



**Tuimising v Ngeno & another (Environment & Land Case  
14 of 2015) [2022] KEELC 2984 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2984 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 14 OF 2015**

**MC OUNDO, J**

**JUNE 23, 2022**

**BETWEEN**

**ELIZABETH CHEPTOO TUIMISING ..... PLAINTIFF**

**AND**

**JANE CHERONO NGENO ..... 1<sup>ST</sup> DEFENDANT**

**GEOFFREY CHERUIYOT ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Vide an Originating Summons of 28<sup>th</sup> March 2015, filed pursuant to the provisions of Order 37 Rule 3, 14 and 15 of the *Civil Procedure Rules*, and all enabling provisions of the law, and thereafter amended on the 23<sup>rd</sup> January 2020, Plaintiff/Applicant herein seeks for the following declarations:
  - i. A declaration that the Plaintiff/Applicant has been in open quiet and exclusive (sic) comprised in LR No. Kericho/Kipchimchim 2782 measuring one point four (1.4) hectares or thereabouts for a period exceeding 12 years.
  - ii. A declaration that the Plaintiff is entitled to the whole parcel known (sic) LR No. Kericho/Kipchimchim 2782 measuring one point four (1.4) hectares or thereabouts by Adverse Possession.
  - iii. An order for cancellation of title measuring one point four (1.4) hectares comprised in LR No. Kericho/Kipchimchim 2782 and that a new title deed reflecting such changes be issued in the name of the Plaintiff/Applicant.
  - iv. An order of injunction against the Defendants, their agents and or representatives from evicting, alienating and/or in any other way interfering with the Plaintiff/Applicant's quiet possession, occupation and use of the parcel measuring one point four (1.4) hectares comprised in L.R No. Kericho/Kipchimchim 2782.



- v. Cost of this suit.
2. The Originating Summons is premised on the grounds stated on the face of it as well as the Supporting Affidavit of Elizabeth Cheptoo Tuimising the Plaintiff/Applicant herein, sworn on the 26<sup>th</sup> March 2015.
  3. The application was opposed by both the 1<sup>st</sup> Defendant/Respondent's Replying Affidavit sworn on the 19<sup>th</sup> May 2015, and further Affidavit of 13<sup>th</sup> February 2020, to the effect that the same was frivolous, vexatious and an abuse of due process of the court. That one Paul Kipruto Chepkwony had been on the suit land as a caretaker from 2000 to 2014. That upon the Applicant failing to honor a sale agreement entered into by the parties on 12<sup>th</sup> October 2001, the Defendant/Respondent had refunded to the Plaintiff/Applicant the part payment made as well as the agreed damages. That thereafter in the month of May or there about in the year 2014, the Applicant had forcefully, illegally and without any color of right deposited building materials on the suit land wherein she had started constructing her house. Injunctive orders had been sought against her in the High Court Succession Cause No. 191 of 2004 and that was when she had obtained forged petty cash vouchers to hood wink the court that she had completed payment. That further, the sale agreement had been the nullity as the suit land the Defendant/Respondent had intended to sell was still registered to her late husband.
  4. Directions were taken on the 13<sup>th</sup> June 2017 that the Originating Summons be heard by way of viva voce evidence and parties then directed to comply with the pre-trial directions. The matter took off for hearing on the 5<sup>th</sup> December 2019 when the Plaintiff Elizabeth Cheptoo Tuimising, testified as PW1 to the effect that she knew the Defendants as persons from whom she had bought land parcel L.R No. Kericho/Kipchimchim2981 and who had subsequently wanted to sell the same land to somebody else.
  5. That she had purchased the land for Ksh. 600,000/= from the 1<sup>st</sup> Defendant and one John Kiget wherein they had entered into a sale agreement on the 12<sup>th</sup> October 2001. She produced the agreement as Pf exh 1.
  6. That before entering into the sale agreement they had had a meeting which had been attended by several people and minutes taken. She produced the minutes as Pf exh 2 and proceeded to testify that as at the time she was testifying she had already paid Ksh. 560,000/= and only a balance of 40,000/= was outstanding. That when they entered into the sale agreement, she had paid Ksh 260,000/= wherein the rest of the money had been paid through petty cash because the 1<sup>st</sup> Defendant started insisting, after entering into the agreement, that they were in dire need of money for sustenance. That she had sympathized with them and had started paying them through petty cash vouchers which mode of payment had been mutually accepted by both parties.
  7. That the petty cash voucher dated 2<sup>nd</sup> October 2000 had been paid by her husband but the date had been wrongly captured. That all the petty cash vouchers had been signed by the sellers. She produced the following petty cash vouchers;
    - i. Voucher dated 2<sup>nd</sup> October 2000 for Ksh. 20,000/=.
    - ii. Voucher for Ksh 7000/=.
    - iii. Voucher dated 11<sup>th</sup> November 2001 for Ksh. 40,000/=
    - iv. Voucher dated 20<sup>th</sup> May 2002 for Ksh. 15,500/=.
    - v. Voucher dated 9<sup>th</sup> September 2003 for Ksh 5000/=.
    - vi. Voucher dated 27<sup>th</sup> December 2001 for Ksh 10,000/=.



