



Chobe (Suing as the Administrator Ad Litem of the Estate of Kipchobe Arap Murgor - Deceased) v Mibei & another (Environment & Land Case 33 of 2020) [2025] KEELC 1227 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1227 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 33 OF 2020
LA OMOLLO, J
MARCH 13, 2025**

BETWEEN

MALAKWEN ARAP CHOBE (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF KIPCHOBE ARAP MURGOR - DECEASED) ... PLAINTIFF

AND

DAVID MIBEI 1ST DEFENDANT

ZAKEO GICHAGA MOIGO 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced the present proceedings vide an Originating Summons dated 20th May, 2020. The Originating summons was later amended on 15th November, 2021.
2. The Originating Summons is expressed to be brought under Sections 37 & 38 of the [Limitation of Actions Act](#) and Order 37 Rule 3 of the Civil Procedure Rules.
3. The Plaintiff seeks the following orders:
 - a. A declaration that the Defendants' right over the whole LR Nakuru/Olenguruone/Amalo/310 measuring 2.6 Hectares or thereabouts got extinguished by adverse possession upon expiry of twelve (12) years when the Applicant was in possession.
 - b. A declaration that upon the expiry of twelve (12) years when the Applicant was in possession of LR Nakuru/Olenguruone/Amalo/310, the whole of the land was held and is currently held in trust for the Applicant.



- c. A declaration that the title of the 2nd Respondent was long extinguished at the time of purported sale of the parcel of land known as to the 1st Respondent hence had no or good title to pass to him on the 11th May, 1996. (sic)
- d. An order that the whole of land parcel LR Nakuru/Olenguruone/Amalo/310 measuring 2.6 Hectares or thereabouts vests in the Applicant's name and that he should be registered as the owner thereof under Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- e. An order that the Respondents do sign all relevant documents to facilitate transfer of the whole of land parcel LR Nakuru/Olenguruone/Amalo/310 measuring 2.6 Hectares or thereabouts to the Applicant and that in default, the Deputy Registrar of this Honourable Court to sign the same.
- f. An order that the Respondents be condemned to pay costs of this suit.

Plaintiff's Contention.

4. The application is supported by the affidavit of Malakwen Arap Choge sworn on 13th November, 2021.
5. He contends that he is the Administrator of the Estate of Kipchobe Arap Murgor who died on 10th July, 1990 and that the said Kipchobe Arap Murgor was a resident of Amalo Location which is now Kuresoi South Sub- County.
6. He also contends that the late Kipchobe Arap Murgor was his father and he was the owner of land parcel No. Nakuru/Olenguruone/Amalo/49 having been allocated the said land by the colonial government in the year 1958 after he relocated from Uasin Gishu to Olenguruone under the African settlement program.
7. He further contends that he entered the suit property which was vacant and had not been allocated to anyone. He adds that the suit parcel was heavily forested and they had to remove most of the vegetation and tree stamps in order for the land to be suitable for farming and adds that he fenced off the suit land using cedar posts which are in place to date.
8. It is his contention that in the year 1977 the government of Kenya conducted adjudication in respect of the land in Olenguruone Settlement. It is his further contention that the parcel of land occupied by his father was registered as Nakuru/Olenguruone/Amalo/49 but a section of it which lays across the river was left unregistered. He adds that this became part of the parcels of land which were referred to as "numberless" as they were not allocated parcel numbers.
9. It is also his contention that they continued occupying the numberless section of the land and later learnt that the said section was subsequently registered as Nakuru/Olenguruone/Amalo/310 in favour of the 2nd Defendant on or about 17th July, 1978. He adds that the 2nd Defendant did not take possession of the land and so they continued being in possession, cultivating food crops and rearing cattle.
10. It is further his contention that upon the death of his father in the year 1990 they continued being in occupation of the two parcels of land namely No's 49 and 310 where he brought up his family while engaging in agricultural activities such as growing maize, potatoes and rearing dairy cattle.
11. He contends that the estate of his late father occupied the said property peacefully and without any interruption until sometime on 8th November, 2019 when the 1st Defendant went to the land and claimed ownership.



12. He also contends that their occupation of land parcel No. Nakuru/Olenguruone/Amalo/310 measuring 2.6 Ha has been uninterrupted for a period of sixty-two years from the year 1958 and they have therefore acquired the said land by way of adverse possession.
13. He further contends that the 1st Defendant alleges that he acquired land parcel No. Nakuru/Olenguruone/Amalo/310 after purchasing it in the year 1996 even though he is not registered as the owner.
14. It is his contention that the 1st defendant has resorted to using the local administration, the police, the Directorate of Criminal Investigation to attempt to evict him and his family from the suit property. As a result, he has been numerous times summoned to the offices of the Chief Amalo, Assistant County Commissioner (ACS) Olenguruone and the Deputy DCIO Kuresoi.
15. It is also his contention that the Deputy DCIO Kuresoi in cohorts (sic) with the 1st Defendant are threatening to arrest him and his family and charge them with the offence of forcible detainer with respect to land parcel No. 310 in an attempt to evict them from the said land.
16. He reiterates that since the title deeds were issued in the year 1978 no other person other than the estate of the deceased has been in occupation of the suit property.
17. It is further his contention that in November, 2019 he reported the unlawful entry and occupation of the suit parcel at Olenguruone Police Station under O.B No. 10/01/11/2019 but no action was taken.
18. He contends that the Defendants have not been able to explain why they have never claimed ownership of the property after the title deed was issued in the year 1978.
19. He also contends since the estate of the deceased has been in occupation since the year 1958, the Defendants have been dispossessed off the suit property. He urges the Court to declare that the estate of the deceased has acquired the suit property by way of adverse possession.
20. He further contends that the Defendants and any other person claiming ownership over the suit property have slept on their rights and they cannot purport to assert any of those rights as they are barred under the Limitation of Actions Act.
21. It is his contention that even though the 2nd Defendant is the registered owner of the suit land, his title to the land has been extinguished and acquired by the Plaintiff by operation of the law. He adds that the Defendants have acquiesced to the Plaintiff in respect of the said property.
22. He ends his deposition by stating that Section 38(1) of the Limitation of Actions Act entitles him to apply on behalf of the estate of the deceased to this Court for the registration of the deceased's estate as the proprietor of the land in place of the 2nd Defendant.

1st Defendant's Response.

23. In response to the Originating Summons, the 1st Defendant filed a Replying Affidavit sworn on 24th June, 2020.
24. He deposes that the family of Kipchobe Arap Murgor is the owner of land parcel No. Nakuru/Olenguruone/Amalo/49 which neighbors land parcel No. Nakuru/Olenguruone/Amalo/310 -the suit property.
25. He also deposes that on 19th April, 1996 his brother Philemon Tekeret Mucharaki introduced him to the 2nd Defendant who informed him that he was selling land parcel No. Nakuru/Olenguruone/Amalo/310 measuring 2.6 Ha because of tribal clashes.



