



**Ndeto v Mutiso & another (Environment and Land Case 385 of 2012 & 88 of 2014
(Consolidated)) [2023] KEELC 17621 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17621 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 385 OF 2012 & 88 OF 2014 (CONSOLIDATED)**

A NYUKURI, J

MAY 17, 2023

BETWEEN

COSMUS MUTUNGA NDETO PLAINTIFF

AND

ROBERT KIAMUKO MUTISO 1ST DEFENDANT

TERESIA MAWEU 2ND DEFENDANT

JUDGMENT

Introduction

1. On 8th October 2012, Cosmus Mutunga Ndeto filed an Originating Summons dated even date vide Machakos ELC No. 385 of 2012 against Robert Kiamuko Mutiso and Teresia Maweu claiming to be entitled to Parcel No. Kalama/Nziuni/334 registered in the name of Teresia Maweu, (suit property), by the doctrine of Adverse Possession. About two years thereafter, Cosmus Mutunga Ndeto (hereinafter referred to as the Plaintiff or Cosmus) together with Robert Kiamuko Mutiso (hereinafter referred to as Robert) filed a plaint dated 22nd September 2014 against Teresia Maweu (hereinafter referred to as the Defendant) seeking cancellation of the above title on grounds that the same was fraudulently obtained.
2. Both suits were opposed by the Defendant. She filed a replying affidavit opposing the Originating Summons as well as a defence and counterclaim in response to the plaint. In the counterclaim, she sought for both eviction and injunction against the Plaintiff. On 4th October 2017, Cosmus withdrew the Originating Summons as against Robert, who had been named as the 1st Defendant. On 17th March 2015, the two suits were consolidated. No reply to defence or defence to counterclaim was filed by Cosmus and Robert.



Background

3. Vide an Originating Summons dated 8th October 2012, the Plaintiff sought the following orders against the Defendant;
 - a. That Applicant be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 1950's all that parcel of land comprised in Title L.R. No. Kalama/Nziuni/334 situated in Kalama.
 - b. That the said Applicant be registered as the sole proprietor of the said parcel of land namely L.R. No. Kalama/Nziuni/334 in place of the above named 2nd Respondent in whose favour the land is currently registered.
 - c. Costs of this application be provided for.
4. The summons was supported by an affidavit sworn on 8th October 2012 by Cosmus the Plaintiff in this case. The Plaintiff deponed that Robert vacated Parcel known as L.R. No. Kalama/Nziuni/334 (the suit property) and that he had been living there without consent and interruption since the 1950's, which is a period of over 60 years.
5. He further stated that Robert was registered as the owner of the suit property from 3rd March 2003 until 27th March 2008, when the said land was transferred to the Defendant. He stated that neither Robert nor the Defendant live on the suit property while he has been on the said property with the Defendant's and Robert's knowledge without paying them rent, licence fee or any consideration and in a manner that is adverse to latter's interest, yet they have never interfered with his occupation. He stated that he has invested colossal sums of money on the land where he has built his family home. He stated that having lived on the suit property uninterrupted and exclusively from the 1950's, he is entitled to the same by way of adverse possession. The Plaintiff attached a certified copy of the extract of the register of the suit property.
6. The Defendant filed a replying affidavit on 25th February 2015, in response to the Originating Summons. She deponed that she was the registered owner of Parcel known as Kalama/Nziuni/334 which she bought for value from Robert on 22nd September 2004. She maintained that upon paying the last instalment on 22nd September 2006, she took vacant possession of the suit property and has been in occupation since then without any interference from anybody.
7. The Defendant further stated that the relevant Land Control Board consent was obtained by the seller and the suit property was registered in her name on 11th April 2008. According to the Defendant, the Plaintiff entered the suit property on 23rd September 2014 and was asked to vacate by the area Chief but he declined. She denied the Plaintiff's assertion that he had been on the suit property since the 1950's and maintained that when the land was transferred to her, the Plaintiff was not in occupation. She maintained that since she obtained title to the suit property, only 6 years had lapsed and therefore the Plaintiff could not lay a claim of adverse possession on her land.
8. The Defendant stated that the Plaintiff had never dispossessed her of the suit property. She further averred that when the Plaintiff entered her land in 2014, he immediately instituted a suit against her by way of plaint dated 22nd September 2014 being ELC NO. 88 of 2014, seeking cancellation of her title on ground of fraud. She contended that the Plaintiff cannot allege fraud in the aforesaid suit and still claim for adverse possession at the same time.
9. The Defendant also stated that she lives on and cultivates the suit property and that the Defendant was a trespasser against whom a counterclaim of eviction had been filed in the aforesaid suit.



