



**Sugut v Koech (Environmental and Land Originating Summons
E013 of 2023) [2025] KEELC 400 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E013 OF 2023
MN MWANYALE, J
FEBRUARY 6, 2025**

BETWEEN

RICHARD KIPSEREM SUGUT PLAINTIFF

AND

BENJAMIN KIPWAMBOK KOECH DEFENDANT

JUDGMENT

1. The Plaintiff Richard Kipserem Sugut vide his Originating Summons dated 5th April 2023, sought for determination of the following issues against the Defendant Benjamin Kipkwambok Koech, to wit,
 - i. A declaration that the Defendants Rights to recover 2.1 Acres out of Land parcel number Nandi/Cheterit/794 is barred under the Limitations of Actions Act Cap. 22 of the Laws of Kenya, and Title over the Portion in Occupation and/use of the Plaintiff thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation for a period exceeding 12 years.
 - ii. That there be an order that the Plaintiff be registered as the proprietor of 2.1 Acres out of Land parcel Number Nandi/Cheterit/794 in place of the Defendant ad/or the register thereof be rectified to reflect the Plaintiff's ownership of the aforesaid land parcel.
 - iii. That the Defendant herein be ordered to execute all the requisite papers necessary to have the Plaintiff be registered as owner of 2.1 Acres out of land Registration Nandi/ Cheterit 794 decreed by the court, I default the Deputy Registrar and/ or the Courts administrative officer be at liberty to execute all such necessary documents to give effect to the judgment and/or decree of the court.
 - iv. Costs of the originating summons be borne by the Defendant.



- v. Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.
2. As the case was commenced by way of an Originating summons, directions were taken for the conversion of the O.S to a Plaint and the Applicant become the Plaintiff, the Replying affidavit was converted to a Defence hence the Respondent is now the Defendant, and the matter proceeded by way of viva voce evidence. These directions were taken on 30th October 2023.
3. After hearing all the witnesses and closure of the Parties respective cases the court called for a survey report so as to be aware of the occupation by the parties as it deemed this evidence crucial to the case and parties were at liberty to file their submissions on the main suit as well as the survey report.
4. After the survey report was filed and deemed as a common Exhibit 1, the Defendant filed an application under a Certificate of urgency and directions in respect of the said application were issued on 11.12.2024 whereat the court directed, interalia, that submissions in respect of the survey report be filed as had earlier been directed and that the merits or otherwise of the application would be disposed off in this judgment.

Plaintiff's Case

5. It is the Plaintiff's case that he has peacefully and openly occupied and cultivated 2.1 acres out of land parcel number No. Nandi/Cheterit/794 for an uninterrupted duration exceeding 12 years w.e.f 1995 and has thus acquired ownership by way of prescription and/or adverse possession: that the said occupation was without interruption and interference by the defendant who is the registered owner, who holds the title in trust of the Plaintiff by operation of the law, Thus the Defendant's title in respect of the 2.1 Acres has now been extinguished.
6. On the strength of the above the Plaintiff sought for Judgment in terms of the prayers set out at paragraph of this Judgment.

Defendant's Case

7. It is the Defendants Defence as captured in the Defendant's Replying Affidavit now converted to a defence that;
 - i. the Originating summons is frivolous, mischievous and a gross abuse of the court process, that the Defendant only sold 0.7 acres to the Plaintiff who failed to pay the full purchase price and as a result of the failure to pay the full purchase price the defendant did not proceed to obtain the requisite Land Control Board Consent, as the Plaintiff did not make full payment.
 - ii. That the plaintiff thereafter grabbed an additional 1.4 acres and thus his occupation of the area totaling to 2.1 acres is forceful and illegal.
 - iii. It is the Defendant's further case that the purchase price was kshs 9,000/=for one point and that the plaintiff only paid for the one point and failed to make any other further payments and failed to pay for the 0.6 cares to date.
 - iv. The defendant demanded the plaintiff to vacate the 2.1 acres which he was occupying forcefully having only paid for 0.1 acre.
 - v. That the defendant had sought for interventions for the plaintiff to vacate the property on various occasions including on 28.11.2004, on 12.02.2012, on 22.10.2022 and on 8.11.2022.



that he did not consent to the occupation and fencing done by the plaintiff of the 2.1 acres, thus the Applicant is not the rightful and genuine owner of the alleged parcel.

