Kettienya v Lelei (Sued in his capacity as the personal representative of the Estate of Paul Lelei Tuei - Deceased) (Land Case 22 of 2012) [2025] KEELC 380 (KLR) (6 February 2025) (Judgment)

Neutral citation: [2025] KEELC 380 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

LAND CASE 22 OF 2012

MC OUNDO, J

FEBRUARY 6, 2025

BETWEEN

WILLIAM KIPKEMOI KETTIENYA ..... PLAINTIFF

AND

ANTHONY KIPLANGAT LELEI (SUED IN HIS CAPACITY AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF PAUL LELEI TUEI - DECEASED) ..... DEFENDANT

JUDGMENT

1. Vide a Further Amended Plaint of 19th May, 2022, the Plaintiff herein sought for the following orders:

    i. An order of permanent injunction restraining the Defendant by himself, agents, servants, employees or any other party through whom they be claiming from interfering with, trespassing onto, subdividing, selling, transferring, assigning, fencing, erecting structures thereon and or doing any other act which is prejudicial to the Plaintiff's proprietary interest in L.R No. Kericho/Kipchimchim/1490 upon a proper survey and a correct boundary being ascertained.

    ii. Costs and interest of the suit.

    iii. Mesne Profits.

    iv. General Damages.

2. Upon service of the Plaint, the Defendant herein filed his Amended Defence and Counter-claim dated 28th February, 2019 wherein he denied the allegations contained in the Plaint putting the Plaintiff to strict proof while stating that it had been the Plaintiff who had secretly and fraudulently annexed into his parcel of land, part of the Defendant's land No. Kericho/Kipchimchim/929 measuring approximately 0.50 or thereabout. That in so doing he had destroyed the boundary that separated the

two parcels of land wherein subsequently he had amended the registry map sheet of his parcel of land to give an impression that he was the lawful owner of the said portion of land.

3. In his Counterclaim, the Defendant (now Plaintiff) sought that the Plaintiff (now Defendant) be ordered to transfer the disputed portion of land measuring 0.8 acres or thereabout to the Defendant (now Plaintiff) and in default, the court's Deputy Registrar executes all the transfer documents in favour of the Defendant (now Plaintiff). That the Plaintiff's suit be dismissed with costs and judgement be entered in his favour in terms of the counterclaim.

4. In a rejoinder, the Plaintiff had denied the allegation contained in the Amended Defence and Counterclaim, wherein he had reiterated the contents of his amended Plaint while adding that the Defendant had no bonafide interest in the suit property which he had trespassed into and had remained therein with a view of illegally establishing a claim over it.

5. The matter did not kick up for hearing immediately due to numerous adjournments at the instance of the parties who had sought that the District Surveyor conduct a ground survey of the two parcels of land to ascertain if there had been any encroachment and to what extent. On 9th December, 2021 when the matter came up for mention to confirm the filing of the Surveyor's Report, the court had been informed of the Defendant's demise wherein vide an application dated 5th April, 2022 he had been substituted with his son Anthony Kiplangat Lelei.

6. Thereafter, the matter had proceeded for hearing on 27th June, 2023 wherein William Kipkemoi Kettienya, testified as PW1 to the effect that he had sued one Paul Lelei Tuei, the original Deceased Defendant who had now been substituted with his son Anthony Kiplangat Lelei as per the Letters of Administration Ad. Litem issued in Succession Cause No. E03/2022 issued on 13th January, 2022 and herein produced as Pf exh 1.

7. That whereas he was the registered to proprietor of land Parcel No. Kericho/Kipchimchim/1490 (Suit Land) to which he had been issued with the title on 28th May 1986. He produced both the title and the Certificate of Search issued on 31st May, 2019 as Pf exh 2 and 3 respectively, stating that the Original Deceased Defendant had trespassed on the said land in the year 2012 wherein he had begun by removing the boundary and cutting down trees.

8. That the said boundary had been between the Original Deceased Defendant's parcel of land No. Kericho/Kipchimchim/960 and his land No. Kericho/Kipchimchim/1490 but the Original Deceased Defendant and his children had removed the trees that had demarcated the two parcels of land whereby they had then started planting tea.

9. That Mr. Kivuva, the District Surveyor, Mr. Kibowen the then surveyor as well as the current surveyor had surveyed the suit land where the extent of the encroachment had been ascertained to have been 0.37 acres as per a report filed in court on 2nd December, 2021. He marked the report dated 1st July, 2019 together with its annexures therein as PMFI 4.

10. His evidence was that the Original Deceased Defendant did not purchase from him part of the disputed portion of land because if that had been the case, then the suitland would have been sub-divided. That the suit land was still virgin as he had not sub-divided it and that he had been in its occupation when the initial survey had been done.