10. In Civil Suit No. 88 of 2014, a Plaintiff dated 22nd September 2014 was filed in the name of Robert and the Plaintiff against the Defendant seeking the following orders;
 - a. that Plot No. Kalama/Nziuni/334 be cancelled and reissued to the Plaintiff.
 - b. That the 1st Plaintiff to transfer the suit land to the 2nd Plaintiff.
 - c. Costs of this suit be awarded.
11. It was the Plaintiffs' averment in ELC No. 88 of 2014, that until 27th March 2008, Robert was the registered proprietor of Parcel No. Kalama/Nziuni/334 (suit property). That by the 1960's, Robert used to live at Kalama but subsequently relocated to Matiliku and left the Plaintiff to guard the suit property. They averred that the Plaintiff and the Defendant occupied different portions of the suit property which they demarcated and planted a sisal fence as a boundary.
12. It was the Plaintiffs' assertion that Robert's land was issued with two title deeds namely Kalama/Nziuni/334 and Kalama/Nziuni/335, whereof the Plaintiff occupied Parcel No. 334 while the Defendant occupied Parcel No. 335. That upon request by the Defendant, Robert transferred Parcel No. 335 to the Defendant. Further that in 2012, the Plaintiff approached Robert and requested him to transfer Parcel No. 334 to him only to realize that the Defendant had fraudulently and illegally transferred the said parcel to herself.
13. It was the Plaintiffs' averment that as they were reviewing the Defendant's acts, the Defendant filed ELC No. 385 of 2012 seeking orders for adverse possession.
14. In response to the plaint, the Defendant filed a defence and counterclaim dated 14th October 2014. She denied the Plaintiffs' claim and stated that she purchased Parcels Kalama/Nziuni/334 and Kalama/Nziuni/335 from Robert on 22nd September 2004 and upon payment of the final instalment on 22nd September 2006, together with her sons, she took possession of the two parcels of land and has been in occupation without disturbance from anyone. She reiterated that she got registered as proprietor of the suit property on 11th August 2008.
15. She stated that as of 22nd September 2004, Robert had no title to pass to any third party and more specifically to the Plaintiff. She denied particulars of fraud attributed to her. She stated further that upon instituting this suit, the Plaintiff entered the suit property on 23rd September 2014 and constructed temporary structures thereon, and when the area chief asked him to vacate he declined. She stated that the Plaintiff had not disclosed to court the outcome of ELC No. 385 of 2012 and that she was never served with documents in respect of the said suit. She stated that she was entitled to quiet possession of the suit property. She stated that the suit was time barred, defective and res judicata in view of proceedings in ELC NO. 385 of 2012.
16. The Defendant counterclaimed for the following orders;
 - a. The plaint dated 22nd September 2014 be dismissed with costs.
 - b. An order be issued compelling the immediate eviction of the 2nd Plaintiff and any person on the property Kalama/Nziuni/334.
 - c. A mandatory injunction be issued restraining the Plaintiffs, their agents, personal representatives, and assigns from trespassing, entering, occupying, cultivating, or constructing any temporary or permanent structures on the said suit land or interfering, altering the suit land or any other manner whatsoever in consistent with the Title No. Kalama/Nziuni/334.
 - d. Costs of the suit.



- e. Any other remedy the court might deem fit to grant.
17. No reply to defence and defence to counterclaim were filed by the Plaintiffs.