- vi. Thus, the Defendant sought for the dismissal of the Originating Summons and a declaration that the occupation by the defendant is illegal as the defendant did not pay for the 0.7 acres of the property and the acquisition by the Plaintiff of the additional 1.4 acres is void and amounts to trespass, that the transaction is a nullity for want of the land control Board consent under the Land Control Act. That the Plaintiff's structure on the suit property be demolished.

Plaintiff's Evidence

8. The Plaintiff testified as P.W. 1 and adopted his supporting affidavit dated 5/4/2023 and the supplementary affidavit dated 22/9/2023 as part of his evidence in chief. It was his further statement that he knew the defendant who had sold him 2.1 acres in Nandi Chepterit⁷⁹⁴. He had started buying from 1995 and an agreement dated 11/7/1995 was prepared by the then Area chief Christopher Koech and the agreement was produced as P exhibit 2, an objection to its production having been overruled with the issue of its probative value having been reserved for determination in this judgment. P.W.1 further stated that on this particular day he bought 0.7 acres but between 1995 and 2004, he bought in piecemeal and all the acreage he bought now totals to 2.1 acres as he would fence the land every time, he purchased the additional acreages. that he had lived thereon from the said time with no dispute till 22.10.2022 when he sought for the assistance of the Chief in a meeting attended by over 30 people so as to request the defendant to transfer the property to him and a demand letter was prepared after the defendant's refusal to transfer the property to him. There had been an earlier meeting on 8/9/2022 at the Assistant Chiefs office. That the Plaintiff and the defendant did not share a boundary as there was a fence between his property and another purchaser. He stated that he had planted trees in the property. The plaintiff produced as exhibits P exhibit 1 an official search, and p exhibit 3 the demand letter, the agreement p exhibits 2 having been alluded to earlier. He identified the minutes of 8.9.2022 and 22.10.2022 which were marked for identification and were to be produced by other witnesses.
9. On cross examination and in relation to the P exhibit 2 the witness stated that the property he purchased from the defendant was not identified in the said Agreement and that the 0.7 acres were not stated from which property that the same would be hived off. The witness stated that he had paid Kshs 9,000 at the execution of the Agreement which was a second agreement and had paid the balance within 6 months. He stated further that he did not go to the Land control board as required within the 6 months. Upon purchase of additional acreage, he would call as surveyor who would extend the fence but no mutations were drawn, the surveyor had no authority from the LCB.
10. In further Cross - Examination the witness stated that the defendant was aware of the fence extension by the surveyor. He stated that the minutes before the chief and the ACC were prepared before the case was filed. The witness stated that he had not had any issue with the respondent on his occupation and that by December 2022 he had bought 2.1 acres made payments to Mr. Koech depending on the needs of Mr. Koech including payment of school fees. That Emily Koech the defendant's wife had signed the agreement too thus giving her consent, that he had paid for the entire 2.1 acres and there was no outstanding balance, the payments had been made on trust. He stated further that there had been no meeting in 2008 and in 2012 to demand payment between him and the defendant and that the confrontation occurred in 2022 when he involved the area chief who called for a meeting at the Plaintiff's home.
11. In Re-Examination the witness stated that the property was located in Chepterit area where he resided. He had initially bought 0.7 acres but over time he bought additional acreage making it 2.1 acres and he had not been sued for recovery of the money nor charged with forcible entry. He confirmed that



