



**Bett & another v Koech (Environment & Land Case 65 of 2017)
[2023] KEELC 20897 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20897 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 65 OF 2017
MC OUNDO, J
OCTOBER 19, 2023**

BETWEEN

SARAH CHEPKEMOI BETT 1ST PLAINTIFF

PAUL KIPKURUI CHERUIYOT 2ND PLAINTIFF

AND

RECHO KOECH DEFENDANT

JUDGMENT

1. Vide a further amended Plaintiff of the 27th September 2021, the Plaintiff filed this suit against the Defendant seeking for the following reliefs;
 - i. An order of permanent injunction to issue agents the Defendant by herself agents, servant and/or employees from further trespassing and/or encroaching into the land parcel L.R No Kericho/Kiptere/1460 and in default on eviction order do issue against her.
 - ii. Damages for trespass and mesne profit.
 - iii. Interest in (ii) above.
 - iv. Cost of the suit.
2. The Defendant filed her defense and counterclaim dated the 14th November 2018 as well as her response to the further amended Plaintiff, on the 6th December 2021 denying the Plaintiff's claim. She raised a counterclaim, that she had been in exclusive use and occupation of the suit land measuring Zero point Five (0.5) of an Acre comprised in LR No. Kericho/Kiptere/1460 from the year 1978, totaling to a period of 40 uninterrupted years. That she had made substantial developments openly and in full view of the Plaintiffs. She thus sought that she be entitled to the Zero point Five (0.5) of an Acre comprised in LR No. Kericho/Kiptere/1460 by virtue of adverse possession for a period in excess of 12 years and thereafter she be registered as the proprietor of the Zero point Five (0.5) of an Acre



comprised in L.R No. Kericho/Kiptere/1460 in place of the Plaintiffs who were the present registered proprietors.

3. The matter proceeded for hearing on the 22nd January, 2018 in the absence of the Defendant wherein on the 16th March, 2018 an ex-parte Judgment had been entered for the Plaintiff. However the suit had started a fresh on the 14th October 2019 pursuant to a ruling of 11th July, 2018 where the Defendant had successfully sought for the said ex-parte summary judgment entered against her be set aside so that the matter could proceed on its merits.
4. Upon the parties complying with the provisions of Order 11 of the Civil Procedure Rules, Sarah Chepkemoi Bett, the Plaintiff herein testified as PW1 on 14th October, 2019 to the effect that she came from Kiptere. That she was in court because the Defendant herein and one Erick Kipngeno had grabbed her piece of land. She adopted her Witness Statement dated 7th June, 2019 as evidence in chief and proceeded to testify that the said suit land was land Parcel No. Kericho/Kiptere/1460. She produced the title deed for the said land as Pf Exhibit 1. She further testified that her late husband had leased a portion of land to Defendant for purposes of grazing her livestock. That upon her husband's demise she had asked the Defendant to move out of the suit land but the Defendant had refused.
5. She further testified that she reported the matter to the area Chief. That she had filed a Succession Cause upon the demise of her husband where the title to the suit land had been jointly registered in her name and that of her son one Paul Kipkirui Cheruiyot. That when the Defendant refused to move out of the suit land, the area Chief advised her to seek redress in a court of law hence the instant suit.
6. Her evidence was that there had been held three meetings before the area chief prior to instituting the instant suit and that of the said three meetings, one was before the District Officer of the area. That she was given a letter by the area Chief referring the matter to the Deputy Commissioner who caused the matter to be handled by District officer. She produced the said letter dated 8th December, 2015 as Pf Exhibit 2 and testified further that the matter was handled by the area District Officer although she could not recall the date in which the said matter was handled.
7. She produced the proceedings of the said meeting as Pf Exhibit 3 and testified that she had served the Defendant with a demand notice from her advocate. She produced the said Demand Letter dated 5th April, 2016 as Pf Exhibit 4 and asked the court to order the Defendant to vacate from the suit land.
8. Upon being cross-examined by the Counsel for the Defendant, she stated that her late husband was one Mr. Cheruiyot Arap Bett and that they shared a common boundary with the Defendant herein although she did not know the name of the Defendant's husband. She confirmed that the suit land had been leased when she was already married to her late husband although she could not recall the year. She testified that she got her Identity Card in the year 1996.
9. That it was not true that Jackson Kipngetchi Yego assisted her late husband in marrying her and that it was also not true that the said Jackson was then using the suit land. That it was not true that there was no lease and it was also wrong to say that the Defendant's husband purchased the suit land from her late husband in the year 1977.
10. That although she could not recall when her husband died, he did not file a suit for eviction against the Defendant's husband. She explained that whereas she had obtained the title deed in the year 2001 yet she had complained to the Chief in the year 2015. She explained further that she did not complain immediately because she had no money to file the instant suit or complain to the authorities as she was educating her children at the time.



