



**Wainaina v Ngure (Environmental and Land Originating Summons  
E012 of 2023) [2024] KEELC 6078 (KLR) (23 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6078 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2023  
LN GACHERU, J  
SEPTEMBER 23, 2024**

**BETWEEN**

**DANIEL WAWERU WAINAINA ..... PLAINTIFF**

**AND**

**YUNA WANJIRU NGURE ..... DEFENDANT**

**JUDGMENT**

1. Vide an Amended Originating Summons (O.S) dated 6<sup>th</sup> November, 2023, and filed on 9<sup>th</sup> November, 2023, the Plaintiff/Applicant, Daniel Waweru Wainaina, has sought for the following Orders:
  - a. That this Court be pleased to declare that the Defendant's title to land parcel number LOC.16/Mwagu/T.23, has become extinguished by operation of law and that the Plaintiff/Applicant has become entitled to whole of the said parcel of the land through adverse possession.
  - b. The Court be pleased to order that the whole of land parcel NO.LOC.16/Mwagu/T.23, be registered in the name of Daniel Waweru Wainaina.
  - c. The Defendant do execute all the necessary documents to effectuate the transfer of whole land known as parcel NO.LOC.16/Mwagu/T.23, to the Plaintiff and in default the Deputy Registrar of this Court be empowered to do so.
  - d. That the costs of this suit be borne by the defendant."
2. The Originating Summons is premised on the grounds stated thereon and on the Amended Supporting Affidavit sworn by the Plaintiff/Applicant, Daniel Waweru Wainaina on 6<sup>th</sup> November, 2023.
3. The Plaintiff/Applicant is the son of Jeremiah Wainaina Thuku, and he claimed that his father purchased the said land parcel No. LOC.16/Mwagu/T.23 (the suit property), from the Defendant's



husband, one Ngure Mararo(deceased), as attested to by a copy of a sale agreement which was executed by the parties on 23<sup>rd</sup> August 1974, annexed as the Plaintiff's Exhibit 2.

4. Further, the Plaintiff averred that following the aforesaid disposal of the suit land, his father moved into and settled on the suit property in 1974, and raised his family thereon, including the Plaintiff who is the eldest son and who was aged 10 years in 1974.
5. It was the Plaintiff's contention that at around year 1990, he attained the age of majority and started a family, whereupon his father moved out of the suit land, and settled elsewhere. That he was permitted by his own father to remain on the suit property to raise his young family. He further averred that subsequently, he brought up his four (4) children on the suit property.
6. It was his contention that his occupation of the suit property has been open, continuous and uninterrupted from 1974, until he was served with a Notice to vacate the suit land on 28<sup>th</sup> August, 2023, which was marked as the Plaintiff's Exhibit 2 3, issued by the Defendant's Advocates, and addressed to his father Jeremiah Wainaina Thuku; who, it was claimed, does not reside on the suit land.
7. It was the Plaintiff's averment that he has carried out extensive developments on the suit property by building semi-permanent structures thereon, and in which he resides together with his grandchildren as verified by his Exhibit3 4, being pictures of the said semi-permanent houses. He described the Defendant's attempts to evict him from the suit property as highly injurious as he has no other place to call home. He urged the Court to restrain the Defendant from carrying out the threat to forcefully evict him from the suit land.
8. He further contended that the acquisition of title to the suit land by the Defendant did not interrupt the computation of time for purposes of the doctrine of Adverse Possession on which the current suit is founded. It was his allegations that he has been a resident on the suit land for over 48 years to the filing of the present suit, and he is therefore entitled to be registered as the proprietor thereof, pursuant to the doctrine of Adverse Possession as the Defendant's title has become extinguished due to his occupation of the suit property for 48 years.
9. This Originating Summons is opposed by the Defendant/ Respondent through Statement of Defence and Counter-Claim dated 11<sup>th</sup> October, 2023, which was filed on 23<sup>rd</sup> October, 2023, wherein she alleged that her Notice to Vacate the suit property dated 28<sup>th</sup> August, 2023 is addressed to Jeremiah Wainaina Thuku, the Plaintiff's father, and not the Plaintiff himself. Therefore, the Plaintiff lacks locus standi to initiate the present suit.
10. She further stated that the issues which the Plaintiff/Applicant has raised in the current suit were entertained by the Court and a decision delivered on the same on 26<sup>th</sup> November, 2019, wherein, the suit commenced by the Plaintiff's father seeking the revocation of the grant vesting ownership of the suit land to the Defendant was dismissed by the Court.
11. The Defendant/Respondent asserted her ownership of the suit property, and stated that the same was transmitted to her through a Confirmed Grant, in respect of her late husband's estate. She refuted the Applicant's claim that his occupation of the suit property has been open and uninterrupted. She contended that the Plaintiff/ Applicant's father was a trespasser onto the suit land, and several cases were presented to the local Chief and Assistant County Commissioner (formerly District Officer) seeking that he vacates the suit land which demonstrates that his occupation was contested.
12. Further, the Defendant/Respondent refuted the Plaintiff/ Applicant's claim that his father purchased the suit property from her husband, and she contended that the suit herein is hinged on misstatements,



deliberate omissions and concealments of material facts from the Court. She urged the Court to dismiss the present suit with costs to the Defendant.

