



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Rotich v Chepkoskei & 3 others (Environment & Land Case 52 of 2019)  
[2023] KEELC 20254 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20254 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**  
**ENVIRONMENT & LAND CASE 52 OF 2019**  
**MC OUNDO, J**  
**SEPTEMBER 28, 2023**  
**IN THE MATTER OF THE ESTATE OF THE LATE MUSEE ARAP MOSONIK**  
**(DECEASED)**  
**AND**  
**IN THE MATTER OF LAND PARCEL NO. L.R KERICHO/KIPCHORIAN/LELU**  
**BLOCK 8 (SONGONYET)/153**  
**AND**  
**IN THE MATTER OF LAND PARCEL NO. L.R KERICHO/KIPCHORIAN/LELU**  
**BLOCK 8 (SONGONYET)/256**  
**AND**  
**IN THE MATTER OF LAND PARCEL NO. L.R KERICHO/KIPCHORIAN/LELU**  
**BLOCK 5 (MONORI)/35**  
**BETWEEN**  
**EZEKIEL KIPKORIR ROTICH ..... PLAINTIFF**  
**AND**  
**RUTH CHEPKOSKEI ..... 1<sup>ST</sup> DEFENDANT**  
**SIMION KIPNGETICH KOSKEI ..... 2<sup>ND</sup> DEFENDANT**  
**PAUL LANGAT ..... 3<sup>RD</sup> DEFENDANT**  
**JOHN MALAKWEN KOSKEI ..... 4<sup>TH</sup> DEFENDANT**



## JUDGMENT

1. Vide an Originating Summons amended on the 24<sup>th</sup> September, 2020 and filed pursuant to the provisions of order 37 rules 1(a) and (g), 2 (b) and (c) of the Civil Procedure Rules and Section 3A & 63 (e) of the Civil Procedure Act, the Plaintiff/Applicant herein sought for determination of the following questions:
  - i. Whether the Deceased Musee arap Mosonik was the beneficial or registered owner of land comprised in L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 having acquired the same through his own efforts before registration.
  - ii. Whether the rights of an adverse possessor can be defeated by either death of the registered proprietor of a land which is subject to a claim based on adverse possession, or transfer of land or even subdivision of such land which is subject to a claim based on adverse possession.
  - iii. Whether or not the Plaintiff who has peacefully, continually and in uninterrupted way occupied, tilled, developed, and possessed the whole of all that parcel of land known as L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 but now subdivided into the following sub-division Titles L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres, from 1999 (January 1998) is entitled to the whole of the said parcel of land measuring 16 acres as an adverse possessor.
  - iv. Whether the Plaintiff has acquired prescriptive rights as an adverse possessor over land parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 but now subdivided into the following sub-division Titles: L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres for over 21 years since the year 1999
  - v. Whether the Plaintiff's continuous, uninterrupted, and peaceful occupation, use and possession of all that parcel of land known as land parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 but now subdivided into the following sub-division Titles: L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres has been adverse to the original registered proprietor thereof and by extension against the now registered proprietors of the Sub-division Titles.
  - vi. Whether the registration of the sub-division Titles L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 is a subject of such a claim on adverse possession.
  - vii. If the court finds in favour of the Plaintiff as an adverse possessor, what would be the fate of the sub-divisions Title Deeds L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257
  - viii. That if the court was to find that the Plaintiff entered the land parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 initially with the permission of the original



registered proprietor (Muse arap Mosonik) on an exchange arrangement with the Plaintiff's land parcel L.R No. Kericho/Kipchorian/Lelu Block 5 (Monori)/35 and in the absence of compliance with section 3 of *Law of Contract Act* and in the absence of the consent of Land Control Board, would the Plaintiff not be deemed to have been in adverse possession six months after the oral exchange agreement to the date of filing this suit.

- ix. Whether as at July 2011 (after the expiry of 12 years from the date the Plaintiff entered the subject land and when the legal requirement of obtaining the land control board had expired by July 1999), the Plaintiff became entitled to this land by the doctrine of adverse possession henceforth.
  - x. Whether on the success of this case, by the Plaintiff, the sub-division Titles should all be consolidated into one title which should revert to the original Title Deed L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 which should subsequently be registered in the Plaintiff's names as an adverse possessor.
  - xi. Whether by the time the Defendants were being registered as the proprietors of the sub-division Titles L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 the Plaintiff had already acquired prescriptive rights on the Land parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153.
  - xii. Whether the register in respect of the said property comprised in L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 ought to be rectified to reflect the names of the Plaintiff/Applicant to pave way for issuance of title deed.
  - xiii. Whether the Applicant/Plaintiff has over the years peacefully and without any interference developed the suit property by building permanent building structures.
  - xiv. Whether the Applicant is entitled to costs of this suit.
2. The Amended Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting Affidavit of Ezekiel Kipkorir Rotich, the Plaintiff herein sworn on 23<sup>rd</sup> October, 2019.
  3. Simultaneously with the Originating Summons, the Plaintiff had filed a Notice of Motion dated 23<sup>rd</sup> October 2019 where he had sought for injunctive relief orders against the Defendants. On 29<sup>th</sup> April, 2020, the said application had been dismissed for lack of merit.
  4. Subsequently, the 1<sup>st</sup> and the 4<sup>th</sup> Defendants filed their Replying Affidavits both dated 11<sup>th</sup> May, 2021 wherein they refuted the allegations made by the Plaintiff but acknowledged that the Plaintiff had been in occupation of part of the land, formerly known as L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153, as a licensee of the 3<sup>rd</sup> Defendant pending the final distribution of the estate of the deceased.
  5. Directions were taken on 10<sup>th</sup> February, 2021 to the effect that the Amended Originating Summons be deemed as the Plaintiff while the Replying Affidavit, as the Defence. Leave was also granted to the Defendants to file and serve their further affidavit, if need be and in lieu of the amended Originating Summons, and parties directed to comply with the pre-trial directions after which the matter would proceed for hearing by way of viva voce evidence.
  6. Subsequently, whereas the Plaintiff, the 1<sup>st</sup> and the 4<sup>th</sup> Defendants complied with the court's direction, there was no compliance by the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants who did not enter appearance.



