



**Nyawara & 2 others v Abor & 3 others (Environment & Land Case 547 & 507 of 2013 (Consolidated)) [2023] KEELC 16454 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16454 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 547 & 507 OF 2013 (CONSOLIDATED)  
SM KIBUNJA, J  
MARCH 22, 2023**

**BETWEEN**

**DISMUS MICHAEL OMONDI NYAWARA ..... 1<sup>ST</sup> PLAINTIFF**

**ERICK ONYANGO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DICKSON OTIENDE ABOR ..... DEFENDANT**

**AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 507 OF 2013**

**BETWEEN**

**DICKSON OTIENDE ABOR ..... APPLICANT**

**AND**

**DISMUS MICHAEL OMONDI NYAWARA ..... 1<sup>ST</sup> RESPONDENT**

**ERICK ONYANGO ..... 2<sup>ND</sup> RESPONDENT**

**PHILEMON KIPTOO KOECH ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Dickson Otiende Abor, the Applicant, filed the originating summons dated the 8<sup>th</sup> November 2013 in Eldoret ELC No. 507 of 2013 against Dismus Michael Omondi Nyawara, Erick Onyango and Philemon Kiptoo Koech, the 1<sup>st</sup> to 3<sup>rd</sup> respondents respectively, claiming to be entitled to



UASIN GISHU/KIMUMU/5.5/2151 and USAIN GISHU/KIMUMU/5.5/2152, the suit parcels, by adverse possession. He sought determination of the following questions;

- a. Whether or not the Applicant has been in occupation, possession and use of the suit properties for a period of over 12 years in fact 28 years and has acquired title and ownership of the said parcels of land by virtue of adverse possession.
- b. Whether or not a declaration and finding that upon expiry of twelve (12) years from 1986 the title of the 1<sup>st</sup> Respondent to suit parcels became extinguished by law and that the 1<sup>st</sup> Respondent only held the title in lands on trust for the Applicant.
- c. Whether or not a declaration should issue that the transfer and or transmission of titles to suit parcels to the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondent respectively were invalid and unlawful and registration should be cancelled as the 1<sup>st</sup> Respondent had no title to pass to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent, the same having been extinguished by operation of law.
- d. Whether or not a declaration should issue that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent Titles to the said parcels of land be cancelled for the reasons aforesaid and an order thereof be issued transferring titles thereof to the Applicant and vesting the same in him.
- e. We should pay costs of this application.

The originating summons is based on the eight (8) grounds on its face, and supported by the affidavit sworn by Dickson Otiende Abor, the applicant, on the 8<sup>th</sup> November 2013, in which he inter alia deposed that on or about June 1986 he bought land parcel plot No. 47 Kimumu settlement scheme, measuring one acre from the 1<sup>st</sup> Respondent, and took immediate possession. The land was at the time registered in the name of the 1<sup>st</sup> Respondent. The said parcel was later subdivided into different portions and he got ownership of the two suit parcels, each measuring 0.2 Hectares. However due to economic factors and ill health of his late wife he was unable to apply and obtain consent from the Land Control Board as prescribed by law, and effect transfer of the parcels to his name. That he and his family have occupied the suit parcels uninterrupted from 1986 until sometime sometimes in June 2013 when the 1<sup>st</sup> and 2<sup>nd</sup> Respondents forcefully fenced the suit parcels. Later the 1<sup>st</sup> Respondent sold and transferred suit parcels to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents respectively. He reported the same to the police in Kapsoya station under OB 10/29/2013. He averred that the transfer of the suit parcels was invalid and unlawful. That as the sale agreement became null and void due to absence of the Land Control Board consent, and his uninterrupted occupation for over 12 years, then he has acquired title to the suit parcels under adverse possession. That the Land Registrar should be ordered to delete the names of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents from the registers of the suit parcels and register his name in place thereon.

2. Dismus Michael Omondi Nyawar and Erick Onyango, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively, filed Eldoret ELC No. 547 of 2013 against Dickson Otiende Abor, the defendant, through the plaint dated the 17<sup>th</sup> December 2013. They among others averred that the Defendant had entered into the suit parcels over a gentleman's sale agreement in 1986, but the family of the 1<sup>st</sup> plaintiff failed to approve it. The 1<sup>st</sup> plaintiff informed the Defendant about the decision of his family but he refused to vacate. At all times when the Defendant was in occupation he had failed to pay rates to the authorities. The 1<sup>st</sup>



plaintiff then transferred UASIN/KIMUMU/2152 to the 2<sup>nd</sup> Plaintiff, his son. The plaintiffs prayed for the following prayers;

