



**Njoki v Pussy (Environment and Land Appeal E006 of 2022)  
[2023] KEELC 945 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 945 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL E006 OF 2022  
AK BOR, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOYCE NJOKI ..... APPELLANT**

**AND**

**MARY OLE PUSSY ..... RESPONDENT**

**The estate of a deceased intestate without heirs will escheat to the Government, precluding any claim of adverse possession.**

Reported by John Ribia

**Land Law** – *adverse possession – conditions precedent – claim of adverse possession over land of a deceased person – when time begins to run – whether time for adverse possession ran from the date of the deceased’s death or from the date of taking possession – whether an administrator was deemed to have the right to recover property from the date of death or the date of obtaining a grant of letters of administration – whether the estate of a person who died intestate and without heirs would escheat to the Government, thereby barring any claim of adverse possession – Constitution of Kenya, article 62(1); Limitation of Actions Act (cap 22) sections 7, 9(2), 13, 16, 41; Law of Succession Act (cap 160) sections 45, 46; Government Lands Act (repealed) (cap 280) section 8A.*

**Land Law** – *public land – escheat – whether land formerly owned by a deceased person without heirs constituted public land – whether such land, upon escheat to the Government, was immune from adverse possession – Constitution of Kenya, article 62(1); Limitation of Actions Act (cap 22) sections 7, 9(2), 13, 16, 41; Law of Succession Act (cap 160) sections 45, 46; Government Lands Act (repealed) (cap 280) section 8A.*

**Law of Succession** – *intermeddling – effect on adverse possession claims – whether unlawful occupation of a deceased person’s land after death but before administration constituted intermeddling and barred adverse possession – whether an administrator’s legal capacity to sue for recovery of land accrued from the date of death rather than from the grant of letters of administration – Constitution of Kenya, article 62(1); Limitation of Actions Act (cap 22) sections 7, 9(2), 13, 16, 41; Law of Succession Act (cap 160) sections 45, 46; Government Lands Act (repealed) (cap 280) section 8A.*



**Words and Phrases** – *escheat* – definition – the reversion of ownership of land back to the State where the registered owner dies intestate without legal heirs – *Black’s Law Dictionary, 10th Edition*

### **Brief facts**

The appeal arose from a dispute over a claim of adverse possession to land formerly registered in the name of a deceased person who died intestate and left no heirs. The appellant contended that she had acquired ownership of the land by virtue of uninterrupted and exclusive possession for the statutory period. The trial court dismissed the claim, holding that the requirements for adverse possession had not been satisfied. Aggrieved by that decision, the appellant filed the present appeal, arguing that the trial court erred in failing to find that her possession met the statutory and judicial criteria for acquisition of title through adverse possession.

### **Issues**

- i. What were the conditions precedent for a claim of adverse possession where the registered owner was deceased and the property was under administration?
- ii. Whether the time for adverse possession over land owned by a deceased person began to run from the date of death or the date the claimant took possession.
- iii. Whether, for purposes of adverse possession, an administrator was deemed to have the right to recover the property from the date of death or the date of grant of letters of administration.
- iv. Whether sections 9(2) and 16 of the Limitation of Actions Act confer on an administrator the legal capacity to sue for recovery of land from the date of death rather than from the date of grant.
- v. Whether section 45 of the Law of Succession Act, prohibiting intermeddling with the free property of a deceased person, bars adverse possession where occupation occurred after death but before administration.
- vi. Whether land owned by a deceased person without heirs constituted public land.
- vii. Whether the estate of a person who died intestate and without heirs would *escheat* to the Government, thereby precluding any claim of adverse possession.

### **Held**

1. Section 7 of the Limitation of Actions Act prevented a registered land owner from commencing an action to recover his land if someone else had possession of that land for a period of 12 years from the date the landowner’s right of action as against the person in possession accrued. That would be the date the land owner became aware of the occupation of his land by the other person since one could only enforce their right to recover land on becoming aware and having knowledge that another person has occupied their land without their consent or authority. That explained why the adverse possession must be open and public.
2. Under section 13 of the Limitation of Actions Act, the right of action to recover land did not accrue unless and until the land was in the possession of some person in whose favour the period of limitation could run, that would be the person in adverse possession of the land. Under section 9(2), where a person brought an action to recover the land of a deceased person, whether under a will or intestacy, and the deceased person owned the land at his death and was the last person entitled to be in possession of the land, the right of action accrues on the date of death. Section 16 provided that for purposes of that Act relating to actions for the recovery of land, an administrator of the estate of a deceased person was taken to claim as if there was no interval of time between the death of the deceased person and the grant of letters of administration.
3. An administrator of the estate of a deceased person was deemed to have had the legal capacity to file an action to recover land which was owned by a deceased person from the date of death and not merely from the date the administrator obtained a grant of letters of administration for the estate of the deceased.
4. Sections 9(2) and 16 of the Limitation of Actions Act did not seem to suggest that for a person claiming adverse possession of land owned by a deceased person, time started to run from the date of his death



