



**Njeru(Deceased) & another v Muturi (Environment & Land Case  
179 of 2015) [2023] KEELC 18834 (KLR) (27 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 18834 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 179 OF 2015  
A KANIARU, J  
FEBRUARY 27, 2023  
IN THE MATTER OF THE SECTION 7, 17, 18, 37 AND 38 OF THE  
LIMITATION OF ACTIONS ACT SECTION 28 (1) OF THE LAND  
REGISTRATION ACT NO. 3 OF 2012 AND ORDER 37 RULE 7 OF THE  
CIVIL PROCEDURE RULES**

**BETWEEN**

**MILLIAM RUGURU NJERU (DECEASED) ..... 1<sup>ST</sup> PLAINTIFF**

**ALICE GICUKU NJERU (SUBSTITUTED PLAINTIFF) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZEPHANIA SIMON MUTURI ..... DEFENDANT**

**JUDGMENT**

1. This suit was filed here on 3/3/2015 via an originating summons dated 2/3/2015. The deceased plaintiff in the suit – Milliam Ruguru Njeru – impleaded the defendant – Zephania Simon Muturi – seeking, inter alia, to be declared to have become entitled to ownership of land parcel No. GITARE/T.168 through the doctrine of adverse possession and/or a declaration that the defendant was registered as proprietor of the same land in trust for herself.
2. That plaintiff has since passed on and was later substituted with her daughter – Alice Gicuku Njeru. The originating summons itself has also been amended and dated 5/5/2021. It was filed on 7/5/2021 and contains the prayers the plaintiff would wish to get if the questions or issues set out on its face are determined in her favour.
3. In a more specific way, this is what the plaintiff wants the court to determine for her.



1. Whether parcel of land No. Kagaari/Gitare/T.168 (0.10 Ha) was owned by the late Koru Gatuovoro during Land Adjudication process.
  2. Whether in 1963 the late Milliam Ruguru Njeru purchased parcel of Land No. Kagaari/Gitaret/T. 168 from the late Koru Gatuovoro for valuable consideration of Ksh. 100 which she acquired from selling porridge.
  3. Whether the late Milliam Ruguru Njeru took possession of the said land in 1964 and was in open quiet, peaceful and uninterrupted possession of the said parcel until she passed away on 22/2/2017 while this suit was pending in court.
  4. Whether the estate of the late Milliam Ruguru Njeru has become entitled to ownership by way of adverse possession of parcel of Land No. Kagaari/Gitare/T. 168 (0.10 Ha).
  5. Whether the defendant is liable to pay costs of the suit.
4. The plaintiff desires and hopes that these questions or issues will be determined in her favour and if that happens, she wants the following orders:
1. That the honourable court do declare that the estate of the late Milliam Ruguru Njeru has become entitled to ownership by way of adverse possession of all that parcel of land known as Kagaari/Gitare/T.168 (0.10 Ha) by virtue of Section 7 of the Limitation of Actions Act on the ground that since 1964, the late Milliam Ruguru had openly, peacefully and as of right been in occupation of the said parcel of land, that is to say for a period exceeding 12 years preceding the presentation of this summons.
  2. That in the alternative, there be a declaration that the defendant was registered as proprietor of parcel of Land No. Kagaari/Gitare/T.168 on behalf of and in trust for the late Milliam Ruguru.
  3. An order that parcel of Land No. Kagaari/Gitare/T.168 be registered in the name of the substituted plaintiff on behalf of the estate of the late Milliam Ruguru.
  4. That costs of the suit be awarded to the plaintiff.
5. The amended originating summons came with a supporting affidavit in which the substituted plaintiff deposed, inter alia, that her late mother purchased the disputed land in 1963; went into possession in 1964; had open, quiet, peaceful and un-interrupted possession until her demise in 2017; that she developed the land and build a homestead for herself and her family; that the deceased mother's late grandson Edwin Gitonga, and her son Augustine Njiru died and were buried on the land; that the substituted plaintiff's late mother was also buried on the land when she passed on; that the substituted plaintiff herself was raised up on that land; that the substituted plaintiff conducted a search and discovered that the land was first registered in the name of one Muriithi Koru who was a son of the seller; that the substituted plaintiff then reported the matter to the area assistant chief, one Lydiah Muturi, who promised to make a follow up with the then registered owner; that the substituted plaintiff later got to learn that the assistant's chief's husband had bought the land; and that she would like the court to declare that the late Milliam Ruguru Njeru is the rightful owner of the disputed land and further that the land be registered in her own name as representative of her late mother's estate.
6. The defendant responded to the suit vide a replying affidavit filed on 2/11/2015 and dated 16/6/2015. He responded further via a further affidavit dated 6/1/2022 and filed on 7/1/2022. In the first response, the defendant deposed, inter alia, that he is the registered owner of the disputed land, having purchased it from the then registered owner – Muriithi Koru - sometimes in 2013; that he took possession of