8. All these petty cash vouchers were produced as Pf exh 3(a -f) and the written submission of her payments as Pf exh 4.
9. She proceeded to testify that she had taken possession of the land immediately after the sale agreement in year 2001 wherein she had cleared the land because it was bushy. That she had then fenced it, planted trees and paddocked it and thereafter constructed a four bedroomed house. That she was still in occupation of the land. She produced photograph of the house and the land showing some of the cows she kept there as Pf exh 5 (a-d).
10. She also produced as Pf exh 6, a copy of a banker's cheque dated 30<sup>th</sup> August 2004 made to John Siele, the money returned by the Defendant, her husband confirming that he did not deposit the cheque in his account. That the cheque had been returned to Kemei a cousin to 1<sup>st</sup> Defendant so that he could take it to 1<sup>st</sup> Defendant since the 1<sup>st</sup> Defendant had been the one who had brought the banker's cheque. That there had also been a letter from KCB bank dated 14<sup>th</sup> September 2005 addressed to the 1<sup>st</sup> Defendant informing her that her cheque was still outstanding. She produced the said letter as Pf exh 7.
11. The Plaintiff further testified that at the time they were transacting, they had agreed that the sellers were to file a Succession Cause and thereafter transfer the land to her but instead the Defendants tried to sell the land to someone else. That she had objected when they got to know the Succession Cause wherein the court had directed her to establish their claim in the Environment and Land Court within 3 months, thus the reason for filing the present suit. She produced the said court order as Pf exh 8 and sought for the court's intervention stating that she had been on the suit land for a period of 19 years wherein she had made substantial development on it through farming, rearing cows, planting maize and about 4000 trees.
12. That the Defendant had never been either on the suit land ,which measured approximately three acres, or in the neighborhood, but had tried to interfere with the suit land through other people. That since the year 2017 when she reported the matter to the police and obtained an OB, herein produced as Pf exh 9, the interference had ceased. She sought for her interest to be catered for in the Succession Cause and the land be transferred to her.
13. I was upon the transfer of the honorable judge in conduct of the matter that on 16<sup>th</sup> February 2021, by consent, parties agreed to proceed with the matter from where it had stopped wherein the Plaintiff who had been stood down was recalled for further hearing.
14. The Plaintiff proceeded to testify that she had been in occupation of the suit land for about 14 years before the Defendant interfered. She sought that the court finds that she was the rightful owner of the land and that the Defendant had no right over the same. See also sought for the Defendant's title be canceled and she be registered as the rightful owner of the suit land. She also sought for permanent order of injunction against the Defendants who were still interfering with the land by cutting down trees, pulling down her fence and uprooting her plants. She also adopted her supporting affidavit of 26<sup>th</sup> March 2018 as her evidence.
15. When cross examined in reference to Pf exh 1, the Plaintiff responded that she had gone before counsel with the 1<sup>st</sup> Defendant. That clause 6 of the said document was to the effect that the balance of Kshs. 240,000/= was to be paid on 31<sup>st</sup> December 2001 and that the vendors were John Kimutai Kiget & Jane Cheronon Ngeno (1<sup>st</sup> Defendant). She confirmed that she did not sue John Kiget and that the sellers of the land were Kimutai Kiget together with Jane Cheronon and her son Geoffrey.
16. She explained that she did not sue Kiget because he had no problem with her. That it had been the 1<sup>st</sup> Defendant and her son Geoffrey who after they had entered into a sale agreement and she had paid



monies to them, went ahead and sought for another buyer with the intention of refunding to her the money she had earlier paid. That the 1<sup>st</sup> Defendant had claimed that the other buyer was offering a better price. That the Defendants had even written a cheque of Ksh. 360,000/= which she (Plaintiff) did not honour and the cheque was still available to them although the person to whom it had been made out to had passed away.