13. In her Counter-claim, the Defendant/ Respondent sought the following Orders from this Court:
  - a. The Plaintiff [Applicant] be evicted from the suit land.
  - b. The Defendant be granted quiet and vacant possession of the suit land.
  - c. Costs of this suit and the counter-claim.
  - d. Interest on the cost at commercial rates.
  - e. Any other relief that the Court deems fit and just to grant.
14. The Defendant/ Respondent described the Plaintiff/ Applicant as a trespasser onto the suit property, and his occupation of the said land as illegal, thus, a legitimate subject of orders of eviction issued by this Court.
15. The suit was canvassed by way of viva voce evidence, wherein the Plaintiff/ Applicant gave evidence for himself and called two more witnesses to support his case. The Defendant/ Respondent on her part gave evidence and also called two witnesses to support her case. Thereafter, the parties filed and exchanged written submissions.

#### **The Plaintiff/ Applicant's Case**

16. PW1 Daniel Waweru Wainaina, testified on 9<sup>th</sup> April, 2024, and adopted his Witness Statement dated 6<sup>th</sup> November 2023, and his amended Supporting Affidavit dated 6<sup>th</sup> November, 2023, as his evidence in chief. He testified that his father Jeremiah Wainaina Daniel, is the lawful owner of the suit property, and that he was not aware of a search carried out to establish the ownership of the suit land. Further, that according to the search, the suit property is registered in the name Yuna (the Defendant). He produced his list of documents dated 6<sup>th</sup> November 2023, as Pexhibits 1-4.
17. He urged the Court to allow his claim because he has lived on the suit land for 49 years, and that he was brought up on the suit property, wherein he has raised up his own children thereon and thus considers it as his home for that long.
18. On Cross-examination by T.M. Njoroge, Counsel for the Defendant, the Plaintiff reiterated that his father's name is Jeremiah Wainaina Daniel and his father lives in Mwaguarea within Kandara Sub-location, Murang'a County. He asserted that he was given the suit land by his father as a gift in 1975, and the land was not transferred to his name. He admitted that he had no documents to show that his father ever handed over the suit property to him.
19. It was his testimony that there exists an agreement for the disposal of the suit property dated 23<sup>rd</sup> August 1974, and which Agreement was attested to by witnesses. Further, that he was 10 years old in 1974, and that the suit land was given to him by his father.
20. The Plaintiff further testified that the suit land was sold by Gikima Thuthura, who is now deceased and that he did not know Gikima Thuthura or the Defendant. It was his further testimony that the Defendant is not a stranger to him as he encounters her now and then. Further, he testified that he has lodged the current suit because the Defendant is intent on taking away the suit property which belongs to him.



21. It was his evidence that he was not privy to the proceedings in the suit before the Succession Court in Kigumo Law Courts, and that the land in issue in the instant suit is land parcel number Loc.16/Mwagu/T.23, which parcel is not registered in his name.
22. Further, the Plaintiff testified that although he knew that Yuna (the Defendant herein), is the registered owner of the suit land, he did not recognize her title as lawful. He reiterated that he has lived on the suit land since 1975, when he was 11 years old, and that the Defendant has never demanded that he vacates the suit property.
23. On re-examination, the Plaintiff stated that his family entered onto the suit land in 1975, and he later remained thereon when his father moved out to establish a new home on his father's (the Plaintiff's grandfather) land. He reiterated that he was occupying the suit land on the basis that it belonged to his father.
24. Further, he testified that the case before Kigumo Law Courts was not between him and Yuna, and he denied knowing the Defendant at all. It was his allegations that he has never been evicted from the suit property by Yuna, nor has he ever been served with a Demand Letter requiring him to move out of the suit land.
25. PW2 David Mwaniki Wainainate testified that he is a brother to the Plaintiff/ Applicant, and he adopted his Witness Statement filed in the Court as his evidence in chief. Further, he stated that he was aware of the history of the suit property, and how the Plaintiff/ Applicant occupied the same. It was his testimony that his father purchased a separate property elsewhere, and decided to leave the Plaintiff/ Applicant to reside with his family on the suit land. Further, that the suit property now belongs to the Plaintiff/ Applicant having been handed over to him by their father.
26. On cross-examination by Counsel for the Defendant, PW2 alleged that he was 42 years old, married and he resides in Thika. He stated that he was born and brought up on the suit property, being land parcel No. Loc.16/MWAGU, and he admitted that he could not recall the last digits. He asserted that the suit land belonged to his father, and that he was brought up thereon.
27. PW2 further testified that his father called a family meeting following purchase of the parcel of land to which he moved from the suit land. He admitted that he had not presented any evidence to demonstrate that his father is the lawful owner of the suit land. He reiterated that he is a resident of Thika and that his father owns a separate parcel of land from the suit property. Further, that he was not aware why his father was not demanding ownership of the suit property, and that his father resided on the suit land since he (PW2) was born. Further, that his father carried out developments thereon.
28. PW2 also stated that he was not aware who the registered owner of the suit land was, as per the information contained in the certificate of official search. That he does not know Yuna (the Defendant), herein, and that he had come to Court in support of the Plaintiff/ Applicant's case because the Plaintiff/ Applicant was born on the suit property.
29. In re-examination, PW2 reiterated that he was born on the suit property, and he has never prior to the current suit, heard of any claim concerning the ownership of the suit property.
30. PW3 Paul Mahigo Ndungu, a peasant farmer testified that he knows the Plaintiff/ Applicant quite well because he is his neighbor. He adopted his Witness Statement as his evidence in chief. Further, PW2 testified that the Applicant was born on the suit land, that his family were neighbors to him, and they attended the same school namely MWAGU Primary School.
31. It was his further testimony that the Plaintiff/ Applicant was brought up on the suit property whereupon the Applicant's father lived with his family. He stated that the Plaintiff/ Applicant lives on