Plaintiffs' Evidence

18. On 4th October 2017, PW1, Cosmus Mutunga Ndeto gave his testimony. He adopted his witness statement filed on 22nd September 2014 in ELC No. 88 of 2014 as his evidence in chief. It was his testimony that he was the 2nd Plaintiff and that by the year 1960's, he used to live at Kalama but subsequently relocated to Matiliku, and that the land at Kalama was subject to adjudication whereof a title deed was issued.
19. According to the witness, his portion was issued with two titles namely Kalama/Nziuni/334 and Kalama/Nziuni/335. That while the Plaintiff was settled at Matiliku, the Defendant settled on the portion of land No. Kalama/Nziuni/335 and Cosmus Mutisya Ndeto settled on land Parcel No. Kalama/Nziuni/334.
20. PW1 further stated in his statement that in 2008, the Defendant requested the Plaintiff to transfer land Parcel No. 335 to her, which he later did. He further stated that in 2012 when Cosmus Mutunga Ndeto also approached the Plaintiff and requested him to transfer Parcel No. 334 to him, he realized that the Defendant had fraudulently transferred the suit property to herself. He further testified that the Defendant was his elder brother's wife and that he had been chased away from the suit property by the Defendant's children.
21. In cross-examination, he stated that he was no longer living on the suit property. He confirmed that the suit property belonged to Robert until 2005 when he sold it to the Defendant. He confirmed that he knew that Robert sold the suit property to the Defendant. He disclosed that at one point the suit property had belonged to his father one Ndeto and that it is Ndeto who transferred the suit property to Robert. He also stated that his father divided land among his children and that his father left him on the suit land which was his portion and which his father had sold.
22. PW2 was Paul Kioko Kaboi. He testified that Robert and Cosmus are his cousins. He adopted his witness statement dated 30th May 2017 as his evidence in chief. It was his testimony that the suit property was ancestral land and that Robert was allocated the suit property by the family. He testified that Robert was no longer interested in the suit property and had intentions of transferring the same to Cosmus and the Defendant, who was a widow. That in 2008, Cosmus called a clan meeting and informed them of the Defendant's intention of evicting him although the Defendant ignored the clan's summons.
23. In cross-examination, he stated that Robert had never sold land to the Defendant and that the suit property is the ancestral land of Cosmus.
24. PW3 was Joseph Mutuku Kimei, the father-in-law of Cosmus. He testified that there were two families on the suit property; that is the Defendant's family and Cosmus' family. According to him, the suit property belonged to Robert. According to PW3, the Defendant had no right to evict Cosmus and that the Chief asked Cosmus to vacate the suit property.
25. In cross-examination, he stated that the Defendant redeemed Parcels 334 and 335 from Robert using money received from her husband's compensation. He denied the allegation that the Defendant bought the suit property from Robert. According to the witness, both the Plaintiff and the Defendant are entitled to the suit property as Robert allowed them both on the land.



