



Bii (Suing as the administrator of the Estate of Kipleting Arap Bolyon) v Too (Environment & Land Case 86 of 2012) [2023] KEELC 18357 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18357 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 86 OF 2012**

**MC OUNDO, J
JUNE 15, 2023**

BETWEEN

**SAMMY KIMUTAI BII PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIPLETING ARAP
BOLYON**

AND

HARON KIPKOROS TOO DEFENDANT

JUDGMENT

1. Coming up for determination is a suit filed by the original Plaintiff, who shall be referred to as the deceased and /or Plaintiff herein for ease of reference, vide his Plaint dated the October 26, 2012 and amended on January 12, 2022 in which he had stated that having been, at all times, the registered proprietor of all that parcel known as LR No Kericho/Kiptugumo/280, the Defendant herein, without any justification right or color had trespassed into the said suit land thereby depriving him his constitutional rights to own and enjoy his property. That it was because of the Defendant's unlawful act that he had sought for the following orders against him;
 - i. Eviction and a permanent injunction restraining the Defendant by himself, agents, servants, employees or otherwise from restraining him from entering, remaining cultivating, interfering with and or doing any other act which is prejudicial to the Plaintiff/ Applicant's quiet enjoyment and occupation of LR No Kericho/Kiptugumo/280.
 - ii. General damages.
 - iii. Costs.
 - iv. Interest on (ii) and (iii) above at court rates.
 - v. Any other relief this honorable court deems just and fit to grant.



2. Following the filing of the suit against the Defendant, he had filed his defense and counterclaim dated the August 14, 2013 stating that the suit land had been sold to him in 1974, wherein he had been given vacant possession and had been in continuous and uninterrupted possession. That he had thus acquired the suit land by adverse possession and the Plaintiff's claim was statutory barred by dint of the provisions of Section 17, 37 and 38 of the *Limitation of Actions Act* and therefore the Plaintiff's suit ought to be dismissed with costs. The Defendant had subsequently filed an Originating Summons in ELC Case No 17 of 2013 in which he had sought orders that he had acquired the suit land by way of adverse possession. By consent, the Originating Summons was consolidated with the present suit.
3. On the May 26, 2014, the parties recorded a consent to the effect that the Defendant be restrained from effecting any further development on the land pending the hearing and determination of the suit but that he shall however be allowed to harvest the crop he has planted.
4. Vide an application dated the May 22, 2018, there had been sought a substitution of the original Plaintiff who was now Deceased with his legal representative one Sammy Kimutai Bii and which application had not been opposed and was allowed as prayed on the July 12, 2018.
5. On October 22, 2018, parties confirmed to having complied with the pre-trial directions and the matter had been set down for hearing which then proceeded on the October 14, 2020 with the evidence of PW1 Sammy Kimutai Bii who testified as follows:
 6. That he hailed from Tuiyobei within Kericho County. That the original Plaintiff in this case – Kipleting Boiyon – was his father who was now deceased. That he had been substituted to proceed with the case vide a grant issued to him by the court. That the Defendant was his uncle. He then adopted both his statements dated the October 26, 2021 and the statement made by his father May 23, 2014 as his evidence.
 7. That the land in dispute being No Kericho/Kiptugumo/280 was registered in the name of his father Kipleting Boiyon who had been issued with the title on August 29, 1996. He produced the title as Pf exh 1 and a search certificate to the same as Pf exh 2.
 8. He made reference to an official search in regard to land parcel No Kericho/Kiptugumo/765 wherein he confirmed the same was registered to Kipkoror arap Too alias Haron Kipkoros Too the Defendant herein. He produced the said search certificate as Pf exh 3. He also produced another search certificate in regard to land parcel number No Kericho/Kiptugumo/766 as Pf exh 4 to which he confirmed was registered to Kimutai arap Too who was his late father's brother. A search certificate for parcel No Kericho/Kiptugumo/767 registered to Kibii Arap Too also a brother to his late father was also produced as Pf exh 5.
 9. That in 1973 while they were inside his father's grass thatched house, the Defendant burnt the same. That at that time, the land had no title, but with the issuance of the title, where the house stood was now land parcel No 280.
 10. That although they had left the land because of that enmity, yet they had continued cultivating on the same. That in 1996, his late father sent him to the land to put up a house for him, wherein they had put up an iron-roofed house which the Defendant and his sons and demolished and for which one son had been arrested and imprisoned for 6 months, vide Kericho case No 1605/1997, while the other sons had fled.
 11. That in the year, 2011, the Defendant trespassed on their land and built his house right where their house previously stood. He was then arrested and charged with the offence of forcible detainer vide