26. He further deposes that he together with his brother visited the land and then conducted a search at the Land Registry which confirmed that the land was registered in the name of the 2nd Defendant.
27. It is his deposition that on 11th May, 1996 he entered into a land sale agreement for the purchase of the suit property. The agreement was drafted by the firm of Chesire & Co. Advocates and the agreed purchase price was Kshs. 150,000/= . It is his further deposition that he paid Kshs. 65,000/= on execution of the agreement and that the balance of Kshs. 85,000/= was paid on 2nd June, 1996.
28. It is also his deposition that he can confirm that the size of the parcel of land on the ground is the same as the size indicated in the original title deed that was surrendered to him upon purchase.
29. It is also his deposition that he has developed the suit property by constructing two houses thereon and has also fenced the land.
30. He deposes that he has cultivated and harvested stones (sic) while living on the land from the year 1996 to date. He adds that he applied for connection of electricity from KPLC in the year 2007 vide meter No. 60347250 which he uses to date.
31. He also deposes that upon fencing the land in the year 1997, he was approached and confronted by the family members of Kibehome Murgor and Kipkorir Cheptalam who started bringing down his fence while the Plaintiff trespassed on the land and cut down the cedar trees that had been planted thereon.
32. He further deposes that on 25th May, 1997 he reported the matter at Olenguruone Police Station vide OB/17/25/5/1997 but despite making the said report, the Plaintiff and his family members trespassed onto the suit property, moved their fence into his land and have illegally occupied a big portion thereof.
33. It is his deposition that he has had many disagreements with the Plaintiff over the boundaries of land parcel No's 49 and 310 on diverse dates since May, 1998 adding that the Chief Amalo Location also summoned them to try and resolve the boundary dispute.
34. It is also his deposition that the matter was reported to the District Land Officer in Nakuru and they were both summoned severally but the Plaintiff was uncooperative and unresponsive.
35. It is further his deposition that the Plaintiff has over the years used the police to try and intimidate him and particularly on 25th April, 2019 the Plaintiff found his son Zacharia Kipyegon tilling the suit land and accused him of trespass before causing him to be arrested but he was not charged.
36. He deposes that the Plaintiff has been in occupation of a portion of the suit property through threats, intimidation and by using hired goons to threaten him and his family and adds that this led him to move his family to an Internally Displaced Persons Camp in Olmekenyu area in Narok South Constituency.
37. He also deposes on 5th May, 2020 a meeting was called by the Assistant County Commissioner where he was required to attend together with the Plaintiff. He goes on to depose that the meeting was held in the presence of Mr. Wilson Cherop who is a registered surveyor and that the Plaintiff attended the said meeting together with his advocate on record while he was represented by his son Zacharia Kipyegon at the meeting.
38. He further deposes that in meeting they agreed that on 21st May, 2020 all the parties would accompany the Assistant County Commissioner, the area Chief, the Deputy DCIO Kuresoi, two village elders and the surveyor Mr. Wilson Cherop to the suit property and try and resolve the boundary issue.
39. It is his deposition that on 21st May, 2020 the visit took place but the Plaintiff did not attend. On 26th May, 2020 the surveyor released his report on the two parcels of land and adds that the area Chief also prepared a comprehensive report.



40. It is also his deposition that over the years, the Plaintiff has caused him mental anguish and deprived him economically as he cannot use his land peacefully and viably.
41. It is further his deposition that he has been advised by his Advocates on record that when a party is claiming adverse possession, he ought to prove that possession was “nec vi, nec clam, nec precario” that is peaceful, open and continuous.
42. He deposes that that Plaintiff should not be allowed to use force and intimidation to disposes him land parcel No. Nakuru/Olenguruone/Amalo/310 and claim adverse possession.
43. He also deposes that the possession claimed by the Plaintiff has not been continuous, exclusive, actual and uninterrupted as there have been disputes filed at the Police, the DCIO, area Chief and the Deputy County Administrators Offices.
44. He further deposes that he has been advised by his Advocates on record that the Plaintiff is seeking an equitable remedy before a Court of equity but has not come to Court with clean hands.
45. It is his deposition that the Plaintiff’s intention is to dispossess him of his legitimately acquired land and adds that his suit was not brought in good faith.
46. He ends his deposition by stating that he stands to suffer prejudice and irreparable loss if the Plaintiff is granted the orders sought and adds that his family stands to lose the right to enjoy their land.

Factual Background.

47. On 27th July, 2020 the Court gave directions that the Originating Summons be heard by way of viva voce evidence. The Originating Summons was deemed as a Plaint and any response to the Originating Summons as a Statement of Defence.
48. The 2nd Defendant failed to enter appearance. An application to serve by way of substituted service was allowed on 5th July, 2022. On 17th January, 2023, Counsel appearing for the Plaintiff informed the court that the 2nd Defendant had been served. The affidavit of service is sworn on 22nd July, 2022 by one Benjamim Randiga.

Plaintiff’s Evidence.

49. Malakwen Chobe testified as PW1. It was his evidence that he is a farmer and a business man.
50. It was also his evidence that he signed the affidavit in support of the Originating Summons sworn on 20th May, 2020. Attached to the said affidavit are documents that he produced as follows;
 - a. The grant issued on 20th May, 2020 as Exhibit P1.
 - b. The Land Certificate issued on 7th June, 1978 as Exhibit P2.
 - c. Copy of the letter dated 8th November, 2019 as Exhibit P3.
 - d. Summons issued by Chief Amalo Location dated 4th May, 2020, 5th March, 2020 and 29th September, 2019 as Exhibit P5 (a), (b) & (c).
 - e. Photographs of the suit property and the developments made thereon as Exhibit P6.
51. PW1 adopted his affidavits in support of the Originating Summons sworn on 20th May, 2020 and 25th April, 2022 as Witness Statements.



52. It was PW1's evidence that the parcel of land in dispute is No. 310 which he took occupation of in the year 1958. He uses the land for farming, rearing cattle and that he had fenced it.
53. It was also his evidence that the first time the 1st Defendant approached him claiming the suit property was in the year 2019. Before then, he had enjoyed peaceful and uninterrupted use and occupation of the suit property.
54. It was further his evidence that he could not remember under whose name land parcel No. 310 is registered. He denied knowing the 2nd Defendant but when he was referred to a copy of the title deed for land parcel No. 310 which was in the list of documents filed by the 1st Defendant dated 4th January, 2021 on 5th February, 2021, he confirmed that the land was registered in the name of the 2nd Defendant.
55. He testified that the said copy of the title deed was issued on 17th July, 1978 and that he had taken occupation of the said land in the year 1958.
56. He also testified that the 1st Defendant was alleging that he had purchased land parcel No. 310.
57. He was referred to document No. 3 on the 1st Defendant's List of documents which is a copy of a sale agreement dated 11th May, 1996. He testified that the 1st Defendant stated that he bought the suit parcel on 11th May, 1996 from the 2nd Defendant (Zakeo Gichuga).
58. It was his evidence that that was not true as he has been in occupation from the year 1958 and he only came to hear about him (1st Defendant) in the year 2019.
59. It was also his evidence that he had not seen any evidence of payment of the purchase price.
60. When he was referred to the Boundary Dispute Summons dated 6th April, 1998 he testified that the said summons was in respect of land parcel No's 49 and 51.
61. He also testified that the said summons was addressed to Kibehome Murgor and Kipkorir A. Cheptalam and are in respect of a dispute that had been filed by the 1st Defendant.
62. He further testified that the dispute in respect of which summons were issued was that the 1st Defendant was the owner of land parcel No's 49 & 51 and that Kibehome Murgor and Kipkorir A. Cheptalam were allegedly the owners of land parcel No. 310 which information contradicted the sale agreement.
63. He reiterated that the first time a claim was laid upon the suit property was in the year 2019.
64. He testified that his prayer was that land parcel No. 310 belonged to him and it should be given to him as he had been in occupation since the year 1958.
65. PW1 swore an affidavit in support of the Originating Summons on 20th May, 2020. He subsequently swore another affidavit on 15th November, 2021 in support of his Amended Originating Summons.
66. In his evidence, PW1 adopted his affidavits in support of the Originating Summons sworn on 20th May, 2020 and 25th April, 2022 as witness statements.
67. In the preceding paragraphs a summary of the averments in the affidavit in support of the Amended Originating Summons sworn on 15th November, 2021 has been set out.
68. Upon perusal of the affidavit sworn on 20th May, 2020 in support of the Originating Summons it is evident that the averments therein are a verbatim replica of the averments in the affidavit sworn on 15th November, 2021.



