



**Ngige (Suing as the Legal Administratrix of the Estate of James
N Kariuki) v Makori & 6 others (Environment & Land Case
368 of 2016) [2025] KEELC 513 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 513 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 368 OF 2016**

**M SILA, J
FEBRUARY 13, 2025**

BETWEEN

**WANJIKU NGIGE PLAINTIFF
SUING AS THE LEGAL ADMINISTRATRIX OF THE ESTATE OF JAMES N
KARIUKI**

AND

**JAMES MAKORI 1ST DEFENDANT
EVANS OMWANDO 2ND DEFENDANT
EVANS OMBEBE 3RD DEFENDANT
TOMAS BASISI 4TH DEFENDANT
DOUGLAS OGENGE 5TH DEFENDANT
MEKUBO EVANS 6TH DEFENDANT
ISOE OGECHI 7TH DEFENDANT**

(Original plaintiff (now deceased) having purchased the suit land in a public auction in 1976; original plaintiff not taking any steps to visit the suit land or take possession of it until 40 years later in 2016; 1st and 2nd defendants asserting to have been on the suit land from birth as it was owned by their father who was chargor, and claiming title by adverse possession; apparent that by the time the original plaintiff was filing suit his title had been extinguished as 12 years had lapsed; plaintiff's case dismissed and judgment entered for the 1st & 2nd defendants)



JUDGMENT

1. This suit was commenced through a plaint which was filed on 8 November 2016 by one James N. Kariuki (the original plaintiff). He died on 27 November 2021 before the trial concluded, and was substituted by his wife, one Wanjiku Ngige, who now continues the suit on behalf of his estate. Earlier on, it was said that the original plaintiff was unwell and he had donated a power of attorney to his son one Antony Muriuki Ngige. It is actually Antony Muriuki Ngige who testified on behalf of the now deceased original plaintiff on 29 July 2021.
2. In the original plaint (for there were subsequent amendments) the original plaintiff had sued only two persons, that is the 1st and 2nd defendants. On 20 July 2017, the plaint was amended inter alia to bring on board the 3rd – 7th defendants. The original plaintiff averred to be the registered proprietor of the land parcel Majoge/Kanyimbo/104 having purchased it in a public auction conducted by Industrial and Commercial Development Corporation (ICDC), as chargee, on 15 July 1978 and he obtained registration in his name on 17 June 1978. He pleaded that in July 2016, the 1st and 2nd defendants trespassed into the suit land and commenced cultivation and development of structures. He pleaded that the 1st and 2nd defendants lured the other defendants to come and encroach onto the suit land under the guise of leasing it to them despite not having title. In the amended plaint he asked for a declaration that he is the bona fide registered owner of the suit land; an order of eviction against the defendants; a permanent injunction to restrain them from utilising or dealing with the suit land; general damages for trespass; costs and any further relief deemed fit to grant.
3. Only the 1st and 2nd defendants entered appearance and filed defence. They denied that there was a charge over the suit land and averred that if there was one then it was discharged during the lifetime of the chargor, leading to the chargor living and enjoying quiet possession of the suit land until his demise in 2015. They denied that the suit land was sold by public auction on 15 July 1978, and that if there was ever a sale, then it is null and void as no charge subsisted on the suit land. They denied that the suit land was transferred to the original plaintiff on 17 June 1978. They contended that the suit land is ancestral land, that they were born and brought up on it, and have never lost possession of it in their lifetime or during the lifetime of the original owner. They averred that any new structures on the suit land are a natural consequence of members of the family coming of age and moving out of their parental homes. They denied undertaking any illegal activities in their ancestral land.
4. A reply to defence was filed more or less joining issue with the 1st and 2nd defendants save to add that it was pleaded that the sale by chargee was on 15 June 1978 and the registration of the original plaintiff as proprietor was on 17 June 1978.
5. The plaint was re-amended on 25 July 2023 but that was only for purposes of substituting the now deceased original plaintiff with his legal representative, i.e Wanjiku Ngige. On 11 August 2023, the 1st and 2nd defendants filed an amended statement of defence. What was added to the original defence was pleading that the plaintiff's interest is extinguished pursuant to Section 17 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, as the 1st and 2nd defendants have been in occupation of the suit land since 1992, which is a period of more than 12 years. They also included a counterclaim seeking a declaration that the plaintiff's title is extinguished by dint of Section 17 of the *Limitation of Actions Act*, that the proprietor is now holding the suit land in trust for them and his title be cancelled; that the title be restored back to the name of the previous proprietor Isaka Musa Nyandoro; the plaintiff to sign all relevant papers to effect the above or the Deputy Registrar to do so ; a permanent injunction to restrain the plaintiff from the suit land; and costs. There was also filed a preliminary objection that the suit is



