



Mukabi v Kiruthui alias Igwanya Kiruthu & 6 others (Enviromental and Land Originating Summons 675 of 2014) [2025] KEELC 546 (KLR) (14 February 2025) (Judgment)

Neutral citation: [2025] KEELC 546 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 675 OF 2014**

JO OLOLA, J

FEBRUARY 14, 2025

(FORMERLY HCCC NO.113 OF 2003)

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA

**IN THE MATTER OF: SECTION 37 AND 38 OF
THE LIMITATION OF ACTIONS ACT CAP 22**

AND

**IN THE MATTER OF: LAND PRACEL NOS.TETU/
MUTHUAINI /1434 AND TETU/MUTHUAINI/1435**

BETWEEN

SIMON MUCHEMI MUKABI PLAINTIFF

AND

**REUBEN IGWANYA KIRUTHUI ALIAS IGWANYA KIRUTHU 1ST
DEFENDANT**

DEDAN NDIRANGU 2ND DEFENDANT

**SIMON GACHUHI KIRUTHU ALIAS SOLOMON GICHUHI KIRUTHU
SUBSTITUTED BY SIMON MUCHEMI MUKABI 3RD DEFENDANT**

**LUCY WANGECHI NDIRANGU SUBSTITUTED BY SIMON MUCHEMI
MUKABI 4TH DEFENDANT**

PETER MUCHEMI NDIRANGU 5TH DEFENDANT

SAMUEL MUTHUI NDIRANGU 6TH DEFENDANT

MAHIGA PRODUCE TRADING CO LTD 7TH DEFENDANT



JUDGMENT

Background

1. This suit was initially filed as Nyeri HCCC. No. 113 of 2003 (OS). It was transferred to this court on 26th November, 2014 when it was given its current reference.
2. By an Originating Summons dated 8th December, 2003 as amended on 23rd October, 2012, Simon Muchemi Mukabi (hereafter “the Plaintiff”) sought for the determination of the following issues:
 - a. Whether the Plaintiff by way of adverse possession has acquired good title to a 3rd share of the original piece of Land Parcel No. Tetu/Muthuaini/555 which has formed Land Parcel Nos. Tetu/ Muthuaini/ 1434 and Tetu/Muthuaini/1435 respectively.
 - b. Whether the Plaintiff is entitled to a share of 0.66 acres within Land Parcel No. Tetu / Muthuaini /1434 registered in the name of the 7th Defendant herein and which was formed after the sub-division of the original piece of land No. Tetu/Muthuaini/ 555.
 - c. Whether the Plaintiff is entitled to a share of 0.9 acres within Land Parcel No. Tetu/ Muthuaini/1435 registered under the names of the 1st, 2nd and 3rd Defendants herein and which was formed after the subdivision of the original piece of land No. Tetu / Muthuaini/555.
 - d. Whether the 1st, 2nd and 3rd Defendants herein should be ordered to sub - divide and transfer a portion of 0.66 acres out of land parcel No. Tetu/Muthuaini/1434 to the Plaintiff herein.
 - e. Who should bear costs of this suit.
3. The Originating Summons is supported by an Affidavit and a Supplementary one both sworn by the Plaintiff wherein he avers that the original Suitland measuring 4.69 acres was registered in the name of Kiruthu Muchemi who was the father of the 1st, 2nd and 3rd Defendants. The Plaintiff further avers that the said Kiruthi Muchemi had two brothers, namely; Ndirangu Muchemi and Mukabi Muchemi.
4. The Plaintiff asserts that during land consolidation, demarcation and registration, his mother Marieta Njeri Mukabi on behalf of her deceased husband, Mukabi Muchemi, allowed the father of the 1st, 2nd and 3rd Defendants being the only surviving brother of her deceased husband to be registered as the owner of 1.56 acres out of land parcel No. Tetu/Muthuaini/555 in trust for the Plaintiff’s family.
5. The Plaintiff further avers that after the said registration, the suit land was unofficially divided by clan elders into three (3) equal portions and the Plaintiff’s family took up their portion which they occupy to date.
6. The Plaintiff further avers that following a succession cause relating to the Estate of their deceased father, the 1st, 2nd and 3rd Defendants became the registered proprietors of the suit property on 12th June, 1975 but the Plaintiff’s family continued to occupy their portion uninterrupted. Sometimes in July, 2002, the 4th Defendant who is now deceased secretly caused the said LR. No. Tetu/Muthuaini/555 to be sub-divided into two portions being Tetu/Muthuaini/1434 and Tetu/ Muthuaini/1435.
7. The Plaintiff avers that following the secret sub-division, the 1st, 2nd and 3rd Defendants retained LR. No. Tetu/Muthuaini/1435 measuring 2.7 acres while the 4th Defendant became the registered proprietor of Tetu/Muthuaini/1434 measuring 2.0 acres. The Plaintiff further avers that following the



