



Kimetto (Suing as the Administrator of the Estate of Tiongik Rotich - Deceased) v Langat & 2 others (Environment and Land Case Civil Suit 18 of 2018) [2023] KEELC 18156 (KLR) (15 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18156 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND CASE CIVIL SUIT 18 OF 2018

MC OUNDO, J

JUNE 15, 2023

IN THE MATTER OF LR NO. KERICHO/LITEIN/1783

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT

(CAP 22) THE LAWS OF KENYA

AND

IN THE MATTER OF LR NO. KERICHO/LITEIN/1783

BETWEEN

DAVID KIPYEGON A. KIMETTO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF TIONGIK ROTICH - DECEASED) PLAINTIFF

AND

SARAH LANGAT 1ST DEFENDANT

AGNES CHEPNGENO 2ND DEFENDANT

ALBIN KIPKEMOI KOECH 3RD DEFENDANT

JUDGMENT

1. By an Originating Summons dated 6th March 2018 and amended on the 10th January 2020, and brought pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules, the Plaintiff/Applicant herein who claims to be entitled to be registered as the sole absolute proprietor of approximately 0.15 acres comprised in LR No. Kericho/Litein/1783 by adverse possession, seeks for the determination of the following:



- i. Whether the Plaintiff is entitled to the parcel of land known as LR No. Kericho/Litein/1783 measuring 0.15 acres registered in the name of the 2nd and 3rd Defendants by virtue of the Plaintiff's adverse possession of the said in open quiet and peaceful occupation for a period of over 50 years
 - ii. Whether the said Plaintiff should be declared as proprietor of the said 0.15 acres in the suit property LR No. Kericho/Litein/1783, currently registered in the name of the 2nd and 3rd Defendants
 - iii. Costs of this suit to be provided by the Defendants.
2. The Plaintiff also sought that judgment be entered against the Defendants for;
 - i. A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as LR No. Kericho/Litein/1783.
 - ii. An order directing the cancelation of LR No. Kericho/Litein/1783 by the registrar Kericho and restoration of the original title Kericho/Litein/686.
 - iii. An eviction order against the Defendants herein.
 - iv. Costs of the suit.
 3. The Originating Summons was premised on the Supporting Affidavit sworn on the 10th January 2020 by David Kipyegon A. Kimetto the Plaintiff herein.
 4. Upon service of the original Originating Summons on the Defendant/Respondents, the 2nd Respondent on behalf of the 1st and 3rd Respondent filed her Replying Affidavit sworn on the 19th October 2018, and which Affidavit was not amended after the amendment of the Originating Summons, wherein she had averred that Plaintiff's allegations in the Affidavit in support of the Originating Summons were false and misleading and that he had not come to court clean hands. That she and the 3rd Defendant had purchased a portion of LR No. Kericho/Litein/686 from the 1st Defendant in the year 2013 after conducting due diligence. That in the same year, they had jointly been issued with a title to land parcel No. LR No. Kericho/Litein/1783 and they had immediately taken possession and proceeded to develop the land.
 5. Upon confirmation of compliance with the pre-trial directions, the matter proceeded for hearing on the 30th September 2019 wherein the Plaintiff, David Kibyegon Arap Kimetto testified as PW1 that he came from Cheborge in Kericho County and used to work for Unilever East Africa but was now a farmer. That he had filed suit on behalf of the estate of Tiongik Rotich deceased who was his father. That the suit related to parcel L.R No. Kericho/Litein/686 which his father bought from Chebusa (Sambusa) arap Chumo in 1969 for the purposes of using it to dry hides and skins as he was involved in that business. That his father had invited Kipkoech Langat, with whom they were good friends, to help him finish a shelter for drying hides and skin which he used to sell to Kipkoech Langat as he was one of his suppliers. That Kipkoech Langat had agreed to help his late father who had in turn given him the title to that piece of land as security as he was to pay him (Kipkoech) using the proceeds of hides and skins.
 6. That after his father had given Kipkoech the title, he (Kipkoech) had added his name in the register so that the two were reflected as co-owners. That after his father paid Kipkoech in full, Kipkoech had returned the title which still contained Kipkoech's name for which Kipkoech had promised to remove it but had died before doing so. That upon the passing away of Kipkoech they had asked his family