- simply because that would depend on the date the person claiming adverse possession of the land came to be in possession of the land and the fact of the possession was known. That was unless the person claiming adverse possession was on the land before its owner died, and the owner had knowledge of the occupation of his land prior to his death but failed to assert his right over the land by filing a recovery suit.
5. By virtue of sections 9(2) and 16 of the Limitation of Actions Act, the respondent, as administrator of the estate, was deemed to have had the right to recover the suit property from the date of his death in 2003 and not 2017 when she obtained a grant of letters of administration over his estate. That right accrued when the appellant occupied the suit property, but not on the date the deceased died. Under the law, the respondent could only seek to recover the suit property from the appellant after obtaining a grant of letters of administration for the estate.
  6. The temporary custodians of an intestate's rights were bare trustees only, and as soon as a grant was obtained, the right or estate automatically vested in the administrator. Between 2003, when the testator died, and 2017, when the grant of letters of administration for his estate was issued to the respondent, his property vested in the courts in conformity with the common law notions of the transmission of an intestate's right or estate.
  7. Section 45 of the Law of Succession Act prohibited intermeddling. The appellant intermeddled with the property of the deceased when she took possession of the suit property and constructed on it, since by law, she was not authorized to deal with the property of a deceased person until the estate of the deceased was administered under the Law of Succession Act.
  8. Section 46 of the Law of Succession Act enjoined the police or administrative officer who became aware that a person had died to report the fact of death to the chief or assistant chief, or administrative officer of the area where the deceased last resided. The chief, assistant chief, or administrative officer who the report was made to was required to go to the last known residence of the deceased and take all the necessary steps for the protection of his free property found there and ascertainment of his other free property and the persons appearing to have any legitimate interest in succession to or administration of his estate and for the guidance of prospective executors or administrators as to the formalities and duties. The proviso also incorporates the Public Trustee or the Assistant Chief.
  9. The rationale for section 46 of the Law of Succession Act was to protect and preserve the free property of a deceased person until the persons having a legitimate interest in succession to or administration of his estate were ascertained. Had what section 46 prescribed been done when the deceased died in 2003, perhaps the suit property would not have been occupied by the appellant while the process of administration of his estate was being pursued, as well as the ascertainment of persons having a legitimate interest in succession to his estate.
  10. Where the heir of a deceased person who owned land could not be ascertained, such land was deemed to constitute public land. The definition of public land under article 62(1)(e) of the Constitution included land in respect of which no heir can be identified by any legal process. That imported the concept of *escheat* (the reversion of property to the State) into the Constitution.
  11. Under Section 8A of the repealed Government Lands Act, where any person in whom there was vested an estate, interest, or right in or over land that was not trust land died intestate and without heirs, that estate, interest, or right would *escheat* to the Government.
  12. The Government Lands Act was repealed in May 2012. If the deceased, who died in 2003, did not have heirs, his estate, interest, or right over the suit property would have escheated to the Government pursuant to section 8A of the Government Lands Act before the Act was repealed, and the appellant would therefore not have had any basis to claim the suit land through adverse possession.
  13. Public land was excluded from the application of the Limitation of Actions Act under section 41, which stipulated that the Act did not enable a person to acquire title over Government land or land otherwise enjoyed by the Government. Had it been that when George Sumare died in 2003, he had



no heirs, the suit property would have constituted public land and would have been exempted from the application of the Limitation of Actions Act by section 41, since one could not claim adverse possession of public land.

14. Where the subject matter in a claim for adverse possession was land registered in the name of a deceased person, and the occupation of the land by the person claiming adverse possession took place after the death of the registered owner but before the grant of letters of administration or probate of a will, the provisions of the Limitation of Actions Act had to be read and applied alongside the Law of Succession Act. The Law of Succession Act came into force on July 1, 1981, while the Limitation of Actions Act took effect on December 1, 1967.
15. Since the Law of Succession Act prohibited intermeddling with the free property of a deceased person, what that meant was that one could not purport to take possession of land where the registered owner was dead because that would amount to intermeddling with the estate under the law.
16. A claim for adverse possession where one purported to have taken possession of the land after the death of the registered owner and before the legal administration of his estate may not be sustainable in light of section 45 of the Law of Succession Act. Such a claimant committed an offence.