7. The matter proceeded for hearing on the 22<sup>nd</sup> November 2021 wherein the Plaintiff, Ezekiel Kipkorir Rotich testified as PW1 to the effect that he lived in Songonyet Kipkelion Sub-County within Kericho County and was a farmer on L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153, (the suit land). That he used to live on land parcel L.R No. Kericho/Kipchorian/Lelu Block 5 (Monori)/35 before he moved to the suit land in the year 1999 after exchanging it with Musee Arap Mosonik's (for ease of reference in this decision, we shall refer to him as "the deceased") land, the suit land herein.
8. He tendered in evidence a Title Deed to Block 35 as Pf Exh 1 and proceeded to testify that he had exchanged the said land with the suit land which had belonged to the deceased who was his neighbor and friend. He testified that the deceased had many parcels of land. That since he (deceased) had asked his children to move to the suit land whereby they had refused, the two men had agreed that the deceased's children move to the Plaintiff's land Block 35 which was nearer. That after the said agreement in the year 1999, he (Plaintiff) had left the said Block 35 which measured 20 acres and had taken occupation of the suit land whereby he had proceeded to develop it.
9. It was his testimony that he had built a semi-permanent house made of timber and iron sheets, ploughed the land and planted trees, coffee and even put up a small factory for pulping. That he had lived on the suit land from the year 1999 to date and nobody had tried to evict him. That the deceased's children knew about the exchange even though the said agreement had been a local arrangement which had not been recorded. That he had lived on that land for about 22 years wherein in the year 2018 some people had gone there in the company of a surveyor where they had proceeded to subdivide the land. That he had then sought for legal advice and subsequently filed the suit herein. An attempt to produce the photographs he had annexed to his Originating summons was objected to wherein the same were marked as PMFI 2(a-i).
10. The Plaintiff then proceeded to testify that from the year 1999, apart from the visit by the surveyor, nobody else had disturbed him. That the people who had accompanied the surveyor during that time had also been accompanied by some the police officers and the chief and that he had later come to learn that the said people were the administrators of deceased's estate. That he did not talk to the people because he had been afraid of the police and that was why he had decided to seek for legal help.
11. On cross-examination, the Plaintiff clarified that his agreement with the deceased had started before the year 1999 but they had come into a final agreement in the year 1998 when he went to see the said land. He confirmed that although there was no other witness to the said agreement, the deceased's children had been around. That after the said agreement, the deceased had informed/called his son Paul Langat, the 3<sup>rd</sup> Defendant herein and his wife Mary Langat. That although the deceased had 3 wives who were alive, only the 3<sup>rd</sup> Defendant's mother knew about the transaction.
12. He further testified that he would not know if the deceased had told his other wives about the exchange of parcels of land. He confirmed that the reason for the exchange had been because the suit land was far from the land that the deceased had bought while his (Plaintiff's) land was nearer to the said land. That the deceased, who was ailing had asked him to go and live on the suit land after which he would transfer the title to him after he had regained his health. Unfortunately the deceased had passed away before he could effect the transfer and title to the suit land to him.
13. That they had not agreed on a date/period upon which to exchange the title but the deceased had told him that the 3<sup>rd</sup> Defendant's mother was the one who was to move to the suit land. That indeed the said 3<sup>rd</sup> Defendant was the one in occupation of his (Plaintiff's) land Block 35. That the deceased was the first to move to the Plaintiff's land Block 35 in the year 1999 before he called his son, the 3<sup>rd</sup> Defendant