- a. Orders that the Defendant be evicted from the Plaintiffs' suit parcels forthwith.
  - b. Orders that the Defendant do pay the plaintiffs mesne profits for the entire period he has been in forceful and illegal occupation of their land parcels since 1986 to the date of eviction from the property as well as interest thereon at commercial rates.
  - c. Costs of the suit.
  - d. Such further and /or other orders as this honorable court shall deem fit to grant.
3. The defendant opposed the plaintiffs claim through his statement of defence dated the 20<sup>th</sup> January 2014 averring that he had bought one acre of land out of plot number 47 Kimumu Settlement Scheme from the 1<sup>st</sup> plaintiff in 1986. That the land was later subdivided into several portions and his one acre became Uasin Gishu/5.5/2151 and 2152 each measuring 0.2 hectares. He averred that he had been in occupation of the suit parcels since 1986 and by virtue of adverse possession the titles of the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs over the said parcels had been extinguished. That he had acquired title to the suit parcels and the plaintiffs' suit ought to be dismissed with costs.
4. The Court on 10<sup>th</sup> February 2014 ordered that Eldoret ELC No. 507 of 2013 be consolidated with Eldoret ELC No. 547 of 2013, and that the latter be the lead file. The court also ordered that the originating summons in filed in ELC No. 507 of 2013 be taken as the Defendant's counter claim to the plaintiffs' claim in ELC No. 547 of 2013.
5. William Sang testified as PW1 as the first witness for the plaintiffs. He testified that he was Chief of Chepkoleil from 1992 and was aware of the dispute between the parties. He disclosed that he was aware that the 1<sup>st</sup> Plaintiff had been chased away with a panga by the Defendant on many occasions from suit parcels, and that in 2013 the Defendant reported that to him that his land had been fenced by the Respondent. He called all parties to a meeting but Defendant failed to attend. On cross examination he testified that he never recorded the threats that the 1<sup>st</sup> plaintiff had complained of. He added that he had called the Defendant to settle the land dispute over three occasions but he never appeared.
6. Dismus Michael Omondi Nyawar, the 1<sup>st</sup> plaintiff, testified as PW2. He testified that he had bought land at Kimumu Settlement Scheme, Uasin Gishu County, from the Settlement Fund Trustees in 1986. He soon after allowed the Defendant to enter into the suit parcels under promise that he would purchase the land, but the intended sale transaction was never completed, as he only paid him KSH 7,000=/. That in 1988 he obtained title of his property and subdivided it into eleven portions giving birth to the suit parcels. That he attempted to evict the Defendant on several occasions but to no avail. He even reported the defendant severally to the office of the Chief in Chepkoleil, and Mr. Willaim Sang, PW1, warnings to the defendant bore no fruits. In 2010 he allowed the defendant to bury his wife on the suit parcels out of humanitarian grounds. In 2013 he transferred parcel USAIN GISHU/KIMUMU/2152 to the 2<sup>nd</sup> Plaintiff as part of his inheritance and UASIN GISHU/KIMUMU/2151 to Philemon Kiptoo Koech, the 3<sup>rd</sup> respondent, vide the sale agreement dated 28<sup>th</sup> June 2013. The said Kiptoo began fencing his land parcel but the Defendant rushed to court and sought injunctive orders. He later took the barbed wire that had been used to fence the plot and never returned it. He said that he had been paying land rates since 1987. He produced copy of titles and mutation form and produced



