



**Mburu v Kamau (Environment & Land Case E004 of 2022)  
[2024] KEELC 6953 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6953 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E004 OF 2022**

**LN GACHERU, J**

**OCTOBER 17, 2024**

**IN THE MATTER OF SECTION 37 AND 38 OF THE  
LIMITATION OF ACTIONS ACT (CAP 22 LAWS OF KENYA)**

**AND**

**IN THE MATTER OF LAND TITLE NUMBER LOC.4/KIRANGA/676**

**BETWEEN**

**SUSAN WANJIRU MBURU ..... APPLICANT**

**AND**

**ESTHER NUNGARI KAMAU ..... RESPONDENT**

**JUDGMENT**

1. The matter for determination herein is Originating Summons dated 3<sup>rd</sup> March 2022, by the Applicant herein Susan Wanjiru Mburu, which is anchored under Order 37 Rule 7 (1), (2) & 3 of the Civil Procedure Rules, as read together with Section 38 of the *Limitation of Actions Act*, wherein, the Applicant has sought for Judgment against the Respondent herein for following orders:
  - a. A declaration that the Applicant herein has been in an open, uninterrupted occupation of land parcel Loc.4/Kiranga/676, and has acquired exclusive rights to the land by adverse possession.
  - b. A declaration that the Applicant has acquired a registrable interest to land parcel No. Loc.4/Kiranga/676, by way of adverse possession.
  - c. Upon ascertaining prayers (a) & (b) above, that Court be pleased to decree that the Respondent's interest or anyone claiming through the Respondent or through the estate of Wambaire Kamau (deceased) to land parcel Loc.4/Kiranga/676, have become extinguished by



operation of law, and that the applicant has become entitled to the parcel of land through adverse possession.

- d. That the Court be pleased to order that land parcel Loc.4/Kiranga/676, be registered in the name of the applicant Susan Wanjiru Mburu.
  - e. That the Respondent be ordered to execute all documents to effect a transfer to the Applicant Susan Wanjiru Mburu, and in default of her doing, the Deputy Registrar of this Court be authorized to sign such documents.
  - f. That the Respondents herein do bear the costs of the suit.”
2. This Originating Summons is based on the Supporting Affidavit of Susan Wanjiru Mburu (the Applicant herein), sworn on 3<sup>rd</sup> March, 2022, wherein she averred that she is the widow of Mburu Wandia, and that Wambaire Kamau (deceased), is the original registered owner of suit land No. Loc.4/ Kiranga/676, as per the Certificate of Official Search carried out in respect of the same and marked “A1”.
  3. She further averred that the Respondent herein filed Succession Cause No.305 of 2019 (Thika), through which suit she became the registered owner of the suit land.
  4. That in year 1968, together with her husband, they purchased the suit property from the original proprietor thereof namely, Wambaire Kamau, and paid the full purchase price of Kshs. 1,000/- (one thousand), to the said Vendor, Wambaire Kamau, and immediately they took possession of the suit land in year 1968.
  5. She also averred that together with her husband who died in year 2021, they constructed permanent structures on the suit property, and cultivated assorted crops and planted trees thereon. Further, that she was summoned by the Local Chief in regard to the ownership of the suit land whereupon she presented documents attesting to the purchase of the suit property by her husband.
  6. It was the Applicant’s further contention that the Local Chief refused to issue her with a letter stating that the suit property was the subject of a purchase by her husband, despite receiving a request to that effect from her Advocates. She attached exhibit marked “A5” being a copy of the letter from her lawyers to the Local Chief.
  7. The Applicant further contended stated that she learnt that the Respondent filed Succession Cause No.305 of 2019 (Thika), through which she obtained a Certificate of Confirmation of Grant wherein, the suit land devolved to the Respondent; as verified by the Applicant’s annexure “A6”.
  8. Further, that she has resided on the suit property for more than 50 years since 1968, which is far in excess of the Statutory period of 12 years and is thus, entitled to be declared the registered owner of the same, having extinguished the Respondent’s rights of ownership over the said parcel of land.