- herein, to join him before the Plaintiff moved away. That he had left a house on his land, Block 35 which had subsequently been occupied by the deceased when he had moved there.
14. That he could not remember whether the deceased had built another house or not but that there were buildings on that land that belonged to his son. That he (Plaintiff) did not take steps to have his land transferred because the deceased had told him that they were to wait for some time after exchanging the land before transferring the said parcels of land. That they had given each other permission to use their respective swapped land. That at the time he had gone to the suit land, he had found the 4<sup>th</sup> Defendant in occupation of part of the land wherein the deceased had informed him that the 4<sup>th</sup> Defendant was to occupy 1 (one) acre of the suit land, a portion which he occupied to date.
  15. That there was no survey done, the 4<sup>th</sup> Defendant was just told by word of mouth to stay on 1(one) acre. He reiterated that he built a house on the suit land in the year 1999 and a small processing factory in the year 2019. That he had planted the first coffee on the land around the year 2014-2015 which coffee had been planted in stages. That he had also planted Cyprus and eucalyptus trees and that although he did not have anything to show that he had planted the trees, he had taken photographs of the same.
  16. The Plaintiff reiterated that since his entry on the suit land in the year 1999 to date, there had been no dispute apart from the incident with a surveyor. That he knew Mary Chepchirchir Langat, who knew about the transaction and would testify on the same in court. That he knew the 2<sup>nd</sup> Defendant as an Administrator of the deceased's estate and a son of one of the wives of the said deceased. That he had learnt of the 2<sup>nd</sup> Defendant's administrative status at the time they had gone to subdivide the suit land. His evidence was that the deceased had died somewhere between the year 2002 and 2003 and that he did not know about the Succession Cause until the time when the said administrators of the deceased's estate visited the suit land in the year 2018.
  17. He further testified that although he and the 3<sup>rd</sup> Defendant spoke on general issues, yet the said 3<sup>rd</sup> Defendant did not inform him of the Succession Cause No. 11 of 2007 hence he was not involved in the same.
  18. On being re-examined, he confirmed that the deceased had lived close to him and they had known each other for long as they were from the same village. That after they had exchanged their parcels of land, each person had taken possession and occupation of the other person's land. He further confirmed that the deceased moved to his land (Block 35) with his cows where he had lived thereon with the 3<sup>rd</sup> Defendant and his wife Mary Langat and their sons.
  19. He reiterated that they spoke with the 3<sup>rd</sup> Defendant about the transfer of title after the deceased's death and that it was only when the surveyor was brought on the suit land in the year 2018, that he had realized that there could be a problem with the said suit land. He confirmed that Mary Chepchirchir was the 3<sup>rd</sup> Defendant's wife who lived on the land Block No.35. He further confirmed that in the year 1998, they had agreed with the deceased that he (Plaintiff) moves to the suit land while the deceased and his children move to Block 35. The moving took place in the year 1999 wherein he took possession and occupation of the suit land.
  20. The next witness, Mary Langat, testified as PW2 to the effect that she lived at Kapseger on Block 35 and that they got onto the said land in the year 1999. That before then, they used to live on land No. 55 in Kapseger. That the deceased, who was her father in law gave them Block 35 after he had exchanged the same with the Plaintiff herein and that the two lived on their swapped lands from the year 1999 until recently. That she was currently living on land parcel No. 55 while her children lived on Block 35. That she used to have another land but when her husband, the 3<sup>rd</sup> Defendant herein, moved to Block No.35, she had remained on the said land.



21. On being cross-examined, she testified that she was not present when the two parcels of lands were exchanged, that it was only the Plaintiff and the deceased who were present and the deceased only told her to live on Block 35. That the Plaintiff and the deceased were to exchange the titles but unfortunately, the deceased passed on before the titles could be exchanged. That although no time limit had been set for the said exchange of titles, there had been plans towards the same because when the Plaintiff visited the deceased, the deceased had told him that he was sick wherein he had unfortunately succumbed to the said sickness.
22. That the deceased did not live in Block 35 but she had been the one who had lived there since the year 1999. That although she lived on a portion of land No. 59, she also visited Block 35. That she had been living on Block No.59 since the year 1975 until the deceased showed her Block 35 hence, she had since been in occupation of both No. 59 and Block 35. That she had built 4 houses on Block 35 which houses belonged to her 4 sons. She also confirmed that the Plaintiff had left a grass thatched house on Block 35 but after they settled on the Plaintiff's land, they had started building other houses. That the distance between block 35 and parcel No.59 was about 1½ Km. she confirmed that the suit land measured 16 acres which was occupied by the Plaintiff. She testified that she was not aware of the Succession Cause to the deceased's estate.
23. On being re-examined, she confirmed that she was told to live on the parcel of land Block 35 that had initially belonged to the Plaintiff, while the Plaintiff moved to the suit land. That each person moved to their respective portions and that she had peacefully lived on that land for 22 years.
24. Wilson Chepkwony Arap Cheruiyot testified as PW3 stating that he was over 70 years old and lived in Songonyet. That he knew both the deceased, who was his neighbor, and the Plaintiff, who had been called by the deceased and shown the suit land, where upon he had built and developed it by planting blue-gum trees and coffee as well as building a factory. That it had been in the year 1999 that the Plaintiff and the deceased had exchanged their parcels of land. That after the said exchange, each party had moved to their respective new parcels of land and developed the same wherein they had lived peacefully. That he had not heard of any disturbance. He confirmed that his own parcel of land was No. 81 and that the Plaintiff also lived in Songonyet.
25. When cross-examined, he clarified that he was not present when the Plaintiff and the deceased had exchanged their parcels of land, but that he had come to know of the said exchange after the Plaintiff went to live on the suit land. That he could not tell under what terms they had exchanged their respective parcels of land. That he knew that the Plaintiff occupied 16 acres because they have a register that they kept in their society, wherein according to the said register, 16 acres was what the deceased was entitled to.
26. He testified that he did not know the parcel number of the land that the deceased had exchanged with the Plaintiff, although he had heard that the other land measured 20 acres although he had not seen it. He clarified that Plaintiff planted the trees around the year 2000 or thereabout, and that though the Plaintiff had planted trees and coffee on the suit land, he did not know when the said coffee was planted. He also confirmed that the 4<sup>th</sup> Defendant was living on a small portion that formed part of the suit land and that he did not know the relationship between the 4<sup>th</sup> Defendant and the deceased.
27. On being re-examined, he confirmed that he knew about the exchange in the year 1999 after inquiring from the people who were building on the land. He also stated that he had lived on his own parcel of land since the year 1970.
28. Christopher Kipterer Sitinei testified as PW4 to the effect that he had been a cattle dip attendant but was now a farmer who lived in Sailo village in Kipkelion where he had lived since the year 1976.