- members to remove his name from the title wherein they had informed them that they were busy doing other things.
7. That the 1st Defendant was the wife of Kipkoech Langat and she had promised to ensure the removal of the name of her late husband from the title but later on things changed and the son of the late Kipkoech with the backing of 1st Defendant started claiming the property from them for which they had sued them but that the case had been dismissed. They then filed a Succession Cause behind the Plaintiff's back where they obtained a grant and used it to subdivide the land.
 8. The Plaintiff produced a search certificate dated the 18th June 2019 for parcel No. 686 as Pf exh 1, a copy of the green card as Pf exh 2 and proceeded to testify that they had tried to resolve the issue without success. That on the site, they had a store for drying hides and skins which had been there since 1969 wherein they also stored raw hides and skins. He sought from the court the prayers in the Plaint.
 9. On being cross examined, the Plaintiff responded that he did not have documents to show that his late father bought parcel No. 686 as it was a long time ago. He agreed that his father gave the title deed to Kipkoech as security wherein Kipkoech had ensured that his name was affixed in the title also. That Kipkoech had no ill-motive since he even returned the title to their father when he was fully paid his money, but died before removing his name from the title.
 10. At this point, the Plaintiff's counsel had sought leave to amend the Originating Summons which leave, by consent had been granted.
 11. After the filing of the amended Originating Summons, the matter proceeded for further hearing on the 13th June 2022 wherein PW2, Joseph Kiprotich Suiyon testified that he lived in Litein within Kericho County and was a farmer. That he understood the case before court and wished to adopt the statement he had recorded on the 23rd February 2018 as his evidence.
 12. He then proceeded to testify that the case was in relation to land parcel No. Kericho Litein 686 which solely belonged to the deceased Tiongik Rotich. That although he could not remember the date Tiongik got the land, yet he had bought the same from Sambusa Chumo in the 1970's. That he did not know Kipkoech Langat although he used to hear about him. That he (witness) lived near the suit land and there had been a time in the 1980's when Chumo had a case with Tiongik Rotich because he wanted to take back the land and sell it to somebody probably because of money issues.
 13. That he never heard of any issues between Tiongik Rotich and Kipkoech Langat and because the land was near his place, he would have heard of any disagreement if the same had arisen. That in as far as he knew, the land belonged to Tiongik Rotich who never sold it.
 14. On Cross examination, the witness responded that before he retired, he was a police officer and had lived away from home for many years but had never seen Kipkoech Langat whom he heard used to sell cow skin. That Tiongik and Kipkoech used to conduct the business of selling skin together and he would not have known if they sold the land as he had been away from home.
 15. PW3 Johana Kipkurui Arap Bii testified that he lived in Litein and was a retired Assistant Chief of Litein. That he understood the case before court as the same was in reference to Tiongik Arap Rotich's land parcel No. Kericho/Litein/686. He adopted his statement recorded on 23rd February 2018 as his evidence before proceeding to testify that he had been an Assistant Chief from 1994-2006 and had been born in Litein. That he came to know of one Kipkoech Langat, who was not a residence of Litein but who used to carry out business in Litein, later.
 16. That the parcel of land No. 686 used to belong to one Arap Chuma for whom he used to work for as a manager at his hotel a long time ago. That the said Chumo had then sold the land to Tiongik Arap