11. He testified that the suit land had been registered to his brother in law Andrew Kilachei Arap Mwei alias Chesuge Arap Mwei in the year 1973. He asked that the court issues an order of permanent injunction against the Original Deceased Defendant's Estate not to interfere with the suit land. He also sought for

damages since the Original Deceased Defendant and his Estate had used the suit land for a long time. Lastly he asked for costs of the suit.

12. On cross-examination, he confirmed that wherein he lived within Kericho municipality, he had another parcel of land on Kisumu Road as well as properties in Nakuru at Molo area and Mulot area in Narok.

13. Further that whilst he had been living within Kericho in the year 1969, he had not been residing on the suit land. That however, he had begun residing on the suit land in the year 1973 or thereabout. When he was referred to Pf exh 2, he confirmed that the same had been issued in the year 1986. That the land Adjudication had been done between the years 1965 – 1970. That whereas he could not remember exactly when he had bought the suit land from Arap Mwei, however, it could have been in the year 1970. That the land adjudication had been done when he was on the suit land.

14. He denied knowledge of one Taprangoi wife of Misoi and further that he was not aware that Chesubei had bought the suit land from Misoi before Adjudication. He confirmed that Erastus Ruto was his neighbor and that he had found them on their land. That he had also found the Original Deceased Defendant herein on the suit land. That he did not know that Taprangoi was Original Deceased Defendant's late mother. That land parcel No. Kericho/Kipchimchim/962 had been adjudicated at the same time as the suit land. That whereas he knew that there had been a forest between Original Deceased Defendant's land and the suit land, he would not have known the happenings on the Original Deceased Defendant's side of his land.

15. He confirmed that the court had visited the suit land. That the Original Deceased Defendant had in the year 2012 planted tea bushes that had extended inside the suit land thus trespassing. He denied the allegations that he was a land grabber. That whereas he did not have the reports filed by the surveyors Kivuva and Kibowet, yet his lawyer had them.

16. His evidence was that immediately the surveyors and the court had left, the Original Deceased Defendant had removed everything. That he had reported the same to the police although he had no evidence to this effect in court. When he was referred to PMFI 4, he confirmed that his title was intact. That whereas he used to be a tea planter and a tea manager in the tea Estate, he had not influenced the amendment of the map and that his record had been clean. He confirmed that there had been land adjudication records.

17. In re-examination, he confirmed that whereas his title deed had been issued in the year 1986, he had been living on the suit land before the land Adjudication had been done and that the adjudicators had found him therein. That the trees had not been planted everywhere and further that he could not pin point the exact time that the tea bushes had been planted since his interest had been on the suit land. His evidence had been that the land adjudication had occurred between the years 1965 and 1970.

18. That whereas he could not tell the finer details, he had a title that was untouched. Further, that whilst he had been a counselor for 28 years, he had never over stepped his responsibility. That he could not have used his influence on a small piece of land. He maintained that he did not cause the amendment of the map.

19. PW2, one Kibet Isaac introduced himself as the current County Surveyor for Kericho County working with the Ministry of Lands and Physical Planning wherein he had worked in that capacity for 5 years. That he held a degree in Geospatial Engineering having graduated from the University of Nairobi and was a full member of the Institute of Surveyors of Kenya.

20. That with regard to the matter in question, his duty had been to oversee the implementation of a court order that had been issued to the effect that he visits the two parcels of land in question being land parcel Nos. Kericho/Kipchimchim/1490 and 962.

21. That subsequently, he had executed the said court order on 19th June, 2019 at around 11:00 am in the presence of both parties. That after visiting the said properties, they had prepared a report dated 1st July, 2019. That the court's order had been to the effect that he establishes the acreage of each parcel of land and ascertain whether there had been any encroachment by either party and thereafter file a report.

22. That they visited the site on 19th June, 2019 wherein the Plaintiff claimed the ownership of parcel No. Kericho/Kipchimchim/1490 while the Original Deceased Defendant had claimed ownership of parcel No. Kericho/Kipchimchim/962. He explained his findings on the ground to the effect that in figure 1 of the Report, the boundary BCD did not exist on the ground as it was currently part of parcel No. Kericho/Kipchimchim/962. That the area under dispute was approximately 0.37 acres and which area the Original Deceased Defendant claimed to have bought from one Tapnyobi, his grandmother, in the year 1969 wherein he had planted tea in the year 1973

23. That the two parcels of land reflected in sheets 7 and 8 of the RIM of Kipchimchim. That he had used the maps as a guide to determine if there had been any encroachment. That the ground measurements on parcel No. Kericho/Kipchimchim/1490 measured 2.14 hectares excluding the disputed area. That on the other hand, the measurements on parcel No. Kericho/Kipchimchim /962 including the disputed area was 1.71 hectares.

