Mwangi & another v Hagelberg & another (Environment & Land Case 355 of 2019) [2022] KEELC 13784 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13784 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 355 OF 2019

JO MBOYA, J

SEPTEMBER 22, 2022

BETWEEN

FREDRICK KIOGORA MWANGI ..... 1ST PLAINTIFF

GRACE WANJIRU KIOGORA ..... 2ND PLAINTIFF

AND

NIKLAS JOHAN HAGELBERG ..... 1ST DEFENDANT

LISA ROLIS HAGELBERG ALIAS LISA EILEEN ROLLS ..... 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. Vide the plaint dated the November 11, 2019, the plaintiffs' herein have approached the honourable court seeking for the following Reliefs;

    a. A declaration that the placement and existence of the physical separation marks entailing a kai-apple hedge and live electric fence between the properties in LR No 14971/12 and LR No 22051 Karen Nairobi was/is by mutual mistake/ignorance of fact by the parties hereto and was previously unknown until July 2019.

    b. A declaration that the defendants are trespassers, illegal occupants and a nuisance on the suit property in LR No 14971/12 Nairobi or part thereof measuring approximately 0.463 acres.

    c. An order that the defendants do pull down at their own costs the physical fence/structures erected on the suit property and cede vacant possession of the suit property to the- plaintiffs within 14 days from the date of judgment, failing which the plaintiffs be at liberty to evict the defendants and uproot/remove the live wire and barriers with the assistance of the OCS Karen police station.

d. General damages and mesne profits for trespass, private nuisance and/or conversion of the suit property.

e. A permanent injunction to prevent the defendants by themselves and/or their trespassing, converting, selling, alienating, pleading/charging, transferring, interring, therein howsoever endangering the suit property and interfering with the plaintiffs ownership thereof.

f. Costs.

g. Interested on (d) and (f) above at court rates till payment in full.

h. Any other or further relief this honourable court may deem just to grant.

2. Upon being served with the plaint and the summons to enter appearance, the 1st and 2nd defendant herein indeed entered appearance on the December 2, 2019 and thereafter filed a statement of defense and counterclaim dated the January 20, 2020.

3. For clarity, the counter-claim sought for the following reliefs;

I. A declaration that the defendants have acquired possessory title over that portion of land measuring approximately 0.4363 acres, being part of the land registered as LR number 14971/12 Nairobi, by way of adverse possession.

II. An order that the portion measuring approximately 0.4363 acres being part of the registered as LR number 14971/12 Nairobi be surveyed and registered by the land registrar, as part of the property described as IR number 22051 (original number 14971/30 & 31) in the name of the defendants.

III. The plaintiffs, their servants, agents be permanently restrained from interfering with removing or dealing with part of the kei-apple fence.

IV. Any other relief the court deems fit to grant.

4. Subsequently, the plaintiff herein filed a reply to defense and defense to counterclaim, in respect of which the plaintiff essentially denied and/or disputed the claim by and or on behalf of the defendants herein.

5. Following the filling of the reply to defense and defense to counterclaim, no further pleadings were filed by either party. Consequently, pleadings closed upon lapse of 14 days reckoned from the date of the last pleading.

Evidence by the Parties:

a. Plaintiffs' case:

6. The first plaintiff herein testified as PW1. In this regard, the said plaintiff essentially adopted the written statement dated the November 11, 2019, which contained an elaborate testimony pertaining to and or concerning the subject matter.

7. It was the plaintiff's testimony that the suit property, namely LR No 14971/12, was allocated to and in favor of the 2nd plaintiff and the witness herein by the government of the Republic of Kenya on or about the December 28, 1992.

8. The plaintiff further testified that upon the allocation and alienation of the suit property to and or in favor of the 2nd plaintiff and himself, same processed and acquired the requisite certificate of title in respect thereof.

9. On the other hand, the witness also testified that the defendants herein are currently registered as the proprietors and/or owners of all that piece of land known as LR No 22051 (original number 14971/30 & 31), which parcel of land measures approximately 1.090 Ha.

10. Further, the witness added that the suit property belonging to and registered in the name of the 2nd plaintiff and himself shares common boundary and or adjoins the parcel of land belonging to and owned by the defendants herein. Indeed, it was stated that the boundary between the two properties is delineated by beacons numbers v10 and v32, respectively.

11. Other than the foregoing, the witness also testified that there was a live kei-apple hedge and an electric fence parallel thereto which had been erected and physically separates the two properties.

12. Be that as it may, the witness further testified that sometime on or about July 2019, the 2nd plaintiff and himself engaged the services of a named engineering surveyor to carryout and/or undertake a topographical survey of the site for purposes of possible development of the suit property.

13. However, it was added that in the course of carrying out and or undertaking the topographical survey, the nominated engineering surveyor established and/or discovered that the common beacons together with a triangular shaped portion of the suit property, measuring approximately 0.463 acres, had been wrongfully and illegally cut off by the shared fence.

14. In fact, the witness further testified that the said triangular portion had been annexed and fenced off in such a manner that same formed part and parcel of LR No 22051, belonging to the defendants.

15. Owing to the foregoing discovery, the witness added that same was thereafter constrained to engage a land surveyor, with a view to carrying out a survey exercise and to ascertain the veracity of the issues that were discovered and revealed by the nominated engineering surveyor.