- the land immediately upon purchase and has developed it; that he only started seeing the applicant after he purchased the land; that the land was surveyed when he purchased it and the plaintiff didn't raise any objection; and that he has in information that the defendant lived in Kigumo in Runyenjes in Embu East.
7. In the further affidavit, the defendant deposed, inter alia, that the estate of the late Milliam Ruguru Njeru is not a living person with legal capacity to make a claim based on adverse possession; that even the late Milliam's daughter, the substituted plaintiff, can not make a claim of adverse possession on behalf of that estate; that the late Milliam was not living on the land when the defendant bought it; that it would be factually and legally inaccurate to say that he is registered as the proprietor on behalf of the late Milliam; that it would be equally wrong to order registration of that land in the name of the substituted plaintiff.
  8. Further, the defendant deposed that contrary to averments that the property belonged to the late Koru Gatuovoro, the original owner according to records is John Murithi Koru and the defendant purchased the land from this owner at Kshs. 140,000/- on 4/4/2012. It was said that it is a lie to allege that the substituted plaintiff bought the land from Koru Gatuovoro in 1963 as the said Koru Gatuovoro had no land to sell. The substituted plaintiff was faulted for not suing Muriithi Koru who was the first registered owner of the suit property. The court was ultimately asked to dismiss the suit with costs.
  9. The court started hearing the matter on 10/3/2022. The plaintiff – Alice Gicuku Njiru – testified as PW1. She said, inter alia, that she and her brother – Augustine – were brought up on the disputed land by her late mother – the deceased plaintiff – who had by then separated from her husband – Njeru Njambari. She could recall that they used to grow coffee, maize, and beans on the land and they also kept a cow.
  10. The plaintiff said she does not live on the land as she got married in 1987, leaving her late mother and her brother, now also deceased, on the land. She then said that her deceased brother had even married a lady called Wanja. The two later separated and Wanja went her way but during subsistence of the marriage, the two were living on the land. The house in which they were living was said to be still on the land at the time the plaintiff was giving her evidence here. The plaintiffs deceased brother and Wanja were said to have sired a son who died in 1987 and was buried on the land. The deceased plaintiff is also buried on the land and so also is the deceased plaintiff's son – Augustine.
  11. PW1 said that the death of Augustine left the deceased plaintiff living alone on the land. She used to visit the deceased plaintiff there. She further said that in the year 2013, she asked the deceased plaintiff about documents relating to the land. Later on, she went to the lands office to enquire and she discovered that the land was registered in the name of one Mureithi Koru. She didn't know Mureithi Koru at the time but she later got to know that he was a son of the person who sold the land to her late mother.
  12. PW1 then decided to report the matter to the area assistant – chief – Lydia Muturi. The assistant – chief promised to talk to Koru. Later on however, her friend by name Muthoni, called. Muthoni informed PW1 that the land was being sold to a neighboring church. The seller happened to be the husband of the very assistant – chief to whom PW1 had reported the matter. That husband is the defendant in this case. PW1 then decided to report the matter higher up in the local administration's hierarchy. In this regard, the matter went to the area Divisional officer at Runyenjes. It appears clear that there were unsuccessful efforts to settle the matter at that level. The matter ultimately ended up here in court.
  13. PW1 further testified that there was a time that the defendant and the area assistant-chief went to the land when her mother was still alive. They caused some damage and PW1 found her mother crying.



