



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 3 OF 2020(OS)**

**IN THE MATTER OF LAND PARCEL NO E. BUKUSU/S. KANDUYI/18770**

**AND**

**IN THE MATTER OF SECTIONS 17, 18, 37 & 38 OF THE LIMITATION OF ACTIONS ACT**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION**

**ELIZABETH AMUKHUMA ANDAI .....1<sup>ST</sup> PLAINTIFF**

**MARTIN OWIRA OJERA..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TABITHA OTSIEKA OJERA .....1<sup>ST</sup> DEFENDANT**

**FELIX WANGILA KOPILO .....2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

***“Cameras cannot lie”***

This phrase literally means that once a person takes a picture, it is proof of that moment’s incident.

**1. PROVERBS 14:5** reads: -

***“An honest witness does not deceive, but a false witness pours out lies”*** Among the ten commandments given to **MOSES** includes:  
***“You shall not lie.”*** - **EXODUS 20:16.**

**2.** The plaintiffs herein have tried to acquire the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/18770** (the suit land) by concocting lies. However, they ended up doing a shoddy job. This will become evident shortly.

**3. ELIZABETH AMUKHUMA ANDAI** and **MARTIN OWIRA OJERA** (the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) moved to this Court vide their amended Originating Summons dated 14<sup>th</sup> February 2020 in which they impleaded **TABITHA OTSIEKA OJERA** and **FELIX WANGILA KOPILO** (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) seeking a determination of the following questions regarding the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/18770** (the suit land): -

**1. Whether or not the plaintiffs herein have been in occupation of the suit land openly, notoriously, continuously and peacefully for a period exceeding 12 years.**

**2. Whether or not the 1<sup>st</sup> defendant’s title over the suit land has been extinguished by operation of the law.**

**3. Whether or not the Court should order the plaintiffs to be registered as the proprietors of the suit land in place of the 1<sup>st</sup> defendant.**

4. Whether or not the plaintiffs have become entitled to the suit land by the concept of adverse possession.
5. Whether the prescriptive rights of the plaintiffs over the suit land has crystalized.
6. Whether or not the 2<sup>nd</sup> defendant did not have a good title to transfer to the 1<sup>st</sup> defendant.
7. Whether or not the 2<sup>nd</sup> defendant's title to NO EAST BUKUSU/SOUTH KANDUYI/18770 had been extinguished by operation of the law of the time of transfer to the 1<sup>st</sup> defendant.
8. Whether or not the 1<sup>st</sup> defendant holds the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 in trust for the plaintiffs.

Arising out of the above issues, the plaintiffs sought the following orders: -

1. The 1<sup>st</sup> defendant's title to the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 has been extinguished by operation of the law.
- 1A: A declaration that the 2<sup>nd</sup> defendant's title over land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 had been extinguished by operation of the law at the time of transferring the same to the 1<sup>st</sup> defendant.
2. The 1<sup>st</sup> defendant hold the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 in trust for the plaintiffs who have been in occupation and use peacefully, continuously and without interruption for more than 12 years.
3. The plaintiffs have acquired the aforestated land by way of adverse possession.
4. The 1<sup>st</sup> defendant do transfer the entire land parcel NO EAST BUKUSU /SOUTH KANDUYI/18770 to the plaintiffs and in default, the Deputy Registrar of this Court do execute all the relevant documents on behalf of the 1<sup>st</sup> defendant to vest ownership of the said land in the plaintiff's names.
5. The production of the original title deed to the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 by the 1<sup>st</sup> defendant to the Land Registrar be dispensed with.
6. Costs be borne by the defendants.

In support of their claim to the suit land, the plaintiffs filed their respective affidavits and, surprisingly, also the supporting affidavit of the 2<sup>nd</sup> defendant herein.

4. They also filed their list of documents dated 5<sup>th</sup> July 2021 and which were also annexed to their supporting affidavits. That list contains the following: -

1. Photograph showing a compound.
2. Photograph showing houses.
3. Photograph showing toilet.
4. Copy of Green Card to the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 registered in the name of the 1<sup>st</sup> defendant.
5. Certificate of Death for DAVID ODHIAMBO OJERA.
6. Certificate of Official Search for the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770.