24. That as per the RIM, the disputed area had been part of the suit land and that the area under dispute measured 0.37 acres. He thus concluded that the suit land had been encroached into by an area of approximately 0.37 acres. That he had signed the Report herein produced as Pf exh 4.

25. His response on cross-examination was to the effect that through Land Registers he had obtained from the Registry, he could see the registered area. That the suit land's registered area was 2.41 hectares against a ground acreage of 2.14 hectares giving a deficit of 0.27 hectares which did not convert to the disputed area which was 0.5 hectares. That on the other hand, the registered acreage of parcel No. Kericho/Kipchimchim /962 was 1.6 hectares wherein the ground area was 1.71 hectares.

26. That the disputed area measured 0.37 acres which converted to 0.15 hectares. That the figures did not add up. That there had been a deficit on parcel No. 1490 of 0.27 hectares while the acreage in the disputed area had been 0.15 hectares. That even if the disputed area was added to the suit land, it would not add up to the registered area since there would still be a deficit of 0.12 hectares.

27. When he was referred to Pf exh 4, he admitted that it had been his colleague who had gone to the ground and prepared the Report. His evidence was that parcel No. Kericho/Kipchimchim/962 had encroached into the suit land wherein tea bushes had been planted on the disputed section.

28. When he was asked to compare the sketch map and the RIM, he testified that they had only zeroed in on the disputed section in comparison to the RIM. That he could not tell which of the two parcels of land had been registered first and neither could he tell when the amendment had been done on parcels Nos. Kericho/Kipchimchim /1490 and 962. That the first registrations did not appear on the ledger but on the main map.

29. That whereas from his report he could not tell when the encroachment had taken place, yet from the findings, the disputed portion had been sold to the Original Deceased Defendant in the year1969 wherein he had plated tea in the year 1973.

30. In re-examination, he had admitted that there had been a discrepancy between the acreage of parcel No. Kericho/Kipchimchim/1490 and the ground acreage even upon including the disputed area. He however confirmed that the encroachment by parcel No. Kericho/Kipchimchim /962 had been by 0.11 hectares.

The Plaintiff thus closed his case.

31. The Defence case was opened with the testimony of Anthony Kiplagat Lelei who testified as DW1 to the effect that the Original Deceased Defendant had been his father. That he had obtained a Limited Grant of Letters of Administration ad litem on 13th January, 2022 in Cause No. E3 of 2022 wherein he had substituted the Original Deceased Defendant in the instant suit.

32. He adopted the Original Deceased Defendant's statement as his evidence in chief before proceeding to testify that his father had died on 4th September, 2021 in the pendency of the suit.

33. That he was born in the year 1962 and that whereas Parcel No. Kericho/Kipchimchim /962 was registered to the Original Deceased Defendant, land parcel No. Kericho/Kipchimchim/1490 (the suit land) belonged to the Plaintiff, parcel No. Kericho/Kipchimchim /1498 belonged to Rose Ruto while land parcel No. Kericho/Kipchimchim/1499 belonged to Erastus Ruto.

34. He explained that initially the whole parcel of land had belonged to his late grandmother Tapnyobi who had later sold it to 3 people being Chesuge Arap Mwei, Erastus Ruto and the Original Deceased Defendant. That Chesuge's land ran up to the River while Erastus' land ran up to the border of land parcel No. Kericho/Kipchimchim /962. That it had been after Erastus' land had been measured, that there had remained an area measuring 0.3 acres in the middle which portion, his grandmother had sold to the Original Deceased Defendant.

35. That subsequently, they had started planting maize on the land in the year 1969 wherein in the year 1973, the Original Deceased Defendant had planted tea. That at the time he had been 11 years old then. That they had planted tea from land parcel No. Kericho/Kipchimchim /962 to the 0.3 acres area that his grandmother had sold to the Original Deceased Defendant up to the river, an area measuring almost 3 acres. He confirmed that the court had visited the scene.

36. That they had been on the suit land when the Plaintiff came to occupy his portion. That there had been no title at the time his grandmother sold the land, which title had subsequently been issued after they had bought the land. That there had been no dispute when they bought the land. He confirmed that the Plaintiff's land went up to the river and that he (Plaintiff) had occupied his own land in the year 1975 which was two (2) years after they had planted the tea bushes therein. That they had been harvesting the said tea from the year 1975 to date.

37. That when the instant matter was filed in court in the year 2012, they had been planting and plucking tea on the disputed portion of the suit land for 39 years. That after his grandmother had sold the land, it had been up to the owner to measure the same. That they had not been told to change the RIM. He confirmed that the Original Deceased Defendant had a title deed to land parcel No. Kericho/Kipchimchim /962 which title deed he produced as Df exh 1.

