



**Macharia v Kimwe (Sued as the Legal Representative of the Estate of Kimwe Gichucha) (Environmental and Land Originating Summons E002 of 2023) [2024] KEELC 7387 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7387 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MURANGA**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**  
**LN GACHERU, J**  
**NOVEMBER 7, 2024**

**BETWEEN**

**MWIHAKI MACHARIA ..... PLAINTIFF**

**AND**

**JOSEPH KIMANI KIMWE (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIMWE GICHUCHA) ..... DEFENDANT**

**JUDGMENT**

1. The Originating Summons herein dated 25<sup>th</sup> January 2023, was filed on 9<sup>th</sup> February 2023, and is premised under Order 37 Rule 7 of the Civil Procedure Rules, as read together with Sections 3 and 3A of the *Civil Procedure Act*, wherein Plaintiff has sought for Judgement against the Defendant for orders:
  - a. That this Court be pleased to declare that the Defendant's title to land parcel No. LOC.4/Kiranga/709, has become extinguished by operation of law, and that the Plaintiff herein has become entitled to the whole of the said parcel of land through Adverse Possession.
  - b. The Court be pleased to order that land parcel No. LOC.4/Kiranga/709, be registered in the name of Mwihaki Macharia.
  - c. The Defendant do execute all necessary documents to effectuate the transfer of whole land known as LOC.4/Kiranga/709, to the Plaintiff and in default the Deputy Registrar of this Honourable Court be empowered to do so.
  - d. The costs hereof be provided for by the Defendant.
2. This Originating Summons is supported by the sworn Affidavit of Mwihaki Macharia, the Plaintiff's herein dated 7<sup>th</sup> September 2023, wherein the Plaintiff contended that sometimes in year 1957, when the land consolidation and adjudication process was underway in Kenya, her husband Macharia



- Gachucha (now deceased), purchased land parcel LOC.4/Kiranga/709 (the suit property), from one Mwaura Githago (deceased).
3. She further averred that her husband entrusted his brother Kimwe Gachucha (the Plaintiff's brother-in-law) to hold the suit land for him. The Plaintiff annexed a copy of the certificate of Official Search in respect of the suit property to show that the suit land is registered in the name of Kimwe Gachucha. She further annexed a copy of the adjudication register denoting a formal transfer of the suit property from the Mwaura Githago, to the Plaintiff's husband.
  4. The Plaintiff also annexed the application for consent executed by herself, and the deceased as well as the Letter of Consent issued by the Kandara Land Control Board dated 5<sup>th</sup> April 1988, in respect of the suit property.
  5. It was the Applicant's further averment that together with her husband, they took possession of the suit property from year 1957 to date, and that her occupation has been open and nobody has asserted a claim over the suit land during the intervening period.
  6. The Plaintiff further averred that sometimes in the year 2008, she discovered that the Defendant had petitioned the Court for grant of letters of administration of the estate of Kimwe Gachucha (deceased) through Succession Cause No. 141 of 2007 (Thika). That she objected to the mode of distribution of the estate of Kimwe Gachucha, pursued by the Defendant for the reason that the Defendant wished to have the suit land devolve to himself in its entirety.
  7. It was her contention that the Succession Court advised her to lodge her claim before a competent Court as it did not possess the necessary jurisdiction to dispose of her claim, hence the instant suit.
  8. Further, the Plaintiff averred that since her entry into the suit land and settling thereon in year 1957, she has carried out massive developments including constructing a permanent house on the property, and planting trees. Further, that she has buried her grandchildren on the suit land.
  9. She urged the Court to allow her claim, as she has been in open, continuous and uninterrupted occupation of the suit property for a period of over 60 years, which entitles her to be declared the registered owner of the said land, pursuant to the doctrine of Adverse Possession.
  10. The Originating Summons is opposed by the Defendant herein through his Replying Affidavit sworn on 9<sup>th</sup> August, 2023. He refuted the Plaintiff's claim that the suit property was acquired through purchase by the Plaintiff and her husband from one Mwaura Githago (deceased). It was his contention that the suit land devolved to Kimwe Gachucha, the registered proprietor thereof, as a gift from his father (i.e., the Defendant's grandfather) namely Gachucha Murira.
  11. The Defendant averred that the said Gachucha Murira allocated different land parcels to his three (3) sons namely:
    - a. Murira Gachucha
    - b. Kimwe Gachucha
    - c. Macharia Gachucha
  12. The Defendant denied the Plaintiff's contention that in year 1988, Kimwe Gachucha, paid a visit to Kandara Land Control Board, for the purpose of transferring the suit land.
  13. Further, he averred that the Plaintiff's claim that she has been in occupation of the suit land from 1957 was refuted, and that the Plaintiff is a sister-in-law to the registered owner of the suit property; as such, her entry onto the property is not adverse to the registered owner or his estate.



14. The Defendant's further averred that the construction undertaken on the suit property by the Plaintiff dates to year 2008, and the same took place following the demise of Kimwe Gachucha.
15. The Defendant reiterated that the Plaintiff's entry into the suit property was permissive because she was allowed therein by her brother-in-law, and that is, the Defendant's father. That the Defendant was not in a position to evict the Plaintiff from the suit property during the pendency of the Succession Cause in respect of the estate of Kimwe Gachucha.
16. After the Pre-trial conference, parties took directions under Order 37 Rule 18 of Civil Procedure Rules, and elected to prosecute the Originating Summons by way of viva voce evidence.

#### **The Plaintiff/applicant's Case.**

17. PW1 Esther Mwhiki Macharia, adopted her Witness Statement as her evidence in chief and also produced her List of documents as exhibits marked as P. Exhibits 1-8.
18. It was her evidence that Kimwe Gachucha is the registered proprietor of the suit land, known as Loc 4/ Kiranga/709, and that in the year 1957, during land adjudication and consolidation, her husband Macharia Gachucha bought the suit land from one Mwaura Githago. However, he did not have the said land registered in his name, but in the name of Kimwe Gachucha, the father to the Defendant herein.
19. She testified that her husband and herself took possession of the suit land from 1957, and they have been in possession and occupation of the said land from then to date. That her said occupation has been in the knowledge of the Defendant and his family, and the said occupation has been open, without interruption, and no one has attempted to evict them from the suit land.
20. Further that in 1988, her deceased husband and herself applied and obtained letter of consent to transfer from Kandara Land Control Board on 5<sup>th</sup> April 1988. Further that in 2008, she got wind that the Defendant had applied for letters of administration to the estate of the deceased at Thika Law Courts, and he claimed to have the suit land entirely devolve to himself as a sole beneficiary.
21. That even if she had objected to the mode of distribution, the Succession Court dismissed her objection on the basis that it had no jurisdiction to deal with the issue of adverse possession. That she has done immense development on the suit land, had built a permanent house thereon and had buried her grandchildren on the suit land without any objection from the defendant.
22. She urged the court to declare that she has acquired ownership of the suit land by virtue of adverse possession, having lived and occupied the suit land openly and without interruption for a period of over 12 years, which is averse to the title of the registered owner.
23. On cross-examination by Mr. Mbugua for the Defendant, PW1 affirmed that the suit property is registered in the name of Kimwe Gachucha, and the registration in question took place during the land consolidation process. She listed her husband's siblings as follows:  
  
Kimwe Gachucha and  
  
Murira Gachucha.
24. PW1 confirmed that her husband was polygamous, and her co-wife is known as Mukami Macharia. That the Succession Court dismissed her objection to the Succession Cause in respect of the suit land. It was her further testimony that she was claiming the suit property on behalf of her husband. She admitted to not having any Grant of Letters of Administration in respect of her husband's estate.



25. She further testified that her husband purchased the suit property in 1967, however, being employed as a factory manager, he opted to have his brother registered as the proprietor of the suit property. She admitted to not having any evidence of the said purchase. The Plaintiff denied occupying the suit land on the basis of being a family member, and asserted that the suit property belongs to her personally.
26. PW1 denied entering into the property in year 2008, and that her husband was not buried on the suit land, but on a separate property. She affirmed that the Defendant is son to the registered proprietor.
27. On re-examination, PW1 testified that she did not produce the application for the Land Board's Consent before the Court. It was her further evidence that she entered into the suit property more than 50 years ago, and she has lived thereon for over 63 years. She indicated her age as 70 years.
28. PW2 Nganga Macharia, also adopted his Witness Statement dated 16<sup>th</sup> January 2024, as his evidence in chief. He stated that he is not related to the Plaintiff, but they come from the same village where he is serving as village elder.
29. It was his evidence that he is a village elder at Kiranga -githunguri area, where he resides and has resided since year 1966. He further stated that he has known the Plaintiff since his youth, and she has been residing on the suit property which is about 500 meters, from his home. Further, that he has known the Plaintiff as a neighbour for more than 40 years. He also testified that the Defendant is completely unknown to him.
30. On cross-examination by Mr. Mbugua for the Defendant, PW2 admitted to having known the Plaintiff's family with the exception of her husband. He also testified that he has in his possession information about how the suit land was acquired. He further stated that he is conversant with the persons who utilize the suit property. It was his further testimony that the Plaintiff is the one who utilizes the suit land, and has been utilizing it for a long period of time.
31. PW2 further testified that he does not know the brothers to the Plaintiff's husband, or member of the GACHUCHA family. He affirmed that the Plaintiff's family owns a separate parcel of land. Further, that he has heard that the Plaintiff's co-wife lives elsewhere, and that he does not know if the Plaintiff's other family members live in Kiranga area, as they are not known to him.
32. On re-examination, PW2 testified that the Plaintiff has lived on the suit property for long period of time, and he has known her from year 1967 or 1968., and that he is 78 years old.

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

33. DW1 Joseph Kimani Kimwe, adopted his witness statement dated 5<sup>th</sup> September 2023, as evidence in chief, and stated that he is peasant farmer and lives in Gatitu area He also produced his List of Documents as exhibits, marked D Exhibit 1. He affirmed that the Plaintiff is his aunt by virtue of her husband being a brother to DW1's father.
34. Further, DW1 testified that his father sired two children, being his sister Mary Wanjiku (deceased), and himself.
35. It was his further evidence that the Plaintiff's husband was married to two wives namely, Mukami Macharia (1<sup>st</sup> wife) and the Plaintiff (2<sup>nd</sup> wife). Further, that the Plaintiff's husband was the beneficiary if a separate parcel of land located in Kiranga area from his father Gachucha Murira.
36. The Defendant testified that the Plaintiff's husband is buried on the mentioned parcel of land, and not on the suit property. Further, that Mukami Macharia, the 1<sup>st</sup> wife of the Plaintiff's husband continues



- to utilize the land in which her husband was buried. The Defendant contended that the Plaintiff sold her share of the said land, and then came to the suit property claiming that the same was family land.
37. On cross-examination by Mr. Wachira for the Plaintiff, DW1 affirmed that the Plaintiff was married to his uncle, and that he has lived in Nairobi for a long time, and only returned to Kandara area in year 1983. He affirmed that the Plaintiff has been utilizing the suit property, which parcel of land DW1 was shown by his uncle. DW1 testified that he was born on the suit land, and that he has purchased a parcel of land in Gatitu. Further, that he remained in Gatitu area during and until the end of the emergency period (1952-1960).
  38. DW1 also testified that the suit property has not been utilized by anyone, and that Macharia (the Plaintiff husband) is buried elsewhere. Further, that following the filing of a lawsuit against him by the Plaintiff sometimes in year 2007, that is the time when the Plaintiff constructed a house on the suit land. That the parties herein have appeared before the local Chief concerning the suit land, and that the suit property is registered in the name of Kimwe Gachucha.
  39. DW1 affirmed the existence of a transfer document in regard to the suit land, however, he disclaimed knowledge as to its contents and admitted not being able to read. Further, he testified to not being aware of any appearance by the Applicant and the registered proprietor of the suit land, before the Land Control Board in year 1988.
  40. Further, DW1 stated that his father used to live with him at Gatitu area before his death. That he was unaware of whether his father sold the suit property to the Plaintiff. It was his further testimony that the Plaintiff has not utilized the suit land for 40 years, and that he lives in Gatitu area, while he (DW1) resides in Ithanga area.
  41. On re-examination, DW1 stated that he owns five (5) parcels of land which he purchased, and that he inherited only one (1) parcel of land. Further, that his father owned land in Gatundu in addition to the suit property. He further testified that the land in Kiranga area, was shared between DW1's father, and his siblings, and the subdivision was done in year 1964. It was his testimony that his father inherited the suit land from his father (i.e., DW1's grandfather), and the same is his father's share.
  42. It was DW1's further testimony that he does not know who is named in the transfer document, and that he came back from NAIROBI in year 1985, while his father died in year 1988, on a month which he could not recall. Further, that he was unaware of the number of years during which the Plaintiff has lived on the suit property, and that the suit property is family land.
  43. After the close of viva voce evidence, the Court directed the parties to file and exchange written submissions.

### **The Plaintiff's Submissions**

44. The Plaintiff herein filed her written submissions dated 22<sup>nd</sup> May 2024, through the Law Firm of Kanyi Kiruchi & Co Advocates, and identified three (3) issues for resolution by the Court being:
45. Reliance was placed on the decision of the Court in the cases of Maweu Vs Liu Ranching & Farming Cooperative Society [1985] eKLR; Wambugu Vs Njuguna [1983] KLR 172; Mtana Lew Vs Kahindi Ngala Mwangandi [2015] eKLR; Mbira V Gachuhi (2002) 1 EALR 137; Stephen Mwangi Gatunge Vs Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR; and, Samuel Kihamba V Mary Mbaisi [2015] eKLR.



46. On the question of costs, it was submitted that costs normally follow the events and are awarded to a successful party in a suit. She urged the Court to allow her claim together with costs.
47. The Defendant did not file any written submissions; and therefore, the Court will rely on his Replying Affidavit, Witness Statement and oral testimony before the Court.
48. This court has now carefully considered the pleadings herein, the available evidence and exhibits produced in court, the written submissions, cited authorities and the 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 suit?

#### **Whether the Plaintiff/Applicant is entitled to the Orders sought?**

49. The Plaintiff herein has laid claim over the suit property, which property is registered in the name of the Defendant's father Kimwe Gachucha, on grounds that he has been in possession and occupation of the said suit land for a period more than 50 years, which is in excess of the statutory period of 12 years.
50. However, the Defendant opposed the said claim and averred that the Plaintiff being a sister-in-law to Defendant's father, who is the registered owner of the suit property, was allowed to reside thereon by virtue of her marriage to a brother of the registered owner.
51. For one to acquire title by adverse possession, as the Plaintiff/Applicant is seeking, he/she must call sufficient evidence and establish the ingredients for a claim of such nature. There are certain principles or tests which need to be fulfilled for a claim of adverse possession to crystallize. These are; one must have occupied the land to the exclusion of others; the occupation must be without the consent of the owner; the occupation must be for a continuous period and uninterrupted period of at least 12 years.
52. Section 17 of the *Limitation of Actions Act*, Cap 22 Lok, extinguishes the rights of a registered owner, where there is a successful claim for adverse possession. Further, Section 38 of the *Limitation of Actions Act* provides as follows:
  - (1) ) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land."
53. The law on adverse possession is provided for under the *Limitation of Actions Act* and Section 7 of the said 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
  - (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.

54. In the case of *Wambugu Vs Njuguna* (1983) KLR page 172, the Court of Appeal held as follows;

- “1. 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.”

55. Further, in the case of *Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi* (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR, the Court reasoned as follows:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

56. Again in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal held that a person claiming land through the doctrine of 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.



57. This court too will consider the holding of the court in the case of *Samuel Kihamba v Mary Mbaisi [2015] eKLR Kisumu Civil Appeal No. 27 of 2013*, where 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”.

58. The Court herein has considered the available evidence, and finds that the Plaintiff has claimed that together with her husband, they purchased the suit property in year 1957 from one Mwaura Githago (deceased), during the period of land consolidation and demarcation exercise in the former Central Province of Kenya. During cross-examination, the Plaintiff testified that the purchase took place in year 1967.

59. The Court is fully cognizant of the fact the Plaintiff gave her evidence in the Kikuyu language which is an indicator that she is a person of limited formal education, and was also of an advanced age. With the above understanding in mind, the Court recognizes that the year 1957 and 1967 could appear quite similar to a speaker not well-versed in the English language.

60. Further, as noted by the Succession Court in its Judgment dated 21<sup>st</sup> March, 2019, in Succession Cause No. 141/2007 (Thika), the Plaintiff herein, then in the role of the 3<sup>rd</sup> Protestor, testified under cross-examination that at the time she appeared before the Land Control Board, she was illiterate and the clerk was the one filling the forms.

61. Be that as it may, the Plaintiff and her Witness Nganga Macharia testified and confirmed under cross-examination that the Plaintiff has lived on the suit property since 1967 or 1968. For his part, the Defendant asserted that the Plaintiff entered onto the suit property in year 2007 or 2008, and her entry followed the filing of a Succession Cause in respect of the estate of Kimwe Gachucha, the registered proprietor of the suit property and father to the Defendant.

62. This Court has perused the copy of Certificate of Official Search dated 30<sup>th</sup> November 2022, which was produced by the Plaintiff as her P Exhibit 2. Entry number 1 on the said document clearly indicates that Kimwe Gachucha was registered as the owner of the suit property on 13<sup>th</sup> March 1967, and a land certificate was issued on 26<sup>th</sup> February 1980.

63. The Court has also considered the copy of Adjudication Register appearing as the Plaintiff's P. Exhibit 3 dated 24<sup>th</sup> May 1966, and has noted that in the said document, the land parcel number is partially blotted out and only number “9” is clear and legible. Further, the Court has perused the copy of Application for the Land Control Board's Consent, marked as the Plaintiff's P Exhibit 4, which is undated as well the copy of the Land Control Board's Consent dated 5<sup>th</sup> April 1988, marked as the Plaintiff's P Exhibit 5. The latter document indicates transfer of the suit land from Kimwe Gachuha (the registered proprietor) to Mwhaki Macharia (the Plaintiff/Applicant).

64. In his Replying Affidavit on record and during cross-examination, the Defendant averred that the Plaintiff was permitted to enter into and settle on the suit land by the registered owner, who was the Defendant's father, because the two were related through marriage, the Plaintiff being a sister-in-law to the registered owner. The Plaintiff denied this allegation by the Defendant that she was permitted to live on the suit land as it is family land, and that the registered owner thereof is her brother-in-law. The



Plaintiff had testified and confirmed under cross-examination, and submissions that the suit property belongs to her personally, as it was purchased by her late husband from one Mwaura Githago.

65. The Defendant averred and testified that the Plaintiff occupied the suit property as a licensee. In the case of *Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001*, (UR), the court delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

66. Further, it is trite that adverse possession runs with the land, and is not to be seen in the title deed. In the instant suit, the Court is concerned with the question as to whether the Plaintiff has proved open, continuous and uninterrupted occupation of the suit land for the statutory 12-years period in order to be entitled to the ownership of the said land under the doctrine of adverse possession.

67. On his part, the Defendant had testified and confirmed under cross-examination that the Plaintiff was married to his uncle; and he referred to the Plaintiff as his aunt. It is evident that the parties herein are related. The Court of Appeal when faced with a claim between relatives and concerning adverse possession in the case of *Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja (Civil Appeal 89 of 2009)* [2013] KECA 417 (KLR) (29 May 2013) (Judgment), reasoned as follows:

“Although the respondent's counsel maintained that Eunice was a licensee, we are disinclined to belabor this point as the learned Judge discounted that notion in his judgment when he opined in part of the judgment; -

“An aunt, uncle, nephew, niece or other relatives who has lived, built, planted permanent commercial crops and harvests crops on ancestral land as described above, does not fit to quality in any of a description of a licensee as analyzed above.”

Thus far, we agree with the learned Judge that Eunice could not be regarded as a Licensee. We however part company with the learned Judge when he goes on to point out that Eunice cannot be in adverse possession...We do not see how the learned Judge was able to draw the dichotomy here to exclude Eunice's claim from the category of claims under adverse possession.”

68. From the above holding of the Court of Appeal, it is evident that a claim based on adverse possession can be sustained against a member/s of the Plaintiff's family.

69. Further, the Court upon perusal of the Plaintiff's Application for the Land Control Board's Consent (LCB), and the Consent thereto dated 5<sup>th</sup> April 1988, produced by the Plaintiff, is satisfied that the deceased registered proprietor of the suit property clearly expressed the intention to put the suit property under the Plaintiff's ownership. In the circumstances, the Court is not persuaded that the Plaintiff's occupation of the suit property was as a licensee.

70. This court will make a refence to the finding of the Superior court in the case of *Kasuve v. Mwaani Investments Ltd. & 4 Others* (2004) KLR 184, where it proclaimed that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a



period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See *Wanje v. Saikwa* [1984] KLR 284.”

71. Moreover, even if this court was to accept the Defendant’s claim that the Plaintiff entered onto the suit land as a licensee, such permission was revoked in 1988, upon the death of the registered proprietor. From 1988 to 2007 or 2008, when the Plaintiff filed an objection at the Succession Court over the way the suit property was being distributed by the Succession Court, it was about 19 or 20 years, which period far exceeds the statutory 12 years period for a Plaintiff to become entitled to land under the doctrine of adverse possession.
72. Having considered the evidence in totality, this Court is convinced that the Plaintiff’s claim for adverse possession in respect of the suit property had already crystalized against the estate of the registered proprietor at the institution of the referred Succession Cause by the Defendant herein. Therefore, by the time the said Succession Cause was filed, the suit land was not available for distribution by the estate of the registered owner.
73. In the case of the case of *Joseph Kamau Gichuki (Suing as the Administrator of the Estate of Gichuki Chege (Deceased) Vs James Gatheru Mukora & another* [2019] e KLR where the Court held that:

“..... It follows therefore that, as at the time the defendants were issued with a grant of letters of administration in respect of the estate of Mukaria in 1992, their claim over the suit property was already time barred, the deceased having occupied the suit property continuously for over 18 years....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.”
74. Further, the Court has carefully considered and evaluated the parties’ pleadings, oral testimony, evidence adduced in court and the written submissions by the Plaintiff herein, and finds that the photographs of the suit property produced by the Plaintiff in support of her case produced as P Exhibit 8 shows inter alia a dwelling house with iron sheet roof, mature trees and a burial site indicated by a wooden cross partly-sticking up from the ground.
75. From the above observations, this Court is persuaded that the Plaintiff has established and proved that she has resided on the suit property for the statutory 12 years period; thus, she is entitled to be declared as the registered owner of the said parcel of land, under the doctrine of adverse possession.
76. Having analyzed the evidence as above, the Court finds and holds that the Plaintiff has proved her case against the Defendant herein on the required standard of balance of probabilities. Accordingly, the court enters judgement for the Plaintiff herein against the Defendant in terms of prayers numbered (a), (b) and (c) of the Plaintiff’s Originating Summons dated 23<sup>rd</sup> January, 2023.
77. On the issue of costs, it is trite that pursuant to the provisions of Section 27 of the *Civil Procedure Act*, costs are awarded at the discretion of the court, and they ordinarily follow the event, and costs are always awarded to the successful party in a suit.



78. The Plaintiff herein is the successful litigant and is thus awarded costs of this suit. In nutshell, Judgement is entered in favour of the Plaintiff herein, against the Defendant in terms of prayers Nos. a, b, c of the Plaintiff's Originating Summons dated 23<sup>rd</sup> January 2023, with costs to the Plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**L. GACHERU**

**JUDGE**

**7/11/2024**

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr Wachira H/B for Mr Kanyi Kiruchi for Plaintiff

Mr Mbugua for Defendant