16. It was the witness's further testimony that after the engagement of the land surveyor, same carried out the designated exercise and confirmed that indeed a portion of the suit property had been annexed and fenced off to from part of the defendants' land.

17. Subsequently, the witness testified that after the confirmation by his nominated surveyor, same proceeded to and shared the discoveries with the defendants. In this regard, the witness contended that the defendants informed same that they will also undertake survey to ascertain and/or confirmed the claims by the witness.

18. On the other hand, the witness testified that thereafter the defendants themselves carried out a survey exercise and that same established and confirmed that indeed a portion of the suit property had been annexed and fenced off to form part of the defendants land.

19. Premised on the foregoing, the witness further testified that thereafter the defendants and himself entered into negotiations, with a view to settling and/or sorting out the dispute.

20. Besides, the witness further testified that variously the defendants and himself agreed to have the kei-apple hedge and the electric fence to be relocated, albeit, at the expense of the witness.

21. Other than the foregoing, the witness also added that the defendants also offered in the alternative to purchase the segment of the suit property which had been fenced within the defendants' property.

However, the witness contended that the said offer by the defendants was not acceptable unto him and same was declined.

22. Nevertheless, the witness proceeded and stated that despite the foregoing deliberations and tentative proposals, the defendants herein backtracked on the initial consensus and as a result of the position taken by the defendants, same, that is (the witness) was constrained to and engaged the services of his advocates on record, with a view to issuing a demand notice to the defendants.

23. Further, the witness herein added that after the issuance and service of the demand notice, the defendants remained adamant and continued to occupy, possess and use the disputed portion of the suit property, as if same, belonged to the defendants.

24. Given the failure and/or reluctance by the defendants to enter into a binding compromise and coupled with the continued occupation of the disputed portions, the witness thereafter stated that he was constrained to and proceeded to file and/or lodge the subject suit.

25. In a nutshell, the witness testified that the disputed portion of the suit property lawfully belong to the 2nd plaintiff and himself and therefore the defendants have no rights and/or interests over and in respect of the annexed portion of the suit property.

26. Other than the foregoing, the witness herein adopted and reiterated the contents of the witness statement dated the November 11, 2019. For completeness, the witness statement herein was adopted and admitted as the witness' further evidence in chief.

27. On the other hand, the witness herein also referred to his Further statement dated the February 4, 2020 and same sought to adopt and rely on the said further statement.

28. Similarly, the court proceeded to and ordered that the further witness statement dated the February 4, 2020 be admitted as the witness's further evidence in chief.

29. Besides, the witness herein testified that same had filed two sets of documents dated, namely, the list and bundle of documents dated the November 11, 2019. For clarity, the witness pointed out that the said list contained seven documents, which the witness sought to be produced and marked as exhibits.

30. There being no objection taken and/or raised by counsel for the defendants at the foot of the list dated the November 11, 2019, the documents thereunder were produced and marked as exhibits P1 to 7, respectively.

31. Other than the foregoing, the witness also referred to the list and bundle of documents dated the February 4, 2020, which contained two documents. In this regard, the witness also sought to adopt and rely on the said documents.

32. Pursuant and at the request of the witness, the documents at the foot of the list dated February 4, 2020, were similarly, produced and admitted as exhibit P8 and 9 respectively.

33. On cross examination, the witness herein stated that the suit property was bought and/or acquired by the 2nd plaintiff and himself in the year 1992.

34. Besides, it was the witness position that at the time when same bought and acquired the suit property, the property was undeveloped. Further the witness added that at the point of acquisition there were no kei-apple fence on either/any side of the suit property.

35. Other than the foregoing, the witness also stated that currently there is a kei-apple fence that has been planted and which separates the suit property from the neighboring property, which belongs to the defendants.

36. Whilst under further cross examination, the witness added that he came to see the kei-apple plants/ fence, when same were about one foot high. Nevertheless, the witness added that he did not see or know who planted the kei-apple fence.

37. Notwithstanding the foregoing, the witness added that the kei-apple fence according to him were planted around the year 2008.

38. Whilst responding to a question on cross examination, the witness stated that at the first time he saw the kei-apple fence same were two feet high and not one foot. Further, the witness added that currently his property is fenced on both side and when he undertook the fencing of the suit property, he did not touch and/or interfere the existing kei-apple fence and the electric wire fence.

39. Other than the foregoing, the witness stated that when he bought or acquired the suit property same was aware of the acreage thereof and that he did not carryout any survey at the onset. For clarity, the witness admitted that the first time he carried out a survey was in the year 2019.

40. Thereafter, the witness added that upon carrying out the survey in respect of the suit property he alerted the defendants and urged the defendants to also carryout a survey to ascertain the veracity of the complaint.

41. Whilst under further cross examination, the witness stated that he was not involved in any protest about some developments in the neighboring property and when shown a written memorandum that contains his name, the witness denied knowledge of the protest and similarly, denied the signature that was attributed unto him.

42. It was the witness further answer that the kei-apple fence was reinforced in the year 2009 and that the electric fence which was installed was installed contrary to his wishes.