- Rotich around the year 1969. That he was there when Tiongik came to ask for the land but was not there when the payment was made. That there had been a time around the year 2009 when Chumo stated that he did not sell the land to Rotich after which there had been a meeting held by the elders, and it had been decided that Chumo had sold the whole piece of land to Tiongok. The disagreement between Chumo and Tiongik had ended and this was at the time he had retired.
17. That he did not hear of any disagreement between Tiongik and Kipkoech Langat and was not aware that the land was shared. That the plot had a store for goats and cow hides as Tiongik used to have a business for skin hides which he bought from the butchery and sold them to Kipkoech Langat after they had dried up.
 18. That the disagreement had started after Kipkoech Langat's son started claiming a section of the land. That the chief had held a meeting but he did not know what transpired therein although he had just heard that the matter was in court. He ended his examination in chief by stating that he knew that the whole land belonged to Tiongik Arap Rotich.
 19. On cross examination, the witness stated that parcel No. 686 had a store for the hides and that Kipkoech used to buy hides from Tiongik. He reiterated that he was not there when the payment was done and would not know if the two were business partners. That Tiongik used to come and go and Kipkoech also did not live there and he did not know Kipkoech until he died.
 20. That since he was an Assistant Chief, he was in a position to know whether people had conducted a succession proceedings because they would come for a letter from the Chief which letter would state the property of the deceased. He did not know whether Kipkoech's wife had filed a succession cause.
 21. The next witness Wilson Kipngetich Tanui testified as PW4 to the effect that he also lived in Litein and was a watchman with the South Rift Matatus at their office. That he knew about the matter in question because it was about land which was near the slaughter house and which land belonged to Tiongik arap Mosong. He sought to adopt his statement dated the 21st February 2018 as his evidence in chief wherein he proceeded to testify that he knew that Tiongik purchased the land from Sambusa Arap Chumo who was his neighbor and whom he knew very well in 1969 and that he did not sell it to anybody else.
 22. That he also knew Kipkoech Arap Langat who had vehicles that used to go to collect goats. The said Arap Langat also used to buy the goat skins from Tiongik who bought them from other people. That both Tiongik and Kipkoech used to conduct the business together but the land belonged to Tiongik. That he used to be together with Tiongik because he used to slaughter the cows and goats and take them to him.
 23. When questioned by the court, the witness had responded that the land was less than an acre. That Tiongik had built a store on the same to keep the animal hides.
 24. On cross examination, the witness reiterated his evidence adduced in his examination in chief adding that he did not know Kipkoech Langat and that if Tiongik wanted to sell the land, he would have called them to witness although he did not know whether the land had been sold.
 25. After the Plaintiff had closed its case the defense hearing proceeded on the 6th February 2023 with the evidence of Sara Langat the 1st Defendant whom the court noted was very old. She testified as DW1 to the effect that she knew Arap Mosom. The reason why she was in court was because the son of Arap Mosom, had denied the fact that her husband, Kipkoech Arap Langat had purchased the land together with Arap Mosom.



