



**Magiri (Suing as the Legal Representative of the Estate of M'magiri M'anampiu – Deceased) v Magiri & 3 others (Environment & Land Case E001 of 2020) [2024] KEELC 13840 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13840 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E001 OF 2020  
CK NZILI, J  
DECEMBER 11, 2024**

**BETWEEN**

**KARUTHI MAGIRI ALIAS MARY MAGIRI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'MAGIRI M'ANAMPIU – DECEASED) ..... PLAINTIFF**

**AND**

**JOHN KABURU MAGIRI ..... 1<sup>ST</sup> DEFENDANT  
FLORENCE MUTHONI ABIRA CHARLES ..... 2<sup>ND</sup> DEFENDANT  
DAVID GITONGA MURIUNGI ..... 3<sup>RD</sup> DEFENDANT  
JOSHUA M'MUTIGA M'RINGERA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Through an amended originating summons dated 19.1.2024, the plaintiff, suing as a legal representative of the estate of M'Magiri M'Anampiu, seeks to be declared entitled to a portion measuring 0.40 ha and 1.84 ha of LR No's. Ntirimiti Settlement Scheme/1056 and 1057, from now on, (the suit parcels of land) which she says to have been under the exclusive possession of the family of the deceased M'Magiri M'Anampiu, since 1983 by virtue of adverse possession.
2. The application is supported by an affidavit sworn on 19.1.2024 by Karuthu Magiri alias Mary Magiri restating the contents of the originating summons and attaching several annexures.
3. The 1<sup>st</sup> and 2<sup>nd</sup> defendants opposed the suit by a replying affidavit of John Kaburu Magiri and a statement of defense and counterclaim dated 4.11.2020. It was averred that the plaintiff's homestead is over five kilometers away from the suit parcels of land and that the suit was res-judicata or an abuse of the court process on account of previous suits and decrees before other courts. Further, the 1<sup>st</sup> and 2<sup>nd</sup>



- defendants averred that the alleged occupation forcefully took place in 1998, leading to the aforesaid previous suits, which were subsequently dismissed as per the annexed plaint and a decree marked JK 1-3.
4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied the alleged adverse possession since the suit was res judicata, bad in law, frivolous, and an abuse of the court process.
  5. By way of a counterclaim, the 1<sup>st</sup> and 2<sup>nd</sup> defendants, as the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the counterclaim, sued the plaintiff as the defendant in the counterclaim. It was averred that LR No's. Ntirimiti Settlement Scheme 1056 and 1057 were a subdivision of the original LR No. Ntirimiti Settlement Scheme/219, initially owned by the late M'Rutere M'Nguthari, who sold it to the 1<sup>st</sup> plaintiff in the counterclaim and handed over vacant possession in 1998, who built farmhouses on the land and continued undertaking farming activities therein.
  6. Again, the 1<sup>st</sup> & 2<sup>nd</sup> defendants averred that in 1998, the plaintiff hired goons who purported to destroy the farmhouses and attempted to plow the land, which was reported to the police, leading to an arrest and charging of the plaintiff's son with arson, who unfortunately jumped bail.
  7. The 1<sup>st</sup> & 2<sup>nd</sup> defendants averred that the 1<sup>st</sup> plaintiff in the counterclaim filed Meru CMCC No. 608 of 1998 and obtained injunctive orders to keep the defendant in the counterclaim at bay, leading to Meru HCC Appeal No. 622 of 2001.
  8. Similarly, the 1<sup>st</sup> plaintiff in the counterclaim averred that he subdivided the land into two, which they have been tilling the land at the exclusion of the defendant in the counterclaim, who filed Meru HCC No. 14 of 2006, claiming ownership, which was dismissed by this court on 12.11.2015, hence the instant originating summons was res judicata and without merits since the title deeds were indefeasible in law.
  9. The plaintiffs in the counterclaim averred that the defendant in the counterclaim was a pathological liar who lives in her residence at Mpuri Area Imenti North Sub-County over 20 km far away from the suit parcels of land, which are situated at Buuri Sub-County.
  10. Equally, the plaintiff counterclaimed for a permanent injunction, stopping the defendant in the counterclaim from trespassing or interfering with the suit parcels of land. The 1<sup>st</sup> and 2<sup>nd</sup> defendants denied that the plaintiff had been exclusively on the land as alleged or at all. The suit was equally opposed by the 3<sup>rd</sup> and 4<sup>th</sup> defendants, who joined issues as raised by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, through a replying affidavit of Joshua M'mtugi M'ringera sworn on 12.6.2024. The plaintiff filed a reply to the defense and defense to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' counterclaim, dated 19.1.2024, admitting the existence of the previous suits and orders, save to add that if at all she was not in occupation as alleged, eviction orders would not have been issued. The plaintiff insisted that the orders of eviction were never executed against her. Additionally, the plaintiff averred that the previous suits, including Meru High Court No 14 of 2006, did not stop time from running for adverse possession or render this suit resjudicata
  11. At the trial, Karuthu Magiri testified as PW 1. She relied on an affidavit and witness statement dated 19.1.2024 as her evidence in chief. PW 1 told the court that she has been on the suit parcels of land since 1983.
  12. Her testimony was that she is a legal representative of the estate of her late husband, M'Magiri M'Anampiu, on account of a certificate of confirmation of grant dated 14.6.1999 and produced as P. Exh No. (1). PW1 said that her late husband was allocated the suit parcels of land in 1983 by the Settlement Fund Trustees (S.F.T), made all the requisite and necessary payments as per receipts before