*Appeal dismissed.*

### **Orders**

*Costs to the respondent.*

### **Citations**

#### **Cases**

#### **Kenya**

1. *Gichuki, Joseph Kamau (Suing as the Administrator of the Estate of Gichuki Chege (Deceased) v James Gatheru Mukora & another* Environment & Land Case 929 of 2000; [2019] KEELC 1108 (KLR) - (Followed)
2. *Jabane v Olenja* Civil Appeal 2 of 1986; [1986] KECA 71 (KLR); [1986] KLR 661 - (Followed)
3. *Kihamba, Samuel v Mary Mbaisi* Civil Appeal 27 of 2013; [2015] KECA 853 (KLR) - (Followed)
4. *Mbui, Gabriel v Mukindia Maranya* Civil Case 283 of 1990; [1993] KEHC 161 (KLR); [1993] KLR 726 - (Followed)
5. *Murathe, Gatuhi v Gakuru Gathimbi* 49 of 1996; [1998] KECA 207 (KLR) - (Followed)
6. *Nyakenogo, Samwel v Samwel Orucho Onyaru* Civil Appeal 24 of 2004; [2010] KECA 307 (KLR) - (Followed)
7. *Pavey, Kim & 2 others v Loise Wambui Njoroge & another* Civil Appeal 217 of 2005; [2011] KECA 342 (KLR) - (Followed)
8. *Roman Karl Hintz v Mwang'ombe Mwakima* Civil Appeal 72 of 1983; [1984] KECA 24 (KLR); [1988] 1 KAR 482 - (Followed)
9. *Songoi, Richard Wefwafwa v Ben Munyifwa Songoi* Civil Appeal 110 of 2016; [2020] KECA 942 (KLR) - (Followed)
10. *Trouistik Union International & another v Jane Mbeyu & another* Civil Appeal 145 of 1990; [1993] KECA 89 (KLR) - (Followed)

#### **Texts**

Garner, BA., (Ed) (2014), *Black's Law Dictionary* St Paul, Minnesota: Thomson Reuters 10th Edn

#### **Statutes**

#### **Kenya**

1. Civil Procedure Act (cap 21) section 79G - (Interpreted)
2. Constitution of Kenya article 62 (1) - (Interpreted)
3. Evidence Act (cap 80) section 78A(3)(a) - (Interpreted)
4. Government Lands Act (Repealed) (cap 280) section 8A - (Interpreted)



5. Kenya Information And Communications Act (cap 411A) section 831 - (Interpreted)
6. Law of Succession Act (cap 160) sections 45, 46 - (Interpreted)
7. Limitation of Actions Act (cap 22) sections 7, 9(2); 13; 16; 41- (Interpreted)

#### **Advocates**

*Mr Isaac Wanjohi* for the appellant

*Mr Amos Chweya* for the respondent

### **JUDGMENT**

1. Being dissatisfied with the judgment delivered by the Honourable Mr Ben Mararo, Principal Magistrate on March 15, 2022 in Nanyuki Chief Magistrates Environment and Land Court Case No 9 of 2020, the appellant lodged this appeal. The grounds set out in the memorandum of appeal dated April 14, 2022 are that the learned magistrate erred in finding that the photographic evidence which the appellant adduced was undated yet the photographs had a date and time stamped on them; that the learned magistrate erred by failing to find that the appellant had proved her claim for ownership of the land known as Nanyuki Municipality/Block 10/293 (“the suit property”) through adverse possession; and that the learned magistrate erred by not finding that her assertion that she had been on the suit property since 2005 was not controverted by the respondent, who she contended conceded that she was not aware of what transpired on the suit property between 2003 and 2009.
2. The appellant also faulted the learned magistrate for dismissing her counterclaim and urged this court to set aside the judgment and decree issued by the learned magistrate and substitute it with an order dismissing the respondent’s suit and allowing her counterclaim. She also sought the costs of the appeal and of the trial.
3. The appeal was canvassed through written submissions which the court read and considered. The appellant submitted that the photographs that she tendered in evidence showed that she entered the suit property in 2005 and that from 2006, she was constructing a house on the suit property. She faulted the trial court for not giving any weight to the photographic evidence she tendered, which she contended depicted the initial stages of the construction of her house on the suit property. She maintained that the certificate of electronic evidence filed in court on May 12, 2021 supported the photographic evidence which was produced.
4. She submitted that from the evidence adduced at the trial, it was clear that the respondent as the owner of the suit property had been dispossessed of the suit property by the appellant in 2005 and that by 2017 the respondent’s possession of the suit property had been discontinued for over 12 years which therefore proved her claim for adverse possession of the land.
5. Further, the appellant submitted that having entered into the suit property in 2005 without the knowledge or consent of the respondent, or the previous registered owner, and having constructed a permanent house where she remained for a continuous and uninterrupted period until 2020 when the respondent filed the suit to recover the land, she had met the prerequisites for adverse possession as the court held in *William Gatubi Murathe v Gakuru Gathimbi* [1998] eKLR.
6. She also relied on the statement which the respondent and her witness made during cross-examination that they became aware of the appellant’s occupation of the suit property in 2009. She contended that her possession of the suit property was adequate, continuous, public and that it was adverse to the registered owner. She added that in *Richard Wefwafwa v Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal set out the conditions required to prove adverse possession which are:- the date