It was a traumatic experience for her mother. She is said to have become sick thereafter and she never recovered.

14. The death of PW1's mother gave the matter another legal twist. PW1 received a court order restraining her from burying the mother on the land. The case went on in court and PW1 was eventually allowed to bury her mother on the land. PW1 said she is the one using the land and neither the defendant nor his administrator wife utilizes it.
15. The cross-examination conducted by the defendant's counsel show PW1 saying, inter alia, that she is married and has allowed somebody called Ann to be using the land. Ann had started using the land when PW1's late mother was still alive and PW1 decided to allow her to continue using the land. PW1 also said the defendant's title is illegal. She further said that the seller of the land to her late mother inherited the land from the clan but it is the seller's son, Mureithi Koru, who got registered as the first owner of the land. That land is said to have crops like coffee, avocados, macadamia and bananas all belonging to PW1 and which were still there when PW1's late mother was still alive. She said that her late mother had lived on the land for over 50 years.
16. Further cross-examination done shows PW1 reiterating some of the things she had said in her evidence-in-chief. These are things like her brother – Augustine – having married a lady called Wanja; the land allegedly being sold to a neighboring church; the defendant and his wife causing destruction or damage to the land; and the fact of the land being owned by her late mother.
17. PW2 was an elderly man who is a brother to the deceased plaintiff. He could recall that the deceased plaintiff bought the land in dispute. He could recall too that issues arose concerning the burial place of the deceased plaintiff when she died. He however said that he buried her on the land. As pointed out already, this witness was old. At the time of giving testimony, he couldn't remember much. He however had a written statement written much earlier and he adopted it as his evidence.
18. From PW2's written statement, it appears fairly clear that the deceased plaintiff bought land as stated by PW1. She then started living on the land. PW2 later got to know that the land was registered in the names of Mureithi Koru, who is the seller's son. He reported the matter to the area chief who promised to act on it but never did. He later got to know that Mureithi Koru had actually sold the land to the husband of the area assistant-chief's. Attempts to settle the matter out of court bore no fruit and that is why it ended up being a case here.
19. PW3, Samuel Ndwigah Elijah, said he knew the deceased plaintiff as she was his neighbor. He adopted his written statement as his evidence. His statement shows him as a neighbor. He said he bought his land parcel No. Kagaari/Gitare/T.123 in the 1970's and he found the plaintiff's mother already living on the disputed land. He was among those who accompanied PW1 while reporting the matter to the area assistant-chief. He said that the land belonged to the late mother of PW1. He talked of PW1's mother having planted coffee, bananas and macadamia on the land. Her homestead was also there and she also buried her son, Njiru, and grandson, Gitonga, on the land. She herself was also buried there when she died in 2017.
20. Cross-examination of PW3 by the defendant's counsel shows him saying that he is a neighbor to the deceased plaintiff as his land borders her land. He also said he knew Mureithi as the son of the seller who sold the land to the deceased plaintiff.
21. The last witness on the plaintiff's side was PW4 – Tirus Njiru Kirumui. He talked of having known the deceased plaintiff, with whom he was related by virtue her sister's marriage to a relative. Like other witnesses on the plaintiff's side, this witness adopted his written statement as evidence. His written statement indicates that he got to know the deceased plaintiff long ago. Her sister, Phidesio, was