26. PW4 was Robert Mutiso Kiamuko, herein also referred to as Robert. He adopted his witness statement dated 22nd September 2014 as his evidence in chief. That witness statement is word for word and written in first person, as the witness statement of PW1. The only difference is that the two statements have different names and signatures, of the owners thereof. He further conceded having sold the suit property to the Defendant. He denied attending the Land Control Board. He stated that he only transferred Plot No. 335 and not Plot No. 334.
27. In cross-examination, he denied that the statement that he had adopted as his evidence in chief, was his. He denied signing the affidavit filed with the suit, and denied filing suit against the Defendant. He stated that he subdivided his land into Parcel Nos. 334 and 335 and that he was never paid by the Defendant or her sons, but that he only received Kshs. 700/- as transport from the Defendant's son. He conceded to the signature in the agreement produced by the Defendant, as being his signature. He confirmed that he gave consent at the Board at the District Officer's office. She stated that there was a young woman living on the suit property and not the Defendant. He stated that they agreed that he transfers the title to the Defendant who paid him money in small instalments. He said he did not know if the Defendant occupied the suit property.
28. PW5 was Nathan Gathanga, the Land Registrar Machakos who worked as Chief Land Registrar Officer. He stated that he had been summoned by court to produce original consent of the Land Control Board but stated that he was not able to trace the original application for consent as he was not able to trace the file. He stated that he did not have spousal consent and original transfer documents as the parcel file could not be traced. He confirmed that in registering title transfers, his office relies on transfer document duly executed and attested; consent of Land Control Board, application for the consent and the payments. He stated that he had a copy of the abstract for Parcel No. 334 which showed that the land was registered on 3rd March 2003 in the name of Robert and a title issued on 27th September 2006. He further stated that on 27th March 2008, a transfer was effected in favour of the Defendant and she was issued with a title document on 11th April 2008. He stated that he had a copy of the presentation book of 27th March 2008 which reflected the transfer, transferor being Robert and transferee being Teresia. He produced certified copies of the abstract and presentation books as exhibits 1 and 2.
29. In cross-examination, he stated that before transfer is accepted in their office, they have the presentation book showing the transfer was presented. He further stated that the transfer must have been accompanied by an application for consent of the Land Control Board, the consent and duty and that they cannot register a document that does not meet the conditions. He stated that he had not found any evidence of a fraudulent transaction in respect of the suit property and that the current registered owner was Teresia. That marked the close of the Plaintiff's case.

Defendant's Evidence

30. DW1 was Paul Muema Maweu. He adopted his witness statement dated 14th October 2014 as his evidence in chief. He testified that the Defendant was his mother and he is the one who prepared the agreement dated 22nd September 2004 in respect of sale of the suit property. He stated further that the consideration was paid in three instalments and that the agreement was for sale of Parcel Nos 334 and 335. He also testified that after the agreement, Robert, Robert's son Muthoka, himself and his mother Teresia attended the Land Control Board where a consent was issued. He produced the agreement in Kamba language with the English translation thereof and the titles for Parcel Nos 334 and 335. He stated that the Plaintiff entered the suit property on 23rd September 2014, where he had constructed a



temporary structure where he lived with his family. He stated that the Plaintiff had no right to be on the land and sought for the orders sought in the counterclaim.

31. In cross-examination, he stated that he is the one who wrote the agreement for the two parcels of land and at that time his mother was unwell. He stated that Teresia gave him permission to purchase the land and it did not have her signature. He stated that the Defendant gave them the money to pay for the consideration. He stated that he signed the Land Control Board application forms and presented them to the Land Control Board. He also stated that he paid duty at the Kenya Commercial Bank and that the documents were presented at the Land's Office as he did not keep copies.
32. DW2, Mutua Maweu adopted his witness statement dated 14th October 2014 as his evidence in chief. That statement was word for word as the statement of DW1, except for his name. Therefore he reiterated the testimony of DW1 and stated further that the Defendant gave them permission to buy land on her behalf and gave them money for that purpose. He stated that Robert sold the land and that he signed the agreement, in the presence of witnesses who were also relatives of Robert. He sought for the Plaintiffs' eviction.
33. In cross-examination, he stated that he was permitted by his mother to enter into the agreement although he did not have evidence to show such permission and that the Defendant did not sign the agreement due to illness. He also stated that he did not attend the Land Control Board.
34. DW3 was the Defendant, Teresia Maweu. She adopted her witness statement dated 14th October 2014 as her evidence in chief. It was her testimony that she gave her children Kshs. 150,000/- to purchase Parcel Nos. 334 and 335 pursuant of which they entered into the agreement dated 22nd September 2004 with Robert. That she took possession of the two plots upon purchase, and put up her home on the suit property. That the suit property was transferred to her on 11th April 2008 and she denied obtaining registration by fraud. She stated that the Plaintiff had on 23rd September 2015 unlawfully and without her consent entered the suit property and constructed temporary structures thereon. She stated that she attended the Land Control Board and was issued with consent. She confirmed that Cosmus was her husband's brother and that he uses a part of the suit property while she uses the other part.
35. In cross-examination, she stated that Cosmus sold his land and came and lived on her land. She stated that documents signed with Robert were signed at the Lands Office. She stated that all the documents were given to the Lands Office and she did not keep any of them. She stated that the transfer was signed before an advocate. On re-examination, she stated that she did not sign the agreement on account of illness.
36. DW4 was Japheth Muthoka Robert Kiamuko, a son of Robert. He adopted his witness dated 12th February 2017 as his evidence in chief. On being shown the agreement produced by the Defence as D-EXb.1, he stated that he knew the agreement as his father was selling Parcel Nos. 334 and 335 and that he was present when his father received the consideration. He also confirmed that those people who were present during the agreement were his relatives, as one was his uncle and another one his brother. He stated that they went to the Land Control Board and that the Board gave its consent. He stated that his father signed the transfer documents and that it was not true that the Defendant defrauded his father because it was his father who sold the suit property to the Defendant. He stated that after signing the transfer forms, his father gave the Defendant his original title deeds together with his passport photographs, copy of Identity Card, copy of pin certificate and all necessary documents. According to the witness, his father was not aware of this suit and did not sign any statement or verifying affidavit and that those filed in his name are forgeries, as his father was 95 years and that Cosmus was taking advantage of his old age and memory lapse.