- He testified that he knew the deceased in the year 1999 when the Plaintiff informed him that he had exchanged land with the deceased. That Mary Chepchirchir (PW2) Langat was married to the deceased's son and that the deceased had given her the exchanged land to live on.
29. His testimony was that the Plaintiff had told him that he had exchanged land with the deceased because his land was nearer to the deceased's other land. That the deceased moved to the Plaintiff's land while the Plaintiff moved to the suit land where to date the Plaintiff had lived on the said suit land while Mary Chepchirchir (PW2) lived on the Plaintiff's land without disturbance. It was his further testimony that the Plaintiff built his houses, and a factory on the suit land
  30. Upon being cross-examined, he confirmed that he had seen the developments by the Plaintiff and that the deceased had given the Plaintiff's original land Block No. 35 to his wife Esther who had subsequently given it to her children. That the deceased did not live on the Block 35 as Mary Langat, the 3<sup>rd</sup> Defendant's wife was the manager of the land on behalf of her children. He confirmed that the 3<sup>rd</sup> Defendant was still alive and that together with his wife Mary Langat, they had been brought to live on Block No. 35 by the deceased.
  31. He testified that there were about 4 houses on land Block 35, that Mary Langat ploughed on the land but that he did not know if the said Mary lived on that land although she frequently visited the said Block 35. That the deceased just used to graze the cows on the Plaintiff's parcel of land but he did not live there.
  32. On being re-examined, he explained that he saw the developments on the suit land while walking past the said land, that Mary's children lived on plot No. 35 which the deceased had given them.
  33. The Plaintiff closed his case wherein the matter was scheduled for defence hearing on 5<sup>th</sup> December, 2022 on which day Ruth Chepkoskei, the 1<sup>st</sup> Defendant had testified as DW1 to the effect that she was a farmer who lived in Kapseger location within Kericho County and that she knew the Plaintiff herein. That although she was not related to him, yet he had occupied the suit land in the year 1999. She testified that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were her step-brothers while the 4<sup>th</sup> Defendant was her uncle.
  34. That the Plaintiff had taken the 3<sup>rd</sup> Defendant's share of land measuring 7 acres out of a total of 15 acres of the suit land, because the 3<sup>rd</sup> Defendant's children had gone to live on his (Plaintiff's) Land Block 35. That she did not know how big the Plaintiff's land Block 35 measured. She confirmed that the suit land was registered in the name of the deceased who was her father and that he had been alive when the Plaintiff took the land. That an agreement had been reached where by the 3<sup>rd</sup> Defendant was to get  $\frac{1}{2}$  of the suit land measuring  $7\frac{1}{2}$  acres which land he had exchanged with the Plaintiff.
  35. It was her further testimony that the suit land had since been sub-divided in the year 2018, after the deceased's death and thus was no longer registered in his name. She testified that they had conducted a Succession Cause, as per a copy of Rectified Certificate of Grant issued on 19<sup>th</sup> July, 2017 in Kericho High Court Succession cause No.11/2007 which she produced as Df Exh. 1, wherein the said suit land had been distributed among the 1<sup>st</sup> Defendant who received  $7\frac{1}{2}$  acres, the 3<sup>rd</sup> Defendant who received  $7\frac{1}{2}$  acres and the 4<sup>th</sup> Defendant who had received 1 acre.
  36. That the 4<sup>th</sup> Defendant was allocated 1 acre because in the year 1983 the deceased had asked him to look after the suit land and had been on the said land since then. That the 3<sup>rd</sup> Defendant had challenged the Grant since he wanted the entire suit land to go to the Plaintiff but after the said Application had been heard, it had been dismissed by the court via its ruling dated 23<sup>rd</sup> September, 2019. She produced the Application dated 28<sup>th</sup> September, 2018 and the Ruling dated 23<sup>rd</sup> September 2019 as Df Exh. 2 and Df Exh. 3 respectively.