- married to his uncle and the deceased plaintiff often used to visit that sister. Later on, the deceased plaintiff got married to one Njeru Njamburi with whom she had three children – Alexander Mwaniki, Alice Gicuku and Augustine Njiru. The deceased plaintiff and her husband were said to have separated and the deceased plaintiff lived for a while on village plots before she bought the land now in dispute where she settled with her children.
22. PW4 also knew the seller of the disputed land to the plaintiff. He was Koru Gauovoro and was living at a place called Kimuri. He sold the plot to the plaintiff, who developed it extensively by planting coffee, bananas, macadamia, maize, yams and other food crops.
  23. Further, PW4 said he was a committee member of the neighbouring church to which the land was intended to be sold. The seller was said to be Lydia Muturi, the area assistant chief who is the defendant's wife. PW4 said he asked where the deceased plaintiff would be relocated to and he was told that the seller had a place where she would relocate the deceased plaintiff. He said that he himself had earlier approached the deceased plaintiff on behalf of the church and had requested that the plaintiff relinquish her land to the church in exchange for another but the deceased plaintiff had refused because she had buried her people there.
  24. PW4 was cross-examined and he reiterated that the deceased plaintiff was married by one Njeru Njamburi with whom she sired children and from whom she later separated. He also said that the deceased plaintiff bought the disputed land from Koru Gatuovoro in 1964.
  25. The court started hearing the defence on 24/10/2022. The first witness DW1, was the defendant – Zephania Simon Muturi. He said he didn't know the deceased plaintiff – also called 1<sup>st</sup> plaintiff by him – but he knows the current plaintiff – also called 2<sup>nd</sup> plaintiff by him. He also didn't know Koru Gatuovoro, the alleged seller of the disputed land to the deceased plaintiff. He adopted as part of his evidence his first or initial replying affidavit to the suit and a further affidavit filed on 7/1/2022. As regards his ownership of the disputed land, he said he transacted with Mureithi Koru who wanted to sell it. He visited the land and saw macadamia trees, coffee bushes, and banana plants. He also saw two deserted mud-walled structures. He decided to buy the land. The price was Kshs. 140,000/- He went to the land office and got a green card, then entered into a sale agreement, and made an initial payment of 50,000/-. Later on, he went to the Land Control Board, which approved the transaction or sale and he eventually got his title deed on 5/7/2013. According to DW1, no one was on the land when he bought it and there was still no one at the time he was giving his evidence here. He said he does not hold the land in trust for anyone and he also denied that the plaintiff is an adverse possessor. Further, DW1 said he bought the land in 2014 while this case itself was filed in 2015, meaning that the requisite period for adverse possession against him has not yet run its full mile. He also faulted the plaintiff for not suing the original owner of the land.
  26. DW1 was cross-examined by the plaintiff's counsel. He is shown saying that Lydia Muturi, was his wife and she was an assistant chief of the area at the time he purchased the land. He also said that it is the seller of the land – Mureithi Koru – who came looking for him. Further also he said that when he bought the land, there was growing coffee, banana stems, macadamia trees and two mud-walled structures on it. It appears clear that he asked about the crops and the seller is said to have told him that it is his father – Koru Gatuovoro – who used to cultivate the place.
  27. DW1 further said that when he bought the land, he decided to fence it and actually started doing so but was stopped by the court. He also talked of having filed a case at Runyenjes in order to stop the current plaintiff from burying the deceased plaintiff on the land. But the court declined to grant him the orders.