26. She testified that her husband used to buy hides and skins wherein at one point he had told Arap Mosom to look for land which they jointly purchased and used to store the hides and skin there. That the land was closer to Arap Mosom's land. That they had later parted ways wherein Arap Mosom's son sued them. That they had subsequently filed the Succession Cause No.116 (B) of 2001 which proceedings she produced as Df Exhibit 1. She also produced Title deed to land parcel No.Kericho/Litein/1783 as Df Exhibit 2 and its official search as Df Exhibit 3 as well as a Certified copy of the Green Card as Df Exhibit 4.
27. She confirmed that they were not in possession of the land as the son of Arap Mosom was utilizing it. That they had sold their portion to some people being the 2nd & 3rd Defendant vide a sale agreement dated 2nd April 2013 which she produced as Df Exhibit 5. That after her husband had passed away, the son of Arap Mosom sued her.
28. At this juncture the court inquired from her about her age to which she responded that although she did not know the exact age, she could be 96 years old.
29. On being cross-examined, the 1st Defendant responded that her children would know if there was an agreement between her husband and Mosom, but all she knew was that they used to buy skins and that was why her husband asked him to look for land in Litein. That she did not see the exchange of money for the purchase as she was not allowed to go where men were conducting their business.
30. David Kibiegon Koech testified as DW2 to the effect that he lived in Roret and was a farmer as well as a pastor in AGC. That he was in court because of a shop that was on land No. Kericho/Litein/1783 which shop belonged to his father and Arap Mosom who was also known as Tiongik Rotich. That Arap Mosom build the shop/store whereas his father Kipkoech Langat used to buy skins. That both men were friends and used to deal with the business of skins. That after Mosom bought the store, he called his father to help him pay for the store as the owner of the land wanted to take back the land. His father had then paid for the store to save it after which Mosom then asked his father to become his partner.
31. That Df Exhibit 4 was a green card that had indicated that they were one company. After his father passed away on 21st July 2020 they had filed a succession the land had been registered to Sarah Langat (DW1) who subsequently sold the land to Agnes and her friend Albin (2nd & 3rd Defendant). He confirmed that the Plaintiff was a son to Mosom and that he had lay claim to the land which belonged to both their fathers.
32. In cross-examination, the witness stated that his father and the Plaintiff's father bought the land together and that there was an agreement to that effect. That the land was registered to both of their fathers. That although Arap Mosom had bought the land from somebody who wanted to take the store, he had called his father to help him pay for the land which had been registered in Tiongiks name before they went to the land Registrar to change the name. He confirmed that he was not there at the time but that Arap Mosom was like his father's child.
33. That they were great friends and his father had passed away before Arap Mosom. That they had used the land together because it had a store for their goods. That after his father died, Mosom continued to use the land.
When questioned by the court, he confirmed that he was 71 years old.
34. The next witness was John Kipkoech Korir aged 70 years old and who testified as DW3 to the effect that he was a farmer and lived in Kapkisiara in Roret. That he was in court to testify for Kipkoech Langat and Rotich about a plot they bought jointly. That he knew both of them as he used to work for



- Kipkoech Langat as his assistant in the purchase of the hides. That Langat used to purchase skins using a bicycle when Kipkoech asked him to look for a plot so that they could purchase. That at a certain time Arap Rotich told him that he was going to build and also informed Langat that the plot was available so while Arap Rotich had looked for the plot, Kipkoech Langat had built on the same. That he had worked with Langat up until his death in 2000 wherein after Arap Langat's wife then registered herself to that plot which she had later sold.
35. In cross examination, the witness reiterated that the two old men had bought the land. That Rotich asked Langat to look for land wherein Langat had paid the money. That he knew they had bought the land together because they had summoned him together with their children and informed them of the same. That he did not know how much they paid, but they had told them that they had settled the purchase price. He denied having seen them remove money but he had heard them say that they had called them as witnesses.
 36. DW4, Joseph Arap Ngeny confirmed that he also lived in Litein, was a farmer and was about 82 years old. That he knew why he was in court. That there had been somebody called Albin together with another lady who had bought Arap Sambusa Chumo's land which used to belong to Arap Langat and Tiongik. He also testified that there had been a time when Arap Langat and Tiongik had a dispute before the elders and the land was divided. That a Cyprus tree showed the boundary of Tiongik and Arap Langat. His evidence was that the land now belonged to Albin and her friend.
 37. In cross examination he had responded that the dispute between Tiongik and Langat had been because everyone wanted their share of the land. That Arap Langat was the rich one who had bought the land and built a shade to dry the hides/skins. That Tiongik had no money. That Arap Langat used to take Tiongik's hides because he was his agent. That Tiongik then wanted his share of the goats.
 38. He confirmed that he was the one who had recorded the proceedings of the dispute before the chief. That Langat used to take Tiongik's hides so Tiongik had asked for land instead of payment of hides. He was given land together with the shed that had been built by Arap Langat who had bought the land from Sambusa and built the shed.
 39. Selina Chepkemoi Sigilai testified as DW5 to the effect that she lived in Litein Town, did not work and was 77 years old. That she had come to testify on how she had bought 1 share of land with Sambusa. That they had bought the land in small parts in relation to the money one had. That they had been nine people who then shared the land. That Sambusa had then called them and told them that he was old and he wanted to give them certificates. That they had gone to the chief wherein she has seen some old men, Arap Mosom and Charating (Arap Koech) who had bought one share.
 40. That they had been given letters to go to the lands office and that was when she had learnt that the old men were sharing the land because of the money they were contributing. That each one of them had contributed 1/= to go to Kericho. That they bought the land in 1969 and got the title in 1970 wherein everyone stood on their share. That the two men had stood on one share.
 41. That she knew them because they had walked together. Her evidence was that Arap Mosom and Charating shared one land. That subsequently Albin and Agnes bought the land.
 42. On being cross examined, the witness had stated that she had gone with the two old men to ask for the certificates. That they had told them that they had bought the land together and even at the Chief's office, they had confirmed the same. That they had contributed the money for the owner of the land to go to Kericho.
 43. She confirmed that the old men were friends and that whereas the owner of the land used to write the names, Mosom used to put his thumb print but the other 'mzee' would write.



