



REPUBLIC OF KENYA



**Serem v Serem (Environment and Land Case Civil Suit E007 of 2021)
[2023] KEELC 21693 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21693 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CASE CIVIL SUIT E007 OF 2021
MC OUNDO, J
NOVEMBER 23, 2023**

BETWEEN

ANNAH CHEBET SEREM PLAINTIFF

AND

RICHARD KIPKORIR SEREM DEFENDANT

JUDGMENT

1. Via the Plaintiff's Complaint dated the 5th March 2021 and filed on the 10th March 2021, she had sought that Judgment be entered against the Defendant for;
 - i. An order of eviction against the Defendant by himself, his agents, Servants or employees or any other party acting on his behalf to vacate parcel No. Kericho/Kipchimchim/756.
 - ii. An order of permanent injunction restraining the Defendant by himself, his agents, servants, employees or any other party through whom he may be acting from interfering with, trespassing onto or doing any other act which is prejudicial to the Plaintiff's proprietary interest in parcel No. Kericho/ Kipchimchim/756.
 - iii. *Mesne* profits.
 - iv. Costs and interest of this suit.
 - v. Any other relief the Court may deem fit and just to grant.
2. The Defendant in his Defence and counterclaim filed on 3rd December 2021 denied the allegations put forward by the Plaintiff stating that sometimes in 1988, the Plaintiff's husband fraudulently transferred the suit properties to himself thus disenfranchising and disinheriting his siblings from their family land on which they had developed and established their families. He therefore sought for the following orders in his counterclaim;



- i. A declaration that the subject property being LR No. Kericho/Kipchimchim/756 is a family Property forming part of the estate of the late Kipserem Chepkwony.
 - ii. A declaration be granted that the subject Property being LR No. Kericho/Kipchimchim/756 was fraudulently registered in the name of the Plaintiff's husband and consequently fraudulently transmitted to the Plaintiff.
 - iii. A declaration that the subject property being LR No. Kericho/Kipchimchim/756 is a family property forming part of the estate of the late Kipserern Chepkwony.
 - iv. An order do issue that the Defendant is entitled to a share of 3.8 acres from the subject property being L. R No Kericho/Kipchimchim/756.
 - v. That the Plaintiffs suit against the Defendant be dismissed with costs to the Defendant.
 - vi. That the Defendant be awarded the costs of the Counter-claim together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to order
 - vii. That any such other or further relief as this Honourable Court may deem appropriate to be made.
3. Pursuant to the Parties having complied with the provisions of Order 11 of the Civil Procedure Rules, evidence was adduced in court on 30th May 2022 wherein the Plaintiff Anna Chebet Serem testified as PW1 to the effect that she lived in Keongo within Kericho County and was a farmer. That she had sued the Defendant herein, Richard Kipkorir Serem who was her brother in law because he was living on her land parcel No. Kericho/Kipchimchm/756 because she wanted him to vacate from the land. She adopted the statements she had made on 6th March 2021 as her evidence.
 4. She then proceeded to testify that initially the suit parcel of land belonged to her husband Benard Kiprotich Serem who had been issued with his title deed in 1998. That upon his death in the year 2010, and after conducting a Succession Cause, the same had been transferred to her and registered in her name to hold in trust for the children.
 5. She produced the death certificate as Pf Exh1, the letters of administration she had been issued dated 24th October 2011 as Pf Exh 3, the search certificate and title deed as Pf Exh 4(a and b).
 6. She testified that the Defendant was her husband's younger brother who had gone into the land in the year 1984 but had refused to leave when asked to do so. That he had even filed a complaint against her before a Kericho Tribunal as well a suit in Kericho, which case had been dismissed in her favour. That she could not remember the number of the case because she was literate. She produced the judgment in ELC No. 42 of 2014 as Pf Exh.5 and sought for the court to order an eviction against the Defendant from her land. She also sought to be paid costs of the suit.
 7. In cross-examination, she responded that she got married in 1980 wherein she had and the Defendant both lived on the land. That this was before it was sub-divided by her father in law. That there has been another land in Londiani which he had given to Richard Serem and Joel Serem who were her brothers in law. That at the time she got married, she had only found Richard because Joel had gone away. That there had been a family home as the land belonged to her father in law who had subsequently transferred it to Benard.
 8. She reiterated that the Defendant was Bernard's younger brother. That her husband had been the eldest. That the land had been given to Richard in 1984 to hold in trust for his brothers. That he had



