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Judge:	Anthony Kaniaru
Citation:	David Nthiga v John Njeru Mbugi [2022] eKLR
Advocates:	-
Case Summary:	-
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Advocates Against:	-
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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT EMBU**

**ORIGINATING SUMMONS NO. 19 OF 2018**

**DAVID NTHIGA.....PLAINTIFF**

**VERSUS**

**JOHN NJERU MBUGI (Sued as Administrator to the**

**Estate of MBUGI MATATA (Deceased).....RESPONDENT**

**JUDGEMENT**

**THE PLAINTIFFS CASE**

1. By an Originating Summons dated 20.6.2018 and filed on even date the plaintiff – **DAVID NTHIGA** – is claiming ownership of land parcel NO **EVUVORE/NGUTHI/1265** (“suit land” hereafter) as an adverse possessor. The suit land is registered in the name of **MBUGI MATATA** (Deceased)– of whom the Respondent – **FRANCIS NJIRU NJAGI** – is son. Francis is also the administrator of the estate of Mbugi Matata. The plaintiff averred that he had occupied the land in excess of twelve years from the 1940s and has therefore acquired ownership by adverse possession.

2. In the Supporting Affidavit that came with the application, the plaintiff deposed, inter alia, that he is a beneficiary of the first registration of the suit parcel of land and was issued with a title deed in 1980. That his title was thereafter cancelled by the government without any notice and the land registered in the name of Mbugi Matata in the year 1989. He says that he belongs to the Mukera clan whose titles were cancelled in favour of the Nditi clan and upon cancellation his clan filed a suit to claim back the land on behalf of its members under Embu ELC JR 49 of 2014.

3. The defendant’s father is said not to have interfered with his occupation and peaceful use of the land during his lifetime and even after his death, his family too did not interfere with such occupation and possession of the suit land. He further averred that in 2009 there was a dispute on the land between him and the defendant’s children but a warning was issued by the District Officer Siakago to the said children and the interference ceased. It is claimed that upon death of the respondent’s father he had received a letter asking him to vacate the land, which letter he responded to through his advocates.

4. He claims to have learnt later that the defendant had filed for succession under Succession Cause No. 145 of 2013 and that the grant was confirmed with the suit parcel of land being part of the parcel included therein for distribution among the defendant and his siblings. He states to have filed an application for revocation of the grant on grounds that the land belonged to him by virtue of his long occupancy on it and that the said application was pending before the court. He reiterated that his occupation has been continuous and uninterrupted.

5. He averred to have cultivated and utilized the land by planting seasonal crops such as maize, beans, millet, bananas, mangoes and trees on the land over the years. He claims to have been in control of the land as he had leased it out to farmers and had employed workers to cultivate crops for his family and himself.

6. The plaintiff has sought the following declarations to wit; that he has occupied the land in excess of 12 years; that he has acquired entitlement to the suit parcel of land; that he is entitled to the suit parcel by way of adverse possession; in the alternative and without prejudice, that the defendant’s father held the land in trust for him and further that the defendant executes a valid transfer in his favour, or in default the executive officer be empowered to execute the transfer instrument.

7. In the suit he raised ten questions for determination which are as follows;

- i) *Whether the Plaintiff was the registered owner of land parcel Evuvore/Nguthi/1265*
- ii) *Whether the Defendant's father Mbugi Matata who is now deceased was the registered proprietor of land parcel known as Evuvore/Nguthi/1265*
- iii) *Whether the plaintiff and his family have had open, exclusive, hostile and notorious occupation and possession of land parcel reference number Evuvore/Nguthi/1265 since 1965*
- iv) *Whether the plaintiff has proven such open, quiet enjoyment, exclusive, uninterrupted, notorious use and occupation and whether that has given rise to adverse possession*
- v) *Whether the inclusion of land parcel number Evuvore/Nguthi/1265 in Succession Cause number Embu High Court Succession Cause No. 145 of 2013 (Estate of Mbugi Matata Deceased) has any legal effect on the Plaintiff's claim for adverse possession*
- vi) *Whether Evuvore/Nguthi/1265 ought to have been included in the list of properties to be distributed to the heirs of the Estate of Mbugi Matata through Embu High Court Succession Cause No. 145 of 2013*
- vii) *Whether the plaintiff has utilized the soil of land parcel number Evuvore/Nguthi/1265 exclusively and for his benefit and that of his family including cultivating seasonal crops such as maize and millet; planting fruit trees such as mangoes, bananas and leasing it to subsistent farmers who pay him money on a seasonal basis.*
- viii) *Is the plaintiff's right as envisioned in section 28(h) of the Land Registration Act Cap 3 of 2012 vested the interest of land parcel number L.R. Evuvore/Nguthi/1265 to the plaintiff"*
- ix) *Whether the plaintiff's claim for adverse possession is rightfully before this Honourable court*
- x) *Whether the plaintiff is entitled to the costs of this suit.*