43. As concerns the statement that the defendants herein were puzzled when same raised the issue of encroachment onto a portion of the suit property, and thereafter offered an apology, the witness indicated that the apology was not in writing but verbal.

44. Further, the witness contended that in the course of the discussion between himself and the defendants an agreement was reached that the planting of the kei-apple fence, was a mutual mistake. However, when pressed to show evidence of such agreement, the witness said that the agreement was verbal.

45. At any rate, the witness also stated that the defendants herein had offered to buy the disputed portion of the suit property, but yet again conceded that the agreement was verbal.

46. Finally, the witness added that ever since the defendants bought and acquired their property, same (witness) had cordial relationship with the defendants.

47. On re-examination the witness reiterated that the key-apple fence was reinforce by putting a chain link and electric wire fence in the year 2008.

48. With the foregoing testimony, the plaintiff's case was closed.

b. Defendants' Case:

49. The defense case revolves around the evidence of two witnesses. The first witness who testified was the 1st defendant herein. For clarity, same testified as DW1.

50. It was the testimony of the witness that the 2nd defendant and himself bought and/or purchased LR No 22051 (original number 14971/30 & 31) from St Nicolas Hospital Ltd on or about the October 30,

2008. For clarity, the witness added that at the time when same bought or acquired the said property there was a fully mature kei-apple fence on all the four side of the property, separating same from the suit property.

51. Further, the witness added that at the time of the purchase of the said property same was informed and alerted by one of the directors of the vendor, namely, Dr Ochiel that the kei-apple fence was planted by him (Dr Ochiel) shortly after the vendor acquired the property in 1996.

52. On the other hand, the witness further testified that at the point in time when same bought the suit property the boundaries of the said property were marked by the existing kei-apple fence.

53. Besides, the witness added that after the plaintiffs herein acquired their property, it appears that same were aware and/or knowledgeable of the existing fence line and in fact same proceeded to plant three fence line without interfering with the existing kei-apple fence.

54. Further, the witness also testified that after the acquisition of their parcel of land, the 2nd defendant and himself constructed their dwelling house, whilst protecting and preserving the natural trees and the ensuing environment and that thereafter same also developed a strong community in the neighborhood, aimed at *inter-alia*, enhancing security within the neighborhood and that the plaintiffs herein are indeed members of the community association.

55. Premised on the foregoing, the witness herein therefore states that the plaintiff herein have been aware of the existence of the kei-apple, right from the onset when the same was plant.

56. Other than the foregoing, the witness stated that on the July 10, 2019, the 1st plaintiff herein went to him and informed same that whilst he(1st plaintiff) was seeking to subdivide the suit property, same discovered that the kei-apple fence had indeed encroached onto the suit property and therefore same wanted that the kei-apple fence be aligned with the established boundary beacon.

57. Pursuant to the foregoing, the witness stated that same was surprised by the claim and allegation of the 1st plaintiff. However, the witness further added that he informed the 1st plaintiff that he would need time to discuss the claim with the 2nd defendant.

58. Be that as it may, the witness proceeded to state that shortly after, both the 2nd defendant and himself travelled abroad for a vacation/holidays and that when same returned, the 1st plaintiff visited him and the 2nd defendant over the issue of the kei-apple fence.

59. Disturbed by the claims on behalf of the 1st plaintiff, the witness stated that the 2nd defendant and himself decided to engage a surveyor to confirm the claim by the 1st plaintiff.

60. It was the witness further testimony that thereafter the 2nd defendant and himself indeed engaged a nominated surveyor who carried out survey on the land and confirmed that the disputed portions, which is claimed by the plaintiffs, indeed formed a portion of the suit property, but had been fenced off within the property belonging to the 2nd defendant and the witness.

61. On the other hand, the witness further testified that subsequently the 2nd defendant and himself consulted their advocates on record pertaining to the rights, if any, that same had acquired over the disputed portion of the suit property based on the duration of occupation, possession and use.

62. Further, the witness added that after the consultation with the advocates for the 2nd defendant and himself, same were advised that given the age of the kei-apple fence and the duration of occupation, dating back to when the original owner of the property namely LR No 22051, was in occupation, same had acquired legitimate rights thereto.

63. At any rate, the witness added that thereafter same received a demand notice from the plaintiffs advocate, which demand notice was escalated to his advocates for further action.

64. Nevertheless, the witness reiterated that the kei-apple fence having been planted by their predecessor, who was in occupation of the property since 1992, the plaintiff herein cannot now lay a claim to the disputed portion of the suit property, which has been fenced and formed part of LR No 22051 for more than 27 years.

65. Based on the foregoing, the witness herein testified that the plaintiffs claim to the suit property stands prohibited by the limitation of actions. In any event, the witness added that the 2nd defendant and himself has since acquired prescriptive rights over the disputed portion of land.

66. In a nutshell, the witness implored the honourable court to find and hold that same was entitled to the disputed portion of the suit property on account of adverse possession.

67. Other than the foregoing, the witness adopted and reiterated the contents of the written statement dated the January 15, 2020.

68. On the other hand, the witness also referred to the list and bundle of documents dated the January 20, 2020 and same sought to adopt the documents as part of his exhibits.