### **The Respondent’s Response**

9. The Respondent opposed the instant suit through her Replying Affidavit dated 23<sup>rd</sup> June, 2022, wherein she affirmed that she is the daughter of Wambaire Kamau (Deceased); and that her daughters are the administrators of the estate of her late father Wambaire Kamau, pursuant to the Grant of Letters of Administration dated 20<sup>th</sup> May, 2020.
10. The Respondent further averred that the suit property belonged to her father, and to his estate upon his demise and she is the only beneficiary of her father’s estate; therefore, the suit land devolved to her upon distribution of its assets.



11. She refuted the Applicant's claim that her father and MBURU WANDIA (Deceased), executed an agreement disposing of the suit property. The Respondent asserted that her father would have disclosed the existence of an agreement to sell the suit land if the same was ever executed. She further averred that the Applicant failed to disclose the mode of payment of the purchase price to her father and that in itself is evidence that no money changed hands in respect of the alleged sale of the suit land.
12. It was the Respondent's further averment that MBURU WANDIA (deceased), was only allowed to cultivate the suit property and therefore, his entry into and occupation of the said land was as a licensee, rather than a purchaser as claimed.
13. The Respondent denied the Applicant's contention that there are permanent houses constructed on the suit property, and further refuted the contention that the Applicant and her husband were residing on the suit land until the latter's death in year 2021. The Respondent controverted the Applicant's averment of having been in occupation of the suit property for more than 50 years, and averred that the suit property was uninhabited. Further, that the Applicant stopped cultivating the suit property following the death of her husband.
14. It was her further contention that as the Applicant is not related in any way to the Respondent's father, and is also not a beneficiary of his estate, and that the Applicant's presence on the suit property is questionable; That it is equally curious that the Applicant had in her possession the death certificate belonging to the Respondent's father.
15. It was further contended that the applicant has failed to establish that she is entitled to the suit property on the basis of Adverse Possession. The Respondent asserted her rights as the registered proprietor of the suit land and which she inherited from her late father.
16. The suit proceeded by way of viva voce evidence.

### **The Applicant's Case**

17. PW1 Susan Wanjiru Mburu, from Kiranga area of Kandara, Murang'a County, adopted her Supporting Affidavit in support of the instant O.S. as her evidence in chief. She asserted that she has been residing on the suit property for 58 years, and that she purchased the suit land, and has been using and cultivating the same for that long. It was her further testimony that her son, Muiruri (now deceased,) constructed a house for her on the suit property, and later her son passed away about 15 years ago.
18. It was her further testimony that the Respondent does not live in Muruka area, but at Kariti which is at Kagunduini area, and that the Respondent has never occupied nor cultivated the suit property.
19. The Applicant further asserted that nobody has ever demanded that she vacates the suit land, and she has been living thereon from 1968. She claimed ownership over the suit property, and urged the Court to allow her claim. She produced her List of Documents as exhibits which was marked P Exhibit 1.
20. On cross-examination by Ms. Wanjiru for the Respondent, the Applicant acknowledged that the Respondent is well-known to her, and that by the time she contracted a marriage, and entered into and settled on the suit property, the Respondent was already married. It was her further testimony that her mother-in-law and the Respondent's mother were related, and they used to live on the suit land. That her mother-in-law died followed by the death of the Respondent's mother. She claimed to have taken care of the Respondent's mother until her demise.
21. Further, that she purchased the suit property in year 1968, from Wambaire Kamau, and delivered the entire purchase price of Kshs. 1,000/=, to the Vendor. She admitted to not having any proof of the



said purchase. Further, that they appeared before the Chief and proof of purchase of the suit land does exist, as she produced a receipt as her exhibit in this Court.