#### **RESPONSE BY THE DEFENDANT**

8. The defendant responded vide a Replying Affidavit dated 18.6.2019 and filed on 19.6.2019. He confirmed that the plaintiff's title to the land had been cancelled and the property registered in his father's name. According to him, the plaintiff had been notified to surrender the title to the land registrar for cancellation. He alleged that the plaintiff was aware of the disputes and claims filed by his clan over ownership of the suit property to wit; Nairobi HC 2509 of 1998 which was transferred to Embu to become HCC No. 165 of 2008. Then there was Nyeri Court of Appeal No. 110 of 2015 and JR 49 of 2014 which suits had all been dismissed with costs.

9. He averred that the plaintiff had never been in uninterrupted occupation or possession of the suit property by dint of the several disputes over the land and that no structures had been put up on the suit property as the defendant and his family had stopped the plaintiff from erecting any property. The defendant confirmed filing for succession for his father's estate and also preventing the plaintiff from farming on the land. He alleged to have taken possession of the suit land when the Mukera clan lost the appeal. It is his contention that litigation must come to an end. He further averred that the plaintiff be ordered to stop interfering with the quiet possession of the land and desist from filing criminal charges against him.

#### **HEARING**

10. On 17.11.2020 the parties by consent agreed to have the Originating Summons considered as a plaint, the Replying Affidavit as defence and to further proceed through viva voce evidence. The court started hearing the plaintiff's case on 19.1.2021. The plaintiff (PW1) said he was given the suit land by his father during adjudication and was subsequently issued with title to the land in 1980. That he had been on the land all along. He reiterated the contents of his Supporting Affidavit and testified that he had never

informed his clan to sue on his behalf. He stated that there was a criminal case related to the land. He reiterated his occupation and possession of the land and that he had cultivated on the land.

11. In cross examination, he confirmed that the land was his and that he had original title to the land. He denied being told by the land registrar to return the title deed and stated to have only known of this when he checked the green card in 2017. He said he was aware of a case relating to the suit parcel but also testified not to have been aware of the suits in Judicial Review 49/2014, HC Civil Case No. 165/2008, Nyeri Civil Appeal No. 110/2018 and that he was hearing of the cases for the first time. He confirmed knowing one Robert Njue Hezekiah who he said is his cousin but states not to have been aware that he had filed a suit on behalf of clan members including himself. He stated that the suit land referred to in the letter dated 20.8.2009 by the area local administration does not refer to the parcel of land he resides on. In re-examination he stated that he became aware of the land cases and succession case upon being informed by his advocate in the year 2017.

12. PW2 was Titus Ndwiga Mbugi. He was nephew to the plaintiff. He relied on his witness statement filed before the court. In his statement dated 24.6.2019, he stated to have learnt of the dispute in 2018 when he was attacked by the defendant and other persons while on the plaintiff's parcel of land. He stated that the land belongs to the plaintiff and that all activities on the land were initiated by him. He states that the plaintiff has planted and cultivated maize and beans on the parcel of land which produce he has been selling to buyers.

13. In cross examination he stated to be a member of the Mukera clan and that Robert Njue and the plaintiff are his uncles. He confirmed not residing on the suit parcel of land. In re-examination he testified that he has never heard of any dispute between the parties or their clans.

14. The court started taking defence evidence on 20.4.2021. The defendant (DW1) stated that the land belongs to his late father and that he is the legal administrator of the estate. He denied that the plaintiff has had uninterrupted possession of the land. He stated that the land belongs to his family and that they cultivate it by planting maize and beans. He further testified that the photographs produced by the plaintiff during the hearing were of his own crops and not the plaintiffs. In his testimony he averred that they have been using the land since they were young. According to him, the plaintiff started claiming the land in 2018 and not earlier than that year. He stated that there has been a dispute between the Nditi clan and Mukera clan and the Nditi clan won and the members of the Mukera clan had been informed to return titles for cancellation.

