company Advocates. The Defendant asserted her rights as the registered proprietor of the suit land as set out in the law, and submitted that she stands in the relationship of "Step-Aunt" with respect to the 1st Plaintiff/Applicant herein. It was her further submission that the suit land was originally registered in the name of Ng'ang'a Wachira , who was her only brother and sibling.
41. Further, she submitted that her brother, Ng'ang'a Wachira was registered as the proprietor of the suit property to hold it in trust for himself and the Defendant, because the suit property is family land. Further, that the suit land was subject to a continuing trust and the same was affirmed by the Succession Court, which became seized of the matter. She also submitted that the suit property was the subject of proceedings in Murang'a High Court Succession Cause No.694 of 2014-Estate of Ng'ang'a Wachira , and the dispute over the ownership of the suit land began in 2008.
42. The Defendant further submitted that the Court in the Succession Cause at Kigumo Court determined the dispute regarding the ownership of the suit property with finality vide a Ruling delivered on 12th



- April, 2019, and the said decision still stands as it was not appealed against by the 1st Plaintiff/Applicant and his father who were claiming that the suit land was the subject of a trust. That the 1st Plaintiff/Applicant was co-administrator of the estate of the late Ng'ang'a Wachira, before he was removed from that position by the Court.
45. The Defendant further submitted that there was an attempt to appeal against the decision of the Kigumo Succession Court through Murang'a High Court P&a Appeal Case No. E031 of 2021-Estate Of Ng'ang'a Wachira, which appeal was dismissed by the Court and the Judgment of the trial Court upheld.
 46. It was further submitted that the 1st Plaintiff/Applicant admitted during cross-examination that the present suit was commenced after the outcome of the Succession Cause at Kigumo, and in the wake of the dismissal of the 1st Plaintiff/Applicant's appeal which renders this suit an utter abuse of the due process of the court.
 47. It was her further submissions that the instant suit has been instituted improperly, mischievously and irregularly, as the Defendant admitted that he entered into the suit land during the pendency of the current suit.
 48. Further, that the 2nd Plaintiff/Applicant failed to testify in the instant suit at the eleventh hour, while the 1st Plaintiff/Applicant failed to file his Statement despite much prompting and accommodation by the Deputy Registrar of this Court. She submitted that the 1st Plaintiff/Applicant admitted during cross-examination that he entered onto the suit land on the permission granted to him by one Dorcas (now deceased) a wife to the registered owner of the same.
 49. It was her further submission that the 1st Plaintiff/Applicant entered onto the suit property as a licensee, hence cannot found a claim for title on grounds of Adverse Possession because licensee's occupation is dependent on the mercy of the owner of the land in question.
 50. The Defendant reiterated the claim that the suit property is family/ancestral land which she has been utilizing by cultivating the same, and building her house thereon. She further submitted that she owns a portion of the suit property while other portions are owned by the donee of her Power of Attorney, and by Julius Mwirigi Muiruri, who was not enjoined in the matter. Further, that she was compelled to vacate the suit property due to insecurity having been a victim of abortive attack by arsonists who attempted to set alight her house.
 51. She described the 1st Plaintiff/Applicant as an "adamant trespasser" and an "intermeddler" as provided for under the *Law of Succession Act*. That the 1st Plaintiff/Applicant has exhibited contempt for the Orders of the Court because he has refused to vacate the suit land, and has gone ahead to construct a house on the suit land and which house he is occupying.
 52. The Defendant/ Respondent identified two issues for determination as follows:
 - a. Whether the Originating Summons is legally defective, incurably defective and abuse of the due process [of the Court]?
 - b. Whether the claim is *res judicata* and/or *sub-judice*?
 53. She submitted that the dispute concerning the ownership of the suit land goes back to year 1984, when a Succession Cause was commenced in respect of the same which case consumed 30 years in the corridors of justice, before it was determined. She reiterated that the said suit was filed before the High Court at Nyeri, and was subsequently transferred to Kigumo Magistrate's Court. It was her further submission that the Plaintiff's claim in the Succession case was based on trust and adverse possession,