11. She clarified that the suit land which measured about 1.2 acres was leased to the Defendant's husband although she did not know the amount of money the Defendant's husband was paying. She further clarified that although there used to be a boundary between them, it was no longer there as the Defendant had removed it and had been using the suit land ever since her husband passed on.
12. That on the 1.2 acres that she was claiming, there were tea bushes, some houses and trees. That the tea was planted immediately her husband passed on. On being cross-examined further, she changed her mind and stated that the tea was planted around the time that she was pursuing succession letters. That despite the Defendant being ordered to vacate from the suit land, she and her family had refused to vacate. She however confirmed that she never sought any injunctive relief from court. She also confirmed that the Defendant had been receiving payment from the tea plantations.
13. She acknowledged that she had never complained to the tea authorities to stop paying the Defendant for the tea planted on her land, that there were houses that were built on the suit land about two year ago, and lastly that they had gone before the area District Officer whereby she had given evidence over the dispute. She explained that her son, who was a co-owner of the suit land was not in court because he was married to the Defendant's daughter.
14. That she was not aware that her late husband had instituted the process of transferring the suit land to the Defendant's husband. When referred to the Land Control Board Consent to transfer document, she confirmed that indeed it was a consent to transfer land from her husband to the Defendant's late husband but maintained that she was not lying to the court. That she had filed a case in the lower court but withdrew the same hence it was not true that the instant suit was not good. She reiterated that the Defendant destroyed the boundary after her husband passed but she had not reported the incident to the police.
15. In re-examination, she confirmed that the Defendant used the suit land to graze cows. She further confirmed that the suit land was also used to grow tea, trees, other crops, and also had houses which had been built thereon about two years ago. She reiterated that she did not come to court immediately because she did not have money as she was educating her children.
16. She further reiterated that she tried to resolve the matter the way she had earlier stated and that her children were not pursuing the matter. That the Defendant had been using the suit land for over 30 years although one of her child had also started living there recently. That although it was true that the Defendant had been using the land for over 40 years, she had raised several complaints with the local administration hence the said Defendant could not be an adverse possessor. That although she couldn't recall when the land was leased to the Defendant's late husband, she confirmed that her late husband died on 10th October, 1981. That the lease was not for a particular period and she did not know whether her late husband was paid money or not. She further confirmed that the Defendant had been using the 1.2 acres of the suit land all along.
17. In the midst of the trial, the Plaintiff's Counsel sought for and was allowed to amend their Plaintiff to join the 2nd proprietor to the suit. Corresponding leave was also granted to the Defendant to amend, file and serve their Defence and Counterclaim. Parties were further granted leave to file any additional Witness Statements if need be.
18. On 14th February, 2023, PW1 had been recalled whereby she reiterated that she had filed the instant suit with her Co- Plaintiff Paul Kipkurui Cheruiyot. She confirmed that she had testified before the court and that the testimony she gave in court was the same that the 2nd Plaintiff would have given. She clarified that the 2nd Plaintiff gave her consent to testify on his behalf and that the said consent was dated 13th February, 2023.



19. Simeon Maina Kiprotich testified as PW2 to the effect that he was a farmer and lived in Chemamul. He adopted his Statement dated 20th May, 2019 as evidence in chief and stated that he knew the Defendant and that she was married to his 'father's generation'. That she had been their neighbor before they relocated. That the 1st Plaintiff was his Aunty while the 2nd Plaintiff was his cousin.
20. He testified that as a family, they had never heard of any sale of land. That his uncle never sold land to Kiptanui Koech who was the Defendant's husband. He explained that all he knew was that around the year 1981, the Defendant's late husband was grazing his cows on 1st Plaintiff's late husband's land but he did not buy it. He proceeded to testify that when their uncle died in the year 1980, the Defendant's sons started claiming that their late father had bought the suit land.
21. His evidence was that by the year 1990, the dispute had been forwarded to the Elders whose decision had been that the land belonged to the 1st Plaintiff's late husband. That the Defendant did not only refuse to stop grazing the cows but also started planting tea and trees on the said suit land. That the 1st Plaintiff's late husband's land and that of the Defendant's late husband were adjacent to each other. He contended that the Defendant forcefully planted trees and build houses and that the 1st Plaintiff's sons were not educated otherwise they would have fought over the land.
22. His further testimony was that the suit land was initially registered in the 1st Plaintiff's late husband's name, one Cheruiyot Bett but was now jointly registered in the names of the 1st and 2nd Plaintiff and there had never been peace as there were always disputes about the suit land which dispute the area chief had tried to solve from home. His wish was that the court returns the land to the 1st Plaintiff.
23. On being cross-examined by Counsel for the Defendant, the witness confirmed that there had been held a baraza in the year 1990, which was verbal and not written. That he attended the said meeting although he had not tendered any evidence of the meeting in court. He clarified that they used to stay in Kaplewa before they moved to Chemamol and that their land was about 500 meters from the Defendant's land.
24. He confirmed that the Defendant's husband grazed his cows on the suit land for the 1st time in 1980 where the Plaintiff's husband did not raise any issue until he died. That the Defendants planted tea immediately their uncle died around the years 1980 – 1982. That they had then moved to Chemamol at the time. That there were no orders issued to the Defendant to stop them from planting tea in the year 1980 and that the Plaintiffs did not report any case to the police but the matter was heard by the elders
25. He testified that he could not remember the year that the 1st Plaintiff was married but the Defendant's husband grazed his cows on the suit land before his marriage and he continued grazing his cows even after marriage. It was his further testimony that he had never appeared before the Land Control Board as he had never bought any land because he lived on his father's land which land had not been transferred to them.
26. When referred to an application for sub-division dated 6th June 1978 (Df MFI 1) at paragraph 2, he confirmed that Kiptanui Koech was the Defendant's husband and that the sub-division was approved on 20th June, 1978. When further referred to the Transfer of land dated 6th June, 1978(DMFI 2), he confirmed that it was indeed the transfer of land whereby the Plaintiff's late Husband was transferring the suit land to the Defendant's husband and that the two had appeared before Advocate Kositany.
27. He proceeded to testify that he did not attend the Land Board in the year 1978 as he was in Eldoret. However, he maintained that as a family, they were never informed of the transfer of the suit land and that he did not think that his uncle attended the Land Control Board. He confirmed that he was aware



that the Defendant lost her two sons but he did not know where their remains had been buried and neither did he know of any case stopping their burial.

28. His further evidence was that he did not hear of any court case between the years 1978 and 1990, apart from the local meeting presided over by the Assistant Chief and village elder where it had been resolved that the suit land belonged to the 1st Plaintiff's husband. That the said meetings were verbal and there had been no minutes taken.
29. He maintained that the tea was planted forcefully on the suit land and whoever planted the said tea was plucking them. That he was not acquainted so well with the Defendant's sons as they had no relationship despite having been neighbors before they relocated to Chemamol.
30. Upon being referred to DMFI-1 on re-examination, he clarified that he could see the document clearly and that the land that was allegedly being transferred was not there. He was further referred to DMFI 2 whereby he confirmed that the application was made on 6th June, 1978 and that the acreage that was intended to be transferred was 0.20 hectares. His further testimony was that in the aforementioned document, the Land Registration Number of the land to be transferred was not indicated hence the document was a fabrication.
31. He reiterated that a meeting was held in the year 1990 by the elders and the issue resolved. That the tea was planted by either the Defendant or her sons and whoever planted the said tea was now plucking it. That he was not aware that some of the Defendant's children were buried on the suit land.

The Plaintiffs thus closed their case.

32. Recho Koech, the Defendant herein testified as DW1 to the effect that she lived in Kaplelwa and that she knew the 1st and 2nd Plaintiffs. That her husband the late Kiptonui Koech bought land measuring 5 points from the 1st Plaintiff's husband one Cheruiyot Arap Bett in the year 1977 before the 1st Plaintiff was married to the said Cheruiyot Arap Bett.
33. She proceeded to testify that after her husband bought the said land, he planted tea bushes in the year 1977 where the late Cheruiyot Bett, the 1st Plaintiff's husband did not raise any issue. That they started plucking the said tea after 2 years. That from the year 1977 to 1980 the family of the 1st Plaintiff did not raise any issue over the tea plantation having been planted on the suit land, but had only started complaining recently.
34. Her evidence was that she had been plucking tea and receiving bonus from the year 1980 and there had not been any court order stopping her. That she used to live in a different house subsequently to which she had put up another house on the suit land when she started planting the tea which house had been on the suit land for more than 10 years and there had been no order from the court asking her to demolish the house.
35. Her further evidence was that her late husband and the 1st Plaintiff's late husband went to the Land Control Board in Kericho. That although she did not know how to read, she was aware that the 1st Plaintiff's husband attempted to transfer the suit land to her husband but the same was not transferred. She urged the court to order that 0.5 acres of the suit land currently registered jointly in the names of the 1st and the 2nd Plaintiff be cancelled and registered in her name.
36. She adopted her Statement dated 18th March, 2018 as evidence in Chief and confirmed that they had held several meetings at home before the institution of the instant suit. That she had seen minutes from the Chief at Sigowet. That the trees on the suit land had also been planted at the same time as the tea.



37. Upon being cross examined by Counsel for the Plaintiffs, she confirmed that there were trees on the land and that she had photographic evidence of the same although she had not shown the same to the court. She confirmed that there were several meetings concerning the dispute on the land which meetings had been initiated by the 1st Plaintiff. That her husband and the 1st Plaintiff did not conduct any meeting, neither was any meeting held between her children and the 1st Plaintiff until recently.
38. She further testified that there was a dispute meeting in the year 1989 with the Chief. When asked whether she had produced any evidence of when the tea bushes were planted and the house built on the suit land, she maintained that the same were planted in the year 1977 immediately they had purchased the land. That although she did not have any documentary evidence, she had taken oath to tell the court the truth.
39. She confirmed that there was a house on the suit land before the case was filed and the said house was there even when her husband passed on. She explained that she sold the tea in Chemamor to KTDA wherein she would normally be issued with a document although she did not know that the said documents would be required in court hence she had left them at home.
40. She explained that she got married in the year 1966 and that her husband was friends with the 1st Plaintiff's husband as they were initiated at the same time. That her husband was on the suit land with the consent of the 1st Plaintiff's husband and that she was asking for the land for the benefit of her children.
41. She confirmed that there was a counterclaim whereby she was claiming land measuring 0.5 acres which her husband had purchased. That her husband died about 11 years ago.
42. Upon being re-examined, she maintained that she swore to tell the court the truth, the said truth being that the tea bushes were planted in the year 1977 wherein she had been in occupation of the suit land all through.
43. Jackson Arap Yegon testified as DW3 to the effect that he lived in Kaplelwa and was a farmer. That he knew both the 1st Plaintiff and the Defendant as they lived together as neighbors. He further testified that the 1st Plaintiff lived 440 yards away from him and that the said 1st Plaintiff got married in the year 1978 after he brought her to the area. He explained that on the first day, they had gone alone where he had showed her a piece of land and told her that ½ an acre had been sold by her husband to the Defendant's husband.
44. That he was aware that there had been a transfer by the 1st Plaintiff's husband to the Defendant's husband. That when they were preparing to go to Sosiot, the 1st Plaintiff's husband had forgotten his ID and they were told to go at a later date but the said 1st Plaintiff's husband got sick and died. He reiterated that the Defendant's husband had bought ½ an acre of the land the Defendant was in occupation. He further confirmed that there were trees, tea and houses were on the said suit land but he could not remember when the tea was planted although the Defendant's children plucked it.
45. He testified that there had not been a dispute between the two old men. That he could not remember when the Defendant's husband died but the dispute between the 1st Plaintiff and the Defendant started after the death of the 1st Plaintiff's husband and the 1st Plaintiff transferred the suit land in her name. That the 1st Plaintiff did not lodge any allegation against the Defendant's husband when he was alive.
46. He adopted his Statement dated 18th March, 2019 as evidence in-Chief and maintained that the Defendant had been on the suit land hence he urged the court to give the suit land to the Defendant since they purchased it.



47. Upon being cross-examined, he confirmed that the 1st Plaintiff and the Defendant had been having cases in the village.
48. DW3, Jackson Kiplangat Chirchir testified that he lived at Kiptere in Kaplelwa village and was a farmer. That he knew the 1st Plaintiff and the Defendant as he was their neighbors. That being a village elder, he was usually called when there were issues thus he heard that there had been a land sale between the 1st Plaintiff's husband and the Defendant's husband although he was not there during the said sale.
49. He testified that he was not aware of the land parcel No. Kericho/Kiptere/1460 but he was in court because there was a boundary dispute between the 1st Plaintiff and the Defendant. He confirmed that the Defendant had tea, houses and trees on that suit land but he did not know when the said tea was planted. He testified that the Defendant had been on the suit land since the year 1971.
50. His further testimony was that there were no issues during the life time of the 1st Plaintiff's husband and the Defendant's husband. That the Defendant's husband passed on in the year 2012 while the 1st Plaintiff's husband passed on between the years 1978 – 1979 or thereabout. That he became the village elder in the year 2015. He adopted his Statement as evidence in-Chief.
51. On cross-examination he maintained that he knew the parties and their husbands. That the suit land was demarcated and the Defendant's husband had grazed on it for a short while before he planted trees and tea. That he only attended one meeting although he had heard that there had been several meetings.
52. On being further cross-examined, he changed his mind and stated that he was not a village elder, but just an old man in the village and that the Defendant was his sister hence he had come to court to assist her in getting the suit land.
53. The Defence closed her case and parties were directed to file their written submissions to which I shall herein summarize as follows;

Plaintiffs' Submissions.

54. The 1st Plaintiff gave a brief summary of her case wherein she submitted that she was the current and legal registered owner of the land parcel Kericho/Kiptere/1460, having acquired the title upon filing succession of her deceased husband. That the Defendant had leased land from her late husband but had refused to move out upon the expiry of the term despite several attempts, as per copies of minutes herein produced as Pf exh 3, to have her move out. That it had been only after she had exhausted all other avenues that she had filed the present suit.
55. That the Defendant's claim that her husband had purchased 5 points of land parcel Kericho/Kiptere/1460 from the 1st Plaintiff's husband in 1977, wherein upon the purchase she had planted tea bushes, trees and had even constructed a house in 1966, were made without any iota of evidence.
56. That indeed the Defendant had also consented that there had been several meetings held to resolve the dispute, but all had failed confirming that the Defendant had never enjoyed peaceful occupation of the land.
57. The Plaintiffs framed their issues for determination as follows:
 - i. Whether the Plaintiff is entitled to the payers sought in the Plaintiff.
 - ii. Whether the Defendant is entitled to the prayers sought in the counter claim.
 - iii. Who should bear the costs?



58. On the first issue for determination as to whether the Plaintiffs were entitled to the payers sought in the Plaint, they submitted that they had provided evidence that they were the registered proprietors of the suit parcel of land and therefore were protected by virtue of the provisions of Section 22 of the [Land Registration Act](#).
59. That they had demonstrated that the Defendant had trespassed into their land parcel wherein she had taken occupation of a portion measuring 1.2 Acres. Reliance was placed on the decision in the case of *Giella vs. Cassman Brown* [1973] E.A 358 to submit that they had established a prima facie case that they were the legal registered owners of land parcel Kericho/Kiptere/1460, and that the Defendant had trespassed onto it.
60. That they resided on the land and had sentimental attachment to it which could not be compensated by an award of damages and as such the only relief that was available to them was that of an injunction against the Defendant without which they would suffer irreparable injury. That the balance of convenience therefore tilted in their favour as the legal registered owners of the suit parcel of land.
61. On the second issue as to the weather the Defendant was entitled to the prayers sought in her counter claim, Plaintiffs submitted that and burden of proof in a claim of adverse possession lay with the adverse possessor who wished to rely on the doctrine. That it was therefore the duty of the Defendant to show that she had been in active possession of the land peacefully without interruption and not forcefully for a period of more than 12 years.
62. That the parties had commonly agreed that the Defendant's occupation on the Plaintiff's land had never been peaceful, since the parties had had tussles over the land as early as the year 1989. They relied on the decision by the Court of Appeal the case of *Mtana Lewa vs. Kahid Ngala Mwangandi* [2005] eKLR, to submit that indeed there had been several attempts to remove the Defendant from their land, where the local leaders from grass roots had made attempts to resolve the matter but the Defendant had forcefully remained on the land. That having exhausted all avenues outside court, the Plaintiffs had opted to prefer this suit. That they did not therefore fail to take action against the Defendant for the period of 12 years as alleged. Reliance was placed on the decision in the case of *Samwel Kihamba vs. Mary Mbaisi* [2015] eKLR to submit that the Defendant having remained forcefully on the Plaintiff's land, she should be estopped from making a claim of adverse possession.
63. That further, the Defendant had failed to demonstrate that indeed she had been in occupation of 0.5 Acres of the Plaintiff's land, and not 1.2 Acres and further that the alleged 0.5 Acres was fenced off from the rest of the Plaintiffs' land. The need of certainty in a claim for adverse possession had been discussed in the case of *Robinson Kiplangat Tuwei vs. Felix Kipchoge Limo Langat* [2020] eKLR where the court had held that a claim to adverse possession should be made with certainty.
64. That since the Defendant's allegation had not been proved and/or supported by any evidence, her counterclaim be dismissed and Plaintiffs' suit be allowed with costs.

Defendant's Submissions

65. The Defendant summarized the background of the matters in issue as well as the evidence as adduced in court before submitting that the she had been in continuous, open, exclusive, uninterrupted occupation and possession of the suit land for a period of over 40 years where she had made substantial developments therein openly and in full view of the Plaintiffs.
66. That as a result of the said occupation, she had acquired proprietary rights over the said portion of suit land by didn't of adverse possession. The Defendant contended that the 1st Plaintiff's husband one Cheruiyot Arap Bett sold to Kiptonui Arap Koech, her husband a portion of land measuring 0.5 acres



- comprised in the suit land herein for Kshs. 1,000/= and had proceeded to make an application to the Land Control Board for sub-division and transfer, which applications had been approved.
67. The Defendant thus submitted that her occupation of the suit land extinguished the Plaintiff's title and the said Plaintiff had been holding the relevant portion of the suit land in trust for her. She placed reliance on a combination of the holdings in the decided cases of *Munyaka Kuna Company Limited vs Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased))* [2018] eKLR, *Kahindi Ngala Mwangandi vs. Mtana Lewa* [2014] eKLR and *Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 others* [2004] eKLR to submit that she had satisfied the ingredients of an adverse possessor as she had been in continuous, open, exclusive, uninterrupted occupation and possession of the relevant portion of the suit property.
68. The Defendant reiterated that what could be deduced from the pleadings was that the suit land was subject to a sale agreement between the Plaintiff's husband and her husband for a portion of land measuring 0.5 acres comprised in the suit land herein for Kshs. 1,000/= wherein an application was made to the Land Control Board for sub-division and transfer, which applications were approved.
69. Consequently, the documents as listed in her Amended list of documents being Land Adjudication Ordinance Receipt dated 7th October, 1977, Land Registration Fee Receipts Serial Numbers 718094 and 718100 both dated 7th October, 1977, Sketch Map dated 31st May, 1978, Letter of Consent Number 9749 dated 20th June, 1978, Application for Registration dated 20th June, 1978, Department of Land Fee Receipt for Adjudication Fee dated 6th June, 1978, Summoning Letter from the Assistant Chief Kiptere Sub-Location dated 2nd September, 1993, and Sub-Division of Parcel Number Kericho/Kiptere/1640 dated 6th June, 1978 were issued in respect of the suit land.
70. Placing reliance on the holding in the decided case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR where the court had pronounced itself on uncontroverted evidence, the Defendant submitted that the court had a duty to interrogate and evaluate uncontroverted evidence in order to determine whether she was entitled to the prayers sought. Further reliance was placed on the decided case of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* [2017] eKLR to submit that since the Defendant was the one who alleged adverse possession, the burden lied squarely on her to demonstrate that she had met the requirement for the grant of an order of adverse possession which burden she had discharged.
71. On the law governing adverse possession, the Defendant placed reliance on a combination of the provisions of Section 7, 17 and 38 of the Limitations of Actions Act. Further reliance was placed on the holding in the decided case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR where the Court of Appeal opined that a person claiming adverse possession must prove the following:
- i. On what date he came into possession.
 - ii. What was the nature of his possession?
 - iii. Whether the fact of his possession was known to the other party.
 - iv. For how long his possession has continued and
 - v. That the possession was open and undisturbed for the requisite 12 years.
72. That concerning the date in which the Defendant came into possession and whether the fact of her possession was known to the other party, the Defendant contended that she entered into the suit land in the year 1971 and had been in occupation since then for a period of over 40 years. Consequently, she had been in exclusive use and occupation of a portion measuring 0.5 acres comprised in Kericho/Kiptere/1460, the suit land herein since the year 1971 a period of over 40 years uninterrupted and



- had made substantial developments therein openly and in full view of the Plaintiffs. That period was beyond the statutory stipulated period.
73. It was the Defendant's further submission that the adverse possessor and the registered legal proprietor of the suit land were well known to each other as they had interest in the same piece of land and no interruption accrued thereto as to the adverse possession of a portion of the suit land measuring 0.5 acres.
 74. On the nature of the Defendant's possession, reliance was placed on the Court of Appeal's decided case of *Samuel Kihamba vs Mary Mbaisi* [2015] eKLR to submit that as the Plaintiffs had rightly stated in their pleadings, that they were the original owners of the suit land hence when the Defendant acquired ownership, the Plaintiffs must have been in occupation of the suit property but did not raise any legal proceedings against the Defendant whose occupation of the said suit land remained uninterrupted.
 75. There were further submissions that the Plaintiffs had not led any evidence in relation to the nature of her occupation. That she gained access to the suit land as a registered owner and there was no way she could seek for permission, hence she was in an open and exclusive occupation of the suit land but as the registered owner. The Defendant contended that adverse possession accrued on land and not title and while the Plaintiff might have acquired the title to the suit land, she did not acquire possession of the relevant portion of the suit land. Therefore, although the Plaintiff was the registered owner of the suit property, no right accrued to her with regard to a portion of the suit land measuring 0.5 acres since she never took possession of the said portion.
 76. Concerning the period of time that the Defendant had continued to occupy the relevant portion of the suit property, the Defendant placed reliance on a combination of holdings in the decided cases of *Gabriel Mbui vs. Mukundia Maranya* [1997] eKLR and *Gachuma Gacheru vs. Maina Kabuchwa* [2016] eKLR where the Court of Appeal cited with approval the case of *Maweu vs Liu Ranching & Farming Cooperative Society* [1985] eKLR to submit that grounded by the facts in the instant suit, time ought to be computed from the year 1971 when the Defendant first occupied the suit land hence it would be right to conclude that there was no order stopping the Defendant from dealing with the relevant portion of the suit land.
 77. Relying on the holding in the decided case of the *Peter Kamau Njau vs. Emmanuel Charo Tinga* [2016] eKLR the Defendant submitted that time started running as from the year 1971, that there was compelling evidence of the existence of an agreement over a portion of the suit land measuring 0.5 acres. That the rights of a person in possession and occupation of land were equitable rights which were binding to the land and the land was subject to those rights. Therefore the Defendant herein having furnished the court with details as to the adverse possession, had sought equity and reciprocated equity that would help guide the court in determining when time began running and find the proper computation. Reliance was placed on the holding in the decided case of *Mwangi & another vs. Njuru Mwangi* [1986] eKLR.
 78. It was the Defendant's contention further that the thrust of her submissions was founded on the fact that she had been living on the portion of the suit land measuring 0.5 acres since the year 1971 without any interruption whatsoever from the Plaintiffs herein. That she had proven that she was entitled to the orders sought that she be registered as the legal owner of a portion of the suit land that is LR No. Kericho/Kiptere/1640 measuring 0.5 acres together with the developments thereon.
 79. That her suit in the counterclaim was merited and the same ought to be allowed in the best interest of justice and judgment entered in her favour as against the Plaintiffs as prayed.



Determination

80. I have considered the matter before me, the evidence as well as the submissions, the authorities and the applicable law. From the summation of the same, the Plaintiffs (a mother and her son) had sought that being the registered proprietor of parcel of land known as LR No. Kericho/Kiptere/1640, the suit land herein, the Defendant without any justification right or color had trespassed into the same thereby depriving them (Plaintiffs) of their rights to own and enjoy peaceful occupation of their property. That the 1st Plaintiff's late husband (who died on 10th October, 1981) had leased a portion of land to Defendant's husband for the purpose of grazing their livestock. That upon her husband's demise she had asked the Defendant to move out of the suit land but she had refused stating that her husband had bought the land, wherein she had proceeded to plant tea, tress and build houses on the said land.
81. That the 1st Plaintiff had tried severally to have the Defendant give them vacant occupation of the suit land wherein they had held several discussions with the local administration to no avail. That the Defendant had been adamant and had continued to forcefully remain on the land. It was thus because of the Defendant's unlawful act that they had sought for her eviction as well as for orders of permanent injunctive against her prohibiting her from interfering whatsoever with the suit land. They had also sought for damages for trespass.
82. In response to the Plaintiff and in her counterclaim, the Defendant sought for orders that she be registered as proprietor to a portion measuring 0.5 acres comprised in the suit land, the same having been sold to her husband the late Kiptonui Koech by the 1st Plaintiff's husband one Cheruiyot Arap Bett in the year 1977 before the 1st Plaintiff got married. That after her husband bought the said land, he planted tea bushes in the year 1977 and she had been plucking the same and receiving bonus from the year 1980.
83. Evidence on record is that whereas the Defendant's family took possession and occupation of a portion of the suit land in 1977, they had been in continuous and uninterrupted possession, where no issues had been raised during the lifetime of the two men. Whilst the Plaintiff's husband passed away on 10th October 1981, the Defendant's husband passed on in the year 2012, after which the 1st Plaintiff raised a complaint with the chief who had heard the matter on the 18th November 2015 and 2nd December 2015 wherein he had forwarded the same vide a letter dated the 8th December 2015 to the Deputy County Commissioner. The matter was heard by the District Officer in a meeting held on the 23rd December 2015 who had determined that the Defendant vacates from the suit land.
84. I have also considered the fact that after the demise of the original proprietor of the suit land, the Plaintiff had filed a Succession Cause where the title to the suit land had been jointly registered in her name and that of her son the 2nd Plaintiff herein on the 4th December 2001.
85. I find two issues arising herein for determination to wit;
- i. Whether the Plaintiffs have proved their case to the required standard.
 - ii. Whether the Defendant has acquired Zero point Five (0.5) of an Acre comprised in L.R No. Kericho/Kiptere/1460 by adverse possession as sought in her counterclaim.
86. On the first issue for determination, it is not in dispute, according to the title herein produced as Pf exh 1, that the suit land being No. Kericho/Kiptere/1460 was registered to the both the Plaintiffs on the 4th December 2001 wherein they had been issued with a title under the repealed Registered [Land Act](#) which is now governed by The [Land Act](#), 2012 and The [Land Registration Act](#), 2012. Indeed the



law is very clear on the position of a holder of a title deed in respect of land. Section 26(1) of the [Land Registration Act](#) provides as follows:

“The Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party
- b. Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme

87. Section 24 (a) of the [Land Registration Act](#) further stipulates as follows:

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

88. Having found that the Plaintiffs were the legal proprietors of land Parcel No. Kericho/Kiptere/1460, having absolute ownership including all rights and privileges appurtenant to it, then by virtue of the Defendant’s presence on the land without their consent and/or permission, we can safely say that the Defendant had trespassed on the same.