- a Kericho criminal case No 1681/2011, wherein he had been sentenced to serve a jail term of 2 years. That at the time, their father was too sick to file suit against the Defendant.
12. He confirmed that the Defendant had been in occupation of land parcel No 280 since the year 2011 and that upon his release, there had been enmity between the Defendant and his (PW 1) late father.
 13. The witness was referred to the proceedings of the case herein above mentioned wherein he had confirmed that that had been the judgment of same. He then went on to testify that the Defendant had neither bought the land nor lived on it peacefully.
 14. When he was referred to the photographs that the Defendant the intended to rely on as evidence that he lived on that piece of land, the witness testified that the buildings thereon being a permanent house with a brick wall and an iron roof was on the Defendants parcel of land No 765 and not on parcel No 280. That the semi-permanent house with rusty iron-roof was the house on parcel No 280 which had been built by the Defendant in 1997 but which the Defendant did not reside there.
 15. The witness asked the court to grant him the prayers sought in the Plaint and informed the court that the Defendant had inflicted alot of suffering upon them for a long time and that he was not in possession, occupation and/or use of the suit land. That the allegations in his counterclaim were false and the same ought to be dismissed. That the agreement he intended to rely on was fake and that the Defendant had been using the police to harass them for which he had severally been locked up in the police cells.
 16. On being cross examined, the Plaintiff/ witness confirmed that he was born in 1966 and that in 1974 he was 8 years old living on the suit land from where he went to school. That he was now a married man and they now lived in Tuiyobei, land which land belonged to his uncle by the name Mr. Kibii arap Too and where his father was buried. He was referred to an agreement which he confirmed was written in Kipsigis language alleging that his father had sold the suit land measuring 3.3 acres to the Defendant.
 17. He then confirmed that the official search he had produced had also put the measurement of the land as 1.3 Ha which was almost the same size as shown in the agreement. He refuted that the land was never sold to the Defendant and confirmed that the Defendant had tried to build a permanent building on the land in year 2011 but he was jailed and hand build the house later on his own land.
 18. He also confirmed that upon his father's death in the year 2014, he was not buried on the suit land because of the animosity, between them and the Defendant over that land. That it was not true that his mother was urging him to leave the land to Defendant. That he could not tell whether the Defendant appealed against conviction and sentence in the case where he was jailed for two years, but they had filed suit for the Defendant to be evicted from the land and that it was not true that the Defendant had been living on that land.
 19. Upon being re-examined, he had reiterated that his father had not sold the land to the Defendant, that his father was not banned from the land because of the animosity between them but that they had moved to Tuiyobei in 1979 (although he was not sure) because they had wanted to live in peace.
 20. Kibii arap Too testified as PW2 to the effect that he came from Kabokyek, Kericho County and was a peasant. That the late original Plaintiff was his brother. That he wished to adopt his statement dated August 10, 2018 as his evidence. That the disputed land being parcel No 280 belonged to his late brother the Plaintiff. That the Defendant had his own land which was No 765. That after land had been shared among them, there had arisen a dispute between his late brother and the Defendant wherein the Defendant had even burnt his late brother's house following which he had allowed his late brother to live on another parcel of land at Tuiyobei, which he had bought but which he had no title to.



21. His evidence was that the disputed land was never sold to the Defendant. That further it was not true that the Defendant had been living on that land because the court had asked him to leave it. He also testified that there had never been peace on that land as claimed by the Defendant who had even tried to build a permanent house but had been stopped by the court. That there had been court cases concerning activities the Defendant had been trying to do on that land and the permanent house the Defendant built was on his land parcel No 765.
22. He confirmed that the photographs shown to him of a permanent brick walled houses was on parcel No 765, while the semi-permanent house was on parcel No 280, built by the Defendant but in which nobody lived.
23. On cross examination, the witness reiterated that the semi-permanent house (house No 3 in the photos) was old and had been built on parcel No 280 in 1985 by the Defendant. He also confirmed that the Defendant was also his brother and that he bore no hatred towards him.
24. He was referred to a land sale agreement written in Kipsigis language to which he confirmed that the same alleged that his late brother sold that land measuring 3.3 acres to the Defendant. He also confirmed that he knew the people who had been mentioned therein as witnesses and that only two of them being Wilson Beth and Chepkwony arap Rono were alive.
25. He will further went on to state that although he was not aware that the land was sold to the Defendant, yet it was not true to say that the Defendant paid money to his late brother who then bought land at Tuiyobei. That the land at Tuiyobei was his and that he had lived in Tuiyobei for over 10 years from 1982.
26. That he could not recall when his late brother, the Plaintiff, went to live there with his family after he had allowed them to do so. That land was parcel No 1063 or something like that, which land he had given to his late brother and his family after the Defendant burnt his late brother's house which had been on the disputed land.
27. The next witness was Joel Kimutai Too who hailed from Chemobei Location, in Kericho County and who testified as PW3 to the effect that he was a retired teacher that he had recorded his statement on the January 10, 2020 and to which he wished to adopt as his evidence. He went on to testify that the parties in this case were his own brothers. That the land in dispute was parcel No 280. That he had his own land which was parcel No Kericho/Kiptugumo/766 as per the copy of search he had. He also confirmed that as per a copy of search for parcel No 280, it was land whereby the deceased Plaintiff lived until the Defendant burnt his house in 1973 which forced the deceased Plaintiff to go and live elsewhere in Kapsoit area. That the Defendant had his own land which was parcel No 765.
28. That he could not tell whether the late Plaintiff had sold his parcel of land No 280 to the Defendant, but that parcel No 765 belonging to the Defendant and parcel No 280 belonging to the deceased Plaintiff shared a clear common boundary which the Defendant destroyed claiming that the land was his.
29. During cross examination the witness was referred to a sale agreement which a confirmed that the same showed that the Plaintiff had sold the land to the Defendant in 1974. He confirmed that at the time the agreement was made, the parties were adults. He also confirmed that there were witnesses, whom he knew, to the sale agreement. He also confirmed from the photographs shown to him that there was an old house with rusty iron roof, which belonged to the Defendant and had been built on land parcel number No 280. He also confirmed that the land at Tuiyobei belonged to PW2, who was also his brother.