37. On cross-examination, he stated that he was one of the sons of Robert Kiamuko and that besides him, his uncles and his elder brother signed the sale of land agreement. He stated that he had not indicated the Parcel Number of the land in issue, and stated that he had no interest in the land.
38. DW5 was Mutuku Maweu, one of the Defendant's sons. He adopted his witness statement dated 14th October 2014 as his evidence in chief. He stated that he signed the agreement produced by the defence. His testimony was similar to that of DW1 and DW2. On cross-examination, he stated that he did not attend the Land Control Board and that his mother did not sign the agreement because she was sick. He said that he was involved in the transfer process. That marked the close of the defence case.
39. At the close of the Defence case, parties were directed to file written submissions in respect of their cases. On record are the Plaintiffs' submissions dated 24th November 2022 and the Defendant's submissions dated 15th November 2022.

Plaintiff's Submissions

40. Counsel for the Plaintiff submitted that evidence adduced demonstrated that the suit property was ancestral land which had been held in trust by Robert on behalf of Cosmus and the Defendant's late husband since 1950's. Counsel argued that Robert was therefore obligated to equally apportion and transfer the ancestral parcel between the Plaintiff and the Defendant's late husband.
41. Counsel further submitted that the mandatory procedure for transfer and registration of the suit property in the Defendant's name was not complied with. It was submitted on behalf of the Plaintiff that for any proprietary interest in a freehold to be transferred there must be a transfer instrument and not a handwritten piece of paper not signed by the purchaser. Counsel relied on Section 8 of the [Land Control Board Act](#) to argue that there was a requirement for the transfer to be accompanied with a consent of the Land Control Board but that the same was not complied with. Reliance was also placed on Sections 8, 108, 109 and 110 of the [Registered Land Act](#) to argue that a disposition of land can only be effected by an instrument in the prescribed form.
42. Counsel also cited Section 5 of the [Stamp Duty Act](#) to argue that every conveyancing transaction must demonstrate payment of stamp duty and that the Defendant did not provide such evidence. Therefore, counsel argued that the process of acquisition of the suit property was not followed which means that Robert never sold the suit property. It was further submitted that the Land Registrar who testified in favour of the Plaintiff did not produce application for consent, letter of consent, transfer instrument, application for valuation of stamp duty, KRA payment receipts and application for registration of transfer.
43. Reliance was placed on the decision in [Cybele Limited v. Patrick Njau and Sabaki Residents Association](#), Machakos ELC No. 374 of 2017, for the proposition that a title document is an end product of a process and that the holder of a title must have supporting documents. Counsel relied on Section 12 of the [Environment and Land Court Act](#) and argued that this court has jurisdiction to cancel title that was fraudulently and irregularly acquired.