89. However the next question that we need to ask ourselves going by the evidence adduced by the Defence is whether the Defendant’s presence on the suit land was legal by virtue of an agreement, whether sale or lease of land measuring Zero point Five (0.5) of an Acre, between the Plaintiffs’ deceased husband and her deceased husband in the year 1977.

90. Indeed from the evidence, on record it is not in dispute that Plaintiff’s deceased husband one Cheruiyot Arap Bett had allowed the Defendant’s late husband Kiptonui Koech to take occupation and use of a portion of the suit land herein in the year 1977. Where he had allowed him only to graze his cattle on the same. That after taking possession of the said portion of the suit land, the Defendant and her husband had proceeded to openly develop the same, by planting trees and tea and even building thereon. There had been no issues.

91. The Plaintiff’s husband then passed away in 1981 wherein she filed a Succession Cause and the title to the suit land had been jointly registered in her name and that of her son the 2nd Plaintiff herein on the 4th December 2001. Up to this time, the parties had lived peacefully. The Defendant’s husband then passed on in the year 2012, wherein in the year 2015 which was 38 years after the Defendant had got onto the land, then the Plaintiff then started raising complaints.

92. What is in contention herein was whether the 1st Plaintiff’s husband had leased the land to the defendant’s husband or sold the same to him.

93. The Defendant has sought to be registered as proprietor of Zero point Five (0.5) of an Acre comprised in LR No. Kericho/Kiptere/1460 by virtue of her uninterrupted occupation and use of the suit land for more than 38 years, that she had thus acquired the same based on the doctrine of adverse possession.



94. 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:

95. 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...”

96. 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.

97. 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 (s)he shall have obtained and registered a High Court (Read Environment and Land) Order vesting the land in him/her.

98. From the above captioned provisions of the law, the Court of Appeal in the case of Benjamin Kamau Murma & Others vs. Gladys Njeri, C A No. 213 of 1996 held that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

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

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

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

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

Has the Defendant thus demonstrated the said elements?

101. From the evidence adduced, it is not disputed that the Defendant had been in actual, open, exclusive and continuous possession of a portion comprised in Kericho/Kiptere/1460 since the year 1977, after



her husband had been put in vacant possession of the same by the Plaintiff's husband and wherein she had lived peacefully up to the year 2015 when the Plaintiff raised a complaint.

102. In *Gabriel Mbui vs. Mukindia Maranya* [1993] eKLR observations were made in the manner of occupation by a claimant for adverse possession as follows:

“SUBPARA a)

The intruder resisting suit or claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for statutory period.

- b) The entry and occupation must be with, or maintained under, some claim or colour of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
- c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
- d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi. that is to say occupation with the clear intention of excluding the owner as well as other people.
- e) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, given reason for notice to the owner and the community, of the exercise of dominion over the land,
- f) The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period.
- g) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.”

103. In *Douglas Mbugua Mungai vs. Harrison Munyi* [2019] eKLR the Court of Appeal held that;

“The issue in the Githu case was whether the mere change of ownership of land that is occupied by another person under Adverse Possession would interrupt such person's adverse possession. And the answer was correct that where the person in possession has already begun and is in the course of acquiring rights under Section 7 of the *Limitation of Actions Act*, those rights are overriding interests by virtue of section 30(f) of the RLA, to which the new registered purchaser's title will be subject. “

104. The same view was followed by the Court in the case of *Kairu v. Gacheru* [1986-1989] E.A where it was held that:

“The law relating to prescription affects not only present holders of the title but their predecessors (Section 7 *Limitation of Actions Act*).”



105. In the case of Titus Kigoro Munyi vs. 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”.

106. This suit was originally filed on the 7th June 2017, the Plaintiff has not proved that she dispossessed the Defendant of the portion of Zero point Five (0.5) of an Acre comprised in LR No. Kericho/Kiptere/1460 for a period of more than 12 years. It is therefore clear from the foregoing provisions of the law and case law that a claim for Adverse Possession shall not only be sustained against the proprietor of the suit land but their predecessors.

107. I find that the Defendant has been in use of the suit land which she claims as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion) for more than 40 years pursuant to the filing of the suit. That her occupation and possession of the suit land had been continuous and peaceful wherein she had proceeded to carry out farming activities and built houses thereon. I find that the Defendant has sufficiently demonstrated the elements herein above stated thereby sufficiently establishing a claim to the land by Adverse Possession.

- i. In the end, the Plaintiffs’ suit via their further amended Plaint of the 27th September 2021 is herein dismissed.
- ii. The Defendant’s counterclaim is herein allowed.
- iii. The Land Registrar shall forthwith enter the name of the Defendant Recho Koech as the proprietor of Zero point Five (0.5) of an Acre comprised in LR No. Kericho/Kiptere/1460
- iv. Each party to bear their own cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19TH DAY OF OCTOBER 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