- and the Court considered the facts and the evidence and thereafter made a determination in favour of the Defendant herein.
54. She added that the appeal lodged against the decision of the Succession Court at Kigumo was dismissed by the High Court (Muranga), and the trial Court's decision was upheld. Further, that the instant suit cannot constitute an appeal against the Judgment of the Succession Court, and is thus an abuse of the due process of the Court
 55. Reliance was placed on the case of *Benson Irungu Njuguna v Francis Kimani Gathuita*, Nyeri Court of Appeal No. 2017 of 2018, to anchor the argument that where a Probate Court has heard and determined a matter, and it is shown that subsequent litigants were parties thereto, then, the doctrine of res judicata becomes applicable.
 56. Further reliance was sought in the decision of the Court in the case of *John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 others* [2021] eKLR. The Defendant also cited the Judgment of the Court in the case *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR.
 57. On the question whether the present suit is sub-judice, it was submitted that the suit land was the subject of the proceedings in Muranga High Court ELC Case No.16 of 2022, wherein , a Judgment was issued and the same was not appealed against. She submitted that the decision of the Succession Court (Kigumo), and the dismissed appeal in respect of the same renders the instant suit sub-judice.
 58. The Defendant further isolated four (4) issues for determination by the Court as follows:
 - a. [The] manner of entry into the suit land.
 - b. Whether the entry, possession and occupation were forceful, adverse to the title owner, notorious and continuous over the period pleaded.
 - c. Whether the Plaintiff has proved his claim.
 - d. Whether the Defendant has proved and is entitled to the Counter-Claim.
 59. On the above issues, the Defendant submitted that the 1st Plaintiff/Applicant stated under cross-examination that he entered unto the suit property on the permission of one Dorcas, which renders him a licensee. She further submitted that the 1st Plaintiff/Applicant could not acquire prescriptive rights against the owner of the suit land who was deceased at the time of the 1st Plaintiff/Applicant's entry.
 60. It was further submitted that the 1st Plaintiff/Applicant having been a Co-administrator in respect of the estate of Ng'ang'a Wachira , the registered proprietor of the suit land, albeit only for a duration of time, the 1st Plaintiff/Applicant was precluded from raising a claim founded on adverse Possession, in respect of the suit property because such a claim would be against himself and no time run in his favour as an Adverse Possessor.
 61. Reliance was sought in the holding of the Court in the case of *Simon Muthuka Kamu v Harrison Musyimi Kakundi & Another* [2021] eKLR, to buttress the argument that in a claim founded on Adverse Possession, the manner of entry into the land in question is essential, and a licensee is always subject to the consent of the owner of the land in question. She further submitted that during the trial, it was shown that the 1st Plaintiff/Applicant and the Defendant are related, and the Court frown upon relatives who are allowed to stay on the land as licensees, only to turn around and claim ownership of the same. Further reliance was sought in the decision of the Court in the case of *Jacob Adungo Odakai v Folobia Aujo Amokolo & Another* [2015] eKLR.



62. She further submitted that the 1st Plaintiff/Applicant failed to establish the portion of the suit land of which he is in occupation and that acreage cannot be shown by mere pictures of houses. Further, that 1st Plaintiff/Applicant needed to have filed an occupation/Valuation report to prove what he occupies in view of the averments advanced by the Defendant, and the donee of the Defendant's Power of Attorney that the Defendant lives on the suit land.
63. It was the Defendant's submission that the Plaintiffs/Applicants' occupation of the suit property has not been open, continuous and notorious, which element are required for claims based on Adverse Possession. It was her submissions that the 1st and 2nd Plaintiffs/Applicants' occupation of the suit property is in contravention of the following Orders of the Court:
1. The Order dated 16th June, 2018, issued by the High Court under the hand of Kimondo, J.
 2. The Order dated 18th August, 2019 in Succession Cause No. 167 of 2018, issued by the Kigumo Succession Court under the hand of the Hon. Ogonda.
 3. An Order dated 28th May, 2022 issued in Murang'a Civil Suit No. E049 Of 2022 ,which suit was stayed by the Court pending the determination of the subject suit under the hand of the Hon. P. Maina.
64. It was further submitted that the 1st Plaintiff did admit during cross-examination that his family's land is where 1st Plaintiff's father was buried during the pendency of this suit, and the said land is land parcel number LOC.17/Iganjo/260.
66. Reliance was placed in the holding of the Court in the case of *Gatu V Kimani & 2 Others* (ELC 16 of 2022) [2023] KEELC 20883 KLR (18th October, 2023 Judgment), to support the proposition that a claim for acreage must be specific. Further reliance was sought in the case of *Githu v Ndele* [1984] eKLR 776.
67. She urged the Court to allow her Counter-Claim, as the Plaintiffs/Applicants are in occupation of 0.3 Acres of land allocated to the Defendant in defiance of the Orders of the Court.
68. The above are the pleadings, the evidence adduced in court, the rival written submissions and the cited authorities which this court has carefully considered and finds the issues for determination are as follows; -
- I. Whether the instant suit is rendered *res judicata* and/or sub-judice by other proceedings related to the suit land?
 - II. Whether the Plaintiffs/Applicants are entitled to the Orders sought?
 - III. Whether the Defendant's Counter-Claim is merited?
 - IV. Who shall bear the costs of the suit?