69. A further perusal of the Court record shows that the affidavit in support of the amended Originating Summons is sworn on 15th November, 2021 and not 25th April, 2022 as stated by PW1.
70. Upon cross examination by counsel for the 1st Defendant, PW1 admitted that land parcel No. Nakuru/Olenguruone/Amalo/49 belonged to him.
71. PW1 also admitted that he had in his possession the title deed and the green card. He confirmed that he was given the title in the year 1978 and the land measured 20 Ha (Approximately 40 acres).
72. He further confirmed that land parcel No. Nakuru/Olenguruone/Amalo/310 is registered in the name of Zakeo Gichaga Moigo and that the land measures 2.6 Ha. He added that the title deed was issued in the year 1978.
73. PW1 confirmed that he was in possession of land parcel No. 310 and stated that there was a river between land parcel No's 49 and 310.
74. Upon clarification sought by the Court, PW1 confirmed that land parcel No. 310 is within the parcel of land that he has fenced. He also confirmed that he became aware of the existence of land parcel No. 310 in the year 2019.
75. He admitted that he went with the 1st Defendant to the District Officer but denied knowing where he lived. He then reiterated that he wanted a declaration that parcel 49 was his land.
76. He stated that he did not know about land parcel No. 310 but later confirmed that land parcel No. 310 is part of land parcel No. 49 and that he wanted the whole of it.
77. He denied knowing the 2nd Defendant and reiterated that he was the only one living on land parcel No. 310.
78. He stated that in the year 1992 there were some Kikuyus but they left. He also stated that he got the parcel of land from a white man.
79. He confirmed that the Chief, the Directorate of Criminal Investigations and the District Officer wanted to remove him from the land but he refused.
80. Upon re-examination he stated that the dispute is with regard to land parcel No. 310 which land he started to use in the year 1958.
81. He reiterated that the first time he saw the 1st Defendant was in the year 2019 and that no District Officer or Chief went to the parcel before the year 2019.
82. He stated that he had produced all the letters that had been written by the Chief and that they were written after the year 2019.
83. He also stated that the 1st Defendant does not live on the suit land.
84. Wilson Barngetuny Koimet testified as PW2. He stated that he is a farmer and that he lived in Olenguruone.
85. It was his evidence that he had come to Court to testify about parcel No. 310. He stated that he had filed a witness statement dated 5th October, 2020. He prayed that the Court adopts the said statement as part of his evidence in chief which prayer the Court acceded to.
86. He testified that the Plaintiff was in occupation of land parcel No. 310 since the year 1958.



87. He also testified that they were allocated land around the same time and that their parcels of land are about a kilometer apart.
88. He denied knowing the 1st Defendant and stated that the (1st Defendant) was not present when they were allocated land. He also denied knowing the 2nd Defendant.
89. He reiterated that the Plaintiff is still in occupation of land parcel No. 310 and testified that he (Plaintiff) is a farmer who grows crops and rears animals and that he has, all along, been doing that work on the suit parcel.
90. He urged the court to give the Plaintiff his land.
91. In his witness statement, PW2 stated that he is the registered owner of land parcel No. Nakuru/Olenguruone/Amalo/46.
92. He also stated that he was allocated the said land by the colonial government in the year 1954 and was issued with a title deed in the year 1978.
93. He further stated that the suit property is within his village and a title deed with respect to the suit land was also issued at the same time he was issued with his.
94. He states that in the year 1958, he together with other native Africans that included the late Kipchobe Arap Murgor were relocated from Uasin Gishu to Olenguruone under the African Settlement Program and were settled in Amalo Location of Olenguruone Division.
95. He also states that the late Kipchobe Arap Murgor took possession of the suit property which at that time was vacant and heavily forested. He cleared the vegetation and fenced off the land.
96. He further states that in the year 1977 the Government of Kenya conducted an adjudication exercise and the portion of land occupied by Kipchobe Arap Murgor was registered as land parcel No. Nakuru/Olenguruone/Amalo/49. He goes on to state that a section of the land that lay across the river marking the lower boundary of LR No. 49 was left unregistered. This land became part of the parcels of land that were referred to as “numberless” since they were not allocated a parcel number.
97. He states that the late Kipchobe Arap Murgor continued occupying the said portion until they learnt that it had been registered as Nakuru/Olenguruone/Amalo/310. No one occupied the land and so the family of the late Kipchobe Arap Murgor continued being in possession.
98. He also states that there is only one fence that encircles the two parcels of land and after the death of Kipchobe Arap Murgor, his family continued being in occupation of the said land where they were engaging in agricultural activities.
99. He further states that the 2nd Defendant never took possession of the suit property and neither did he construct any structure on the land or lease it.
100. He states that sometime in the year 1997 the 1st Defendant went to the suit property with a land sale agreement between him and the 2nd Defendant and forcefully entered a portion of the suit property that neighbors a public quarry and erected some structures thereon.
101. He also states that upon being challenged by the Plaintiff, the 1st Defendant vacated the land and relocated to Olmekenyu in Narok County where he was residing until he was evicted from the Mau Forest Complex.
102. He reiterates that the Plaintiff and his family have been in peaceful occupation of the suit property since the year 1978.



103. He states that the 1st Defendant had been using local administration to try and evict the Plaintiff from the land and had on numerous occasions caused the Plaintiff and his family to be summoned to the offices of the Chief Amalo, Assistant County Commissioner (ACS), Olenguruone and the Deputy DCIO Kuresoi.
104. He also states that the Chief Amalo Location has taken personal interest in the suit land and had allegedly used his office to unlawfully harass the Plaintiff and his family.
105. Upon cross examination by counsel for the 1st Defendant, PW2 denied knowing the 1st Defendant. He confirmed that his parcel of land was No. 142 and not 46.
106. He also confirmed that he was issued with a title deed to his land in the year 1978. He further confirmed that he knew Kipchobe Arap Murgor who was the father of the Plaintiff.
107. He stated that it was not true that Kipchobe Arap Murgor had migrated from Uasin Gishu in the year 1958 to Olenguruone as stated at paragraph 4 of his statement.
108. He confirmed that the Plaintiff was living on the suit land and added that he did not know the owner of land parcel No. 49.
109. He also confirmed that land parcel No. 310 belongs to the Plaintiff even though he had not seen the title and added that in his statement he mentioned a numberless parcel and explained that it meant that the land had no number.
110. He stated that he did not know whether or not there was a river on the suit parcel.
111. He reiterated that him and the Plaintiff live 1km apart and denied that the Plaintiff was his friend explaining that they were just neighbors. He also denied being aware of the acreage of the Plaintiff's land and reiterated that he did not know the 2nd Defendant.
112. Upon re-examination, he stated that he was aware that title deeds had been issued but he had not seen the title to land parcel No. 310.
113. He reiterated that the Plaintiff had been occupation of the land from the year 1958 and stated that his land had a river passing through it but on the Plaintiff's side he was not aware if there was a river.
114. He stated that he was given land parcel No. 142 and not 46 and clarified that his statement had a typing error. He also stated that all of the people living in Olenguruone were migrants having migrated from Uasin Gishu.
115. Upon clarification sought by the Court, PW2 stated that he arrived at Olenguruone in the year 1954 but he was allocated the land in the year 1958. He also stated that he was eighty-one years old and added that had Kipchobe Arap Murgor been alive, he would be over a hundred years old.
116. He admitted that the Plaintiff was older than him and that land parcel No. 142 originally belonged to him (PW2) and that it was the committee that was allocating land.
117. On 19th June, 2023 the Court adopted the report filed by the Regional Surveyor and Land Registrar. The report is dated 3rd March, 2023. The Plaintiff's case was then closed.
118. After the Plaintiff's case was closed, on 9th October, 2023, the Plaintiff filed an application dated 4th October, 2023 seeking that the orders issued on 19th June, 2023 be vacated. This was the order admitting the surveyor's reported date 3rd March, 2023 into evidence. The Plaintiff also sought leave to cross examine the Surveyor and Land Registrar on the contents of the report.