- the court, and took possession of the land. She said that he passed on 1.10.1986 before the transfer to his name took place. PW1 produced the receipts as P. Exh No. 2, 3, 4 (a) and (b) and photographs showing the developments on the land as P. Exh No. (5).
13. The plaintiff told the court that after the death of her husband, she continued to occupy and develop the land, measuring 0.40 ha and 1.84 ha to date. PW1 told the court that she applied for a full grant, including the suit land as part of her husband's estate, only to realize that the land was fraudulently and irregularly subdivided at the instance of the 1<sup>st</sup> defendant into LR No. Ntirimiti Settlement Scheme/1056 and 1057 and is currently fraudulently registered in the names of the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants as per a copy of green card produced as P. Exh No's. 10 & 11.
  14. PW 1 told the court that the Settlement Fund Trustee failed to issue an allotment letter to her late husband's name despite the payments and instead fraudulently issued the same to the 2<sup>nd</sup> - 4<sup>th</sup> defendants, who acquired registration despite her open, exclusive, continuous and uninterrupted occupation and developments on the land, which includes semi-permanent houses, planted trees and subsistence farming going by the produced photographs.
  15. PW 1 told the court that the 1<sup>st</sup> defendant had previously sued her in Meru CMCC No. 608 of 1998, whose judgment was delivered on 24.5.2001, after which she preferred an appeal in Meru HCC Appeal No. 62 of 2001, whose judgment was delivered on 4.11.2004, quashing the lower court decision. PW 1 equally told the court that she also filed Meru HCC No. 14 of 2005, but the suit was dismissed for non-prosecution. The judgments and pleadings were produced as P. Exh No. 6 - 9 respectively.
  16. In cross-examination, PW 1 told the court that the land was vacant when she went to occupy it in 1983 and has been thereon for over 41 years. She was unable to ascertain if she had sued the initially registered owner of the land as per the green card apart from the name of M'Rutere M'Nguthari in her previous suits. PW 1 insisted that her structures, which have been on the land, were allegedly torched and destroyed by the 1<sup>st</sup> defendant, with a view of evicting her from the land but she eventually repaired them and resumed occupation.
  17. PW 1 said that she had no letters on record from the Settlement Fund Trustees to show who was the initial owner of the land. Equally, she said that she had not joined the S.F.T. in this suit since they were not the ones who were staking a claim on her land. PW 1 said that all the mature trees and structures on the land belonged to her and that it was her son who had been tilling the land throughout. According to PW 1, John Kaburu was allegedly allotted the land as per the green card, while she was still occupying it and has never evicted her from the land.
  18. Joseph M'Imunya testified as PW 2. Replying on a witness statement dated 19.7.2024 as his evidence in chief, PW 2 told the court that he was a neighbor of the plaintiff and hence aware that she has been in the suit land since 1983, which is currently underutilization by her children. PW 2 told the court that the plaintiff's late husband and himself were former workers of the S.F.T, before they were allocated and took possession of the suit land in 1976. He told the court that his parcel number was 217. PW 2 told the court that ordinarily, S.F.T. used to charge the land title until an allottee cleared the requisite statutory payments and charges before the transfer could be effected in the allottee's name.
  19. Stephen Gikunda M'Imanyara testified as PW 3. He relied upon a witness statement dated 19.1.2024 as his evidence in chief. He told the court that he was a neighbor of the plaintiff and owner of Parcel No. 296, which was about 100 meters from the plaintiff's parcel, next to that of PW 2. He confirmed that the plaintiff is the one who has been utilizing the suit land. Similarly, he confirmed that the 1<sup>st</sup> defendant has never utilized the land.



