



M’Inoti (Suing in his capacity as administrator ad litem of the Estate of Hellen Karambu M’Inoti – Deceased) v Imathiu; Mwendwa (Interested Party) (Environment & Land Case 101 of 2016) [2023] KEELC 830 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEELC 830 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 101 OF 2016
CK NZILI, J
FEBRUARY 15, 2023

BETWEEN

PAUL MWENDA M’INOTI (SUING IN HIS CAPACITY AS ADMINISTRATOR AD LITEM OF THE ESTATE OF HELLEN KARAMBU M’INOTI – DECEASED) PLAINTIFF

AND

PETER KIRIMA IMATHIU DEFENDANT

AND

CATHERINE MWENDWA INTERESTED PARTY

JUDGMENT

1. The plaintiff suing as a legal administrator of the estate of the late Hellen Karambu M’Inotids sued the defendant who is the registered owner of LR No’s Nyaki/Munithu/1480 & 1481 seeking that the court declares him entitled to the suit parcels of land by virtue of adverse possession. The originating summons was accompanied by an affidavit in support sworn by Paul Mwenda M’Inoti on 18.7.2016. The plaintiff averred that the deceased alongside her beneficiaries have been in exclusive and open possession of the suit parcels of land since 1993 and that they have made various improvements to the suit parcels of land by erecting a perimeter fence, putting up a permanent dwelling structure and undertaking farming activities. It was also averred that even after the deceased passed on in 2010, her remains were interred on the suit land.
2. The affidavit in support was accompanied by attached copies of death certificate, burial permit, an affidavit, grant ad litem and official searches as annexures marked PMM “1” and PMM “2” respectively. Following interlocutory applications dated 8.7.2016, 16.2.2021, 21.7.2017 and 2.10.2018, the court issued orders of for the maintenance of the status quo on the suit properties till the hearing and



- determination of the suit. Catherine Mwendwa a daughter of the deceased was also joined as an interested party to the suit. In addition, the originating summons was supported by the plaintiffs and interested parties' affidavits and witness statements dated 24.11.2021 all contained in the bundle of documents dated 17.12.2021.
3. In reply to the originating summons, the defendant swore a replying affidavit dated 10.3.2021 and witness statement dated 1.2. 2021. Additionally, the defendant filed a list and a bundle of documents dated 1.3.2021 all contained in the defendant's paginated bundle of documents dated 19.9.2022.
 4. In the said replying affidavit, he vehemently denied the alleged occupation and development on his suit parcels of land by both the late Hellen Karambu M'Inoti and her daughter Catherine Mwendwa. On the other hand, the defendant averred that he bought the two parcels of land in 1993 with an incomplete 2 bed roomed semi-permanent house but with mature trees, a fence, indigenous shrub and nappier grass.
 5. The defendant averred that while in the process of putting up a barbed wire fence and a chain link, he leased out the suit land to Dr. Brenchley who completed the construction of the aforesaid house, built a sewer system, a septic tank, erected another one bedroomed semi-permanent house and a pit latrine. It was averred that the tenant employed three casual laborers to take care of the plants and the fence. The laborers would commute from their homes hence none was living on the suit land whose names were the late Hellen Karambu and Ester Kinoti, who were being paid their monthly dues throughout by their employer.
 6. The defendant went on to state that in 2014, he instructed a surveyor by the name Festus Mbaabu Rimbere to resurvey the boundaries of LR No. Nyaki/Munithu/1480 for purposes of giving his neighbor, one Dr. Charles Kathurima Murithi an access road to his property as per his email communication, in which the surveyor attached a draft mutation and a registry index map.
 7. The defendant averred that around 20.5.2016, the plaintiff made numerous phone calls to him while in the USA seeking to be engaged in the farm as a casual employee to clean the compound by trimming and cutting the fence, the general upkeep and to be harvesting the nippier grass, doing simple farming and banana trees in lieu of wages until the defendant came back. The defendant averred that he accepted the same only for the plaintiff to commit some crime and fled from the area to evade a police arrest.
 8. It was averred by the defendant that the plaintiff only resurfaced in 2020, stole his fencing posts which was reported by his sister-in-law to the local chief and the police as per the OB report attached. The defendant averred that the plaintiff filed the claim a month later, yet his late sister never lodged such a claim during her lifetime since she was a casual employee of Dr. Brenchley.
 9. The defendant averred that as an ordained clergy then with the Methodist church, now in the diaspora and a serious investor he left Kenya in 1997 to pursue further studies. He urged the court that his property should be protected against such intruders as the plaintiff since he never permitted the alleged burial of the remains of the deceased on his land, the same should be exhumed if at all any remains were interred there.
 10. The defendant attached copies of his ID as annexure PKI (a), a copy of a search for LR No. 1480 as annexure PK 1 (b), a copy of records for LR No 1480 as annexure PK 1 (c), a copy of records for LR No. 1481 as annexure PK 1 (d), an official search for LR No. 1481 as annexure PK 1 (e), an email to the surveyor and a mutation form as PK 1 (2), an OB report as PK 1 (3), a chiefs letter as PK 1 (4) and a bundle of photographs showing his construction as PK 5 (a) – (h) respectively.
 11. At the trial, the plaintiff testified as PW 1. He adopted his witness statement dated 18.7.2016 together with the affidavit sworn on the even date as his evidence in chief. PW 1 also produced a copy of the