- them as exhibits. On cross examination he testified that he never took Defendant to the Land Control Board, and that he never sued defendant for the whole period of 24 years he remained in possession, as he thought that he would pay the remaining purchase price. He added that he gave his son land 2152 and sold UASIN GISHU/KIMUMU/2151 to Philemon Kiptoo Koech vide a sale agreement.
7. Beatrice Atieno Omondi, wife to the 1<sup>st</sup> Plaintiff and mother to the 2<sup>nd</sup> Plaintiff testified as PW3. She testified that the 1<sup>st</sup> Plaintiff had a drinking problem, which the Defendant took advantage of, and made him sign the alleged sale agreement, and subsequently allowed him into the suit parcels in or about the year 1987. That in 2010 she allowed the Defendant to bury his wife on the suit parcel, upon paying Ksh. 10,000 and a promise to pay a further Ksh.18,000 in the presence of the village elder, Mr. Joseph Mulimi. He also promised to negotiate and pay for portion of the land where he had built his house and buried his wife. On cross examination she testified that the 1<sup>st</sup> Plaintiff had told her that the Defendant had refused to pay the balance of the purchase price for the suit properties though she was not present when the agreement was being made.
  8. Joseph Mulimi Jona, testified as PW4 that he has been a village elder since 1992, and that there have been issues regarding occupation of the suit parcels, as the defendant never paid for the land as agreed. He had on many occasions reported disputes between the defendant and the 1<sup>st</sup> Plaintiff to the area Chief. In October 2010 the Defendant lost his wife and he helped him to convince the 1<sup>st</sup> Plaintiff to allow him to bury his wife on the suit land. He confirmed that the defendant paid the 1<sup>st</sup> plaintiff Ksh. 10,000 and promised to pay a further Ksh. 18,000 for the portion of the land where his wife was buried, and where he had built his house. He added that he was aware that the defendant had failed to honor that promise. On cross examination, he testified that the 1<sup>st</sup> Plaintiff did not tell him that they had a written sale agreement with the Defendant, and that the latter had entered on the land in 1986. He added that he had been unable to reconcile the two parties. He added that when the Defendant's wife died, the defendant paid Ksh.10,000/- for survey fees under an agreement with the 1<sup>st</sup> Plaintiff's wife and son, and had agreed to pay Ksh 18,000 later. That he could recall when the Defendant's house was being constructed and added that he was a violent man and that he had chased the 1<sup>st</sup> Plaintiff with a panga.
  9. The plaintiffs then closed their case and the first defence witness was heard. The record shows that the plaintiffs' case was later reopened and Erick Onyango, the 2<sup>nd</sup> Plaintiff, testified on the 19<sup>th</sup> October 2018. The proceedings of that day show the said Erick was 'recalled' and testified as PW2. However, the proceedings of 5<sup>th</sup> March 2015 show the witness who testified as PW2 was Dismus Omondi Nyawara, the 1<sup>st</sup> plaintiff, before he was stood down as he did not have some documents. I will therefore direct that Erick Onyango be taken as PW5 and not PW2, so as to maintain the sequence of the plaintiffs' witnesses.
  10. Alfred Kingoini Nyairo, an advocate, was the first witness for the defence and testified as DW1. He testified that in June 1986 he prepared an agreement between the 1<sup>st</sup> Plaintiff and Defendant for sale of suit parcels at a purchase price of Ksh. 15,000. That in the agreement the 1<sup>st</sup> plaintiff acknowledged that Ksh.7,000 was paid to him during execution, the balance of Ksh. 8,000 was to be paid before 15<sup>th</sup> July 1986 and possession was to be taken upon payment of full price. He told the court that he was not aware that Defendant had taken possession immediately. He produced the sale agreement that he had prepared for the two as exhibit. He further testified that on the 26<sup>th</sup> July 2000, he wrote to the Defendant notifying him that the subdivision had been completed, survey approved, new parcels issued and he was expected to pay Kshs. 28,294 being the survey costs to Dismus Nyawara, the 1<sup>st</sup> plaintiff. He added that on the 9<sup>th</sup> December 2019 he was informed that the police were investigating issues relating to the transaction between the 1<sup>st</sup> plaintiff and defendant. On cross examination he