time barred and brought outside the 12 years limitation period in view of Section 7 of the Limitation of Actions Act; that the court is bereft of jurisdiction to determine a suit which is statute barred; and that the suit is incompetent and should be dismissed with costs.

6. PW -1 was Antony Muiruri Ngige. I mentioned earlier that he was holding a power of attorney donated by the original plaintiff and he testified on 29 July 2021 before Onyango J. He relied on a statement that his father had recorded on 20 July 2017. In it, the original plaintiff stated that in July 1976, he read an advertisement in the Daily Nation, where ICDC advertised the suit land for sale. He developed interest, participated in the auction, and emerged the highest bidder. He was then issued with the Certificate and Memorandum of Sale. The chargee prepared the requisite documents and the property was transferred to him. He then became its proprietor. He stated that in July 2016 the 1st and 2nd defendants entered upon and/or trespassed onto the suit land and commenced cultivation without his permission. They also commenced construction of structures but the construction was thwarted following the intervention of the Area Chief who stopped the construction. He stated that the 1st and 2nd defendants has lured the other defendants to encroach into the suit land pretending to lease it to them. In court, he referred to the Green Card and pointed out that the suit land was previously in name of Isaka Musa who had charged it to ICDC on 20 May 1971. He stated that the title was discharged on 24 September 1976 and that the title was transferred to his father on 15 July 1976. His father collected the title deed on 25 March 2016. He stated that after his father visited the land in 2016 and found the defendants, he reported to the Chief and also instructed his advocate to write a demand letter dated 27 October 2016. The defendants responded to the demand letter asserting that they are beneficiaries of the suit land.
7. Cross-examined, he testified that his father did not take possession of the land after it came to be registered in his name. Prior to 2016, his father had not gone to see the area Chief. He acknowledged that his father took almost 40 years to visit the suit land. He gave the reason that his father was pre-occupied with his business in Kisumu. Since 2016, his father never went back to the property. He was questioned on the Green Card which showed that the transfer was done on 17 June 1978 and his father got the Land Certificate on 25 March 1978 but denied that there was fraud.
8. After he testified, counsel for the plaintiff applied to call the area Chief and sought leave to file his witness statement. This was opposed but the court allowed the same. The matter was then fixed for hearing on 15 March 2022. On that day it was mentioned that the original plaintiff is now deceased and the matter was put in abeyance pending substitution. The order of substitution was given on 21 March 2023 and thereafter the plaint was re-amended. On 20 July 2024, an additional witness statement was filed. It was not by the Chief as had earlier been applied, but was one of David Magori Nyambane. He testified as PW-2 before me on 25 July 2024, as Onyango J had by then been transferred to another station.
9. PW-2 stated that he knew the original deceased plaintiff and his wife as he used to live with them. He testified that he was 22 years when the suit land was purchased in an auction at which time he was living with the plaintiff's family. When the land was purchased he (PW-2) did not know where the land was. In 2008, after the post election clashes, the original plaintiff moved from Kisii to Kisumu and he told him to oversee the land. He (PW-2) testified that he went to the land in 2007/2008 during the post-election clashes and found nothing on the land. He went again in January 2009 and found it in the same state. It had no structure and there was no cultivation, though some neighbours were grazing their cattle in it. In 2016, the original plaintiff called him and asked that he accompanies him to the land. They went to the land and found two structures built and sugarcane cultivated. The original plaintiff called the Chief, one Eric, who came and talked to the 1st defendant and his wife. The Chief asked who had built the second house and he was told it is the 2nd defendant. The 1st defendant also