the suit land together with his family, and he has lived thereon since childhood, and nobody has laid claim to the said property.

32. On cross-examination by Counsel for the Defendant, PW3 testified that the Applicant's father, Waweru Wainaina resides on a separate parcel of land, from the suit land. Further, that he does not know the history of the suit property, and that he has been called by the Plaintiff/Applicant, who is his neighbor, to give evidence.
33. It was his further testimony that the Plaintiff/ Applicant was brought up on the suit property, and that he was aged 12 years in year 1974. He admitted not to have known whether or not the suit land was the subject of a purchase. He also testified that the Applicant was given the suit land by his father, and that he did not know the actual time-period when the Applicant's father handed over ownership of the suit land to the Applicant
34. PW3 also admitted of not being aware whether the Plaintiff/ Applicant holds any documents attesting to his ownership of the suit land. Further, that the Plaintiff/ Applicant lives on the suit land together with his family and the Applicant's father owns a different parcel of land.
35. On re-examination, PW3 reiterated that as he was growing up, the Plaintiff/ Applicant was his neighbor. He testified that the Applicant's father had a separate parcel of land within the neighborhood, and that he was not aware whether the Applicant's father purchased the suit property or not. Further, that the reason for him being in Court was to testify that the Plaintiff/Applicant has been residing on the suit land for a long time.

### **The Defendant's Case**

36. Dw1 Eunice Wanjiru Ngure, a peasant farmer testified that the suit property belongs to her father, and that she filed a Succession Cause over his estate, and she was granted Letters of Administration in respect of her father's estate.
37. It was her further testimony that she knows Daniel Waweru, who is also her clansman, and also adopted her Witness statement dated 11<sup>th</sup> October, 2023, and list of documents marked DEXHIBIT 1 as her evidence in chief. Further, she testified that the Plaintiff/ Applicant built on the suit land during the pendency of the current suit, and that she did send demand letter to the Plaintiff/ Applicant, which was ignored.
38. On cross-examination by Ms. Njuguna, Counsel for the Plaintiff/Applicant, DW1 stated that she is also known as Yuna. Further, she testified that according to her ID Card, she was born in 1929, and she could not remember when she contracted her marriage.
39. It was her testimony that her late husband was known as Ngure Mararo, and that she was not aware whether her husband witnessed the sale of the suit land by her father-in-law to Jeremiah (the Applicant's father). It was her further testimony that she could not recall when her husband died. Further, that she did not discuss the suit property with her husband.
40. DW1 admitted that she filed a Succession Cause and that her father-in-law did not tell her that he had sold the suit property. She testified that the case before Kigumo Law Courts was between Wainaina and herself, and she has never sued the Plaintiff/ Applicant herein.
41. She further testified that she demanded that the Plaintiff/ Applicant vacates the suit property by serving him with a Court order and she thought that the Plaintiff/ Applicant would move out of the suit land. It was her further testimony that in the intervening period from 1990, to the filing of this suit, she requested the Applicant to move out of the suit property, and he responded by threatening her.