30. In re-examination, he reiterated that the house in the photographs was an old house which had been built before 1973. He also confirmed that the Defendant lived in his new house shown in the photograph and which house was built on land parcel No765. That the Plaintiff had gone to live in Tuiyobei on land that belonged to PW2, because his house had been burnt by the Defendant.
31. Kiptanui arap Belio testified as PW4 to the effect that he came from Kabobyek and was a village elder. He also adopted his written statement dated 10th August 2018 as his evidence before he proceeded to testify that he knew the parties in this case and that they were brothers. That the deceased Plaintiff was an elder brother to the Defendant.
32. That as an area village elder, he knew land parcel No 280 where the deceased Plaintiff had been living. That long ago, after the dispute arose, the Defendant had burnt the Plaintiff's house wherein he (Defendant) had been arrested and jailed. That it had been after the Plaintiff's house had been burnt, that he had felt unsafe and had gone to live with PW2 at Tuiyobei. That when he went to live Tuiyobei with his family and did not return to the disputed land for some time, in the year 2011 when the deceased Plaintiff and his children tried to construct a house on the disputed land, the Defendant and his sons destroyed it.
33. He was referred to some photographs which he confirmed that one showed a new modern house which belonged to the Defendant. That the old house in the photographs belonged to a person he did not know. He also confirmed that the land in dispute belonged to the Defendant and the new modern house was on the Defendant's land and not on the land in dispute.
34. In cross examination, he confirmed that being an area village elder he knew the parties and was not aware that the original Plaintiff had sold the land to the Defendant. That he could not recall the year when the house was burnt and was not aware of any sale of land. That he could also not tell when the deceased Plaintiff went to live in Tuiyobei or whether the deceased Plaintiff sold land to Defendant, but that it had been after the house was burnt that the deceased Plaintiff and his family went to live at Tuiyobei where PW2 lived. That the deceased Plaintiff was buried in Tuiyobie because the Defendant was hostile and couldn't allow burial on the disputed land.

The Plaintiff thus closed its case.

35. On the December 15, 2021, the defence proceeded with his case with the evidence of Kipkoros Arap Too the Defendant herein as DW1, who testified that he lived in Kapogiek and was a farmer. That he had recorded his statement on August 15, 2013 which he wished to adopt as his evidence. That in 1973, he had bought land measuring 3.3 acres from Kipleting Arap Boiyon vide an agreement herein marked as Df MFI 1, but along the way Kipleting Arap Boiyon had refused to give him the title and had instead taken away the land.
36. That he had bought the land in form of 5 cows and the rest of the purchase price had been paid in form of money. That he could not remember how much he had given out but the purchase price had been written in the agreement. That he had been shown the land and given the same wherein he had started utilizing it and had built a residential house as per the photographs herein produced as Df Exh 2(a & b) court, up to 1975 when a dispute arose.
37. That Kipleting Arap Boiyon died before they had had gone to the Land Board and that was when his other siblings started disturbing him. His evidence was that he was still using the land and had therefore acquired it by adverse possession since he had been in occupation since 1974. That it had only been this year (sic) that the Plaintiff's Advocate had put him in prison for two years wherein after he had been released.



38. He then proceeded to testify that the number of the title to the land was No 280 as per the copy of Green Card which he produced as Df Exh 3. He then sought from court to be issued with a title deed on account of his adverse possession.
39. During cross examination, the Defendant confirmed that land parcel No Kericho/Kiptugumo/280 was registered to his brother, but that he had sold it to him. He also confirmed that land parcel No 765 was registered under his name and that Kimutai Arap Too was his brother. That each of the 4 brothers had been given a piece of land wherein the deceased Plaintiff had sold the whole of parcel No 280 measuring 3.3 acres to him, in exchange for cows, which he had taken and had left the land for him. He produced the sale agreement as Df exh 5 and confirmed that the deceased Plaintiff had been buried elsewhere as they had agreed with his brother over the purchase of land.
40. He also confirmed that he had been charged with the offence of assault but that he had appealed against the criminal judgment and had been released as he had not committed any offense. He further confirmed that he was utilizing the suit land where he had built his houses and was living peacefully and that the Plaintiff's beneficiaries had land where they lived.
41. That he had poured building material (sand and stones) on the suit land and nobody had interrupted him. He denied having set any house on fire, having chased anybody away, having behaved violently or having done anything to remove his brother from his land stating that his brother had peacefully moved out of the land. He reiterated that he had bought the land for 5 cows and Kshs. 1,000/- wherein he had later given his brother some additional cows.
42. In re-examination, he responded that after he had purchased the land from his brother, his brother had gone and purchased land in Tuyobei and that had been the place he was buried and which place was around 3Km from the suit land. That he had been utilizing land parcel No 280 until recently when the Plaintiff's legal representative planted maize on the same as the case was proceeding.
43. Chepkwony Kiplangat Rono alias Kibilo Rono testified as DW2 to the effect that he lived in Kaboyek village within Kericho County within Kiptugumu village. That he knew the deceased Plaintiff Kiplating Arap Boiyon and that Haron Kipkoros Too was his brother. That in 1994, when the Plaintiff was selling his land to the Defendant, he had called him and many other people, some who had died as witnesses. That at that time the Defendant had given the Plaintiff 3 cows and Kshs 500/= as purchase price for land which had measured 3.3 acres. That after he had sold the land, he had left the Defendant on the land and had gone to Tuyobei which was more fertile. That the Plaintiff had lived in Tuyobei until his death and was buried there. He confirmed that Tuyobei which was in Kapsoit sub-location was about 5 Km from the suit land.
44. That the Defendant had lived on the suit land to date where he had planted sugar cane and had built a permanent house. That the sale agreement had been reduced into writing by one Wilson Arap Bet who was the secretary then.
45. In cross examination, he reiterated that he had been a witness to the sale agreement which had been written on site and wherein there had been no house. He also confirmed that the parties herein had been given the land by their mother and that the Defendant had paid 3 cows and Kshs 500/= to purchase the suit land, wherein after the Plaintiff had taken the purchase price he had gone away. That after two weeks he had been paid a further Kshs 1,900/= in addition to the purchase price. That the burning of the house had occurred before the sale agreement when the two parties, being young and drunk at the time had fought. That subsequently they had become friends again.
46. He also confirmed that in the year 2011, the Defendant had been charged in court for arson. That both Kiplating and Haron had been given land and the permanent house was on the border of the two



- parcels of land. That the Plaintiff did not build any house. That he had not gone to the suit land but he usually saw the houses.
47. That it had been after the Plaintiff had left, that the Defendant had built on the land where he had also planted sugar cane and maize before the case was filed. That from 1974, the dispute had begun about 3 – 5 years ago.
 48. That the parties' mother did not want the Plaintiff to sell land to other people but had agreed for the same to be sold to his brother the Defendant. That the Plaintiff had two parcels of land, wherein he had sold one land to one brother called Kibii Arap Too and the suit land to the Defendant.
 49. In re-examination, the defence witness reiterated that the parties' mother had preferred that the Plaintiff sells the land to his brother rather than outsiders. That he had been called by the Plaintiff as a witness to witness him sale the land and that he had been a witness to both the Plaintiff and Defendant.
 50. DW3, Wilson Kibii Bett testified that he lived in Kabokyet location within Kericho County. That he knew both the Plaintiff and the Defendant as siblings. He testified that in 1994, the Plaintiff had sold the land to the Defendant (Kipkoros Arap Too) and that he had been present during the transaction and had reduced the transaction into a written sale agreement. He was referred to DMFI wherein he confirmed that indeed it had been the agreement he had written in 1974 after he had been asked by both the Defendant, the Plaintiff and their mother to do so and that that the agreement had been entered into in the presence of other people. He confirmed that the agreement was written in kipsigis language but did not know whether it had been translated into English language. That both parties and their witnesses had signed it but that all their witnesses save DW2 had since passed away.
 51. That the original Plaintiff had agreed to take 3 cows and Kshs 1,550/= wherein there had been a balance of Kshs 1,950/= which had been paid on December 1, 1974. He produced the agreement as Df Exhibit 1.
 52. He proceeded to testify that he lived near the parties and his land bordered theirs. That after the agreement had been entered into, the Defendant had built two houses on the suit land, one out of grass, the other out of iron sheets wherein he had lived on the suit land unto the year 2019 when the house was removed and the Plaintiff then got the title deed.
 53. That there had been a case in 2009 following which in 2019, the Plaintiff's children had asked the Defendant's children to demolish the house and go to their land. They had done so. His evidence was that after the sale of the land, the Plaintiff had gone to Tuyubei where he lived up to his death and where he had been buried.
 54. In cross examination, the witness stated that at the time, he had been a clerk at the Chief's office. That he had recorded the sale agreement at Arap Koros' house on the December 10, 1974 after he had been summoned to do so by both the Plaintiff and Defendant. That other people had also sought to buy the land, but mama Rhoda Chesaina who was present at the time had refused wherein she had opted that the land be sold to the Defendant. He reiterated that the Plaintiff Arap Boiyon did not live on that land and that he had written the agreement on the land belonging to Kipleting Arap Boiyon. That the Defendant had built a house for his young wife on the suit land.
 55. That the parties' mother had refused to be added as a party to the agreement because as she had stated, she had given the land to her sons. That although he did not know when the cows were taken, yet he confirmed that the Defendant (sic) had taken the 3 cows and had gone with them.
 56. He also reiterated that it was true that the Plaintiff had wanted to sell the land to outsiders including to his own father, but his mother had preferred her child to buy the land instead. That the Defendant



had then utilized the land from 1974 and when Constitutional issues started, some children obtained the title from the Land Board.

57. He also conceded that in the 1970's there had been a case where the Defendant had been charged after he had burnt the Plaintiff's house, which had been on another piece of land where his younger brother now lived.
58. That he was aware that the Defendant had recently been released from jail but did not know what the case had been all about. That he knew Kibii, a brother to the parties who lives near the suit land as he had another land in Tuiyon. That since 1974, the Defendant had been peaceful on the land up to recently in the year 2010 upwards wherein the Plaintiff's children had now taken possession of the suit land.
59. He confirmed that the permanent house was built on the Defendant's land and not on the suit land and that there was a demarcation of the boarder. That at the start of the case, he had asked the Plaintiff why he was now receding the sale agreement, wherein the Plaintiff had informed him that it had been his children who had been pushing him to do so. He also stated that it had not been true that the Defendant had evicted the Plaintiff from the suit land.
60. In re-examination he reiterated that the Plaintiff's children were the ones who had been against the sale agreement and that all the children lived in Tuyobei save for one called Samwel, who had come around the year 2021 to live on the suit land where he had built a timber house.
61. The defence then closed its case and parties were directed to file their written submissions.

Plaintiffs Written Submissions.

62. In their written submissions dated the January 21, 2023, the Plaintiff framed their issues for determination as follows;
 - i. Whether the Plaintiff is the registered proprietor of the suit property;
 - ii. Whether the Defendant has trespassed onto the suit property
 - iii. Whether the Defendant's use, possession and/or occupation of the suit property was adverse to the rights and interest of the Plaintiff for the court to dismiss the Plaintiff's claim and enter judgment for the Defendant as prayed in the counterclaim.
 - iv. Whether the Plaintiff is entitled to the reliefs sought.
63. On the first issue for determination as to whether the Plaintiff was the registered proprietor of the suit property, it was the Plaintiff's submission that they had demonstrated through the calling of witnesses and production of the title deed and a certificate of official search in relation to land parcel No Kericho/Kiptugumo/280 that the deceased Plaintiff was indeed the registered proprietor of the suit property. Reliance was further placed on the provisions of Sections 24, 25 (1) and Section 26 of the [Land Registration Act](#) to buttress their submissions.
64. On the second issue for determination, as to whether the Defendant had trespassed onto the suit property, the Plaintiff submitted that the court takes cognizance of the testimony given in evidence together with all the certificates of official searches produced for land parcels No Kericho/Kiptugumo/765, 766 & 767 as the Plaintiff's exhibits 3, 4 & 5 respectively, alongside the testimony by the Defendant that he was the registered proprietor of Land parcel Kericho/Kiptugumo/765. That further the court to take into consideration of the Defendant's admission which had been collaborated



by the Plaintiff's witnesses that the parties herein had each been allocated a piece of land by their mother which land had subsequently been registered and transferred to the parties as following:

- i. No Kericho/Kiptugumo/280 in the name of Kipleting Arap Boiyon
 - ii. No Kericho/Kiptugumo/765 in the name of Kipkoros Arap Too
 - iii. No Kericho/Kiptugumo/766 in the name of Kimutai Arap Too
 - iv. No Kericho/Kiptugumo/767 in the name of Kibii Arap Too.
65. That in view of the foregoing, and the fact that the Plaintiff at the hearing produced as Pf exh 6 a copy of a judgment in criminal case No1681/2011 where the Defendant had been charged and convicted for the offence of forceful detainer, that he had demonstrated that the Defendant was indeed a trespasser and the court should hold as such.
66. On the third issue as to whether the Defendant's use, possession and/or occupation of the suit property was adverse to the rights and interest of the Plaintiff and therefore the court should dismiss the Plaintiff's claim and enter judgment for the Defendant as prayed in the counter-claim, it was the Plaintiff's submission that the Defendant was a registered proprietor of a distinct and separate land registered as Kericho/Kiptugumo/765.
67. Reliance was placed on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act* that described what constituted an action for Adverse possession, which was a doctrine of law vide which a person obtained legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period of 12 years and that the possession ought to have been without the permission but with the knowledge of the registered owner. Further reliance was placed on the decision in the case of *Mtana Lewa vs. Kabindi Ngala Mwangandi* [2015] eKLR where the Court of Appeal had defined what adverse possession constituted.
68. That in the light of the provisions of the law, the cited case law, and the production of the copy of the Judgment in Kericho Criminal Case No1681/2011, there was sufficient evidence adduced by and on behalf of the Plaintiff to demonstrate that the Defendant's entry into the suit property was forceful when he set ablaze the Plaintiff's dwelling house several years ago. That the Defendant did not in any way refute that he had been charged and subsequently convicted to serve two years in prisons for the offence of forceful detainer contrary to Section 91 of the Penal Code.
69. The Defendant had also admitted that he was no longer in use, possession and occupation of the suit land after the determination of the Kericho High Court Criminal Appeal case No 10 of 2015 where the court had upheld both conviction and sentence. This effect therefore, it was the Plaintiff's submission that there had been uncontroverted evidence adduced at the hearing demonstrating that the Defendant's claim of adverse possession was unmerited.
70. As to whether the Plaintiff was entitled to the reliefs sought, the Plaintiff's submission was that in view of the testimonies of all the witnesses together with the exhibits produced in support of his claim, which evidence was not shaken or displaced by the Defendant's the evidence, that the court do find that he had proved his case on a balance of probability and to accordingly dismiss the Defendant's counter claim and enter judgment for the Plaintiff as prayed.

Defendant's Submissions.

71. In their defence and in support of their counterclaim, the Defence framed their issues for determination in their submissions dated the February 22, 2023 as follows;



- i. Whether or not the Defendant purchased LR No Kericho/Kiptugumo/280 from Kipletin Boiyon.
 - ii. Whether the Defendant has acquired title to LR No Kericho/Kiptugumo/280 by reason of being in adverse possession so as to entitle him to be declared as owners(sic) of the said parcels(sic) of land.
72. On the first issue for determination, the Defendant submitted that it was not in dispute that the suit land was currently registered to the deceased Kipletin Arap Boiyon and that he was registered to land parcel LR No Kericho/Kiptugumo/265(sic) which land bordered and abutted the suit land.
73. That from the evidence tendered in by the defence, the Defendant had on the 10th November, 1974 by a sale agreement herein produced as Df exh 1, purchased the suit land measuring 3.3 acres from the late Kipletin arap Boiyon wherein he had been put in possession and use of the same and whereby he proceeded to construct his temporary house and plant sugarcane.
74. That further evidence adduced by the defence was to the effect that Kipletin arap Boiyon had received cows and cash as the purchase price and the transaction was witnessed by DW2 and DW3 among others. That after the transaction the Plaintiff had left for Tuyoibei where he purchased another land using the proceeds of the sale and had settled there. He was even buried in Tuyoibei upon his demise.
75. On the second issue for determination as to whether the Defendant had acquired title to LR No Kericho/Kiptugumo/280 by reason of being in adverse possession so as to entitle him to be declared as owner of the said parcel of land, it was the Defendant's submission that from the evidence adduced, that upon purchase of the said suit land, the Plaintiff had given him vacant possession and use of the said land in 1974 wherein he constructed a semi-permanent house, planted sugar cane and crops thereon. That since after the purchase of the land on the November 10, 1974 the Plaintiff had neither applied for nor obtained the requisite consent from the local Land Control Board within the stipulated six months from the date of purchase as was required under Section 6 (1) of the Land Control Act, the said transaction became null and void. That the Plaintiff neither chased away the Defendant nor took any action against him and therefore the Defendant remained in peaceful and uninterrupted occupation and use of the suit land and thus his possession for more than 38 years became adverse. Reliance was made to the Court of Appeal decision in Ruth Wangari Muigai vs Edward Njuguna Mawngi (2015) eKLR.
76. The Defendant further submitted that the criminal case No 1681 of 2011 preferred against him in the year 2011 was an afterthought meant to disrupt his continued occupation of the said suit land and therefore the same did not constitute the Defendant's possession and use of the said land for 38 years. Reliance was placed on the decision in the case of Josinter Atieno Ouma & another v Joshua O. Omiti & another [2018] eKLR.
77. That further, although the Plaintiff forcefully chased the Defendant from the suit land, while this suit was pending determination, predicated on the aforesaid Criminal case No1681 of 2011, the Defendant had already acquired title to the suit land by way of adverse possession and the said action by the Plaintiff did not constitute an interruption of the Defendant's possession and use of the said land from 1974-2011. This is because his action was statutorily time barred under Section 7 of the Limitation of Actions Act. That the Plaintiff's action of dispossessing the Defendant from the suit land was an exercise in futility as the Defendant had already acquired title to the land by way of adverse possession. That the Limitation of Actions Act was not inconsistent with the provisions of Constitution and therefore one could not claim title to his land after expiry of a period in excess 12 years. Reliance was placed on the court of Appeal decision in Mtana Lewa vs Kabindi Ngala Mwagandi [2015] eKLR.



78. The Defendant thus urged the court to hold and find that the Defendant had been in peaceful, quiet, uninterrupted and continued possession and occupation of LR No Kericho/Kiptugumo/280 for period of more than 38 years hence had acquired title to the same by adverse possession. That the Defendant had proved his case against the Plaintiff on a balance of probability and therefore the Plaintiff's suit should be dismissed in favour of the Defendant's counter-claim.

Determination.

79. I have considered the matter before me, the evidence as well as the submission, the authorities and the applicable law. From the summation of the same, the original Plaintiff (now deceased) had sought that being the registered proprietor of parcel of land known as LR No Kericho/Kiptugumo/280, the suit land herein, the Defendant without any justification right or color had trespassed into the same thereby depriving him (Plaintiff) of his constitutional rights to own and enjoy his property. That it was because of the Defendant's unlawful act that he had sought for his eviction as well as for permanent injunctive against him prohibiting him from interfering whatsoever with the suit land
80. In response to the Plaintiff and in his counterclaim, the Defendant sought for orders that he be registered as proprietor to the suit land, the same having been sold to him by the deceased Plaintiff in 1974, wherein he had taken vacant possession and had been in continuous and uninterrupted possession, thus he had acquired the same by adverse possession and should be registered as its proprietor.
81. I have considered the prayers sought by both parties herein, I have also considered the fact that after the demise of the original Plaintiff, he was substituted by his legal representative, his son herein who was made party to the suit to proceed with the same.
82. It is not in contest that the suit herein was filed by siblings squabbling over a piece of land that they had inherited from their parents. From the evidence adduced, and the statements recorded by the witnesses which had been adopted in court, it is clear that following the subdivision of family land by their mother Jane Cheron Chesaigut around 1970, the parties herein, and their siblings were registered to their respective portions of land as follows;
- i. No Kericho/Kiptugumo/280 in the name of Kipleting Arap Boiyon (deceased Plaintiff)
 - ii. No Kericho/Kiptugumo/765 in the name of Kipkoros Arap Too (Defendant)
 - iii. No Kericho/Kiptugumo/766 in the name of Kimutai Arap Too
 - iv. No Kericho/Kiptugumo/767 in the name of Kibii Arap Too.
83. That after subdivision and distribution of the family land, each party took possession and occupation of their respective parcels of land.
84. The Plaintiff's case was that sometime in the year 1973, the Defendant herein claiming ownership to his share of land parcel No Kericho/Kiptugumo/280, trespassed thereon and set ablaze his (Plaintiff's) house, which stood on the said land, destroying the boundary therein before chasing away and displacing the Plaintiff who together with his family had fled and settled in Tuiyobei on a piece of land owned by DW2. The Defendant then took possession of the said land.
85. That in 1996, the deceased Plaintiff had sent the current Plaintiff to the land to put up a house for him, wherein they had indeed put up an iron-roofed house which the Defendant and his sons and demolished and for which one son had been arrested and imprisoned for 6 months, vide Kericho case No 1605/1997, while the other sons had fled.



86. That in the year 2011 when the Plaintiff and his family tried to take back possession of their land by constructing a house therein, the Defendant and his son had demolished the same and had proceeded to put up their own structure thereon. That the matter had been reported to the authorities wherein the Defendant had been convicted and sentenced to serve two years imprisonment for the offence of forcible detainer contrary to section 91 of the *Penal Code* in Kericho Chief Magistrates' Court Cr Case No 1681 of 2011. The Original Plaintiff had denied having ever sold his land to the Defendant.
87. The Defendant's case on the other hand was that via a land sale agreement dated the November 11, 1974, which was witnessed by DW2 and DW3, the original Plaintiff had sold to him his land measuring 3.3 acres wherein he had paid him 5 cows and some money. That he had then been given vacant possession of the land but later the deceased Plaintiff Kipleting Arap Boiyon, who was his brother had refused to give him the title and had instead taken back the land.
88. That he had bought the land in exchange of 5 cows and the rest of the purchase price had been paid in form of money. That after he had purchased the land from his brother, his brother had gone and purchased land in Tuiyobei with the proceeds from the sale of his land and where he had settled until his death. That he had been buried in Tuiyobei which was around 3Km from the suit land. His evidence was that he had been utilizing land parcel No 280 until recently when the Plaintiff's legal representative planted maize on the same as the case was proceeding. His evidence was that since he had been using the land since 1974, he had thus acquired it by adverse possession.
89. I find two issues arising herein for determination to wit;
- i. Whether the Plaintiff has proved his case to the required standard.
 - ii. Whether the Defendant has acquired the suit land by adverse possession.
90. On the first issue for determination it is not in dispute, according to the title herein produced as Pf exh 1 and a search certificate to the same as Pf exh 2, that the suit land being No Kericho/Kiptugumo/280 was registered to the deceased Plaintiff Kipleting Arap Boiyon on the June 21, 1976 wherein he had been issued with a title on August 29, 1996.
91. I note that the above captioned properties were registered under the repealed *Registered Land Act* which is now governed by the *Land Act, 2012* and The *Land Registration Act, 2012*. Indeed the law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the *Land Registration Act* provides as follows:
- “the Certificate of Title issued by the Registrar upon registration, 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 the 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
 - b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme



92. Section 24 (a) of the *Land Registration Act* further stipulates as follows:

' subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto....'

93. Having found that the deceased Plaintiff was the legal proprietor of land Parcel No Kericho/ Kiptugumo/280, having absolute ownership including all rights and privileges appurtenant to it, then by virtue of the Defendant's presence on the land without the Plaintiff's consent and/or permission, we can safely say that the Defendant had trespassed on the same. However the next question that we need to ask ourselves going by the evidence adduced by the Defendant and his witnesses is, whether the Defendant's presence on the suit land was legal by virtue of a sale agreement between him and deceased Plaintiff.

94. Indeed from the Defendant's evidence, which was supported (I have intentionally not used the term corroborated) by the evidence of DW2 and DW3, the deceased Plaintiff herein had sold the suit land to him vide a sale agreement dated the 11th November 1974, a transaction which is denied by the Plaintiff, wherein he had given him some cows and some cash and in exchange the deceased Plaintiff had given him vacant possession of the suit land wherein he had migrated to Tuiyobei where he had bought another land with the purchase price and settled there. That upon his demise, he had been buried on that land

95. Section 3(3) of the *Law of Contract Act* provides as follows;

3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

96. I have looked at the man-made sale agreement (and its translated version) dated the November 10, 1974 herein produced as Df exh 1 which read as follows:

"This 10th day of November 1974 Kipleting A Too has sold his land measuring 3.3 acres for Kshs 4,000/= (four thousand) to Kipkoros A Too. Kipleting A Too has received Kshs 500/= with three heads of cattle, two oxen and heifer valued at Kshs 500/=, 500/= and 550/= respectively. The total amount to see these Kshs. 2,050/= and the balance is Kshs. 1,950/= and Kshs 1,000/= shall be paid on December 1, 1974 (Friday) and the balance thereof shall be paid on a date to be agreed upon on December 1, 1974."

97. I note that although the same was in writing, and contained the names of the parties, yet there was no description of the property, and whereas the purchase price was to be paid in instalments, the court has not been provided with any evidence proving that the said instalments were paid and/or the terms of the contract had been fulfilled and/or frustrated. This in my humble opinion could be the reason as to why the Plaintiff had denied there having been any sale agreement between him and the Defendant.



98. I have further considered the fact that whereas the Plaintiff was registered as the proprietor to the suit property on the June 21, 1976, the sale agreement between the parties dated the November 11, 1974 had been entered into prior to the registration of the Plaintiff as proprietor of the land and therefore simply put, the Plaintiff had no title to pass at the time the agreement was entered into which made the said transaction was null and void abinitio as he had no capacity to sell.
99. To begin with, having found that the sale transaction herein was void abinitio the Plaintiff having no title to pass at the time, the issue of consent from the land control board cannot come into play as in the words of Lord Denning in *Mcfoy vs United Africa Company Limited* (1961) 3 All ER 1169 if an act was void, then it was in law a nullity. That one could not put something on nothing and expect it to stay there. It would collapse.
100. On the second issue for determination, the Defendant has sought to be registered as proprietor of the suit land by reason of the doctrine of adverse possession. That by virtue of the sale agreement of 11th November 1974, wherein he had then been given vacant possession of the land and no consent from the Land Control Board had been sought, within the stipulated six months from the date of purchase as was required under Section 6 (1) of the *Land Control Act*, the said transaction had become null and void and by virtue of his uninterrupted occupation and use of the suit land for more than 38 years, he had thus acquired the same based on the doctrine of adverse possession.
101. The court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:
102. 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...”
103. Section 13 of the *Limitation of Actions Act* aforesaid further provides that:
- A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.
104. 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 (Read Environment and Land) Order vesting the land in him/her.
105. From the above captioned provisions of the law, the Court of Appeal in the case of *Benjamin Kamau Murma & Others vs Gladys Njeri*, C A No 213 of 1996 held that:
- “The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”



106. The onus is on the person or persons claiming adverse possession;

“.. 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”

107. The main the elements of adverse possession that te Defendant thus had to prove include:

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

Has the Defendant thus demonstrated the said elements?