- demise of the 4th Defendant on 12th October, 2007, the 5th and 6th Defendants who are the sons of the 4th Defendant transferred their portion of land to the 7th Defendant on 10th February, 2012.
8. Reuben Igwanya Kiruthu (the 1st Defendant) is opposed to the Plaintiff's claim. In a Replying Affidavit sworn on 20th May, 2022 on his behalf and on behalf of the 2nd Defendant, the 1st Defendant avers that following the demise of their father, they filed Nyeri High Court Succession Cause No. 15 of 1974. He further avers that he did file an Affidavit of Protest in Succession Cause No. 467 of 2009 (in the Matter of the Estate of Lucy Wangechi Ndirangu) and that the court made a Ruling to the effect that LR. No. Tetu/Muthuaini/1434 had been illegally dealt with.
 9. Peter Muchemi Ndirangu (the 5th Defendant) is equally opposed to the claim. In his Replying Affidavit sworn on 13th May, 2015 on his own behalf and that of his brither – the 6th Defendant, he avers that they are the sons of Lucy Wangechi Ndirangu who passed away on 13th October, 2007. The 5th Defendant avers that following a Succession Casue they filed, the High Court ordered that LR. NO. Tetu/Muthuaini/1434 be registered jointly in his name and that of the 6th Defendant.
 10. The 5th Defendant further avers that neither the Plaintiff nor their mother occupies LR. No. Tetu/Muthuaini/1434 and he asserts that both the Plaintiff as well as the 1st to 4th Defendants are vexatious litigants who have filed a multiplicity of suits in regard to this matter. He urged this court to find that this suit is an abuse of the court process and that the same does not disclose any reasonable cause of action against the 5th and 6th Defendants.
 11. Mahiga Produce Trading Co. Ltd. (the 7th Defendant) is equally opposed to the suit. In a Replying Affidavit sworn on 27th November, 2012 by its Director Allan Kanyi Kinyanjui, the 7th Defendant avers that the contents of this suit are strange, wild and that the same does disclose any reasonable causes of action against them. The 7th Defendant asserts that it is the registered owner of LR. No. Tetu/Muthuaini/1434 having purchased the same from the 5th and 6th Defendants free from any encumbrances.

Analysis and Determination

12. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
13. This suit was initially instituted by the Plaintiff herein jointly with his mother Marieta Njeri Mukabi (Marieta) on 8th December, 2003. Prior to the amendments later on effected on their Originating Summons on 23rd October, 2012, the pair had sought orders against the initial four Defendants seeking to be declared to have acquired one third of the parcel of land previously known as LR. No. Tetu/Muthuaini/555 by way of adverse possession.
14. It was the Plaintiff's case that the original suit land was in the year 1958 and with the consent of Marieta registered in the name of Kiruthu Muchemi who was the father of the 1st, 2nd and 3rd Defendants. According to the Plaintiffs, the said Kiruthu Muchemi had two brothers; namely;
 - i. Ndirangu Muchemi who was the husband of Lucy Wangechi Ndirangu (the 4th Defendant); and
 - ii. Mukabi Muchemi who was the husband of Marieta and the father of the surviving Plaintiff.
15. The Plaintiffs told the court that as at the time of land consolidation, demarcation and registration in 1958, the two brothers had passed away and since Kiruthu Muchemi was the only one alive, Marieta



consented and the elders agreed to have him registered as the proprietor of the only family land on the understanding that he was to hold 1/3 share thereof in trust for Marieta and her family.

16. It was further the Plaintiff's case that on the basis of that understanding, the father of the 1st, 2nd and 3rd Defendants together with the elders of their clan thereafter proceeded to unofficially sub-divide the suit land into three equal portions. Each of the three (3) families then occupied their portion and Marieta's family continues in occupation of their portion to date.
17. The Plaintiffs told the court that sometime in the 1970s, Kiruthu Muchemi passed away and in or about the year 1974, his sons, the 1st, 2nd and 3rd Defendants filed a Succession Cause in relation to his estate upon which the three sons came to be registered as the joint proprietors of the suit land in the year 1975. Many years later, the Plaintiffs came to discover that in July 2002, the 1st, 2nd and 3rd Defendants acting in concert with the 4th Defendant had proceeded to sub-divide the original parcel of land measuring 4.69 acres into two parcels, namely, Tetu/Muthuaini/1434 measuring 2.0 acres and registered in the name of the 4th Defendant and Tetu/Muthuaini/1435 measuring 2.7 acres registered in the names of the 1st, 2nd and 3rd Defendants jointly.
18. The Plaintiffs assert that the said sub-divisions were done secretly and with the sole purpose of denying them their rightful share within the original piece of land and hence their demand herein that they be given their rightful share of the suit land.
19. As the matter dragged on in court, a number of events appear to have taken place thereby necessitating the amendments made to the Originating Summons in October, 2012. First, Marieta passed away leaving her son as the sole Plaintiff herein. On 12th October, 2007, the 4th Defendant equally passed away thereby necessitating the joinder of her sons and legal representatives, the 5th and 6th Defendants herein. The 3rd Defendant would also pass away later on 28th August, 2015 leaving his two brothers to defend the claim.
20. Almost 20 years after the claim was instituted, Reuben Igwanya Kiruthu (the 1st Defendant) filed a response to the claim on his own behalf and on behalf of his sole surviving brother – the 2nd Defendant. In his short Replying Affidavit sworn on 20th May, 2022 and filed herein on 8th June, 2022, the 1st Defendant deposes as follows;