- the defendant's wife was present when the Agreement for sale was prepared. The witness stated that he was occupying 2.1 acres since a surveyor would be involved whenever the he purchased additional acreage. It was his statement that he had occupied the 2.1 acres from 1995 and that they had been no meetings in 2004 and in 2012 over the suit property, the property was registered in the name of the Defendant. He was present when the Agreement was made and his name reflects on the Agreement. There had been no dispute till 2022 and this suit was the first dispute.
12. Pw2 was Margaret Jepkoech Kurgat the area chief of Chepterit Location who was a brief witness who produced P Exhibit 4 and P exhibit 5 being minutes of meetings held on 22.10.22 and 8.11.2022 respectively involving the ownership dispute complaint as between the plaintiff and the defendant and she stated that the meetings had resolved that the plaintiff had purchased the suit property and the defendant ought to transfer to him. The first meeting had been attended by 32 elders while the second meeting had been attended by 21 elders. It was her evidence that both meetings had awarded the plaintiff 2.1 acre
 13. In cross examination the witness stated that she had served as an Assistant chief before ascending to the position of chief. The minutes were titled Lands dispute although they had not sat as a land dispute tribunal. That the meeting was held at the plaintiff's home and the Defendant was present but he refused to accept the minutes. She stated that she was not aware that some payments had not been done and that no land control board consent had been issued in the transaction. She was aware that the first sale had been done in 1995 and the meeting to resolve was done 28 years later in 2022. That the agreement had lapsed after 6 months. She was the chairperson of the meeting in P Exhibit 4 but did not appoint a secretary as she took the minutes herself. She stated that the minutes were accurate and not manufactured. That everyone had an opportunity to state their grievances at the meeting.
 14. In Re-examination the witness stated that she took the attendance list after the meeting, her role in both meetings were to take minutes as an Administrator. The minutes had captured the issues pertaining to the dispute being the issues of the acreage and that everyone stated his grievances. The first meeting was held at the plaintiffs home so as to see the developments that the plaintiff had made. Mr. koech stated that he had sold 1.6 acres while Mr. Sugut indicated that he had bought. 2.1 acres
 15. PW3 Mr. Felix Kipchumba equally testified that he was testifying pursuant to court summons so as to produce photographs that he had taken in respect of the buildings and developments carried out in the suit property. The witness a son of the Plaintiff stated that he was the one who took the photographs through his personal phone, printed the photographs and signed the certificate, he produced the photographs and the certificate as P exhibit 6 a to k
 16. In cross-examination the witness stated that he had signed the certificate but had not indicated his identity card number on the same, that the certificate did not capture the gadget and the serial number and that the Tecno phone did not have a printer and the external printer details were not captured in the certificate which also left out the details on the condition of the phone. The witness indicated that the phone that was used to take the photographs was his, having being gifted by his mother who had bought the same. The witness stated that the photographs had been taken at 4.30 p.m but the same were not date stamped.
 17. In Re-examination the witness stated that he had printed the photographs in a cyber cafe and that he was in control of the phone as it was his. And that he took the photograph as an ordinary person and not a professional.
 18. was Mr. Samuel Kibet Kitur who adopted his witness statement dated 11.10.2023 as part of his examination in chief and was thereafter cross examined. In cross examination he stated that he had known Mr. Sugut the plaintiff from 1995 as his neighbor who had initially bought 0.7 acres in Nandi/