69. There being no objection, the documents at the foot of the list dated 20th January were adopted and admitted as exhibits D1 to D6 respectively.

70. Further, the witness also referred to a further list of documents dated the January 22, 2021, containing three documents and same sought to produce the said documents as further exhibits.

71. However, the intended production of the said documents was objected to and same were thereafter marked as dmfi 7, 8 & 9, respectively.

72. On cross examination, the witness stated that the land same bought is LR No 22051 and that same was bought and transferred in favor of the 2nd defendant and himself on the October 30, 2008.

73. On the other hand, the witness stated that same has filed a claim for adverse possession and that the claim relates to a portion on LR No 14971/12, belonging to and registered in the names of the plaintiff.

74. Whilst still under cross examination, the witness stated that same entered upon and took possession of the portion of land, being claimed under adverse possession in the year 2008. In this regard, the witness admitted that by the time the suit herein was filed, same had only been in occupation on the disputed portion for 11 years.

75. Other than the foregoing, the witness herein further stated that immediately upon the purchase of LR No 22051 the 2nd defendant and himself carried out and undertook a survey in respect thereof in the year 2009. Nevertheless, the witness admitted that the survey report which was carried out in the year 2009 was misplaced and the only thing he had was a cover letter which forwarded the survey report.

76. Besides, the witness herein stated that the claim about the trespass on a portion of the land belonging to the plaintiffs was only brought to his attention on the July 10, 2019. In this regard the witness added that the claim of trespass, surprised him.

77. Other than the foregoing, the witness also stated that after the claim for trespass, the 1st plaintiff and himself exchanged various massages, but same clarified that there was no time when it was agreed the kei-apple fence would be moved.

78. Nevertheless, the witness also added that the 2nd defendant and himself discovered and ascertained that the disputed portion of land did not form part of LR No 22051 somewhere in the year 2008, but that same did not inform the plaintiff.

79. Whilst answering a question as to why same was surprised when the 1st plaintiff laid a claim to the disputed portion, the witness stated that same was surprised, because the 1st plaintiff was seeking to recover the disputed portion after so many years.

80. Other than the foregoing, the witness herein added that his claim premised on adverse possession, predates the time when the 2nd defendant and himself bought the property. For clarity, the witness pointed out that the claim for adverse possession takes into account the previous duration when same was under the occupation of his predecessor in title.

81. The 2nd witness was Dr Silas Mukethi, who testified as DW2. According to the witness, same is a license surveyor, a registered physical planner as well as a lecturer at the University of Nairobi, School of Built Environment.

82. Further, the witness stated that same recorded a witness statement dated the January 22, 2021 and same sought to adopt the witness statement as his evidence in chief.

83. Other than the foregoing, the witness also indicated that same had been retained and/or engaged by the defendants herein to carryout survey exercise on the defendants parcel of land, namely, LR No 22051 in the year 2009.

84. Further, the witness added that upon receipt of instructions to undertake the survey exercise, same proceeded to and did the surveying and thereafter prepared a report dated the May 18, 2009 and which report was accompanied with various documents.

85. The witness further added that the documents which accompanied the report formed part of a document filed in honourable court and therefore same sought to produce the document as exhibit.

86. Given that the witness was the author of the documents at the foot of the list dated the January 22, 2021, same proceeded to and produced the documents as exhibits. For clarity, the documents were marked as exhibit d7, 8 & 9 respectively.

87. On cross examination, the witness stated that the survey report which same had prepared on the May 18, 2009 was misplaced by the 1st defendant. However, the witness added that same was able to trace a copy of the forwarding letter from his records.

88. In answer to a question why the forwarding letter which was availed to court was not signed, the witness stated that the said letter was his file copy and that same are ordinarily not signed.

89. Besides, the witness stated that even though the original report was lost or misplaced by the 1st defendant, same retained a soft copy in his system and the soft copy is what same used to generate the report produced before the court.

90. Be that as it may, the witness added that the report which same produced in court, was reconstructed from the information which was retained in soft copy and that the reconstruction was done on the January 22, 2021.

91. Further, the witness added that prior to preparing the original survey report, which was dated the May 18, 2009, same visited the defendants property and took cognizance of the feature that were obtaining therein.

92. At any rate, the witness also added that prior to reconstructing the survey report which had been lost by the defendant, same revisited the defendants property in the year 2021 and the information gathered during the re-visitation was helpful in the reconstruction of the survey report which was produced before the court.

93. With the foregoing testimony, the defendants was closed.

Submissions by the Parties:

94. Upon the close of the defense case, the advocates for the parties agreed to file and exchange written submissions and in this regard, the court proceeded to and prescribed timelines for the filing and exchange of the written submissions.

95. Pursuant to the directions of the court, the plaintiffs' counsel crafted and filed his written submissions which were dated the May 6, 2022 together with a set of authorities dated the May 7, 2022.

96. On the other hand, the defendants' advocates filed written submissions dated the June 24, 2022 and a bundle of authorities of even date.

97. It is appropriate to point out that the written submissions and the bundle of authorities filed by and or on behalf of the parties herein formed part and parcel of the record of the court and that the court has taken cognizance of same.

98. Similarly, it is also important to observe that the said submissions and the reported decisions shall also be taken into account and considered in the course of the analysis of the evidence tendered, with a view to arriving at an informed conclusion.

