



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 8 OF 2019 (OS)

(FAST TRACK)

THE BOARD OF MANAGEMENT,

SYMBIOS KABEIYO PRIMARY SCHOOL.....1ST PLAINTIFF/APPLICANT

SYMBIOS KABEIYO MICRO COMMUNITY...2ND PLAINTIFF/APPLICANT

SYMBIOS CHILDREN'S HOME.....3RD PLAINTIFF/APPLICANT

-VERSUS-

ELIZABETH JELAGAT CHEPSIROR (sued at the Administratrix of the estate of

late **KIPYEGO CHEPSIROR KOLIL**

(DECEASED).....DEFENDANT/RESPONDENT

JUDGMENT

By an Originating Summons dated 21st January 2019 the plaintiff/applicants sought for the following orders:

- a) That the Applicant has obtained title over 11.8 acres (4.72 Ha) out of land parcel No. Uasin Gishu/Sosiani Settlement Scheme /112 by way of adverse possession having actually, openly, notoriously exclusively and peacefully occupied *nec clam nec vi nec precario* the said parcel of land for a period exceeding 12 years.
- b) Consequently upon the foregoing land parcel No. Uasin Gishu/Sosiani Settlement Scheme/112 be subdivided, and 11.8 acres be hived therefrom along the current boundaries, the Applicants be registered as the sole, absolute and indefeasible proprietor of 11.8 acres out of aforesaid parcel of land No. Uasin Gishu/Sosiani Settlement Scheme /112 and declare the title held by the estate of the Late Kipyego Chepsiror Kilil (Deceased) to the extent of the 11.8 acres occupied by the Plaintiffs extinguished by virtue of adverse possession.
- c) The County Surveyor, Uasin Gishu County to curve out and subdivide a portion of land measuring 11.8 acres currently adversely, actually, openly, notoriously, exclusively and peacefully occupied, and designate a number for the Registrar to enter the name of Symbios Kabeiyo Primary School, Symbios Children's Home, Symbios Kabeiyo Micro Community as the proprietor of the out of said land parcel No. Uasin Gishu/Sosiani Settlement Scheme /112 in lieu of the estate of the Late Kipyego Chepsiror Kilil (Deceased).
- d) Consequently, upon the foregoing, the County Land Registrar, Uasin Gishu County do enter the names of Symbios Kabeiyo Primary School, Symbios Children's Home, Symbios Kabeiyo Micro Community as the proprietors of the said portion measuring about 11.8 acres out of land parcel No. Uasin Gishu/Sosiani Settlement Scheme /112 in lieu of the estate of the Late Kipyego Chepsiror Kilil (Deceased).
- e) The Respondents do pay the Plaintiffs the costs of this suit.

APPLICANTS' CASE

The Applicant called one witness Stephen Kipsang Boit who testified in support of the Plaintiff's case. It was the plaintiff's case that the funds used to purchase the parcel were obtained from Symbios Micro Community International in 1999 to start the three institutions.

PW1 stated that the plaintiff initially operated as Shangilia Children's home between the year 1999 – 2005 and the Applicants/Plaintiffs took over in 2005 to date. That the parcels were purchased on behalf of the Applicants/Plaintiffs by Pastor Ranogwa Francis Onziowa between the years 2000 and 2002. PW1 gave a history of purchase of the parcel of land and that they took possession immediately upon purchase.

It was further the PW1's testimony that the Applicants have been in peaceful uninterrupted possession since the year 2000 when the suit land was purchased and took occupation which is a period of more than 12 years.

PW1 also testified that the stay on the suit parcel of land was without the consent of the registered proprietor who has been out of the said parcel of land measuring a total of 11.8 acres for a period of over 12 years.

It was PW1's evidence that they sunk 2 boreholes and installed pumps and generators on the suit land. That the deceased did on 19th April 2003 and Elizabeth Jelagat Chepsiror together with Salome Jepchumba obtained letters of Administration but Salome died leaving Elizabeth as the sole administrator.

PW1 also stated that they obtained an order to preserve the estate vide Succession Cause No 170 of 2005 pending the determination of the dispute of ownership.

PW 1 produced a list of documents which were marked as exhibit Nos 1 to 30 that included, memorandum of discharges where Pastor Kefa Kadenge and Absalom Omeri confirmed that they had no claim to Shangilia Children's home and Sybios Micro Community – Kaibeio from any liability.