i). Whether the instant is suit rendered *res judicata* by other proceedings related to the suit land?

69. The substantive law on *Res Judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21, which stipulates as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

70. Further, the Black’s Law Dictionary 10th Edition defines “*res judicata*” as follows:

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”

71. In the case of *Christopher Kenyariri v Salama Beach* [2017] eKLR, the Court clearly stated the elements to be satisfied when determining whether a matter is rendered *res judicata* as follows:

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. Former suit between same parties or parties under whom they or any of them claim.
- c. Those parties are litigating under the same title.
- d. The issue was heard and finally determined.
- e. The court was competent to try the subsequent suit in which the suit is raised.

72. Similarly, in the case of *E.T v Attorney General & Another* [2012] eKLR it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction.”

73. Further, in the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Court set out the rationale for the rule of *res judicata* as follows:

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in distinctive but conjunctive terms:

- a. The suit or issue was directly and subsequently in issue in the former suit.
- b. The former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

74. The Court has carefully considered the pleadings, evidence adduced in court and the rival written submissions of the parties. The Court has perused the Certificate of Official Search forming part of the Defendant’s Bundle of Documents, dated 27th September, 2022, which reflects that land parcel No. Loc.7/Gakoigo/282, measures approximately 1.21 Hectares, and is apportioned as follows:

Kabura Gichuhi– 0.3 Acres;



John Kimani Wachira 1.7 Acres;

Julius Mwirigi Muiruri 1.0 Acres.

75. The Court notes that the above subdivisions of the suit property are the result of an Order of this Court dated 22nd February, 2022, issued in Muranga ELC Case No. E041 OF 2021 – John Kimani Wathiga & Julius Mwirigi Muiruri v Kabura Gichuhi. The Plaintiffs/Applicants in the instant suit were not parties to the preceding case. Further, the issues raised in the current suit pertain to whether the Plaintiffs/ Applicants have demonstrated that they are entitled to be registered as the owners of the suit property pursuant to the doctrine of Adverse Possession. These issues were not the subject of determination in Muranga ELC Case No. E041 of 2021 – John Kimani Wathiga & Julius Mwirigi Muiruri v Kabura Gichuhi.
76. The Court is satisfied that the issues raised in the instant suit were not the subject of adjudication and final determination in the other lawsuits concerning the suit property. In the premises, the Court holds and finds that the issues raised by the Plaintiffs/Applicants were not rendered *res judicata* by the other previous suits involving the suit property to which the Defendant has referred this Court.

ii). Whether the Plaintiffs/Applicants are entitled to the Orders sought?

77. The Plaintiff/Applicant’s suit is premised on the doctrine of Adverse Possession, rather than on the suit land being the subject of a trust, customary or otherwise. It is trite that parties are bound by their pleadings. In the case of [Daniel Otieno Migore v South Nyanza Sugar Co. Ltd](#) [2018] eKLR, the Court reasoned as follows:

“It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.”