letters of administration ad litem as P. Exh No. (1), a copy of the death certificate as P. Exh No. (2), a copy of burial permit as P. Exh No. (3), copies of official searches for LR No's. 1481 and 1480 as P. Exh No. 4 (a) and (b), a copy of his statutory declaration as P. Exh No. (5) and a copy of the chiefs letter as P. Exh No (6). His evidence was that the deceased entered into the suit land in August 1993 and that the defendant only made entry into the land in 2021 since 1997.

12. In cross examination, the plaintiff denied that the deceased was a casual laborer of the defendant's tenant. PW1 was unable to produce any receipts for any expenses the deceased may have incurred putting up any developments on the suit land. Asked about the nature of developments made by the deceased on the land, the plaintiff admitted that he would only pay occasional visits to the land and that other than the burial permit, he had no other evidence that the deceased was buried on the suitlands. The plaintiff admitted that he was not certain if the defendant knew that the deceased was occupying his land. Concerning the effective entry, PW 1 admitted that after the defendant visited the land in 2021, he threatened his niece, Catherine Mwendwa who had no option but to vacate the house in the suit land for her own safety. In his view, PW 1 said that the deceased had acquired prescriptive rights by 2006. Further PW 1 confirmed that his sister passed on in 2010 though could not explain why he had to wait for 6 years to lodge the suit after she passed on. PW 1 stated that the agents who entered into the land in 2016 had gazette notices alleging to have had instructions from the defendant to dispose of the land.
13. Catherine Mwendwa, the interested party testified as PW 2. She adopted as her evidence in chief, the witness statements dated 16.7.2016 and 24.11.2021 as well as her affidavit sworn on 7.12.2021. Her testimony was that her late mother entered into the suitlands in 1993 while she was two years old. She told the court that the defendant was never in the land until February, 2021. PW 2 produced photographs of the deceased's developments on the land as interested party Exh. No. 1 (a)(b)(c) & (d), copy of her ID card as Exh. No. (2) and the order issued on 22.7.2016 as interested party Exh. No. (3).
14. In cross examination, PW2 stated that she had no receipts for any expenses allegedly incurred by the deceased in putting up the interested party's Exh. No. 1 (a) – (d). She denied that her late mother was an employee of the defendant's tenant. Further, PW 2 admitted that the defendant evicted her from the land in 2021 using a gang of people whereof she made a police report.
15. PW 2 in re-examination said that the defendant knew about their occupation of the land since 1993 but took no action to evict them from his land. She clarified however that the defendant had an adjacent parcel of land which he would occasionally visit but not where they were occupying.
16. Asked by the court why she did not take out letters of administration and why her ID card did not bear the deceased's names, PW 2 said that on 18.7.2016 she was aged 25 years old, but was a minor at the time her mother passed on in 2010. She said that as at 2010 she was a student. Similarly, PW 2 confirmed that she had no chief's letter indicating her as the daughter of the deceased. She confirmed that she never took out any of the names of the deceased as part of her identity. The court also observed that PW 2 was sitting in court while the plaintiff was giving his testimony.
17. Esther Karoki Kinoti testified as DW 1 and adopted her witness statement filed alongside the defendant's replying affidavit and dated 3.3.2021 as her evidence in chief. Her testimony was that between 1993 to 1994, she was working together with the late Hellen Karambu M'Inoti as casual laborers of the defendant's tenant, a Dr. David L. Brenchley now deceased. She said that their duties entailed tilling, planting, harvesting and the general maintenance of LR No. Nyaki/Munithu/1480 and 1481 located in Nyaki location. Her evidence was that they who would be paid their wages through the defendant, as the representative of the employer in Kenya at the time. She testified that at no time did the deceased and herself reside on the suit lands since the deceased home was at Kaaga Rural.