17. She confirmed that she had paid Ksh. 260,000/= to the Advocate and that the balance was to be paid on 31<sup>st</sup> December 2001 upon production of the title. She denied that she had not paid the balance because the Defendants had withdrawn the Title from the lawyer, and stated that she had wanted to know the whereabouts of the title so that the Defendants could start the succession process so that she could in turn pay the balance.
18. She also confirmed that the Defendants had been collecting money from her in bits and went on to state that if anybody had paid Joel Shiele any money, such payment was not related to her as the buyer and that it had not been true that the balance was paid in the year 2014. That she had paid the balance of the money though petty cash.
19. She also confirmed that the order of 31<sup>st</sup> March 2015 had been one of status quo to the effect that she had only been restrained from finishing with the building of her house on the land. That she did not know why the 1<sup>st</sup> Defendant had rescinded the contract and returned the money, but that the 1<sup>st</sup> Defendant had authorized her son Geoffrey to pick the money.
20. She also testified that there had been a time, she could not remember, when she had arrested one Paul Rotich whom they had caught felling trees on the land and that there was an OB to that effect. She reiterated that Jane and Geoffrey had sold her the land upon which she had been in peaceful occupation of apart from the interference by Paul (she pointed him out in court).
21. Upon being re-examined, she stated that she had bought the land on 31<sup>st</sup> December 2001 wherein she had been in occupation up to the year 2015 when she was interrupted. That from the year 2001-2015, nobody stopped her from working on the land. She stated that the agreement gave her the authority to enter the land and that she did not need the consent of Paul. She concluded her evidence by stating that she had satisfied the court on the doctrine of Adverse Possession.
22. When the Plaintiff was questioned by the court, she had reiterated that she entered upon the suit land in the year 2001, and had never left the same as she still lived on the same as at the time of giving her testimony.
23. John Kimutai Kiget, testified as PW2. He stated that he lived in Buret and was born in the year 1935. He testified that he knew the Plaintiff and that she bought the said piece of land. He further testified that he together with the 1<sup>st</sup> Defendant sold the Plaintiff the piece of land wherein they had executed the sale agreement before an Advocate. He stated that whereas he had sold to the Plaintiff 1-acre piece of land at a price of Kshs. 200,000/=, the old woman (1<sup>st</sup> Defendant) had sold to the Plaintiff 2 acres of land at Kshs. 400,000/=. It was his testimony that the Plaintiff paid him the money and that they were to give the Plaintiff the title to the land. He stated that the Defendants had subsequently wanted to sell the same land for Kshs. 4,000,000/= wherein he had refused to take back the money they had bought to him because they had already sold the land to the Plaintiff. He testified further that after he sold the land, the Plaintiff got into the land about 20 or 50 years ago although he could not remember the exact time. He stated that he had recorded a statement on the 11<sup>th</sup> October, 2017 which he sought to be adopted as evidence.
24. On cross-examination, PW2 stated that he could not remember the date they had executed the agreement because it was a long time ago. However he confirmed to having sold the land for Kshs.



- 600,000/= in which he was paid 200,000/= and Jane took 400,000/= wherein she had wanted to resell the same piece of land. He stated that on the day they had gone to the lawyer, Jane had taken her Kshs. 400,000/= wherein she had later received an additional Ksh. 200,000/=. That they had been paid all the purchase money and therefore they had no debt with the Plaintiff. He reiterated that the Defendants wanted to sell the land for millions and that he didn't want any money since he had already been paid. He stated that he wanted the Plaintiff to be given her land as she was already on the land. He wondered why people were disturbing the Plaintiff. He referred to the 1<sup>st</sup> Defendant as a con-woman because there was no balance remaining.
25. He insisted that he was speaking the truth and did not want any more stories. He also referred to the "boy sitting in court"- 'Paul Rotich' as a bad person whom he thought had been hired by the 1<sup>st</sup> Defendant. He said that Paul's father was his brother and that Paul did not know anything about the land. That Paul had been given his own land which he had sold.
26. He humored the court by stating that he had no balance with the Plaintiff but if she felt something was remaining, then she could pay him out of her own good heart. He stated further that before the owner of the land died, he called him and gave him 1 acre. He was categorical that the suit land belonged to the Plaintiff.
27. On being re-examined the witness reiterated that the Plaintiff had finished paying him and if any money was remaining, the Plaintiff could pay him out of her good heart. He stated that the 1<sup>st</sup> Defendant sold the land again and gave him money but he had refused it, that he did not want any money from the 1<sup>st</sup> Defendant. He stated that after he sold the land, he went away to his farm and that he did not want to steal anybody's land. He concluded that the title should be given to the Plaintiff.
28. Wilson Kiget, testified as PW3, to the effect that he was a farmer, growing tea and that he lived Chesingoro in Litein. He testified that he knew the Plaintiff to whom his brother John Kiget had sold to land. That whereas John had sold 1 acre to her, Jane had sold 2 acres which all totaled to 3 acres. He testified that the Plaintiff took possession after the said land was sold to her. That although he could not remember when the land was sold, yet it had been about 30 years ago. He stated that although the Plaintiff had been utilizing the land, he had later heard that the Defendants wanted to take the land from her. That one Paul had wanted to snatch the land. He asked for the court to issue orders installing Elizabeth as the owner. He also sought for his statement dated 11<sup>th</sup> October, 2017 to be adopted as evidence.
29. On cross-examination, he stated that he had heard that the Plaintiff was not living peacefully on the land as Paul kept on disturbing her. He also confirmed that Geoffrey Cheruiyot was a son to Jane who was one of the persons who was on the land but that he did not know her other names. He stated that he had accompanied Elizabeth and the Defendants to an advocate's office wherein he had executed the sale agreement. That he had witnessed the payment but had later heard that the parties herein had a dispute. That the matter had been reported to the police but the Plaintiff had not lived peacefully on the land as there has been war.
30. Upon being re-examined, the witness stated that in the 1<sup>st</sup> agreement PW2 was given Ksh. 80,000/= but that he was not given money as the money was for his brother. He stated that the Plaintiff was given the piece of land after the surveyor measured it. That after the old woman had sold the land, there had been peace for long until recently when they heard that some trees which resulted into war. He stated that the people who had cut the trees included Paul who was arrested by the police. That the period could have been in the year 2015 because before then, the Plaintiff had lived peacefully.