- the person came into possession, the nature of his possession, whether the fact of his possession was known to the other party, how long his possession continued, and lastly that the possession was open and undisturbed for the requisite 12 years.
7. The appellant submitted that since she entered the suit property without the permission or consent of the respondent or the deceased owner she was in hostile possession of the suit property from the time she entered it. She relied on the utility bills which she tendered in evidence relating to the payments she made for water and electricity as well as the land rates paid in respect of the suit property.
  8. As to whether the fact of her possession was known to the other party, the appellant submitted that the respondent conceded that from 2003 when George Sumare died until 2009 she was unwell and that when she learnt of the illegal occupation of the suit property she instructed her advocate to issue a demand letter, which was issued to a different person and not the appellant. She maintained that there was ample evidence to show that her possession of the land begun in 2005 and continued uninterrupted until 2020 when the appellant filed the suit in the Magistrates' Court.
  9. The appellant also relied on *Gabriel Mbui v Mukindia Maranya* [1993] eKLR where the court held that a person alleging a right by adverse possession must not only show that his possession had lasted 12 or more years but also that it had all the time been in open conflict with the title on which the owner relied. Further, that such a person must show that his possession was of such a nature and involved the exercise of rights that were irreconcilable with those claimed by the owner of the land as to give the owner occasion to dispute that possession.
  10. The appellant invited the court to analyse the respondent's evidence in the record of appeal including her testimony that the suit property was owned by her son George Sumari who died in 2003 and that between 2003 and 2009 she was ill. That on recovering, she served a demand letter on Alfred Ngonga and pursued succession in 2013. She obtained a title over the suit land in 2019. The appellantsubmitted that the respondent averred in her further statement that the appellant begun construction in 2013 after she commenced the succession proceedings.
  11. The appellant submitted that the respondent's witness, Tulai Tapato Ole Molo stated in evidence that there was a house on the suit property which was razed down in 2009 and that there was construction in 2013 which he claimed was the time the appellant occupied the suit property. The appellant submitted that from the respondent's evidence, it was clear that the respondent was not aware about the position prevailing on the suit property between 2003 and 2005 when she entered the land but that she became aware in 2009. However, she did not serve any demand on the appellant and only filed suit against her in 2020.
  12. The appellant argued that in determining the claim for adverse possession, the trial court should have considered the time when the respondent who sought to evict the appellant was registered as the owner of the property. She faulted the learned magistrate for failing to consider this aspect yet from the record the respondent testified that she pursued succession for the estate of her late son and obtained a confirmed grant in 2017 before a lease was issued to her in March 2019. The appellant argued that by the time the respondent was registered as the owner of the suit property she had already acquired rights over the land since she had been on the land from 2005 to 2019 hence the registration of the respondent as its owner was void.
  13. The appellant relied on section 16 of the *Limitation of Actions Act* on the point that for actions for recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of letters of administration. She also relied on *Joseph Kamau Gichuki (Suing as the administrator of the Estate of Gichuki Chege (Deceased) v James Gatheru Mukora and Another* [2019] eKLR where the court held that the death of



a registered owner of land did not stop time from running for purposes of adverse possession under the *Limitation of Actions Act*.

14. The appellant submitted that she fully controverted or rebutted the respondent's claim of ownership of the suit property since she denied any knowledge of the respondent or her claim of ownership. Further, that the respondent confirmed that she only knew about the appellant in 2020 when she instituted the suit. The appellant claimed that the learned magistrate failed to consider her submissions and urged this court to allow the appeal.
15. The respondent submitted that the photographs which the appellant produced did not have a date or time stamp and that it was unclear as to when those photographs were taken. Further, that this fact was confirmed by the appellant when she was cross examined on the photographs.
16. The respondent relied on section 78A(3)(a) of the *Evidence Act* on the weight to be attached to electronic and digital evidence having regard to: the reliability of how such evidence was generated, stored and communicated: the reliability of the manner in which the integrity of the electronic and digital evidence was maintained; and the manner in which the originator of the electronic and digital evidence was identified.
17. The respondent urged that the burden lay on the appellant to demonstrate when the photographs were taken, how they were generated, stored and communicated. She argued that the photographs produced by the appellant did not meet those requirements.
18. She also relied on section 831 of the *Kenya Information and Communications Act* on the aspect that where a law required information to be presented or retained in its original form, that requirement is met by an electronic record if a reliable assurance exists as to the integrity of the information from the time when it was first generated in its final form as an electronic message or otherwise; and where it is required that information be presented, that information is capable of being displayed to the person to whom it is to be presented.
19. The respondent submitted that she was the current registered owner of the suit property and that the appellant occupied the property without her authority or that of her deceased son. She maintained that the appellant occupied the suit property in 2013 and that in 2009 Alfred Ngonga to whom she issued a demand letter to vacate the land was the one occupying the suit property.
20. The respondent drew the court's attention to the bundle of receipts which the appellant produced and stated that the first date appearing on those receipts was August 17, 2009 and it could only be presumed that that was when the appellant's possession of the suit property began. The respondent pointed out that the receipt for payment of utility bills was issued in the name of John Muriithi Nduhio who was not a party to the suit and was not called to confirm that he paid the deposit for electricity and made the subsequent payments on behalf of the appellant. The respondent urged that the utility bills at pages 69 and 70 of the record of appeal were not relevant to this case because they do not indicate the land that the bills relate to.
21. The respondent contended that since the appellant did not deny being in possession of the suit property and admitted during the trial that she was a trespasser, the court rightly granted the reliefs which she sought in the suit.
22. The respondent submitted that the memorandum of appeal was filed on April 14, 2022 seven days outside the period stipulated in section 79G of the *Civil Procedure Act* without leave to file it out of time.