Defendant's Submissions

44. Counsel for the Defendant submitted that for the Plaintiff to succeed in a claim for adverse possession, he must demonstrate that he has been in possession of the suit property peacefully, openly, notoriously, without force and continuously for a period of 12 years. Counsel argued that it was not disputed that the Defendant was registered as proprietor of the suit property on 27th March 2008 and that his suit was filed on 8th October 2012 which is 4 years and therefore a period of 12 years had not



lapsed. Counsel also pointed out that the Plaintiff confirmed that both him and the Defendant were in occupation of the suit property. To buttress their submissions, counsel referred to the cases of *Murugami Gichembe v. Gunda Gichembe* Civil Case No. 1258 of 1996 High Court at Nairobi and *Elias Joseph Waburi Wamunyu v. Joseph Mwangi Njoroge* [2017] eKLR, for the proposition that to prove adverse possession, the claimant must show continuous uninterrupted occupation of 12 years.

45. On whether there was evidence of occupation of the suit property by the Plaintiff, counsel argued that no evidence was produced to show that there were extensive developments as proof of the Plaintiff's occupation. Counsel argued that adverse possession can only be claimed against a property's registered owner and referred to the case of *Mwinyi Hamisi Ali v. Attorney General & Another* [1997] eKLR.
46. On whether the Defendant was entitled to the orders sought in the counterclaim, counsel contended that, as the Plaintiff failed to file a response to the counterclaim the same way unopposed. Counsel argued that although the Plaintiff alleged fraud as against the Defendant, Robert who testified as PW2 disowned the witness statement alleged to be signed by him and the verifying affidavit attached to the plaint. Counsel pointed out that PW2 never instructed the advocate to file suit and that it was Cosmos who filed the suit. Counsel argued that this position was confirmed by Josephat Kiamuko Mutiso the son of Robert who testified in favour of the Defendant. On that basis, counsel urged the court to strike out the case in the name of Robert as against the Defendant. Reliance was placed on the case of *Joseph Mwangi Theuri & 37 Others v. David Gitonga Gitinji* [2016] eKLR, where the court considered a case as having been withdrawn on the basis that one of the Plaintiff disowned the suit. To buttress the same issue, counsel relied on the case of *Eddah Wanjiru Mburu v. Tayari Farmers Co. Ltd & Another* [2021] eKLR.
47. On whether fraud had been proved, counsel submitted that allegations of fraud must be particularised and specifically proven. Reliance was placed on the cases of *Nyagate Guto v. Maxwell Okemwa Mogere & Another* [2011] eKLR and *Peter Lavatsa Kabwoya v. Nicholas G. Karira & Another* [2021] eKLR, for the proposition that fraud must be strictly proved. Counsel contended that the evidence by the Plaintiff did not prove fraud on the part of the Defendant as Robert testified that he transacted with the Defendant in respect of the suit property and that the Land Registrar testified that there was no evidence of fraud.
48. In addition, counsel submitted that Robert cannot transfer the suit property to the Plaintiff as the same is registered in the Defendant's name. On the prayers made in the counterclaim, counsel relied on Section 26 of the *Land Registration Act*, and argued that the Defendant being the registered proprietor of the suit property had absolute ownership thereof and therefore the Plaintiff had no right to be on the suit property. Reliance was placed on the case of *Kasikar Loitareng v. Limanyang Loitareng* [2020] eKLR for the proposition that where a party shows they have good title to property they should be protected by the law.

Analysis and Determination

49. This court has carefully considered the pleadings, evidence and submissions filed by the parties and, in the court's view, the issues that arise for determination are;
 - a. Whether the Plaintiff has proved that he is entitled to the suit property by adverse possession.
 - b. Whether the Defendant obtained title to the suit property by fraud.
 - c. Who between the Plaintiff and the Defendant is entitled to the orders sought.



50. A claim for adverse possession is a claim anchored on the provisions of the [Limitation of Actions Act](#). Section 7 of the [Limitation of Actions Act](#) provides as follows;

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.