78. In the case of [Ogando v Watu Credit Limited & another](#) (Civil Suit E098 of 2022) [2024] KEHC 3074 (KLR) (14 March 2024) (Judgment), the Court referenced the decision of the Court in [Barclays Bank \(T\) v Jacob Muro](#), Civil Appeal No. 357 of 2018, wherein, the Court cited with approval Sir Jack I.H. Jacob’s publication titled “The Present Importance of Pleadings” first published in *Current Legal Problems* [1960] at page 174 as follows:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he as to meet and cannot be taken by surprise at the trial. The court itself is as well bound by the pleadings of the parties as they are themselves. It is not part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings...”

79. Have the 1st and 2nd Plaintiffs/Applicants demonstrated that they have been in occupation of the suit property for the statutory period of 12 years to be entitled to the same under the doctrine of Adverse Possession as claimed?



80. The Defendant averred and submitted that the 1st and 2nd Plaintiffs/Applicants occupation of the suit land started immediately after the Judgment of the Court in Succession Cause No. 167 of 2019. No such Judgment was produced before this Court for perusal, apart from the three (3) Rulings analyzed hereinabove.
81. Be that as it may, the Defendant stated that the Plaintiffs/Applicants entered unto the suit land sometimes in year 2019, while the Plaintiffs/Applicants claimed to have been in occupation of the suit land since 1967. The 1st Plaintiff/Applicant testified that he was born and raised on the suit property and has resided thereon since 1967, which claim was supported by the 2nd Plaintiff/Applicant in her Affidavit and joint Further Affidavit on record.
82. It was the 2nd Plaintiff/Applicant contention that her father-in-law Nganga Waweru lived on the suit land from 1967, while she has been in occupation of the same since contracting a marriage with the 1st Plaintiff/Applicant. The 1st Plaintiff/Applicant admitted during cross-examination that his father Nganga Waweru was not buried on the suit land.
83. The law on adverse Possession is provided for under the [Limitation of Actions Act](#). Section 7 of the Act [Limitation of Actions 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”.
84. Section 17 of the [Limitation of Actions Act](#) extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 of the [Limitation of Actions Act](#) on the other hand provides as follows:
- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.”
85. The Court of Appeal in Kisumu in Civ App. No. 110 of 2016 [Richard Wefwafwa Songoi v Ben Munyifwa Songoi](#) [2020] eKLR held that a person claiming Adverse Possession must establish the following
- (a) On what date he came into possession.



- (b) What was the nature of his possession?
 - (c) Whether the fact of his possession was known to the other party.
 - (d) For how long his possession has continued and
 - (e) That the possession was open and undisturbed for the requisite 12 years.
86. Further, In the case of Kisumu Civil Appeal No. 27 of 2013 *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the Court held:
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”.
87. Furthermore, in Nairobi CoA No. 218 of 2017 *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR, the Court reasoned as follows:
- “The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner’s title”.
88. The Court in Malindi App No. 56 of 2014}} *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR held;
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
89. Further, in the case *Mbira v. Gachubi* (2002) 1 EALR 137, the Court reasoned as follows:
- “... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”
90. The 1st Plaintiff/Applicant testified that he entered unto the suit property on the permission of one Dorcas, allegedly the wife of the deceased original owner of the said parcel of land. It is evident that the 1st Plaintiff/Applicant’s manner of entry onto the suit land was permissive, and thus cannot be adverse to the registered owner.



91. In the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased)* [2022] eKLR, the Court declared as follows:

“The Applicant’s occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have found that such claim can be sustained after payment of the last installment.”

92. In the case of Nairobi Civ No. 283 of 1990: *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.”

93. During re-examination, the 1st Plaintiff/Applicant testified that he did not file a Valuation Report, and that he only attached photographs attesting to his occupation of the suit property and that he has buried his son thereon. The photographs annexed by the 1st and 2nd Plaintiffs/Applicants marked “JWN2” show a wooden plaque with the wording “Grace Wanjiru Waweru Sunrise: 2002- Sunset: 25-6-2017.”