23. In her supplementary submissions, the appellant maintained that the photographs showed a clear date stamp with the year when they were taken and that that was sufficient evidence of when she took her possession of the suit property. Regarding the issue of the appeal being filed out of time, the appellant invited the court to look at the proceedings which show that there was no entry for any proceedings which took place on March 8, 2022. That it was clear from the proceedings in the record of appeal that judgment was delivered on March 15, 2022 when the appellant sought and was granted stay of execution.
24. The main issue for determination is whether the court should allow the appeal and set aside the judgment and decree of the learned magistrate. In determining whether the appellant proved her claim for adverse possession of the suit property before the trial court, the court is minded that it should not lightly differ from the findings of the trial court which had the benefit of seeing and hearing all the witnesses. It should only interfere with those findings if they were not based on evidence, or on a misapprehension of the evidence or if it is demonstrated that the learned magistrate acted on wrong principles in reaching the finding he did. (See *Mohamed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] eKLR.)
25. George Sumare who died in 2003 and who was the registered owner of the suit property, was the son of the respondent. The respondent stated that she lives in Doldol and that her late son lived on the suit property with his wife and children. She stated that after the death of her son, she was admitted in hospital for a long time. She applied for letters of administration for her late son's estate and the grant was confirmed on August 17, 2017. The suit property was transferred to her name on January 7, 2019 to hold in trust for Salvine Sankale, Betastina Senina and Antanella Resato, being the children of the late George Sumare.
26. She filed suit on February 9, 2020 seeking a declaration that the appellant was a trespasser on the suit property and a permanent injunction to restrain the appellant from dealing with the suit property. The appellant filed a defence and counterclaim on February 22, 2021 and averred that she had occupied and developed the suit property since 2005 with the knowledge of the respondent. Further, that she had had continuous, peaceful and uninterrupted possession of the suit property from 2005 when she developed permanent structures on it.
27. At the hearing, the respondent testified while the appellant called two witnesses to give evidence. Upon conclusion of the hearing and filing of submissions, the learned magistrate delivered the judgment which the court notes is dated March 8, 2022, dismissing the appellant's counterclaim and allowing the respondent's claim.
28. It was the appellant's case that she entered the suit property in 2005 and that she connected electricity after she completed construction. On cross examination, she could not remember when the construction was done. She claimed that she asked around and got the number for the plot from the County Council and started paying rates to the Council in 2009.
29. She produced photographs of the development on the land which she claimed were taken in February 2006. The appellant contended that the learned magistrate failed to take the photographic evidence of the development on the suit property into consideration and that the court disregarded the certificate of electronic evidence. The certificate of electronic evidence was prepared by John Muriithi Nduhiu who stated that he took the photographs in February 2006.
30. The learned magistrate found that the photographs were undated and that they did not substantiate the appellant's claim that she took possession of the suit property in 2005. According to section 78A(3) (a) of the *Evidence Act*, the weight to be attached to electronic and digital evidence must have regard to



how reliable the manner in which the evidence was generated, stored and communicated; the reliability of the manner in which the integrity of the electronic and digital evidence was maintained; and the manner in which the originator of the electronic and digital evidence was identified. John Muriithi Nduhiu who took the photographs was not called to give evidence on how the digital evidence was generated or the reliability of the manner in which the integrity of the electronic and digital evidence was stored and maintained from 2006 when it was taken until 2022 when it was produced in court.

31. The court has looked at the two original photographs which were produced in court. One of the photographs is not dated while the second one has November 15, 2005 stamped on it. This contradicts paragraph 3 of the certificate of Electronic Evidence in which John Muriithi Nduhiu swore that he took the photographs in February 2006. He did not give the specific day in February when the photographs were taken. This court agrees with the findings of the learned magistrate that not much weight could be attached to the photographs which the appellant relied on to prove that she entered the suit property in 2005 or that she commenced construction on the land in 2006.
32. The appellant stated in her testimony that she was told the land belonged to Mary but did not know about George and his children. She produced payment requests for rates issued in the name of George Sumare for the suit land. The request dated February 1, 2019 for Kshs 2,800 was stamped by the County Government of Laikipia on February 1, 2019; the one dated February 2, 2018 for Kshs 2800 was stamped on February 2, 2018, the one dated February 18, 2016 for Kshs 2800 was stamped on February 18, 2016; the one dated February 2, 2017 for Kshs 2,800 was stamped on February 2, 2017; and the one dated September 29, 2015 for Kshs 2800 was stamped on September 29, 2015. She also produced an unclear demand note which was not stamped and the one dated August 17, 2009 demanding payment of Kshs. 40,000 which was also not stamped by the County Government to confirm its authenticity unlike the other rates demand which the appellant produced. She produced a copy of an official receipt from the County Government of Laikipia dated January 27, 2021 for payment of ground rent of Kshs 2,800.
33. The rates demand notes for 2015, 2016, 2017, 2018 and 2019 which the appellant produced appear to have been paid even though it is difficult to discern the dates when the payments were made because they were overwritten over the print of the demand notes. From these requests for rates and the payments made, one can deduce that the appellant started paying rates for the suit property in the late George Sumare's name in 2015 and not earlier as she contended. She did not adduce evidence of payment of rates or rent for the suit property before 2015.
34. Tapato Ole Molo who was called by the respondent to testify stated that the suit property had a six roomed semi-permanent timber house up to 2009 when it was burnt down. That corroborated the respondent's evidence that the late George lived in the house on the suit land with his family and that that house was burnt down in 2009. If indeed the house that the late George lived in was on the suit property until 2009 when it was burned down, then it is unlikely that the appellant built on the plot while the late George's house was still standing on the land. The court notes that in her evidence, the appellant did not address the issue of the late George's house that previously stood on the suit land, and which was burnt down. She only stated that the suit property was empty when she started construction.
35. The appellant produced the consumer ledger card from the Nanyuki Water and Sewerage Company for 2004 to 2009. The court notes that the ledger is in the name of John Muriithi Nduhiu and not the appellant's name. They show that the first payment of Kshs 425 was made from November 11, 2008 with a more substantial payment of Kshs 4,500 being made on February 9, 2009. There is nothing to connect that ledger which is in the name of John Muriithi Nduhiu, to the appellant or to the suit property since no plot number is given on the ledger.



36. The appellant produced a customer's statement of account printed by Kenya Power for plot number 293/10 Nanyuki Town for the period running from April 8, 2000 to February 8, 2021. It shows that a deposit of Kshs 2,500 was made on the account on February 16, 2009. The customer's name is given as John Muriithi Nduhiu and not the appellant. The appellant did not lead evidence to show any link between John Muriithi Nduhiu in whose name the electricity statements are to her. When she was cross examined on this issue, she merely stated that the exhibit was hers and added that she was struggling to get money. If the appellant were occupying the suit property as she claimed, then the utility bills would have been issued in her name.
37. The respondent's evidence was that in 2009 she issued a demand letter to Alfred Ngonga who she found on the suit property to stop construction and pull down any structures that were erected on the land. She produced the demand letter issued to Alfred Ngonga. Had the appellant been on the suit property in 2009 and had that fact come to the respondent's knowledge, the respondent would have issued the demand letter to the appellant and not Alfred Ngonga. The respondent issued a demand letter to the appellant on January 20, 2020 and in response the appellant's advocate indicated that she had been in occupation of the land legally and legitimately since 2004.
38. Tapato ole Molo who gave evidence for the respondent stated that there was construction going on in 2013 on the suit property and that he assumed it was the late George Sumare's widow developing the suit property. He confirmed that the appellant who was his neighbour had occupied the land since 2013. The evidence of Tapato who lives near the suit property is believable. The evidence tendered before the learned magistrate proved that the appellant took possession of the suit property in 2013 and not in 2005.
39. In *Kim Pavey & 2 others v Loise Wambui Njoroge & another* [2011] eKLR the court held that to prove title by adverse possession it was not only necessary to show that some acts of adverse possession had been committed, but that it was also necessary to prove that the possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. The court defined dispossession to mean that the owner had been driven out of possession by another. In this case, the appellant moved into the suit land after its owner, George Sumare had died, she did not drive George out of possession of the suit land.
40. The Court of Appeal enumerated some of the factors which a person claiming adverse possession must show in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR. These are: - the date he came into possession; the nature of the possession; whether the fact of his possession was known to the other party; how long his dispossession had continued; and that the possession was open and undisturbed for the requisite 12 years. This denotes knowledge of the possession which a dead person like the late George could not be expected to have. The appellant stated that she did not know the respondent prior to 2020. The evidence tendered by the respondent and Tupato shows that the respondent became aware of the fact of the appellant's possession of the suit property in 2013. By 2020 when the suit was filed the appellant had not met the requisite statutory period of 12 years to found a claim for adverse possession.
41. The court stated in *Samuel Kibamba v Mary Mbaisi* [2015] eKLR that to succeed in a claim for adverse possession, one must prove that he had occupied the land openly, without force, without secrecy and without license or the land owner's permission. A dead person certainly cannot possibly give permission or assert his ownership rights over the land registered in his name, never mind that he cannot even be dispossessed of land because he is dead anyway.
42. The facts in *Samwel Nyakenogo v Samwel Orucho Onyaru* [2010] eKLR which the appellant relied on are distinguishable from this case. The claim was based on a sale that was not concluded and the



- necessary land control board consent was not obtained. In this case the appellant claims to have taken possession of the suit land after the demise of the registered owner before the respondent took out letters of administration and obtained a title over the suit land.
43. The facts in *Joseph Kamau Gichuki (Suing as the administrator of the Estate of Gichuki Chege (Deceased) v James Gatheru Mukora and Another* [2019] eKLR which the appellant relied on are also distinguishable from the circumstances of this case. In that case, occupation of the suit land which led to the claim for adverse possession commenced in 1974 after the death of the registered owner but before the coming into force of the *Law of Succession Act*. In this case, George Sumare, who was registered as the owner of the suit property died in 2003 hence the *Law of Succession Act* which came into force on July 1, 1981 applies to his estate and its administration.
  44. A corollary point that emerges for determination from the peculiar circumstances of this appeal is whether one can claim adverse possession of land which they occupied after the death of the registered owner.
  45. It is helpful to review the applicable law. Section 7 of the *Limitation of Actions Act* stipulates that a person may not bring an action 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. The essence of this provision is to prevent a registered land owner from commencing an action to recover his land if someone else has had possession of that land for a period of 12 years from the date the landowner's right of action as against the person in possession accrued. This would be the date the land owner became aware of the occupation of his land by the other person since one can only enforce their right to recover land on becoming aware and having knowledge that another person has occupied their land without their consent or authority. This explains why the adverse possession must be open and public.
  46. Under section 13 of the *Limitation of Actions Act*, the right of action to recover land does not accrue unless and until the land is in the possession of some person in whose favour the period of limitation can run, this would be the person in adverse possession of the land.
  47. Under section 9(2) of that *Act*, where a person brings an action to recover the land of a deceased person, whether under a will or intestacy, and the deceased person was in possession of the land at his death and was the last person entitled to be in possession of the land, the right of action accrues on the date of death. Section 16 provides that for purposes of that *Act* relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there was no interval of time between the death of the deceased person and the grant of letters of administration.
  48. This court's understanding of sections 9(2) and 16 is that an administrator of the estate of a deceased person is deemed to have had the legal capacity to file an action to recover land which was owned by a deceased person from the date of death and not merely from the date the administrator obtained grant of letters of administration for the estate of the deceased.
  49. The two sections do not seem to suggest that for a person claiming adverse possession of land owned by a deceased person time starts to run from the date of his death simply because this would depend on the date the person claiming adverse possession of the land came to be in possession of the land and the fact of the possession was known. That is unless the person claiming adverse possession was on the land before its owner died and the owner had knowledge of the occupation of his land prior to his death but failed to assert his right over the land by filing a recovery suit.
  50. By virtue of sections 9(2) and 16 of the *Limitation of Actions Act*, the respondent as administrator of the estate of the late George Sumare is deemed to have had the right to recover the suit property from