- Cheperit 494 from Mr. Koech but had not witnessed any of the agreement for sale. The witness stated that he as presents in the October 2022 meeting held to resolve the dispute between the plaintiff and the defendant, that every time the plaintiff purchased an additional acreage the boundary would change.
19. In further cross examination the witness stated that the existing boundary suggest that the plaintiff was occupying 2.1acres. the witness was not aware the amount that had been paid by the Plaintiff to the defendant since payments had been made in bits. There was continuous sale whenever Mr. koech had personal needs he would sell. The witness stated that he did not see any surveyors during that time. In respect of the meeting held on 22.10.2022 the witness said that the area chief convened the same at the plaintiff's house but there was no secretary, and the village elders were also present. There was purchase and construction but no Land Control Board Consent. The witness was not aware of any outstanding balance in respect of the purchase and was not aware of any follow up having been made towards the same.
 20. In Re-Examination the witness stated that he knew the acreage occupied since the plaintiff and the defendant had shown them the boundaries, that Mr. Sugut had occupied the parcel from 1995. He had attended the meeting held on 22.10.2022 but could not recall who the secretary had been, the meeting had been convened as a result of the complaint by Mr. Sugut that the defendant had refused to transfer to him. The witness stated that there was a barbed wire between the two portions which were separated by a neighbor.
 21. Mr. Alfred Kiprobon Kemboi testified and adopted his witness statement. He stated that he had been casual worker for the plaintiff for about 30 years at the plaintiff's farm which he had bought from the defendant. In cross examination the witness stated that he did not witness any agreements of sale between the two. he stated that the plaintiff had taken possession of the suit property between 1993 and 1995 and that upon payments being made to the defendants he would move the boundaries after been shown the new boundaries by the surveyor. The witness stated that he is the one who planted trees and tea and erected the fence. The boundary would be moved with the assistance of the defendant by way of barbered wire,
 22. In further cross examination the witness stated that there was a semi- permanent house which was Mr. Sugut first house but there was erected a permanent house later on. He stated that there had been no dispute between the two save for the complaint by Mr. Sugut which the village elders and the chief attended. He was adamant that the plaintiff had purchased the property but had not witnessed any agreement for sale or exchange of money. The witness learnt from the meeting convened by the chief that the plaintiff had no title and was not aware whether the plaintiff had attended a land control board.
 23. On re-examination the witness stated that he learnt of the purchase whenever he was instructed to move the boundary and the instructions were issued by the defendant and the surveyor would be present any time, he moved the boundary. The markings would be done by the surveyor. The witness stated that he planted trees and tea erected the fence, dug a borehole, a pit latrine and constructed a house. He had worked for Mr. sugut for more than 25 years and had planted the tea in 2012 and there were no disruptions while he worked.
 24. PW.6 Mr. David Sang, adapted his witness statement dated 11.10.2023 as part of his evidence in chief, it was his further testimony that the Plaintiff and the Defendant were neighbours. In cross-examination the witness indicated that the Plaintiff and the Defendant were his neighbours but that Mr. Sugut the Plaintiff had not title. He stated that he had found Mr. Sugut on the suit property from 1995, but he was not present when he bought, and did not know whether they were Agreements and what amount had been paid. He indicated that Mr. Sugut had bought the 2.1 acres progressively. He was not aware how much Mr. Sugut had paid and confirmed that they had been no dispute between the two, who



- had lived peacefully. He stated that Mr. Sugut had possession of the suit property and had planted and harvested trees. He was not aware whether there was any outstanding balance, he had not been called to a dispute between the two, he was not aware whether the Plaintiff had gone to the Land Control Board.
25. On re-examination, he stated that he had lived as a neighbour of the Plaintiff and the Defendant for more than 20 years without a dispute, he knew the property belonged to Mr. Sugut as he had found him in the area. He stated that he had not taken sides and that Mr. Sugut lived on more than 2.0 acres.
26. PW7, was the last witness to testify on behalf of the Plaintiff, Mrs. Emmy Jepkemy Seroney adopted her witness statement as part of her evidence in chief. The witness stated that she knew the Defendant as the person who sold land to her husband in July 1995. On P.Exhibit 2, she recognized the same as the agreement that she had witnessed. She stated that they had discussed the dispute on 22.10.2022 in the presence of village elders, as the Defendant was not willing to transfer the property. The meeting had been chaired by the Area Chief who prepared minutes. The witness equally stated that another meeting had been held at the ACC's office at Mosoriot on 08.11.2022 where she was in attendance together with the Plaintiff and the Defendant and the meeting was chaired by the ACC. The witness stated that Nandi/Chepterit/794 was registered in the name of the Defendant. She had been indicated in the Agreement as a joint purchaser as she was the spouse of the Plaintiff. She stated that they were other purchasers including Esther Kemboi who had purchased property within the property of Benjamin Kipkwambok.
27. On cross-examination, the witness stated that the Plaintiff had not signed P.Exhibit 2 and she was the purchaser in the Agreement. They had purchased 2 points to include to the additional 5 points; already purchased, there was no agreement for the initially 0.5 point. On the date of execution of the Agreement they paid Kshs.9,000/=. The witness stated that they had no agreement for the 0.5 acres. The witness stated that they bought the last piece from the Defendant in 2004 and that they have bought a total of 2.1 acres progressively from 1995 to 2004. The witness did not have documentation to support the purchase of the additional 1.4 acres, though she said they paid in cash. The witness stated that she was aware of the procedure to purchase property that required Land Control Board consent; and confirmed that they have not obtained the said consent since the Defendant had refused to attend the Board. She confirmed that a meeting was held in October 2022 at their home pursuant to a complaint they had made against the Defendant; and that the chief took the minutes, and the chief was also the chair. Mr. Kitur who was present in the meeting of 22.10.2022 signed the minutes on 26.10.2022 but was present in the meeting.
28. On re-examination, the witness stated that she jointly purchased with the Plaintiff as he was his husband. They paid for 2.0 acres in cash; and were occupying 2.1 acres. They had acquired the property progressively from 1994 to 2005, they would pay and move the fence. The Defendant had been paid in fully and there was nothing owing to him. She said they had occupied the property from 1995 to date. She stated that the chief had been taking minutes whilst chairing the meeting.
29. With the testimony of the seven witnesses, the Plaintiff's case was closed.