42. It was her further testimony that she reported the threats directed upon her by the Plaintiff/Applicant to the Police and later she sent her Advocate to the Applicant. DW1 was emphatic that the Applicant is occupying the suit land illegally, and that upon issuing Notice to the Applicant's father to vacate the suit property, he threatened to cut her to pieces using a panga.
43. It was her further testimony that she has never discussed the issue of the suit land with the Applicant herein, and that she was involved in a lawsuit over the suit property with the Applicant's father one Wainaina, not with the Plaintiff/ Applicant himself.
44. On re-examination, DW1 stated that the Applicant is named Waweruand is the son of Wainaina, who filed a Succession Cause at the Kigumo Law Courts, and who failed to Appeal against the decision of the Court in that Succession Cause, which decision was against him. It was her further testimony that the said Wainaina opted to lodge the instant case, instead of appealing.
45. Dw2 Peter Njuguna Karanja), who lives in Mwaguarea and is known to DW1, who is his neighbor and not his relative stated that Daniel Waweru Wainaina, is also known to him. He adopted his Witness Statement as his evidence in chief.
46. On cross-examination by Ms. Njuguna for the Plaintiff/ Applicant, DW2 stated that he knows Jeremiah and he does not know Daniel. He added that he is familiar with Wainaina, and his son Daniel Waweru Wainaina. Further, that he was present when the case [before Kigumo Law Courts] was filed, and that he has lived in the vicinity of the suit land for 40 years.
47. It was his further testimony that Daniel Waweru is the Plaintiff/ Applicant herein, and that he is unaware whether the Plaintiff/Applicant lives on the suit property. He admitted to having seen the Applicant working on the suit land, and that he was not aware of the scuffle over the suit property.
48. Further, DW2, testified that the suit property belongs to the Defendant/Respondent, and that she acquired the same from her father, who was name Gikima.
49. DW3 Timothy Gathura Karanja, from Gatangaarea, testified that he knew the Defendant/ Respondent and was not related to her. He admitted that he knew the Plaintiff/ Applicant, who is also his neighbor. He adopted his Witness Statement dated 11<sup>th</sup> October, 2023, as his evidence in Chief.
50. On cross-examination by Counsel for the Applicant, DW3 stated that both the Defendant/ Respondent and the Plaintiff/ Applicant are his neighbors. He also admitted that the Plaintiff/ Applicant resides on the suit property.
51. It was his further testimony that he was brought up in MWAGU area, and that he attended the same school as the Applicant. Further, that the Plaintiff/Applicant's father lived on the suit land together with the Applicant, and later the father to the Applicant moved out of the suit land and left it to the Applicant.
52. DW3 further testified that he wanted to purchase a different parcel of land from the suit property, and that the Defendant/ Respondent's son wished to buy some land. Further that he carried out a search of the suit land and he discovered that it was registered in the name of Gikima Nothua.
53. It was his further testimony that he did not pay a site visit to the suit property, and that he had never demanded that the Plaintiff/ Applicant vacates the suit property. He further testified that the Applicant resides on the suit land and knows full well that the same does not belong to the Applicant. Further, that the Plaintiff/ Applicant has never moved out of the suit land.



54. After the close of the Defense case, the Court directed the parties to file and exchange written submissions.

### **The Plaintiff/applicant's Submissions**

55. The Plaintiff/Applicant filed his written submissions on 10<sup>th</sup> June, 2024, through the Law Firm of Esther Kimani & Company Advocates.

56. He identified four (4) issues for resolution by the court as follows:

1. Whether the current suit is res judicata and/or an appeal?
2. Whether the Applicant has met the threshold for Orders of Adverse Possession?
3. Whether the Plaintiff is entitled to the ownership of land parcel number LOC.16/Mwagu/T.23 by adverse possession?
4. Who should bear the costs of the suit?

57. It was the Plaintiff/Applicant's submissions that according to a copy of the Green Card marked as his P EXHIBIT 1, dated 28<sup>th</sup> September 2023, and the Certificate of Official Search dated 6<sup>th</sup> September 2023, the Defendant/ Respondent is the registered proprietor of the suit land, and she was registered as such on 21<sup>st</sup> November, 2018.

58. It was also submitted that three (3) elements needed to be proved before this Court could conclude that this matter is res judicata; Reliance was placed in the decision of the Court in the case of John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 Others [2021] eKLR, wherein , the Court listed the following three (3) elements:

- a. There is a former judgment/Order which was final.
- b. The judgment or order was rendered by a Court having jurisdiction over the subject-matter and the parties, and;
- c. There must be between the first and second action identical parties, subject-matter and cause of action.

59. The Plaintiff/Applicant further submitted that a Judgment of the Court was delivered in Kigumo Succession Case No. 2 Of2016, wherein, the parties were Jeremiah Wainainaand Yuna Wanjiru. Further that the issue in contention in the said suit was that the Defendant herein had filed a Succession Cause, and had allegedly omitted to include one Jeremiah,as a beneficiary of the estate of the late Gikima Nothua.It was his further submission that the Court in Kigumo Succession Case No. 2 Of2016, ruled that the right claimed by the Applicant (Jeremiah), was that of a purchaser, and therefore, it did not constitute one of the required standards for the revocation of a grant.

60. The Plaintiff/Applicant further submitted that the current suit concerns the Plaintiff/ Applicant's occupation of the suit property as distinguished from his father. Further, that the present suit is concerned with the doctrine of Adverse Possession, and is entirely unrelated to Kigumo Succession Case No. 2 Of2016. He added that the eviction notice marked Exhibit3, was served upon him personally as the occupant of the suit land, and not his father.