15. In cross examination, the defendant stated to be aware of a letter by his advocate dated 13.9.2017 telling the plaintiff to vacate the land. He confirmed there has never been a case between the plaintiff and his father over the land; that the land is not registered under the Nditi clan's name; and further that he had not produced any notice to show that the plaintiff was informed to return the title to the land office. He went ahead to state that in the letter by the chief land registrar, the plaintiff's name does not appear therein and neither is the land in dispute mentioned. He confirmed that the suit was initiated by the clan and the plaintiff was not involved and stated that the judgment by the Court of Appeal pointed out that the suit ought to have been brought by the people as opposed to the clans.

16. He argued that his father gave notice to the plaintiff to vacate. He also stated that he has no documents to demonstrate that the suit parcel of land was covered in the clan cases; and finally that he has no photographs to show that he is in possession and use of the land. In re-examination on the issue of possession, he argued that he was issued with a restraining order which in his view would not have been issued as had he not been in possession.

17. The defence second witness was Jamlick Njiru (DW2). In his testimony, he reiterated what DW1 said in his evidence in chief and re-examination. He however, states to have been the 8<sup>th</sup> defendant in the suits by his clan. He confirms that the Mukera clan instituted the suit on behalf of its members and lost in all the cases. It is his testimony that during demarcation in 1972, the land was wrongly given to the Mukera clan members.

## **SUBMISSIONS**

18. The parties filed submissions to the suit. The plaintiff filed his submissions on 21.12.2021. He gave a background of the suit and identified two issues for determination by the court. The first was whether the plaintiff was in possession of the land. This he argued in the affirmative, and stated that he had attached photographs to evidence his occupation, possession and cultivation of the land. He further submitted that the defendant had not challenged his production of the photographs to evidence the developments on the land.

19. The second issue was whether the plaintiff's possession of the land was adverse. The plaintiff relied on the case of **Kasuve Vs Mwaani Investments Limited & 4 Others 1 KLR 184**, which cited with approval the case of **Wilson Njoroge Kamau Vs Nganga Muceru Kamau [2020] eKLR** where the court of Appeal restated what a plaintiff in a claim for adverse possession has to prove. The plaintiff further relied on the provisions of Section 38 of the Limitation of Actions Act.

20. It was submitted that the plaintiff's had been in occupation from 1940s and that his occupation had been open and notorious and that he had done developments on the land. It is his submissions that the defendant's father had never dispossessed him of the suit land. It was argued that the defendant had failed to produce evidence to show that he objected to the plaintiff's occupation of the land before his father's demise.

21. On the issue of the suits by the Nditi and Mukera clan over the suit land, it was submitted that the defendant had failed to prove that either the plaintiff had requested the clan to represent him or that he had participated in the said suits. According to the plaintiff, he had never been in any suit with the defendant's father and he had also not participated or been part of the dispute between the clans. According to the plaintiff, the suits by the two clans did not stop time from running for purposes of the Limitation of Actions Act (Cap. 22) as the suit land was registered in the defendant's father's name and not the clan.

22. The plaintiff's assertion is that the defendant's father did not assert his right by instituting legal proceedings to claim the land or making entry into the suit parcel. In support of this, reliance was made on the case of **Karuntimi Raiji V M'makinya Mitunga [2013] eKLR and Ndutho Vs Itumo & 2 others Nairobi Civil Appeal No. 213 of 1999** where the court is said to have stated that mere filing of a suit for recovery of possession may not disrupt possession by the adverse possessor because disruption is a physical thing.

23. The plaintiff argues that his occupation of the land created an overriding objective, recognized under section 28 of the Land Registration Act. It was reiterated that neither the defendant nor his father had occupied the land and that the defendant's attempt in the year 2018 to forcefully gain entry was restrained by the court. Ultimately, the plaintiff submitted that he had proved a claim on adverse possession over the suit parcel of land and urged the court to allow his suit with costs.