44. The court noted that the witness was truthful and was not being confused by the cross-examination.
45. The next witness Albin Kipkemoi Koech, the 3rd Defendant in this matter testified as DW6 to the effect that she lived in Litein and was a business person. That she was in court because of a piece of land she had bought although she could not remember the number. That the land initially belonged to Tiongik and Arap Mosom and had been divided into two wherein the portion belonging to Tiongik was given to Sarah while the land that belonged to Arap Mosom remained with his family. That the 1st Defendant, Sarah had sold to her land in the year 2013 which land they had jointly bought with Agness Chepngeno, the 2nd Defendant herein.
46. That before they got title, they had conducted a search wherein they had confirmed that it had been registered to Sarah who then transferred the same to them after they had completed the payments. That the title was then registered to both their names since they had contributed to purchase of part of it. That they had conducted their due diligence and Sarah's land had passed through Succession Cause wherein there had been no objection.
47. That they had been in possession of their title deeds for 4 to 5 years after succession and there had been no objection even when they had put up a fence and build their structures.
48. When examined by the court, the 3rd Defendant informed the court that the land was commercial wherein they had put a structure which had tenants who were conducting their business therein. That the Plaintiff did not live on the land but had land which also had structures for business.
49. On cross examination, the 3rd Defendant's response was that the land had belonged to two people whose name she had seen on the documents. That the structures on the land were business kiosks/stalls.
50. Agnes Chepngeno the 2nd Defendant herein testified as DW7 to the effect that she lived in Litein and was a business woman. She confirmed to having bought Sarah's piece of land jointly with DW6. That the Plaintiff had filed suit claiming that the land was not Sarah's land. That they had conducted a search and she knew that the land was Sarah's land before which it had belonged to some two 'wazee' Tiongik and Arap Mosom.
51. That at the time they conducted a search and bought the land, it had been registered in Sarah's name. That although the two wazee had bought the land together, Sarah had transferred the land to them wherein they had obtained a title and had been in possession of the land for more than 7 years.
52. The defence then closed its case and parties were directed to file their written submissions which I shall herein summarize as follows;

Plaintiff's written submissions.

53. After the Plaintiff had summarized the evidence adduced in court, he delineated the issues for determination as follows: -
 - i. Whether the Plaintiff herein is entitled to the suit property by virtue of adverse possession.
 - ii. Whether the court should grant the orders sought.
 - iii. Who should pay the cost:
54. On the first issue for determination as to whether the Plaintiff was entitled to the suit property by virtue of adverse possession, it was the Plaintiff's submission that the answer was in the affirmative. That the law on adverse possession was well settled and is founded on Sections 7, 13, 17 and 38 of



Limitation of Actions Act. That the Court of Appeal had discussed the circumstances under which the cause of action accrued in the case of *Wines & Spirits Kenya Limited & Another vs. George Mwachiru Mwangi* [2018] eKLR whereas in the case of *Tabitha Waitherero Kimani vs Joshua Ng'ang'a* [2017] eKLR the ingredients of adverse possession had been set out to include; (a) an open and notorious use of the property, (b) continuous use of the property, (c) Exclusive use of the property and (d) actual possession of the property.