37. She testified that she did not know why the court had dismissed the 3<sup>rd</sup> Defendant's Application. That the suit land had later been subdivided into 3 parcels as directed by the court whereby the 3<sup>rd</sup> Defendant got Title to No. L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, the 1<sup>st</sup> Defendant got Title to L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 while the 4<sup>th</sup> Defendant got Title to L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257.
38. She had confirmed that at the time of the sub-division, the Plaintiff was in occupation of the land whereby he had planted coffee on 5 acres in the year 2007 and had also built a factory thereon in the year 2018 which properties, as well as a maize plantation, were on a 7 acres portion of land occupied by the Plaintiff.
39. That the 3<sup>rd</sup> Defendant herein did not have any share on the suit land. That she planted some beans on almost 2 acres and the Plaintiff planted maize on the other portion of land. That the 7<sup>1</sup>/<sub>2</sub> acres that the Plaintiff was occupying belonged to the 3<sup>rd</sup> Defendant and was not inclusive of her 7<sup>1</sup>/<sub>2</sub> acres portion although the said Plaintiff had used almost 10 acres of the suit land. That when the Plaintiff entered the suit land in the year 1999, the said land had not been subdivided hence the Plaintiff was using almost all of the land while the 4<sup>th</sup> Defendant was occupying 1 acre of the suit land.
40. That the rest of the suit land was used as grazing land for the Plaintiff's and 4<sup>th</sup> Defendant's cattle there being no boundary limiting the Plaintiff's land at the time. That after the Succession Cause in the year 2018, the Plaintiff's land had been delaminated but she was in use of 2 acres as the rest of the land was used by the Plaintiff who drove away any person that she sent to farm on her portion.
41. Upon being cross-examined, she confirmed that she had known the Plaintiff since the year 1999 when he occupied the suit land. That the deceased also knew the Plaintiff who had houses and a factory on the suit land. When referred to PMFI 3 she confirmed that those were the buildings on the suit land which the Plaintiff had occupied since the year 1999. She also confirmed that she had never served any notice upon the Plaintiff because the said Plaintiff lived on the 3<sup>rd</sup> Defendant's portion of land. That the 3<sup>rd</sup> Defendant, his wife and the deceased were present during the exchange but the said deceased was aware that the Plaintiff was taking the 3<sup>rd</sup> Defendant's portion of land because the other portion belonged to her (DW1's) mother by the name Tapsony Mosonik.
42. She explained that the deceased was present because he had wanted the 3<sup>rd</sup> Defendant to exchange part of the land with the Plaintiff. That she had not attached any document to show that the Plaintiff occupied the suit land as a licensee and that the Plaintiff had not paid anything to her since the year 1999 because the 3<sup>rd</sup> Defendant occupied his land. That as a family, they had sub-divided the suit land in May, 2018 and fenced it. She confirmed that the Plaintiff was currently occupying 10<sup>1</sup>/<sub>2</sub> acres of the suit land and that the 4<sup>th</sup> Defendant was aware of the exchange of the parcels of land between the Plaintiff and the deceased.
43. On being re-examined, she confirmed that the Plaintiff constructed the houses in the year 1999 which houses occupied around ½ an acre, that the Plaintiff occupied the said suit land together with the 4<sup>th</sup> Defendant. That the use of land in common between the Plaintiff and the 4<sup>th</sup> Defendant subsisted until the Succession process was concluded in the year 2017 where upon the land had been sub-divided. The 1<sup>st</sup> Defendant closed her case.
44. Since there was no evidence tendered by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, the Defence case was marked as closed wherein parties filed their written submissions which I shall summarize as herein under.



## Plaintiff's Submissions

45. The Plaintiff raised one issue for determination to wit; whether he had proved the grounds requisite under the Principle of Adverse possession. He then went on to submit that it was not in contention that he had peacefully, continuously, uninterrupted and fully occupied the suit property since the year 1999 wherein he had conducted extensive developments as articulated by the pictures produced in court.
46. He relied on the provisions of Section 7 of the Land Act, 2012 and the definition of Adverse Possession as is disposed in the Black's Law Dictionary, 9<sup>th</sup> edition to submit that he had acquired the suit property by prescription as pronounced by the principles of adverse possession where he had been in continuous, exclusive, hostile and notorious occupation of the same. The Plaintiff further submitted that the period of time he had occupied the suit property exceeded the mandatory twelve (12) years prescribed by the law and therefore, the title of the proprietor of the suit land ought to be extinguished in his favour by dint of his Adverse Possession. Reliance was placed on the combination of the provisions of Sections 7, 17, 18(1) and 38(1) and (2) of the Limitation of Actions Act as well as the holding in the case of Wilson Njoroge Kamau vs. Nganga Muceru Kamau [2020] eKLR where the court had quoted the Court of Appeal case in Kaswe vs. Mwaani Investments Limited & 4 Others (2004) 1KLR.
47. The Plaintiff further placed reliance on the provisions of Section 28(h) of the Land Registration Act, 2012 to submit that one of the overriding interests on land recognized by law was the rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
48. It was the Plaintiff's submissions that the 1<sup>st</sup> Defendant herein conducted the Succession proceedings to the estate of Musee Arap Mosonic (deceased), wherein he had included the suit property in the list of the Deceased's assets while bearing full knowledge that the said property had already been exchanged by the deceased and no longer formed part of the deceased's property. That such concealment of material facts while presenting documents to a Court of Law amounted to fraud as per the definition of fraud found in the Black's Law Dictionary 10<sup>th</sup> Edition. That the Court herein was empowered to order the rectification of the Register by directing that any registration be cancelled or amended if it is satisfied that the same was obtained, made or omitted by fraud or mistake. Reliance was placed on a combination of provisions of Section 80(1) of the Land Registration Act, 2012 and Section 107 of the Evidence Act, 2008.
49. It was the Plaintiff's further submissions that he had satisfied all the required precepts under the principle of adverse possession for which the Defendants had also confirmed that indeed the suit property was a result of a subdivision of L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 wherein the Plaintiff together with his family had been in occupation from the year 1999 to date which had amounted to 24 years, a period which was over the requisite 12 years. That the said occupation and possession of the suit property had been open, continuous and without interruption for all that period of time. No contradictory evidence had been tendered in by the Defendants.
50. In as far as the instant claim was raised against the estate of the deceased Musee Arap Mosonik, the Plaintiff relied on the decided case by the Court of Appeal in Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR to submit that claim for Adverse Possession was attached to the land and not title, that he had acquired absolute proprietorship over the suit land and the 1<sup>st</sup> Defendant's illegal actions and maneuvers of purporting to re-acquire the same could not be upheld. Reliance was also placed on the provisions of Article 40 of the Constitution of Kenya to submit that the rights to property did not extend to property that had been acquired unlawfully.



51. Further reliance was placed on the holding in the case of *Celina Muthoni Kitthinji vs. Safiya Binti Swaleh & 8 others* [2018] eKLR where the court of equal status had held that the proper way of assessing proof of Adverse Possession was whether or not the title holder had been dispossessed or had discontinued his Possession for the statutory period, and not whether or not the claimant had proved that he or she had been in possession for the requisite number of years. The Plaintiff thus submitted that having produced photographs showing extensive developments including permanent buildings, it pointed to the fact that the vast developments had been undertaken openly over a period of time.
52. Finally, the Plaintiff sought for the Court to hold that he had proven on a balance of probability that he was entitled to be registered as the absolute owner of L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153.

### **Defendant's Submissions**

53. The 1<sup>st</sup> Defendant summarized the background of the matters in issue as well as the evidence as adduced in court before framing three issues for determination to wit;
- i. Whether the Originating Summons before the Court are incompetent for failure to annex certified extract of title and/or certified true copy of the Register (Green card).
  - ii. Whether the Plaintiff has been in actual, peaceful, uninterrupted, hostile and exclusive possession of 15 acres comprised in L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 for a period of at least 12 years.
  - iii. What remedies are available to the parties herein?
54. On the first issue for determination, the 1<sup>st</sup> Defendant submitted that the Plaintiff herein flaunted the express provisions of law by instituting the suit herein without annexing a certified true copy of the Register in respect of L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 and neither did he produce it as evidence in support of his claim, hence his Originating Summons should be rendered incompetent. Reliance was placed on the provisions of Order 37 Rule 7 of the Civil Procedure Rules, 2010 as well as the holdings in the decided cases of *Elizabeth Cheptoo Tuimising vs. Jane Cheronu Ngeno & Another* [2016] eKLR and *Andrew Likaibua Kathuku alias Nguga M'kaibi vs Jacob Miriti Kaaria & 2 Others* [2019] eKLR.
55. On the second issue for determination, the 1<sup>st</sup> Defendant submitted that the Plaintiff was not entitled to the suit property as he had not been in actual, peaceful, hostile and exclusive possession of the same. That although the 1<sup>st</sup> Defendant had admitted the Plaintiff's occupancy of part of the suit property, the said occupation was merely that of a licensee therefore an eviction notice could not be served upon him as there was an understanding that he was occupying the 3<sup>rd</sup> Defendant's portion of the suit property. The Plaintiff relied on the decided case of *Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui* [2017] eKLR to submit that for a claim of adverse possession to succeed, it must have been without the consent and/or licence of the registered owner.
56. The 1<sup>st</sup> Defendant, in referring to the Plaintiff's testimony that Musee Mosonik (the deceased) first moved to the suit land before calling his son the 3<sup>rd</sup> Defendant herein to join him, submitted that if the above assertion was indeed true, then PW2, PW3 and PW4 would have reiterated the same. She submitted that PW2 and PW4 testified to the effect that they were only informed of the land exchange by the Plaintiff and surprisingly, the key witness that is the 3<sup>rd</sup> Defendant, was never called as a witness despite PW4's testimony that he was still alive.