PW1 also produced sale agreements, certificate of official search, sketch map of the plot, approved plan from the office of the Physical Planner, Photographs, certificate of registration of Childrens institutions, Inspection report of Sybios Kaibeyo Primary School, Grant of letters of Administration, ruling dated 23/11/07, minutes of Eldoret West Education Board and certificate of registration of the 1st plaintiff amongst other documents.

It was PW1's evidence that the respondent has never sued them for eviction or to vacate the suit land. PW1 therefore urged the court to allow the prayers in the Originating summons with costs.

On cross examination, PW1 stated that the school is a private school and that he is one of the partners named in the certificate of registration. He also admitted that there was a suit between them and Shangilia Childrens home HCC No 82 of 2005 which was transferred to Environment and Land Court as ELC No 519 of 2012 which was dismissed for want of prosecution

PW1 further stated in cross examination that they were informed by the Succession court to file their case in the Environment and land Court as the Succession cause could not deal with the land dispute. That the Succession Cause restrained the Administrators until the suit is heard and determined and further confirmed that they took possession of the suit land in 2005.

RESPONDENT'S CASE

The Respondent namely Elizabeth Jelagat Chepsiror gave evidence in opposition to the applicant's case and stated that the plaintiffs did not buy land from her late husband but she was aware that one Francis bought the land. She also stated that she was not aware whether the succession cause was still ongoing and whether the plaintiffs had stayed on the suit land for a period of 12 years.

However, she admitted that the plaintiff is the one in occupation of the suit land,

On cross examination DW1 stated that she knows that the husband sold land to one Francis and that she did not know when the land was sold. DW1 also confirmed that there is a school on the suit land but she does not know for how long it has been in existence.

When asked about the Succession Cause DW1 stated that she does not know about the pending succession cause before the court and that she was not aware of any orders restraining the plaintiffs from interfering with the suit land.

DW2 the In - charge Registry Environment and Land Court produced ELC No 519 of 2012 which was dismissed for want of prosecution on 22nd June 2018

APPLICANT'S SUBMISSIONS

Counsel for the Applicant submitted that since the Plaintiffs purchased the suit land between the year 2000 and 2005, the Defendants have been dispossessed of their land and their title to land has been extinguished and the Plaintiffs have acquired the same title to the suit land measuring approximately 11.8 acres by way of adverse possession.

It was counsel's submission that there was no evidence from the Respondents that they had tried to assert their rights on the suit land by either taking possession or instituting legal proceedings for the past 12 years, hence the Plaintiffs have proved that they have used the land for more than 12 years which they claim as of right *nec vic clam, nec precario*. Further that the order dated 23rd November 2007 by Justice Ibrahim (as he then was) recognized the sale of land to the Plaintiffs by the deceased and it only stopped the distribution of the estate until the rightful purchaser is determined and it did not stop time from running or dispossessed the Plaintiffs from the suit land.

Mr. Magare cited the provisions of **Section** 38 (1) of the Limitations of Actions Act CAP 22 ;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act 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 the proprietor of the land”

Counsel therefore submitted that the Plaintiffs gained the right to be the registered proprietors of the land parcel No. Uasin Gishu/Sosiani Settlement Scheme/112 measuring approximately 11.8 acres on 13th February 2012 when the 1st portion of 6 acres was purchased on 14/2/2000, 12/4/2014 when the 2nd portion of 3 acres was purchased on 12/4/2002 and on 5/7/2017 when the 3rd portion was purchased on 5/7/2005.

Mr Magare cited the Court of Appeal case of **Macharia Maina & 87 Others –vs- Davidson Mwangi Kagiri (2014)eKLR (Koome, Mwilu & Odek, JJA)** held at paragraph 25 that:-

“The transaction between the parties is to the effect that the Respondent created a constructive trust in favour of all persons who paid the purchase price...”

Further in the case of **Kynoch Ltd –vs- Rowlands (1912) 1 Ch 527 534 Lindley MR in Littledale –vs- Liverpool College (1900)1 ch 19, 21 as cited in Sisto Wambugu –vs- Kamau Njuguna (1983)eKLR** the court stated that :-

“For an order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his rights to either by being disposed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it”.