61. The Plaintiff/Applicant refuted the Defendant/Respondent's contention that the current suit is an attempt by the Plaintiff/ Applicant's father to appeal against the decision of the court in Kigumo Succession Case No. 2 Of2016. He argued that the former suit and the instant suit are distinguishable



in terms of the jurisdiction of the Courts before which the two suits were commenced, and also in terms of the rights claimed in each suit. Further, that the parties were different in the two cases, as well as the interests pursued in both causes of action. It was also submitted that the issues raised in the current suit cannot be said to have been resolved with finality by the Court in Kigumo Succession Case No. 2 Of2016.

62. On the question of whether he has met the threshold for the grant of orders of Adverse Possession, the Plaintiff/ Applicant relied on the holding of the Court in the cases of *Richard Wefwafwa Songoi V Ben Munyifwa Songoi [2020] eKLR (Kisumu Civil. Appeal. No. 110 of 2016)*; and, Gabriel Mbui V Mukindia Maranya.
63. The Plaintiff/ Applicant further submitted that he has adduced sufficient evidence herein to demonstrate that the Defendant/ Respondent is the registered proprietor of the suit property as attested to by a copy of the Certificate of Official Search marked P.Exhibit 3, on record and an extract from the Green Card marked P.Exhibit1, in respect of the suit land.
64. It was his further submission that he has presented adequate evidence to prove that he entered onto the suit property in 1975, and erected structures thereon, which evidence was not controverted by the Defendant/ Respondent. Further, that the Defendant/ Respondent failed to controvert his claim that since 1990, the Plaintiff/ Applicant has been residing on the suit property together with his family.
65. The Applicant submitted that to succeed in a claim founded on Adverse Possession, a claimant needs to demonstrate that his entry into the land in question was non-permissive, non-consensual and without license. Reliance was placed in the findings of the Court of Appeal in the case of *Mombasa Teachers Cooperative Savings & Credit Society V Robert Muhambi Katana & 15 Others [2018] eKLR*.
66. Further, the Plaintiff/Applicant submitted that the evidence contained in the photographs marked as his Exhibit3 (a-d,) clearly proved that his occupation of the suit property since 1990, as claimed was his, neither the Defendant/Respondent nor her father granted him the permission to occupy the suit land. He argued that as there was no license issued to him allowing him to reside on the suit property, his occupation of the suit property was, therefore non-permissive.
67. He also submitted that he is entitled to the suit land having occupied the same from 1990, to the time of filing of the instant suit in 2023, which period was in excess of the statutory 12-year period. Reliance was sought in a copy of the sale agreement dated 1974, which confirmed the purchase of the suit property by the Plaintiff/Applicant's father. Further, that there was immediate occupation of the suit property by his father in 1975.
68. He reiterated his averments as set out in his Supporting Affidavit that his father moved out of the suit property in 1990, to a separate parcel of land, leaving the Applicant to raise up his own family on the suit land. Further, that the length of the period during which he has been residing on the suit property from 1990 to the filing of the present suit is 33 years, and that his evidence of occupation of the suit property was not controverted, as the same was confirmed by the Defendant/Respondent and her witnesses at the trial.
69. On the third issue of whether his occupation of the suit property was open, continuous and uninterrupted, reliance was placed in the holding of the Court in the case of *Abdirashid Adan Hassn V Estate of W.H.E. Edgley [2022] KLR*, where the Court referenced the decision of the Court of Appeal in the case of *Maweu V Liu Ranching and Farming Cooperative Society (1985) KLR 430*, for the dictum that: "In law, possession is a matter of fact depending on all circumstances".



70. The Plaintiff/Applicant submitted that his peaceful occupation of the suit property is borne out by the pictures tendered before the Court, as his evidence and showing the semi-permanent structures he erected thereon.
71. It also submitted that the Defendant/Respondent did admit under cross-examination that she had not served any Court order or demand letter upon the Plaintiff/ Applicant, which required him to vacate the suit land. He relied on the reasoning of the Court in the case of Gabriel Mbui V Mukindia Maranya [1993] Eklr, where it was held that mere possession is not sufficient to make the possession an adverse one.
72. He also submitted that his occupation was attended to by fencing off the occupied land, tilling and building of semi-permanent structures, and therefore, his claim over the suit land on grounds of Adverse Possession was merited. He urged the Court to allow his claim and restrain the Defendant/ Respondent from entering into, possessing or disposing of the suit property.
73. On the issue of costs, it was submitted that costs follow the event, and are ordinarily awarded to the successful party in a suit. The Plaintiff/Applicant submitted that he was entitled to the costs of the suit having demonstrated the veracity of his claim by way of evidence. Further, that the evidence presented before the court satisfied the requirements set out by the court in the case of Gabriel Mbui V Mukindia Maranya(Supra).