- Further, DW 1 said she never witnessed the deceased putting up any structures or homestead on the suit land.
18. Concerning the evidence by PW 1, DW 1 said she was shocked to hear him claim rights over the land since the only person occupying the land at the time was Dr. Brenchley. DW1 said that their role was purely to tend the fence, water flowers, the trees and weed out unwanted plants DW1 confirmed that the late Dr. Brenchley was the tenant utilizing a property for horticulture and cultivation. She said that she stopped working on the land after the tenant relocated to the USA, though the deceased continued working in the land but never put up any structures therein.
 19. In cross examination, DW 1 said that she had no employment records showing that she used to work for the late Dr. Brenchley on the suit land as a tenant of the defendant. Similarly, DW 1 clarified however that before the defendant left for America, he used to live with Dr. Brenchley and was the one who would be sent their wages through the bank so as to pay them with the deceased. Similarly DW 1 clarified that the defendant used to be their immediate supervisor over their duties on behalf of the late Dr. Brenchley since at the time he was based in Kenya.
 20. At the close of the defence case, parties filed written submissions dated 2.12.2022 and 6.12.2022 respectively.
 21. The plaintiff submitted that the evidence tendered by PW 1 & PW 2 had sufficiently established the ingredients of adverse possession as to the taking of possession, developments therein, interment of the remains of the deceased on the suit land and the discontinuance of possession of the defendant for 12 years. Reliance was placed on *Langat Kipkemoi Anthony & another vs Maseiya Ole Ololmaitai & another* (2020) eKLR, *Wilson Njoroge Kamau vs Nganga Muceru Kamau* (2020) eKLR, *Kasuve vs Mwaani Investments Ltd & 4 others* 1 KLR 184, *Peter Ngethe t/a PNN Funeral Services vs Standard Group PLC & another* (2020) eKLR.
 22. On the aspect of the claim of tenancy, lease and or casual employment, the plaintiff submitted that under Section 38 (1) of the *Land Act* as read together with Section 3 (3) of the *Law of Contract Act* nothing was brought in writing to prove the existence of such a contract. Further, the plaintiff submitted the definition of casual laborer as per Section 2 of the *Employment Act* was not proved by way of receipts, bank statements, rent receipts and or record to show that the deceased was indeed a casual laborer of the late Dr. Brenchley.
 23. The court was urged to find no material produced by the defendant for it to infer a lease, tenancy, casual employment and therefore dislodge the claim based on adverse possession.
 24. On the part of the defendant, it was submitted based on the holding in *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* (2017) eKLR, the burden of proof rested with the plaintiff to demonstrate that he had acquired the land by extinction of right to property including the fact that the defendant had knowledge to the possession; the deceased resided on the properties together with the plaintiff and the interested party and that the possession was peaceful, open and continuous. Reliance was also placed on *Mbui vs Mukindia Maranya* (1993) eKLR.
 25. The defendant submitted that the plaintiff in cross examination, the plaintiff admitted that he lacked documents to show the possession and any expense incurred over any developments or the maintenance of the structures on the suit land. As to P. Exh No. 3, the defendant submitted it was clear that the deceased's residence was indicated as Kiathe, Imenti North and not in the suit premises.
 26. As to whether the defendant was aware of the plaintiff's occupation of his land, the defendant submitted that no evidence was tendered to support such ingredients as held in *Samuel Kibamba vs Mary Mbaisi* (2015) eKLR and *Alfred Welimo vs Mulaa Sumba Barasa* C.A 186 of 2011, on



- the proposition that adverse possession is not established merely on account of abandonment of the property without evidence of animus possidendi and the assertion of rights inconsistent with those of the true owner. The defendant submitted that the deceased never filed the claim during her lifetime and that the plaintiff took another 6 years to do so leaving doubts as to the deceased animus possidendi.
27. Similarly, the defendant urged the court to find the plaintiff's evidence inconsistent, contradictory and unbelievable particularly with regard to PW 2, a minor in 2010 being left alone in the suit land while the plaintiff was living elsewhere in Kaaga to be visiting her occasionally. As regards the photographs, it was submitted that no certificate was produced authenticating the same as per the law on electronic evidence. It was submitted that the interested party testified that she was in school for four years meaning that there was no continuous occupation as alleged and further that there was no corroboration of PW1's evidence of a continuous occupation for 17 years.
28. Concerning the evidence of the defence witness, the defendant submitted that her evidence was credible and consistent that they used to work with the deceased as casual employees of a known tenant who never resided on the suit land hence discounting the elements of possession and discontinuance of possession by the true owner, the defendant. Reliance was placed on *Samuel Kibamba (supra)*.
29. The court has gone through the pleadings, oral and documentary evidence tendered and written submissions. The issues commending themselves for the court's determination are:
- i. If the plaintiff and the interested party have demonstrated capacity to sue and advance a claim on behalf of the deceased.
 - ii. If the plaintiff has proved a claim based on adverse possession to be entitled to the prayers sought.
30. The plaintiff brought this claim for and on behalf of the estate of the deceased, who was her late sister. He produced P. Exh No.1, a limited grant issued on 16.6.2016 as P. Exh No. (2) a certificate of death dated 12.5.2016 and a burial permit dated 17.2. 2010 as P. Exh No. 3. Further, the plaintiff produced P. Exh No. (5) in which he had stated on oath that he was a beneficiary of the parcel No. LR Nyaki/Munithu/1481 which belonged to his late sister, and survived by her only daughter the interested party. The plaintiff averred that her late sister left him as the guardian and administrator of her estate amongst the estate, the suit land herein. At paragraph 7 of P. Exh No. 5, the plaintiff averred that his late sister and himself had extensively developed the suit lands and knew no other land as their land. Further, the plaintiff averred that he had been in active and actual possession of the land herein for a period of 15 years. At paragraph 9 thereof, the plaintiff averred that he was swearing the application in support of a caution. Additionally, the plaintiff produced P. exh No. 6, a letter dated 9.5.2016 by the chief Ngiine Location who confirmed the assertion on occupation by the plaintiff.
31. PW2 supported the originating summons as an interested party by witness statements dated 9.4.2019, 7.12.2021 and a supporting affidavit. At paragraph 7 of her affidavit, the interested party stated on oath that after her mother passed on 11.8.2010, she continued to openly use, develop, farm and exclusively occupy the suit land until 6.2.2021, when the defendant came and damaged the gate, pulled down the fence, cut down the trees and destroyed the water tank and changed the roof of the house she was living in. In support of her claim PW2 produced photographs s showing the alleged damage and an order issued on 22.7.2016 for the inhibition.
32. In the case of *Rejesh Pranjivan Chundasama vs Sailesh Pranjivan Chudasama* (2014) eKLR, the court held that a litigant is clothed with locus standi upon obtaining a limited grant or full grant of letters of administration. The court cited with approval *Otieno vs Ougo* (1987) eKLR. on the proposition that



- an administrator was not entitled to bring any action as an administrator before he had taken out letters of administration, otherwise if he did that the action would be incompetent as of the date of inception.
33. In this suit, the interested party sought to be enjoined in the suit to pursue the claim on her own right. The court allowed her to join as an interested party. In her affidavit, statements and evidence tendered, she stated she was the only daughter and the beneficiary to the estate of her late mother. She has taken the view that she had acquired prescriptive rights to the land, following her occupation after her mother passed on in 2010 up to 2021.
 34. The plaintiff acquired letters of administration pursuant to Section 54 of the *Law of Succession Act*, for purposes of prosecuting this suit. The law is that a relationship does not give locus standi to the deceased relatives to file suits before obtaining a limited grant. In *Haco Shanko vs Mohamud Vita Sharko* (2018) eKLR, the court held that one's relationship to the deceased did not clothe such a party with locus standi. The court further stated that if each beneficiary was to be allowed to file a suit touching on the deceased estate without a grant, then there would be a plethora of cases. The court went on to strike out the suit.
 35. In this suit, the interested party was brought in as an interested party. In *Francis Karioko Muruatetu & another vs Republic and 5 others* (2016) eKLR, the Supreme Court of Kenya held that a party seeking to join proceedings in any capacity must come to terms with the fact that the overriding interest or stake in any matter was that of the primary/principal parties before the court since the determination of any matter will have a direct effect on the said parties. The court went on to state that third parties admitted as interested parties may only be remotely or indirectly affected. The court held that where parties join as interested parties the issues to be determined by the court shall always remain the issues presented by the principal parties or as framed by the court. The court went on to say that an interested party may not frame its own fresh issues or introduce new issues for determination by the court. The court said that a stake by an interested party cannot take the form of a new issue to be introduced before court and that a court cannot be steered by an interested party towards a consideration of new issues.
 36. Flowing from this, it is apparent that the interested party herein cannot purport to seek substantive orders as though she was a principal participant in this suit. She had an opportunity to join as a plaintiff but she opted not. As indicated above and in cross examination by the court, the interested party confirmed that at the time the plaintiff took out letters of administration she was an adult. She gave no good reasons why she did not file the suit alongside the plaintiff and or take out letters of administration ad litem jointly with the plaintiff.
 37. Similarly, the interested party and now PW 2 never produced any document to show that she was a beneficiary of the estate of the deceased so as to be entitled to the concept of tacking and advance the adverse possession claim for and in the name of the deceased's estate. The application for the limited grant of letters of administration ad litem was never availed before court, listing the interested party as the sole beneficiary and or heir of the estate of the deceased. Asked by the court why her name did not include any of the deceased's names and why she had no birth certificate indicating her relationship with the deceased, PW 2 was unable to give any plausible explanation.
 38. So even if the interested party had proved to be a beneficiary of the estate of the deceased, still she would have been required to plead and prove that between 2010 and the time she joined the suit or even earlier than the death of her mother, that she had an independent possession of the land from the deceased in her capacity as the daughter with an intention to possess the land to the exclusion of all persons including the defendant during that period. This was the position taken by the Court of Appeal in *Jospeh Mutafari Situma vs Nicholas Makbanu Cheronjo* (2007) eKLR.