22. It was the Applicant's testimony that her son has built on the suit land and he utilizes the same. Further, that there are mud structures constructed on the suit property, and that the Respondent is the person who received the full Purchase Price of Kshs. 1,000/=, in her capacity as a daughter to the vendor of the suit property. Further, that one Joseph Kamande recorded the sale agreement for the disposal of the suit land. She admitted to not having a copy of the written sale agreement for purchase of the suit property.
23. She also testified that she holds a copy of the death certificate of the Respondent's father, as well as a Certificate of Official Search in respect of the suit land dated 17<sup>th</sup> January, 2022, wherein, the Respondent is registered as the proprietor.
24. The Applicant further asserted her ownership over the suit land, and that the Chief confiscated the Sale Agreement in respect of the suit land, hence, she had nothing to show that she purchased the said land. Further, that the Respondent filed a Succession Cause in her absence, wherein a Confirmation of Grant was issued. That she did not stop the Succession Cause instituted by the Respondent as she was unaware of the same.
25. She stated that at the time of executing the sale of the suit land in year 1968, the usual practice was for the purchase price to be paid in cash. That it was the Respondent who received the full purchase price, and that none of the witnesses to the transaction dated 1968 is alive.
26. On re-examination, the Applicant stated that her son built on the suit land having been gifted the said land by his father (the Applicant's husband). That her son is buried on the suit property, and that the sale agreement was snatched from her by the Chief following the filing of a report against her by the Respondent before the said Chief. Further, that she has sought to retrieve her documents from the Chief in question in vain. She also testified that she lived on the suit property during the lifetime of Wambaire Kamau, and has continued to reside thereon in the period following his demise. She reiterated that the Respondent has never utilized the suit property.
27. Although the Applicant had listed one Joshua Kamande as her witness, during the trial, the said witness disowned his Written Statement, and was reported to express support for the Respondent's case. Therefore, Applicant closed her case and did not call any witness.

### **The Respondent's Case**

28. DW1 Esther Nungari Kamau, a peasant farmer who lives at Kamoro Loc.4, adopted her witness statement as evidence in chief, and denied knowing the Applicant herein. She also produced her list of Documents as D Exhibits 1-16.
29. The Respondent affirmed that her father was named Kamau Mukuria, and was the original registered owner of the suit property. Further, that she is the only daughter of her father, who was married to only one wife, ESTHER. She also testified that the suit land has never been the subject of any sale; and that had there been any sale of the suit land, her mother would have notified the Respondent of the same.
30. Further, she confirmed to having filed the Succession Cause in respect of her parents' estate. She urged the Court to dismiss the current suit and direct the Applicant to vacate the suit property.
31. On cross-examination by Ms. Waithera Mwangi for the Applicant, the Respondent stated that she contracted a marriage in year 1960, in Kamoro area, where she lives to date. She further testified that she planted a live fence on the suit land after filing the Succession Cause in respect of her late father's estate. However, the live fence was uprooted, and that prior to filing the said Succession Cause, she called



- MBURU (the Applicant's husband), to a meeting before the Local Chief because the said MBURU was retaining the death Certificate belonging to the Respondent's mother.
32. She denied ever having obtained her mother's Death Certificate from the Chief, and averred that it is MBURU, who handed over the said death Certificate to the Chief and who in turn, passed the same over to the Respondent. Further, that the elders, her daughters and the Applicant's son were also present during the meeting with the Chief
  33. She further testified that her father held all rights of ownership over the suit land, which was registered in the name of Wambaire Kamau, who was mother to the Respondent. She reiterated that MBURU was only allowed to cultivate the suit property, and did not enter into the said land as a purchaser, and she denied that her mother disposed off the suit land.
  34. It was her further testimony that the said MBURU entered into the suit land in a year which the Respondent was not able to recall, and she was already married at the time of the MBURU'S entry. That her mother died in year 1971, and the Respondent was not notified of the said death until her mother had been buried.
  35. Further, that she has relatives living near the suit land, and they are the ones who took care of her mother's burial as is the customary practice. She admitted to not having reported her mother's death to the police. She reiterated that her mother died in year 1971, and MBURU continued living on the suit property.
  36. The Respondent's further testified that she filed the Succession Cause in respect of the suit land in year 2019, and started to use the suit property after filing the said suit. Further, that she obtained the title to the suit land registered in her name at the conclusion of the Succession Cause.
  37. She admitted that the Applicant has utilized the suit property since year 1971, and that she started utilizing the suit property following the conclusion of the Succession Cause, which she herself initiated. It was her further testimony that the Applicant has been utilizing the suit property from year 1971 to 2020.
  38. The Respondent testified that there are no permanent structures constructed on the suit property and she has planted crops thereon.
  39. On re-examination, the Respondent testified that she is the sole beneficiary of her mother's estate and her mother was the registered proprietor of the suit land. She further testified that the Applicant was only allowed to utilize the suit property and not to own the same. She admitted to not having filed a Succession Cause in respect of her mother's estate immediately upon her mother's death.
  40. After the viva voce evidence, the court directed the parties to file and exchange written submissions, which directions they duly complied with. This court had carefully considered the said written submissions and summarizes as below.