- “ 1. That I am the 1st Defendant and the 2nd Defendant has authorized me to swear this Affidavit;
2. That I and the 2nd Defendant are brothers and our father is the late Kiruthu Muchemi;
3. That after our father's death succession proceedings were filed in Nyeri DM Succ. Cause No. 15 of 1974. Annexed marked RK1 are Succession Cause No. 15 of 1974 (sic);
4. That I confirm the existence of the Succession Cause by annexing my Affidavit of Protest which relates to the suit lands and pray for (the) same to be considered as part of our evidence. Annexed is the Affidavit marked “RK2”;
5. That LR Tetu/Muthuaini/1434 has been illegally dealt with and the High Court has found as such. Annexed marked “RK3” is a copy of the Ruling; and
6. That for the Plaintiff to allege he has by adverse possession acquired a good title considering the long history of the litigation which has been going on is false.”



21. Having been substituted as the legal representative of the 4th Defendant, Peter Muchemi Ndirangu, (the 5th Defendant) swore a Replying Affidavit on 13th May, 2015 stating his position and that of his brother – the 6th Defendant. It was the 5th and 6th Defendants’ position that on 19th November, 2010, they had been issued with Letters of Administration for their mother’s estate in Nyeri High Court Succession Cause No. 467 of 2009.
22. The 5th and 6th Defendants asserted that the Certificate of Confirmation issued in the said Cause had ordered that LR. No. Tetu/Muthuaini/1434 that was initially registered in their mother’s name be registered in their joint names as proprietors by transmission. They further asserted that neither the Plaintiffs nor the 1st to 4th Defendants had ever occupied the portion of the land known as Tetu/Muthuaini/1434. It was their case that the 1st to 3rd Defendants were evicted from the land in the year 2006 and they and their mother had taken full occupation thereof until the time they sold the land to the 7th Defendant.
23. Mahiga Produce Trading Co. Ltd. (the 7th Defendant) are equally opposed to the Plaintiff’s claim. In a Replying Affidavit sworn on its behalf by its Director Allan Kanyi Kinyanjui, the 7th Defendant asserts that it is the registered proprietor of LR. No. Tetu/Muthuaini/1434 having purchased the same from the 5th and 6th Defendants in October, 2011. It is the 7th Defendant’s case that as at the time they did purchase the land, the same had no encumbrances and was therefore legally transferred to themselves.
24. In regard to a claim for adverse possession, Section 38 of the *Limitation of Actions Act* provides as follows:

“SUBPARA 38

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
 - (2) An order made under subsection (1) of this section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”
25. The doctrine of adverse possession was aptly defined in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi* (2015) eKLR where the Court of Appeal held thus:

“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 owners, the essential prerequisite 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.”

26. In the matter before the court, it was not in dispute that the suit property was on the first registration carried out on 31st July, 1958 registered in the name of Kiruthi S/o. Muchemi. According to the Plaintiffs, that registration was done in trust for the registered proprietor who was to hold the same on



his own behalf and on behalf of his two deceased brothers – Ndirangu Muchemi and who was father of the 5th and 6th Defendants, and Mukabi Muchemi who was the father of the Plaintiff herein.