55. That from the evidence adduced by the Plaintiff and corroborated by his witnesses, it had been crystal clear that after the demise of his father in the year 1999 and also after the demise of the 1st Defendant's husband in the year 2000, which as per the doctrine marked the beginning of time for the adverse possessor, the Plaintiff had continued to openly, notoriously, continuously, to exclusively and actually possess the property in question from the year 2000 up to the year 2012 wherein he had fenced the plot, erected a structure and planted trees, which developments actually served as notice to a reasonable person that a claim may be laid on the property. That the Plaintiff had continued to actually possess the said portion of land using the shed that had been constructed by his father to do other activities until the year 2013 when he was disposed of the same after the 1st Defendant fraudulently registered the same in her name and sold it off to 2nd and 3rd Defendants respectively.
56. That at no time did the 1st Defendant and her family members enter into the said land and/or lay claim during the twelve-year (12) period running from the year 2000 when her husband died to the 1st day of November 2012 when the land was registered in her names as its proprietor.
57. That the Defendants never tabled any evidence of proof that they had laid claim to the said land before the same was registered to the 1st Defendant in the year 2012.
58. On the second issue for determination as to whether the court should grant the orders sought, the Plaintiff submitted that based on the arguments herein advanced, the answer was in the affirmative and the court should grant the Plaintiff a declaratory order of ownership to the suit property LR. No. Kericho/Litein/1783 by adverse possession.
59. On the last issue as to who should bear the cost of the suit, the Plaintiff's submissions were that costs normally followed the event as was provided for under Section 27 of the Civil Procedure Act, unless there were exceptional circumstances. That they believed that there were no exceptional circumstance in the present case and the Plaintiff should be granted the costs.
60. In conclusion the Plaintiff had submitted that whereas possession was a matter of fact, the question whether that possession was adverse or not was a matter of legal conclusion to be drawn from the findings of facts. That the Plaintiff had met the threshold of the conditions to be satisfied before granting ownership of land through adverse possession and in that regard, his prayers should be allowed.

Defendants' written submissions.

61. The Defendants also summarized the evidence adduced in court before submitting that the law on adverse possession emanated from Section 7 and 13 of the Limitation of Actions Act. They also based their submissions on the holding in the case of *Mtana Lewa vs. Kahindi Ngala Mwangandi* [2015] eKLR to submit that asserting that the right to adverse possession did not accrue automatically, that it must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.
62. That the court of appeal in the case of *Wambugu vs. Njuguna* [1983] eKLR had demystified the principle of adverse possession by holding that dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use



- it. That the *Limitation of Actions Act*, on adverse possession, contemplated two concepts; dispossession and discontinuance of possession.
63. That from the foregoing it was clear that the court should determine how the Plaintiff took possession of the suit land, when did he possess and occupy the suit land (to the exclusion of the Defendant's) how long he had remained in possession and lastly the nature of his possession and occupation. Reliance was placed on the decision in *Mombasa Teachers Co-operative Savings and Credit Society Ltd vs. Robert Muhambi Katana & 15 Others* [2018] eKLR
64. The Defendants framed their issues for determination as follows;
- i. Whether the Plaintiff has met the threshold to be entitled to the ownership of LR No. Kericho/Litein/1783 by adverse possession?
 - ii. Who should bear the cost of the suit?
65. In response to the first issue for determination, the Defendants submitted that although the Plaintiff's testimony was that his father, had bought the suit land and also acknowledged that Kipkoech Langat (the 1st Defendant's husband) assisted his father to build the drying shed and used to purchase hides from suppliers including Plaintiff's father, he did not elaborate the extent of the business and also failed to produce any agreement confirming that Kipkoech Langat was to retain the title deed in lieu of payment for the iron sheets he had bought for the business.
66. That although the Plaintiff had alleged that Kipkoech Langat inserted his name in the title deed without his father's consent, yet in the same breath he had also confirmed that there had been no dispute between his late father and the said Kipkoech Langat.
67. The Defendants then proceeded to regurgitate the evidence that had been adduced in court submitting that from the testimony of witnesses it was clear that although Tiongik Rotich bought the suit land from Sambuso Chumo, Kipkoech Langat helped him to pay the remaining balance when Sambuso Chumo threatened to repossess the land and also helped to build the drying shed for the skins and hides.
68. That none of the witnesses were able to clearly discern the extent of the relationship between Tiongik Rotich and Kipkoech Langat where the said hides and skins business is concerned and also the extent of Kipkoech Langat's share or otherwise in the said business. Which then lead to the question as to when time started running to entitle the Plaintiff to adverse possession and whether the Defendant's right over the suit was ever extinguished?
69. Reliance was placed on the decision in the case of *Joseph Macharia Kairu vs. Kenneth Kimani Muirui* [2021] eKLR referred to in *Gabriel Mbui vs. Mukindia Maranya* [1993] eKLR to submit that time did not begin to run unless there was some person in adverse possession of the land. That from the evidence adduced in court, both Tiongik Rotich and Kipkoech Langat owned the suit land jointly and that the said distinct shares of the suit land were occupied by the respective families of Tiongik Rotich and Kipkoech Langat up until when Kipkoech Langat's share was sold to the 2nd and 3rd Defendants.
70. That at no single time did the Plaintiff occupy and/or use the suit land to the exclusion of the Defendants so as to entitle him to acquire the same by adverse possession and therefore time in adverse possession could not be said to run when the person against whom time was running was in active use of the said land.
71. On the question as to who should bear the costs of the suit? It was the Defendants' submission that costs followed the event, and that the successful party should be awarded costs. That should the court



find that the Plaintiff had failed to prove his entitlement to the Defendants' portion of land by adverse possession, then it should exercise its discretion and grant the costs of the suit to the Defendants.

72. In conclusion the Defendants submitted that based on the evidence adduced in court, the Plaintiff had failed to establish exclusive, continuous and open possession of the suit land to the exclusion of the Defendants and therefor the court should find that the ownership rights of the 1st Defendant's husband Kipkoech Langat and the 2nd and 3rd Defendants' have not been extinguished by adverse possession in favour of the Plaintiff.
73. That having failed to prove adverse possession, the Plaintiff was therefore not entitled to an order of cancellation of the titles of land known as L.R. No. Kericho/Litein/1783 by the Land Registrar as prayed and his suit be dismissed with costs to the Defendants.

Determination.

74. I have anxiously conceded the Plaintiff's Originating Summons herein and pleadings. The Plaintiff had presented himself as an administrator to the estate of the late Tiongek Rotich (deceased) who was the registered proprietor of the original parcel of land as L.R. No. Kericho/Litein/868 which was subsequently subdivided giving rise to L.R. No. Kericho/Litein/1783 and which land he now sought to be registered as its proprietor by virtue of the doctrine of adverse possession.
75. Under the provisions of Sections 107 and 109 the *Evidence Act*, the Court has not been furnished with any evidence to prove that there had been any grant of representation to the estate of Tiongek Rotich so as to bring a suit against the Defendants and therefore it cannot be said that the Plaintiff had the locus standi to sue on behalf of the estate of Tiongek Rotich.
76. Indeed in the case of Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229 the Court of Appeal gave meaning to the term locus-standi by stating:
- “.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”
77. Since the issue of locus standi is a point of law which goes to the root of any suit whereby its absence renders a suit fatally defective, lack of it cannot therefore be termed as a mere technicality and the provisions of Article 159 (2) (d) of *the Constitution* cannot in such circumstance salvage the suit. The suit herein is a candidate for striking out but the again if I am wrong and there was an inadvertent omission of commission by the Plaintiff and his Counsel I shall consider the suit as follows;
78. 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:
79. 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...”
80. 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.

81. 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.

82. The onus is always 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 Plaintiff s 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”

The main the elements of adverse possession that a claimant has to prove include:

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

Has the Plaintiff herein demonstrated the said elements?

83. I find the issues arising for my determination as being:

- i. Whether the Plaintiff has been in open, continuous, uninterrupted and exclusive occupation, possession and use of approximately 0.15 acres comprised in LR No. Kericho/Litein/1783.
- ii. Whether the Plaintiff has acquired title by way of adverse possession of approximately 0.15 acres comprised in LR No. Kericho/Litein/1783.

84. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

85. I have considered the evidence herein adduced in court and from what I understand, both the deceased Tiongik Rotich who was the Plaintiff's father and the deceased Kipkoech Langat who was the 1st Defendant's husband jointly carried out the business of skin and hide trade on a parcel of land No. Kericho/Litein/686 which had been purchased from one Sambuso Chumo way back in the 1969 and wherein they had built a shelter to dry skins and hides for their trade.

86. That although the land had been bought by Tiongik Rotich whose name was entered in the Register on the 11th December 1969, it is on record that there had subsequently arisen a dispute between him and the seller Sambuso Chumo who wanted to repossess the land apparently for none completion of payment wherein Tiongik Rotich had called upon Kipkoech Langat to come to his rescue and the matter had been solved by the elders amicably.



87. Kipkoech Langat's name was then entered into the registry on the 24th February 1970 as having ½ share of the land. From the evidence on record the two gentlemen the continued with their trade jointly and peacefully until their demise in the years 1999 and 2000 respectively.
88. Vide a succession Cause filed by the 1st Defendant in Kericho No. 1168 of 2001 in the mater of the Estate of Kipkoech Arap Langat, there had been issued a certificate of Confirmation of Grant dated the 10th March 2010.
89. Subsequently on the 1st November 2012 No. Kericho/Litein/686 had been registered in equal shares to the 1st Defendant and the deceased Tiongik Rotich, wherein on the 13th March 2013, No. Kericho/Litein/686 had been subdivided into two resulting into No. Kericho/Litein/1783 and 1784.
90. Subsequently vide a sale agreement of 2nd April 2013, the 1st Defendant sold her share of land No. Kericho/Litein/1783 to the 2nd and 3rd Defendants herein wherein they had been issued with a title deed on the 22nd July 2013 and they had taken possession of the suit land and constructed business premises thereon. The Plaintiff herein filed suit seeking adverse possession to the said land on the 6th March 2018 which was about 4 years and 4 months later.
91. From the evidence on record, the land to which the Plaintiff lay claim to, based on the doctrine of adverse possession is land No. Kericho/Litein/1783 which came into operation on 13th March 2013 after the subdivision of No. Kericho/Litein/686 and therefore time started running against the 2nd and 3rd Defendants on the 22nd June 2013 when they were registered as proprietors of the suit land.
92. This suit was originally filed on the 6th March 2010, the Plaintiff has not proved that he dispossessed the Defendants of No. Kericho/Litein/1783 for a period of 12 years as it is clear that for the purposes of adverse possession if any, time should have started running upon the registration of the Defendants as its proprietors. In the present instant, the suit was registered to the 1st and 2nd Defendants on the 22nd June 2013 and therefore time started running from the year 2013 up to the 6th March 2018 when the Plaintiff subsequently commenced legal proceedings that effectively stopped time from running, which makes it 5 (five) years thus making the filing of the present suit premature.
93. It is further evident from the evidence adduced herein that upon the sale of the suit land No. Kericho/Litein/1783 measuring 0.15 acres to the 1st and 2nd Defendants herein, they had immediately taken possession wherein they had put a structure which had tenants therein who were conducting their business. That they had been in possession and/or occupation of the same for more than 5 years prior to the institution of the suit herein.
94. In Gabriel Mbui vs Mukindia Maranya [1993] eKLR observations were made in the manner of occupation by a claimant for adverse possession as follows:
 - a) The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.
 - b) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.



- d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period.
- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.”

95. I find that not only was the Plaintiff's Originating Summons prematurely filed but that he has not met any of the conditions herein above enumerated in the Gabriel Mbui case (supra) and it is for these reasons and the authorities herein cited that I find that the Plaintiff /Applicants' Originating Summons dated 6th March 2018 and amended on the 10th January 2020 is devoid of merit and I proceed to dismiss it with costs.

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

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