38. He urged the court to grant the prayers in the counter claim as had been sought by the Original Deceased Defendant.

39. On Cross-examination, he confirmed that Tapnyobi was also known as Taprambui Misoi. That the said Tapnyobi was his grandmother since his grandfather and Tapnyobi's husband had been brothers. That land parcel No. Kericho/Kipchimchim /962 had been bought in the year 1969 from Tapnyobi although he did not know the purchase price. That the second land measuring 0.3 acres (the suit land) had been bought by paying an initial deposit of Kshs. 2,000/= and later on an amount of Kshs. 40,000/= had been added making a total of Kshs. 42,000/=. He confirmed that both parcels of land had been bought in the year 1969.

40. That whereas Kshs. 2000/= had been paid in the year 1969, Kshs. 40,000/= had been paid in the year 2001. That one Johnstone Smith (Deceased) together with Tanpyobi's sons had witnessed the sale. That the said Tanpyobi sons were alive safe for Erastus Ruto who was deceased but his wife was alive. That the Original Deceased Defendant had planted tea bushes in the year 1973 wherein they had taken the tea leaves after harvesting, to Tegat Tea Factory (KTDA). That currently, the tea leave were delivered to Kaisugu Tea factory and that they had changed the factory, where they took the harvested tea leaves, a long time ago.

41. He explained that in those days one would get a licence from KTDA to show the amount of tea bushes one had planted and on what parcel of land. That at first KTDA used to send tea extension officers to visit the tea farms although they were not currently visiting the tea farms as much. That whereas the tea had been planted when he was young, he knew that the same had been planted in the year 1973.

42. That they knew that the Plaintiff had fraudulently changed the map when he started alleging that the Original Deceased Defendant had trespassed onto his land in the year 2012. His evidence was that although he did not know when the boundary had been destroyed, yet he was sure that Tapnyobi had died in the year 2001.

43. He went further to testify that Tapnyobi had moved to Nakuru soon after she had sold the suit land in 1969. That whereas Chesuge had also bought land in the year 1969 from the said Tapnyobi, he did not know the acreage of the said portion of land which ran from upwards to the river. That he also could not tell the acreage of their own parcel of land.

44. In re-examination, he confirmed that his father had informed him of the amount that he had paid for the land wherein Smith (Deceased) had been a witness to the sale. That whereas he had no information on the license of KTDA, is father had never been charged for planting tea without license.

45. That they had been plucking tea for a long time wherein they had used the proceeds from the sale of the same to educate the whole family. That planting tea had been his father's occupation. He explained that currently tea planting had been liberalized since one could choose where to take their tea. That when the instant matter had been instituted in the year 2012, they had neither been charged nor reported to the police.

46. When he was referred to Df exh 1, he confirmed that land parcel No. Kericho/Kipchimchim/962 measured 1.6 hectares and proceeded to state that he did not have information to the effect that the Plaintiff had changed the RIM. He confirmed that they had lived with Arap Mwei from the year 1969 to 1975 when the suit land had been sold to the Plaintiff. That whereas the said Arap Mwei's land had run from the top to the River, the same did not meander.

47. Stephen Kipkelei Tuei testified as DW2 and introduced himself as a person who once worked with the police workshop in Nakuru between the years 1982 and 1995 but was currently a farmer in Molo whereby he kept cattle in addition to planting potatoes and pyrethrum. He adopted his Witness Statement dated 24th July 2012.

48. He confirmed that the parties to the suit were known to him, that his mother, one Tapramboi Misoi had sold land measuring 0.3 acres in the year 1969 to the Original Deceased Defendant who was his cousin, wherein the said Defendant had planted tea bushes therein in the year 1973.

49. That he had been born on that land, had gone to school and to work while residing on that said land. That whereas his mother used to live both in Kericho and Nakuru, when she became old, she had gone to live in Nakuru.

50. That his mother had sold the land to the Original Deceased Defendant and one Ruto. That whereas the Plaintiff's land was far from theirs wherein they had been separated by another parcel of land, the Plaintiff had by passed the owner of that parcel of land and had asked from them for land. That his mother did not sell the land directly to the Plaintiff, but had sold it to one Chesuge who had later sold it to the Plaintiff.

51. That the Original Deceased Defendant had been given the land where he had planted trees and tea bushes.

52. He confirmed that 3 people, being the Original Deceased Defendant, Ruto and Chesuge had bought parcels of land from his mother, one Tapramboi Misoi in the year 1969. He explained that after Ruto had bought his parcel of land, his mother had sold the remaining small section to the Original Deceased Defendant and that all the three purchasers were neighbors. He confirmed that the whole parcel of land had been his mother's before she had sold the same to the 3 purchasers.