119. The application dated 4th October, 2023 was heard on 9th November, 2023 when parties recorded a consent on the said application. The terms of the consent were that the orders of 19th June, 2023 adopting the joint report dated 3rd March, 2023 be set aside and the Plaintiff be allowed to cross-examine the District Land Registrar Nakuru and the Regional Surveyor on the contents of the said report.
120. David Mibei testified as DW1. It was his evidence that he lives on land parcel No. Nakuru/Olenguruone/Amalo/310.
121. He stated that he had filed a witness statement dated 4th December, 2021. He also stated that on 7th October, 2021, the Court allowed him to rely on the Replying Affidavit sworn on 24th June, 2020 to form part of his evidence. He prayed that the Court adopts the said statement and Replying Affidavit as part of his evidence in chief which prayer the Court acceded to.
122. It was his evidence that in the year 1996 he bought the suit property from the 2nd Defendant for Kshs. 150,000/=.
123. It was also his evidence that before he purchased the suit property, he went to see the land and conducted a search at the Lands Registry.
124. It was further his evidence that he was shown a title deed for the suit property which was registered in the name of Zakeo Gichaga Philip Moigo. He produced a copy of the title deed as Exhibit D1.
125. He testified that he went to Chesire & Co. Advocates to have a sale agreement drawn. He produced a copy of the sale agreement dated 11th May, 1996 as Exhibit D2.
126. He also testified that after they executed the land sale agreement, he took occupation of the parcel and started building. He went on to testify that in the year 1997, he completed construction and the Plaintiff demolished his fence and forcefully took possession of the suit land.
127. He further testified that he reported the matter to the police and that his statement to the police was that the Plaintiff stated that he took occupation of the land because it was next to his parcel and that the person who owned it, who was from the kikuyu community, ran away and Plaintiff stated that he is the one who should own it.
128. It was his evidence that the Chief heard about the dispute, summoned them and prevailed upon them to live peacefully but the Plaintiff continued with his threats.
129. It was also his evidence that he went to a surveyor who asked him to pay a fee so that he could determine the boundaries between land parcel No's 49 and 310. He produced a boundary disputes summons dated 6th April, 1998 as Exhibit D3.
130. It was further his evidence that the surveyor went to the land the first time but the survey could not proceed because the people who were supposed to be there were not present.
131. He testified that the surveyor visited the suit parcel a second time but the survey did not proceed because it was rainy and the roads were impassable and the surveyor informed him to go back during the dry the season.
132. He also testified that he went back to the surveyor during the dry season but he was never given a date. He went back there severally but they were too busy to conduct the survey.



133. He further testified that he went to the District Land Registrar who wrote the letter dated 28th May, 1998 to the area Chief asking him to try and resolve the issue. The said letter was produced as Exhibit D4.
134. It was his evidence that the Chief called him and the Plaintiff and asked them to live peacefully. He went on to state that in the year 2020, the Chief again called him and the Plaintiff. The Plaintiff was asked to produce his title documents but he did not have any.
135. It was also his evidence that they attended meetings before Chief six times and in all those instances, the Plaintiff did not produce any title documents.
136. It was further his evidence that the Chief called a private surveyor who surveyed the land in the presence of the District Officer. The Plaintiff did not attend the survey and the Chief wrote a report on the survey which was dated 29th May, 2020. The report was not produced in evidence.
137. He testified that the surveyor also gave a report which is dated 26th May, 2020. The report was produced as Exhibit D6.
138. He also testified that he has been in occupation of the suit property since he bought it and added that the Plaintiff tried to take occupation of the suit parcel by force. He prayed that the Plaintiff be removed from the portion of the suit parcel that he is in occupation of.
139. In his witness statement, DW1 stated that it was his brother Philemon Tekeret (DW2) who introduced him to the 2nd Defendant.
140. He also states that he had been in possession of the suit property from December, 1996 to date and further states that he has constructed two houses on the land, fenced it, has grown crops on it and also harvested the stones on it.
141. He states that he applied for electricity connection from Kenya Power and Lighting Company vide meter No. 60347250 which he uses to date.
142. He also states that sometime in the year 1997, the family members of Kibehome Murgor and Kipkorir Cheptalam confronted him, brought down his fence while the Plaintiff trespassed onto the suit property and fell red Cedar trees.
143. He further states that he reported the matter to the police and because of the Plaintiff's interference, he has not been able to utilize his land peacefully.
144. Upon cross examination DW1 confirmed that he conducted a search before he purchased the suit parcel but admitted that he did not have the search in Court.
145. He also confirmed that he entered into an agreement with the 2nd Defendant. When he was referred to the sale agreement produced as Exhibit D2 he admitted that the agreement stated that he had paid kshs. 65,000/= and had a balance of Kshs. 85,000/=.
146. He further confirmed that he had no evidence of payment of kshs. 85,000/= and added that the vendor had not complained of non-completion.
147. DW1 admitted that it was the advocate who was to complete the transaction. He also admitted that he did not go to the Land Control Board and that the advocate took care of everything including payment of stamp duty though he did not have a stamp duty receipt.