Section 17 provides that;

Subject to section 18 of this [Act](#), at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished

Section 38 (1) and (2) provides that;

1. 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.
 2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this [Act](#).
51. To prove adverse possession the claimant must show that they have been in open, exclusive, notorious and uninterrupted possession of the suit property without the permission of the true owner for a continuous period of 12 years. It is upon such claimant to demonstrate that their possession of the land in issue has dispossessed or discontinued the true owner's possession. In the case of *Wambugu v. Njuguna* [1983] KLR 172, the court held as follows;

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 disposed 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.

.....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.

52. Similarly, in [Mtana Lewa v. Kahindi Ngala Mwagandi](#) [2015], the court held as follows;

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 not 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.....

53. In the instant case, the Plaintiff states that he entered the suit property in the 1950's. The evidence he gave on record also shows that the suit property was initially owned by one Ndeto, the Plaintiff's father, then transferred to Robert and then subsequently transferred to Teresia Maweu, the Defendant. The



Plaintiff testified that he had been on the suit property with his parents. It is not in dispute that the suit property was registered in the name of Robert on 3rd March 2003 and subsequently transferred to the Defendant on 27th March 2008. Therefore, if before 3rd March 2003, the suit property was owned by the Plaintiff's father one Ndeto, the question would then be whether a person can claim adverse possession against their own parents. My answer is in the negative. In any event, the Plaintiff has not claimed to have acquired adverse possession as against his father. Where a person is in possession of their parent's property, a presumption of permission to be on the property is made by virtue of the parent-child relationship unless and until the presumption is disapproved. I therefore hold and find that the Plaintiff could not claim for adverse possession for the period before Robert was registered as proprietor of the suit property.

54. Robert was registered as proprietor of the suit property on 3rd March 2003, while the suit for adverse possession was filed on 8th October 2012. Therefore from 3rd March 2003 to 8th October 2012, the time period was nine years. Therefore the argument that time had already lapsed even before the Defendant got title is rejected, as the statutory period was not met. I therefore find and hold that at the time the suit property was transferred to the Defendant, the statutory period had not lapsed as against Robert. In addition, the Defendant having been registered as owner of the suit property on 27th March 2008, only four years had lapsed when the suit herein was filed and therefore the Plaintiff has not proved that he was on the suit property for 12 years.
55. On whether there was dispossession of the suit property from the Defendant, I note that both the Plaintiff and the Defendant's testimonies pointed to the fact that none of the parties exclusively possessed the land. They were both on the land and therefore the element of exclusive occupation was not proved. In the premises, I hold and find that the Plaintiff has failed to prove his claim of adverse possession.
56. On the question of whether the suit property was fraudulently acquired, Article 40 of the Constitution provides that the Constitutional right to acquire and own property does not extend to property that is not lawfully acquired. Section 26 of the Land Registration Act No. 3 of 2012 provides that any title that is obtained by fraud, misrepresentation, want of procedure, illegality or corruption can be impeached. I have considered the evidence on record and I note that the suit property was transferred to the Defendant from Robert. In his testimony, Robert denounced this suit and insisted that he never signed a witness statement or a verifying affidavit. Cosmos has not proved ownership of the suit property or any interest thereon. Robert states that he did not file this suit which means he has no complaint against the Defendant. Robert in his testimony confirmed that it is him who signed the agreement produced by the Defendant. That agreement is very clear that the sale transaction was for Parcel Nos. 334 and 335. The agreement shows that a consideration of Kshs. 150,000/- was paid in full to Robert towards the purchase of the two parcels. Therefore, the Defendant proved that the acquisition of the suit property was lawful as the same was through lawful purchase.
57. On whether the registration of the Defendant was fraudulent, I note that that process has not been challenged in any court by Robert. Robert's denunciation of the suit filed by Cosmos amounts to withdrawal of suit. In addition, the two particulars of fraud stated in the plaint was that there was no consent from the Land Control Board and no consideration was paid. On the issue of payment of consideration, Robert confirmed signing the sale agreement that demonstrated payment of Kshs. 150,000/- and therefore that allegation was baseless. On the question of lack of consent, I note from the evidence of DW5, Japheth Muthoka Kiamuko the son of Robert that his father attended the Land Control Board and handed over the original title deed, and other relevant documents to facilitate the transfer of the suit property to the deceased. I accept this witness testimony as being the true account of what transpired as opposed to the Plaintiff's testimony that Robert was in the process of transferring