In the case of **Hosea V. Njiru & Others (1974)EA 526, Simpson J.** following **Bridges –vs- Mees (1957)2 All ER 577**, as cited in the case of **Sisto Wambugu –vs- Kamau Njuguna (Supra)** held that:-

“Once payment of the last installment of the purchase price had been effected the purchaser’s possession became adverse to the Vendor and that he henceforth, by occupation for twelve years was entitled to become registered as proprietor of it”

Mr Magare submitted that in this case, the Plaintiffs finished paying the purchase price and took possession of the land and therefore they are entitled to adverse possession. The Plaintiffs occupation has never been terminated and they never rescinded the agreement therefore time started running on completion of purchase price.

On the question of dispossession, his Lordship said:-

*“The next question, therefore is what constitutes dispossession of the proprietor, Bramwell LJ in **Heigh –vs- Jack** said at 273 that to defeat a title by dispossessing the former owner acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”*

Counsel further relied on the case of **Kynoch Ltd –vs- Rowlands (Supra)** where the court stated that ;

*“The same point was made by Bramwell LJ in **Leigh –vs- Jack (1879) 5 EX D 264, 272** where he said referring to the statute of Limitations” “Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. If this is the right way to approach the problem, the question becomes “ Has the Claimant proved that the title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period? Rather that has the Claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years? It certainly makes it easier to understand the authorities if one adopts the first formulation”*

Counsel further stated that the filing of objection proceedings in a Succession Cause does not stop time from running and that it is evidence of assertion of ownership.

Mr Magare also relied on the Court of Appeal case of **Eldoret CACA No. 212 of 2012- Isaac Cypriano Shingore =vs= Kipketer Togom (Supra)**. In paragraph 13 stated that -

“There is no merit in the argument by the Appellant that the Objection Proceedings in the Succession Cause and the complaint by the Respondent before Land Disputes Tribunal had an effect of interrupting the Respondent’s possession. We are unable to appreciate how steps taken by the Respondent to ascertain his claim to his property can be constructed steps by the Appellant to assert his ownership to the property”

Further that the same argument can be extended to the dispute in Eldoret ELC No.519 of 2012 being a dispute between a Purchaser and his agent, cannot in any way by the Defendant to assert title.

Counsel also cited the case of n **Eldoret CACA No. 212 of 2012- Isaac Cypriano Shingore =vs= Kipketer Togom (Supra)**, continued in paragraph 14:-

*“As the Court held in **Githu Vs. Ndeete [1984]KLR 776** “Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see **Cheshire’s Modern Law of Real Property, 11th edition at p 894. In my view the giving of***

notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.” In Mount Carmel Investments Ltd vs. Peter Thurlow Ltd and another [1988] 3All ER 12g, the Court of Appeal, in England held: “The mere assertion by the true owner of a claim to possession of land in a letter sent to a squatter was not sufficient to prevent the squatter obtaining title by adverse possession. Accordingly, the letter sent to the defendants by the plaintiff’s solicitors did not have the effect of causing the defendants to cease to be in possession for the purposes of acquiring title by adverse possession.”

It was Mr. Magare’s submission that the Plaintiffs have not been dispossessed from the suit land parcel No. Uasin Gishu/Sosiani Settlement Scheme/112 measuring approximately 11.8 acres and that the Defendants/Respondents have been dispossessed since 2000 a period of over 12 years (actually 20 years).

Counsel therefore urged the court to find that the plaintiffs have proved that they have acquired the suit land by way of adverse possession with costs of the suit.

DEFENDANT’S SUBMISSIONS

Counsel for the respondent gave a brief background to the suit and listed the following as undisputed facts:

- a) The defendant is an administratrix to the estate of the late Kipyego Chepsiror Kolil (hereinafter referred to as the “**Deceased**”) pursuant to a grant issued in **Eldoret Succession Cause Number 170 of 2005.**
- b) The grant is yet to be confirmed owing to the fact that a dispute arose between Shangilia Children’s Home and Symbios’s Micro Community – Kaibeyo as to the owner of the portion that was sold, and which portion comprises assets in the estate of the deceased;
- c) By ruling of Hon. Justice Ibrahim in **Eldoret Succession Cause Number 170 of 2005.** the court held that the court could not allow distribution of the said property until the dispute between the purchasers that is, Shangilia Children’s Home and Symbios Micro Community – Kaibeyo is resolved;
- d) The court stayed the succession cause in the interim to allow the 2 disputants that is, Shangilia Children’s Home and Symbios’s Micro Community – Kaibeyo to institute proceedings against each other in the High Court and the successful party to file the judgment and decree where the court would order transmission to the rightful claimant;
- e) The court also ordered that the administrators were not allowed to transfer, dispose or part with the assets of the estate until determination of the intended suits and any subsequent appeal;
- f) Inhibition orders were issued against the title inhibiting any dealing with the property L.R. No. Uasin-Gishu/Sosiani Settlement Scheme/112 until further orders of the court.
- g) The said ruling was never appealed against or reviewed.
- h) Pursuant to the directions of *Ibrahim J*, Francis Oziova Ranogwa and another on behalf of Shangilia Childrens Home sued Symbios’s Micro Community – Kaibeyo in **Eldoret Environment and Land Court Number 519 of 2012 (formerly High Court Case Number 82 of 2009).**
- i) The case was dismissed for want of prosecution and no application for review or appeal arose from the order of dismissal issued by Hon Justice Ombwayo;
- j) The said order for dismissal was never reviewed or appealed against.
- k) The plaintiffs lacked the requisite capacity to enter into legally binding contracts;