94. From the evidence adduced by the 1st and 2nd Plaintiffs/Applicants, it is not clear whether they have occupied the suit land for the requisite 12-year period thereby, entitling them to be registered as the owners thereof. Further, there was no any other independent evidence to support a claim that the Plaintiffs are in occupation of the suit land, and have occupied the same for long. No Valuation Report was produced to confirm the acreage occupied by the Plaintiffs herein.

95. Having analyzed the evidence as above, this Court holds and finds that the 1st and 2nd Plaintiffs/Applicants have failed to establish that they are in possession of the suit land, have dispossessed the true owner, who is the Defendant herein, or the true owner has discontinued her possession and occupation of the suit land.

96. For the above reasons, this court further finds and holds that the Plaintiffs/ Applicants have failed to prove that they are entitled to the suit property on the basis of adverse Possession, and that the same should be granted to them.

iii). Whether the Defendant’s Counter-Claim is Merited?

97. The Defendant asserted that the 1st Plaintiff/Applicant is a repeat trespasser onto the suit property, while the 1st and 2nd Plaintiffs/Applicants insisted that they live on the suit land, and have buried a child of theirs thereon as attested by the annexed photograph marked “JNW 2.”

98. The Defendant sought the following main relief in her Counter-Claim dated 6th June, 2023:

“That the applicants ought to be ordered to vacate possession of the small portion they have invaded and trespassed into in contempt of the various court orders and decrees and I do seek an order for their forcible eviction.”

99. The Defendant argued and submitted that the Court in Kigumo Succession Cause No. 167 of 2018(formerly Succession Cause no. 694 of 2014 Muranga High Court), determined the question



of the ownership of the suit property with finality and the same is not available for litigation in the instant proceedings. The Defendant annexed the following decisions, all of them Rulings issued by the Kigumo Court:

1. Ruling dated 30th July, 2019.
 2. Ruling dated 12th April 2019.
 3. Ruling dated 17th June, 2021.
100. The Court has perused the Ruling of the Court dated 12th April, 2019, and has noted in the said Ruling, the Court applied the table of consanguinity found in Second Schedule of the [Law of Succession Act](#) to the dispute between the Applicant (the 1st Plaintiff/Applicant herein) and the Defendant herein and one Ruth Njeri Wathiga, as the 1st and 2nd Protestors respectively. The said Court determined that according to the table of consanguinity set out in the Second Schedule of the [Law of Succession Act](#), brothers and sisters of the deceased are placed in the 2nd degree while nephews and nieces are placed in the 3rd degree.
101. Consequently, the Succession Court found that the Defendant herein (as the 1st Protestor) was a sister to the deceased Ng'ang'a Wachira, while the 1st Plaintiff/Applicant was a step-nephew to the deceased. Therefore, the Court ruled that the 1st protestor was entitled to the only asset of the estate of the deceased namely, the suit land.
102. Turning to the Ruling dated 30th July 2019 delivered in Kigumo Succession Cause No. 167 of 2018, the Court found that the 1st Plaintiff's father namely, Nganga Waweru, was a step-brother to one Ng'ang'a Wachira, the original registered owner of the suit land. Ng'ang'a Wachira died in Mombasa in 1978, as attested by the Certificate of Death dated 4th July, 1978, on record and he did not have children of his own. No succession cause was commenced in respect of the estate of one Dorcas, who was reportedly married to the deceased. Further, no evidence was presented before the Court attesting to the marriage between Dorcas and the deceased.
103. The Court in its Ruling in Succession Cause No.167 of 2018, stated the Defendant's argument regarding the acquisition of the suit property by the deceased as follows:
- “Kabura also stated that Waweru Ng'ang'a was son to Ng'ang'a who was a step uncle to their father hence he was a stranger to the succession proceedings and had no locus to either apply for grant or seek revocation of grant. She averred that Waweru Ng'ang'a had his own land at Iganjo where he lived with his sons and that the suit land was purchased by the deceased after they agreed to sell their ancestral land in Nginda location. She further claimed that Ng'ang'a Waweru and his son James Waweru Ng'ang'a were falsely claiming to be on the suit land.”
104. It is noteworthy that, in the instant suit, the Defendant subscribes to the position that the suit land is family/ancestral land, and the deceased was registered as the proprietor of the said land, being the only male child in the family and her only sibling to hold it in trust for himself and the Defendant.
105. Therefore, as a matter of fact, either the suit property is family/ancestral land or, the same was the product of purchase by the deceased Ng'ang'a Wachira, during his lifetime, and it cannot be both. The Defendant has offered two contradicting explanations regarding the mode of acquisition of the suit land by the deceased Ng'ang'a Wachira.
106. In the Ruling of the Court dated 30th July 2019, the Court ruled that both the 1st Plaintiff/Applicant and the Defendant failed to disclose to it the material fact that the 1st Plaintiff/Applicant's father