the suit property to him, when he realized that the Defendant had transferred the same to herself. If the Plaintiff's version were the true position, then Robert would have been in possession of his original title deed, because his own copy of the register shows that after he was registered as proprietor thereof on 3rd March 2003, the title deed thereof was issued to him on 27th September 2006. So if the transfer was fraudulent, he would still be in possession of his original title deed.

58. Importantly, Robert having disowned the suit alleging fraud as against the Defendant, that amounts to withdrawal of suit by him. The only evidence on record given in support of the allegations of fraud is the evidence of Cosmus. As earlier pointed out in this judgment, his witness statement dated 22nd September 2014 was word for word with the statement of Robert and which evidence was clearly attributed to Robert who disowned it. As that narrative was disowned by Robert, the same narrative cannot be of any assistance to Cosmus, as he did not transact with the Defendant to know whether or not the transaction and subsequent processes were within the law.
59. I find that the Plaintiff's testimony was therefore not credible as he filed a claim for adverse possession, failed to serve or prosecute the same, later filed a suit alleging fraud and stated in paragraph 14 of his plaint that the Defendant filed ELC No. 385 of 2012 claiming the suit property on the basis of adverse possession. In addition, the Plaintiff confirmed in cross-examination that he was aware that the Defendant had purchased the suit property from Robert, which evidence was contrary to his testimony in chief. Besides, as Robert confirmed to have sold the suit property to the Defendant which means that the Defendant's acquisition of the suit property was lawful, there was no reason given as to why a lawfully acquired property would be fraudulently registered. When the Land Registrar testified, she stated that there was no evidence of fraud and that the only issue was that the parcel file was missing. In the absence of a parcel file from the witness called by the Plaintiff, that cannot impute fraud on the part of the Defendant.
60. Fraud ought to be specifically pleaded and strictly proved. That was not done in this case.
61. In view of the above reasons, I find and hold that fraud was not proved by the Plaintiff.
62. Section 26 of the *Land Registration act* vests registration of the Title in a title holder with absolute ownership rights. Therefore the Defendant has indefeasible ownership of the suit property and her rights thereto ought to be protected in law. Therefore the presence of Cosmus on the suit property is unlawful and amounts to trespass.
63. In the premises, I find and hold that the Plaintiff has failed to prove his claim of adverse possession and allegations of fraud as against the Defendant and the same is hereby dismissed with costs. On the other hand, I am satisfied that the Defendant has proved her counterclaim on the required standard and I enter judgment for the Defendant as follows;
 - a. The plaint dated 22nd September 2014 be and is hereby dismissed with costs.
 - b. An order be and is hereby issued compelling Cosmus Mutunga Ndeto to vacate Parcel No. Kalama/Nziuni/334 within 60 days of this judgment and in default he shall be evicted at his own expense.
 - c. An injunction be and is hereby issued restraining Cosmus Mutunga Ndeto and Robert Kiamuko Mutiso, their servants, agents, personal representatives and assigns from trespassing, entering, occupying, cultivating, or constructing any temporary or permanent structures on the said suit property or any other manner whatsoever inconsistent with the Title No. Kalama/Nziuni/334.
 - d. Costs of the counterclaim shall be borne by Cosmus Mutunga Ndeto, the Plaintiff herein.



64. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 17TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Muia for Plaintiff

Mr. Nagwere holding brief for Mr. Kimeu for 2nd Defendant

No appearance for 1st Defendant

Ms Josephine – Court Assistant