Mr Tororei therefore urged the court to determine three issues namely, jurisdiction, capacity to contract and whether or not the plaintiffs have demonstrated their claim of adverse possession.

On the first issue on jurisdiction counsel relied on the case of **Re the Matter of the Interim Independent Electoral Commission (2010) eKLR** where the Supreme Court stated as follows:

*“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by Statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in **Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited [1989] KLR 1**, which bears the following passage (Nyarangi, JA at p.14): “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”*

Counsel submitted that the originating summons is defective, a non-starter, premature and an abuse of the court process. That vide the ruling by Ibrahim J, in **Eldoret Succession Cause Number 170 of 2005** where the court issued various orders which limit this court's jurisdiction in granting the orders as sought in the originating summons.

It was counsel's submission that the originating summons is incompetent and defective as cases preferred vide originating summons are regulated by Order 37 of the Civil Procedure Rules and a claimant for adverse possession must adhere to section 38 of the Limitation of Actions Act whereby Rule 7 dictates that when the originating summons are preferred, the same shall be supported by an affidavit to which a certified extract of the title to land in question has been annexed.

That from perusal of the affidavit sworn by one Margaret Chebet Matui indicates that a copy of the title has been annexed as but the said document clearly demonstrates that it is a copy of the search that has been annexed. Counsel therefore urged the court to find that this is in flagrant breach of the law which has been couched in mandatory terms, and which dictates that a certified extract of the title be annexed as was held in the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR**, where the court expressed its surprise for the trial court and/or the parties from challenging the competence of the originating summons for failure to adhere to the strict rules of the Civil Procedure Rules which call for annexing of a certified extract of the title. It held as follows:

*“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of **Githu v Ndele [1984] KLR 776**. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old Civil Procedure Act and the rules made thereunder that when taking out and O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application. Indeed, the then Order XXXVI Rule 3D (2) specifically provided:*

“...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...”

That requirement no doubt was couched in mandatory terms failing which it would render the O. S. incompetent. We have perused the entire O. S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission.

Counsel submitted on the overriding objective established under Article 159 of the Constitution giving the court judicial authority to give due regard to substantive justice over procedural technicalities and that procedural rules must be adhered to as this provision is couched in mandatory terms.

Counsel urged the court to be guided by the case of **Elephant Soap Factory Ltd vs Nahashom Mwangi & Sons (1971) KHCD N126** where the court held that a court will not invoke its inherent jurisdiction under section 3A of the CPA or any other provisions of the law when there is an express provision dealing with the matter since court may not nullify an express provision by invoking its inherent powers. Also, in **Joel K. Yegon & 4 Others V. John Rotich & 4 Others, Nairobi Misc. Civil Application No. 995 of 2005, where** Nyamu J held that since there are specific provisions of the law under which court's jurisdiction should have been invoked, provisions calling upon court to invoke its inherent discretion such as section 3A of the CPA does not apply.

On the issue of the dispute between Shangilia Children's Home and the 2nd plaintiff, counsel submitted that pursuant to the directions of Hon Justice Ibrahim in **Eldoret Succession Cause Number 170 of 2005**, Francis Oziova and another on behalf of Shangilia Children's Home sued the 2nd plaintiff in **Eldoret Environment and Land Court Number 519 of 2012 (formerly High Court Case Number 82 of 2009)**, which case was never heard on merit as the same was dismissed for want of prosecution by Hon Justice Ombwayo on 22/6/2018. The court delivered a ruling and held as follows

“ However, the Court cannot allow distribution of the said property until the dispute between the purchasers is resolved.