Defence Evidence

30. DW1 Evans Kipkorir a police officer based at Mbalambala police station and a son of the Defendant, testified and adopted his witness statement. The witness stated that he did not remember the exact year that Mr. Sugut came to the property, but remembered that during his circumcision period and particularly on 28.11.2004, his father visited him in the bush and told him that Mr. Sugut had not finalized the purchase price. The witness could not recall the acreage that his father had sold but stated that his father had told him that Mr. Sugut bought 0.7 acres but had only paid for 0.1 acres, he informed



- court that his father had told him of a dispute over the ownership in 2012. The witness indicated that he had interacted with Mr. Sugut who informed him of the Agreement dated 11.07.1995, that the witness stated that he attended the meeting at Mr. Sugut's home on 22.10.2022 but his name did not appear in the list as well as his father's name that of his mother and his sister.
31. On cross-examination, the witness stated that he was born 1991 and that his father was the registered owner of Nandi/Chepterit/794. He stated that he attended the meeting at Mr. Sugut's home but did not attend the meeting at the ACC's office though his father was in attendance. The witness did not know how much was owing and he further stated that Mr. Sugut was in occupation of the property but he had paid for 0.1 acres. The witness did not recall when Mr. Sugut took possession of the 2.1 acres, he agreed that Mr. Sugut was in occupation illegally, but there was no suit that had been initiated for recovery of the suit and/or the balance of the purchase price. He stated that the 2.1 acres had been planted with trees, and that there was a lady known as Esther Kemboi who had bought the property as well as Isaac Metto but none of them had been given a title by way of transfer. The witness stated that his school fees were not paid by the proceeds of sale paid by Mr. Sugut. He confirmed that he had no grudge with the chief and that Mr. Sugut occupied the suit property without his father's permission.
 32. The Defendant Mr. Benjamin Kipkwambok Koech testified as DW2, he adopted his witness statement, as part of his evidence in chief, it was his further statement that Mr. Sugut bought from him 0.7 acres but he only paid for 0.1 points, in Nandi/Chepterit/794. They agreed that Agreement for sale would be prepared once the Plaintiff paid everything. The witness indicated that the property was registered to him on 13.06.2008, he had sold the same but had not been registered since he undertook succession in 2008. The witness stated that he allowed the Plaintiff to enter the suit property in 1995, his father had subdivided the property before his death and he had sold his portion. The witness stated that he had initially sold 0.2 points but later on sold 0.5 points after his mother's death.
 33. The witness stated that his son did not know when Mr. Sugut entered the suit property.
 34. The witness stated that he only received Kshs.9,000/= for only one point. He stated that Mr. Sugut was occupying 2.1 acres while his whole property was 3.06 acres and that his only remaining acreage was 0.9 acres. The witness stated that Mr. Sugut was occupying 0.7 acres and he did not know why he was claiming 2.1 acres.
 35. He stated that he was called to the meeting by the chief when the meeting was over and he was not present during the said meeting. His name was missing from the attendance list as he had attended when the meeting was over.
 36. With regard to the other meeting, at the ACC's office his name had been captured on the attendance list but his details were missing, together with the details of his wife and daughter. He had no bad relationship with the chief.
 37. He stated that in 2004, he went to the Plaintiff to ask him to give him his balance for the 0.6 acres, he demanded the balance in 2012, in the company of his brother Julius Koech. He had refused to sign the transfer forms which were forwarded to him on 21.12.2022, since the application for the Land Control Board consent was for 2.1 acres. The witness produced D.Exhibits 1 – 8 as per his list of documents. He had told the Plaintiff to vacate the property in 2004, as well as in 2012.
 38. The witness stated that the Plaintiff ought to get his 0.1 acres which he had paid for and that he had not been paid for the 2.0 acres, and that the Plaintiff was only occupying 0.7 acres and not the extra 1.4 acres. That Mr. Sugut utilizes the 1.4 acres for tilling and grazing of his cows; which he had allowed him. The witness was ready to surrender the 0.1 acres.