- the date of his death in 2003 and not 2017 when she obtained grant of letters of administration over his estate. That right accrued when the appellant occupied the suit property but not the date George Sumare died. Under the law of course the respondent could only seek to recover the suit property from the appellant after obtaining grant of letters of administration for the estate of the late George Sumare.
51. This begs the question, if one dies intestate and they owned land, where is their property vested from the date of death until letters of administration over his estate are issued by the court? In *Trouistik Union International & Another v Jane Mbeyu and another* [1993] eKLR, the court held that at common law, death by itself automatically divested the deceased of his chose in action because the dead have no rights in law, but because no legal right is without an owner, the right must be vested in a person or entity.
  52. The court went further to discuss in whom the personal property of an intestate should vest in the interval between death and the grant of letters of administration in the *Trouistik* case. The court observed that the *Law of Succession Act* did not provide for the vesting of an intestate's property between the date of death and the grant of letters in an entity.
  53. The court agreed with the suggestion which Kneller JA made in *Roman C Hintz v Mwangombe Mwakima* [1988] 1 KAR 482 that such property ought to vest in the courts in conformity with the common law notions of the transmission of an intestate's right or estate. The court mentioned that it ought to be remembered that all the temporary custodians of an intestate's rights are bare trustees only and that as soon as a grant was obtained, the right or estate automatically vested in the administrator.
  54. Applying the Court of Appeal's reasoning in the *Trouistik* case to the facts of this case, it would mean that between 2003 when George Sumare died and 2017 when the grant of letters of administration for his estate were issued to the respondent, his property vested in the courts in conformity with the common law notions of the transmission of an intestate's right or estate.
  55. It is also useful to consider the *Law of Succession Act*. Section 45 prohibits any person from taking possession or disposing of, or otherwise intermeddling with the free property of a deceased person except where it is authorised by law or by a grant of representation under that *Act*. A person who contravenes that provision is guilty of an offence besides being answerable to the rightful executor to the extent of the assets which he has intermeddled with.
  56. Based on the law as it is prescribed by section 45 of the *Law of Succession Act*, it can be said that the appellant intermeddled with the property of the late George Sumare when she took possession of the suit property and constructed on it since by law she was not authorised to deal with the property of a deceased person until the estate of the deceased was administered under that *Act*.
  57. Section 46 of the *Law of Succession Act* enjoins the police or administrative officer who becomes aware that a person has died to report the fact of death to the chief or assistant chief or administrative officer of the area where the deceased last resided. The chief, assistant chief or administrative officer who the report is made to is required to go to the last known residence of the deceased and take all the necessary steps for the protection of his free property found there and ascertainment of his other free property and the persons appearing to have any legitimate interest in succession to or administration of his estate; and for the guidance of prospective executors or administrators as to the formalities and duties. The proviso also incorporates the Public Trustee or the assistant chief.
  58. The rationale for section 46 of the *Law of Succession Act* is to protect and preserve the free property of a deceased person until the persons having a legitimate interest in succession to or administration of his estate are ascertained. Had what section 46 prescribes been done when George Sumare died in 2003, perhaps the suit property would not have been occupied by the appellant while the process of



- administration of his estate was being pursued as well as ascertainment of persons having a legitimate interest in succession to his estate.
59. Where an heir of a deceased person who owned land cannot be ascertained, such land is deemed to constitute public land. The definition of public land under article 62(1) of the Constitution incorporates at (e) land in respect of which no heir can be identified by any legal process. This imports the concept of escheat into the Constitution.
  60. Black's Law Dictionary, 10<sup>th</sup> Edition defines escheat as the reversion of land ownership back to the lord when the immediate owner dies without heirs or the reversion of property, especially real property, to the State upon the death of an owner who has neither a will nor any legal heir.
  61. Under section 8A of the repealed Government Lands Act, where any person in whom there was vested an estate, interest or right in or over land that was not Trust Land died intestate and without heirs, that estate, interest or right would escheat to the Government.
  62. The Government Lands Act was repealed in May 2012. If George Sumare who died in 2003 did not have heirs, his estate, interest or right over the suit property would have escheated to the Government pursuant to section 8A of the Government Lands Act before the Act was repealed and the appellant would therefore not have had any basis to claim the suit land through adverse possession.
  63. Public land is excluded from the application of the Limitation of Actions Act by virtue of section 41 which stipulates that the Act does not enable a person to acquire title over Government land or land otherwise enjoyed by the Government. Had it been that when George Sumare died in 2003 he had no heirs, the suit property would have constituted public land, and would have been exempted from the application of the Limitation of Actions Act by section 41 since one cannot claim adverse possession of public land.
  64. In this court's view, where the subject matter in a claim for adverse possession is land registered in the name of a deceased person, and the occupation of the land by the person claiming adverse possession took place after the death of the registered owner before grant of letters of administration or probate of a will, the provisions of the Limitation of Actions Act have to be read and applied alongside the Law of Succession Act. More so because the Law of Succession Act came into force on 1/7/1981 while the Limitation of Actions Act took effect on December 1, 1967.
  65. Since the Law of Succession Act prohibits intermeddling with the free property of a deceased person, what that means is that one cannot purport to take possession of land where the registered owner is dead because that would amount to intermeddling with the estate under the law.
  66. A claim for adverse possession where one purports to have taken possession of the land after the death of the registered owner and before the legal administration of his estate may not be sustainable in light of section 45 of the Law of Succession Act. According to the law, such a claimant commits an offence.
  67. The appeal lacks merit and is dismissed with costs to the respondent.

**DELIVERED VIRTUALLY AT NANYUKI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023.**

**KOSSY BOR**

**JUDGE**

**In the presence of:**

Mr. Isaac Wanjohi for the Appellant

Mr. Amos Chweya for the Respondent



Ms. Stella Gakii- Court Assistant