39. In the case of *James Kamau Kimani vs James Gichuru Gaturu* (2000) eKLR, it was held that the plaintiff who had not obtained letters of administration lacked capacity to represent the estate of the deceased. With the same reasoning therefore and guided by the above caselaw, my finding is that it is only the plaintiff herein who has the requisite capacity to represent the estate of the deceased in furtherance of the claim of adverse possession and not the interested party. Therefore, any pleading by the interested party and any issues raised by her seeking to advance an independent claim on adverse possession for and on behalf of the deceased have no foundation in law.
40. The law and the requirements for a claim based on adverse possession have been determined severally by our courts. In the case of *Muthiora vs Marion Muthamia Kiara (suing on behalf of the estate of Erastus Muthamia Kiara (deceased))* Civil appeal 43 of 2017 (2022) (judgment) KECA 28 (KLR) 4th February 2022) Judgement, the court held that occupation of land done in hostility to the respondent's title but in a mistaken believe by a party as being a legitimate owner of the suit land did not amount to adverse possession since there was no intention to dispossess the true owners.
41. In the case of *Songoi vs Songoi* (2020) eKLR, the court cited with approval *Mbira vs Gachubi* (2002) 1 EALR 137 where it was held that a person seeking adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory period of 12 years, without interruption.
42. In this suit, the plaintiff averred that his late sister entered the land in 1993 and remained therein until her death in 2010 following which PW2 continued occupying the land. In his evidence, the plaintiff testified that he would only occasionally visit the suit lands where his late sister was undertaking various activities including construction and farming. He said that after she passed on and her remains were interred on the suit land, her daughter PW 2 continued occupying the land until he filed the suit before court. His evidence was that the defendant only came to the land in 2021 and evicted the interested party from the land.
43. In *Alfred Welimo v Mulaa Barasa (supra)*, the court held that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it unless the abandonment and the taking of the land by the intruder was with the intention to possess and the assertion of rights inconsistent with those of the true owner.
44. Therefore, in order to succeed in this suit, the plaintiff had to give tangible and cogent evidence that his late sister other than the mere possession of the suit lands there was *nec vic, nec clam and nec precario* as held in *Kimani Ruchine vs Swift Tutberfold Co. Ltd* (1980) KLR 1500.
45. Further in *Wambugu vs Njuguna* (1983) KLR, 173, the court held that adverse possession contemplated the two concepts of possession and discontinuance of possession of the true owner and that the proper way of assessing the prove of adverse possession was whether or not the title holder had been dispossessed or had discontinued his possession for the period of 12 years and not whether or not the claimant had proved that he or she had been in possession for 12 years.
46. In *Songoi vs Songoi (supra)*, the court took the view that to proof adverse possession a party must inter alia show: -
- a. On what date he came into possession.
 - b. What was the nature of his possession.
 - c. Whether the fact of his possession was known to the other party.
 - d. For how long his possession has continued



e. That the possession was open and undisturbed for the requisite 12 years.

47. In this matter, the plaintiff averred that his late sister's entry on the land was in 1993 until she died in 2010. He said that the defendant left for the USA in 1994 and only came back in 2021 though he would occasionally visit the country but never discontinued the deceased's possession as he had an adjacent land where he would reside. PW1 said that after her sister died, no notice to vacate or an eviction order was served until 2021 when the defendant invaded the land and destroyed their developments. His evidence was that the defendant's rights got extinguished in 2006. On her part, PW 2 testified that they lived with her late mother on the land since 1993 while she was an infant, grew up therein and erected a permanent home so by the time her mother passed on 11.8.2010, they had been there for 17 years, at the time she had just attained the age of majority. She stated in her statement that after her mother's death, her uncle came and continued to occupy the land and developed it until on 18.7.2016 when they obtained inhibition orders and continued to occupy the land until 2021 when the defendant came in and destroyed their developments.
48. In the statement dated 9.4.2019 the interested party stated that she was a beneficiary of the estate of the deceased with nowhere else to live. She asked to be made an administratrix of her estate so as to be registered as such. A copy of the official search produced as P. Exh No. 4 (a) & (b) indicated the land came under the name of the defendant on 10.2.1993. P. Exh No. 4 (b) indicates that the plaintiff was attempting to register a caution using P. Exh No's 5 & 6 around 4.7.2016. In the *Mtana Lewa vs Kabindi Ngala Mwangandi* (2016) eKLR case the court held that the essential prerequisites as that the adverse possession was neither by force, stealth or under the license of the true owner. The defendant in his replying affidavit sworn on 18.6.2016 averred that he leased the land to Dr. Brenchley, who took vacant possession and employed the deceased and DW 1 as his casual workers who would commute from their homes as they took care of the farms. He also averred that in 2014, he engaged the services of a surveyor and attached a mutation form and reports to the police as well as photographs showing his developments on the suit lands. In the said affidavit he also made adverse comments against the plaintiff that as his casual laborer, he stole his items leading to a police report.
49. DW 1 also testified and confirmed that indeed she used to work with the deceased on the farm between 1993 – 1994 as workers of DR. Brenchely, a tenant of the defendant. She also confirmed that neither the deceased nor the plaintiff were living, occupying or possessing any of the suit lands as alleged since the developments therein belonged to the defendant. The plaintiff did not file any supplementary affidavits to specifically counter the assertions by the defendant that he was also one of his casual employees who purportedly stole his items leading to a police report.
50. The plaintiff failed to bring any evidence by way of receipts for any expenses relating to putting up of any developments by the deceased on the suit lands. The plaintiff's evidence was also contradictory to his earlier affidavit sworn in support of the application for caution that he was also an occupant and developer of the suit lands alongside the deceased.
51. There were no specific particulars given on what improvements the deceased made on the suit lands prior to her death and thereafter by either the plaintiff or PW2. Similarly, PW 1 and PW 2 were unable to explain why the deceased and by extension PW 1, had to wait for 6 years to file the claim.
52. Additionally, if PW 2 was an adult in 2010 by the time her mother passed on and continued to occupy the suit lands, it is inconceivable why she did not jointly apply for the letters of administration and likewise jointly file the suit for adverse possession so as to advance her claim as the person then on the land unlike the plaintiff who admitted in cross examination that he was only occasionally visiting his late sister on the land.