Issues for Determination:

99. Having reviewed the plaint dated the November 11, 2019, the written statement and the various documents filed on behalf of the plaintiffs and having also reviewed the statement of defense and the various documents filed on behalf of the defendants; and having duly considered the written submissions filed on behalf of the parties, the following issues are germane and thus worthy for determination;

    I. Whether the plaintiffs' are the registered owners of LR No 14971/12, otherwise referred to as the suit property.

    II. Whether the defendants have trespassed onto the suit property and if so, the duration of such trespass.

    III. Whether the plaintiffs' right to recover the disputed portion of the suit property measuring 0.463 acres currently occupied by the defendants is barred by the *Limitations of Actions Act*.

    IV. Whether the defendants' are entitled to the impugned portion of the suit property by virtue of adverse possession.

Analysis and Determination

Issue Number 1 whether the plaintiffs' are the registered owners of LR No 14971/12, otherwise referred to as the suit Property.

100. The 1st plaintiff herein testified before the court as PW1. According to the 1st plaintiff, the 2nd plaintiff and himself bought and acquired the suit property on or about the December 28, 1992.

101. It was further stated by the 1st plaintiff that upon the acquisition of the suit property, the same was duly transferred to and registered in the names of the 2nd plaintiff and himself. Thereafter, same were issued with a certificate of title, which was produced as exhibit P1.

102. Suffice it to note, that indeed the certificate of title shows and confirms that the plaintiffs herein are truly the registered proprietor of the suit property.

103. Pursuant to and by dint of the certificate of title, whose authenticity has neither been challenged nor impeached, it is safe to find and hold that indeed the plaintiffs herein have proved and established that same are the registered proprietors of the suit property.

104. At any rate, it is also imperative to state that the issuance of a certificate of title or such other documents of title confers or vests in the named proprietor legitimate rights and interests over the named property.

105. For coherence and to be able to understand the import and significance of registration of title, one needs to take cognizance of the provisions of section 24 and 25 of the *Land Registration Act*, 2012, which are pertinent and imperative.

106. To this end, it is appropriate to reproduce the said provisions and same are reproduced as hereunder;

> 24. Interest conferred by registration subject to this Act—
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
>
> (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
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> 25. Rights of a proprietor
>
> (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
>
> (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
>
> (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

107. From the foresighted provisions, it is evident that the registration of a person as the proprietor of a named/designated piece of land, bestows upon the named owner absolute and exclusive right thereto.

108. To fortify, the foregoing observation, it is apt to invoke and rely on the holding in the case of *Joseph Arap Ng'ok v Justice Moijo ole Keiwua*, Nairobi civil application No 60 of 1997, (unreported) where the court stated and observed as hereunder;

> "Section 23(1) of the Act [RTA] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be challenged on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy."

109. However, it must also been pointed out that though the registered proprietor enjoys absolute and exclusive ownership rights, *inter-alia* rights of occupation, possessions and use, such rights are however subject to certain prescribed statutory limitations.

110. For example, the absolute and exclusive ownership rights over a property are subject to overriding interest, details whereof have been addressed *vide* the provisions of section 28 of the *Land registration Act*, 2012.

111. Because of the importance of the provisions of section 28 supra in respect of the subject matter, it is similarly, appropriate to reproduce same.

112. Consequently, the provisions of section 28 of the *Land Registration Act* are reproduced as hereunder;

> 28. Overriding interests unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—
>
> (a) deleted by Act No 28 of 2016, s. 11(a);
>
> (b) trusts including customary trusts;
>
> (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
>
> (d) natural rights of light, air, water and support;
>
> (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
>
> (f) deleted by Act No 28 of 2016, s 11(b);
>
> (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
>
> (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
>
> (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and

(j) any other rights provided under any written law, provided that the registrar may direct the registration of any of the liabilities, rights and interests hereinbefore defined in such manner as the registrar deems necessary.

[Act No 28 of 2016, s 11]

113. Despite the import and tenor of the foregoing provisions, I must restate and reiterate that the title belonging to and registered in the names of the plaintiffs herein, was never challenged and or impeached.

114. In a nutshell, I therefore come to the conclusion that indeed the plaintiffs are the registered owners of the suit property on account on a valid and existing certificate of title.

Issue Number 2 whether the defendants' have trespassed onto the suit property and if so the duration of such trespass.

115. Having established and authenticated that the plaintiffs herein are the lawful and registered proprietors of the suit property and therefore conferred with absolute rights thereto, it then means that any other person can only enter upon or remain thereon pursuant to the permission or consent of the plaintiffs.

116. However, where any third party, the defendants not excepted enters upon and remain on the suit property or a portion thereof, without the permission or consent of the plaintiffs, such entry would thus amount to or constitutes trespass.

117. At this juncture, it is appropriate to then discern what amounts to trespass or simply put, the definition of trespass.

118. In this respect, one needs to take cognizance of section 3 of the *Trespass Act*, which provides as hereunder;

3. Trespass upon private land

(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.

119. In respect of this matter, evidence was tendered by the 1st plaintiff that on or about the July 10, 2019, same commissioned an engineering survey, in readiness to carry out and/or undertake further development on the suit property.