20. John Kaburu Magiri testified as DW 1. He relied upon a replying affidavit sworn on 14.11.2020 as his evidence in chief. His evidence was that he bought the land from M'Rutere M'Nguthari in 1998, took vacant possession, and started developing it. Equally, he said that after the son of the plaintiff attempted arson, he was arrested and charged before court by the police. DW 1 told the court that there had been previous suits over the suit parcels of land as per a decree dated 24.5.2021 in Meru CMCC No. 608 of 1998, an amended plaint in Meru HCC No. 14 of 2006, a decree dated 30.7.2018 for the lifting of the inhibition order, the initial copy of the green card for LR No. Ntirimiti Settlement Scheme 219, a ruling in CMCC No. 14 of 2006 dated 3.5.2006, and lastly, an order in Meru CMCC No. 608 of 1998 dated 10.5.2002, which he produced as D. Exh No's. 1-7, respectively.
21. DW 1 told the court that going by D. Exh No. 5, the initial allottee of the land was M'Rutere M'Nguthari, who procedurally sold and lawfully transferred the land after the S.F.T lifted an existing restriction. Again, DW 1 termed the photographs produced by the plaintiff as misleading since the structures on the land belonged to him.
22. He said that he bought the land when it was vacant and no one was living on it. DW 1 told the court that he sold the land to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. DW 1 insisted that the land was currently vacant and not occupied by the plaintiff's children as alleged or at all. He denied causing any damage to the land as alleged by the plaintiff; otherwise, she would have lodged a police complaint against him.
23. Joshua M'Mutuga M'Ringera testified as DW 2. He relied on a replying affidavit dated 12.6.2024 as his evidence in chief. DW 2 told the court that he bought the suit land after initially causing a scene visit and verification alongside the 3<sup>rd</sup> defendant. He confirmed that at the time, the suit parcels of land had some structures, including a pit latrine and farming activities belonging to the 1<sup>st</sup> defendant.
24. DW 2 told the court that he was the one who made a police report in 1998 at Subuiga police station against the plaintiff's son, Nicholas Mwiti, for attempted arson of the land. DW 2 told the court that apart from an official search at the lands office, he visited the land in the company of a surveyor to ascertain its status before he bought the land.
25. Accordingly, DW 2 said that he was the one who had been tilling the land despite occasional harassment attempts by the plaintiff. DW 2 told the court that he had not been made aware of the previous suits when he bought the land, save that the official search certificate had shown the land belonged to the 1<sup>st</sup> defendant and that there was no caution lodged against the title in 2022. DW 2 told the court that a part of the structures belonged to the 1<sup>st</sup> defendant who also cleared his farm produce before handing over vacant possession to him; otherwise, no one else was on the land, least of all the plaintiff.
26. DW 2 said that other than the official search certificate, he did not make inquiries from the locals to ascertain the occupants of the suit land; otherwise, it was the 1<sup>st</sup> defendant who had tilled the land. DW 2 told the court that after the dispute arose, he stopped utilizing the land pending the hearing and determination of the suit, save for occasional visits to the land.
27. After the close of the defense case, parties were directed to put in written submissions. The plaintiff relied on written submissions dated 29.10.2024 and isolated three issues for determination. On adverse possession, the plaintiff submitted that the facts and evidence produced indicated that the entry into the suit parcels of land was out of an allocation of the land in 1983 and compliance with the terms and conditions of the allocation by the S.F.T. The plaintiff submitted that she remained in open, continuous, and uninterrupted occupation of the suit land for over 37 to the exclusion of the initial allottee subsequent and current registered owners, which allocation, subdivisions, transfers, and registration she termed as fraudulent, null and void.