### **The Applicant's Submissions**

41. The Applicant filed her written submissions dated 16<sup>th</sup> April 2024, through the Law Firm of Waithira Mwangi & Co. AdvocateS, and submitted that in year 1968, her husband executed an agreement for sale, disposing the suit land with the then registered proprietor Wambaire Kamau (Deceased), and which agreement was reduced to writing by one Joshua Kamande, a close relative of the Vendor.
42. It was her further submissions that the purchaser delivered the entire purchase price of Kshs.1,000/=, to the Vendor. The Applicant stated that the said Joshua Kamande, later disowned his Witness



- Statement, declined to appear as the Applicant's witness despite summons to that end, and reportedly attempted to support the Respondent's cause.
43. It was also submitted that the Applicant together with her husband who died in year 2021, entered into the suit land in year 1968, upon payment of the full purchase price of Kshs.1,000/=, to the Vendor/registered owner Wambaire Kamau.
  44. Further, that the said Wambaire Kamau entered into an oral agreement with the Applicant's husband that in the event of her death, the Applicant's husband would take care of her (i.e., Wambaire Kamau's) burial; which oral agreement, therefore, explains why the Applicant obtained and retained the burial permit/death certificate in respect of Wambaire Kamau.
  45. The Applicant further submitted that she appeared before the Chief in order to obtain a letter to enable her to lodge a Succession Cause or to assert her purchaser's interest in respect of the estate of the late Wambaire Kamau; However, the Chief confiscated both the death certificate belonging to Wambaire Kamau, and the sale agreement dated 1968, which documents were seized from the Applicant, and were never returned not an Inventory recorded in respect of the same.
  46. The Applicant identified four issues for determination.
    - a. Whether the Applicant has met the threshold for grant of Orders of Adverse Possession?
    - b. Whether a claim for Adverse Possession can be made against the estate of a deceased person?
    - c. Whether the applicant is entitled to be registered as the absolute owner of the suit property by way of adverse possession?
    - d. Who should bear the costs of the suit?
  47. The Applicant submitted that it was not in dispute that Wambaire Kamau, was registered as the owner of the suit property which subsequently devolved to the Respondent through a Certificate of Confirmation of Grant issued in KANDARA Succession Cause No.305 of 2019. It was further submitted that the Respondent was registered as the proprietor of the suit land on 20<sup>th</sup> December, 2021.
  48. Reliance was placed in the decision of the Court in the cases of *Gachuma Gacheru V Maina Kabuchwa* (2016); and, *Wambugu V Njuguna* (1983) KLR 172, to anchor the argument that Adverse Possession is a fact to be observed upon the land in question, and is not affected by changes in the registered ownership as appears on the title deed.
  49. It was further submitted that going by the Respondent's annexure ENK-1, it is stipulated that the Vendor Wambaire Kamau died on 4<sup>th</sup> June 1971. Further, that, accepting the Respondent's contention that the Applicant's husband was allowed to cultivate the suit land only, such permission must have been granted by Wambaire Kamau before 4<sup>th</sup> June, 1971. Further, that the said permission lapsed upon the death of Wambaire Kamau; and therefore, the Applicant's residence on the suit property after 4<sup>th</sup> June 1971, was without permission or consent and adds up to 51 years of living on the suit land.
  50. On the question of whether proceedings of an Adverse Possession, in nature can be brought against the estate of a deceased person, reliance was sought in the holding of the Court in the cases of *Titus Kogoro Munyi V Peter Mburu Kimani* (2015) eKLR; *Peter Thuo Kairu V Kuria Gacheru* (1988) 2 klr 111; and, *Regina Wanjiru Mwago & Another V Lucy Wairimu Gichuhi & 2 Others*(2019) eKLR, to buttress the position that for purposes of Adverse Possession, time does not stop running upon the death of the registered proprietor.