39. The witness stated that Mr. Sugut no longer grazed cows but had planted tea without his authority and was thus a trespasser on the 1.4 acres, as the transaction had not been given the Land Control Board consent.
40. In cross-examination, the witness stated that he was the registered owner of Nandi/Chepterit/794. He knew he pointed out the property, and they had been on dispute over the property, that the Plaintiff was occupying the property and utilizing 2.1 acres without his permission. He confirmed that the Plaintiff had permanent and a temporary house. He had not sued for recovery of the land before, but went to demand for the payment in 2012 in the company of Julius Koech and the late Gilbert Chepsiror. He indicated that Julius Koech was not his witness.
41. On the meeting on 22.10.2022 the witness stated that there was a meeting at Richard's house convened by the Plaintiff but he was called when the meeting was about to end. He attended the meeting at the ACC's office but was not given a chance to take. He stated that the Plaintiff had planted tea on 0.4 points of the property and he was ready to give him 0.1 acres.
42. The witness stated in further cross-examination that he had sold to Esther Kemboi but had not transferred. The current value of the property was Kshs.250,000/= per point. He had not sued the Plaintiff for balance of the purchase price but had reported to the village elder who is now deceased. He stated that during the transaction his son was a minor, he stated that from 1995 the Plaintiff had been in occupation. He stated that it was Richard's wife who would make payments, and that he would approach Richard whenever he had a problem.
43. On re-examination, the witness stated that he had a dispute with the Plaintiff in 2004, and that he was ready for 1 point to be given to the Plaintiff.
44. DW3, Emily Chepkoech Koech testified and adopted her witness statement dated 03.10.2023 as part of her evidence in chief. It was her further testimony that her husband the Defendant was the registered owner of about 3.3 acres and had sold only 0.7 acres to the Plaintiff who had paid for only 0.1 acres. They had initially sold 2 points then later on sold 0.5 points. They did not receive any money for the initial points.
45. The witness could not recall how payments had been made in respect of the property since she and her children were not involved. She stated that there was no Agreement between Sugut and her husband. She stated that she had not signed D.Exhibit 4 the Agreement for sale, and that in 1995 Mr. Sugut purchased 0.2 acres and paid only Kshs.9,000/= and that Mr. Sugut did not pay for 2.1 acres. She stated that Mr. Sugut had initially built a semi-permanent house on 0.2 acres where he had settled. She would inquire from Mr. Sugut, why he was building yet he had not paid before 2004. They had demanded for payment of the balance in 2004 in the company of her husband and son. They had not gone to the Land Control Board since they were good neighbours. In 2012, they involved Mr. Gilbert Chepsiror to demand the money from Sugut when Mr. Chepsiror. When Mr. Chepsiror wanted transfer done to his name, Mr. Sugut had refused to cooperate.
46. They had demanded payment even after 2012, the witness stated that she was present in both the meetings of 22.10.2022 and the one at the ACC's office, though her name was missing. She stated that P.Exhibit 4 and P.Exhibit 5 had been authored by the chief. She stated that there was no continuous occupation for 12 years.
47. She stated that Mr. Sugut would refuse to go to the Land Control Board and that she was ready and willing to give Mr. Sugut the 0.1 acres; and vacate the 0.6 acres, and return the 2.0 acres to the Defendant as they did not give him permission.



48. On cross-examination, the witness stated that Benjamin Koech was the owner of the property having inherited it from his father and that he was registered in 2008 according to D.Exhibit 1. She stated that Mr. Richard entered the 2.0 acres without permission he was only entitled to 0.1 acres; he was not in a hurry to pay, but they did not sue him
49. On D.Exhibit 2, the letter stated that the occupation was illegal. She stated that Mr. Sugut had a semi-permanent house and also a permanent house. Mr. Sugut had planted and harvested tea on the property but the trees had been planted by Mr. Sugut and themselves.
50. She stated that they had not reported anywhere that Mr. Sugut had grabbed their land. She said they occupy and utilize a lesser acreage than Mr. Sugut. They had already transferred to Esther Kemboi, and that Esther Kemboi property was between the Plaintiff's and the Defendant's.
- Mr. Sugut had fenced his property he had cows, which later died. He had dug a borehole. The witness stated that her husband would take money from Mr. Sugut without her knowledge. She died having signed the Agreement for sale and did not agree with the content.
51. On re-examination the witness stated that Mr. Sugut fenced 2.1 acres hence a bigger portion than theirs.
52. After the testimony of the 3 witnesses, the Defence case closed.