57. Further submission was that there had been a myriad of inconsistencies in the Plaintiff's evidence as none of the witnesses could elucidate on the terms of the so called agreement. The Plaintiff also never submitted the particulars of his land parcel to show whether it had the exact acreage, registration number and the current status.
58. That on cross-examination, the Plaintiff had admitted that he had been given permission to use the suit land and that no survey was ever carried on the said suit land. That the major developments carried out by the Plaintiff were from the year 2014 when he first planted coffee hence there were no hallmarks of his purported long-term occupation.
59. The 1<sup>st</sup> Defendant's further submissions were that even if the Plaintiff's claim was justifiable, he had neither submitted any evidence on when his possession became hostile nor had he proved his exclusive possession. That the Plaintiff and all his witnesses had agreed that the 4<sup>th</sup> Defendant herein was in occupation of an acre on the suit land and had all along lived on the said land parcel hence the Plaintiff's assertion that he had been in occupation of the entire suit property was meant to hoodwink the court.
60. The 1<sup>st</sup> Defendant relied on the decisions in *Kasuve vs Mwaani* (supra) and *Celina Muthoni Kithinji* (supra) to reiterate that the Plaintiff's occupation of the said property was merely that of a licensee and that even if a claim for adverse possession was to lie, the same would only be against the 3<sup>rd</sup> Defendant's share of the suit property. That should the Court find the instant suit to be competent, the Plaintiff had not satisfied the conditions precedent for an inference that he was entitled to the suit property by operation of the doctrine of adverse possession.
61. Consequently, the 1<sup>st</sup> Defendant sought for the court to find and hold that the Plaintiff had failed to prove on a balance of probability that he was entitled to the 16 acres comprised in L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 by virtue of adverse possession.
62. On the third issue for determination as to whether the Defendant (sic) was entitled to the reliefs sought, the 1<sup>st</sup> Defendant's submission was that the amended Originating Summons filed on 25<sup>th</sup> September, 2020 be dismissed with costs.

### **Determination.**

63. This is a matter where the Plaintiff/Applicant herein seeks for orders that he be registered as proprietor parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 land which has since been subdivided resulting into L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 and L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257 measuring 16 acres in total having acquired title by virtue of the doctrine of Adverse Possession after its original owner, the late Musee Arap Mosonik had allegedly taken possession and occupation of his land L.R No. Kericho/Kipchorian/Lelu Block 5 (Monori)/35 in what can loosely be termed as an "exchange program" that had occurred in 1999.
64. The Plaintiff's evidence was that in the year 1998 he and the deceased Musee Arap Mosonik had entered into a gentle man's agreement to exchange their respective parcels of land wherein in the year 1999 he had taken possession and occupation of the deceased's land originally registered as L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153, while the deceased had taken possession and occupation of his (Plaintiff's) land registered as L.R No. Kericho/Kipchorian/Lelu Block 5 (Monori)/35 where he had settled his son the 3<sup>rd</sup> Defendant here and daughter in law who testified as PW2. There had also been an agreement that whilst parties were in occupation of their new parcels of land, the transfer would take place at a later date since the deceased Musee Arap Mosonik was ailing. This agreement did



not come to pass as Musee Arap Mosonik subsequently passed away in the year 2003 before he could effect the transfer and title to the suit land to him.

65. The Plaintiff's case was that soon after the exchange he had proceeded to develop the suit land wherein he had planted Cyprus and Eucalyptus trees as well as coffee and had even constructed a small factory for pulping. That he had lived peacefully on the suit land from the year 1999 to date save for the year 2018 when the deceased's administrators and a surveyor had gone to sub divide the land. His argument was that having been in open, quiet continuous and without interrupted occupation of the suit land from the year 1999 to date wherein he had made significant developments and which period had amounted to 24 years, a period which was over the requisite 12 years, that he be declared to have acquired prescriptive rights as an adverse possessor over land parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 and its subsequent subdivisions.
66. The Defendants' case which was prosecuted by the 1<sup>st</sup> Defendant only on the other hand was to the effect that she was a daughter to the deceased Musee Arap Mosonik who was the proprietor of the suit land which measured 15 acres. That indeed the Plaintiff had been on the suit land since 1999 and had been using almost all the land, whereby he had planted coffee on 5 acres in the year 2007 and had also built a factory thereon in the year 2018, although he was only entitled to the 3<sup>rd</sup> Defendant's (her step brother) share of the land measuring 7<sup>1</sup>/<sub>2</sub> acres because he had exchanged his portion with the Plaintiff's parcel of land. That the remaining portion belonged to her (DW1's) mother by the name Tapsony Mosonik.
67. The 1<sup>st</sup> Defendant's case was that the 4<sup>th</sup> Defendant had also been in possession of a portion of 1 acre of the suit land from the year 1983, a reward from her father, the deceased, for having looked after the suit land. That the original suit land had since undergone a succession process vide Kericho High Court Succession Cause No.11/2007 wherein there had been issued a Rectified Certificate of Grant on 19<sup>th</sup> July, 2017. That subsequently the suit land had been sub-divided in the year 2018 whilst the Plaintiff was in occupation for which it had been distributed and the 1<sup>st</sup> Defendant had received 7<sup>1</sup>/<sub>2</sub> acres, the 3<sup>rd</sup> Defendant received 7<sup>1</sup>/<sub>2</sub> acres whilst the 4<sup>th</sup> Defendant had received 1 acre.
68. The 1<sup>st</sup> Defendant's argument was that the Plaintiff was in occupation of part of the suit property as a licensee to the 3<sup>rd</sup> Defendant's portion of the suit property. That for a claim of adverse possession to succeed, the Plaintiff ought to have been on the suit land without the consent and/or licence of the registered owner.
69. 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:
70. 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...”
71. 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.