5. In her supporting affidavit dated 11<sup>th</sup> February 2020, the 1<sup>st</sup> plaintiff has averred, inter alia, that she is the widow to **DAVID OJERA** who died in 2014 but she has since been inherited by her brother – in – law the 2<sup>nd</sup> plaintiff. That the 1<sup>st</sup> defendant is her step mother – in – law. That when she got married to **DAVID OJERA** in 1995, he and the 2<sup>nd</sup> plaintiff were in occupation of the suit land where they established a home and she has continued to plough and plant crops. That at that time, the suit land was registered in the names of the 2<sup>nd</sup> defendant but in 2015, it was registered in the names of the 1<sup>st</sup> defendant. Therefore, the 1<sup>st</sup> defendant holds the suit land in trust for the plaintiffs. That when her husband died in 2014, he was buried on the suit land which the plaintiffs have continued to occupy peacefully and neither of the two defendants have ever interfered with their occupation of the suit land hence her claim to it by way of adverse possession.

6. In his supporting affidavit dated 11<sup>th</sup> February 2020, the 2<sup>nd</sup> plaintiff depones, inter alia, that the suit land was purchased by his deceased father **JAMES ODERA** in 1989 from the 2<sup>nd</sup> defendant although the sale agreement showed that the purchaser was his wife **ALICE OJERA** a step mother to the 2<sup>nd</sup> plaintiff. However, the land was transferred to the 1<sup>st</sup> defendant although it was occupied by **YUANITA**

**OJERA** one of the four (4) wives of **JAMES OJERA** the other wives being **ALICE OJERA**, **GLADYS OJERA** and the 1<sup>st</sup> defendant. When **YUANITA OJERA** passed away in 1992, she left the 2<sup>nd</sup> plaintiff and the husband to the 1<sup>st</sup> plaintiff occupying the suit land. When the 1<sup>st</sup> plaintiff's husband died in 2014, the two plaintiffs continued to occupy the suit land where they grow food crops although they have also established a home thereon. That neither the 1<sup>st</sup> defendant nor **ALICE OJERA** have set foot on the suit land from 1989 to – date although the same is registered in the name of the 1<sup>st</sup> defendant. That when **DAVID OJERA** the 2<sup>nd</sup> defendant's brother died, he was buried on the suit land without any objection from the defendants or **ALICE OJERA**. That the 2<sup>nd</sup> defendant had no title to transfer to the 1<sup>st</sup> defendant and in any event, the plaintiffs' prescriptive rights thereon had already crystallized and therefore, the 1<sup>st</sup> defendant holds the title to the suit land in trust for them.

7. Following the consolidation of the two suits, the 1<sup>st</sup> defendant's plaint in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 87 of 2019** became the defence and Counter – Claim.

8. In that case, the 1<sup>st</sup> defendant had sought the main order that the plaintiffs be evicted from the suit land, remove the caution and be also permanently enjoined together with their relatives, agents, workers, assignees or employees from trespassing on the suit land. It was her case that although she is the registered proprietor of the suit land, the plaintiffs had in August 2019 trespassed thereon without any colour of right and purported to build a temporary house without her permission.

9. The particulars of trespass were pleaded in paragraph 4(i) to (iv) as follows: -

*4(i) "Entering defendant's land without any permission and/or authority.*

*(ii) Constructing a temporary house in the defendant's land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 while aware that they were not the owners.*

*(iii) Acting in a manner that can cause breach of peace by entering constructing and occupying the defendant's land.*

*(iv) Threatening the defendant with dire consequences if she dares to access the suit land."*

The defendant also pleaded that the plaintiffs had cautioned the suit land thus restricting and hindering her from disposing it.

10. The 1<sup>st</sup> defendant also filed her statement dated 20<sup>th</sup> August 2019 and that of her witness **ALICE OJERA** dated 22<sup>nd</sup> October 2019. She also filed the following document by her list dated 28<sup>th</sup> August 2019: -

1. Copy of title deed to land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770.

2. Certificate of Search for land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770.

3. Photograph of a mud structure (showing they were taken on 20.08.201....)

4. Copy of land sale agreement dated 17<sup>th</sup> June 1989 between **FELIX WANGILA KAPILO** as seller and **ALICE OJERA** as purchaser for one (1) acre out of parcel NO EAST BUKUSU/SOUTH KANDUYI/3283.