- said that he is not aware that the land was ever sold and according to him it still belonged to his father. The Chief came up with the names of the 3rd – 7th defendants who had apparently leased the land. The original plaintiff took photographs and painted the houses with an ‘X’ mark.
10. Cross-examined, he acknowledged that the original plaintiff never lived on the land and never constructed a house on it. He nevertheless claimed that the original plaintiff took possession of the land and settled on it. He acknowledged that he went to the land in 2009, which is 33 years after the sale. The next time he went there was 2016, which was 7 years later. He did not know whether the original owner, the father of the 1st and 2nd defendants, died in 2015. He denied that the houses marked ‘X’ were actually houses on the neighbouring land and he was also questioned on the documentation leading to the title issued to the original plaintiff.
 11. With the above evidence, the plaintiff closed her case.
 12. DW – 1 was the 1st defendant. He testified that he was born in 1960 on the suit land. He stated that his father Isaac Nyandoro Musa, who died in 2015, left the land to him and the 2nd defendant, who is his brother. He stated that he divided the land to them in 1992. He did not know the 3rd – 7th defendants and denied giving them any land. He testified that he lives on the suit land with his five children and his brother has four children. He also has grandchildren living on the land. He had some brothers who died and who were buried in 1979 and 1980 in the suit land. His sister also died in 1980 and was buried in the suit land. In total he has 16 relatives all buried in the suit land in an area set aside for this purpose. He testified that before his father died in 2015 nobody came to claim the land and even from 2016 nobody has come to claim it. He stated that he was not aware of his father taking a loan with the property as security and was not aware of it being sold in an auction. He denied starting to develop the land in 2016.
 13. DW – 2 was Evans Omwando Nyandoro, the 2nd defendant. He testified that he was born in 1972 on the suit land and has lived therein to date. He stated that he does not know the 3rd – 7th defendants and that the only ones who live on the suit land are himself and the 1st defendant together with their families. He mentioned that he has four children and two grandchildren who live on the suit land. He recalled that in 2016, he heard that some people had come to the suit land and marked the houses of their neighbours with an ‘x’ mark. He elaborated in cross-examination that the houses marked ‘x’ belonged to his cousin one Gideon Zedekiah who does not live on the suit land but in a neighbouring land parcel No. 102 belonging to a brother of his father. He affirmed that his father died in 2015 and he was not aware of a loan taken by his father. He also mentioned that a number of his family members are buried on the suit land. It was in 2016 that they discovered that the plaintiff has title to the suit land.
 14. DW – 3 was Hellen Mora Orioba who stated that she was born in 1956. Her husband is brother to the father of the 1st and 2nd defendants. She testified that she got married into this family in 1979 and from the time she got married she has been seeing the 1st and 2nd defendants living on the suit land. She denied that any houses were being built in the year 2016.
 15. DW – 4 was Joel Ombati Nyamweya, a holder of a Bachelor of Arts in Land Economics from the University of Nairobi, and Masters Degree in Valuation and Property Management. He prepared a report on the ground status of the suit land which he presented to court. He stated that he visited the suit land and also plotted it on the google earth app. From the app he presented a pictorial report indicating what was on the ground in 2009, 2011, 2014, 2016, 2018 and 2022, and 2024. From the satellite image of 2009 he identified nine houses on the suit land. In 2011, there were five houses; in 2014, there still five houses. In 2016, there were four houses, and still four houses in 2018. In 2022 there were seven houses and nine houses in 2024. He also marked out where the graves were on the land. Cross-examined, he testified that the google earth app started being available in 1985 and what



he could access only took him back to 2009. He elaborated that there are two compounds on the suit land, one of the 1st defendant and the other of the 2nd defendant. Initially there were grass thatched houses but which are no longer there and it appeared to him that these were demolished in favour of iron sheet roofed houses. He identified five grave sites that he could see signs of and he confirmed that the oldest of the graves was of 1978 and the latest of 2023. He confirmed the fact of death from the village elder, one Hellen Orioba and one Isanda the Chief. He also identified trees on the land which according to him were over 10 years old.

16. I allowed the plaintiff opportunity to present her own ground report or call any additional evidence to rebut the report. The plaintiff opted to recall PW-2. He repeated his evidence that in 2009 there were no houses on the suit land and that he never saw any graves on it. He insisted that the land was plain and had not even been cultivated. He stated that it was in 2016 when they found two houses, one each for the 1st and 2nd defendants which appeared new. He also added that the village elder for the village is one Joseph Mahoto. He contended that the photographs in the satellite images were not true though he conceded that he was not a surveyor. He is a practising mediator.
17. With the above evidence the defence closed their case.
18. I invited counsel to file written submissions and I have taken note of the submissions filed. I take the following view of the matter.
19. The plaintiff contends that her deceased husband purchased the suit land in 1976 through a public auction and he thereafter became the registered proprietor. She now wants the defendants evicted and for her to be given vacant possession. The 1st and 2nd defendants contend that the suit land was not charged and was therefore irregularly transferred to the plaintiff. They have also raised the defence of limitation in addition to claiming title to the suit land through the doctrine of adverse possession.
20. Although the 1st and 2nd defendants contest the charge and sale of the suit land to the original plaintiff, on my part, I am prepared to find that indeed there was a charge and there was an exercise by the chargee of her statutory power of sale. It is not very clear when the sale was conducted but it must have been sometimes in 1976. I have seen a transfer by chargee dated 15 July 1976, and a Land Control Board consent dated 7 December 1976. This implies that the sale was in 1976. However, it appears that the transfer of the land took a while for the transfer was effected on 17 June 1978. It is not very clear why it took this long but whatever the case, I have no reason to doubt these documents of charge, discharge, and transfer by chargee. The title produced shows that the original plaintiff got registered as proprietor on 17 June 1978. He was issued with a Land Certificate on the same date and on 25 March 2016, he was issued with a title deed. At the time that he filed suit, he was indeed the registered proprietor of the suit land.
21. I am not persuaded by the arguments raised by the 1st and 2nd defendants as to whether there was a charge or a proper transfer by chargee. I however think that their case for title for the suit land through the doctrine of adverse possession has substance.
22. The suit land was purchased by the original plaintiff sometimes in 1976. In his witness statement, the original plaintiff never stated when he first went to the suit land if at all. All he said was that the suit land belongs to him and he is therefore the one entitled to its possession. When his son, PW-1 testified, he confirmed that the original plaintiff did not take possession of the land and before 2016 his father had not been to see the area Chief. He acknowledged that his father took almost 40 years to visit the suit property. I am aware that PW – 2 alleged that the original plaintiff first went to the suit land in 2009. I must say that I was not too impressed with his evidence. First I observe that he was never mentioned at all by the original plaintiff. You would think that if the original plaintiff truly went to the land with