51. Therefore, a claim based on Adverse Possession, can be commenced against the estate and/or beneficiaries of a registered owner. It was the Applicant's submission that the suit land was registered in the name of Wambaire Kamau on 13<sup>th</sup> March 1967, until 20<sup>th</sup> December 2021, when ownership over the same, passed to the Respondent without affecting his claim as an Adverse Possessor.
52. On the issue of whether the Applicant has established that he is entitled to the suit property, it was submitted that this Court may elect to calculate the period of the Applicant's occupation from either of two starting points. Firstly, the Court was invited to compute the time of the Applicant's entry and occupation of the suit land from year 1968 when her husband purchased the same. It was argued that using 1968 as the starting point, the Applicant's equitable claim of Adverse Possession crystallized in 1980.
53. In the alternative, the Court was urged to tabulate the time of the Applicant's occupation as starting following the death of the registered owner, that is on 5<sup>th</sup> June 1971; in which case, the Applicant's claim founded on Adverse Possession would accrue on or about 6<sup>th</sup> June 1983.
54. It was further submitted that the Respondent did admit during the trial that the Applicant has been utilizing the suit property without, however, presenting any evidence to show that the Applicant is utilizing only a part of the suit land. It was submitted that the Applicant has established he is entitled to be registered as the absolute proprietor of the suit property.
55. On the issue of costs, it was submitted that the Applicant having proven her case to the required standard is entitled to be awarded costs of the suit.

### **The Respondent's Submissions**

56. The Respondent filed written submissions dated 26<sup>th</sup> June 2024, through the Law Firm of Kamau J. Mwangi & Co Advocates. It was submitted that the Applicant failed to supply any proof of purchase in respect of the suit land; Further, that she failed to demonstrate that money was exchanged for the purpose of disposal of the suit land.
57. It was further submitted that the Applicant and her family stopped utilizing the suit property immediately upon the demise of Wambaire Kamau on 4<sup>th</sup> June, 1971. The Respondent reiterated the averments set out in her Replying Affidavit to the effect that at the meeting with the Local Chief, the Applicant failed to present any receipts of purchase issued by the Vendor of the suit property.
58. It was further submitted that the Respondent has been utilizing the suit land until she was prevented from doing so courtesy of an injunction issued by this Court. She admitted to have commenced Kandara Succession Cause No.305 of 2019, which eventuated in a Confirmation of Grant which transmitted the suit property to her and a title thereof issued in her name on 20<sup>th</sup> December 2021.
59. A single issue for determination by this Court was isolated, namely: Whether the Applicant has fulfilled the ingredients for Adverse Possession. The provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act* as read together with Order 37 of the Civil Procedure Rules were restated to develop an understanding of what the doctrine of Adverse Possession entails. The mandate of this Court as per the provisions of Article 162 of *the Constitution* of Kenya was reiterated. Further reliance was sought in the reasoning of the Court in the cases of Gabriel Mbui V Mukindia Maranya [1993] eKLR; and, Mtana Lewa V Kahindi Ngala Mwangandi [2015] eKLR.
60. It was the Respondent's submission that the Applicant while claiming that she entered the suit land in year 1968 upon purchasing the said land, has not provided proof of such purchase. She submitted that Adverse Possession can accrue in situations where a purchaser enters the land in question pursuant to



a sale Agreement which is not completed as held by the Court in the case of Wilfred Kegonye Babu V Henry Mose Onuko (2019) eKLR.