5. Acknowledgment slips.

11. In her statement, **TABITHA OTSIEKA OJERA – DW 2** (the 1<sup>st</sup> defendant) confirms that she is the registered proprietor of the suit land while the 1<sup>st</sup> plaintiff is her step – daughter and the 2<sup>nd</sup> plaintiff is her step – son. That the suit land was purchased by her sister **ALICE OJERA** who is also her co – wife. That because she suffers from a disability, her sister **ALICE OJERA** had the suit land registered in her names. That their deceased husband was buried at his ancestral home in **BUSIA** where the plaintiffs also have land. That she was living with the 1<sup>st</sup> plaintiff's deceased husband who was forcefully buried on the suit land. That the suit land was purchased by her sister and co – wife **ALICE OJERA** who was then working at the District Commissioner's Office where she retired.

12. That the 2<sup>nd</sup> plaintiff has been threatening her that she will face dire consequences unless she gives them the land, an issue which she has reported severally to the **BUNGOMA POLICE STATION**. That the plaintiffs constructed and continue to construct a house on her land without her knowledge and they cannot purport to claim the suit land by virtue of burying her step son thereon by force and if they wish, they can exhume the body and bury it in **BUSIA** where they have their ancestral land. That the 2<sup>nd</sup> plaintiff caused the suit land to be restricted which action has prevented her from utilizing it. She is sickly and her Counter – Claim should be allowed.

13. In her statement **ALICE OJERA (DW 1)** confirmed that the 1<sup>st</sup> defendant **TABITHA OTSIEKA OJERA (DW 2)** is both her sister and a co – wife. That she worked at the **DISTRICT COMMISSIONER'S OFFICE BUNGOMA** as a secretary until her retirement and in 1989, she purchased the suit land from **FELIX WANGILA KAPILO** and his wife **PRISILA NAFULA WANGILA**. However, since she was sickly, she directed the vendor to transfer the land in the 1<sup>st</sup> defendant's name as her deceased husband made no contribution towards the purchase price and was buried in his ancestral land in **SIAYA** when he died. That she and her sister have been utilizing the suit land until August 2019 when the plaintiffs caused them to be chased away from the Government house so that the same could be given to them. That the suit land is not ancestral land and the plaintiffs cannot have it by force. That she and the defendant live in fear as the plaintiffs have hired goons to eliminate them so as to take the land.

14. The hearing of the case commenced and ended on 7<sup>th</sup> December 2021.

15. The plaintiffs were the only witnesses who testified in support of their case and produced the list of documents as their documentary evidence. They also adopted as their evidence their respective supporting affidavits referred to above.

16. The 1<sup>st</sup> defendant also adopted her statement filed in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 87 of 2019** and called as her witness her sister and co – wife **ALICE OJERA**. She also produced as her documentary evidence the list of documents filed in the Subordinate Court.

17. Submissions were thereafter filed both by **MR WAMALWA R.** instructed by the firm of **ROBERT WAMALWA & COMPANY ADVOCATES** for the plaintiffs and by **MR WAMALWA S.** instructed by the firm of **WAMALWA SIMIYU & COMPANY ADVOCATES** for the defendants.

18. I have considered the evidence by both parties as well as the submissions by Counsel.

19. Before I proceed further, I must point out that in their amended Originating Summons dated 14<sup>th</sup> February 2020, the plaintiffs impleaded one **FELIX WANGILA KOPILO** as the 2<sup>nd</sup> defendant. They then annexed to the said amended Originating Summons the witness statements of the said **FELIX WANGILA KOPILO** dated 17<sup>th</sup> October 2019 and filed in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 87 of 2019**. It is not clear whether the said **FELIX WANGILA KOPILO** was ever served with the amended Originating Summons. Certainly he was not called as witness for either of the parties and neither was he a party in the **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 87 of 2019**. The suit land is not registered in his name. In the circumstances, no orders of adverse possession with regard to the suit land can be made as against him since he is not the registered proprietor thereof. A claim for land on the basis of adverse possession, as is clear from **Section 38(1)** of the **Limitation of Actions Act**, can only be made as against **"the person then registered as the proprietor of the land."** With respect to the land parcel **NO EAST BUKUSU/SOUTH KANDUYI/18770**, what runs through the evidence herein is that it was sold to the 1<sup>st</sup> defendant by the said **FELIX WANGILA KOPILO**. No orders can be made against the said **FELIX WANGILA KOPILO** the 2<sup>nd</sup> defendant in respect to the suit land. Indeed, the order being sought against him in prayer No 1A of the amended Originating Summons is that his interest in the suit land **"had extinguished by operation of law at the title (sic) of transferring the same to the 1<sup>st</sup> defendant."** **FELIX WANGILA KOPILO** himself has not made any claim to the suit land. It is obvious therefore that he was wrongly joined in these proceedings. As he neither filed any pleadings nor even participated in these proceedings, the suit against him is for striking out with no orders as to costs.

20. That leaves **TABITHA OTSIEKA OJERA** (1<sup>st</sup> defendant) as the only defendant in this case.

21. The plaintiffs' case is that they are entitled to orders that they have acquired the suit land by way of adverse possession. Specifically, the 1<sup>st</sup> plaintiff has pleaded that she has lived on the suit land since her marriage in 1995 to one **DAVID OJERA**.

22. The 1<sup>st</sup> defendant's case however is, as per her plaint in the **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 87 of 2019** and which is the defence and Counter – Claim, that in fact the plaintiffs forcefully trespassed on the suit land in August 2019 and should be evicted, permanently enjoined from occupying it and the caution placed thereon be removed.

23. I have identified the following three issues for my determination: -

**1. Have the plaintiffs met the threshold for orders that they have acquired the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 by way of adverse possession and therefore should be registered as the proprietors thereof instead of the 1<sup>st</sup> defendant.**

**2. Are the plaintiffs trespassers on the land parcel NO EAST BUKUSU/ SOUTH/18770 who only invaded it in August 2019 the same month this suit was filed and are therefore not deserving of orders in adverse possession.**

**3. Who bears the costs of this suit?**

It is common ground that the suit land is registered in the names of the 1<sup>st</sup> defendant. She holds the title thereto issued to her on 31<sup>st</sup> December 2015 as the second owner. The plaintiffs claim that they have utilized the suit land openly, notoriously, continuously and peacefully for a period in excess of 12 years and therefore the 1<sup>st</sup> defendant's title has been extinguished by operation of the law.

24. **Section 38(1)** of the **Limitation of Actions Act** provides that: -

*38(1) "Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 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."*

**Section 7** of the same Act provides that: -

*7: "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 first accrued to some person through whom he claims, to that person."*

In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 KLR 184**, the Court held that: -

**“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA No 2 (1984) KLR 284. A title by adverse possession can be acquired under the Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – (see GITHU .V. NDEETE 1984 KLR 776.”**

In **MATE GITABI .V. JANE KARUBU MUGA & OTHERS C.A CIVIL APPEAL No 43 of 2015 (NJERI)** the Court said: -

**“For one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force and without licence or permission of the land owner with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the latin maxim nec vi nec clam, nec precario. See also ELIVA NYONGESA LUSENAKA & ANOTHER .V. NATHAN WEKESA OMACHA – KISUMU CIVIL APPEAL No 134 of 1993 and KASUVE .V. MWAANI INVESTMENTS LTD & 4 OTHERS 2004 KLR 184 ………”**

25. At the commencement of this Judgment, I alluded to the fact that the plaintiffs have tried to acquire the suit land through deceit. I can now revisit that matter.

26. When **TABITHA OTSIEKA OJERA** as plaintiff first filed **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 87 of 2019** seeking to evict the plaintiffs from the suit land, she simultaneously filed an application seeking orders of injunction to restrain them from building, constructing trespassing or interfering with her peaceful occupation of the said land pending the hearing and determination of the suit. In support of that application for injunction dated 28<sup>th</sup> August 2019, the 1<sup>st</sup> defendant swore a supporting affidavit of even date to which are annexed several documents. Among those documents are five (5) photographs of an incomplete mud house (annextures **TOO – II (a), (b), (c), (d)** and **(e)**). What is important about those photographs is that they clearly show the date when they were taken and although the full year was not captured when the pictures were taken, the visible dates read, 22/08/2, 22/08, 22/08/201 and 22/08/20. It is clear from the photographs that the construction of the house was far from complete and indeed there is no evidence to suggest that it was being inhabited as there are even no windows on it. There is no doubt from those photographs that the construction of the house must have commenced in August 2019. And in paragraph five (5) of the said supporting affidavit, the 1<sup>st</sup> defendant (who was the plaintiff in the Subordinate Court) deponed as follows: -

**5 “That the defendants who have never stayed in the said land have trespassed on my land and are building a house thereon (see copy of photographs annexed and marked TOO – II (a), (b), (c), (d) and (e)”**

In her replying affidavit dated 3<sup>rd</sup> September 2019, the 1<sup>st</sup> plaintiff did not make any reference to those photographs nor question their probative value and veracity as evidence. However, in support of her amended Originating Summons, the 1<sup>st</sup> plaintiff swore a supporting affidavit dated 11<sup>th</sup> February 2020 in which she averred, inter alia, that she and the 2<sup>nd</sup> plaintiff have in occupation of the suit land since 1995. In paragraph 8 of the same affidavit, she depones as follows: -

**8: “That I together with the 2<sup>nd</sup> Applicant we have also planted trees and we have established a home where we live (Hereto annexed and marked EAA 2 are copies of photographs).**

The photographs exhibited by the plaintiffs do not show the date when they were taken, unlike those of the 1<sup>st</sup> defendant. However, it is clear that they are pictures of the same house as exhibited by the 1<sup>st</sup> defendant the only difference being that they now show the mud house fully plastered with furniture inside. There is no doubt whatsoever that the plaintiffs constructed the said house in or around August 2019 when the 1<sup>st</sup> defendant sued for their eviction in **BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 87 of 2019**. It is also clear that the plaintiffs only put up the mud house on the suit land when they were served with the notice dated 14<sup>th</sup> September 2018 requiring them to vacate the Government house **NO BUNG/HOU/T/MGS**. It is also constructive to note that in her supplementary affidavit dated 10<sup>th</sup> September 2019 in support of her application for injunction, the 1<sup>st</sup> defendant deponed in paragraph 5 as follows: -

**5: “That my land since (sic) 1989 no one has ever lived there at (sic) but I have been using the same for farming.”**

And in their joint defence to the suit seeking their eviction, the plaintiffs (as defendants) had pleaded as follows in paragraph 4: -

**4: “The defendants deny the contents of paragraph 4 of the defence (sic) as the defendants started being in occupation of the said land now for more than 15 years, a place the defendants call home hence the particulars of fraud (sic) vested upon the defendants are denied in toto.”**

The 1<sup>st</sup> defendant (as plaintiff) had not pleaded any fraud as against the defendants in the Subordinate Court. They had pleaded trespass as per paragraph 4 of their plaint. And it cannot be possible that the defendants in the Subordinate Court (plaintiffs in the consolidated suit) had, **“for more than 15 years, know and utilized the newly constructed mud structure as “home.”** Indeed, when she was cross – examined by **MR WAMALWA S.** Counsel for the defendants in the consolidated suit, the 1<sup>st</sup> plaintiff had this to say: -

**“It is true that we constructed the home on the land in 2019 and that is when the 1<sup>st</sup> defendant TABITHA ODERA went to Court to injunct me. The house is not complete but I live in it. I stopped further construction when the Court stopped me. I can see the photographs produced by me and the 1<sup>st</sup> defendant. They look alike.”**

The 2<sup>nd</sup> plaintiff similarly admitted during cross – examination that he was the one who constructed the house on the suit land in 2019 shortly before the injunctive orders were issued in the Subordinate Court.

27. When the 1<sup>st</sup> defendant in the consolidated suit was led by her Counsel in her evidence in chief, she said: -

***“I have heard the evidence of the plaintiffs that they have been utilizing the suit land since 1992. That is not true. It is me and ALICE OJERA (DW 1) who have been utilizing it. Their testimony is false. Even the 2<sup>nd</sup> plaintiff’s mother YUANITA has never used the land. It is true that DAVID OJERA was buried on the land but on the permission of ALICE OJERA because the father had nowhere to bury him.”***

In paragraph 17 of her affidavit in support of the Originating Summons, the 1<sup>st</sup> plaintiff has averred as follows: -

**17 “That when my husband died in 2014, he was buried on the said suit land.”**

However, as is now clear from the testimony of the 1<sup>st</sup> defendant, that burial was done with the consent of ALICE OJERA (DW 1) who purchased the suit land but had it registered in the names of the 1<sup>st</sup> defendant. That act of burying DAVID OJERA on the suit land, having been done with the consent of both the registered and beneficial owners thereof, cannot support a claim for adverse possession. That is because, for possession and occupation of land to be adverse, it must not be with the consent of the registered proprietor. In her statement recorded in the BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 87 of 2019, ALICE OJERA stated in paragraph 8 that infact the said burial was done ***“forcefully”*** and in spite of her ***“protests.”*** That would still defeat the plaintiffs’ claim to the suit land by adverse possession. As was held in ROBERT SHUME & OTHERS .V. SAMSON KALAMA 2015 eKLR: -

***“By dint of Section 7 of the Limitation of Actions Act, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent’s title for a period of twelve (12) and more years. Stated differently, and bearing in mind that possession is a question of fact, they were expected to show that their possession was nec vi nec clam nec precario, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without the permission of the owner.”*** Emphasis added.

28. From the photographic evidence produced herein, and I started this Judgment by observing that ***“cameras cannot lie,”*** it is obvious that infact the plaintiffs in this suit first trespassed onto the suit land in August 2019 when they put up the mud structure exhibited therein and not in 1992 or 1995. Before then, there was no structure on the suit land which they could call ***“home.”*** The Originating Summons was first filed on 4<sup>th</sup> February 2020 before being amended on 14<sup>th</sup> February 2020. That means that by the time the plaintiffs filed their Originating Summons, they had only been in occupation and possession of the suit land for six (6) months which is a long way short of the twelve (12) years required in law for the grant of orders of adverse possession. And even then, it is clear from the record in BUNGOMA CHIEF MAGISTRATE’S COURT CIVIL CASE No 87 of 2019 that following an application by the 1<sup>st</sup> defendant, the plaintiffs were restrained vide a ruling delivered on 3<sup>rd</sup> October 2019 by HON S. MOGUTE (PRINCIPAL MAGISTRATE) from continuing with any further construction on the suit land pending the hearing and determination of the suit.

29. Indeed, in the ruling delivered on 3<sup>rd</sup> October 2019, HON MOGUTE similarly found that the plaintiffs had only started constructing the house on the suit land in August 2019 and put a stop to any further constructions. He delivered himself as follows: -

***“Without going into the merits of the case at this interlocutory stage, I find it fair and just to issue an order maintaining the status quo as of today pending the hearing and determination of the main suit herein. For avoidance of doubt, if there is any construction was going on the suit land as shown on the photos taken on 22/8/2019, the same to stop forthwith pending the hearing and determination of the suit herein.”***

30. Clearly, there was no house on the suit land which the plaintiffs had occupied since 1995 as alleged.

31. Having failed to prove that they have been in occupation and occupation of the suit land for twelve (12) years, the plaintiffs are not deserving of any orders of entitlement thereto by way of adverse possession.

32. In his submissions dated 15<sup>th</sup> December 2021, Counsel for the plaintiffs has challenged the validity of the 1<sup>st</sup> defendant’s title to the suit land by casting aspersions on how it was acquired. This is how Counsel has submitted at page 6: -

***“Your Lordship, the 1<sup>st</sup> defendant did not tell this Court how she acquired the suit land stated (sic) that the 2<sup>nd</sup> defendant is the owner who transferred the land to her. My Lord, the law is very clear pursuant to Section 3(3) of the Law of Contract that transaction in land must be in writing.”***

After citing various cases and provisions of the Land Registration Act, Counsel for the plaintiffs continues at page 7 as follows: -