53. In her witness statement dated 18.7.2016, the interested party indicted that some brokers invaded the land with a view of evicting them from the land, purporting to be under the instructions of the defendant.
54. If then the person said to have come to the suitlands were the land surveyors sent by the defendant, obviously it cannot be true that the defendant had abandoned possession and or had discontinued possession of his land to the deceased.
55. Further, and if indeed the deceased passed on having accrued the right to adverse possession by 2006 and if then the plaintiff and the interested party continued to occupy the land up to 2016, the question is whether the plaintiff has put before court any evidence to show that between 2010 and 2016 he was in adverse possession of the land on his own right and or was still advancing the accrued rights of the deceased. In *Mbui vs Maranya* (*supra*) the court held that time did not begin to run unless there was some person in adverse possession of the land and that time could not run merely because the land was vacant. The court further held that entry must be followed by possession and an appropriation since a right of action could not accrue unless there was somebody against whom it was enforceable, possession being a matter of fact.
56. In their evidence, PW 1 and PW 2 were unclear on who exactly was staying on the land between 2010 and 2016 since the interested party was alleged to have been in school while PW 1 admitted that he would only occasionally visit the suit premises. On the other hand, DW 1 alluded to the fact that the deceased entry into the land was because she was a casual laborer hence a licensee of her tenant. The duty was upon the plaintiff to dislodge the assertion by the defendant that her late sister and himself were permitted entrants to the land. The plaintiff was unable to demonstrate how such a permitted entry became adverse.
57. To my mind, the plaintiff's evidence and documentation were unable to dislodge the defense of permissive entry and demonstrate when her late sister's intention to own or possess the land which was hostile to the right of the true owner. In *Mbui vs Maranya* (*supra*), the court held that tacking was permissible provided that there was sufficient nexus often called privity between successors and that if the next one was his heir and there was no interruption.
58. In this suit the period between 2010 and 2016 remains a mystery and an unexplained by the plaintiff on who exactly was in occupation and in possession of the suit lands, since the deceased was no more and the interested party was in school. The plaintiff's evidence was inconsistent, illogical and misleading to say the least as to whether he took over the exclusive possession or occupation after the deceased passed on or whether it was the interested party who remained therein yet she was said to have been in school and also a minor.
59. While on that point the court in *Kweyu vs Omutu* court of Appeal Civil Appeal No. 8 of 1990 said that there must be facts showing a clear intention to hold adversely and under a claim of right, de facto use and occupation must be shown with the knowledge of the owner. In absence of such evidence and a claim by interested party, my finding is that the adding together of the periods of possession but to different persons would be impossible since both the plaintiff and the heir to the deceased were unable to prove possession and occupation between 2010 and 2016.
60. The upshot is that the plaintiff has failed to prove his claim to the required standards. The suit is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 15TH DAY OF FEBRUARY, 2023



In presence of:

C/A: Kananu

Wambua for plaintiff and interested party

Miss Gedion for defendant

HON. C.K. NZILI

ELC JUDGE