24. The defendant on his part filed submissions on 2.2.2021. He reiterated the averments in his Replying Affidavit and evidence in chief. The court was invited to examine the history of the suit parcel of land as recorded on the green card. The defendant further identified four issues for determination before the court.

25. The first was whether the plaintiff has been in continuous, open uninterrupted and exclusive physical possession of the suit property for a period of 12 years. The defendant invited the court to examine the plaintiff's pleadings. It was argued that from the plaintiff's amended notice of motion dated 18.10.2018, the plaintiff had admitted being aware that his title had been canceled. The title is said to have been canceled via a chief registrar's letter which called the plaintiff and other 60 title holders to surrender their titles for cancellation and that the plaintiff had declined to surrender his and was misusing the powers of the court to circumvent the wheels of justice.

26. Still on the plaintiff's pleadings, the defendant alluded to a letter produced by the plaintiff dated 20.8.2009 written by the District officer, Evuvore area and addressed to some members of the defendant's family. In the letter, the plaintiff is said to have acknowledged a pending suit over ownership of the property and that the addressee were not to interfere with the land. It was therefore submitted that the plaintiff had never been in open, notorious, exclusive and continuous occupation of the suit land. The court was urged to resist the plaintiff's attempt to overturn the decision of previous courts. According to the defendant, the plaintiff had not satisfied the requisite period of 12 years in view of the protracted dispute.

27. The second issue was whether the plaintiff's intention was to dispossess the rightful registered owner. On what is to be demonstrated in a case of adverse possession, reliance was made on case of **Richard Wefwafwa Sangoi vs Ben Munyifwa Songoi, Court of Appeal NO. 110/2016 (2020 eKLR)**. It was submitted that the suit property was one of the subject matter in the three suits which were represented by the Mukera clan. According to the defendant, the plaintiff should be stopped from claiming he was not a party to the litigation since had the decisions been in his favor he would have executed the judgment.

28. The third issue is whether the suit land was held by the defendant's father in trust for the plaintiff. It was answered in the negative and it was submitted that no evidence had been tendered to prove such trust. Finally the court was urged to put an end to the dispute on the suit land.

## ANALYSIS TO DECISION

29. I have considered the pleadings, the evidence and the rival submissions by the parties. The issue for determination is whether the plaintiff has proved the requirements for adverse possession. The legal framework on Adverse possession is stipulated under Section 7 of the Limitations of Actions Act, Chapter 22 of the Laws of Kenya, which provides: “*An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.*”

30. In the case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** the Court of Appeal defined adverse possession as ; “*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, which 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*”.

31. Further, on what has to be established for a claim on adverse possession to suffice, the court of appeal in the case of **Francis GICHARU KARIRI V PETER NJOROGI MAIRU, (2005) eKLR** cited with approval the decision of the High Court in the case of **KIMANI RUCHINE V SWIFT RUTHERFORD & CO LTD, (1980) KLR** wherein it was stated “*The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration; See Wanyoike Gathire v Berverly, (1965) EA 514, 518, 519 per Miles, J.*”

32. It therefore follows that a person claiming adverse possession has to prove use and occupation of the land, with actual or constructive knowledge of the owner and such possession must not be broken or interrupted for a period of twelve years. The possession must also be open and notorious and the intention to defeat the registered owners title must be demonstrated.

33. I will first seek to establish whether the plaintiff has proven possession of the land with knowledge of the registered owner. The plaintiff herein has brought a claim of adverse possession on grounds that he has been in possession and occupation of the land from the 1940s. It is his claim that the land was gifted to him by his father who was from the Mukera clan. His late father was subsequently registered as the owner of the land. From the pleadings, it appears that the land was initially registered in the plaintiff’s father’s name but the title was canceled and issued in favor of Mbugi Matata, the defendant’s father, in the year 1998.

34. The plaintiff avers not to have known of the cancellation of title until the year 2017 when he checked the green card. He claims to have cultivated the land by planting seasonal crops and fruits which produce he sells to third parties. He further said that he has leased the farm to other farmers. In support of this, he produced photographs to prove such possession and also called Titus Ndwiga as his witness, who testified that the plaintiff has been utilizing the land from the time the said witness was born. In support of his claim of adverse possession, the plaintiff has referred to a letter by the defendant’s advocate dated 13.9.2017 in which he was given a notice to vacate from the suit parcel of land and it is his assertion that the letter proves that he was in possession of the land.