31. The Plaintiff closed their case and matter was scheduled for Defence hearing on 28<sup>th</sup> February, 2022 wherein Jane Cheronu testified as DW1, to the effect that she was a farmer who lived in Maso, that she was married to David Chesemet Koech who was deceased. She confirmed that they had a land dispute with Elizabeth Tuimising to whom she had sold to her land so that she could take her children to school. The Plaintiff had defaulted in the payments and although there had been a sale agreement yet the money offered had been little.
32. She testified that although she could not remember when the agreement was signed, yet the same had been executed in Advocate Sigira's office in the year 2001 wherein parties had agreed for a purchase price of Ksh. 600,000/= on 12<sup>th</sup> October, 2001. She further stated that the Plaintiff had paid her KShs. 260,000/= whereupon they had agreed for the balance to be paid within 2 months. The plaintiff defaulted in the payment.
33. She also stated that although she did not know the number of the land, yet it was situate in Kyombo. She was reminded of the parcel number of the land as being LR No Kericho/Kipchimchim/2782 wherein she proceeded to testify that land measured 2 ½ acres and that that was the acreage she wanted to sell to the Plaintiff. She further stated that when Elizabeth failed to pay the balance of the purchase price, she had looked for her clans' people so that they could help her contribute for the money Elizabeth had paid. That she had returned the purchase price to Elizabeth which was in the form of a banker's cheque in name of Joel Siele who was her husband. That this was in a meeting that had been attended by Geoffrey, Joseph Bii, Wilson Kimalel, Elizabeth and herself. That after the meeting, she had given Joel Siele the cheque.
34. That he had received the same but she could not remember whether she had received any communication from the bank. It was her evidence that Elizabeth had not lived on the land for 20 years, but rather that in the year 2015, she had come on the land and tried to construct therein but had been stopped by the court through an injunction. She denied having received Ksh. 300,000/= from the petty cash and that neither was Geoffrey given that money.
35. It was her testimony that had the plaintiff wanted to pay her, it would have been before Counsel Kirui whom she did not know was also called Siele Sigira. She reiterated that at the time of her testimony, she had not been paid the balance and that she did not give the money to Joseph or John Kiget. She stated that when they went to sign the agreement, they had been 4 persons, herself, Geoffrey, Wilson and Kimalel, Siele and Elizabeth present. She further testified that her grandson called Paulo lived on the suit land and that she would like the court to remove Elizabeth from the land because she had returned her money.
36. She adopted her statement as evidence and produced the list of documents dated 14<sup>th</sup> November, 2017 as Df exh 1, and Df exh 2. She further stated that the Plaintiff had never lived on the suit land. She confirmed that Paulo had been arrested at one time and that Elizabeth had caused his arrest in the year 2015. She stated that Elizabeth had brought building materials on the land wherein she had started building but had been stopped by the court.
37. When examined by the court as to who between Elizabeth and Paulo was living on land, she had answered by stating that all she wanted was for the court to tell Elizabeth to demolish the house she had started building so that she can leave the land.
38. On cross-examination, she reiterated although she lived at Maso which was a different land from land title No. Kericho/Kipchimchim/2782, yet she used to cultivate in Keongo before her husband died.
39. Her further evidence was that she could not remember going to an advocate to sign an agreement and that she was illiterate. When the Court Assistant read the sale agreement (Df Exh.1) to her, she had