148. He also admitted that he did not have the transfer forms with him in Court because they were left with the advocate. He stated that before the year 1996, he was living in Nakuru while his family was in Bomet.
149. He confirmed that at paragraph 18 of his replying affidavit, he states that he was living in an Internally Displaced Persons camp in Narok South. He explained that he needed the children to go to school away from the suit land as there were disputes over it.
150. He admitted that he lived in an Internally Displaced Persons Camp from the year 2005 to 2019 after he was evicted from the land that he was occupying in Mau Forest.
151. DW1 confirmed the averments made at paragraph 13 of his replying Affidavit wherein he avers that he had reported the invasion to the police station. He admitted that the OB number was correct but he did not have any piece of paper or document with the OB number because it got lost.
152. He admitted that he went to the survey office and paid some money and was issued with a receipt.
153. He also admitted that even though at paragraph 11 of his replying affidavit he avers that he applied for supply of electricity to the suit parcel, he did not attach or produce any document as evidence.
154. DW1 confirmed that he is in occupation of land parcel No. Nakuru/Olenguruone/Amalo/310 and that the Plaintiff is in use and possession of a portion of the said land. The Plaintiff's cows graze on the land and he started planting trees despite the Court order.
155. He stated that before the year 2020, there were indigenous trees growing on the land and that he had not seen any Cyprus trees. He confirmed that when he bought the land, it was vacant.
156. Upon re-examination, he reiterated that when he bought the land it was vacant. He also reiterated that after he took occupation, he put up a building and made an application to Kenya Power & Lighting Company to connect electricity.
157. He stated that the 2nd Defendant has never claimed the land and that the OB number was issued in the year 1997 but the piece of paper on which the OB number was written got lost.
158. He also stated that he paid the balance of kshs. 85,000/= and took occupation. He reiterated that they signed all the documents including the transfer forms but they left them at the Lawyers office for him to complete the registration.
159. He further stated that his children were living at the Internally Displaced People's Camp while he was at the suit parcel in Olenguruone.
160. He stated that his family was not living on the suit parcel because they were afraid of the dispute he had with the Plaintiff. They live on a parcel of land that he was given by his brother which is near the Internally Displaced Persons Camp. He reiterated that he had lived on the suit parcel since the year 1996.
161. Philemon Tekeret Mucharaki testified as DW2. He stated that he had filed the witness statement dated 4th February, 2021. He prayed that that the Court adopts the said statement as part of his evidence-in-chief which prayer the Court acceded to.
162. It was his evidence that he lived in Olenguruone and that his brother was living in Nakuru.
163. It was also his evidence that he heard that the 2nd Defendant was selling his parcel of land and at the same time his brother was looking for land to buy.



164. It was further his evidence that he chose the land that belonged to the 2nd Defendant and he told the 1st Defendant about it and that the 1st Defendant went to see it and he liked it.
165. He testified that they went to the Land's office and conducted an official search which search confirmed that the land was registered in the name of the 2nd Defendant.
166. He also testified that after the search revealed that the land was registered in the name of the 2nd Defendant, they approached him (2nd Defendant). They went to Chesire & Co. Advocates in the year 1996 and entered into a land sale agreement.
167. The 1st Defendant paid the 2nd Defendant a sum of Kshs. 65,000/= and had a balance of Kshs. 85,000/=.
168. It was his evidence that the advocate was given all the documents and he took over the process of transfer. He added that balance of Kshs. 85,000/= was paid after one month.
169. It was also his evidence that the 1st Defendant took occupation of the land in the year 1996. He planted Cyprus & blue gum trees, built a house and removed stones from the land.
170. It was further his evidence that in the year 1997 there were clashes and the Kikuyus sold their land. The Nandi's took the parcels belonging to the Kikuyus because they did not want the Kipsigis to take the land.
171. He testified that the Plaintiff said that the land belonged to him and one Talam also wanted a portion of the suit land. He went on to narrate that the Plaintiff claimed the suit property because it was initially owned by a Kikuyu.
172. He also testified that the Plaintiff encroached on the suit land and that Talam left when he was shown the title document.
173. He further testified that he accompanied the 1st Defendant to the Police Station and to the Chief in an attempt to resolve the dispute.
174. It was his evidence that they were advised to get a surveyor but when he (surveyor) went to the suit property the first time, the survey did not take place.
175. It was also his evidence that subsequently, a new Chief took office and he also wrote a letter. He added that a private surveyor also visited the suit parcel and made a report.
176. It was further his evidence that the government surveyor also visited the parcel. DW2 reiterated that the 1st Defendant has been in occupation of the suit property since the year 1996.
177. He testified that the Plaintiff took possession of a portion of the suit property forcefully and started planting trees a year before he gave his evidence. (PW2 testified on 11th October, 2023).
178. He also testified that the 1st Defendant is in possession of the other part of the suit property where he has constructed his house and is undertaking quarry activities.
179. In his witness statement DW2 states that he met with a village elder who confirmed the ownership of the suit property. He also stated that in January, 1996 he met up with the 2nd Defendant who showed him the boundaries of the suit parcel.
180. He also states that the boundaries were marked using poles which were later destroyed by the Plaintiff.



181. He further stated that the 1st Defendant has been in occupation of the suit property and that he enjoyed quiet possession of the land.
182. He states that the 1st Defendant confirmed that the total size of the land on the ground was similar to the one indicated in the original title deed.
183. DW2 also stated that the 1st Defendant developed the land by constructing two houses on it and fencing it adding that he took occupation in December, 1996.
184. He further states that in the year 1997, the 1st Defendant was approached by the family of Kibehome Murgor and Kipkorir Cheptalam who brought down his fence while the Plaintiff trespassed on the land cut down the red cedar trees that had been planted thereon.
185. DW2 goes on to narrate that in the year 1998, Mr. Kipkorir Cheptalam approached the 1st Defendant and they resolved their issues and continued to live together in harmony but when the 1st Defendant tried to resolve the issues between him and the Plaintiff his efforts were in vain.
186. Upon cross examination, he confirmed that he lives in Narok County as shown in his National Identity Card.
187. He confirmed that he used to live in Olenguruone from October, 1992 to the year 1998. He further confirmed that he was living on his brother's parcel of land which was later sold to one Timoi.
188. He reiterated that he was the one who found the suit land and explained that during those years, persons from the Kikuyu community were selling their land and had made land sale announcements in every place.
189. He confirmed that he got information from the Chief's office that the suit land was up for sale. He reiterated that they conducted an official search before purchasing the suit land but stated that the said search certificate had not been produced in court.
190. He also confirmed that even though he testified that the balance of kshs. 85,000/= was paid, he did not have anything in Court to show that it was paid adding that he only saw the payment of kshs. 65,000/=.
191. He confirmed that the documents that were taken to the Lands Office were the title deed and the transfer forms. The said documents were taken by the 2nd Defendant and Chesire Advocate.
192. When referred to the land sale agreement (Exhibit D2) he admitted that his name does not appear on it as a witness.
193. He confirmed that he was present during the private survey and stated that the original title for land parcel No. 310 was at the Lands Office.
194. He also confirmed that the 2nd Defendant had a family but his wife was not present at the signing of the sale agreement.
195. As stated in the preceding paragraphs and in great detail, on 9th November, 2023 the parties, by consent, set aside the orders of this Court issued on 19th June, 2023. The said order adopted the joint report dated 3rd March, 2023 by the Regional Surveyor and the Land Registrar Nakuru and also allowed the Plaintiff opportunity to cross-examine them on the contents of their report.
196. Despite summons being issued, the Plaintiff did not avail the District Land Registrar Nakuru and the Regional Surveyor for cross-examination as ordered.
197. On 1st July, 2024 the Defendants case was closed.



Issues for Determination.