35. The defendant on his part denies the claim of adverse possession. According to him, the land belongs to his father and the family has been in possession of the land and has cultivated it. It is his claim that the photographs produced in court to prove ownership were indeed photographs of his cultivation on the land. From the evidence before the court, it is evident that the plaintiff late father lost ownership of the land in the year 1998 when the defendant’s father was subsequently registered as owner of the land. The plaintiff’s claim of adverse possession can only be asserted against the registered owner of the land from the time the plaintiff’s father’s title was canceled in the year 1998.

36. Both parties have placed evidence before this court, with each claiming possession of the land. I have looked at the evidence before the court. There are several letters which I consider material to prove the issue of possession on the land. The first is a letter dated 20/8/2009 written by the District Officer, Evuvore area and addressed to one Lucy Mumbi and Erasmus Ireri, who from the pleadings by the defendant, are wife and son of the registered owner of the land. The letter cautions the said persons from interfering with the person occupying or using the land pending determination of Embu case No. 2509 of 1998. The said letter is copied to the plaintiff and one Severine Nyaga, and it can only be inferred that the person in possession of the land is either of the two persons to whom the letter is copied.

37. There is a second letter dated 13.9.2017 written by the advocate on record for the defendant and addressed to the plaintiff which gives notice to the plaintiff to vacate the land and further remove all structures on it. The defendant has alluded to being in possession and occupation of the land but from the two letters and the photographs produced as evidence by the plaintiff, the court can deduce that the plaintiff was in actual possession of the land. Without any evidence to the contrary, the court finds that the issue of possession is proven by the plaintiff. It is clear that the defendant, upon acquiring title, did not gain possession or occupation of the land. Also by virtue of the said letters, knowledge can also be imputed on the part of the family of the registered owner as it is evident as in 2009 they were trying to interfere with such possession of the plaintiff on the land.

38. Apart from the issue of possession and knowledge of possession, the other element to be considered is whether the possession has been continuous and uninterrupted for a period of twelve years. On when time can be computed the court of Appeal in the case of **Karuntimi Raiji v M'makinya M 'itunga [2013] eKLR** relying on the case of **Francis Gitonga Macharia – v- Muiruri Waithaka Civil Appeal No. 110 of 1997** stated “*that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent*”. For purposes of this suit, time therefore began to run from the time the defendant’s father was registered on the land in the year 1998 as that is the year the plaintiff’s occupation of the land can be deemed to have become adverse.

39. There are two scenarios when the period of possession and occupation is considered to have been interrupted. Either when the owner makes entry on the land or when they take legal proceedings to assert their right on the land. The two scenarios were well articulated by the Court of Appeal in the case of **Mwangi Githu v Livingstone Ndeete [1980] eKLR** where it was stated as follows “*Time ceases to run under the Limitation of Actions Act either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see Cheshire’s Modern Law of Real Property, 11th edition at p 894.*

40. From my earlier determination, I have already taken the position that neither the defendant nor his family has gained entry on the land and that the land has been in possession of the plaintiff. On whether the defendant has asserted his right by way of legal proceedings, the defendant has averred that there have been several cases on the suit parcel of land, which cases have interrupted the time computation for purposes of adverse possession.

41. The defendant has given a history of the dispute over the suit parcel of land. He states that the land was wrongfully given to the Mukera clan during adjudication; that as a result of the adjudication the land was registered in the name of the plaintiff father in the year 1979. The Nditu clan then filed an appeal before the minister and during the pendency of the appeal a restriction was placed on the land pending determination of the appeal, which appeal was determined in favour of the Nditu clan and the suit land registered in the name of the defendant’s father. Upon such cancellation, the Mukera clan is said to have filed a suit challenging the cancellation of title for members of its clan in Nairobi HC 2509 of 1998 which was transferred to Embu and became HCC No. 165 of 2008. Then there was Nyeri Court of Appeal No. 110 of 2015 and JR 49 of 2014 and that all these suits were dismissed with costs.

42. The plaintiff has denied knowledge of these suits. He avers that he has never informed his clan to represent him in any matter and only became aware of the suits in the year 2017 when the defendant through his advocate wrote a letter requesting him to vacate the land. It is contended that the parcels of land that were subject of the above stated suits were not stated and the Court of Appeal in its judgments had faulted the suit for being brought by the clans as opposed to individuals who were registered as owners of the land and whose titles were subsequently canceled.