I hereby order and direct that all proceedings in the Succession Cause be stayed. The two disputants to institute proceedings against each other in the High Court. Whichever of them is successful shall lodge the judgment and Decree in this course upon which this Court as a Succession Court will order transmission to the rightful claimant.

The Administrators shall not transfer, dispose or part with the assets of the Estate until determination of the intended suits and any subsequent appeal.

It was counsel's submission that ruling was never reviewed or appealed against and in light of this holding, **Eldoret Environment and Land Court Number 519 of 2012 (formerly High Court Case Number 82 of 2009)** was never heard and determined on merit before the same was dismissed for want of prosecution. It is also not disputed that the orders of dismissal by Hon. Justice Ombwayo were never reviewed or appealed against.

Counsel further urged the court to find that unless and until the dispute between the 2 disputants is resolved as per the directives of Ibrahim J, this court lacks the requisite jurisdiction to grant the orders as sought in the originating summons and relied on the Court of Appeal case in **The Tee Gee Electrics and Plastics Co Ltd v Kenya Industrial Estates Ltd – Civil Appeal No. 333 of 2001**, where it was held that a case dismissed for want of prosecution is one which was not heard on merits.

On the issue of inhibition orders, counsel submitted that this court has no jurisdiction to issue the orders as sought as the same would be

equivalent to this court disposing off an asset of the estate of the deceased that is, 11.8 acres or thereabouts comprised in Uasin-Gishu/Sosiani Settlement Scheme/112 contrary to the ruling of Succession Court and which would amount to reviewing the orders of Hon. Justice Ibrahim in **Eldoret Succession Cause Number 170 of 2005** when this court and the High Court are courts of equal rank/status with distinguished and specialized jurisdiction.

Counsel cited the Court of Appeal case of **Karisa Chengo & 2 others v Republic [2015] eKLR** in distinguishing the jurisdiction of the High Court, the Employment and Labour Relations Court and the Environment and Land Court held as follows:

*It is therefore clear that the High Court no longer had original and unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under section 12 of the ELRC Act and section 13 of the ELC Act. **Conversely, the courts contemplated in Article 162(2) of the Constitution cannot deal with matters reserved for the High Court. It is an established principle of law that anything done without jurisdiction is a nullity and we so find. In other words we hold that the proceedings before the High Court were a nullity to the extent that Angote, J. sat in them without jurisdiction.** To our minds, by using the words 'with the status of the High Court' it is clear that the High Court is not higher in hierarchy than the ELRC and ELC; these are courts of equal rank. By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. The constitution though does not define the word 'status'. The intentions of the framers of the Constitution in that regard are obvious given the choice of the words they used; that the three courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. **To us it simply means that the ELRC and ELC exercises the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court.** It was the intention of the drafters in our view to give the ELRC and ELC independence from the High Court. This independence is essential to the role of the Courts as specialized courts charged with the responsibility of developing coherent and evolving labour relations, environment and land jurisprudence. In concluding this aspect of the matter, we reiterate that **the High Court, the ELRC and ELC are courts of equal status, autonomous of each other and each exercises peculiar jurisdiction. They are not one and the same.** Indeed the provisions of Article 165(3)(a) leave no doubt that the High Court has unlimited original jurisdiction in criminal and civil matters save those reserved for the two special courts. Nowhere is it provided under the Industrial Court Act or the Environment and Land Court Act that these two courts shall have jurisdiction to deal with criminal matters other than those matters reserved for the specialized courts. If there had been such an intention, nothing would have been easier than specifically stating so. **They too therefore do not have jurisdiction to deal with matters reserved specifically for the High Court and the reasons for that are obvious.***

On appeal, the Supreme Court affirmed this holding by the Court of Appeal in **Republic v Karisa Chengo & 2 others [2017] eKLR.**

That this court's jurisdiction has been established under Article 162 (2) (b) of the Constitution, section 13 of the Environment and Land Court Act. It has no powers over High Court matters including reviewing and/or setting aside orders issued by the Justice Ibrahim who was sitting in his capacity as a High Court deliberating over a Probate and Administration cause.

Counsel also relied on the Supreme Court case in **Samuel Kamau Macharia & Another v Kenya Commercial Bank and two others (2012) Eklr** where it was held that a court of law can only exercise jurisdiction conferred upon it by the Constitution, the Statute or both.

On the second issue as to whether the plaintiff had capacity to enter into a contract, counsel submitted that the plaintiffs allege that the suit property does not form part of the estate of the deceased since the same was legally acquired by them. It is the defendant's assertion that the plaintiffs lacked capacity to enter into legally binding contract with respect to acquisition of the suit property as the agreement executed by Francis and the deceased dated 14/2/2000 demonstrates that the Purchaser was buying the property on behalf of Shangilia Children's Home and not on behalf of any of the plaintiffs.

Further that a perusal of the agreement executed by Francis and one Christine Chemaiyo Stephen dated 12/4/2002 equally demonstrates that the Purchaser was buying the property on behalf of Shangilia Children's Home and not on behalf of any of the plaintiffs. And that the memorandum demonstrates that the same was executed by Francis Ranogwa and Kefa Kadenge on behalf of Shangilia Children's Home and the 2nd plaintiff – Symbios Micro Community–Kabeiyo (in – formation).

Counsel also stated that at the time of entering into this memorandum of understanding, the 2nd plaintiff was not a known entity in law capable of entering into a contract as the contract clearly alleges that the 2nd plaintiff were identified as incoming trustees. Counsel therefore urged the court to find that the plaintiff did not have capacity to enter into a contract for sale of land as was held in the case of **Nawaz Abdul Manji & 4 others v Vandeeep Sagoo & 8 others [2017] eKLR** that the Governing Act for trustees and trusts was the Trustee (Perpetual Succession) Act. Under section 3, the trustees are said to be body corporate, incorporated and who have the capability of holding property and even institute or defend suits. They are said to have been appointed by any body or association of persons established for *inter alia* educational purpose. These trustees may apply to the Minister for a certificate of incorporation of the trustees as a corporate body.

It was counsel's submission that no certificate of incorporation or trust deed was produced in court hence the plaintiff's failed to demonstrate that they were ever incorporated as trustees with the responsibility of holding and/or acquiring property on behalf of the 3rd defendant, the contracts were void.

In the case of **Management Committee of Shalem Community Edicators & 7 Others v Registered Trustees of Micro Enterprises Support Programme Trust [2016] eKLR,** the court voided contracts entered into by a community based organization for lack of capacity to enter into binding contracts.

On the issue as to whether the plaintiffs have proved adverse possession, counsel relied on the case of **Wilson Kazungu Katana (supra)**, where the Court of Appeal established the principles to successfully plead adverse possession. It held that the parcel of land must be registered in the name of a person other than the applicant; the applicant must be in open and exclusive possession of that possession of that piece of land in an adverse manner to the title of the owner; and the applicant must have been in that occupation for a period in excess of 12 years having dispossessed the owner or there having been discontinuance of possession by the owner. It also placed the burden of proving adverse possession upon the claimant.

In the case of **Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184**, the court held that the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.

Counsel submitted that in order to prove adverse possession the parcel of land must be registered in the name of a person other than the applicant and that it is not disputed that suit property is registered in the name of the deceased Kipyego Chepsiror Kolil but however the plaintiffs have pleaded the doctrine of ademption stating that by virtue of the sale agreements, the suit property no longer forms part of the estate of the deceased.

By virtue of this argument by the plaintiffs that they legally purchased the suit property and therefore do not form part of the estate of the deceased, counsel submitted that their claim must fail because they are disputing ownership of the suit property and relied on the case of **Haro YondaJuaje v Sadaka DzenoMbauro & another [2014] eKLR** where the court held as follows:

29. *One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land.*"

Counsel submitted that the plaintiffs currently occupy the suit property which fact was confirmed by DW1. It is therefore not disputed that the plaintiffs occupy the suit property but the question is whether the occupation is adverse and relied on the Court of Appeal case **Kasuve (supra)** and **Wanje (supra)** in **Wilson Kazungu Katana (supra)** where it held as follows:

"What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession."

Further in the case of **Samuel Miki Waweru v Jane NjeriRichu, Civil Appeal No. 122 of 2001, (UR)**, the Court of Appeal held:

*"...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim **is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.***

Mr Tororei therefore urged the court to find that the plaintiffs occupation wasn't adverse to the title of the deceased as trespassers but rather, they occupied the suit property with the permission of the owner by virtue of the various land sale agreements.