120. Further, the 1st plaintiff testified that after the nominated engineering surveyor finished the exercise, same reported to and informed the 1st plaintiff that a segment of the suit property comprising of beacons v10 and v32 and which was triangular in shape had been fenced off and included within the defendants' property.

121. It was further stated that the portion of the suit property, comprising of the boundary beacons v10 and v32, which was triangular in nature comprised of an acreage measuring 0.463 acres.

122. Other than the testimony by the 1st plaintiff, it was conceded by the 1st defendant that indeed same was aware and knowledgeable of the fact that a portion measuring 0.463 acres, which constitutes part of

the suit property, have indeed been annexed and fenced within LR No 22051, registered in the names of the defendants.

123. Further, the 1st defendants also added that same discovered and/or established that the disputed portion had been annexed and fenced within the defendants land, as early as the year 2008, when the defendants bought LR No 22051 from the previous registered owners thereof.

124. Essentially, the import of the evidence by the 1st defendant is that the defendants are aware that same are occupying and in possession of a portion of the suit property, belonging to the plaintiffs, albeit without the plaintiffs permission.

125. In short, the defendants herein acknowledged and confirmed that same have truly trespassed onto a portion on to the suit property belonging to and registered in the names of the plaintiffs.

126. In any event, it is further contended that the impugned trespass commenced from the onset when the defendants bought LR No 22051 and found that what was sold to them had already been fenced and comprised of the disputed portion of the suit property.

127. Premised on the foregoing, two things arise. First, the defendants have admitted to have trespassed onto a portion of the suit property.

128. Secondly, it is evident that the impugned trespass arose and/or commenced from the inception when the defendants bought their land, namely LR No 22051, on the October 30, 2008.

129. In conclusion, my answer to the second issue is that indeed trespass has been established and that same accrued and/or commenced in the year 2008.

130. Nevertheless, a conclusive finding on the import and tenor of this determination, must however await the determination of the third issue, which will endeavor to ascertain the duration for which the disputed portion has been annexed and included within the property, currently belonging to and registered in the name of the defendants.

Issue Number 3 whether the plaintiff's right to recover the disputed portion of the suit property measuring 0.463 acres currently occupied by the defendants is barred by the Limitations of Actions Act.

131. The 1st plaintiff herein testified that same discovered and/or established that the kei-apple fence had been planted where same stands to date in the year 2009. However, the 1st plaintiff was not firm on the exact date when the kei-apple fence was planted.

132. Further, the 1st plaintiff also stated that by the time same discovered the kei-apple plant, which same contended to have been planted between the year 2008 and 2009, the kei-apple fence was about one foot high.

133. Nevertheless, whilst under cross examination, the 1st plaintiff changed tune and now stated that though same did not see who planted the kei-apple fence, however by the time same discovered the kei-apple the same were approximately 2 feet high.

134. On the other hand, the 1st defendant testified that by the time the defendants bought and/or purchased LR No 22051 from St Nicolas Hospital Ltd, the property was fully fenced on all the four sides. Further, the 1st defendant added that the fence comprised of kei-apple, which was mature at the time the defendants bought the land in question.

135. Besides, the 1st defendant also testified that at the time of entering into the sale agreement with the previous proprietors, namely, St Nicolas Hospital ltd, one of the directors of the said hospital, alerted same that the mature kei-apple was indeed planted in 1996.

136. From the testimony by the two sides, which have been reproduced in the preceding paragraphs, there are two aspects speaking to when the kei-apple fence which has fenced off a portion of the suit property and included same in the land belonging to the defendants, was planted.

137. To my mind, the timeline when the kei-apple fence, was planted is critical and material in discerning the duration under which the disputed portion has hitherto been under the occupation of the adverse parties, resting with the current defendants.

138. Having listened to the evidence by the 1st plaintiff and having taken into account the contradictory statement in the course of his testimony, including the exact date when the kei-apple fence was planted, when the existence of the kei-apple fence was discovered and the height to the kei-apple fence, at the time when the 1st plaintiff discovered its existence, I come to the conclusion that the 1st plaintiff herein was not being truthful about the duration of the existence of the kei-apple fence.

139. In any event, it was also pointed out by the 1st defendant that at the time when same bought and acquired LR No 22051 from the previous owner, even the suit property had similarly been fenced with a three-layer fence, which did not disturb the existing kei-apple fence.

140. Notwithstanding the foregoing, the 1st defendant also testified that when same bought and acquired the suit property, the impugned kei-apple fence was mature. In this regard, the connotation is that the kei-apple fence had been planted and established long before the year 2008.

141. Other than the foregoing, it also becomes apparent that if by 2008 the kei-apple fence was mature, then basically same was planted by the one other than the defendants herein. In this regard, it becomes obvious that the impugned kei-apple fence, was no doubt, planted by the defendants predecessor in title.

142. I beg to point out that having considered and assessed the demeanor of the respective witnesses, I am more inclined to believe the testimony of the 1st defendant, concerning the time when the kei-apple fence was planted.

143. Premised on the foregoing, it becomes crystal clear that if the disputed portion was fenced within LR No 22051, by the previous owner and in the year 1996, then the timeline for computing the duration for recovery of the disputed portion commences from the year 1996.

144. In any event, it is common ground that anyone who seeks to recover a piece of immovable property or a portion thereof, must file and/or commence the requisite proceedings within 12 years from the date of accrual of the cause of action.

145. To this end, the provisions of section 7 of the *Limitation of Actions Act*, cap 22 laws of Kenya are pertinent.

146. For completeness, the said provisions are reproduced as hereunder;

> 7. Actions to recover land
>
> 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.

147. Where a cause of action is caught up by the *Limitation Of Actions Act*, the effect thereof is to extinguish the cause of action and thereby render same sterile and redundant.

148. Consequently, a cause of action that has been caught up by the *Limitation Of Actions Act*, cannot be agitated before a court of law and if same is agitated before a court of law, the court of law is prohibited from taking cognizance and acting upon same.

149. Other than the foregoing, the import of the limitation of actions is that the bearer of the cause of action which is barred by the limitation, becomes non-suited.

150. To fortify the observations in the preceding paragraphs, it is imperative to adopt and endorse the holding in the case of *Moffat Muriithi Muchai (suing on behalf of the Estate of the Late Milka Njoki Muchai (Deceased)) v Wanjiru Wanjohi Gatundu & 2 others* [2019] eKLR, where the court stated as hereunder;

> 34. section 7 of the *Limitation of Actions Act*, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the plaintiff's mother having bought the suit land in the 1990's and thereby claiming ownership in the same, he could seek to recover it from the 1st defendant, but only if he did so within twelve years from the date on which the right of action accrued to him.
>
> 35. There is no doubt that a period of about sixteen years have lapsed from the date on which the right of action accrued to the date when this suit was filed. No leave for extension of time to file the suit outside the twelve-year period has been exhibited before this court. The plaintiff needed to commence his claim within the time prescribed under section 7 of the *Limitation of Actions Act*. It follows therefore that by the time he filed this suit, the claim was statute barred.

151. Recently, the import, implication and effect of the law of limitations was addressed and deliberated upon by the Court of Appeal in the case of *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Limited* [2017] eKLR, where the court observed as hereunder;

> It is common ground that the cause of action in this matter was based on contract and that section 4 of the *Limitation of Actions Act* prohibits suits filed after the end of six years from the date on which the cause of action accrued. As Potter, JA observed in the case of *Gathoni v Kenya Cooperative Creameries Limited* (civil application No 122 of 1981):
>
> > "The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."
> >
> > It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this court in *Divecon v Samani* (1995-1998) EA 48 stated as follows:-
> >
> > "....to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of part III shows that its provisions do not apply to actions based on contract.

In light of these clear statutory provisions, it would be unacceptable to imply as the learned judge of the superior court did, that „„the wording of section 4 (1) of the *Limitation of Actions Act* (chapter 22) suggests a discretion that can be invoked??.

152. In view of the foregoing holding, I come to the conclusion that by the year 2019, when the plaintiffs filed and/or originated the suit for recovery of the triangular shaped portion of the suit property, which was fenced within LR No 22051, the limitation period for recovery of the said portion had long lapsed and/or extinguished.

153. In the premises, it is my further finding that the claim by and or on behalf of the plaintiffs herein is therefore redundant and incapable of being enforced against the defendants herein or otherwise.

154. Before departing from the issue herein, it is worthy to mention the submissions by the plaintiff that the impugned activities by both the defendants and his predecessors in title, would constitute continuous trespass and therefore the law of limitation would not be applicable.

155. However, my understanding of the provisions of section 7 of the *Limitation of Actions Act* is that trespass to land constitutes a cause of action and hence the owner of the land is enjoined to commence the requisite recovery proceedings within 12 years from the date of the commencement of the impugned trespass.

156. Failure to do so, the right of the registered proprietor to reclaim or recover the portion/property trespassed on, ceases and/or become extinct.

Issue number 4 whether the defendants are entitled to the impugned portion of the suit property by virtue of adverse possession.

157. The 1st defendant herein testified that same bought and acquired LR No 22051, and thereafter the said property was transferred and registered in their joint names on the October 30, 2008.

158. Further, the 1st defendant also added that by the time same bought and acquired their property, the portion comprised of LR No 22051 was fenced on all the four sides. For clarity, the 1st defendant reiterated that kei-apple fence was indeed mature at that point in time.

159. Be that as it may, the 1st defendant also conceded that by the time when the subject suit was filed, the 2nd defendant and himself had only occupied the disputed triangular shaped portion of the suit property for 11 years.

160. Clearly, from the evidence of the 1st defendant, same had not accrued or accumulated the requisite 12-year period, necessary before a declaration of adverse possession can be made.

161. Be that as it may, it was the 1st defendant's testimony that prior to LR No 22051, including the disputed portion being sold to same, the said disputed portion had been under the occupation and possession of another trespasser.

162. Premised on the foregoing assertion, the 1st defendant therefore contended that in ascertaining and/or computing the duration of his occupation, the period during which his predecessor in tile had used the disputed portion ought to be included and/or reckoned.

163. To my mind, the current defendants took over occupation and possession of the disputed triangular shaped portion from another trespasser, whose occupation had also been adverse to the interest of the plaintiffs.

164. In my considered view, the plaintiffs cause of action, towards recovery of the disputed portion of land first accrued against the previous trespasser. However, the right of action for recovery, was neither activated nor acted upon by the plaintiffs.

165. Given the foregoing scenario, it is my finding and holding that where one trespasser replaces another trespasser over a given or designated portion of land the computation of time is reckoned from the date of the commencement of trespass by the initial trespasser, who has been replaced by his/her successor, fostering the same trespass.

166. To this end, I find succor in the holding in the case of *Joseph Iriet Mutogo v Hosea Shisoko Manyasa* [2007] eKLR, where the Honourable court stated and observed as hereunder;

> But where one trespasser removes another trespasser who is in adverse possession to the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by adverse possession need not be all the land comprised in the title

167. Recently, the Court of Appeal added its/her voice to the foregoing dictum in the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR, where the court observed as hereunder;

> " Trespassers are trespassers. That is why the common law principle holds true that where one trespasser removes another trespasser who is in adverse possession to the title of the owner and continues to occupy the land, the period of adverse possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own (see *Amos Weru Murigu v Murata Wangari Kambi & another* (supra)). It is important to point out that in adverse possession, it is the knowledge by the owner of the land that there is a trespasser on his land that counts. There does not have to be a meeting of the minds, that is to say, that the owner knows of the trespasser and the trespasser knows of the owner. As long as the owner knows that there is a trespasser on his land and the owner does not assert his title or eject the trespasser, time in adverse possession will run. But knowledge that the owner knows of the trespasser on the land must be strictly proved. It is not enough for the trespasser to speculate that the owner must have known that he was on the land without showing clearly that the owner knew or could not in the circumstances of the case be ignorant about it. If there is evidence that the trespasser occupied and carried activities and/or developments on the land claimed which the world could see and it is shown, for instance, that the owner lives near the land claimed or visits the area where it is located, the owner cannot be allowed in law to feign ignorance that he does not know of the trespass.

168. Finally, the 1st plaintiff herein testified and contended that same was not aware of the fact that the disputed triangular shaped portion, had indeed been alienated and fenced within LR No 22051, currently belonging to the defendants.

169. At any rate, the 1st defendant added that same only discovered the offensive alienation and annexation on the July 10, 2019, after receiving a report from the nominated engineering surveyor, whom same had engaged.

170. Premised on the foregoing, it was contended by the 1st plaintiff or better still on behalf of the plaintiffs, that without knowledge that a portion of the suit property had indeed been annexed, same could not have taken out appropriate and suitable recovery proceedings.

171. Consequently, it was added that the doctrine of adverse possession cannot arise and/or accrue until the owner of the land subject to adverse possession is aware of the incidence of trespass, to enable same commence recovery proceedings.

172. The foregoing contention sounds hugely attractive. But it must be recalled that ignorance of the law is no defense. In this regard, the fact that the plaintiffs were ignorant of their right to commence recovery proceedings, does not aid their claim in respect of the disputed portion of the suit property.

173. To this end, the holding of the Court of Appeal in the case of *Ishmael Ithongo v Geoffrey Ithongo Thindiu* [1981] eKLR, is appropriate and succinct.

174. For coherence, the honourable court stated and observed as hereunder:

> " A right to land is extinguished, in the absence of fraud, after the statutory period, although the owner is unaware that Adverse possession has been taken (*Rains v Buxton* [1880] 14 Ch D 537.) As is stated in *Rustomjee on Limitation and adverse Possession* at p 1380, ignorance on the part of the owner whether of his right or of the infringement of his right does not prevent ... the operation of the statute.

175. In view of the foregoing, I come to the conclusion that the defendants herein have indeed established and proved their claim to and in respect of the disputed portion of the suit property by way of adverse possession.

Final Disposition

176. Based on the analysis contained in the body of the judgment, it must have become clear, apparent and/or evident that the plaintiffs have not proved and/or established their claim at the foot of the plaint dated the November 11, 2019.

177. Conversely, the defendants have on their part established and proved the claim at the foot of the counterclaim dated the January 20, 2020.

178. Consequently and in view of the foregoing, I am obliged to make the following orders;

i. The plaintiffs" claim be and is hereby dismissed.

ii. The defendants counterclaim be and is hereby allowed in terms of prayers 1, 2 and 3 thereof.

iii. Further that the plaintiffs' herein shall be obliged to facilitate the survey and subdivision of LR No 14971/12, with a view to excising the portion measuring 0.4363 acres, which shall thereafter be transferred to and registered in the names of the defendants.

iv. However, the costs of the subdivision and the consequential transfer and registration of designated portion of the suit property shall however be borne by the defendants.

v. In default by the plaintiffs' to comply clause (iii) hereof within a duration of sixty (60) days from the date hereof, the deputy registrar of this court shall be oblige to execute the requisite instrument for purposes of subdivision of LR No 14971/12 and the instruments for the transfer of the resultant portion measuring 0.4363 acres in favor of the defendants.

vi. Costs of the suit and the counterclaim be and are hereby awarded to the defendants.

179. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr. Mawewu for the Plaintiffs

Ms. Wairimu h/b for Mr. Gatuguta for the Defendants**