- testified that he prepared the agreement, witnessed the payment of Kshs.7000 and execution of the agreement by the parties, though the date was not indicated in the agreement by mistake.
11. Elijah Maswai Cheruiyot, Senior Assistant Chief, Kimumu Sub location, since 1996 testified as DW2. He told the court that he had known the defendant since 1986. That on the 22<sup>nd</sup> October 2010 he had issued him with a burial permit and that there was no dispute on the suit parcel during that period. He added that he had always known that one part of land parcel Uasin Gishu /KImumu/47 belonged to the Defendant, who had a permanent house there. On cross examination he testified that he had not brought anything to prove that he was chief, and that he was not aware of any dispute between the parties.
  12. Dickcon Otiende Abor, the defendant, testified as DW3 and adopted his statements dated the 12<sup>th</sup> November 2014 and 8<sup>th</sup> November 2013 filed in ELC No. 547 of 2013, and the supporting affidavit filed in ELC No. 507 of 2013 as his evidence in chief. He testified that he had also sued Philemon Kiptoo Koech, the 3<sup>rd</sup> respondent, but as he later vacated from the suit land he had no further claim against him. He testified that he bought the suit lands from the 1<sup>st</sup> plaintiff in 1986 pursuant to an agreement made before DW1. That he paid the 1<sup>st</sup> plaintiff Ksh. 7,000 out of the purchase price of Ksh. 15,000. He took possession and constructed the house that appeared in the photographs he produced. That the 1<sup>st</sup> plaintiff has not applied for the Land Control Board consent though he has been asking him to do so. He testified that he had been in possession of the suit parcels for over 36 years, and by the time he filed the suit in 2013, he had then been in possession for 27 years. That he filed the suit after 3<sup>rd</sup> respondent came onto the land reportedly after 1<sup>st</sup> plaintiff sold it to him. That he first reported to the police who then advised that he file a suit. He testified that when his wife Zipporah died, he buried her on that land and paid PW3 Ksh. 10,000 that she had asked for as part of the survey fees. That there was a time he learnt the 1<sup>st</sup> plaintiff was offering third parties to buy the suit land and he filed cautions. That the 1<sup>st</sup> plaintiff had written a letter to him asking for the balance of Ksh. 28,000 to cater for surveying fees which he had not agreed to pay. He therefore asked for the plaintiffs' titles to the suit land to be cancelled, plaintiffs be evicted and the lands be returned to him. He also prayed for costs of the suit. In cross examination, DW3 testified that he had paid the balance of the purchase price to 1<sup>st</sup> plaintiff later. That he started building his house in 1987, started using it in 1991 and is still there to the date of his testimony. That he had not known of any dispute over the suit land until after the 3<sup>rd</sup> respondent came to the land claiming he had bought it from 1<sup>st</sup> plaintiff. That it was during the subdivision by the surveyor brought by 1<sup>st</sup> plaintiff that he asked his one acre be in two parcels. That he had not dealt with the 2<sup>nd</sup> plaintiff but learnt he had been registered with one of the suit parcels. He denied refusing to pay the balance of the purchase price or chasing the plaintiffs' family and representatives whenever they went for the payment. That the Ksh. 10,000 he paid PW3 was part of the Ksh. 28,000 survey fees.
  13. The next witness was Daniel Nderitu Waiganjo who testified as DW4. He adopted his statement of 8<sup>th</sup> November 2013. He stated that he is a neighbor to the plaintiffs and the defendant from the 1980's and had not heard of any disputes between them over the suit lands.
  14. John Otiende and David Ochieng, sons to the defendant, testified as DW5 and DW6 respectively, confirming that they reside on the suit lands bought by their father from the 1<sup>st</sup> plaintiff.
  15. The learned counsel for the Defendant filed submissions dated the 24<sup>th</sup> March 2022 on the 25<sup>th</sup> March 2022, and relied on the case of Wilson Njoroge Kamau versus Nganga Muceru Kamau Muranga ELC No. 259 of 2017 (OS) where a part of land had been in occupation of land for 12 years and was granted title on account of adverse possession. he also cited the case of Celina Muthoni Kithinji versus Safiya Binti Swaleh & 8 others Mombasa ELC NO. 248 of 2016. The court has given due considerations to the said submissions.



16. The following are the core issues for the determination by the court;
- a. Who is the legitimate owner of the suit parcels?
  - b. What reliefs are owed to the legitimate owner of the suit parcels if any?
  - c. Who bears the costs of the suits?
17. The court has carefully considered the pleadings filed, the parties' evidence, submissions by counsel and come to the following conclusions;
- a. The Defendant claims the suit parcels under adverse possession. The doctrine of Adverse Possession is one of the ways an individual can acquire land in Kenya. It is trite law that a claim for adverse possession is attached to land and not title. This was the position articulated in *Maweu VS Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru VS Maina Kabuchwa* [2016] eKLR where the Court held  
  
“Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”.

In the case of Nairobi Civ No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] Eklr, the Court held; -

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

The principle of adverse possession was more elaborately set out 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.”

  - b. The principle of adverse possession is well set out under *Limitation of Actions Act* chapter 22 of Laws of Kenya. 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 is 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.”

- c. This right to be in adverse possession of 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 apply 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 that;

‘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 of *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 Defendant's rights accrued, the Court will seek to answer the questions whether his possession was adverse to the registered owner's title, and if so, from when?