28. The plaintiff submitted that the developments on the suit land, as per the photographs, show that she was in possession and ownership of the land, unlike the predecessors and current owners of the title to the land. Reliance was placed on the Limitation of Actions Act Cap 22 Eliphias Cosmas Nyambaka vs Charles Angucho Suchia (2016) eKLR, Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR, Wambugu vs Njuguna (1983) KLR 172 and Mbira vs Gachuhi (2002) 1 EALR 137.
29. The 1<sup>st</sup> and 2<sup>nd</sup> defendants relied on written submissions dated 22.10.2024, terming the evidence of the plaintiff as shaky, false, and groundless from the start to the end, for at no time had she been in occupation of the land. Reliance was placed on Kiambi vs Miriti KEELC 13299 (KLR), Kasuve vs Mwaani Investment & 4 others (2004) 1 KLR 184, Macharia vs Hunyu KEELC 22370 KLR.
30. The 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that they were purchasers who bought LR No. Ntirititi Settlement Scheme/1036 from the 1<sup>st</sup> defendant who had obtained title from the late registered owner M'Rutere M'Ngaruthi.
31. The 3<sup>rd</sup> & 4<sup>th</sup> defendants submitted entries in the green card for L.R No. Ntirititi Settlement Scheme/219 the mother title shows that on 9.7.1998, the director of land adjudication had restricted the title register. Further, the 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the failure by the plaintiff to sue both the S.F.T and M'Rutere Ngaruthi who allegedly allocated the land to someone else, instead of her late husband was fatal to her case. Equally, the 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the omission to avail documents to prove if there was any dispute or complaint lodged between the said late husband and the first registered person, M'Rutere M'Ngaruthi, weakened the plaintiff's suit.
32. The 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that given the previous suits, the plaintiff ought to have pleaded all her claims, then sued all the parties and prosecuted the said claims in 1998. Even assuming the plaintiff had any claim, the 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that time for adversity was interrupted by those former suits.
33. On fraud, the 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the plaintiff failed to prove the same to the required standard. The 3<sup>rd</sup> & 4<sup>th</sup> defendants submitted that before purchasing and acquiring the land, they made a scene visit and found no one in occupation of the land, and therefore, they were innocent purchasers for value without notice of any interest over the land by the plaintiff. Equally, the 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the documents produced by the plaintiff to prove ownership were not originals, authentic, verified, or certified, and no officer was summoned from the S.F.T. to prove if the receipts were genuine or not.
34. The 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the fact that the plaintiff had included the suit land in the list of assets of her late husband did not give rise to any title to the land whose register was opened on 30.6.1986 under the S.F.T and first registered in the name of M'Rutere M'Ngaruthi on 11.3.1998.
35. The court was urged to be guided by David Munene Wamwati & others vs Registered Trustees of ACK & another Nyeri C.A No. 26 of 2015 and Richard Mugo Kiambo vs James Muriuki Kiambo Nyeri C.A NO. 46 of 2013, on the elements of adverse possession, which, unfortunately, the plaintiff has failed to prove in this suit.
36. The court has carefully gone through the pleadings, evidence tendered and the law. The issues calling for my determination are:
  - i. If the suit is res judicata, frivolous, raises no cause of action and was an abuse of the court process.



- ii. What was the effect of the dismissal of the earlier suit by the plaintiff against the 2<sup>nd</sup> defendant to the instant suit as regards the claim based on fraud or illegality?
  - iii. If the plaintiff has disclosed and proved a claim of adverse possession against the defendants.
  - iv. Whether the plaintiff is entitled to the reliefs sought.
  - v. Whether the counterclaim has merits.
  - vi. What is the order as to costs?
37. The plaintiff brings this suit as the legal representative of the estate of M' Magiri M' Anampiu, pursuant to a grant confirmed on 14.6.1999 that had included the L.R Ntirimiti Settlement Scheme/219 as part of the estate of the deceased. The plaintiff has averred that the deceased husband applied in 1982, paid for, and was allowed to occupy the land by the initial owner, the Settlement Fund Trustees.
38. However, she pleaded that the late husband passed in 1986 before the transfer to his name, though his family and the plaintiff continued to live and occupy the land until they obtained the certificate of grant in 1999, only to realize that the land had been allocated to a third party, subdivided, transferred and registered in the names of the defendants. The plaintiff termed the transactions as fraudulent, illegal, and subject to her accrued overriding interests since 1983.
39. The plaintiff admitted that the 1<sup>st</sup> defendant had sued her in the previous suits. She produced several judgments, pleadings, and orders among them dated 24.5.2007, 4.11.2004 and 12.11.2015. On the other hand, the defendants have termed the suit as an abuse of the court process, res judicata, unprocedural, a delaying tactic in view of the previous orders, the property as illegally and irregularly included as part of her late husband's estate and lastly the suit as devoid of any merits. The defendants, in their written submissions, urge the court to find the suit as res-judicata, an abuse of the court process and also devoid of any merits. The plaintiff is of a contrary opinion.
40. Res judicata is a doctrine provided under Section 7 of the *Civil Procedure Act*. In *IEBC & others vs Maina Kiai & others* (2017) eKLR, the court set out the five elements to be proved for the doctrine to be invoked: (a), the suit or issue must be direct and substantial in issue in the former suit (b) the former suit must have been between the same parties or parties under which they or any of them claim (c), those parties were litigating under the same title and (d) the issue was heard and finally determined in the former suit, (e) the issues was heard and determined to finality by a competent court.
41. In *John Florence Maritime Services Ltd & Another vs. Cabinet Secretary Transport and Infrastructure & others* Petition 17 of 2015 (2021) KESC 39 (KLR) (civ) (6<sup>th</sup> August 2021 (Judgment), the court reviewed the law on res judicata. It cited *KCB vs Muiri Coffee Tea Estate Ltd and another* (2016) eKLR, that res-judicata was a doctrine of substantive law whose import is that once the legal rights of parties have been judicially determined, such verdict stands as a conclusive statement as to those rights and a party is only allowed one bite at the cherry and prevented from returning to court to claim further on the same title as in the earlier action.
42. The court said that the doctrine serves the cause of order and efficacy in the adjudication process to prevent a multiplicity of suits that may clog the courts, occasion unnecessary costs to the parties and to ensure that the litigation comes to an end.
43. As to subsequent claims that could have been raised in the earlier suit, in *William Koross vs Hezekiah Kiptoo Kowen & others* (2015) eKLR, the court observed that the philosophy behind res-judicata was a finality to litigation in order to counter the propensity of human beings keeping on trying until something gives in through endless and vexing litigation as a public interest doctrine promoting the