- confirmed that that was how they had agreed in the year 2001 which was about 21 years ago. That after she had sold the land in 2001, she had gone there only once but not to farm on it. She stated that Elizabeth used to farm on the land and that she had planted grass and cut down her trees. That she had also reported the case of trespass against Elizabeth to the police since the year 2001 but she had never been arrested. The witness also confirmed that although the suit land was hers yet she had not filed a case to evict the Plaintiff from thereon. She further stated that although she had also lodged a complaint against Elizabeth at the Chief's office, yet she had not filed minutes in the court and that she did not know whether John Kiget had also complained.
40. She reiterated that she was complaining because Elizabeth did not complete payment of the purchase price. That when they wrote the agreement, the witnesses were John Kiget, Geoffrey, Siele, Tuimising and herself. That she returned the money, which she could not remember the amount, through a cheque which was issued in the name of John Siele.
41. She confirmed that Siele was not party to the agreement and that she had resolved to refund the money because Siele and Elizabeth had lied to her that they would pay her balance. She confirmed that Ksh. 20,000/= had been paid to Wilson Kiget and Kimalel Kiget on 2<sup>nd</sup> October 2000 although she did not know whether her son, Geoffrey Kibet Cheruiyot, had been paid Ksh 7,000/=. That all she knew was that Geoffrey had been paid Ksh. 40,000/= on 11<sup>th</sup> November 2001. That she was unaware that Geoffrey had been paid Ksh. 15,500/= on the 20<sup>th</sup> May 2002. She further stated that she was not paid Ksh 5,000/= on 9<sup>th</sup> September 2003 and did not know if Geoffrey had been paid Ksh. 10,000/= on the 27<sup>th</sup> December 2001. That further it was not true that a total of Kshs. 100,060/= had been paid through petty cash because had Elizabeth paid her, the payment would have been done before Counsel.
42. It was her testimony that the Kshs. 200,060/= was paid to her before Counsel and that there was no day, she had sent Geoffrey to take money and neither had she sought to know from Geoffrey if he had taken money as he lived in Kipsitet. She stated further that before she sold her land, she had constructed a house thereon. That there were no cattle on the land and that although she lived in Maso yet she sometimes used to cultivate on the suit land upon which stood her husband's house. She testified that she did not remember when she lastly went to the suit land after having sold it but that her grandson lives on the said land and grazed cattle there.
43. She reiterated that her grandson had been arrested while on the land and that Elizabeth's husband had the money she had refunded. She stated that Elizabeth could go and live on John Kiget's land. She confirmed to having sold the land to the people who were now disturbing her. That she had sold 1 acre to Elizabeth and the land was still in her name and if she gave out the title, then the land would become the Plaintiff's land.
44. The 1<sup>st</sup> defendant was re-examined wherein she had reiterated that Paul Rotich was her grandson and that he lived on the suit land. That the Plaintiff had not finished paying her and she had returned the money through the account of Joel Siele who was her (plaintiff's) husband. That she did not receive any petty cash because the Plaintiff had only paid her once and told her to wait for two (2) months. That she had returned the money upon getting tired of asking for the same from the plaintiff whose house at teacher's college she had visited on a number of occasions.
45. Paul Rotich, testified as DW2 that he was a farmer who lived in Kyongo and that he knew Jane Cheronon Ngenon and Geoffrey Cheruiyot. That whereas Jane was his grandmother, Geoffrey was his father. He testified that he had been a witness to the sale agreement between Jane and Elizabeth Tuimising whom he came to know in 2016, and that Jane had sold land to Elizabeth in the year 2001. That he had also been in the meeting which had been attended by Siele, Jane Cheronon, Joseph Bii, and Wilson Kiget wherein there had been a discussion on the selling of the land parcel No. 2782.