***“There was no land sale agreement between the 1<sup>st</sup> defendant and 2<sup>nd</sup> defendant. Either way, there was no land sale agreement between the 1<sup>st</sup> defendant and her sister (DW 1). There was no production of application for Land Control Board and Consent to prove that the 1<sup>st</sup> defendant followed the right procedure in acquisition of the suit property. Failure to follow the said process is fatal. Mere production of a title deed (but in this case there was no production) does not confer a good title to enable one file a suit. Our position is anchored on the Court of Appeal celebrated case of PETER KAMAU NJAU .V. EMANUEL CHARO***

What I hear Counsel to be urging this Court to do is to find that infact the 1<sup>st</sup> defendant does not hold a valid title to the suit land. However, by making such submission, the plaintiffs are infact shooting themselves in their feet because they cannot claim for orders to be registered as the owners of the suit land by way of adverse possession and yet at the same time, question the same title which they are seeking to be registered in their names. If the plaintiffs' case is that the 1<sup>st</sup> defendant does not hold a valid title to the suit land, the route which they should have taken was to seek it's cancellation.

33. The plaintiffs have also alluded to a trust. The Court will not imply a trust except in the clearest of cases. In **PETER NDUNGU NJENGA .V. SOPHIA WATIRI NDUNGU 2000 eKLR**, the Court of Appeal held thus: -

***“The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the Court may presume a trust. But such presumption is not to be arrived at easily. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied.”***

The trust which the plaintiffs appear to be referring to as per their amended Originating Summons is due to their claim that they are entitled to orders that they have acquired the suit land through adverse possession. However, as is now clear, their claim to this suit land by way of adverse possession has collapsed. And I am unable to see any evidence that could justify a finding in their favour on the basis of a constructive, express, resulting customary or any other trust.

34. The plaintiffs' suit must therefore be dismissed.

35. The 1<sup>st</sup> defendant by her plaint in **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 87 of 2019** and which is the Counter – Claim sought the eviction of the plaintiffs from the suit land, an order of permanent injunction to restrain them from trespassing thereon and a further order that they remove the caution thereon.

36. As the registered proprietor of the suit land, the 1<sup>st</sup> defendant is entitled to all the rights and privileges belonging or appurtenant thereto. Those rights include the right to eject trespassers from the suit land. That title can only be challenged if obtained through fraud misrepresentation, illegally, un – procedurally or through a corrupt scheme. The title is also of course subject to any other overriding interests such as prescriptive rights or trusts which this Court has found wanting. And in the absence of any evidence that the 1<sup>st</sup> defendant obtained the title to the suit land through fraud, misrepresentation, illegally, un – procedurally or through a corrupt scheme, she is entitled to enjoy the use of the suit land and eject any trespassers thereon. The evidence before me shows clearly that the plaintiffs are trespassers on the suit land and ought to be evicted therefrom.

37. The 1<sup>st</sup> defendant's Counter – Claim is merited and is for allowing.

38. With regard to costs, the parties are family notwithstanding the acrimony between them. The order that commends itself to make in the circumstances, and so as not to aggravate the situation, is that each party shall meet their own costs.

39. Ultimately therefore and having considered all the evidence herein, I make the following disposal orders: -

**1. The plaintiffs' suit is dismissed.**

**2. Judgment is entered for the 1<sup>st</sup> defendant as pleaded in her Counter – Claim as follows: -**

**(a) The plaintiffs, their agents, servants, assignees, relatives or any persons claiming through them shall vacate the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 within three (3) months from the date of delivery of this Judgment or they be evicted therefrom in accordance with the law.**

**(b) Thereafter, the plaintiffs, their agents, servants, assignees, relatives or any other persons claiming through them shall remain permanently restrained from entering, trespassing, constructing ploughing or in any other way interfering with the 1<sup>st</sup> defendant's possession, ownership and occupation of the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770.**

**(c) The restriction placed on the land parcel NO EAST BUKUSU/SOUTH KANDUYI/18770 by the plaintiffs is removed forthwith.**

**3. The suit against the 2<sup>nd</sup> defendant is struck out with no orders as to costs.**

**4. Each party to meet their own costs.**

**BOAZ N. OLAO.**

**J U D G E**

**17TH MARCH 2022.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 17TH DAY OF MARCH 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

**RIGHT OF APPEAL EXPLAINED.**

**BOAZ N. OLAO.**

**J U D G E**

**17TH MARCH 2022.**