27. In their pleadings before the court, the 1st and 2nd Defendants vehemently denied that their father had held the land in trust for his two deceased brothers. It must have been on the basis of that belief that in 1974 following the death of their father, they filed Nyeri DM Succession Cause No. 15 of 1974 whereupon the original LR. No. Tetu/Muthuaini/555 was transferred to the names of the three brothers as joint proprietors.
28. While the 3 brothers denied the existence of the trust, it was quite apparent that the registration of their father as the proprietor of the land was out of some understanding between their father and the two widows left behind by their father's two deceased brothers. Testifying at the trial herein, Reuben Igwanya Kiruthu (DW1) readily conceded during cross-examination that his father had two brothers who were deceased and that their two widows lived on the land with their children. It was his testimony that even after Marieta, the Plaintiff's mother passed on, some of her children continue to live on a portion of the land to-date.
29. From the record herein, it was apparent that as at the time Lucy Wangechi Ndirangu (the 4th Defendant) passed away in the year 2007, she was yet to file a response to the Plaintiff's claim. It was however clear from the testimony of her son Peter Muchemi Ndirangu (DW2) that their mother had equally harbored similar thoughts as those of the Plaintiff herein, that the 1st, 2nd and 3rd Defendants' father had held the suit land in trust for the other families of the brothers.
30. Having waited in vain for the 1st, 2nd and 3rd Defendants to give her title to the portion of the land, DW2's mother quietly instituted Nyeri HCCC No. 176 of 1987 against the 1st, 2nd and 3rd Defendants seeking a declaration that the trio held the land in trust for herself and sought to have that trust determined.
31. It was apparent from the material presented before the court that on 5th February, 1997, that dispute was by the consent of the parties referred to arbitration by the D.O. Nyeri Municipality to be assisted by four elders nominated by the parties. The award of the elders was read on 18th June, 1997. The same is what awarded DW2's mother 2 acres out of LR. No. Tetu/Muthuaini/555.
32. It was also clear that the 1st, 2nd and 3rd Defendants were unhappy with the award and sought to set it aside. Their application to set the same aside was dismissed by J.L.A. Osiemo J. on 30th March, 1998 and the elders award was consequently adopted as an order of the court. That award in essence is what led to the sub-division of LR. No. Tetu/Muthuaini/555 into two, resulting in Tetu/Muthuaini/1434 measuring 2 acres registered in the names of the 4th Defendant and Tetu/Muthuaini/1435 measuring 2.7 acres which was retained in the joint names of the 1st, 2nd and 3rd Defendants. The award having been adopted as an order of the court remains so as the same has never been set aside.
33. From the Plaintiff's own testimony, it was evident that when his mother Marieta got wind of those proceedings, she filed an application on 22nd November, 1999 seeking to be enjoined and to be granted 1.6 acres of the original suit land on the basis of the trust that had been relied on by DW2's mother. That application was however declined as it came too late after the award had been adopted as the judgment of the court. The Plaintiff's mother does not appear to have followed up or appealed the decision.
34. In the circumstances of this case, it was clear to me that the 1st and 2nd Defendants do not deny that the Plaintiff and his family have remained on their portion of the land since the year 1975 when the 1st, 2nd and 3rd Defendants became the registered proprietors of LR. No. Tetu/Muthuaini/555. There was



no evidence that the registered proprietors had made any attempts to re-possess the portion of land occupied by the Plaintiffs even after the land was sub-divided in the year 2002 to create LR. No. Tetu/Muthuaini/1434 and 1435 respectively.

35. From their evidence and testimony before the court, the Plaintiffs did not contest the position taken by the 5th and 6th Defendants that the portion of land they occupy does not extend to LR. No. Tetu/Muthuaini/1434. Indeed, the Plaintiffs claim against the 5th and 6th Defendant was clearly motivated by reasons of trust and not that of adverse possession. The Plaintiffs claim against all the Defendants is based on a claim of adverse possession and there was no claim based on trust.
36. It follows that the claim against the 5th and 6th Defendants and by extension the 7th Defendant must fail. The 7th Defendant has produced a Sale Agreement clearly indicating that it did purchase the said LR. No. Tetu/Muthuaini/1434 in 2011 free of any encumbrances from the 5th and 6th Defendants.
37. In regard to the 1st and 2nd Defendants, it was clear to me that they had discontinued their possession and occupation of the portion of land that came to be registered upon sub-division as LR. No. Tetu/Muthuaini/1435 which portion is occupied by the Plaintiffs since the year 1975.
38. As was stated in the case of Kasuve –vs- Mwaani Investment Ltd. & 4 Others (2004 1 KLR 184.

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

39. In the premises, I am persuaded that the Plaintiffs have made out a case for adverse possession as against the 1st and 2nd Defendants. Accordingly, I hereby make the following orders:
 1. The Plaintiff has by way of adverse possession acquired good title to a portion of land measuring 0.9 acres comprised within Land Parcel No. Tetu/Muthuaini/1435 presently registered under the names of the 1st, 2nd and 3rd Defendants herein.
 2. The 1st, and 2nd Defendant are hereby directed to forthwith sub-divide and transfer the portion of land measuring 0.9 acres out of Land Parcel No. Tetu/Muthuaini/1435 to the Plaintiff herein
 3. In the circumstances herein each party shall bear their costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 14TH DAY OF FEBRUARY, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Firdaus the Court Assistant.
- b. Mr. S.K. Njuguna Advocate for the Plaintiff
- c. Mr. Kiminda for the 1st and 2nd Defendants
- d. No appearance for the 7th Defendant



e. Mr. Ombongi for the 5th and 6th Defendants