- never moved out of the land despite having been asked to do so. That he had lived on the land like his home although he had his own land.
9. When she was re-examined, she stated that the Defendant Richard had another land measuring 7 acres in Londiani which land he had been given by his father and where he had built his home which got burnt. That her father in law had sub divided the land to his sons whilst he was alive.
 10. Her response to the examination by the court was that her father in law had died in October, 2021. The Plaintiff then closed its case.
 11. The defence case proceeded with the testimony of the Defendant Richard Kipkorir Serem one testified as DW1 to the effect that he was a farmer who hailed from Kipchimchim but lived in Keongo. He also adopted his statement recorded on 18th January 2023 as his evidence.
 12. He proceeded to testify that the case before court was in relation to land parcel No. Kericho/ Kipchimchim/756 measuring 12 acres. That the land was registered to his late brother Bernard Serem. That he lived on the said land with his late brother's wife (Plaintiff)
 13. He produced a copy of a title deed to No. Kericho/Kipchimchim/756 dated 13th June 1975 as Df exh 1 and confirmed that the said land certificate was registered to Kipserem Chepkwony who was his father. That there was also a scale map attached to the copy of the title deed (Df exh 1b) which showed that the land was sub-divided more than 10 years ago into 3 for;
 - i. Joel Serem.
 - ii. Bernard Serem.
 - iii. Richard Serem.
 14. That he lived on the left side of the scale map which was a portion of the land where he had been born. That he had built his grass thatched house as a young man but later built a permanent house. He produced photographs showing his house as Df Exhibit 2 (a – g).
 15. When he was referred to Df Exhibit 2(f), he confirmed that the same showed the boundary separating his land and Bernard's house while Df Exhibit 2 (g) showed the land with his tea bushes which were planted in 1975. That the land initially belonged to his father but they did not know how it had been registered to his brother's name even when they had the title deed in their father's name. That despite the fact that his father had sub-divided the land to them about 10 years ago, none of them had been given a title deed.
 16. He confirmed that he lived with the Plaintiff Ann Serem, who was his sister on the said parcel of land. That she got married to his brother in 1984. He confirmed that after she had filed suit, he had filed a dispute to the land dispute tribunal. That thereafter, they had conducted a search on the land wherein they had found that Ann Serem had transferred the title deed to her name. He produced the search certificate dated 26th November 2021 as Df exh 3. He proceeded to testify that after the search they had also obtained a green card to the land which showed that the land had been registered to Ann Chebet. He produced the Green card as Df Exhibit 4.
 17. That they could not understand why the land was registered to Ann because it had been registered to their father Kipserem Chepkwony on 1st April 1971. That how it was transferred and registered to Bernard Serem on 4th February 1988, he did not know. He sought that the court dismisses the Plaintiff's suit because the land belonged to their father and had been subdivided amongst the three of them as per the finding of the elders in the Land Disputes Tribunal and Df exh 1(b) which was drawn showing the occupation of the land to date.



18. In cross examination the Defendant responded that scale map was drawn by a surveyor about 10 years ago. He also confirmed that he was born on that land in 1956. That the title had been issued in 1975 wherein he had planted tea at which time he had been a matatu driver.
19. He was referred to the Green Card to which he responded that after they had seen it, that they had realized that his brother had been registered as proprietor 1988. He however denied that his father had given Bernard the land. That he had even reported the matter to the Assistant Chief who had advised him to go to the Land Tribunal.
20. That he had filed a suit against the Plaintiff being No.42 of 2014, which had been dismissed. That he had appealed against the court's decision but did not know the number of the Appeal although the same was still ongoing in Nakuru.
21. He reaffirmed that the land had been given to them 10 years ago and it was while they were in the process of the procuring a title, that Bernard got sick and died. That Bernard's name was registered by mistake and this was confirmed by his father who had told them that the name had been inserted fraudulently. He denied that in No.42/2014 his father had stated that he had given the land to Bernard. They insisted that Bernard's name had been inserted in the register by mistake.
22. When he was re-examined, he was categorical that his father did not give Bernard the land. That the meeting that had been called for had not been attended by Bernard's family because they had refused to attend the same.
23. His response to the courts examination was that his father had another land in Londiani in which his brother Joel and his mother lived. That Joel, their last born was taking care of their aged mother.
24. The defence then closed their case and parties were directed to file their written submissions which I shall summarize as herein under.

Plaintiffs written submissions.

25. Plaintiff gave a brief summary of the facts of the case before framing his issues for determination as follows;
 - i. Whether the Defendant should vacate the suit property.
 - ii. Whether the Plaintiff acquired the suit property through fraud
 - iii. Whether the Defendants counterclaim is res judicata
 - iv. who shall have costs for the suit
26. On the first issue for determination the Plaintiff relied on the decision in the case of [*Paulo Kipserem A Chepkwony v Annah Chebet Serem*](#) [2020] eKLR which was the previous suit between the parties herein in relation to the same property, but a distinct cause of action and suit had been dismissed. That in the said previous suit filed by the Defendant herein he had sought for the prayers sought in the counterclaim in the current suit, and which suit had been dismissed for reasons that there had been no fraud disclosed. That in view of the wording in the previous suit, it was evident that the Plaintiff herein was the registered proprietor of the suit property which she held in trust for her children.
27. On the second issue for determination, the Plaintiff relied on the provisions of section 26(1) of the [*Land Registration Act*](#) as well as the definition in [*Black's Law Dictionary*](#) that defined fraud to submit that there was no fraud in the registration of the suit property to the Plaintiff's husband. That it was trite that it was not enough to plead and state that fraud had been committed, but the said fraud ought



to be distinctively proved. Reliance was placed on the decision in the case of *Paul Muira & Another v Jane Kendi Ikinyua & 2 others* [2014] eKLR where the court had cited with approval the Court of Appeal case in *Musonga v Nyati* [1984] KLR 425.

28. On the issue as to whether the Defendants counterclaim was res judicata, the Plaintiffs submission was in the positive to the effect that the same had been heard and determined on merit in *Paulo Kipserem A Chepkwoy (Supra)* that the Plaintiff herein was an administratrix of the suit property having acquired beneficial interest on her behalf and on behalf of her children through succession from her deceased husband who had been the registered proprietor of the said parcel of land since 1988. That nothing in the previous judgment refrained the Defendants therein from exercising her legally required rights over the suit property and therefore the orders herein sought in the current suit were malicious, vexatious and an abuse of the court process as the judgments therein stood executed.
29. On the last issue for determination as to who would bear the cost of the suit the Plaintiff relied on the provisions of section 27 of the *civil procedure act* to submit that costs normally followed the event and there were no exceptional circumstances, in the present case, to depart from this established legal principle. That the Plaintiff had proved beyond a balance of probabilities that she was the rightful owner of the suit property of land and her suit thus be allowed and the Defendant's counterclaim be dismissed costs.

Defendant's submissions.

30. The Defendants issues for determination were as follows;
 - i. Whether the suit property was a family property and the Plaintiff's husband was holding it in trust for the beneficiaries.
 - ii. Whether a certificate of title supersedes a title by seisin.
 - iii. Whether the title to 3.8 acres of LR No. Kericho/Kipchimchim/756 should vest in the name of the Defendants by operation of law.
 - iv. Whether the estate of Bernard Kiprotich Serem (deceased) should be estopped to the extent of 3.8 acres in the suit property from alleging that the whole of LR No. Kericho/Kipchimchim/756 belongs to Bernard Kiprotich Serem (deceased) having been registered under his name.
 - v. Who should bear the costs of the suit.
31. On the first issue for determination the Defendant relied on the Black's Law Dictionary to define Trust to before proceeding to submit that the rights of a registered owner of property were clearly set out under Sections 24, 25 and 26 of the *Land Registration Act* which rights were subject to overriding interests as was stipulated under Section 28 of the said *act*.
32. That land parcel LR No. Kericho/Kipchimchim/756 measuring 3.8 acres was family land that had that had initially been registered to the deceased father. That the same was therefore held in trust for the rest of the family by the Plaintiff's deceased husband who had transferred the same into his name without the knowledge of the rest of the family. That the Plaintiff had subsequently petitioned for Letters of Administration in the year 2014 and transferred the suit land into her name without informing the rest of the family who were residing on the suit land and had put up permanent structures as their homes.
33. On the current issue as to whether a certificate of title superseded a title by seisin, the Defendant's submission was that for almost 30 years, he had been in occupation of 3.8 acres of the suit land given to him by his father where he had put up his permanent house and planted trees and tea bushes. The



Defendant relied on the decision in *Benja Properties Limited v Syedna Mohamed Burbannudin Sabed & 4 Others* [2015] eKLR to submit that all titles to land were ultimately based upon possession in the sense that title of a man seised prevailed against all who could show no better right to seisin. That seisin was the root of title and that he was entitled to 3.8 acres of the suit land which he had been in occupation for the last 30 years.

34. On whether 3.8 acres of the suit land shall vest in the Defendants by operation of the law, the Defendant relied on the provisions of Section 7, 13, 37 and 38 of the *Limitation of Actions Act*, the principles of adverse possession as well as the decision in the case of *Mtana Lewaa v Kahidi Ngala Mwangandi* [2015] eKLR to submit that courts have recognized the legality and Constitutionality of adverse possession as one of the overriding interests as envisaged under Section 28(h) of the *Limitation of Actions Act*. That the Defendant herein had been living and utilizing 3.8 acres of the suit parcel of land at the exclusion of the whole world for more than 30 years wherein he had been asserting his rights and presented himself as the owner of the said portion of land. That by virtue of the provisions of sections 7, 13, 37 and 38 of the *Limitation of Actions Act* he was therefore entitled to the 3.8 acres of land by operation of the law.
35. As to whether the estate of the deceased Bernard Kiprotich Serem (deceased) should be estopped to the extent of 3.8 acres in the suit property from alleging that the whole of LR No. Kericho/ Kipchimchim/756 belongs to Bernard Kiprotich Serem (deceased) having been registered under his name, the Defendant, while relying on the *Black's law Dictionary* on the definition of estoppel and the holding by the Court of Appeal in the case of *Sarah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR submitted that the estate of his deceased brother should be estopped from asserting a different position from the one his late brother took when he was alive. That by his deceased brother allowing the Defendant to possess, occupy and utilize 3.8 acres of the suit parcel of land to the exclusion of the whole world even after he had transferred the same to himself in 1988, until his death, led to the operationalization of the doctrine of estoppel by conduct.
36. On the issue as to who would pay the costs, the Defendant submitted that he had defended his rightful ownership of 3.8 acres of the suit property. By the Plaintiff petitioning for Letters of Grant without notifying the interested parties, this matter would have been settled without coming to court and therefore the Plaintiff should pay the costs.

Determination.

37. I have carefully and anxiously considered the Plaintiff's claim against the Defendant, the Defendant's defence and Counterclaim against the Plaintiff, the evidence, submissions as well as the applicable law and the authorities herein cited.
38. Indeed the court is alive to a previous case which had been filed as ELC Case No. 42 of 2014 and reported as *Paulo Kipserem A Chepkwony v Annah Chebet Serem* [2020] eKLR between Kipserem Chepkwony (suing through his legal Attorney Richard Kipkorir Serem) versus Annah Chebet Serem (sued as the administrator of the estate of Bernard Kiprotich Serem) wherein the Plaintiff had sought for the following orders
 - i. A declaration that the transfer of the suit land by the said Bernard Kiprotich Serem from the Plaintiff to himself was fraudulent and/or improper and equally that the subsequent transmission of the suit land to the Defendant herein is fraudulent.
 - ii. An order of rectification of the register so as to restore the Plaintiff as proprietor of the same. In the alternative, the parcel of land namely Kericho/Kipchimchim/756 be registered in the names of Anna Chebet Serem, Richard Kipkorir Serem and Joel Kipkoech Serem as proprietors in common.



39. After a full trial where the original proprietor of the suit property the late Paulo Kipserem Chepkwony, had been summoned by the courts to shed light on the issues in controversy, wherein he had confirmed to having transferred the suit property to his late son Bernard and that both Richard and the Defendant lived on the suit property which was big enough, the court rendered its verdict as follows;

“Although the Plaintiff pleaded fraud and gave the particulars of fraud in paragraph 5 of the plaint, the evidence of fraud did not meet the required standard which is higher than a balance of probabilities. The Defendant was not cross-examined on what process her late husband undertook in order to have the suit property transferred to him and the issue of the transfer documents and consent of the Land Control Board was only raised by counsel in his submissions. The evidence of the Principal Plaintiff was to the effect that he divided the suit property among his three sons but he did not seem to have a problem with the fact that the deceased registered that suit property in his name. This is because he did not bother to intervene when his sons had a dispute before the elders in respect of the suit property. Similarly, the Principal Plaintiff took a neutral stand in the instant suit as he stated that he had not sued the Defendant and he was not aware of this suit. As far as he is concerned, the suit property is big enough to be shared between his son Richard and the Defendant.

In view of the foregoing, it is my finding that the Plaintiff has not proved fraud to the required standard and he is therefore not entitled to the reliefs sought. Consequently, the Plaintiff’s suit is dismissed.”

40. The said decision of the court has not been overturned on appeal and it is thus in relation to this decision that the Plaintiff herein (who was the Defendant in the previous suit) has filed the current suit seeking for eviction orders against her brother in law, the Defendant in this case, from the suit parcel of land. She also seeks for a permanent injunction to be issued against the Defendant by himself, his agents, servants, employees or any other party through whom he may be acting, from interfering with, trespassing onto or doing any other act which is prejudicial to her proprietary interest in the suit land being parcel No. Kericho/ Kipchimchim/756.
41. In his defence and counterclaim, the Defendant stated that sometime in 1988, the Plaintiff’s husband had fraudulently transferred the suit properties, which was family land to himself, thus disenfranchising and disinheriting his siblings from their land on which they had lived for more than 20 years, developed and established their families thereon. He thus sought for a declaration that the subject property being LR No. Kericho/Kipchimchim/756 was a family property forming part of the estate of the late Kipserem Chepkwony and that he was entitled to a share of 3.8 acres from the said subject property.
42. I find the matters arising for determination thereto as being;
- i. Whether the issue of the fraudulent transfer of LR No. Kericho/Kipchimchim/756 to the Plaintiff’s deceased husband is res judicata.
 - ii. Whether LR No. Kericho/Kipchimchim/756 was a family property forming part of the estate of the late Kipserem Chepkwony.
 - iii. Whether the Defendant was entitled to a share of 3.8 acres from the said subject property having lived on the same for more than 20 years.
 - iv. Whether eviction orders and a permanent injunction should issue against the Defendant.
 - v. Who should pay costs.



43. On the first issue for determination, it is not in dispute that the suit land herein originally belonged to the late Kipserem Chepkwony who was registered as its proprietor on 1st April 1971 and was issued the title on the 13th June 1975. That the deceased Kipserem Chepkwony was a father to the Defendant and a father in law to the Plaintiff. It is also not in dispute that during the lifetime of the late Kipserem Chepkwony, the Plaintiff's husband Bernard Serem who was a brother to the Defendant had caused the said land to be registered in his name on 4th February 1988.
44. Bernard Serem died on the 5th October 2010 wherein the Plaintiff was registered as the proprietor of the suit property on the 31st January 2014 through transmission, vide Kericho High Court Succession Cause No.42 of 2011, to hold in trust for the deceased's children.
45. Pursuant to her registration as proprietor of the suit parcel of land, the Defendant herein instituted suit No. ELC Case No. 42 of 2014 against the Plaintiff in her capacity as the administrator of the estate of Bernard Kiprotich Serem seeking for prayers as herein above alluded where the court had found that the Defendant herein had not proved fraud to the required standard and was therefore not entitled to the reliefs sought.
46. The substantive law on *res judicata* is found in Section 7 of the [Civil Procedure Act](#) which provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”
47. In order therefore to decide as to whether this case on the issue of fraud is *res judicata*, a court of law should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the instant case to ascertain;
- i. what issues were really determined in the previous case;
 - ii. whether they are the same in the subsequent case and were covered by the decision of the earlier case.
 - iii. whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction.
48. The test in determining whether a matter is *res judicata* as stated was summarized in [Bernard Mugo Ndegwa -vs- James Nderitu Gitbae and 2 others](#) (2010) eKLR, as follows that the matter in issue is identical in both suits where;
- i. The parties in the suit are the same;
 - ii. There is sameness of the title/claim;
 - iii. There is concurrence of jurisdiction; and
 - iv. Is finality of the previous decision.
49. Having alluded to the finding of the Court in the previous matter, I find that the matter in issue on fraud therein was directly and substantially the same with the present matter and between the same parties and that the court of concurrent jurisdiction had dealt with finality on the issue of fraud and therefore the Defendant's Defence on this line should fail for being *res judicata* the previous suit.



50. Indeed it was held in *E.T v Attorney General & Another* (2012) eKLR that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and others* (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and another Nairobi* HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

51. On the second issue of determination as to whether LR No. Kericho/Kipchichim/756 was a family property forming part of the estate of the late Kipserem Chepkwony, the answer in my humble opinion would be in the negative. I say so because the court in the previous matter having found that there was no evidence of fraud in the registration of the same to the Plaintiffs deceased husband Bernard Serem, evidence on record is that the suit property was thereafter legally registered to the Plaintiff through transmission.

52. The rights of a proprietor of land are set out in Section 26 of the *Land Registration Act*, which provides as follows:-

“The certificate of title issued by the Registrar upon registration, or 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 that 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; or
- (b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. “

53. From the above provision of the law, it is clear that the Plaintiff having finally been registered as the proprietor of the suit land, to hold in trust of the deceased’s children, she became the absolute and indefeasible owner of the said property on their behalf. Her registration/title could only be challenged as provided by Section 26(1) (a) & (b) of the *Land Registration Act*. In the instance case, the two scenarios had been dealt with in the previous suit being No. ELC Case No. 42 of 2014 and had not proved. I find that the title held by the Plaintiff to land parcel No. Kericho/Kipchichim/756 was not family property forming part of the estate of the late Kipserem Chepkwony.

54. On the third issue for determination as to whether the Defendant was entitled to a share of 3.8 acres comprised in the said subject property having lived on the same for more than 20 years, the Court of



Appeal in rejecting an objection to the procedure where a claim for adverse possession was raised in the defence, in *Gulam Mariam Noordin v Julius Charo Karisa*, [2015] eKLR held as follows;

“Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted.”

55. The Court of Appeal then went further to hold that it had in *Teresa Wachika Gachira vs Joseph Mwangi*, CA 325 of 2003 it had expressly stated that;

“Irrespective of the procedure adopted, the onus is on the person claiming adverse possession to prove that he has used the land he is claiming *nec vi, nec clam, nec precario*. It is clear that the change in the court’s approach to this question has, by and by been dictated by the need to do substantive justice.

56. The court of Appeal then summed up its finding by holding that;

“The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent’s occupation of the suit property was adverse to that of the appellant; and that the latter’s title was so extinguished.”

57. In the instant case there is no dispute that the Defendant herein had raised his defence that he was born on the suit land and had been in occupation of 3.8 acres of the suit wherein he had developed the same, built a permanent residential home, and planted tree bushes that were now over 20 years of age. Indeed the Plaintiff in her evidence admitted that the Defendant was her husband’s younger brother who had been on the land since the year 1984. It therefore goes without saying that his occupation of the suit property was adverse to that of the Plaintiff.

58. 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:

“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 or, if it is first accrued to some person through whom he claims, to that person”.

59. Section 13 of the *Act* is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”



60. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.
61. The Court of Appeal in the case of *Benjamin Kamau Murma & Others vs Gladys Njeri*, C A No. 213 of 1996 held as follows:

“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.

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”

62. The main the elements of adverse possession that a claimant has to prove include :
- i. actual,
 - ii. open,
 - iii. exclusive
 - iv. and hostile possession of the land claimed.

Has the Defendant herein demonstrated the said elements?

63. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it.
64. It is not disputed that the Defendant was born on the suit land and has been in occupation and possession of a portion of 3.8 the acres of the suit land long before the same was the registered to his deceased brother Bernard Serem in the year 1988, and that he had grown tea bushes that were over 20 years old. There is nothing to suggest that that occupation was in secrecy or that it was not known to the Plaintiff. It is also not in dispute that the Defendant had been dealing with the portion of 3.8 acres of the suit premises exclusively. To this effect I find that the Plaintiff was dispossessed of the suit premises by those acts which were *nec vi, nec clam, nec precario* (that is, neither by force, nor secretly and without permission). At the expiration of the twelve-year period, the proprietor’s title was extinguished by operation of the law and Section 38 of the Limitation of Actions Act permits the adverse possessor to apply to this Court for an order that he be registered as the proprietor of the land.
65. Flowing from the Defendant’s occupation of the suit property which was adverse to that of the Plaintiff and which extinguished her title to the said portion of 3.8 acres of land comprised in the suit land, I find and hold that the Defendant has proved on a balance of probabilities that his right of action as against the Plaintiff has accrued pursuant to the provisions of Section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act. In the circumstance herein I find as follows;



- i. The Plaintiff's suit is herein dismissed with no costs as these are family members.
- ii. The Defendant's counterclaim that he is entitled to a share of 3.8 acres comprised in the subject property being No. Kericho/Kipchimchim/756 succeeds as prayed.
- iii. The Plaintiff shall transfer a portion measuring 3.8 acres comprised in the subject property No. Kericho/Kipchimchim/756 to the Defendant at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar of this court shall execute on behalf of the Defendant all the necessary transfer documents.
- iv. It is so ordered.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 23RD DAY OF NOVEMBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