It is not disputed that the plaintiffs are in current occupation of the suit property in which a school has been built. They have relied on various sale agreements as to how they acquired occupation. It is reiterated that should the court find that they had capacity to contract, the plaintiffs didn't occupy the property by way of trespass but rather, with permission by way of those agreements.

Further that the plaintiffs having relied on the doctrine of ademption as raised in their further affidavit, time cannot be said to run at all since they declined to acknowledge the estate of the deceased as the true owner of the suit property and therefore the doctrine of adverse possession cannot be pleaded and sustained. Counsel therefore urged the court to dismiss the suit with costs to the respondent.

ANALYSIS AND DETERMINATION

The issues for determination in a claim for adverse possession are well settled in the various judicial decisions of the court. To establish adverse possession, a claimant must demonstrate that he has used the land without force, without secrecy and without persuasion (***nec vi nec clam nec precario***) for the prescribed period of twelve (12) years.

In the case of **Munyaka Kuna Company Limited- Vs- Bernado Vicezo De Masi (The Administrator of The Estate of Domenico De Masi (Deceased) (2018) eKLR**, the court while addressing the four ingredients stated as follows:

" To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (nec vi nec clam nec precario) for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted."

The facts of this case are that the plaintiffs purchased 11.8 acres of land from the deceased husband of the defendant through one Pastor

Francis Onziova between 2000 and 2005 and took possession, constructed a Children's Home and a School which is still operational to date. This fact was confirmed by both the plaintiff and the defendant who stated that the late husband sold the land to Francis but she was not aware that it was bought on behalf of the plaintiffs. The defendant also admitted that the plaintiffs are in occupation and are running a school.

It should also be noted that the defendant stated that she has never filed any suit or asked the plaintiffs to vacate the suit land and that they have been occupying the land in open and without secrecy. The plaintiffs therefore have been in continuous occupation of the suit land for a period of more than 12 years.

The issues for determination are as to whether the originating summons is competent, the effect of the Succession Cause in the High Court and the ruling by Justice Ibrahim dated 23rd November 2007 and whether the plaintiffs have proved that they have acquired the suit land by adverse possession.

On the first issue whether the originating summons is competent, counsel faulted the summons for not annexing an extract of the register and stated that an official search would not suffice as it is couched in mandatory terms.

In the court of Appeal case of **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR** it was held that:

On our part, we have weighed the submissions made on behalf of the parties. Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36(2) of the Registered Land Act provides:-

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:-

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration we think a search certificate meets the requirements of the relevant law.

The above case sorts out the issue of a search certificate that is signed by the Land Registrar as sufficient to give a true record of the ownership of the suit land. Section 37(2) of the Registered Land Act (now repealed) provides that every document *purporting* to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved. The court is under an obligation to presume that the official search was signed by the Land Registrar as no one disputed that fact. The defendant also never raised the issue of authenticity of the search. Having said that I find that the official search was sufficient as it showed the details of the registered proprietor.

On the issue of capacity, it is not in dispute that the plaintiffs bought land from the deceased husband of the defendant and the defendant confirmed that one Francis bought the land but she was not aware that he was buying on behalf of the plaintiffs. There is no one complaining that the plaintiffs are in possession and that they bought the land. It is also on record that the defendant has admitted that the plaintiffs have been in occupation and are still in occupation and has never asked them to vacate the suit premises.

The plaintiffs produced memorandum of understanding between one Kefa Kandege and Francis Ranogwa relinquishing their positions as Trustees and releasing them from any liabilities. The documents produced in respect of certifications and statutory requirements of running children's home and a school show that the plaintiffs were grounded.

On the issue as to whether the plaintiffs have proved adverse possession, the evidence on record is that the plaintiffs have been in possession over a period of 12 years and have done so in open and without secrecy and that the owner has been dispossessed of the suit land

A proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has been discontinued his possession for a statutory period and not whether or not the Claimant has proved that he has been in possession of the requisite number of years as was held in the case of **Kynoch Ltd –vs- Rowlands (Supra)** where the court stated that ;

“The same point was made by Bramwell LJ in Leigh –vs- Jack (1879) 5 EX D 264, 272 where he said referring to the statute of Limitations” “Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. If this is the right way to approach the problem, the question becomes “ Has the Claimant proved that the title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period? Rather that has the Claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years? It certainly makes it easier to understand the authorities if one adopts the first formulation”

In the present case, there was evidence of dispossession of the Respondent who conceded in her testimony that the Plaintiffs are in occupation of the suit land and there is a school running and a Children's home since when her late husband sold to the Applicants in 2000. Effectively, the suit land is subject to prescription rights which crystallized between the years 2012 and 2017.