53. That whereas his mother had the title deed to the whole parcel of land, he did not know its number. That the land had initially belonged to his father wherein the same had been transmitted to his mother upon his demise. That whereas the land had been family land, he was not aware if it had a title because he had been young at the time. He reiterated that his mother had sold the land to Chesuge who had in turn sold the same to the Plaintiff although he could not tell when the said transaction had happened because he had been away.

54. He reiterated that the Original Deceased Defendant had bought the land and planted tea therein in the year 1973 and not in the year 2012 as submitted. That he knew that the land had belonged to the Original Deceased Defendant.

55. His response on cross examination was to the effect that after Ruto had bought his parcel of land, a portion of land measuring 0.3 acres had remained. That whilst he could not remember when the land had been sold to Ruto since he had been away, when he went back, he had found the 3 purchasers on the land wherein his mother had told him that she had sold the land to them. That whilst Ruto was deceased, his wife and children were still alive.

56. He confirmed that Chesuge had been the first person to buy the land although he neither knew the acreage nor the year he had bought the same since he had not been there and had not witnessed the sale. That in the year 1970s after the land had been sold, his sixth born sibling had taken his mother to Nakuru. That he had also bought his own land in Nakuru where he had been living.

57. That whereas he had been born in the year 1942, by the year 1973 he had left home and this had been after the Original Deceased Defendant had planted tea which he used to find him ploughing. That the tea was on the suit land to date.

58. That he had not asked the 3 purchasers whether they had the titles because he was not interested in their land. That whereas he knew that the land was Original Deceased Defendant's, he had not seen the RIM and would not testify to issues regarding the said land since he had not been there and did not know if a survey had been done. He confirmed that both the Original Deceased Defendant and Ruto's land had been fenced hence he would not know the exact location of the disputed area.

59. That the Original Deceased Defendant had planted blue gum trees, Avocado and tea bushes. That however, he had not seen other trees since he had not gone down the river and was therefore not sure whether there had been cypress trees since he had only seen the blue gum trees. That further, he could not tell if the Original Deceased Defendant had made developments on his land since he did not reside there.

60. In re-examination, he confirmed that he did not witness the sale but had just found people on the land wherein his mother had told him that she had sold the land to them. That he did not know about a map because it did not concern him. That the land that had tea bushes, avocado and blue gum trees was land parcel No. Kericho/Kipchimchim/962.

The Defence thus closed his case.

61. Parties filed their respective submissions wherein the Plaintiff vide his submissions dated 29th May, 2024 summarized the factual background of the matter and the evidence adduced before framing his issues for determination as follows:

i. Whether the Defendant trespassed and/or illegally encroached onto the Plaintiff's parcel of land known as L.R No. Kericho/Kipchimchim/1490.

ii. Whether there are remedies available to the parties herein.

62. On the first issue for determination, he submitted that it was not in dispute that he was the registered proprietor of the suit land L.R No. Kericho/Kipchimchim/1490 land which was adjacent to the Defendant's land, L.R No. Kericho/Kipchimchim/962. That sometime in the year 2012, the Defendant had without any colour of right encroached and/or trespassed onto the Plaintiff's land parcel, wherein he had proceeded to plant tea bushes and to utilize a portion thereof measuring half an acre or thereabouts.

63. That the evidence adduced in court by PW2 confirmed that the disputed area, measuring approximately 0.37 acres formed part of his land. That whereas the Defendant and his witness claimed that the Original Deceased Defendant had purchased the 0.3 acres from Taprambui Misoi, no evidence had been submitted in support of the said assertion. That further, the Defendant and his witness did not know when the boundary had been destroyed or even the acreage of the parcels of land. That PW 2's evidence to the effect that the Defendant had encroached on 0.37 acres comprised in the Plaintiff's parcel of land parcel, was not discredited or dislodged.

64. That in so far as the legality of the Plaintiff's title had not been challenged, pursuant to the provisions of Section 26 of the *Land Registration Act*, the Plaintiff was entitled to protection of his proprietary rights as guaranteed by the provisions of Section 24 (a) of the *Land Registration Act* and Article 40 of *the Constitution*. That subsequently, the deceased Defendant's actions of entering onto the portion of land measuring 0.5 acres or thereabout, comprised in the Plaintiff's parcel of land and proceeding to plant tea bushes thereon, was trespass.

65. His reliance was hinged on the provisions of Section 3(1) of the *Trespass Act* to submit that at no point did he consent to the Defendant's actions since he had and continues to suffer substantial loss due to the said actions by the Defendant. Further reliance was placed on the provisions of Section 24 of the *Land Registration Act* to submit that his registration as the proprietor of the land vested in him absolute ownership of the land together with all the rights and privileges appurtenant thereto. He thus urged the court to find that the portion of land comprised in L.R No. Kericho/Kipchimchim/1490 belonged to the Plaintiff and any occupation of the same by the Defendant constituted trespass.