28. The second defence witness – DW2 – was John Mureithi Koru. He adopted as his evidence an affidavit dated 27/8/2013, another affidavit dated 6/11/2022, and his written statement also dated 6/1/2022. He said that the land in dispute was his own, having got it from his clan. He sold the land in 2013 to the defendant. He said he knew the deceased plaintiff – called 2<sup>nd</sup> plaintiff by him – and he also knew her husband – Njeru Njamburi. He denied that the deceased plaintiff was using the land in 1963. He said it is his own parents who were using it.
29. This witness was cross-examined by the plaintiff's counsel and he said he was born in 1961; that he couldn't recall when his clan was allocating land; and that he got registered as owner in 1978 and got his title in 1979. He also said that he didn't occupy the land as he had another land and that the structures on the land belonged to his late father. He said however that he couldn't tell who was harvesting the crops on the land.
30. Hearing over, both sides filed written submissions. The plaintiffs submissions were filed on 13/12/2022. According to the current plaintiff, the deceased plaintiff, Milliam Ruguru Njeru, bought the land in 1963, took possession in 1964, and was in such possession until 22/2/2017 when she passed away. The deceased plaintiff was buried on the land, and her grandson – Edwin Gitonga – and her own son – Augustine Njiru – were also buried there. The current plaintiff was also brought up on the land.
31. It was submitted that when the deceased plaintiff bought the land, it was not registered but the son of the seller – Mureithi Koru – got registered as its owner in 1978. Mureithi was said to be aware that the deceased plaintiff was in occupation of the land but he took no steps to assert his title. He then also transferred the land to the defendant who also did not take possession.
32. The plaintiff then cited Section 7 of the *Limitation of Actions Act* (Cap 22) which forbids a person to recover land after 12 years from the time he was supposed to take action to recover it. He also invoked Section 17 of the same Act which provides that the title of the person who has failed to take such action stands extinguished after 12 years.
33. The title of the seller of the land to the defendant was said to have become extinguished 12 years from 14/7/1978 when he became the registered owner. Precisely, the title was said to have become extinguished sometimes in July 1990, which is when the 12 years ended. The seller then did not have a valid legal title from that time on which he could pass on to the defendant or anyone else.
34. The right of the person then in occupation and/or possession was said to be an overriding interest pursuant provisions of Section 28 of the Registration of *Land Act* NO. 3 of 2012.
35. Further, the plaintiff cited the case of Mtana Lewa Vs Kahindi Ngala Mwangandi (2015) eKL where the court made the observation that pursuant to Section 37 and 38 of the *Limitation of Actions Act*, if the land is registered under one of the Registration Acts, then the title is not extinguished but held in trust for the person in possession until such person obtains a court order vesting the title in him. This then led the plaintiff to the submission that the seller held the title in trust for the deceased plaintiff from July 1990. The plaintiff reiterated that he was right in suing the defendant as the current registered owner since at the time this suit was instituted, the seller was not the registered owner.
36. The defendant's submissions were filed on 29/11/2022. The submissions gave an overview of both the defendants and the plaintiff's case. It was then submitted that the defendant demonstrated well how he followed due process in purchasing the land. It was observed that the defendant's evidence was corroborated by that of the seller – DW2.
37. Further, PW1 was said to be living with her husband and not on the land. She was also said to have confirmed that Mureithi Koru – DW2- was the original proprietor of the land. According to the



defendant, PW1 said she didn't know how her late mother came to settle on the land. It was also submitted that PW1 did not show documents showing that her late mother had purchased the land from Koru Gatuovoro.