I find that the plaintiffs have proved that they have used the land which they claim as of right *nec vic nec clam, nec precario*. The defendant had knowledge of continuous occupation and have never been broken or any endeavours to interrupt it at all. The Plaintiffs took possession in 2000, fenced the land, constructed classrooms, planted trees and did everything that a diligent owner could be expected to know about. The Plaintiffs have been on the suit land between 2000 and 2005 to date.

Further, it is on record that the Plaintiff have used the land to the exclusion of the defendant. And have been actual possession by physically using the land as a property owner would, in accordance with the type of property location and users.

In the case of **Wambugu vs Njuguna (Supra)** the court held that where the Claimant is in exclusive possession of the land with leave and license of the Appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined. The plaintiffs also proved that they did not enter the land with the permission of the owner but through purchase. It was held that the case of **Sisto Wambugu –vs- Kamau Njuguna (Supra)** that:-

“Once payment of the last installment of the purchase price had been effected the purchaser’s possession became adverse to the Vendor and that he henceforth, by occupation for twelve years was entitled to become registered as proprietor of it”

The plaintiffs paid the purchase price in full and the moment this was done and by virtue of occupation for a period of more than 12 years they became entitled to become the registered proprietors

In the case of **Public Trustee vs= Wandura 1984 KLR 314 at 319 Madam J** stated:-

“..adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971 the appellant had not transferred the suit property to the respondent. In 1978, if any permission or license to enter the suit property had been given by the Appellant, the same was terminated by the letter dated 18th August, 1978 from Karuga Wandai& Company Advocates. From 18th August 1978, onwards the continued occupation and possession of the suit property by the Plaintiff was adverse to the appellant’s title. Computing adversity from 18th August, 1978, we are satisfied that the Plaintiff’s claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Originating Summons was filed on 7th February 1991..’.

The requirements for adverse possession has also been set in the case of **Mbira –vs- Gachuhi (2002) EALR 137** as cited in the case of **Celina Muthoni Kithinji –vs- Safiya Binti Swaleh & 8 Others (2018)eKLR** the court held that:-

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”

Further in **Kisumu Court of Appeal NO. 134 of 1993 – Eliud Nyongesa Lusenaka & Another vs= Nathan Wekesa Omocha** the court of Appeal held as follows:-

“...We think, the 1st Appellant had sufficient title in the land against which the respondent could acquire prescriptive rights through adverse possession and the matter between the 1st appellant and the respondent had nothing to do with the interest of the SFT in the disputed land”.

On the issue of the implication of the ruling dated 23rd November 2007 by Ibrahim J (as he then was) the ruling is very clear that it gave parties an opportunity to go and sort out the issue of ownership and go back for endorsement of the judgment. This case essentially speaks to the implementation of that ruling and not going against the spirit of the said ruling. The court is adjudicating of the issue of ownership and not interfering with the distribution of the estate of the deceased. The Administrator of the deceased estate who is the defendant herein is in agreement that the suit land was bought by the one Francis only that she was not aware that he was buying it on behalf of the plaintiffs.

The ruling stated that

However, the Court cannot allow distribution of the said property until the dispute between the purchasers is resolved.

I hereby order and direct that all proceedings in the Succession Cause be stayed. The two disputants to institute proceedings against each other in the High Court. Whichever of them is successful shall lodge the judgment and Decree in this course upon which this Court as a Succession Court will order transmission to the rightful claimant.

The Administrators shall not transfer, dispose or part with the assets of the Estate until determination of the intended suits and any subsequent appeal.

This ruling was to preserve the suit land pending the hearing and determination of the legitimate owner of the land. This did not stop this court from determining this case as it is to help in the administration of the estate of the deceased which acknowledged that land had been sold. I find that there is no conflict with this ruling on jurisdiction of the court to handle this matter.

Having considered the pleadings, the submissions and the relevant authorities I find that the plaintiffs have proved that they have acquired the suit land vide adverse possession and are therefore entitled to be registered as owners of 11.8 acres of the suit land

DATED and DELIVERED at ELDORET this 24TH DAY OF FEBRUARY, 2021

M. A. ODENY

JUDGE