Ng'ang'a Waweru was a step-brother to the deceased, resulting in the revocation of the Grant issued to them on 15th February, 2017, and subsequently confirmed on 12th April 2019, in respect of the estate of Ng'ang'a Wachira .

107. With regard to the Ruling of the Court dated 17th June, 2021, the Court declared that it was not entitled to sit as an appellate Court with regard to the Rulings dated 12th April 2019, and 30th July, 2019, because the two Rulings were rendered by a Court of concurrent jurisdiction. Further, the Court vide the Ruling delivered on 17th June, 2021, determined that the Rulings issued on 12th April 2019 and 30th July 2019, were both intact as neither Ruling was appealed against.

108. This Court is not bound by the decisions of the subordinate Courts as a matter of stare decisis. The three stated Rulings annexed by the Defendant now form part of the record of the instant suit, and constitute an important point of reference with regard to the present dispute. The Court in its Ruling dated 17th June, 2021, reasoned as follows:

“It is noteworthy that the Ruling dated 30/07/2019, that revoked the Grant dated 15/02/2017, did only revoke that Grant, the same ruling did not and was not an appeal of the ruling of the Court dated 12/04/2019, that held the Applicant as the sole beneficiary of the estate of the Deceased. While revoking the Grant either knowing or inadvertently Hon. Mwangi held that the Court was to determine who was entitled to the Property, yet she had already made that determination in her ruling of 12/04/2019.”

109. This Court is not persuaded by the above reasoning of the Court to the effect that the two Rulings dated 12th April 2019, and 30th July, 2019, respectively are both intact. The Ruling dated 30th July, 2019, having been issued subsequent to the Ruling dated 12th April, 2019, necessarily supersedes and abrogates the latter.

110. Secondly, the Court has not found any basis to support the conclusion that the Court in rendering the Ruling delivered on 30th July, 2019, was oblivious of its own previous Ruling issued on 12th April, 2019. The Court that confirmed the Grant in question is the same Court that revoked it. The said revocation took place upon the Court being satisfied that a material fact was concealed from it by both the 1st Plaintiff/Applicant and the Defendant herein.

111. Therefore, this Court finds and holds that the Grant which was confirmed by the court on 12th April, 2019, entitling the Defendant to the suit property, as the Deceased only surviving sister was revoked on 30th July, 2019, upon the Court's knowledge that the Deceased had a step-brother (the 1st Plaintiff/Applicant's father Ng'ang'a Waweru) who was alive at the time. Consequently, this court finds that the lower Court exhibited some misapprehension of the law vide its Ruling dated 17th June 2021, in holding that the Ruling dated 12th April, 2019 is intact.

112. Section 24(a) of the *Land Registration Act*, 2012, provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

113. Further, Section 26 (1) of the *Land Registration Act*, 2012 states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute



and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

114. Again, Section 80 (1) of the *Land Registration Act*, 2012, provides instances when the Court can make orders for rectification of title or register, as follows-

“(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

115. It is evident that the 1st Plaintiff/Applicant’s father Ng’ang’a Waweru, was a step-brother to the deceased. The Court is satisfied that if this information was not concealed from the trial Court by the Defendant and the 1st Plaintiff/Applicant as stated in its Ruling issued on 30th July, 2019, the Court would not have declared the Defendant the sole beneficiary of the suit property being the only article of property belonging to the estate of the deceased, as it did on 12th April, 2019.