38. The defendant then cited the case of Regina Wanjiru Mwago & Another Vs Lucy Wairimu Gichuhi & 2 others ELC No. 9 of 2018 (O.S.), Muranga, where the court emphasized that adverse possession can only be claimed against a registered owner. In that case, the case of Kasuve Vs Mwaani Investment Limited & other, 1 KLR 184 was cited for the position that for a claim of adverse possession to be proved, the claimant must demonstrate open exclusive possession which is exercised as of right and without interruption for 12 years after dispossession the owner or after discontinuation of possession by the owner.
39. According to the defendant, he got title on 5/2/2014 and this suit was filed on 2/3/2015. There was therefore only a period of one year which can be said to be adverse to his ownership of the land. It was emphasized that the current plaintiff lives elsewhere. The court was ultimately asked to dismiss the case.
40. In the course of hearing, several exhibits were produced. The plaintiff produced the following:
  1. Limited Grant of letters of administration ad Litem PEX No. 1
  2. Copy of green card for the disputed land (PEX No. 2)
  3. A letter dated 30/1/2015 from the District land Registrar to the plaintiff intimating intention to remove a caution placed on the Land Registrar by the plaintiff. (PEX No. 3)
  4. A response to the letter above made to the Land Registrar by the plaintiff's counsel. The response is dated 2/3/2015. PEX No. 4.
  5. Another letter dated 19/3/2015 from the plaintiff's counsel to the District Land Registrar expressing objection to removal of caution PEX No. 5
  6. A plaint of suit No. 19 of 2017 filed by the defendant against the plaintiff at Runyenjes seeking, inter alia, an order restraining burial of the deceased plaintiff on the disputed land (PEX No. 6)
  7. An application under a certificate of urgency seeking a temporary restraining order against the plaintiff to injunct her from burying her deceased mother on the land PEX No. 7.
  8. Another application, this time by the plaintiff, seeking an order to stop the police from interfering with the burial of the deceased plaintiff on the disputed land (PEX No. 8).
  9. A court order from Runyenjes dated 20/3/2017 (PEX No. 9).
41. The defendant on his part made available the following exhibits:
  1. A list of names of allottees who were allocated land by the clan. (DEX No. 1)
  2. Sketchmap showing the disputed land (DEX No. 2).
  3. Minutes of Land Control Board, Runyenjes, meeting held on 5/7/13 (DEX No. 3)
  4. Land sale agreement (DEX No. 4)
  5. Title deed for the disputed land (DEX No. 5)
  6. Copy of green card for the disputed land (DEX No. 6)
  7. Receipt showing payment of 500/-, being payment for a search at the Land's office (DEX No. 7)



8. Certified copy of list of church officials present on 14/9/2014 (DEX No. 8)
  9. Police abstract dated 8/8/2013 showing report of loss of title (DEX No. 9)
  10. Gazette notice announcing loss of title for the disputed land and expressing intention to issue another one (DEX No. 10).
42. I have considered the pleadings, oral and documentary evidence on record, and the rival submissions. The plaintiff called three (3) witnesses – Kangara Ndava (PW2), Samuel Ndwigah Elijah (PW3), and Tirus Njiru Kirumwi (PW4) – all of whom were elderly men living in the immediate neighborhood of the disputed land. A crucial common thrust of their evidence is that they knew the deceased plaintiff; saw her living and cultivating on the disputed land; were aware that the disputed land was sold to her long ago by the father of the seller of the land to defendant; and finally that they knew of the manner in which the land was sold to the defendant. It appeared to me that these old men were sincerely telling the court what they knew.
43. Given the evidence given by the plaintiff and her witnesses, I think I have to make a choice as to who to believe because the defendant also deposed in his replying affidavit dated 16/6/2015 that he bought the land, went into possession, and extensively developed it. But I realize that when the defendant gave his evidence as DW1 on 24/10/2012, his main focus was on how he bought the land. He didn't talk of developments he had done on it. He also admitted during cross-examination that when he bought the land, he saw mature coffee trees, banana stems, macadamia trees and two mud-walled structures on it. The crops he mentioned are the same ones mentioned by the plaintiff's witnesses as having been planted and grown by the deceased plaintiff.
44. Further, it was clear to me that both the defendant and the plaintiff, had another round of dispute in the lower court at Runyenjes. The defendant was the plaintiff in that suit and had filed it mainly to prevent burial of the deceased plaintiff on the land. The suit in the lower court was filed via a plaint made available to this court as PEX No. 6. At paragraph 7 of that plaint, the defendant, who was plaintiff then, pleaded as follows:
- “The plaintiff avers that he had on several occasions asked the defendant and her late mother to vacate from the suit land but they instead continued to remain therein with impunity”.
45. From all this, it is clear that when the defendant says that he bought the land, went into possession, and developed it, he was telling a lie. His pleadings in the lower court tell a different story. The seller of the land himself testified as DW2 and it is clear that he was never in occupation of it. Curiously, when asked by the plaintiff's counsel to say who was harvesting the crops on the land, he said he didn't know.
46. Another bit of crucial evidence is that in her lifetime, the deceased plaintiff had buried her own son and grandson on the land. In fact the evidence of PW4 shows that the church to which the defendant tried to sell the land after he bought it had earlier on tried to approach the deceased plaintiff with an offer that it exchanges her land with another but the deceased plaintiff had declined the offer because of her deep attachment to it arising from the fact that she had deceased loved ones close to her who were already buried there. It is clear that the church, which is a neighbor, view that land as good for its future expansion, hence its offer to give the deceased plaintiff another parcel of land in exchange. That offer must have been made because the deceased plaintiff lived on it and would have to vacate in order for the church to use it.
47. When all this is considered, I feel justified to make a finding, which I hereby do, that the deceased plaintiff was the one in possession and occupation of the disputed land.