43. The defendant has argued that the plaintiff was aware of the suits by virtue of a letter dated 20.8.2009 which the plaintiff had relied on in his evidence. It is further argued that the plaintiff’s cousin was the one who represented the Mukera clan in the suit. I have looked at the said letter which I have earlier referred to in this judgment. The letter is written by the District Officer Evuvore area and addressed to Lucy Mumbi and Erasmus Ireri. It cautions the said persons from interfering with the person occupying or using the land parcels Evuvore/Nguthi/1265 and 2294 pending determination of Embu case No. 2509 of 1998. As earlier stated, the plaintiff was copied the said letter and, if anything, the plaintiff is the one who filed the letter in support of his case. The case alluded to in the said letter is one of the cases said to have been filed by the Mukera clan.

44. Despite the denial of knowledge by the plaintiff, it appears very clear that he was much aware of the said suits. This is especially so concerning the case alluded to in the letter as at the year 2009, and not 2017 as he alleged. From the contents of the letter, this court can only impute knowledge of the said case on the part of the plaintiff. Further, the letter as written sought to protect the plaintiff’s interest pending determination of the suit. This means that the plaintiff was represented by the Mukera clan in

the said suit and even the subsequent appeal. It also shows that the plaintiff was well aware of this.

45. Apart from the letter, my attention is also drawn to the pleadings by the plaintiff. In paragraph 4 of his Supporting Affidavit, the plaintiff states *“That upon cancellation of my title and many others titles for members of my clan (Mukera clan) and subsequent registration of the said titles in the names of the defendant’s father and members of his clan (Nditi clan). My clan filed suit to claim back our land and one such suit is Embu ELC Judicial review No. 49 of 2014 filed by Mukera clan representatives against the Nditi clan representatives”*. I believe that the issue of knowledge of the plaintiff of the suits filed and his representation by the clan in the suits is now clear. The plaintiff has not been straightforward and forthcoming on this issue of knowledge of the suits. He is obviously being less than honest. He was aware of the case filed by the clan and he cannot be separated from the cases. In my considered view, these cases stopped the running of time. My considered view is that neither the plaintiff nor the defendant can convincingly claim that the clans to which they belong did not represent their interests in the cases.

46. As earlier stated, time for purposes of adverse possession could only start being computed from the year 1998. However, the suit filed to claim an interest in the land by the plaintiff’s clan was filed in the same year 1998 and determined in 2011. An appeal against the decision was preferred in 2011 and determined in October 2013 while the Judicial Review application was filed in 2014 and determined in 2019. Time for purposes of this claim could only begin to run from the year 2019, one year after this suit was filed. The occupation by the plaintiff was therefore not continuous as time did not run because of the suits by his clan claiming ownership of the land. As already pointed out of out, the plaintiff was aware of the suits. The suits were meant to benefit him and other members of his clan. When the suits failed, the plaintiff decided to disown the clan. Through craft of interpretation and legal ingenuity, he wants to be seen as an individual who is entitled to the land by adverse possession.

47. The plaintiff has in the alternative sought for the court to establish that the defendant’s father held the suit parcel of land in trust for him. The Court of Appeal in the case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** while making reference to the issue of trust in adverse possession stated as follows *“Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.*

48. A case of trust in a claim for adverse possession therefore arises when the person is indeed an adverse possessor by virtue of being in open, continuous and uninterrupted possession for a period of twelve years. Then if such land becomes registered, the title holder is deemed to be holding the title in trust for the adverse possessor. The plaintiff herein is not an adverse possessor and his claim on trust also fails.

49. The claim by the plaintiff fails in its entirety and the suit is therefore dismissed. Each side should bear its own costs.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 16TH DAY OF MARCH, 2022.**

In the presence of:

Plaintiff – present

Defendant – absent

Miss Ndorongo for the defendant

Ms. Mutegi absent for the plaintiff

Mureithi for Ms. Mutegi for plaintiff

Court assistant – Leadys

Interpretation English/Kiswahili

Right of Appeal 30 days.

**A.K. KANIARU**

**JUDGE**

**16.03.2022**

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