stability of judgments, where a successive party can reap his fruits and the unsuccessful party learn to let go.

44. The court said that res-judicata is not solely about the same subject matter. It is also about the same parties or parties acting in privity with each other over the same subject matter going by Section 7 [Civil Procedure Act](#) explanation No. 6.
45. The defendants have referred to the earlier suits in which the plaintiff had been sued, leading to some decrees, or where she had sued, especially before this court in 2006, and the suit was dismissed for want of prosecution. The 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that the plaintiff should have raised her claim in the earlier suits where she had been sued and was therefore abusing the court process.
46. The Black's Laws Dictionary 10<sup>th</sup> Edition defines a vexatious suit as one instituted maliciously with no reasonable grounds and with the aim of creating trouble and expense to the opposite party. A frivolous suit is defined as one lacking legal basis or merits and without reasonable purposes. A scandalous suit is a disgraceful and irrelevant abuse of the process. It is defined under the same dictionary as improper and tortious use of legitimately issued court process to obtain a result that is either unlawful or beyond the process scope or wrongful.
47. In *Yaya Towers Ltd vs Trade Bank Ltd in (liquidation) Civil Appeal 35 of 2000* and *D.T Dobie & Co. Ltd vs Muchina (1982) KLR 1*, the court said that it has to act cautiously and carefully before dismissing a suit which is said to disclose a reasonable cause of action or otherwise an abuse of the court process.
48. Applying the preceding case law, the judgment delivered between John Kaburu Magiri and Mary Magiri in Meru CMNO 608 of 1998 was over eviction and permanent injunction. The plaintiff had put up a defence of allocation of the land to her by S.F.T. to her late husband and hence her subsequent occupation of the land after her late husband passed on. She termed the registration by the 1<sup>st</sup> defendant therein as fraudulent. She had raised the defence as a legal representative of her late husband as per the temporary grant of letters of administration. The plaintiff called evidence from the former manager of S.F.T. The 1<sup>st</sup> defendant herein equally called witnesses on how he bought the land from M'Rutere M'Ngaruthi. The trial court found the 1<sup>st</sup> defendant's title as indefeasible for the plaintiff was unable to prove her defence of fraud or sue either the S.F.T or the initial owner M'Rutere M'Ngaruthi. The trial court faulted the plaintiff for not raising a counterclaim or filing a fresh suit to claim the land from the allocating authority or against the initial allottee. The trial court granted the 1<sup>st</sup> defendant a permanent injunction and an eviction order by a judgment dated 24.5.2001. The plaintiff filed Meru HCA No. 62 of 2001 against the said judgment.
49. On appeal, the main contention was that the trial court had failed to consider the overriding interest raised by the plaintiff herein, for she had pleaded occupation of the land for over 15 years, since her husband passed on; hence, she could not be termed as a trespasser. Further, the High Court observed that the issue of jurisdiction had also been raised by dint of Section 3 (1) of the Land Disputes Tribunal Act and if the issue of adverse possession could be determined by the lower court. The High Court set aside the lower court judgment with costs.
50. In Meru HCC No. 14 of 2006, the plaintiff had sued the S.F.T, M'Rutere M'Ngaruthi and the 2<sup>nd</sup> defendant herein for fraud as per D. Exh No. (2). D. Exh No. (3) shows that the suit was dismissed by this court on 12.11.2015 for want of prosecution and that on 18.7.2018, the inhibition order earlier issued against the title to L.R Ntirimiti Settlement Scheme/1056 was lifted.
51. The plaintiff does not dispute the existence of the previous suits but takes the view that the said suits do not affect the current suit. Equally, the defendants do not dispute that the initial decree in the suit



against the plaintiff by the 1<sup>st</sup> defendant for eviction was set aside by the High Court on appeal and that the subsequent suit against the 2<sup>nd</sup> defendant and other parties not in this suit was dismissed for want of prosecution on 12.11.2015. From the pleadings and evidence tendered, the 1<sup>st</sup> – 4<sup>th</sup> defendants have not met the ingredients of res-judicata.

52. The critical question that remains, however, is whether the dismissal of the suit based on fraud and similar cause of action, save for adverse possession, entitles the plaintiff to bring a fresh suit against the 2<sup>nd</sup> defendant and, by extension, to base her claim on similar facts and evidence which was available in the previous suits. A cause of action is a conduct on the part of the defendant that gives rise to a reason to complain to the plaintiff. See D.T Dobie vs Muchina supra.
53. A dismissal of a suit for want of prosecution is similar to a judgment under Order 9 Rule 7 of the Civil Procedure Rules. It bars a party whose suit has been dismissed from bringing a fresh suit. See Njue Ngari vs Ephantus Njiru & another C.A NO. 29 of 2015 (2016) eKLR. Instead of seeking to set aside the dismissal or appeal against the order made by this court in 12.11.2015, the plaintiff opted to file a fresh suit on 9.10.2020. The plaintiff changed the cause of action and the parties without disclosing in her pleadings the litigation history of the matter and obtained an interim order dated 29.10.2020. It was only the 1<sup>st</sup> defendant who disclosed the litigation history in a replying affidavit and statement of defense and counterclaim dated 14.11.2020.
54. The plaintiff filed a reply to the 1<sup>st</sup> and 2<sup>nd</sup> defendants' statement of defense and the counterclaim on 19.1.2024 admitted the pendency of the previous suits, the decrees. She, however, denied res judicata and the question of abuse of the court process. The reason why the issue of adverse possession was never raised in the previous suits remains unanswered in the pleadings and in the plaintiff's testimony. The defendants urge the court to find the suit an abuse of the court process and an afterthought, generally and in particular, the 2<sup>nd</sup> plaintiff in the counterclaim, who should enjoy the statutory defense, where a suit is dismissed for non-prosecution, as it bars revival of a similar suit.
55. The court finds that the plaintiff's current claim is based on fraud, just like in the dismissed suit, the only difference being that in this suit, it is only the 2<sup>nd</sup> defendant who has survived. The plaintiff has ingeniously left out on board the Settlement Fund Trustees and the initial allottee, M'Rutere M'Ngaruthi who were parties in the dismissed suit. My finding is that the suit against the 2<sup>nd</sup> defendant is fatal and amounts to abuse of the court process. I say so because the dismissal of the suit acts as a bar to the revival of a suit based on the same facts. It amounts to abuse of the court process. The 2<sup>nd</sup> defendant is being vexed twice by purporting to be blamed for the transaction, which happened without his participation. There is evidence also that the plaintiff became aware of the changes to the title register by 2007. To bring a claim based on fraud in 2020 was amounting to bringing a stale claim.
56. The next issue is whether the plaintiff has proved adverse possession against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. Adverse possession occurs where there is apparent dispossession & discontinuance of the land from the owner. A claimant must prove that she has been in exclusive possession of the land openly and as of right and without interruptions for 12 years, either after dispossessing the owner or by discontinuance of possession by the owner of his own volition. See Kasuve (supra), Kiambi (supra) Gitahi vs James Kaburu Muga & others Nyeri C.A No. 43 of 2015 and Mtana Lewa vs Ngala Mwangandi (2015) eKLR.
57. The claimant must tender evidence of possession and dispossession. In David Munene Wamwati & others vs the Registered Trustees of ACK & another (supra), the acts of fencing the land and putting up structures thereon were found to be so inconsistent with and hostile to the title of the registered owners, that for the deceased to have failed to take any action to rebut and repulse such trespass and for so long a period as in the very conduct that invites the consequences of extinguishment of his title.



58. The court termed the actions as incontrovertibly a form of dispossession of the owner to constitute an act that was supremely inimical to and a total repudiation of the owner's right. See also *Githu vs Ndeete* (1984) KLR 776.
59. In *David Munene Wamwati* (supra), the court observed that the passage or transfer of title from the registered owner to a third party did not interrupt or otherwise cancel out the adverse possession. In *Richard Mugo Kiambo vs James Muriuki Kiambo* (supra), the court cited *Gaitima Kingua vs Muga Gathangi* (1976-1980) 1 KLR 325 that the planting of a boundary of tufts of nappier grass, fencing of and cultivation were sufficient to prove adverse possession.
60. As to the assertion of right the court said that the giving out of a three day's notice was not enough to stop time from running. In *Elphas Cosmas Myambuka vs Charles Angucho Sachia* (supra), the court observed that the notice to vacate the land was clear evidence that the claimant had been on the land for over 20 years.
61. Interruption of adverse possession may arise when a suit is instituted against the trespasser to evict him. It also occurs when a deliberate act of assertion of title occurs.
62. In *Githu vs Ndeete* (supra), the court said that assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. In *Amos Weru Murigu vs Muratha Wangari Kambi & another* (supra), the court held that writing a demand letter to vacate is not enough assertion of title. Additionally, the land for adversity must be clearly identified in terms of location, size and portion from the larger suit premises. See *Wilson Kazungu Katana & others vs Salim Abdalla Bakshwein & another* (2015) eKLR.
63. In *Njuguna Ndatho vs Maasai Itumo & others* (2002) eKLR, the court cited *William Gatuhi Murathe vs Gakuru Gathimbi* C.A No. 49 of 1996 and [\*Joseph Gachimu Kiritu vs Lawrence Munyambu Kabura C.A No. 20 of 1993\*](#) that the filing of a suit for recovery of land stops time from running for purposes of section 38 of the *Limitation of Actions Act*. As to invoking adverse possession of a claim to suit land as a defense and counterclaim, the court said it was a misconceived procedure. The court, however, in *Chevron (K) Ltd vs Harrison Charo Wa Shutu* (2016) eKLR cited *Maraba vs Muriba* C.A No. 188 of 2002, *Wabala vs Okumu* (1997) LLR 609 C.A.K and *Gulam Mariam Noordin vs Julius Charo Karia* C.A No. 26 of 2015, that where a party is sued for vacant possession, there was nothing wrong with raising a defense and counterclaim based on adverse possession. Further, in *Richard Wefwafwa Songoi vs Ben Munifwa Songoi* (2020) eKLR, the court observed that there was nothing wrong with commencing a suit based on adverse possession through a plaintiff.
64. In this suit, it is not disputed that the 1<sup>st</sup> defendant sought and obtained a permanent injunction and eviction orders on 25.5.2001. Time for adversity was therefore interrupted until 2004. In reply to the defense and defence to the counterclaim dated 19.1.2024, the plaintiff denied the suit is res-judicata or statute-barred. She admits that there was a decree which, however, was set aside on appeal in 2004.
65. The plaintiff avers at paragraph 4 of the reply and defense to counterclaim, that the previous suits did not interrupt time from running for adverse possession. Equally, the plaintiff denies that the defendants made an effective entry into and took vacant possession of the land from her. She reiterates that the exclusive occupation has been on for 37 years. The evidence of her son, Nicholas Mwit being arrested for attempted arson in 1998 has not been denied or refuted in the defense to the counterclaim. Adverse possession must be peaceful and uninterrupted. It must be without stealth and force.
66. In paragraph 12 of the reply to the defense and counterclaim, the plaintiff avers that if the defendants were in occupation, they would not have filed a recovery suit as Meru CMCC No. 608 of 1998. The same reasoning could be extended to ask why the plaintiff did not raise a defense of adverse possession



- in that suit for eviction if she had been on the land since 1983. The plaintiff admits filing Meru HCC No. 14 of 2006, which was dismissed for want of prosecution on 12.11.2015. The suit had not been brought against the 1<sup>st</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants, yet they had a stake in the matter.
67. Between the dismissal of the appeal in 2004 and the filing of the suit premises in 2006, which suit was dismissed for want of prosecution in 2015, and the filing of this suit, the plaintiff has to demonstrate that her occupation of the land was exclusive, uninterrupted, open, notorious, and peaceful.
  68. The defendants have taken the view that after the plaintiff's son was arrested, he absconded bail and ran away. It is the same son that the plaintiff says has been in exclusive use of the land throughout. The son was not called as a witness in this matter to confirm that time was uninterrupted or the occupation was peaceful; there were no threats or violence. There is no dispute that the defendants sought and obtained a lifting of inhibition against LR No. Ntirimiti Settlement Scheme/1056 on 18.7.2018 after this court dismissed the previous suit in 2015.
  69. In adverse possession there must be animus possidendi. There is evidence that the plaintiff, in the succession cause leading to the confirmation of grant dated 14.7.1999 and in the 1998 suit, which was overturned on appeal in 2004, was not advancing interest over the land based on adverse possession. The evidence is clear that the plaintiff had based the earlier cause of action on an alleged allotment letter by S.F.T. and an alleged fraudulent transfer of land belonging to the estate of her late husband. The [Law of Succession Act](#) defines what is the free property of a deceased person. If the transfer of the suitland had not occurred in 1986, obviously, I agree with the defendant's submissions that the inclusion of L.R. No 217 in the confirmed grant was inconsequential and conferred no better title to the initial land to the plaintiff.
  70. The claim based on adverse possession was also not included in the amended plaint filed on 15.5.2009 in Meru HCC No.14 of 2006, which was dismissed for a want of prosecution on 12.11.2015. The claim based on adverse possession only came up when this suit was filed on 9.10.2020.
  71. The plaintiff's evidence is that she believed the suit land was part of the estate of the deceased based on the record of the land adjudication officer up to 2021 which showed her late husband as the recorded owner as per P. Exh No. (9). So, if the plaintiff, up to 2021, believed that the land that she was occupying was allotted land, the question is how then she would at the same time want the court to find the occupation as hostile to the registered owner(s). The plaintiff's claim or defense up to 2018, when her suit was dismissed for want of prosecution, was that her allotment letters and documents were valid and those of the defendants invalid, fraudulent, and or illegally obtained. The question is, when then does the plaintiff want the court to start counting time for adversity to run?
  72. For adverse possession to arise there must be wrongful entry to the land, followed by dispossession and discontinuance of possession of the valid owner. There must also be evidence of acts committed or undertaken by the adverse possessor that are inconsistent with the purpose for which the valid owner intended to use the soil. The actual owners must also be aware that they have been dispossessed and that the trespasser is utilizing the land as of right. P. Exh No. (5) bears no details on when they were taken and the parcel number to which they were taken. Equally, a certificate of processing the photographs in line with the [Evidence Act](#) is missing.
  73. Other than pleading, 0.40 ha and 1.84 ha out of LR No. Ntirimiti/Settlement Scheme/1056 and 1057, the plaintiff was unable to identify the specific adverse acts belonging to her in each of the parcel numbers.
  74. The upshot is that I find that the plaintiff has been unable to prove all the ingredients of adverse possession to be entitled to the reliefs sought.



75. As to the counterclaim, the court has held that the plaintiff's claim against the 2<sup>nd</sup> defendant is an abuse of the court process. The plaintiffs to the counterclaim have been able to substantiate their contention on the manner of allocation, registration, subdivisions, and transfer of the suit land from the initial owner S.F.T to M'Rutere M'Ngaruthi and to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs in the counterclaim, was formal, regular, procedural and lawful.
76. The defendant to the counterclaim has been unable to impeach the title deeds held by the 1<sup>st</sup> - 4<sup>th</sup> defendants on account of fraud, irregularity, obtaining by corrupt means, or being subject to any overriding interest. The defendants, as absolute owners of the suit parcels of land are entitled in law to enjoy proprietary rights, benefits and interests to the exclusion of the defendant in the counterclaim.
77. The defendant to the counterclaim has been unable to substantiate her defense to the counterclaim dated 19.1.2024 by way of demonstrating that her occupation of the suit land, if any, was adverse to the rights of the 1<sup>st</sup> & 3<sup>rd</sup> plaintiffs in the counterclaim and the defendants for the requisite period of 12 years. The upshot is that the suit by the plaintiff is dismissed while the counterclaim is allowed. Costs to the defendants.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 11<sup>TH</sup> DECEMBER, 2024**

In presence of

C.A Kananu

All parties

Anampiu for 1<sup>st</sup> & 2<sup>nd</sup> defendants

Mrs. Ntarangwi for 3<sup>rd</sup> and 4<sup>th</sup> defendants

Arithi for the plaintiff

Muthomi Njeru for Kerubo

**HON. C K NZILI**

**JUDGE**