66. On the second issue for determination as to whether there were remedies available to the parties herein, he submitted that having proved his interest and ownership of the suit property, he was entitled to its exclusive use and occupation. He thus urged the court to issue an order restraining the Defendants, his agents and servants from trespassing onto and/or doing any other act which was prejudicial to his proprietary interest in L.R No. Kericho/Kipchimchim/1490. Reliance was placed in the decided case of Ochako Obinchu v Zachari Oyoti Nyamongo [2018] eKLR. Further reliance was placed in the

decided case of Henry Mwangi Wainaina v Stephen Kimani Gachuri & another [2019] eKLR to submit that the Plaintiff had met the threshold for the grant of a permanent injunction having established ownership to the suit property.

67. That whereas trespass was actionable without proof of damage, the Plaintiff urged the court to take cognizance of the Defendant's acts of trespass onto his portion of land and the planting and picking of tea thereon, which acts had caused the Plaintiff untold loss denial of his quiet use and occupation of the land. That noting the duration of the trespass and the size of the land, that the court do award him mesne profits and damages for the loss that had been suffered as a result of the wrongful deprivation of his land from the year 2012 to date. He placed reliance in a combination of decisions in the case of Park Towers Ltd v John Mithamo Njika & 7 Others [2014] eKLR and Duncan Nderitu Ndegwa v KP & LC Limited & Another [2013] eKLR. He thus urged that his Amended Plaint dated 19th May, 2022 be allowed as prayed.

68. Via his submissions dated 10th September 2024, the Defendant also summarized the factual background of the matter as well as the evidence that had been adduced in court before framing his issues for determination as follows; -

    i. Who owns the disputed portion as per the lands office records?

    ii. Who has the actual possession of the disputed area and for how long?

    iii. Can the principle of adverse possession apply in this instance?

69. On the first issue for determination as to who owns the disputed area, he submitted that whereas the parties herein had their respective parcels which shared one boundary, the District Surveyor's Report had indicated that as per the registry index map, the disputed area measuring 0.37 acres was part of the Plaintiff's parcel of land LR No. Kericho/Kipchimchim/1490. That further, while the Defendant (sic) had pleaded fraud in its registration, he did not lead evidence in court to that effect. That it was not contested that the suit land had originally belonged one Chesuge who never had a dispute with the Defendant and although it had been confirmed that there had been disparities in the ground measurements of the two parcels of land, the surveyor could not tell when the maps had been amended. He thus submitted that the disputed area was owned by the Plaintiff.(sic)

70. On the second issue for determination as to who had the actual possession of the disputed area and for how long, he submitted that whilst the Plaintiff had alleged that the Defendant had encroached on the suit land in the year 2012, when the court visited the two parcels of land in the year 2018, it had been clear that the disputed area had just existed on paper since on the ground the old tea bushes that had been planted in LR No. Kericho/Kipchimchim/962 ran all the way from the upwards side to its lower section including the disputed area. That further, there had been large cypress trees in the disputed portion which appeared aged over 40 years.

71. He thus submitted that the Plaintiff's claim of invasion of his land in the year 2012 had been perpetuation of untruths in his desperate attempt to sanitize his case and a ploy to negate and pre-empt the claim of adverse possession by the Defendant who had occupied the land for eons and had therefore had acquired the portion of land by dint of the doctrine of adverse possession.

72. That the third issue for determination had thus been proved wherein reliance was placed on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*, as well as on the decision in the case of Wambugu v Njunguna [1983] KLR 172, Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR. That the site visit by the court had also confirmed that the disputed portion had been represented on the maps only but not on the ground wherein it had been evident that the Defendant had planted tea

bushes and had been in open occupation of the disputed portion for over 50 years up until the year 2012 when the Plaintiff awoke and decided to file the instant suit.

73. He thus urged the court to find that the Plaintiff had been dispossessed of the disputed portion by acts which had been nec vic, nec clam, nec precario wherein at the expiry of 12 years the Plaintiff's title had been extinguished by the operation of law.

74. That subsequently, flowing from the Defendant's occupation of the disputed area which had been adverse to that of the Plaintiff and which had extinguished his title to the disputed portion measuring 0.37 acres comprised in Kericho/Kipchimchim/1490, the court should hold that the Defendant had proved on a balance of probability that his right of action as against the Plaintiff had been adverse pursuant to the provisions of section 38 as read together with Sections 7, 9 and 13 of the *Limitation of Actions Act* .He thus urged the court to dismiss the Plaintiff's suit with costs and uphold the Defendant's counterclaim.

Determination.