#### **The Defendant/respondent's Submissions**

74. The Defendant/ Respondent filed her written submissions dated 27<sup>th</sup> May 2023, through the Law Firm of T.M. Njoroge & Co Advocate. It was her submission that she became the registered proprietor of the suit land by virtue of the determination of the Court in the Succession Cause in respect of the estate of the late Gikima Nothua. Further, that the preceding decision of the Court has not been challenged, vacated or set aside.
75. He further submitted that the Plaintiff/ Applicant's claim must fail because the sale Agreement relied upon in the suit names one Jeremiah Thuku Wainaina, as the Purchaser, yet the Applicant has not presented a grant Letters of Administration or Letters of Administration Ad litem in respect of the estate of the said Jeremiah Thuku Wainaina. She also submitted that the Applicant lacks locus standi to commence the instant suit due to lack of proof that he is a legal representative of the estate of Jeremiah Thuku Wainaina.
76. It was the Defendant/ Respondent's further submission that the sale Agreement dated 23<sup>rd</sup> August 1974, which was relied upon by the Plaintiff/ Applicant offends the provisions of the [Land Control Act](#) CAP 302, owing to failure to procure the Consent of the local Land Control Board, within six (6) months from the date of its execution and also taking into account that original registered owner of the suit land died on 8<sup>th</sup> October, 2002.
77. The Respondent further submitted that the Plaintiff/ Applicant's claim that his occupation of the suit land was open, continuous and uninterrupted, was not true. She submitted that during the trial, Defendant/Respondent demonstrated she sought the eviction of Jeremiah Thuku Wainaina(the Applicant's father,) from the suit land on several occasions by sending her Advocates. However, the said Jeremiah Thuku Wainaina, responded by threatening cut the Respondent to pieces using a Panga.
78. Further, that the Applicant's father failed to lodge an Appeal against the decision of the Succession Court, issued in respect of Succession Cause No. 2 of 1986 KigumoSPMCC, in respect of the estate of the late GikimaNothuaalias Nothua Thiga. She also submitted that the Certificate of Confirmation of Grant issued in respect of the estate of the deceased has not been revoked.



79. It was her further submission that by virtue of the proceedings and decision in Succession Cause No. 2 of 1986 KigumoSPMCC, the instant suit is rendered *res judicata*. That there have been numerous lawsuits in respect of the suit property, and litigation must come to an end. She reiterated that the Plaintiff/ Applicant's occupation of the suit land has not been uninterrupted, as it has been the subject of numerous lawsuits. She urged the Court to dismiss the instant suit and to allow her Counter-claim with costs.
80. The above is the summary of the Pleadings by the parties herein, the evidence adduced in court, and the rival written submissions, which this court has carefully read and considered. The court finds the issues for determination are;
- I. Whether the Plaintiff/Applicant possess the requisite *locus standi* to commence the instant suit?
  - II. Whether this suit is *res judicata*?
  - III. Whether the Plaintiff/Applicant is entitled to the Orders sought?
  - IV. Who shall bear the costs of the suit?
    - i. Whether the Plaintiff/Applicant possess the requisite *locus standi* to commence the instant suit?
81. In the case of *Law Society of Kenya V Commissioner of Lands & Others*, Nakuru High Court Civil Case No.464 of 2000, the Court held that:
- “*Locus Standi* signifies a right to be heard, a person must have sufficiency of interest to sustain his standing to sue in Court of Law”.
82. Further, in the case of *Alfred Njau and Others Vs City Council of Nairobi (1982) KAR 229*, the Court stated that:
- “the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no *Locus Standi* means that he has no right to appear or be heard in such and such proceedings”.
83. In the case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR*, the Court reasoned as follows:
- “Further the issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. *Locus standi* relates mainly to the legal capacity of a party. The impact of a party in a suit without *locus standi* can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”
84. This suit is expressed to be brought by the Plaintiff/ Applicant in his personal capacity as distinguished from Succession Cause No. 2 of 1986 KigumoSPMCC, which suit was commenced by the Plaintiff/ Applicant's father. In terms of the parties in respect of the two causes of action, the Court is satisfied



that each case was moved by a different party, although the Defendant/ Respondent was the same in both instances. In view of the foregoing, the Court holds and finds that the Plaintiff/ Applicant possesses the necessary authority to commence the present suit.

ii Whether this suit is res judicata

85. Section 7 of the *Civil Procedure Act* on res judicata, 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.”

86. In the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), the Court of Appeal understood the meaning and import of res judicata as follows:

“...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 disjunctive but conjunctive terms;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That 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.”

87. The instant suit is brought by the Plaintiff/ Applicant under his own name as the occupant of the suit property since 1990, together with his family. Further, the Court holds and finds that the suit herein is not rendered res judicata as the Court in Succession Cause No. 2 of 1986 KigumoSPMCC, did not entertain a question touching on the doctrine of adverse Possession, which issue forms the basis of Applicant’s claim in the instant suit.