116. The Defendant became the registered owner of the suit land upon being declared the only surviving sister of the Deceased original owner which information was not truthful as attested to by the trial Court in its Ruling dated 30th July, 2019. It is trite that “the historical context in which a party obtains a title deed is as good as the title.” See the decision of the Court in the case of *Kijogi & another (As Legal Representatives of the Estate of Jerevasio Mitambo – Deceased) v M’murithi & 4 others* (Environmental and Land Originating Summons 40 of 2019) [2024] KEELC 3777 (KLR) (8 May 2024) (Judgment).

117. In her Counter claim, the Defendant had urged the court to declare that she is the legal and registered owner of the suit land, and is entitled to quiet enjoyment and possession of the same. Further, that the Plaintiffs should be ordered to give vacant possession. However, given the circumstances that led to her being registered as such, this court cannot allow her counter-claim as prayed.

118. Further, this court finds that the issue of who is entitled to inherit the suit land should be dealt with once and for all. Consequently, this court directs and orders the cancellation of the title deed issued in the Defendant’s name in respect of the suit property as the same was obtained upon non-disclosure to the Court of the material fact that the deceased was also survived by a step-brother namely Ng’ang’a Waweru(now deceased).

119. The said Cancellation of the Defendant’s title will offer the breath of life to the Order of the Court dated 30th July, 2019, revoking of the Grant issued in favour of the Defendant on the basis of consanguinity to the deceased.

120. The Court further directs and orders that the Land Registrar do issue a fresh title in the name of the original registered owner Ng’ang’a Wachira (now deceased), to allow the beneficiaries of the deceased’s estate who include the Defendant and the family of the said Ng’ang’a Waweruto participate in the process of succession and its distribution.

121. The Court is aware of the consent Judgement that was entered by this Court on 22nd February 202 in ELC Case No. E041 of 2021, wherein the suit property – Loc.7/Gakoigo/282, was subdivided into three portions. The Court notes that one of the Plaintiffs in the said ELC No. E041 of 2021 was



the Defendant's witness herein (John Kimani Wathiga). Therefore, the said consent could have been entered and issued through concealment of material facts, and thus a misrepresentation.

122. This Court takes cognizance of the Defendant's advanced age and attendant bodily infirmity. Consequently, the court directs that the said cancellation should be done within the next 30 days from the date of this Judgement so that the necessary Succession proceedings can commence.

(iii) Who should bear costs of this suit?

123. Section 27 of the *Civil Procedure Act* is very clear that costs are awarded at the discretion of the court. However, costs follow the event, and are awarded to the successful litigant. The Court has found and held that the 1st and 2nd Plaintiff/Applicants have failed to prove their case for ownership of the suit land through adverse possession on the required standard of balance of probabilities.

112. Similarly, the court has found and held that the Defendant's Counter-Claim has not been proved on the required standard, and it is thus disallowed entirely. Further, the court finds that the dispute herein concerns members of the same family, and none have succeeded in their respect claim. For that reason, the Court orders that each party to bear its own costs.

113. Having now carefully considered the available evidence, the submissions and the relevant provisions of law, the court finds that the Plaintiffs/Applicants have failed to prove their case on the required standard of balance of probabilities. Consequently, the Plaintiffs/ Applicants suit as contained in their Originating Summons dated 7th October 2022, is found not merited and is dismissed entirely with an order that each party to bear its own cost.

114. Equally, this court finds the Counter- claim brought by the Defendant dated 6th June 2023, is not merited, and the same is dismissed entirely, with an order that each party to bear its own costs.

115. Further, the Court directs that the title deed held by the Defendant herein, issued on 20th December 2021, be cancelled and revert to the name of the original owner now deceased – Ng'ang'a Wachira , so that Succession proceedings can commence.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF SEPTEMBER, 2024.

L. GACHERU

JUDGE

26/09/2024

Delivered online in the presence of:

Joel Njonjo Court Assistant.

M/s Nzilani H/B for Mr. Nganga for Plaintiffs/Applicants

Mr Kirubi H/B for Mwangi Ben for Defendant/Respondent

L. GACHERU

JUDGE

26/09/2024