46. He also confirmed that Df Exh.1 were the minutes taken at the meeting wherein it had been agreed that the land be sold to John Siele and Elizabeth Cheptoo Tuimising. The purchase price was also agreed upon. That the sale agreement had been written by Siele Sigira Advocate wherein the land had been sold but not all the purchase price had been paid. He stated that they had agreed at a price of Kshs. 600,000/= but the money that had been paid at the Advocates office had been Kshs. 260,000/=. He also confirmed that his grandmother had returned the money paid to the purchaser through a bankers' cheque paid into the account of Joel Siele wherein the bank had confirmed payment as per Df exh 3.
47. His evidence was that he neither knew about the money paid by petty cash nor what petty cash was. That Elizabeth got into the suit land in the year 2015 wherein she had attempted to build a house. That subsequently he had been arrested but the case had been withdrawn. He confirmed that he had been living on the suit land since 1998 and that when Elizabeth attempted to take possession of the same, they had reported the matter to the police and the court had also issued her with an order of injunction dated 31<sup>st</sup> March 2015.
48. He further stated that Elizabeth had never lived on that land as she lived on another land which she had bought. That the land was bushy, she had neither build a house, nor planted trees and that he was the one who had planted the trees the Plaintiff lay claim to. He also stated that the cows on the land are his neighbor's cows save for 1 cow which was his and that Elizabeth did not have any cows on the land.
49. His further testimony was that Geoffrey could not have been given money because such as payment ought to have been through Siele Sigira advocate and the Chief. He concluded that he lived on the land and that even his clan knew as much.
50. On being cross-examined, the witness confirmed that he had been present during the execution of the sale agreement although his name was not on the agreements and neither had he signed the same. He confirmed that the 1<sup>st</sup> Defendant was his grandmother, and his father was John Kiget and that his parents lived in Chelilis in Kericho but his grandfather had sent him to live on the suit land. He confirmed that he had been in the meeting where the discussion of the sale had taken place. And that whereas the whole land measured 3.5 acres, the title had indicated that it measured 4.4 acres.
51. He also confirmed that it had been Jane and John Kiget Kimutai who had sold the family land. That when Elizabeth arrested him, she had taken that opportunity to plant grass and trees and that she could not have taken possession of the land in the year 2001 since she had not finished paying the purchase price. He stated further that the Plaintiff built the house by force after destroying his house. That he was the one who had planted the bananas and the sugarcane on the land. He testified that Elizabeth had planted sugar cane on the neighbor's land and that the avocados on the land grew by themselves. He stated that Elizabeth had not put a fence on the land and wondered how anyone could fence a land that had not been surveyed. That he and his friend were the ones who had put up the fence. He stated that the 1<sup>st</sup> Defendant sometimes came to visit him and to give him money to cultivate
52. He testified that from the year 2001-2016 he could not remember when the 1<sup>st</sup> Defendant went to the suit land, and neither could he have known whether there had been any case seeking for eviction of Elizabeth from the suit land since he was the one who had been asked to take care of the suit land.
53. The witness was examined by the court wherein he had reiterated that although and Elizabeth had never lived on the land, yet she had been advised by counsel to build the house thereon in 2015.
54. In re-examination, the witness stated that everything on the land including the fruits and the bees were his and that Elizabeth has not lived on the land since 2001 but only came there in 2015 seeking to build on land. He reiterated that to date, he had been the one who had been living on the land. That his



grandmother usually did send money to him to take care of the land by maintaining the fence, planting trees. He maintained the evidence that that he came onto the land in 1998.

55. Geoffrey Kibet Cheruiyot testified as DW3, and stated that he was a mason who was born in Maso but had moved to Kipsitet. He testified that the suit land was registered to the 1<sup>st</sup> Defendant's and that he saw Elizabeth at the time of the sale agreement. He testified that there was a meeting conducted before the land was sold and that the people present were Jane, Joseph, Wilson, John Kiget and himself. That meeting was held in the year 2001 where it had been decided that his mother sells the land so as to use the proceeds for school fees. The balance was to be used to purchase land at Lekia. He stated that they agreed that the land be sold for Ksh. 600,000/= wherein Elizabeth had paid Kshs. 260,000/= and the balance was to be paid by 31<sup>st</sup> December 2001. Elizabeth did not honor her part of bargain. He testified that the agreement was done in the office of Siele Advocates. That subsequently the money had been returned to Joel Siele who was husband to Elizabeth.
56. He denied having been paid any money in the form of petty cash as the balance ought to have been paid where the agreement had been executed which was at Siele Advocates. He stated that he did not receive any Ksh. 15,000/= on 20<sup>th</sup> May 2002, Ksh. 7,000/ in November or Ksh. 4,000/= and neither was Ksh 20,000/= paid to Wilson Kiget. His evidence was that that Paul had lived on that land since 1998 after his mother asked him to take care of the land.
57. He testified further that Elizabeth had not lived on that land that she had only bought materials in 2015 wherein an injunction order had been issued by the court against her by an order of 31<sup>st</sup> March 2015 in a suit filed by his mother. That Elizabeth neither lived on the land since 2001, build, planted trees nor kept cattle. That after they had returned the money to her after pursuing her on several occasions, the land reverted to themselves. He stated that they put the money to the bank and that there was a receipt to show the said banking, as well as a letter written to his mother confirming that Joel had received the money. Reference was made to DF MFI 3. He adopted his statement as evidence.
58. In cross-examination, he stated that he lived on the suit land for 3 years from 1996-2000 and that at the time the parties entered into the sale agreement he was not on the land. That his brothers Cheruiyot and Kipngetch had not lived on the suit land and that whereas John Kiget was his cousin, Paul was his nephew. He stated that Paul's father had a share to the suit land. That Paul had been given 1 acre whereas their share was 2 ½ acres. That whereas Paul lived on his share, belonging to his uncle, nobody was in occupation of the 2 ½ acres because there was an injunction.
59. It was his testimony that from the year 2000 up to the time the injunction was issued, Paul used to use the whole land and that Elizabeth did not plant trees nor put a fence or gate on the land. He also confirmed that there was a case to evict Elizabeth. That when she started putting up the house, they sought an injunction and filed a report to the Chief, a meeting was called but Elizabeth did not show up. He agreed that the said minutes had not been filed. That Elizabeth's house was built in 2015 and he had never received any money. That since his mother had been paid Ksh. 260,000/= they had not been given any money. He stated that he was the one who had built the house on the 2 ½ acres of land using 12 iron sheets.
60. In re-examination, he reiterated that Elizabeth came on the land in 2015 and that it was now 6 years contrary to the evidence she had given that she had been there for 20 years. He maintained that Paul Rotich lived on the suit land, Elizabeth did not pay the balance, and that he did not receive any petty cash. That the signatures on the petty cash were forged and the land was still theirs. He maintained that had the Plaintiff had completed the money, it would have been paid through their advocate because parties had not agreed for the payment to be made through petty cash but through the Advocate.