- d. It is an undisputed fact that the Defendant occupied the suit parcels in 1986 with permission of the 1<sup>st</sup> plaintiff. He was to pay Ksh. 15,000 as purchase price, but only gave the 1<sup>st</sup> Plaintiff Ksh. 7000. The advocate who handled the transaction between the two parties, DW1, testified in regards of preparing the undated sale agreement which he produced as exhibit. It is the Defendant's case that he had been in occupation of the suit parcels for a period of 28 years by the time the suit was filed. He had enjoyed quiet possession of the suit parcels all the years, but a dispute over the suit parcels first ensued in 2010 when he was burying his late wife. The Plaintiffs have provided evidence through PW1 to PW4 that there had been a long standing dispute between the 1<sup>st</sup> Plaintiff and Defendant over his illegal occupation of the suit parcels. They detailed several incidents that the 1<sup>st</sup> Plaintiff had been chased by the Defendant. That evidence was recounted by the defendant and his witnesses who included DW2, Chief of the area, and DW3, a neighbor of both the defendant and the plaintiffs. To the defendant, he has had quiet enjoyment of the suit lands until about 2013 when the 3<sup>rd</sup> respondent came onto parcel 2151 claiming he had bought it from 1<sup>st</sup> plaintiff under the sale agreement dated 28<sup>th</sup> June 2013 that was produced as an exhibit.
- e. That even though the sale agreement between the 1<sup>st</sup> plaintiff and defendant that has not been disputed is undated, both sides agree it was made in 1986. The advocate who drafted it confirmed that fact when he testified as DW1. Even if the court was to take it that the agreement was made on the last day of that year, that is 31<sup>st</sup> December 1986, it became void after six months' period as no consent of the Land Control Board was obtained, by the 31<sup>st</sup> June 1987. The defendant's occupation of the suit lands from 1<sup>st</sup> July 1987 became adverse to the title of the registered owner, the 1<sup>st</sup> plaintiff. That by the end of July 1999, a period of twelve (12) years had lapsed with the defendant in possession, and without the 1<sup>st</sup> plaintiff exercising his right to recover the land. The 1<sup>st</sup> plaintiff's title to the suit lands became extinguished at the expiry of twelve years of the defendant's continuous and uninterrupted adverse occupation from July 1987. The 1<sup>st</sup> plaintiff thereafter continued holding the titles in trust for the defendant.
- f. That the defendant continued in possession of the suit land, and during the subdivision of the parent title number 47, his one acre was determined at his request in two parcels numbers 2151 and 2152. The Defendant was obviously to meet the Surveyor's fees but he did not do so immediately. It appears the 1<sup>st</sup> plaintiff paid all the Surveyor's fees. Though they were registered under the name of the 1<sup>st</sup> plaintiff, he held the titles as trustee for the defendant. That fact appears to have been accepted by the 1<sup>st</sup> plaintiff and his family because when the defendant's wife died in 2010, all they wanted was payment of the surveys fees amounting to Ksh. 28,000. The defendant paid Ksh. 10,000 to PW3 and he still has a balance of Ksh. 18,000 to clear.
- g. The court is aware about the provision of Section 26 (1) of the *Land Registration Act* No. 3 of 2012 that provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and



conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

And even though the plaintiffs have presented to the court copies of the documents to show they are the ones registered with the suit parcels, the above findings of the court show the 1<sup>st</sup> plaintiff held the titles in trust for the defendant, the adverse possessor, since July 1999. It follows therefore that the 1<sup>st</sup> plaintiff did not have capacity, indeed had no title to pass to the 2<sup>nd</sup> plaintiff when he transferred parcel 2152 to him on the 28<sup>th</sup> June 2013, or to sell parcel 2151 to the 3<sup>rd</sup> respondent.

- h. That from the evidence available the plaintiffs have failed to prove their case against the defendant to the standard required by the law. The defendant on the other hand has established his claim under adverse possession against the Plaintiffs.
  - i. It is trite that costs largely follow the event, unless where for good cause the court directs differently as can be seen from the provisions of section 27 (1) of the *Civil Procedure Act* chapter 21 of Laws of Kenya. However, in view of the history between the parties, and with the hope that they will work towards having a cordial relationship as neighbours, the court is of the view that each party bears his own costs.
18. That flowing from the above determinations, the court finds and orders as follows;
- a. That the plaintiffs’ claim as set out in the plaint filed in ELC No. 547 of 2013 is hereby dismissed.
  - b. That the defendant’s counterclaim as contained in the originating summons filed in ELC No. 507 of 2013 is hereby allowed as prayed.
  - c. That each party to bear his own costs in both ELC NO. 507 of 2013 and 547 of 2013.
  - d. That so as to avoid the need for the parties to litigate over the balance of the surveys fees of Ksh. 18,000 [eighteen thousand only], owed to the 1<sup>st</sup> plaintiff that the defendant did not dispute when he paid the deposit of Ksh 10,000 to PW3, the court on its own motion orders that the defendant do pay that amount to the 1<sup>st</sup> plaintiff with interest at court’s rates from 2013, from the date of filing of the suits, till payment in full.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 22<sup>nd</sup> DAY OF MARCH 2023.**

**S. M. Kibunja, J.**

In The Presence Of:

Plaintiffs : Absent

Defendant : Absent

Counsel : Mr. Magut for Plaintiffs. M/s Tuwei for Defendants.

Wilson – Court Assistant.