75. I have considered the parties case as pleaded and the evidence as adduced in support of their respective case thereof, the submissions by Counsel for the parties, the law and the authorities cited.

76. Vide a a further amended Plaint of 19th May, 2022, the Plaintiff herein sought for an order of permanent injunction restraining the Defendant by himself, agents, servants, employees or any other party through whom they be claiming from interfering with, trespassing onto, subdividing, selling, transferring, assigning, fencing, erecting structures thereon and or doing any other act which is prejudicial to the Plaintiff's proprietary interest in L.R No. Kericho/Kipchimchim/1490 upon a proper survey and a correct boundary being ascertained.

77. His case was premised on his evidence that whereas he had obtained title to land Parcel No. Kericho/Kipchimchim/1490 on 28th May 1986, the Original Deceased Defendant had trespassed and encroached on a portion measuring 0.37 acres of the said land in the year 2012 wherein he had removed the boundary demarcating the two parcels of land being Kericho/Kipchimchim/960 and his land No. Kericho/Kipchimchim/1490 by cutting down trees and had then proceeded to plant tea bushes.

78. In support of his case, he had called PW2 the land surveyor who had confirmed that indeed the two parcels of land reflected in sheets 7 and 8 of the RIM of Kipchimchim. That upon a ground visit to the disputed parcels of land, he had noted that the ground measurements differed from the measurements on the map. That whereas the suit land's registered area was 2.41 hectares its ground acreage was 2.14 hectares giving a deficit of 0.27 hectares. That on the other hand, the registered acreage of parcel No. Kericho/Kipchimchim /962 was 1.6 hectares wherein the ground area was 1.71 hectares. That the deficit on the suit land did not convert to the disputed area which was 0.5 hectares. He had however concluded that the suit land had been encroached into by an area of approximately 0.37 acres wherein tea bushes had been planted on the disputed section.

79. The Defendant's case on the other hand had been that originally, the whole parcel of land had belonged to his late grandmother Tapnyobi who had in the year 1969, sold it to 3 people being Chesuge Arap Mwei, Erastus Ruto and the Original Deceased Defendant, his father. That it had been after Erastus' land had been measured, that there remained an area measuring 0.3 acres in the middle which portion, his grandmother had also sold to the Original Deceased Defendant. That subsequently, they had started planting maize on the land in the year 1969 wherein in the year 1973, the Original Deceased Defendant had planted tea on his land parcel No. Kericho/Kipchimchim /962 including the 0.3 acres area.

80. That Chesuge later sold his land to the Plaintiff in 1973 who had occupied his own land in 1975. That they had been harvesting the said tea from the year 1973 up until when the instant matter was filed in court in the year 2012.

81. In his Counterclaim, the Defendant sought that the Plaintiff be ordered to transfer the disputed portion of land measuring about 0.8 acres to him and in default, the court's Deputy Registrar executes all the transfer documents in his favour and the Plaintiff's suit be dismissed with costs.

82. Having summarized the parties case as herein above the issue that stands out for my determination is;

    i. Whether the Plaintiff has established his case on a balance of probability as against the Defendant.

    ii. Whether the Defendant's counterclaim should be upheld.

83. On the first issue for determination it has not been disputed that indeed by the time the Plaintiff herein took occupation of his suit parcel of land namely No. Kericho/Kipchimchim/1490, he had found the deceased Defendant already in occupation of his own parcel of land No. Kericho/Kipchimchim /962 and that the two parcels of land bordered each other.

84. It is also not in dispute that the deceased Defendant had planted tea bushes on No. Kericho/ Kipchimchim/962 which extended (trespassed) into a portion measuring 0.37 acres of the Plaintiff's land parcel No. Kericho/Kipchimchim/1490.

85. I find the issue in dispute herein being when (the year) the said trespass of planting of the impugned tea bushes occurred. It is evident that whereas the Plaintiffs claim was that the said trespass had occurred in the year 2012, the Defendant on the other hand was adamant that the tea bushes had been planted in the year 1973.

86. Indeed the court had paid a site visit to the disputed parcel of land on the 29th March 2019 (however there are no findings filed as to the status on the ground) and directed that the district land surveyor visits both parcels of land to ascertain whether there was any encroachment by either party. The directions were complied with and the surveyor's report dated 1st July 2019 filed in court on the 2nd December 2021.

87. The Court of Appeal in the case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR held that,

> " A cause of action is an act on the part of the defendant, which gives the Plaintiff his cause of complaint."

88. That definition was given by Pearson J. in the case of Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:

> " Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the court."