61. It was further submitted that the present suit is expressed to be founded on a sale agreement, however, there is no written contract placed before the Court by the Applicant and which in itself infringes the requirements of Section 3 (3) of the Law of Contract Act. The Respondent stated that in a purchase scenario, Adverse Possession takes effect upon delivery of the final instalment to the Vendor and the Applicant has failed to establish the existence of an agreement for purchase of the suit property or proof of payment.
62. It was submitted that during the trial, the Applicant admitted that the suit land is not being utilized or cultivated. The Respondent stated that the rights to the suit land held by the Applicant's husband lapsed upon his demise. It was further submitted that if at all the applicants held any rights over the suit property, the same were extinguished on the registration of the Respondent as the owner of the same on 20<sup>th</sup> December 2021. The Applicant was accused of wanting to enrich herself unjustly by filling of the instant suit.
63. This court has considered the pleadings herein, the annexures thereto, the evidence of the parties and the exhibits produced, the written submissions, cited authorities and relevant provisions of law, and finds the issues for determination are; -
  - I. Whether the Plaintiff/ Applicant is entitled to the Orders sought.
  - II. Who shall bear the costs of the Application.

**i). Whether the Plaintiff/ Applicant is entitled to the Orders sought.**

64. The Applicant's claim is premised on her occupation of the suit property for more than fifty years, allegedly from 1968, when, together with her husband, they allegedly entered into and settled thereon, on the strength of a purchase executed with the then registered owner Wambaire Kamau, and mother to the Respondent herein. The Applicant stated that she entered unto the suit land in year 1968, together with her husband, during which time the suit property was registered in the name of Wambaire Kamau(Deceased).
65. The Respondent was registered as the proprietor of the suit land on 20<sup>th</sup> December 2021, which means that the larger portion of the Applicant's alleged occupation of the suit land falls within the time when Wambaire Kamau, was the registered owner of the suit land.
66. The Applicant claim is that she is entitled to the suit property by virtue of the doctrine of prescriptive rights/Adverse Possession. The law on Adverse Possession is provided for under the Limitation of Actions Act. Section 7 of the Act Limitation of Actions Act, stipulates 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”



67. In the case of *Samuel Kihamba v Mary Mbaisi [2015] eKLR Kisumu Civil Appeal No. 27 of 2013*, 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”.

68. The Court of Appeal in the case of *Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996* held as follows:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

69. Further, in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR*, the Court of Appeal held that a person claiming Adverse Possession needs to 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.

70. While pointing out what to be consider in a claim of adverse possession, the court in case of *Regina Wanjiru Mwago & another v Lucy Wairimu Gichuhi & 2 others [2019] eKLR*, held as follows:

“For a party to succeed in summons for Adverse Possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an Adverse Possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in Court evidence to prove that the suit land where he/she is claiming Adverse Possession indeed belongs to the Defendant.”

71. The Respondent asserted and submitted that the Applicant and her husband were allowed to cultivate and/or utilize the suit land by the Respondent’s mother, and therefore, they entered the same as licensees, and not as purchasers as claimed. Further, the Respondent submitted that the Applicant and her family vacated the suit property following the death of Wambaire Kamau, on 4<sup>th</sup> June, 1971. Moreover, that the permission granted to the Applicant, and her husband to utilize the suit land terminated upon the death of Wambaire Kamau, on 4<sup>th</sup> June, 1971. It was the Respondent’s further argument that the rights of a licensee held by the Applicant’s husband in respect of the suit land lapsed upon his death in year 2021.



72. In the case of *Mate Gitabi vs. Jane Kaburu Muga and 3 Others Nyeri Court of Appeal Civil Case No. 43 of 2015*, the court dealt with a situation where an adverse possessor claimant was in occupation of the land belonging to a deceased person. The court held as follows:

“He continued to occupy the land openly, without secrecy, without violence and without permission. He did so in a manner inconsistent with and wholly adverse to the right of the estate of the deceased, his heirs and all those claiming under him. In this regard, it little matters that the 1st Respondent did not take out letters of administration until 2003, or that she did not get to be the registered owner until 2004, both events being more than thirty years since the appellant took adverse possession of the land or dispossessed the 1st Respondent...”

73. Again in the case of *Samwel Nyakenogo v Samwel Orucho Onyaru* [2010] eKLR, the Court of Appeal held as follows:

“For about 19 years, the Respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the Respondent’s said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent’s Adverse Possession of the portion he bought from the deceased.”

74. This court too will consider the holding in the case of *Titus Kigoro Munyi v. Peter Mburu Kimani* (2015) eKLR, where the Court proclaimed as follows:

“It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors.”

75. Further, in the case of *Joseph Kamau Gichuki (Suing as the administrator of the Estate of Gichuki Chege(Deceased) v James Gatheru Mukora & another* [2019] eKLR, the court held as follows:

“I am in agreement with the plaintiff that as at the time the defendants obtained grant of letters of administration in respect of the estate of Mukaria and purported to transfer the suit property to themselves by transmission, the suit property was not available for distribution amongst the beneficiaries of the estate of Mukaria since Mukaria’s title over the property had been extinguished under section 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and the property acquired by the deceased by adverse possession. The registration of the defendants as the owners of the suit property was therefore unlawful.”

76. From the above reasoning of the Superior Courts, it is clear that a claim premised on the doctrine of Adverse Possession, is not defeated by the death of registered owner of the land in question, and such a claim survives the death of the deceased and is inherited by his/her estate.

77. The Applicant’s entry onto the suit land either as a purchaser as claimed or a licensee as stated by the Respondent was permissive. It is trite that where the entry is permissive, Adverse Possession can only take hold once the permission is revoked.

78. The Respondent, in her written submissions, subscribed to the position that the Applicant vacated the suit land following the death of WAMBARIE KAMU on 4<sup>th</sup> June, 1971. The Court takes note of the fact during cross-examination, the Respondent did admit several times that the Applicant, and



her husband were living on and utilizing the suit land from 1971, until the death of the Applicant's husband in year 2021.

79. The Court is persuaded that even accepting the Respondent's averment that the Applicant entered onto the suit land on the permission of the registered proprietor and not due to a purchase of the same, such permission was revoked upon the death of the said registered proprietor on 4<sup>th</sup> June, 1971; therefore, time began to run for purposes of Adverse Possession against the estate of the deceased from 5<sup>th</sup> June, 1971, and crystalized 12 years later, that is, on 5<sup>th</sup> June 1983.
80. Further, it is not lost to this court that one, Joshua Kamande who was listed as a witness for the Applicant seemed to have undergone a change of heart during the trial, disowned his Written Statement and wanted to jump ship and support the Respondent's case. It cannot escape the Court's attention that the said Joshua Kamande was reported to be a close relative of the original registered owner of the suit land, namely Wambaire Kamau; thus, he is related to the Respondent.
81. The Court has also considered the fact that the Applicant's son namely MUIRURI, was buried on the suit property and the said burial took place some 15 years ago, and there was no evidence that the Respondent objected to this burial. The burial of the Applicant's son on the suit land by itself is inconsistent with the Respondent's contention that the Applicant and her husband were residing on the suit land as mere licensees.
82. It is the finding and holding of the Court that the Applicant has demonstrated her open, continuous and uninterrupted occupation of the suit property in excess of the Statutory period of 12 years.
83. Having now carefully considered the available evidence, this court finds and holds that the Applicant has proved her case against the Respondent herein on the required standard of balance of probabilities. Further, the court finds and holds that the defence of the Respondent is not merited, and thus, the said Defence is dismissed entirely, and Judgement is entered in favour of the Applicant herein.
84. Accordingly, the Applicant's Originating Summons dated 3<sup>rd</sup> March 2022, is found merited and the same is allowed entirely in terms of the prayers No. (a), (b), (c), (d) and (e) therein.
85. On the issue of costs, the court is guided by the provisions of section 27 of the Civil Procedure Act, which provides that costs are granted at the discretion of the court. However, costs follow the event and is awarded to the successful litigant. The Applicant is the successful litigant and is awarded costs of this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024**

**L. GACHERU**

**JUDGE**

17/10/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

M/S Wathira Mwangi for the Applicant

N/A for Defendant/Respondent (Though Judgement date taken in the presence of her advocate.)

**L. GACHERU**



**JUDGE**