48. The dispute before me is one of adverse possession. The Black's Law Dictionary, 10<sup>th</sup> Edition, page 65, has various definitions of adverse possession, with the fourth one being as follows:

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open, and notorious.”.

It is clear that it is not every possession of land that defeats title; it is adverse possession that defeats the title. In the old case of Wallis Cayton Bay Holiday Camp Limited Vs Shell-mex And B.p. LTD [1974] 3 ALL ER 575, the court observed as follows:

“Possession by itself is not enough to give title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor ...”

49. Locally, the threshold to be met was expressed succinctly in the case of Wambugu Vs Njuguna [1983] KLR 172 as follows:

“(2) In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to the land. Either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title [is an act] .... Inconsistent with his enjoyment of the soil for the purpose for which he intended to use it ....

(3) 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 whether or not the claimant has proved that he has been in possession for the requisite number of years.”

50. From a statutory standpoint, Section 7 of the *Limitation of Actions Act* [Cap 22] provides 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.”

I think this provision is expressing a common Law position captured well in the Latin maxim as follows:

“Longa posse'ssio parit jus possidendi et tollit actionem vero domino”

Which means that long possession produces the right of possession and deprives the true owner of his action. It may be useful to add that under Section 17 of the same Act, the title of the person who fails to take action to recover land within a period of 12 years from the time the cause of action accrued becomes extinguished. The position in law is that from then owner, the registered owner of the land holds the land in trust for the adverse possessor.

51. In this matter, I have already made a finding that the deceased plaintiff was the one in actual occupation and possession of the land. Evidence has it that she bought the land from the father of DW2 in early 1960s. She went into possession and started using the land as its owner. DW2 became the registered owner in 1978 while the deceased plaintiff was already in possession and occupation. He didn't do