108. From the evidence adduced, it is not disputed that that sometime in the year 1973, the Defendant herein claiming ownership to land parcel No Kericho/Kiptugumo/280, trespassed thereon and set ablaze the Plaintiff's house, destroying the boundary therein and chasing away the Plaintiff and his family wherein he took possession of the suit land.

109. In 1996, when the deceased Plaintiff and his son PW1 put up an iron-roofed house on the suit land, the Defendant and his sons had demolished it for which one son had been arrested and imprisoned for 6 months, vide Kericho case No 1605/1997, while the other sons had fled.

110. In the year 2011 when the Plaintiff and his family tried to take back possession of their land by constructing a house therein, the Defendant and his son had demolished the same wherein they had proceeded to put up their own structure thereon. The Defendant had ended up being sentenced to serve a prison term of 2 years for the offence of forcible detainer contrary to section 91 of the [Penal Code](#) in Kericho Chief Magistrates' Court Cr. case No 1681 of 2011.

111. The Plaintiff's case was that the Defendant without any color of right on allegations that the said piece of land was his in exclusion of the Plaintiff violently entered into the said piece of land and started constructing and cultivating therein to the total exclusion of the Plaintiff.

112. To me the conduct of the Defendant does not prove that he has been in use of the suit land which he claims as of right: *Nec vi, nec clam, nec precario* (No force, no secrecy, no evasion). Indeed I find that from the evidence adduced herein that the Defendant's occupation and possession of the suit land has been through acts of violence akin to terrorism and his occupation has neither been continuous nor peaceful as the Plaintiff had subsequently retaken full possession wherein he had proceeded to carry out farming activities and has kept the Defendant out since the year 2011, a fact which the Defendant admitted when he testified that the Plaintiff's legal representative had taken possession of the suit land wherein they had planted maize as the case was proceeding. Meaning that he was no longer in use, possession and occupation of the suit land.

113. In [Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui](#) [2017] eKLR the Court of Appeal while acknowledging adverse possession is a common law doctrine restated the same by citing the India



Supreme Court decision in the case of *Kamataka Board of Wakf vs Government of India & others* [2004] 10 SCC 779 where the court stated thus: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

114. From the above authorities, it is clear that party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. A person who has violently taken land from the proprietor lacks the ingredient of peaceful occupation. It will also depend on the actions that the said proprietor has taken against the person who forcefully took the peace of land from him/her i.e. are there any court orders to that effect and is the forceful trespasser obeying the court's order?

115. In *Gabriel Mbui vs. Mukindia Maranya* (1993) eKLR, Kuloba J held that:

“And in Equity, a person cannot get title by doing wrong. Even if he has been in possession for twelve or more years, a Court of Equity would not allow him to enforce his strict rights under the *Limitation of Actions Act*. There is a broad principle of Equity dating back for more than one hundred years, that where a person has gained advantage by violation of the law, he will not be allowed to enforce rights accruing to him by virtue of his defiance of the law.....”

116. In *Simon Muthuka Kamu vs. Harrison Musyimi Kakundi & another* [2021] eKLR, the court held that:

“On whether the Defendants have acquired land parcel No Nzaui/Nziu/393 by way of adverse possession, based on the reasoning above, the Defendants' claim of having acquired title by adverse possession cannot stand. These are people who have clearly gained advantage by violation of the law and it does not matter that they have been in possession for 12 years or more. Further, I am convinced that their occupation has been forceful and therefore fails to meet the threshold of an adverse possessor.”

117. Adverse possession to land cannot and should not be granted once it has been established that such possession, acquisition, occupation and use of land was obtained through violent means. If indeed the Defendant had bought the land from the Plaintiff as alleged and if indeed he had been in occupation of the same for more than 12 years, he ought to have filed suit under the provisions of Sections 37 and 38 of the *Limitation of Actions Act* to have the suit land registered to his name by virtue of adverse possession. I find that he was indolent in the enforcement of his rights and as such embarked on the use of violence which is frowned upon by the court for it would be encouraging people to violently take possession/occupation of other people's land and thereafter claim adverse possession.

118. I find that owing to the fact that the plaintiff, who is the legal representative of the original proprietor of the land having repossessed the land from the Defendant who had violently taken possession of the



same, adverse possession in the present circumstance is not applicable as the threshold for a claim of the same was not met. The Defendant's counter claim lacks merit and is herein dismissed.

119. In conclusion, I find in favour of the Plaintiff and order that;

- i. The Defendant herein by himself, agents servants, employees or otherwise are herein restrained from entering, remaining, cultivating interfering with and or doing any other act which is prejudicial to the Plaintiff/Applicant's quiet enjoyment and occupation of LR No Kericho/Kiptugumo/280.
- ii. Costs of the suit and counter claim is awarded to the Plaintiff.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 15TH DAY OF JUNE 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