- him in 2009, he would at least have mentioned that in his witness statement but there was no such mention. Even PW – 1 never mentioned him when he testified. Where he was fished from, I do not know, but it is clear to me that he was introduced when the plaint was further amended by the Legal Representative of the original plaintiff to try and shore up the case of the plaintiff.
23. But even if we are to believe him, it was in 2009 that they first went to the suit land. This was 33 years after the purchase of the land by the original plaintiff and about 31 years after the original plaintiff obtained registration into his name. 12 years had obviously lapsed and it follows that his title had already been extinguished in 2009. There was no dispossession of the 1st and 2nd defendants from the suit land in 2009 or prior thereto.
 24. I am aware that PW-2 alleged that in 2009 there was nobody on the suit land but that cannot be believed. This oral evidence was squarely countered by DW-4 who presented satellite images of the suit land, including what was on the land in 2009. I have absolutely no reason to doubt the expertise of DW-4 and he qualifies to be an expert witness. I also have absolutely no reason to doubt his report. Despite giving the plaintiff a chance to present her own report, the plaintiff brought none but only chose to recall the same PW-2. There is therefore nothing tangible that challenges the said report and as I have mentioned there is really nothing to cast doubt upon that report. The report is fully backed up by satellite imagery.
 25. In fact, it is the quality of such evidence that parties to such suits need to be encouraged to present. It is actually ground breaking evidence, for it can be demonstrated what was on land in a certain period of time. I do not see how the mere oral evidence of possession, or lack of it , by PW-2, can beat such solid evidence.
 26. From the report of DW-4 and the satellite images it is apparent that the suit land is demarcated into two compounds, one of the 1st defendant and the other of the 2nd defendant. They have developed several houses on the suit land and which houses were in existence as at the year 2009. There were in fact nine houses on the suit land in 2009. The number of houses has been fluctuating which was explained to be owing to some old houses being pulled down and more modern housing being put up. From the photographs annexed the houses must be pretty old for they have very old and rusted iron sheet roofs. I am not in doubt that this is the place that the 1st and 2nd defendants were brought up and have lived all their lives. It was indeed not demonstrated to me by the plaintiff that the father of the 1st and 2nd defendant ever parted with possession of the land at any one time or that he had other alternative land apart from this one so that he could afford not to be utilising this land. Neither was it shown that the 1st and 2nd defendants have other land. That reinforces the belief that the 1st and 2nd defendants have always been on the suit land and have never parted with its possession. Indeed they consider the suit land their ancestral home.
 27. In his submissions, Mr. Mulisa, learned counsel for the plaintiff, submitted that time started running in 2016 when trespass was discovered. That is not the position of the law. Time started running against the original plaintiff at worst from 1978 when he became registered as proprietor of the suit land. It is immaterial that he had no knowledge of people being on his land. Ignorance of trespass by the owner of the suit land does not stop time from running. Time would start running in favour of the 1st and 2nd defendants from the time they developed the intention to possess the suit land as their own and we can assume that to have occurred when they became of age, i.e when they attained 18 years. The 1st defendant was born in 1960 and the 2nd defendant in 1972. By 1990 they had both attained the age of majority. By the time this suit was filed in 2016 they had been in possession of the land of their own volition and as fully grown adults for a period in excess of twenty six (26) years. The evidence is overwhelming that they had been on the suit land even prior to the purchase of the land by the original



- plaintiff and they have never parted with possession of it. I am fully persuaded that the period that the 1st and 2nd defendants have been in possession of the suit land of their own assertion is much more than the minimum 12 years required by law.
28. Despite the original plaintiff holding title, his rights to the suit land are now extinguished pursuant to Section 7 as read with Section 17 of the *Limitation of Actions Act*. These two sections respectively provide as follows :
- (7). 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.
- (17). Subject to Section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.
29. It will be seen from the above that when the time for bringing an action to recover land lapses, then the title of the person is extinguished. The cause of action of the original plaintiff accrued as at 1976 when he bought the suit land. He never sued until 2016 which is 40 years later. His title, following Section 17 above, got extinguished and he lost all rights to the suit land. Given that the title of the original plaintiff is extinguished, the 1st and 2nd defendants are entitled to apply under Section 38 of the *Limitation of Actions Act*, to be registered as proprietors of the suit land. The 1st and 2nd defendants have indeed proved that they have been in quiet, peaceful, uninterrupted possession of the suit land all their lives, and this period surpasses by a wide margin the liminal period of 12 years. I am thus persuaded to find for the 1st and 2nd defendants.
30. I proceed to dismiss the case of the plaintiff and allow the case of the 1st and 2nd defendants. I order the plaintiff to within 30 days of being presented with the requisite documents of transfer by counsel for the 1st and 2nd defendants, to execute the same in order to transfer the suit land to the 1st and 2nd defendants and surrender the original title deed to facilitate the transfer. In default the Deputy Registrar and/or any person assigned by him/her to execute the said documents and in such event, the Land Registrar to proceed and register the transfer and waive the requirement of the original title being presented, and also waive the requirement for LCB consent. The 1st and 2nd defendants will shoulder any requisite fees needed to effect the transfer.
31. The last issue is costs. If the plaintiff abides by the order to transfer the land to the 1st and 2nd defendants as directed above, there will be no orders as to costs. If the plaintiff declines to voluntarily transfer the land as ordered above, the plaintiff will shoulder the costs of the dismissed suit together with the costs of the counterclaim.
32. Judgment accordingly.

DATED AND DELIVERED THIS 13 DAY OF FEBRUARY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Mulisa for the plaintiff

Mr. Marube h/b for Dr. Nyaundi for the 1st & 2nd defendants



N/A for the 3rd – 7th defendants

Court Assistant – Michael Oyuko