Plaintiff's Submission

53. The Plaintiff has framed and submitted five issues as follows: -
- i. Issue number 1, whether the non-joinder of the Plaintiff's spouse is fatal to the suit, on this issue the Plaintiff submits while placing reliance on Order 1 Rule 9 and 10 of the Civil Procedure Rules that a misjoinder and/or non-joinder of parties is not fatal to a case and further places reliance on the decision in the case of *William Kiprono Towett and 1597 Others Vs. Farmland Aviation Ltd and 2 Others (2016) eKLR* where the court held inter alia,

“That no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
 - ii. On issue number 2, to wit whether P.Exhibit 2 lacks probative value in light of the provisions of the *stamp duty Act*, the Plaintiff submits that during pre-trial conference, no objection was raised on the issue of the Agreement for sale lacking stamp duty and that the same could not be raised at trial, to buttress this point the Plaintiff relies on the decision in the case of *Joel Muga Opija Vs. East African Sea Food Limited, Civil Appeal No. 309/2010 (2013) eKLR* as well as *Abok James Odera T/a Odera and Associates Vs. John Patrick Machira T/a Machira and Company Advocates (2013) eKLR*, where a document that had not been stamped was held not to be non-compliant.

The Plaintiff also cites the decision in the case of *Paul Njoroge Vs. Abdul Sabuni Sabonyo (2015) eKLR*, where the court allowed a document to be produced and payment of stamp duty to be made thereafter.
 - iii. On issue number 3, the Plaintiff has framed an issue to wit, when did time start running for purposes of Adverse possession.

On this issue, the Plaintiff submits that time for purposes of adverse possession, started on 11.06.1995 in accordance with P.Exhibit w, when he entered into the suit property, the entry



being pursuant to the Agreement for sale, but permission thereafter terminated, for purposes of adverse possession. In support of this limb of submission, the Plaintiff cites the decision in the case of *Wilson Kazungu Katana and 101 Others Vs. Salim Abdalla Bakswein and Another* which decision quotes the decision in the case of *Kasuve Vs. Mwaari Investments Limited and 4 Others* 2004 IKLR 184 and *Wange Vs. Saika*.

The Plaintiff also quotes the decision in *Miki Waweru Vs. Jane Njeri RIchu*, where the court held interalia,

“In our view there a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction thereafter becomes void under Section 6(1) of the *Land Control Act* for lack of consent of the Land Control Borad such permission is terminated by operation of law and the continued possession if not illegal becomes adverse from the time the transaction becomes void.”

The Plaintiff further cites the decision of the case of *Simon Kilinge Kingoo and 11 others Vs. Amos Kamia Nguku and 4 others* (2019) eKLR wherein it was held interalia,

“Therefore, the mere fact that the occupation of the suit land by the Plaintiff is contrary to the provisions of the *law of succession Act* cannot in itself defeat a claim for adverse possession. The Plaintiffs having occupied the suit land for 12 years uninterrupted and without the permission of the registered owner of the administrators of the Estate of the registered owner, I find that they are entitled to the suit land by way of adverse possession.”

- iv. On issue number 4, the Plaintiff has framed the same as follows. Whether the Plaintiff has confines of the doctrine of Adverse possession? With regard to this limb of submission, the Plaintiff places reliance on the case of *Wilson Kazungu Katana and 101 Others Vs. Salim Abdalla Bakswein* on the ingredients to be proved.

on this issue, the Plaintiff has submitted on sub issues, including whether the Defendant is the registered owner of the suit property to which the Plaintiff submits that the same was proven by P.Exhibit 1.

- v. On sub issue 2, as to whether the Plaintiff is in possession of the suit land or lives and has physically and actually lived thereon in open, hostile and continuous manner since the years 1995 to entitle him an adverse owner, the Plaintiff submits that he has lived on a portion of Nandi/Chepterit/794 which is identifiable.