- anything to assert his title. He allowed the status quo to remain and by the time he was selling the land to the defendant, the deceased plaintiff was still in occupation and possession. That deceased plaintiff was buried on this land in the year 2017. Her own son and her grandson had also been buried there earlier.
52. The defence side has averred that the plaintiff is not an adverse possessor because the defendant obtained his title in the year 2014 while this suit was filed in the year 2015. That is a period of only one year yet the period for adverse possession is 12 years. The plaintiff was also faulted for not suing the seller of the land. It is necessary to give the court's position on this.
  53. First, it needs to be appreciated that the plaintiff only came on board as a party after her mother's death. It is her deceased mother and not herself, who filed the suit. In order to join the suit as a party, the current plaintiff got the requisite grant in order to represent the estate of her late mother in this suit. It is the plaintiff's mother therefore who was an adverse possessor. The current plaintiff is by an extension only an adverse possessor because she is the living legal representative of her late mother. She would not be an adverse possessor if her late mother was not. But she would be an adverse possessor if her late mother was one. It would be wrong in my view for the defendant to think that the deceased plaintiff's rights and interests in the disputed land were interred or buried with her. The correct position in Law is that those rights survived her and are legally part of her estate.
  54. It seems also to be the defendant's possession that adverse possession is attributed to him alone. True, it is him who is sued. The rationale for this seems to me that he was the title holder at the time the suit was filed. All the orders sought are against him as the title holder. Maybe it would have been necessary to join Mureithi Koru, the seller, as a party in order to shed clearer light on the background against which adverse possession is pleaded. But any such omission to join him is in my view cured by the fact that Mureithi Koru himself gave evidence here as DW2. The court therefore has his side of the story and it seems reasonable to assume that this is the same story he would have given had he been sued. Mureithi Koru can not therefore be heard to say that he was condemned unheard.
  55. Further it is self-evident from the supporting affidavit that came with the originating summons that possession and occupation of the land by the deceased plaintiff even pre-dates the procurement of title by the seller. But the adverse possession itself is traced from the time the seller became the registered owner of the land to the time the suit herein was instituted. The seller became the registered owner in 1978. This suit was instituted in the year 2015. During that period, it is the deceased plaintiff herself, and not the current plaintiff, who was on the land. She was not living thereunder any licence or with permission of the registered owner. She was living there in her own right as the owner. The defendant himself was a registered owner for some part of the period that the deceased plaintiff was living on the land.
  56. It appears to me to be the position of the defendant that as he has not been the registered owner for the requisite period that can be said to be enough – that is to say 12 years – for adverse possession to be proved, then the plaintiff can not be said to be an adverse possessor against him. The position in law is clear. In *Ngati Farmers Co-operative Society Limited Vs Councilor John Ledidi & 15 others*: CA No. 94 of 2004, Nakuru [2009] eKLR, the court held, inter alia, that change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's right of adverse possession. This same position can be culled from the case of *Janet Ngendo Kamau Vs Mary Wangari Mwangi*: Civil Appeal No. 173 of 2003, Nairobi [2007] eKLR. The rationale for this position is that adverse possession attaches to the land, not the title, and as long as the adverse possessor is in adverse possession, it does not matter how many times the title changes hands.



57. The position that obtains in this matter is that the seller of the land became registered owner in 1978. It is clear that the deceased plaintiff was on the land as owner of the land. The seller did not make effective entry into the land or file a suit in court to wrestle physical ownership of the land from the deceased plaintiff. This state of affairs continued and by 1990, it is clear that the deceased plaintiff had been continually on the land openly, as of right, and with full knowledge of the seller. The title of the seller became defeated in 1990. From 1990, he only held the land title in trust for the deceased plaintiff. By the time the defendant was buying the land in 2014, the seller only had a defeated or extinguished title. He could not therefore legitimately or legally pass that defeated or extinguished title to anybody. The defendant was therefore wittingly or unwittingly taking a risk to part with his money to acquire a title that had already been extinguished or defeated. The seller had no legal title that he could pass on to him.
58. Given what the court has said up to now, it is clear that the plaintiff has the upper hand regarding the ownership of the land. The current plaintiff becomes an adverse possessor not in her own right but by dint of the accrued rights of adverse possession to the deceased plaintiff who was her mother. This is the person who, as the analysis herein shows, had become an adverse possessor by the time she died.
59. It is now clear that adverse possession has adequately been demonstrated in this case. The plaintiff is therefore entitled to and is granted all the prayers – which are prayers 1, 2, 3, and 4 – in her amended originating summons dated 5/5/2021 and filed on 7/5/2021. These are the same prayers set out in the beginning pages – specifically at paragraph 4 – of this judgement.

**JUDGEMENT DATED, SIGNED and DELIVERED in open court at EMBU this 27<sup>th</sup> day of FEBRUARY, 2023.**

**A.K. KANIARU**

**JUDGE**