198. The Plaintiff filed his submissions on 17th September, 2024 while the 1st Defendant filed his submissions on 25th September, 2024.
199. The Plaintiff submits on the following issues;
 - a. Whether the Plaintiff's claim is merited.
 - b. Who should bear the costs of this suit.
200. With regard to the first issue, the Plaintiff relies on Section 107 of the *Evidence Act*, paragraphs 13 & 14 of Volume 17 of the Halsbury's Laws of England, Sections 37 & 38 of the *Limitation of Actions Act*, the judicial decisions of Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & another [2005] 1EA 334, Gabriel Mbui v Mukindia Maranya [1993] eKLR, Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR and submits that he has been in possession of the suit property since the year 1958.
201. The Plaintiff also submits that he has always been in possession of the suit parcel even after registration of the 2nd Defendant as the owner of the land.
202. The Plaintiff further submits that the 1st Defendant does not dispute that the 2nd Defendant is the registered owner of the suit property.
203. It is the Plaintiff's submissions that the Surveyor and Land Registrar in their report dated 3rd March, 2023 found that he was in occupation of land parcel No. Nakuru/Olenguruone/Amalo/49 and that had encroached and fenced a portion of Nakuru/Olenguruone/Amalo/310 measuring 1.45 Ha where he had planted eucalyptus trees.
204. It is also the Plaintiff's submissions that it was however shocking that the Regional Surveyor and the Land Registrar found that the 1st Defendant had also been in occupation of the suit parcel for years as evidenced by the building thereon and it was unclear why the Plaintiff had encroached on it.
205. It is further the Plaintiff's submissions that the said report is inconsistent as it confirms the Plaintiff's occupation but concludes that the land should be given to the 1st Defendant.
206. The Plaintiff relies on the judicial decisions of Wambugu v Njuguna [1983] KLR 172, Mbira v Gachuhi [2002]1 EALR 137 and submits that he has demonstrated that the 2nd Defendant is the registered owner of the suit property and that he has had non-permissive, actual, open, notorious, exclusive and adverse use thereof.
207. The Plaintiff also relies on Section 112 of the *Evidence Act* and submits that even though the 1st Defendant alleges that he purchased the suit property from the 2nd Defendant, he did not produce any evidence to show that he paid the balance of the purchase price of kshs. 85,000/= as stipulated in the agreement and neither did he produce any evidence to show that the 2nd Defendant executed the transfer forms in his favour and/or surrendered the original title to him.
208. The Plaintiff submits that the 1st Defendant did not produce any completion documents and neither did he state why he had not taken any steps to acquire the title deed or evict the Plaintiff from the land.
209. The Plaintiff relies on the judicial decisions of Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others [2009] eKLR, Dina Management Limited vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 [KLR] [21 APRIL 2023] [JUDGEMENT] and submits that the 1st Defendant failed to prove that he purchased the suit property and/or that he paid the purchase price thereof.



210. The Plaintiff relies on Section 27 of the *Civil Procedure Act* and urges the Court to allow his amended Originating Summons as prayed.
211. The 1st Defendant submits on the following issues;
- a. Whether the Defendant is a bona fide purchaser for value to entitle him to beneficial rights over the suit parcel Nakuru/Olenguruone/Amalo/310.
 - b. Whether the Plaintiff has been in adverse possession of Nakuru/Olenguruone/Amalo/310 to entitle him to be registered as the proprietor of the parcel.
 - c. Whether the Plaintiff is a trespasser to the suit land.
 - d. Who is to bear the cost of the suit.
212. With regard to the first issue, the 1st Defendant relies on Section 107 of *Evidence Act*, Section 26 of the *Land Registration Act*, the judicial decision of Nyakwana vs Cleophas Bwana Ongaro [2015]eKLR and submits that he produced a copy of the Certificate of Title of the suit property that showed that the 2nd Defendant is the registered owner.
213. The 1st Defendant also submits that the 2nd Defendant sold the suit property to him and he is a bonafide purchaser of the land from where he derives his beneficial rights and interests from.
214. The 1st Defendant further submits that the Plaintiff did not adduce any evidence to show that the suit property was registered in either his name or the name of Kipchobe Arap Murgor (deceased). It is the 1st Defendant's submissions that the Plaintiff only produced a certificate of title of the adjoining parcel of land No. Nakuru/Olenguruone/Amalo/49.
215. With regard to the second issue, the 1st Defendant reproduces the evidence adduced during the hearing, relies on Sections 7 & 13 of the Limitations of Actions Act, the decisions in Wambugu v Njuguna [1983] KLR 172, Ongwen & another v Kenya & another (Environment & Land Case E027 of 2021) [2023] KEELC 279 (KLR), Mbira v Gachuhi (2002) 1EALR 137 and submits that from the evidence adduced, the Plaintiff took possession of a portion of the suit property forcefully which does not amount to dispossession.
216. The 1st Defendant also submits that the Plaintiff did not adduce any evidence to demonstrate that his father took possession of the land in the year 1958 and as per the report filed by the County Surveyor, the eucalyptus trees planted by the Plaintiff were still 'very young'.
217. The 1st Defendant submits that the Plaintiff encroached on the suit property sometime in the year 1997 as shown by the District Land Registrar's Summons dated 6th April, 1998.
218. He also submits that he acted after the Plaintiff encroached and therefore his occupation was not adverse in any way. The 1st Defendant relies on the judicial decision of Mtana Lewa vs Kahindi Ngala Mwangadi [2015] eKLR in support of his submissions.
219. With regard to the third issue, the 1st Defendant submits that this matter is a boundary dispute and the Court ordered the Regional Surveyor to visit the land and establish its occupation.
220. The 1st Defendant also submits that the regional surveyor in his report found that he was the one who had been in possession of the suit property for years and had undertaken developments thereon.
221. The 1st Defendant further submits that it is therefore absurd that the Plaintiff is pleading adverse possession as he had clearly encroached on the land with a view to defeat his exclusive proprietary rights.



222. The 1st Defendant relies on Section 3(1) of the *Trespass Act*, the judicial decision of John Eutick vs Nathan Carrington & others (citation not given) as was cited in *M'Tuamwari v Kenya Power and Lighting Company (Environment & Land Case E023 of 2021)* [2023] KEELC 21498 (KLR) (8 November 2023) (Judgment), *Park Towers Ltd vs John Mithamo Njika* [2014] eKLR and urges the Court to find the Plaintiff as a trespasser and award him general damages for trespass.
223. The 1st Defendant also relies on the judicial decision of Philip Aluchio vs Crispinus Ngayo [2014] eKLR as was cited in *Hosea Nyandika Mosagwe & 2 Others vs County Government of Nyamira* [2021] eKLR and submits that the Plaintiff is undeserving of the orders sought and urged the Court to dismiss his suit.
224. The 1st Defendant relies on Section 27 of the *Civil Procedure Act* and seeks that the suit be dismissed with costs to him.

Analysis and Determination.

225. After considering the pleadings, submissions and testimonies of the Plaintiff, 1st Defendant and their witnesses, the issues that arise for determination are as follows;
- a. Whether the Plaintiff has acquired land parcel No. Nakuru/Olenguruone/Amalo/310 by way of adverse possession.
 - b. Who should bear costs of the suit.
226. Before I delve into the two issues for determination, the following things are important for noting:
- a. That this suit is a claim for adverse possession and the fact of purchase, completion or non-completion and/or failure to produce evidence of payment of the purchase price and transfer of the suit land to the 1st Defendant are therefore immaterial to the Plaintiff's claim.
 - b. That the Defendant did not file a counterclaim and that, therefore, the claim for trespass and damages for trespass cannot sustain.