72. 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
73. Section 37 of the *Limitation of Actions Act* provides that:
- “Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”
74. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by Adverse Possession to land, (s)he must apply to the High (Read Environment and Land) Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:
- i. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
  - ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
75. It is alleged, because no title deed was produced as evidence, that before its subsequent subdivisions, parcel L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/153 was registered to the deceased Musee Arap Mosonik.
76. It is further not contested that the plaintiff herein had been in occupation and possession of the said suit land since the year 1999 for which he had subsequently developed the same by planting trees, coffee and had also constructed a small factory for pulping.
77. Lastly, it is not contested that pursuant to the death of Musee Arap Mosonik, and whilst the Plaintiff was still in occupation of the suit land, in his exclusion, succession proceedings had been filed in the Kericho High Court in Succession Cause No.11/2007 wherein a Rectified Certificate of Grant herein produced as Df exh 1 had been issued on 19<sup>th</sup> July, 2017. The said suit land had then been distributed among the deceased’s beneficiaries wherein the 1<sup>st</sup> Defendant had received 7<sup>1</sup>/<sub>2</sub> acres, the 3<sup>rd</sup> Defendant received 7<sup>1</sup>/<sub>2</sub> acres and the 4<sup>th</sup> Defendant had received 1 acre. The suit land had then been surveyed and sub-divided into 3 parcels in the year 2018 whereby the 3<sup>rd</sup> Defendant got Title to No. L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/255, the 1<sup>st</sup> Defendant got Title to L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/256 while the 4<sup>th</sup> Defendant got Title to L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/257.(No extracts of the title deeds had however been produced as evidence)
78. What is contested herein and which forms my basis for determination is whether there had been an agreement between the Plaintiff and the deceased Musee Arap Mosonik wherein the plaintiff had exchanged his parcel of land L.R No. Kericho/Kipchorian/Lelu Block 5 (Monori)/35 with the deceased’s parcel of land L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/2578 (Singonyet)/153 and therefore the Plaintiff was entitled to the same by virtue of the doctrine of adverse possession.



79. Indeed whereas evidence by the Plaintiff was that in the year 1998 he and the deceased Musee Arap Mosonik had entered into a gentle man's agreement to exchange their parcels of land wherein in the year 1999 both parties had swooped their parcels of land and taken possession and occupation of each other's land, the defence evidence was that the Plaintiff was only entitled to the 3<sup>rd</sup> Defendant's share of land measuring 7<sup>1</sup>/<sub>2</sub> acres, land which he had exchanged with him. It is further on record that the Plaintiff did not utilize the whole of the suit land because the 4<sup>th</sup> Defendant was also in occupation and possession of a portion of 1 acre of the same.
80. Evidence on record is that before the proprietor of the original parcel of land could effect transfer, he had passed away in the year 2003 which was 4 years after the Plaintiff's occupation of his land. The Succession proceedings had then been instituted vide Succession Cause No 11 of 2007 at which time the Plaintiff had not occupied the property for more than 12 years and therefore the deceased's interest in the land had not yet been terminated by operation of law but formed part of the estate of the deceased be shared amongst his beneficiaries in the absence of any evidence to the contrary.
81. As at the time the Plaintiff came into possession of the suit land, a certificate of Confirmation of Grant dated 19<sup>th</sup> July 2017 (Df exh 1) had been issued, an application by the 3<sup>rd</sup> Defendant dated the 28<sup>th</sup> September 2018 (Df exh 2) seeking a revocation or annulment of the said Grant made, and a ruling by the High Court dated 23<sup>rd</sup> September 2019, herein produced as Df exh 3, delivered. That when the Plaintiff brought the action seeking for adverse possession, time had aggregated to a period of 19 (nineteen) years. The Plaintiff however did not annex the certified extract of the title or Register/Green card to L.R No. Kericho/Kipchorian/Lelu Block 8 (Singonyet)/2578 (Singonyet)/153 to his Originating Summons and neither did he produce the same in evidence herein.
82. Order 37 Rule 7(2) of the Civil Procedure Rules makes it mandatory that the extract of the register, or green card, be annexed to the Originating Summons and for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land that is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.
83. In the case of *Johana Kipkurui Rotich vs. Charles Kiagi* [2019] eKLR the court held as follows:
- “It is clear from the above that one needs to annex the extract of the title. This provision of the law is not superfluous, for there are categories of land where time for Adverse Possession will not start running. Among these is land under the Government, which is covered under Section 41 of the *Limitation of Actions Act*.”
84. Indeed 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 (emphasis mine) in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”
85. 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 were inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

86. In the case of *Titus Kigoro Munyi v. Peter Mburu Kimani* (2015)eKLR it had been observed that:

“It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors”.

87. It is therefore clear from the foregoing provisions of the law and case law that a claim for Adverse Possession shall only be sustained against the proprietor of the suit land (see Court of Appeal's holding in *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR) and the predecessors and this can be so upon the claimant annexing the registerable document to the suit land. Having said this, and in consideration of the case before me, I find that the Plaintiff has not annexed an extract of the title, or any other document of title, in relation to the suit parcel of land, to show who the past or the current registered proprietor is/are as required by the rules. As the matter stands, nobody knows who the registered owner of the land claimed by the Plaintiff is, and this court cannot tell whether the Plaintiff is disentitled to benefit from the running of time on the said title. Parties shall be held liable on their pleadings.

88. I find in this case that the Plaintiff has not made out a prima facie case to the required standard as adversity of a title must be established as against a known owner and not in vacuum. I therefore proceed to dismiss the suit with costs to the 1<sup>st</sup> Defendant.

It is ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