88. The Plaintiff/ Applicant argued and submitted that the parties in the current suit are different from those in Succession Cause No. 2 of 1986 KigumoSPMCC. In addition, the jurisdiction of this Court and the Court in the foregoing cause is different, thirdly, the reliefs sought in both cases are also different

89. Upon perusal of the pleadings and reliefs sought by the Plaintiff/ Applicant herein, the Court is satisfied that the instant suit being founded on the doctrine of Adverse Possession, its subject-matter differs from that in Succession Cause No. 2 of 1986 KigumoSPMCC, wherein, the Plaintiff/ Applicant’s father, asserting his right as a purchaser of the suit land, sought the revocation of a grant of Letters of Administration which conferred ownership over the same to the Respondent.

90. It is trite that a special category of Magistrates may entertain disputes related to issues of Adverse Possession. The Court in the case of *Patrick Ndegwa Munyua v Benjamin Kiiru Mwangi & another*



[2020] eKLR, held that a certain category of Magistrate’s Courts is vested with the mandate to handle questions related to adverse Possession, as follows:

“The alterations, adaptations, qualifications and exceptions referred to above must give Section 38 (1) of the *Limitation of Actions Act* conformity to Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates’ Courts Act*, 2015 both of which were enacted to give effect to Article 162(2) (b) and Article 169(1) (a) and (2) of *the Constitution*. So as attain that conformity, Section 38 (1) of the *Limitation of Actions Act* must be construed as not depriving magistrates who are duly gazetted and have the requisite pecuniary jurisdiction, of the jurisdiction and power to handle cases involving occupation of and title to land, including adverse possession which is essentially a dispute on title to land. Such an interpretation is further in line with Article 259 which enjoins the court to interpret *the constitution* in a manner that promotes its purposes, values and principles.”

91. Be that as it may, a Magistrate’s Court exercising its jurisdiction as a Succession court is not mandated to entertain matters related to Adverse Possession. The foregoing role is exclusively carved out for that category of magistrates who are duly gazetted and have the requisite pecuniary jurisdiction to handle cases involving occupation of and title to land pursuant to the provisions of Section 26 (3) and (4) of the *Environment and Land Court Act*, 2011 and Section 9 (a) of the *Magistrates’ Courts Act*, 2015.
92. The Court holds and finds that the Court handling Succession Cause No. 2 of 1986 KigumoSPMCC, lacked jurisdiction to entertain a question related to Adverse Possession and, as a matter of fact, was not presented with such an issue for resolution. In the upshot, it is the holding of the Court that the issues raised in the instant suit are not rendered res judicata due the proceedings in Succession Cause No. 2 of 1986 KigumoSPMCC.
  - iii. Whether the Plaintiff/Applicant is entitled to the Orders sought?
93. The doctrine of Adverse Possession is provided for under Section 7 of the *Limitation of Actions Act* which 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”.



94. 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(1) of the *Limitation of Actions Act* stipulates as follows:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 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.”

95. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the Court understood the meaning and import of the doctrine of Adverse Possession as follows:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”

96. In *Samuel Kibamba v Mary Mbaisi* [2015] eKLR (*Kisumu Civil Appeal No. 27 of 2013*), the Court reasoned as follows:

“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”.

97. The Court of Appeal in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR (*Kisumu Civ App. No. 110 of 2016*), opined 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.”

98. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] Eklr, the Court held as follows:

“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.”

99. The issue as to who is the registered proprietor of the suit land is not contested. The Plaintiff/Applicant supplied an extract from the Green Card to the suit property as well as a copy of the Certificate of Official Search in respect of the suit land both of which reflect that the Defendant/Respondent is the registered owner of the suit property. The Respondent also affirmed her ownership over the suit land.
100. The Plaintiff/ Applicant contended that he entered onto the suit land in 1975, following his father’s purchase of the same from one Gikima Nothuavide a sale Agreement dated 23<sup>rd</sup> August 1974, on record. However, the Plaintiff/Applicant’s claim is not dependent on the said purchase by his father; rather, it hinges on the Applicant’s alleged open, continuous and uninterrupted occupation of the suit property since 1990, during which year, he claims, his father moved out of the suit land, onto a separate parcel of land.
101. Although both parties and their witnesses mentioned the Applicant’s father who was said to be alive, the Applicant’s father was not called as a witness in the instant proceedings. In his pleadings, the Plaintiff/ Applicant indicated that he suspected that the Defendant/ Respondent was working in concert with the Applicant’s father to dispossess the Applicant of the suit property. The foregoing could well explain the Applicant’s reluctance to call upon his own father as a witness at the trial.
102. The Court in the case of *Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR (Civil Appeal No 164 of 2011)*, referenced the reasoning of the Court of Appeal in the case of *Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR* as follows:

“There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the *Limitation of Actions Act* (cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession”.

103. The Court in the case of *Gerald Muriithi V Wamugunda Muriuki & Another (2010) eKLR*, cited with approval the decision of the Court of Appeal in the case of *Wambugu V Njuguna (1983) KLR* page 172 as follows;

“In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.”



104. Further, the Court in the case of in the case of Kimani Ruchire –v – Swift Rutherfords & Co. Ltd., (1980) KLR 10 at page 16 letter B, held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it by way of recurrent consideration.”

105. In order to succeed in his claim which is anchored on the doctrine of Adverse Possession, the Plaintiff/ Applicant’s needed to prove that his occupation of the suit property been open, continuous and uninterrupted for a period of 12 years as required by law. The Plaintiff/ Applicant stated that he entered the suit land in 1975, at the age of 10 years as part of his father’s household, and was brought up thereon until he attained age of majority and started his own family in 1990, and in that same year, his father moved out of the suit property to establish a new household on a different parcel of land.

106. The Defendant/ Respondent assumed ownership of the suit property following the confirmation of a grant of Letters of Administration issued in respect of the estate of the late Gikima Nothua. The Defendant/Respondent argued and submitted that there have been numerous lawsuits against the Plaintiff/ Applicant regarding the ownership and possession of the suit property which, therefore, contradicts the Plaintiff/Applicant’s claim that his occupation of the

107. However, upon careful consideration of the pleadings, evidence and rival submissions tendered by the parties herein, the Court has not found any record of proceedings involving the parties herein, relating to the ownership of the suit land. For the avoidance of doubt, the Plaintiff/ Applicant was not a party in Succession Cause No. 2 of 1986 KigumoSPMCC.

108. In addition, the Demand Letter dated 28<sup>th</sup> August, 2023 issued by the Respondent requiring the Plaintiff/ Applicant to deliver vacant possession of the suit property is addressed to Jeremiah Wainaina Thuku, the Applicant’s father, although the same was served upon the Plaintiff/Applicant herein as the occupant of the suit land.

109. In the case of Paul Kamande Gicheha v Jacob Kinyua Kiragu [2018] eKLR the Court reasoned as follows:

“Time therefore began to run against the Defendant in favour of the Plaintiff from the time the latter occupied the suit property and was engaged in acts that were inconsistent with the Defendant’s title, for instance building houses on the suit property, planting trees and the digging of a dam. There is nothing to suggest that that occupation was secret or that it was not known to the Defendant.”

110. The Applicant’s occupation of the suit land was attested to during cross-examination of the Defendant/Respondent’s witnesses, DW2 and DW3, whose testimony in that respect corroborated that of the Plaintiff/ Applicant and his witnesses. In addition, the Plaintiff/ Applicant presented pictures showing semi-permanent structures which he claimed that he erected them on the suit property.

111. In view of the foregoing, it is not in doubt that the Plaintiff/Applicant is in possession of the suit property. Therefore, it is the holding and finding of this Court that the Plaintiff/ Applicant’s claim based on adverse Possession crystallized against the estate of the late Gikima Nothua, who died in year



2002, because the Plaintiff/ Applicant together with his family had been in occupation of the suit land since 1990.

112. It is trite that the mere change of ownership of land which is occupied by another person under Adverse Possession does not stop time from running or interrupt such person's Adverse Possession. See the decision of the Court in the case of *Githu v Ndeete* [1984] KLR 776.

113. Consequently, this court finds and holds that upon a careful consideration of the evidence presented by the parties in the current proceedings, the Court is satisfied that the Plaintiff/ Applicant has demonstrated that he resides on the suit property and has been in open, continuous and uninterrupted possession of the same in excess of the statutory period of 12 years.

114. Therefore, this court finds and holds that the Plaintiff/ Applicant has proved his case on the required standard of balance of probabilities. For the above reasons, this court enters judgement in favour of the Plaintiff/ Applicant herein.

iv. Who shall bear the costs of this suit?

115. It is trite that costs should follow the events, and that the successful party is always awarded costs. The Plaintiff/Applicant herein being the successful party, this Court finds no reasons not to exercise its discretion in his favour and award costs of the Originating Summons dated 6<sup>th</sup> November, 2023 to the Plaintiff/Applicant.

116. In a nutshell, this court finds and holds that the Plaintiff/ Applicant has proved his case on the required standard of balance of probabilities and his claim as contained in his amended Originating Summons dated 6<sup>th</sup> November 2023, is found merited and is allowed entirely with costs.

117. Consequently, judgment is entered for the Plaintiff/ Applicant as against the Defendant/ Respondent herein in terms of prayers No. a, b, c & d of the Amended Originating Summons dated 6<sup>th</sup> November 2023. For avoidance of doubt, costs of this suit shall be met by the Defendant/ Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF SEPTEMBER 2024.**

**L.GACHERU**

**JUDGE.**

**23/9/2024**

Delivered online in the presence of;

Joel Njonjo - Court Assistant.

M/s Njuguna for Plaintiff/ Applicant

T.M. Njoroge for Defendant/ Respondent.

**\*\*L.GACHERU\***

**JUDGE.**

**23/9/2024**