A. Whether the Plaintiff has acquired land parcel No. Nakuru/Olenguruone/Amalo/310 by way of adverse possession.

227. It is the Plaintiff's case that he is the son of Kipchobe Arap Murgor (Deceased). It is also his case that the family of the late Kipchobe Arap Murgor moved from Uasin Gishu to Olenguruone in the year 1958 and adds that in the same year, his family cleared bushes and occupied an uninhabited parcel of land.
228. It is also the Plaintiff's case that in the year 1977, the government conducted land adjudication and registered the land occupied by his late father's family as Nakuru/Olenguruone/Amalo/49.
229. It is his further case that a portion of the land that they were in occupation of was left unregistered. This land was across the river from land parcel No. Nakuru/Olenguruone/Amalo/49.
230. It is also his case that he continued being in occupation of the unregistered land until he learnt that it had been registered as Nakuru/Olenguruone/Amalo/310 in favour of the 2nd Defendant.
231. It is the Plaintiff's case that he has lived peacefully on the land till the year 2019 when the 1st Defendant claimed the unregistered land (suit parcel) while alleging that he had purchased it from the 2nd Defendant.



232. In support of his case, the Plaintiff produced a copy of a Limited Grant ad Litem issued to him on 20th May, 2020 by the Chief Magistrate's Court at Molo in Probate and Administration Cause No. 33 of 2020 (Exhibit P1). It is in the matter of the estate of Kipchumba Arap Murgor Alias Kipchober Arap Murgor- Deceased.
233. The Plaintiff also produced a copy of a title deed (Exhibit P2) of land parcel No. Nakuru/Olenguruone/Amalo/49 issued to Kipchober S/O Murgor on 7th June, 1978. The land measures approximately 20 Ha.
234. The Plaintiff produced a copy of the letter dated 8th November, 2019 (Exhibit P3) written by Tarus & Co. Advocates and addressed to Chobe Malakwen (the Plaintiff). The letter requests the Plaintiff to vacate land parcel No. Nakuru/Olenguruone/Amalo/310 within five days because it belonged to the 1st Defendant.
235. A letter dated 11th November, 2019 (Exhibit P4) was produced. It is written by Bore, Malanga & Co. Advocates and addressed to the 1st Defendant through Tarus & Co. Advocates. The letter informs the 1st Defendant that the Plaintiff is the beneficial owner of the disputed parcel of land which forms part of land parcel No. Nakuru/Olenguruone/Amalo/49. In the said letter, the Plaintiff demands that the 1st Defendant desists from making any claim to the said parcel of land.
236. Copies of summons issued by Wesley Langat Chief Amalo location were produced. The summons dated 4th May, 2020 (Exhibit P5(a)) are addressed to the Plaintiff summoning him to appear before the Assistant County Commissioner's office (District Officer) in Olenguruone on 5th May 2020 at 10 am.
237. The summons dated 5th March, 2020 (Exhibit P5(b)) are issued by Wesley Langat to a Mrs. Anna and one Cristine warning them against trespassing on land parcel No. Amalo/310 pending the determination of the dispute.
238. Colored photographs were produced as Exhibit P6. The photographs show trees and cattle on what is alleged to be the suit parcel and the fence purportedly put up by the Plaintiff.
239. On the other hand, the 1st Defendant's case is that he purchased the suit parcel from the 2nd Defendant vide the land sale agreement dated 11th May, 1996.
240. It is also the 1st Defendant's case that he immediately took possession and in the year 1997 he completed construction of two houses. It is further his case that after he completed construction, the Plaintiff forcefully took possession of the land.
241. It is his case that they have had various meetings with the area Chief and District Officer over the suit property which culminated in a private surveyor visiting the suit land and making a report.
242. The 1st Defendant has in support of his case produced a copy of the title deed for land parcel No. Nakuru/Olenguruone/Amalo/310 issued to Zakeo Gichaga Philip Moigo on 17th July, 1978 as Exhibit D1.
243. The 1st Defendant also produced a copy of a land sale agreement dated 11th May, 1996 as Exhibit D2. It is between him and Zakeo Gichaga Philip Moigo (2nd Defendant). The agreement is for the sale of land parcel No. Nakuru/Olenguruone/Amalo/310. The terms of the agreement are that Kshs. 65,000/= would be paid at the execution of the agreement while the balance of Kshs. 85,000/= would be paid before 31st August, 1996. The agreement is drawn by Chesire & Co. Advocates.
244. A copy of a boundary dispute summons dated 6th April, 1998 was also produced. (Exhibit D3). It is addressed to Kibehome Murgor and Kipkorir A. Cheptalam through the Chief Amalo Location.



245. The summons are issued by John M.W Mwangi the Land Registrar Nakuru District with respect to land parcel No's. Nakuru/Olenguruone/Amalo 49 & 51 which parcels are stated to be registered in the name of David Mibei and land parcel No. Nakuru/Olenguruone/Amalo/310. The summons required the attendance of the owners of the said parcels on 25th May, 1998 for purposes of determining the boundary dispute.
246. A copy of a letter dated 28th May, 1998 was also produced (Exhibit D4). It is written by George P. B Ogeng'o the District Land Registrar and addressed to the area chief Olenguruone Location through the area assistant Chief Amalo sub-location. The subject of the letter is boundary dispute Nakuru/Olenguruone/Amalo/ 405 & 51. The letter informs the area Chief that there is a boundary dispute filed on 23rd January, 1998 by David Mibei against Kibehome Murgor and Kipkorir A. Cheptalam. The Chief was to visit the site and stop any developments thereon until the matter is resolved.
247. A copy of a report dated 26th May, 2020 was produced as Exhibit D6. The report is done by Wison K. Cherop a surveyor who works with Geoinfo Land Surveyors & Consultants and it is addressed to the Assistant County Commissioner Olenguruone Division.
248. The report made the following finding and recommendation;
- “Parcels 49, 310, 387 and the river exist on the ground and therefore is prove (sic) that the river centreline (sic) is the common boundary between 310 and 49 and ideally the farms should maintain the natural river course as their common boundary”
249. It is not disputed that the 2nd Defendant is the registered owner of the suit parcel of land. It is also not disputed that both the Plaintiff and the 1st Defendant are in possession of the suit parcel. What is disputed is whether the Plaintiff has been in occupation of the said land peacefully for a period of over twelve years.
250. Section 38 (1) and (2) of the *Limitation of Actions Act* provides as follows:
- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land. (2)An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
251. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR held as follows;
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs in to action essentially by default or inaction of the owner. The essential prerequisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is averse to the title owner.” (Emphasis mine)
252. As stated in the preceding paragraphs, it is the Plaintiff's case that the family of the late Kipchobe Arap Murgor moved to Olenguruone and took possession of land that was un inhabited.