89. A cause of action is therefore a set of facts to justify a right to sue. What then in this case is/are the sets of facts that the Plaintiff used to justify his rights to sue/cause of action? Whereas the Plaintiff's testimony was that the trespass occurred in the year 2012, the Defendant on the other hand testified that the tea bushes had been planted by his father in the year 1973. It was therefore the Plaintiff's obligation under the provisions of Sections 109 and 112 of the *Evidence Act*, which stipulate that the legal burden of

proof lay upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, to marshal evidence to dispute the Defendant's claim on when the cause of action occurred, which he miserably failed to do.

90. The emerging issues as stated in the report as well as the evidence adduced by the surveyor who testified as PW2 was to the effect that there existed no boundary on the ground as the disputed portion formed part of the Defendants' land. This in my view and without any contradicting evidence from the Plaintiff, rendered credence to the Defendant's argument that the impugned tea bushes had been planted on the disputed portion of land in the year 1973. The suit herein having been filed in the year 2012 which was about 39 years later was therefore time barred.

91. Section 7 of the *Limitation of Actions Act* provides:

> " 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

92. 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.

93. The Court of Appeal in Mukuru Munge vs. Florence Shingi Mwawana & 2 others [2016] eKLR held that:

> ''The purpose of the law on limitation of actions is to avoid stale claims, based on the sensible and rationale appreciation that over time memories fade and evidence is lost. The law of limitation therefore seeks to compel claimants not to sleep on their rights and to bring their claims to court promptly. Secondly, the law on limitation of actions ensures that claims are instituted within reasonable time after the cause of action has arisen, so as to secure fair trial when all the evidence is available and to ensure that justice is not delayed. In our minds, those are important constitutional values and principles, which are underpinned by legislation on limitation of actions.''

94. The Plaintiff needed to have commenced 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 already statute barred.

95. In the case of Bosire Ongero vs Royal Media Services [2015] eKLR the court had held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter was statute barred the court had no jurisdiction to entertain the same.

96. The locus classicus on jurisdiction is the celebrated case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal had held as follows;

> " 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.''

97. The Supreme Court in Ibren v Judges and Magistrates Vetting Board & 2 others (Petition 19 of 2018) [2018] KESC 75 (KLR) (21 December 2018) (Judgment) held as follows

> " A jurisdictional issue is fundamental and can even be raised by the court suo motu, as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367 stated thus:.
>
> > What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded..."

98. Clearly, the Plaintiff's suit was a non-starter and is herein dismissed.

99. The Defendant in his counterclaim sought that the Plaintiff be ordered to transfer the disputed portion of land measuring about 0.8 acres to him and in default, the court's Deputy Registrar executes all the transfer documents in his favour. In so pleading and the evidence adduced, the Defendant had raised the issue of adverse possession.

100. This pleading had sufficiently been supported by the evidence herein adduced to the effect that the Defendant's father had been in possession and occupation of the disputed portion of land since the year 1973 up to the year 2012 when the suit was filed, and that he had planted tea bushes on that portion of land. This in essence meant that the original deceased Defendant had been in actual, open, exclusive and hostile possession of the disputed portion of land for over 12 years.

101. The Court of Appeal in the case of Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR had held as follows:

> ''The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. See Mariba v Mariba Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See Wabala v Okumu (1997) LLR 609 (CAK). In Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows;
>
> > "Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala v Okumu [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in Bayete Co. Ltd v Kosgey [1998] LLR 813 where

the plaint made no specific plea of adverse possession, the plea was nonetheless granted."

102. The Defendant presented evidence to the effect that his father, the original deceased Defendant had planted the tea bushes on the disputed portion of land in 1973, at which time the Plaintiff was not in occupation. That it had only been in the year 2012 that the Plaintiff had "discovered" that the deceased Defendant had encroached on the property. That indeed, the Plaintiff who bought his parcel of land in the year 1973 had found the deceased Defendant already in occupation and had never raised a complaint wherein the deceased Defendant had continued plucking the tea for the close to 39 years before the suit was filed.

103. I find that the onus was on the Plaintiff to lead evidence to support his assertion that trespass to his portion of land by the deceased original Defendant had been committed in the year 2012 and not earlier, so as to rebut the Defendant's contention that his father got into the land and had been on the suit premises since 1973.

104. Having found that the deceased Defendant manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the Plaintiff's rights. The Plaintiff was dispossessed of the suit premises by those acts. To this effect the Defendant's counterclaim succeeds and it is ultimately ordered as follows;

    i. The Plaintiff's suit is herein dismissed.

    ii. The Defendant's counterclaim succeeds as prayed.

    iii. The Plaintiff shall transfer a portion measuring 0.37 acres of his land parcel No. Kericho/Kipchimchim/1490 to the Defendant at the latter's expense within 30 days from the date hereof failing which the Deputy Registrar of this court shall execute on behalf of the Defendant all the necessary transfer documents.

It is so ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 6TH DAY OF FEBRUARY 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE