



Case Number:	Environment and Land Case E006 of 2021(OS)
Date Delivered:	24 Feb 2022
Case Class:	Civil
Court:	Environment and Land Court at Muranga
Case Action:	Judgment
Judge:	Lucy Nyambura Gacheru
Citation:	Mary Wangari Macharia (Suing in her capacity as the administratrix of the estate of Macharia Gutu Thungu(Deceased) v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR
Advocates:	Ms Wainaina H/B for Nganga Ngigi for the Applicant/Plaintiff Mr S K Njuguna for the Respondent/Defendant
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application allowed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

E.L.C NO. E006 OF 2021(OS)

**MARY WANGARI MACHARIA (Suing in her capacity as the administratrix of the
estate of MACHARIA GUTU THUNGU (Deceased).....APPLICANT**

-VERSUS-

**EDWIN ONESMUS WANJAU (Suing in her capacity as the administrator of the estates
of Kimingi Wariera (Deceased) and of MWANGI KIMINGI (Deceased)...RESPONDENT**

JUDGMENT

By Originating Summons dated 3rd March 2021, the Applicant sought for the following orders against the Respondent;

- 1. THAT the Plaintiff be declared to have become entitled to one (1) Acre out of land parcel Number LOC 13/GITUGI/422, registered under The Registered Land Act (Cap 300 Laws of Kenya) (now repealed) by having had adverse possession of the said land for over twelve (12) years.**
- 2. THAT the Defendant's title to the said land be declared extinguished and or invalid, null and void and the Plaintiff be registered as proprietor of the suit land.**
- 3. THAT the Defendant do execute the necessary documents to effect the transfer of the said one (1) acre of land parcel Number LOC 13/GITUGI/422 to the plaintiff**
- 4. THAT the costs of the Application be provided for**

The Application is premised on the Supporting Affidavit of the Applicant dated 3rd March, 2021. It is the Applicant's averments that she is the widow of **MACHARIA GUTU THUNGU (deceased)** and the administratrix of his Estate. That the Defendant is a son of the late **Mwangi Kimingi**, who had filed a Succession Cause No. 230 of 2002 – Muranga in respect of the estate of his father the late **KIMINGI WAIRERA**. That the Defendant's father (Mwangi Kimingi) died before finalization of the said Succession Cause and the Defendant was substituted in his place after obtaining Limited Grant of Letters of **Administration Ad Litem**. That before demarcation of lands, Kimingi Wariera (now deceased) sold to **Macharia Gutu Thungu** (now deceased) a portion of one (1) acre out of his lands. That after demarcation was done, the land of **Kimingi Wariera** was registered as proprietor of land Parcel No. **LOC 13/GITUGI 422** and Parcel NO. **LOC 13/GITUGI 424**. That the portion that was sold was on **LOC 13/GITUGI 422**. That the Defendant's father being the only heir of the late **Kimingi Wariera** renegotiated the sale of the land and the sale was confirmed vide Sale Agreement dated 24th February 1998. That the agreed purchase price was **Kshs. 35,000/=** which the Applicant's husband (now deceased) paid to the Respondent's father.

Further, that the late **Macharia Gutu Thungu**, was given vacant possession by the Respondent's father and his family and he have been in **exclusive, open and continuous** occupation of the suit property for over 50 years without interruption. That it was a term of the sale agreement that the Defendant's father would file a Succession Cause in his father's estate, and on determination have the

same transferred.

In response to the Summons, the Respondent filed a Replying Affidavit dated **15th April 2021**, sworn by the Respondent. The Respondent deponed that he is the son of **Mwangi Kimingi** (now deceased) and the late **Kimingi Wariera** was his grandfather. That land parcel No **LOC 13/GITUGI/422**, which is the suit land and parcel No **LOC 13/GITUGI/424** were both registered in the name of the late **Kimingi Wariera** on **2nd July 1963**. That both parcels of land form part of the estate of the deceased in **Succession Cause 23 of 2012**, which is still pending determination in **High Court at Murang'a**. That after filing a Succession Case for the estate of the late Kimingi Wariera, the late **Macharia Gutu Thungu**, together with others filed a **caveat** in the said succession cause on **28th August 2001**, an indication that they were aware of the succession proceedings. That the family of the late **Mwangi Kimingi** have filed objection proceedings in High Court **Succession Cause No. 23 of 2012**. That Mwangi Kamingi was the sole administrator of the estate of the Late Kamingi Wariera and he died on **17th April 2009** before the Succession Case was concluded and determined. That upon his demise in 2009, the Respondent herein was substituted in his place in the Succession Cause and was subsequently appointed as an administrator of the estate of the late Kimingi Wariera.

Further that the applicant has alleged that the Late **Kamingi Wariera**, sold to her late husband a portion of one (1) acre out of parcel **No LOC 13/GITUGI/422**, but she has not disclosed the date of the said sale agreement. That the Applicant had alleged that the sale agreement was renegotiated in Paragraph 9 of the Supporting Affidavit, yet she has not disclosed what the initial amount was. That the Plaintiff failed to demonstrate when the full purchase price was cleared. That the late **Macharia Gutu** was put in occupation of the suit land by the late **Mwangi Kimingi** and therefore he was a licensee. That the late Macharia Gutu had filed an Affidavit of Protest in **Murang'a High Court Succession Cause 23 of 2012**, against the proposed Confirmation of Grant. That the High Court directed him and others to file their claims before the **ELC** within **60 days**, against the estate of the deceased. That the said Succession Cause was stayed pending the determination of the ELC Case. That on **6th December 2017**, he was sued in his capacity as administrator in Murang'a **Civil Case 358 of 2017**, by the Late **Nasser Kimani Njoroge** and others who were claiming portions of parcels sold to them by the late **Mwangi Kimingi** that formed the estate of the late **Wariera Kimingi**. That Civil Case 385 of 2017 was withdrawn with cost to him. That the late **Wariera Kimingi** was still the registered proprietor of the suit land, and the Applicant had nothing to claim from his estate. That the suit land had never been surveyed and/or subdivided.

That Respondent averred that his advocates have advised him that the contested Succession Cause and the subsequent civil cases have interfered with and interrupted the Applicants claim for adverse possession of the suit land. That the Applicant had no legitimate claim against him and the Applicants case should be dismissed with costs.

On **27th August 2021**, the Respondent filed a further Replying Affidavit sworn the Respondent, and deponed that the late **Mwangi Kimingi** died on **17th April, 2022**. That the Applicant's husband who passed away on **7th January, 2017** was not in adverse possession of the suit land as he occupied the same with **permission** of **Mwangi Kimingi** (deceased). That the period for adverse possession if any was discontinued by the Summons for Confirmation of Grant filed and the Affidavit of **Protest** filed by the Applicant's late husband on 21/8/2015.

The Applicant on **5th October 2021** filed a Further Affidavit dated **4th October 2021** and deponed that the Respondent being the administrator of the estates of both **Kimingi Wariera** and **Mwangi Kimingi** should be made to ratify their acts during their lifetime and cannot be legally allowed to dissociate himself from their acts. That the Replying Affidavits filed by the Respondent are a sham and are marred with misrepresentation of facts. That her family has been in **active possession** of the suit land for a period of over 12 years. That **Civil Suit 358 of 2017**, was filed within **60 days**, in line with the directions of the Succession Court, but she withdrew the said suit for being incurably defective as the Respondent herein had been sued in his personal capacity as opposed to being sued in his capacity as administrator of the estate of **Mwangi Kimingi**.

Further, that **Civil Suit 358 of 2017**, was also flawed for misjoinder. That the Respondent's response to the claim is a mere denial and should be struck out with costs.

The matter proceeded by way of viva voce evidence wherein the Applicant gave evidence for herself and the Respondent too gave evidence for himself and called no witness.

PLAINTIFF'S CASE

PW1 MARY WANGARI MACHARIA the administratrix of the estate of her late husband, Macharia Gutu Thungu, adopted adopt

her witness statement dated **22nd October 2021**, as her evidence in chief. She also adopted her list of documents dated **22nd October 2021**, and produced the documents therein as exhibits. She urged this Court to allow her claim.

On cross examination, she testified that her late husband was bought **one (1)** acre from Mwangi Kimingi and he finished paying the Purchase price. That she did not know when her husband finished paying the Purchase Price. That the suit land belonged **Kimingi Wairera**, who was now deceased. That the land was sold to her late husband by **Kimingi Wariera** and not **Mwangi Kimingi**. That the agreement was between **Mwangi Kimingi** and her late husband because **Kimingi Wariera** died. That they had sued **Onesmus Wanjau**, because they wanted a title deed for the suit land but he had refused to assist them. That a surveyor had not gone to the land as he refused to visit it. That the estate of Kimingi Wariera and the estate of **Mwangi Kimingi** have refused to aid the Applicant get title, but **Mwangi Kimingi** had no problem.

DEFENCE CASE

DW1 EDWIN ONESMUS WANJAU adopted his Replying Affidavit and Annexures thereto dated **15th April 2021**, as evidence in chief. In addition, he adopted his witness statement dated **9th November 2012**, as part of his evidence in chief. He urged the Court to dismiss the Originating summons.

On cross examination, he told the Court that his late father was called **Mwangi Kimingi Wairera**, and he was the administrator of his estate. That he was issued with letters of administration to that effect on **17th June, 2011**. That his father was the administrator of the estate of the late **Kimingi Wairera** and he became administrator of the said estate when his father died. That he had not refused to give the Applicant the land. That his father was the only son of **Kimingi Wairera**. And he sold the land without their knowledge and/or consent. That the late **Kimingi Wairera** did not sell the land to anyone. That Macharia was shown where to cultivate by **Kimingi Wairera**, but he did not buy the said land. That the late Kimingi Wairera had given a few people land who had now refused to move out.

On re-examination, he testified that his late father had filed a succession cause and the same had been protested by their mother. That the Plaintiff was still on the suit land and the **Succession Cause** was still pending in Court.

Thereafter, the parties filed and exchanged their written submissions which the Court has considered.

The Applicant through the **Law Firm of Nganga Ngigi & Co Advocates**, filed her written submissions dated **21st December 2021**, and submitted that the law is clear that it matters not how one came into occupation of the land, provided that you prove to have been in exclusive possession for **12 years** either after dispossessing the owner or by discontinuation of possession by the owner. She relied on the case of *Murunga Kabangi & 2 Others vs. Hannah Wairimu Gitau & another (2019) eKLR* where it was held;

“In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

She submitted further that the Plaintiff had demonstrated that her family had been in possession of the suit land for over **12 years**, after taking over from the owner of the land.

It was the Applicants' further submissions that **succession** does not affect **adverse possession** and therefore time for adverse possession was not discontinued when a Succession Cause was filed. Finally she submitted that the Respondent was estopped in law from denying the actions of the Late **Mwangi Kimingi** and **Kimingi Wairera**, which were performed during their lifetime.

The Respondent through the Law Firm of **S. K. Njuguna & Co. Advocates** filed his written submissions dated **27th January 2022** and submitted that the Applicant had not proved her case on a balance of probability because; she had failed to demonstrate the date of occupation in her pleadings, the occupation was consensual, there was no evidence of the actual extent of the portion of that land the Plaintiff Occupies, there was breach of sections **45 (1)** and **(2)** of the **Succession Act** and no suit was filed by the Applicant within the timelines granted by the High Court.

The Court has carefully read and considered the pleadings by the parties herein, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are;

I. Whether the Plaintiffs has met the threshold for grant of orders for adverse possession"

II. Whether the Plaintiff is entitled to one (1) Acre to be excised out of land parcel Number LOC 13/GITUGI/422"

III. Who should bear the cost of the suit"

From the pleadings on record and the documents produced, it is not in doubt that **Macharia Gutu Thungu**, is deceased and the Applicant has filed the instant suit in her capacity as an administrator to his estate. It is also not in doubt the **Kimingi Wariera** is deceased and **Mwangi Kimingi** was the sole administratrix of his estate. Further, it is not in doubt that the said **Mwangi Kimingi** died on **17th April 2009**, and subsequently the Respondent herein became the administrator in the estates of both **Kimingi Wariera** and **Mwangi Kimingi**.

It is on this background that the Respondent has been sued. It is evident that the suit land forms part of the estate of the late **Kimingi Wariera** as the succession matter had not been concluded when Mwangi Kimingi died in 2009.

It is trite that a claim for **adverse possession** is attached to land and not title. The Court having laid the basis for the instant suit, it will then proceed to delve into the issues outlined above.

1. Whether the Applicant has met the threshold for the grant of orders for adverse possession

It is the Applicant's case that she has been in **continuous uninterrupted occupation** and **possession** of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the Applicant.

Claims for adverse possession are set out in several provisions of the Limitation of Actions Act. Section 7 of the said Act places a bar on actions to recover land after **12 years** from the date on which the right accrued. Further Section 13 of the same Act provides that adverse possession as the exception to this limitation:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Finally, **Section 38 of the Act** provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

The principles to be considered in case of Adverse Possession were elaborated in the case of **Wambugu vs Njuguna [1983] KLR 172**, where the Court held that:

“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 are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“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 of the requisite number of years.”

This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the Act gives authority to the claimant to Appeal to Court for orders of adverse possession. The **Court in Malindi App No. 56 of 2014;- Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** held:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

Further, in the case **Mbira v. Gachuhi (2002) 1 EALR 137**: the court stated as follows;

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

Therefore, to determine whether the Applicant’s rights have accrued the Court will seek to answer the following

- i. How did the Applicant take possession of the suit property"**
- ii. When did she take possession and occupation of the suit property"**
- iii. What was the nature of her possession and occupation"**
- iv. How long has the Applicant been in possession"**

On the issue of possession, the Applicant contends that she and her husband gained entry into the suit land after being given vacant possession by the late Kimingi Wairera. She further contended that vide a sale agreement dated **24th February 1998**, between her husband and the Respondent’s father (now deceased) the initial agreement was renegotiated and a consideration of **Kshs. 35,000** /= paid.

From the evidence of the Applicant, this Court is unable to establish when the said **Kimingi Wairera** granted the Applicant and her husband (now deceased) possession. This Court will now move to examine the veracity of the alleged sale agreement dated **24th February 1998**.

It is trite that for a claim for adverse possession to suffice the claimant must demonstrate that the same was **non-permissive** and **non-consensual** and **without license**. (See **Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR** where the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or

non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

It is clear from the above analysis that a claim based on a sale agreement cannot issue, since the vendor’s consent and permission is obtained before one can gain ingress into the land.

However, every rule has an exceptions and the Court in *Nairobi App No. 73 of 1982 Public Trustee v Wanduru Ndegwa [1984] eKLR*, found that Limitation of Action begun running from the date of final payment. In the case *Hosea v Njiru & Others [1974] EA 526, Simpson J, following Bridges v Mees [1957] 2 All ER 577*, held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.

In the instant case, the Applicant contends that a sale agreement dated **24th February 1998** renegotiated an initial sale agreement ,between **Macharia Gutu Thungu** and **Wairera Kimingi**. The initial sale agreement was not presented in Court and its existence was questioned by the Respondent. This Court however perused the sale agreement dated **24th February 1998**, and notes that the same was executed by both parties. Further, the same is indicative of the intention of both parties to be bound by it. In the said agreement the Vendor was to file a succession cause and do all that was necessary to have the suit land transferred to the purchaser. The Court notes that a Succession Cause was indeed filed and the same is still pending at the **High Court in Murang’a**. Therefore, that the transfer is yet to be done and the estate of the late **Macharia Gutu Thungu** is yet to get title to the land they purchased.

Save for claiming that the Late **Kimingi Wairera** did not sell any land to the Applicant’s husband, the Respondent has not contested and/or controverted the existence of the sale agreement dated **24/2/1998**. As such this court has no reason to doubt the existence and validity of the said Sale Agreement. The said sale agreement is indicative of a consideration of **Kshs. 35,000/=** which the late **Mwangi Kimingi**, acknowledged receipt of. It is evident therefore that the Applicant late husband had already paid the entire **Purchase Price**, prior to executing the sale agreement on **24th February, 1998**. The Respondent has not led any evidence to the contrary and has not rebutted the Applicants evidence. Having stated that, the Late **Macharia Gutu Thungu**, became adverse to the land on **24th February, 1998** and time for adverse possession will be computed from that date.

After establishing the above, this Court will move on to investigate whether the Applicant has been in **open, exclusive and uninterrupted** possession for a period of at least 12 years from February 1998.

The Applicant has contended that she has been in possession of the suit land without any interruption for over 50 years. The Applicant did not produce any evidence to show that he has put up a home or planted a thing thereon. However, the Respondent on cross examination confirmed that the Applicant was in occupation of the land but contended that the said consent for occupation was given by Mwangi Kimingi (deceased) without the knowledge and/ or consent of the estate of **Kimingi Wairera**. That **Kimingi Wairera** being the registered owner of the suit land, did not sell the same to anyone during his lifetime.

This Court finds that the Applicant has been able to establish **open, quiet and uninterrupted possession** of the suit land in line with the principles of **adverse possession**. Time will however be computed from **24th February, 1998** when the sale agreement was executed and the purchase price paid. The result of the above is that the Applicant had been in possession of part of the suit land parcel **No. LOC 13/GITUGI/422** for a period of 23 years by the time the instant suit was filed.

The Respondent has contended that time in **adverse possession** was paused when the Applicant filed a protest in the Succession Cause and also when they filed **Civil Suit 358 of 2017**, and **Civil Suit 39 of 2018**. This Court notes that the land in question is registered in the name **Kimingi Wariera** (now deceased). It is not in dispute that the estate of the said **Kimingi Wariera** is yet to be distributed and a Succession Cause No. 23 of 2012, is still pending before the high court of Murang’a. Further it is not in doubt that **Mwangi Wariera** (deceased) was the sole Administrator of the estate of **Kimingi Wariera**, and when he died, the Respondent herein being the administrator of his estate was substituted to become administrator.

This Court appreciates that the suit land was sold to the late **Macharia Gutu Thungu**, pending conclusion of the succession matter. The Court has perused some of the pleadings filed in the **Succession Cause** which have been produced in evidence herein. The Court notes that the Applicant herein had filed a Protest, in the **Succession Cause** to protect her right to the suit land, which she allegedly acquired via a sale agreement. What begs an answer is whether a Succession Cause stops time from running in adverse possession.

It trite that the filing of a claim asserting rights over land stops time from running in adverse possession. A succession cause is initiated for the purpose of distributing the property of the deceased owner, to the persons entitled. Those entitled are determined on the basis of whether the person died testate of intestate.

Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. In the instant case, there was no evidence that the filing of the succession cause was for eviction of the Applicant from the suit property or was meant to assert rights over the land. As stated above, adverse possession accrues to land and not title and unless the Respondent took steps to evict the Applicant from the suit land, which he did not, the mere act of claiming ownership on title does not stop time from running. This Court concurs with the decision of the Court in the case of *Registered Trustee, Catholic Diocese of Murang'a v Micere Njau & 3 others [2022] eKLR* where it was held:

“It has been held again and again for purposes of limitation of Actions time does not stop to run on account of change of ownership of the land. A claim for adverse possession runs with the land irrespective of the change of ownership. A mere change of ownership does not affect a claim for adverse possession. The taking out of succession proceedings by the defendants in H.C Succession Cause No, 282/2006 (Embu) and the subsequent issuance of new titles to the resultant parcels was tantamount to nothing but an exercise in futility. The purported new titles were tiger papers which did not stop time from running for purposes of adverse possession.”

In relation to the two civil suits filed, it is not in doubt that **Civil Suit 39 of 2019** was consolidated with **Civil suit 358 of 2017**. It is also not in doubt that **Civil Suit 358 of 2017**, was withdrawn by the Plaintiff before it was decided on merit. Be that as it may, the Court notes that the two civil suits were filed by the Applicant herein against the Respondent herein to assert her rights acquired pursuant to the alleged sale agreements executed between them and the late Mwangi Kimingi. There is no evidence of assertion of rights by the Respondent herein in the said cases and this Court finds no reason to infer that the filing of the said civil cases stopped time from running.

The upshot of the foregoing is that the Applicant has on a balance probability established that he meets the threshold for the grant of orders for adverse possession.

2. Whether the Plaintiff is entitled to one (1) Acre to be excised out of land parcel Number LOC 13/GITUGI/422"

What flows from the pleadings is that the suit land herein is not surveyed. However, the agreement expressly states that the Applicant was entitled to one acre to be excised from land parcel **No. LOC 13/GITUGI/422**. The occupation of the Applicant on the suit property has been confirmed by the Respondent. From the attached extract of Green Card, it is evident that the land is registered under the name of **Kimingi Wairera**. What this Court appreciates is that the land can easily be identified.

For a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court in *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another [2015] eKLR* this Court observed:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs. Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”[Emphasis added]

The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of **Order 37 Rule 7 of the Civil Procedure Rules**, which requires that an application for **adverse possession** be accompanied with a title deed extract. The Applicant has attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of **Kimingi Wairera** measuring **8.0 acres** identified as **Fort Hall Loc. 13 Gitugi/ 422**. This Court has not enjoyed the benefit of being able to identify the exact occupation of the Applicant out of the entire parcel **Fort Hall Loc. 13 Gitugi/ 422**, but what is not in dispute is that the Applicant is occupying part of the land which is one acre. It would not be difficult for this Court to conclude that the Applicant and the Respondent are aware of the Applicant's confines and or borderlines the larger portion notwithstanding.

In totality, this Court finds and hold that the Applicant has on a balance of probability demonstrated that he is entitled to **one (1)**

acre piece of land to be excised from **Fort Hall Loc. 13 Gitugi/ 422.**

3.

Who should bear costs

It ordinarily costs normally follow the event and the successful party is always awarded costs. The Applicant herein is the successful party, and this Court has no reasons not to exercise its discretion in his favour.

Having now considered the available evidence in totality together with the vital written submissions, the Court finds and holds that the Applicant herein has proved on the required standard of balance of probabilities that she is entitled to ownership of the stated parcel of land by virtue of adverse possession.

For the above reasons, the Court enters judgment for the Applicant herein against the Respondent in terms of the claim contained in the Originating Summons dated **3rd March 2021**. The Court allows the Applicant's claim herein in terms of prayers No. **(a) (b)** and **(c)** and **(d)**.

Is so ordered

DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 24TH DAY OF FEBRUARY, 2022

L. GACHERU

JUDGE

Delivered online via Microsoft teams platform

In the presence of;

Ms Wainaina H/B for Nganga Ngigi for the Applicant/Plaintiff

Mr S K Njuguna for the Respondent/Defendant

Kuiyaki - Court Assistant

L. GACHERU

JUDGE



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