253. It is also the Plaintiff's case that in the year 1977 land adjudication took place and a portion of the land they were in occupation of was registered as Nakuru/Olenguruone/Amalo/49.
254. It is further his case that the land that was across the river which they were also in occupation of, remained unregistered until they later found out that it had been registered as Nakuru/Olenguruone/Amalo/310 in the name of the 2nd Defendant.
255. The Plaintiff produced a copy of the title deed for land parcel No. Nakuru/Olenguruone/Amalo/49 (Exhibit P2) which shows that Kipchober S/O Murgor was registered as the owner on 7th June, 1978.
256. The 1st Defendant produced a copy of the title deed for land parcel No. Nakuru/Olenguruone/Amalo/310 which shows that Zakeo Gichaga Philip Moigo was registered as the owner on 17th July, 1978.
257. From the two title deeds it clear that the suit property was registered in the name of the 2nd Defendant about one month after land parcel No. Nakuru/Olenguruone/Amalo/49 was registered in the name of the Plaintiff's father.
258. The Plaintiff claims that they have been in occupation of the suit parcel from the year 1958 to date. It is important to note that land parcel No. 310 was registered in the year 1978. Between the year 1958 to 1978 the land was not registered.
259. In the judicial decision of Daniel Gikundi M'Impwi & 7 others v Charles Mutura Njau [2019] eKLR the Court held as follows;
- “29. According to Section 37 and 38 of the Limitations of Actions Act, land must be registered in the name of another for whom the claimant is claiming adverse position. (sic) The rational (sic) for registration is to be found under section 41 which provides for exemptions of the Limitations of Actions Act in certain case such as land owned by the Government of Kenya, Settlement Fund Trustee, trust land. In the case of Erick Chepkwony Aengwo Vs Jonathan Rutto Kibiesang ELC 743 OF 2012, the Court held that Adverse Possession does not begin to run for land that is unregistered.” (Emphasis mine)
260. In the above cited judicial decision, the Court held that adverse possession cannot accrue against land that is unregistered.
261. Since adverse possession cannot accrue against land that is not registered, the period between 1958 and 1978 is excluded when computing time. This therefore means that the Plaintiff cannot claim adverse possession between the years 1958 and 1978.
262. The Plaintiff claims to have been in peaceful possession of the suit property till the year 2019 when the 1st Defendant begun to claim the land.
263. On the other hand, the 1st Defendant submits that he purchased the suit parcel in the year 1996 and took immediate possession. In his evidence, the 1st Defendant states that after he took possession he constructed a house but the Plaintiff demolished his fence and forcefully took possession.
264. In his witness statement dated 4th February, 2021 the 1st Defendant states that the families of Kibehome Murgor and Kipkorir Chaptalam brought down his fence while the Plaintiff trespassed and started cutting down the red cedar trees that were on the land.



265. The 1st Defendant also states that he reported the said matter to the police and sought the assistance of the Chief and the Land Registrar.
266. In support of his assertions, the 1st Defendant produced Boundary Dispute Summons dated 6th April, 1998 (Exhibit D3) and a letter written by the Land Registrar dated 28th May, 1998. (Exhibit D4).
267. The boundary dispute summons dated 6th April, 1998 (Exhibit D3) are issued to Kibehome Murgor and Kipkorir A. Chaptalam informing them that David Mibei (the 1st Defendant) who was the owner of land parcel No. Nakuru/Olenguruone/Amalo 49 & 51 applied to the Land Registrar for him (the Land Registrar) to determine the boundary between his land and their land parcel No. Nakuru Olenguruone/Amalo/310.
268. The Letter dated 28th May, 1998 (Exhibit D4) is written by the District Land Registrar and addressed to the Chief Olenguruone Location, informing him (the Chief) that a boundary dispute had been filed by the 1st Defendant against Kibehome Murgor and Kipkorir A. Cheptalam. The subject of the letter is “Boundary Dispute Nakuru/Olenguruone/Amalo/403 & 51”
269. This Court notes that even though the 1st Defendant’s evidence was that he was embroiled in a land dispute in the year 1998 with the Plaintiff, the Boundary Dispute Summons (Exhibit D3) and the letter dated 28th May, 1998 (Exhibit D4) points to the contrary. Essentially, the dispute the 1st Defendant is alluding to was a boundary dispute between him and Kibehome Murgor and Kipkorir A. Cheptalam over the parcels of land listed therein.
270. This Court notes that neither the Plaintiff’s name nor the name of his deceased father Kipchobe Arap Murgor is listed in the summons and the letter.
271. It is therefore logical to deduce that any alleged dispute that took place in the years 1997 and 1998 did not involve the Plaintiff or the estate of his late father.
272. The Plaintiff in his evidence states that he has planted trees on the suit parcel while the 1st Defendant states that he has constructed houses on the land.
273. The evidence by the 1st Defendant that he has constructed houses on the suit property is not controverted. This demonstrates that the Plaintiff is not in possession of the entire parcel of land as alleged but he is possession of a portion of it.
274. In the judicial decision of *Ogak v Auma & another* (Environment & Land Case 11 of 2021) [2023] KEELC 65 (KLR) (19 January 2023) (Judgment) the Court held as follows;

“...It behoved upon the plaintiff to prove the size of the specific portion that he was in exclusive occupation and possession of; which he did not. On that basis, I am unable to find that the plaintiff did prove that he was in exclusive occupation of North Ugenya/Simur/3049 or that he was in exclusive occupation of a particular portion of it. Had he disclosed the identifiable portion, I would not have hesitated but to find in his favour on the specific portion. I place reliance on the decision of *Githu v Ndele* [1984] KLR 776 where the Court held that;

“The identification of the land in possession of an adverse possessor is important and intergral (sic) part of the process of proving adverse possession’

36. It is trite that the acreage of the land being claimed must be specifically ascertained and the burden of proof was on the plaintiff who laid a claim of



adverse possession. The Court of Appeal decision of Gerishon Muindi Baruthi v Willays Gatinku Mukobwa & another *CA No 98 of 1998* was cited with approval in the case of Charles Mwangi Kiiru & 2 others v Boniface Maina Gichomo & another; [2021] eKLR. In Gerishon's case, the Court held thus;

“Exclusive possession of a portion of parcel of land which is definite would entitle the appellant to establish his claim on ground of adverse possession provided the period of 12 years has run’

275. As was held in the above cited judicial decision, the burden of proof is on the Plaintiff who is claiming adverse possession to prove the specific acreage of land that he is in occupation of.
276. The Plaintiff ought to have therefore disclosed the identifiable portion of land parcel No. Nakuru/Olenguruone/Amalo/310 that he is in possession of. From the evidence adduced, it is apparent that he has failed to do so.
277. On 17th January, 2023, this Court issued an order that the District Land Surveyor and Land Registrar visit land parcel No. Nakuru Olenguruone/Amalo/310 and establish occupation, the extent of the suit parcel and the developments made thereon.
278. Pursuant to this order, the Nakuru Land Registrar and the Regional Surveyor Rift Valley Region filed a report dated 3rd March, 2023 which set out the acreage of the suit parcel that each of the parties is in occupation of.
279. On 19th June, 2023 the Court adopted the said report as evidence in this matter but on 9th November, 2023 the parties by consent set aside the orders issued on 19th June, 2023 that adopted the joint report.
280. It is important to note that it is only the joint report by the Regional Surveyor and the Land Registrar, Nakuru that indicates the specific acreage of the suit parcel that each of the parties is in occupation of. However, by dint of the consent entered into by the parties on 9th November, 2023 the Court cannot rely on the said report in determining the specific portion of land that the Plaintiff is in possession of. Essentially, this consent works against the Plaintiff's case.
281. For the Plaintiff to succeed in his claim for adverse possession, he ought to have gone a step further and proved the size of the specific portion of the suit property that was in his exclusive possession but he failed to do so.

B. Who should bear costs of the suit.

282. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap 21). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason directs otherwise.

Disposition.

283. In the result, I find that the Plaintiff has failed to prove his claim for adverse possession. Consequently, this suit is hereby dismissed with costs to the 1st Defendant.
284. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 13TH DAY OF MARCH, 2025.

L. A. OMOLLO



JUDGE.

In the presence of: -

Mr. Bore for the Plaintiff.

Mr. Miruka for Wanjir for the 1st Defendant.

Court Assistant; Mr. Joseph Makori.