61. At the close of the Defendants' and whereas parties were directed to file their written submissions, only the Defendants complied. I shall summarize their submissions as herein under

### **Defendant's submissions.**

62. The Defendant summarized the background of the matters in issue as well as their evidence and that of the Plaintiff as adduced in court before submitting that as at 12<sup>th</sup> October 2001, they did not have the capacity to sell the suit land as the same had been registered in the name of the deceased David Chesimet Koech and therefore the sale agreement was null and void there having been no confirmed Letters of Administration. That further, the sale agreement was not honored by the Plaintiff/Applicant despite her evidence that she had completed payment of the purchase price when she paid one Geoffrey Cheruiyot using petty cash vouchers. That indeed the said Geoffrey Cheruiyot was not even privy to the sale agreement.
63. That the Plaintiff/Applicant entered onto the suit land without consent of the 1<sup>st</sup> Defendant Respondent and therefore it could not be said that she had dispossessed her, going by the principles of Adverse Possession, for the entry onto the suit land had been illegal since she had not completed paying the balance of the purchase price and her initial payments had been refunded to her.
64. That it could not be said that the Plaintiff/Applicant had been in open, peaceful and continuous possession and occupation of the suit land for more than 12 years without interruption by the 1<sup>st</sup> Defendant who had knowledge of her occupation. This is so because the said allegation was displaced by the defence evidence and more so the evidence of Paul Rotich who testified as DW2 to the effect that the Plaintiff/Applicant had attempted to enter the suit land in 2015 wherein she had been restrained by an injunction issued by the Probate Court.
65. That the Plaintiff's attempt to occupy the suit land was not peaceful as the same had been dodged with an application after another and a suit from the very beginning which prompted her to file an affidavit of protest in the Probate Court wherein she had been directed to file suit in the present court. That in a matter such as this where the Plaintiff/Applicant sought orders of Adverse Possession to extinct the right of the proprietor, the onus was on her to demonstrate that she had met the requirements for the grant of the said orders.
66. That in the year 2015, the court had barred her from any dealings on the suit land. That by the Defendants not using the land, it was not conclusive evidence of disposition, although Paul Rotich was in possession of the suit property where he had planted trees, fruits and had kept cattle.
67. That although the Plaintiff/Applicant urged the court to start the countdown from year 2001 for Adverse Possession, yet it was trite knowledge and time could not start running before the land was registered to the person against whom Adverse Possession was claimed. As at the time the suit was filed by the Plaintiff/Applicant, the suit land was still registered to the deceased. That the Plaintiff/Applicant's evidence had been dislodged by the Defendants' evidence. She had failed to prove her case to the standard required by law and therefore the same ought to be dismissed with costs.

### **Determination**

68. This is a matter where the Plaintiff/Applicant seeks for orders that she be registered as proprietor of (1.4) hectares or thereabouts comprised in LR No. Kericho/Kipchimchim 2782 having acquired the title by virtue of the doctrine of Adverse Possession after the purchase of the same in a sale agreement of 12<sup>th</sup> October 2001.



69. The Plaintiff's evidence was that she had purchased the land at Ksh. 600,000/= from the 1<sup>st</sup> Defendant and John Kiget wherein they had entered into a sale agreement on the 12<sup>th</sup> October 2001. That she had paid Ksh 260,000/= as part payment wherein the rest of the money was paid through petty cash because the 1<sup>st</sup> Defendant had started insisting on payment citing that they were in dire need of money for sustenance. That she had sympathized with them and had started paying them through petty cash vouchers which mode of payment had been mutually accepted between parties. That as at the time she was testifying she had already paid Ksh. 560,000/= leaving a balance of 40,000/=.
70. The Plaintiff's case was that she had taken possession of the land immediately after the sale agreement in year 2001 wherein she had cleared the land which was bushy, fenced it, planted trees, paddocked it and thereafter constructed a four bedroomed house. That she was still in occupation of the land. That at the time they were transacting the sale agreement, parties had agreed that pursuant to the sellers obtaining the Letters of Administration, they were to transfer the land to her, but instead the Defendants had tried to sell the land to someone else, wherein she (Plaintiff) had raised an objection in the Probate Court which Court had then directed her to file the present proceedings.
71. The Plaintiff's suit was opposed by the 1<sup>st</sup> Defendant, who was categorical that the sale agreement entered into between the Plaintiff and the Defendants was illegal as they had no title to pass, the said property having been still registered to the 1<sup>st</sup> Defendant's deceased husband David Chesimet Koech. That secondly, the sale agreement had been rescinded when the Plaintiff/Applicant failed to complete the purchase price and the Defendant refunded the initial installment paid.
72. 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:
73. 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...”
74. 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.
75. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court (Read Environment and Land) Order vesting the land in him/her
76. Section 37 of the *Limitation of Actions Act* provides that:
- “Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”



77. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by Adverse Possession to land, (s)he must apply to the High (Read Environment and Land) Court for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the Court is provided for in Order 37 Rule 7 of the *Civil Procedure Rules* as follows:
1. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
  2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
78. It is not contested, although no title deed was produced as evidence, that that parcel LR No. Kericho/Kipchichim/2782 was registered to David Chesimet Koech and that at the time the sale agreement was being entered into between the Plaintiff as the buyer, and the 1<sup>st</sup> Defendant and one John Kimutai Kiget as vendors on the 12<sup>th</sup> October 2001, David Chesimet Koech was already deceased and no Letters of Administration had been issued to the legal representatives of his estate.
79. It therefore goes without saying that the vendors herein held no valid title to the suit property to enable them sell and/or transfer the same to the Plaintiff since the land was and is still registered to the deceased David Chesimet Koech. The sale agreement and the alleged lease further became null and void after the expiry of the respective six months, for lack of consent of Land Control Board under the *Land Control Act*.
80. Since the alleged sale agreement became null and void by virtue of the vendors not having any title to pass, and secondly after the expiry of the respective six months there having not been consent of Land Control Board, I find that the issue for determination and decision to be rendered in this dispute is solely on the basis of the claim of Adverse Possession.
81. Order 37 Rule 7(2) of the *Civil Procedure Rules* makes it mandatory that the extract of the register, or green card, be annexed to the Originating Summons and for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land that is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.
82. In the case of *Johana Kipkurui Rotich v Charles Kiagi* [2019] eKLR the court held as follows:
- “It is clear from the above that one needs to annex the extract of the title. This provision of the law is not superfluous, for there are categories of land where time for Adverse Possession will not start running. Among these is land under the Government, which is covered under Section 41 of the *Limitation of Actions Act*.”
83. Indeed the Court of Appeal in the case of *Benjamin Kamau Murma & Others vs Gladys Njeri*, C A No. 213 of 1996}} held that:
- “The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land (emphasis mine) in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”



84. 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. See *Littledale vs Liverpool College* (1900)1 Ch.19, 21.
85. In *Douglas Mbugua Mungai v 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. “
86. 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*).”
87. In the case of *Titus Kigoro Munyi v. Peter Mburu Kimani* (2015)eKLR it had been observed that:
- “It must be noted that under Section 7 of the *Limitation of Actions Act*, the law relating to prescription affects not only present holders of the title but their predecessors”.
88. It is therefore clear from the foregoing provisions of the law and case law that a claim for Adverse Possession shall only be sustained against the proprietor of the suit land and the predecessors and this can be so upon the claimant annexing the registerable document to the suit land. Having said that, and in consideration of the case before me, I find that the Plaintiff has not annexed an extract of the title as required by the rules. She has indeed not even annexed a copy of the title deed, or any other document of title, in relation to the suit parcel of land, to show who the past or the current registered proprietor is/ are. As the matter stands, nobody knows who the registered owner of the land claimed by the Plaintiff is, and this court cannot tell whether the Plaintiff is disentitled to benefit from the running of time on the said title. Parties shall be held liable on their pleadings. I find in this case that the Plaintiff has not proved her case to the required standard, and proceed to dismiss the suit with costs to the Defendants.
- It is ordered.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23<sup>RD</sup> DAY OF JUNE 2022.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