The Plaintiff submits that according to the certificate of search the 12 years period accrued from the date of registration of the Defendant as a proprietor.

The Plaintiff places reliance on the decision of *Mtana Lewa Vs. Kahindi Ngala Mwangandi* (2015) eKLR on the elements to be proved. The Plaintiff submits that the neighbours proved the element of publicity of occupation of the Plaintiff,

The Plaintiff further submits that the occupation was also proved by the photographs which were produced in accordance with Section 106 (B) (4) of the *Evidence Act*.

The Plaintiff submits that the occupation was not by force and/or illegal as indicated by the Defendants.

- vi. On the last issue, the Plaintiff submits that the Defendant interests in the suit property were extinguished by effluxion of time and is holding the title in Trust for the Plaintiff.

To buttress the point the Plaintiff relies on the decision in the case of *Peter Mbiri Michuki Vs. Samuel Mugo Michuki*.



- vii. Lastly, the Plaintiff submits that costs of the case be awarded to him and that the Plaintiff case be allowed as prayed.

Defendants Submission

54. On his part the Defendant through his counsel on record Ms. CF Otieno Esq. Advocate framed and submitted on 8 issues which the court frames as follows: -
- i. On issue number 1, on whether the Applicant purchased land from the Respondent and the acreage thereof.

The Defendant submits that the only evidence of purchase is the agreement dated 11.07.1995 (D.Exhibit 4) for a sum of Kshs.9,000/= only. That the Agreement shows a purchase of 0.2 acres totaling Kshs.18,000/= but only Kshs.9,000/= was paid and no further payments and/or agreements were made. That there was no further documentation supporting the purchase of 2.0 acres out of the 2.1 acres.
 - ii. On issue number 2, as to whether the Applicant paid the full purchase price to the Respondent in full; the Defendant submits that the only payment made was for Kshs.9,000/= for 0.1 acres.
 - iii. Whether the Sale Agreement dated 11.07.1995 is valid and properly before court. The Defendant placing reliance on Section 19 of the stamp duty Act submits that the said Agreement having not been stamped is an invalid Exhibit before court. It would be validated if stamp duty is paid either to the court or collector of stamp duty.
55. On proof of Adverse possession framed as issue number 4, the Defendant submits that the adverse possession was not proved and places reliance on the decision in the case of Wifred Kegonye Babu Vs. Henry Mose Onuko Kisumu Civil Appeal No. 82 of 2014, as well as Mungania Vs. Imanyara (1985 KLRI) to support the proposition that a purchaser cannot seek adverse possession based on an Agreement for sale. The Defendant further relies on decision in the case between Sisto Wambugu Vs. Kamau Njuguna.
56. The Defendant further submits that the Plaintiff has approached the court with unclean hands, and have given the reasons hereof, and is thus not entitled to the orders sought and should vacate the same, the 2.0 acres that the Plaintiff is illegally occupying.
57. On the surveyor's report, the Defendant submits that the Chief Chepterit location was in attendance during the survey process and as she had given evidence on behalf of the Plaintiff, she was a biased witness and hence the survey report ought to be expunged since the two other purchasers were also absent. That the survey report is not accurate as it did not identity in the sketch map the Appellant homestead, he fenced off part the trees and their age and type of fencing.
58. The Defendant further submits that the Plaintiff should be condemned to pay the costs, and the Plaintiff's occupation should be declared illegal, declaration that the Plaintiff did not fully pay for the 0.7 acres, and that the Plaintiff is a trespasser.
59. Before framing the issues for determination, the court makes notes of the following undisputed facts in the matter: -
- i. That the Defendant is the registered owner of the parcel known as Nandi/Chepterit/794.
 - ii. That the Plaintiff initially purchased 0.7 acres from the Defendant In or about the year 1995, but no Land Control Board consent was issued in respect of the said purchase.



- iii. That the Plaintiff and Defendant occupy distinct portions within Nandi/Chepterit/794 separated by the portion occupied by Esther Kemboi.

Issues of Determination

60. Having analyzed the pleadings, the evidence on record, the submissions of the parties and the relevant and applicable law, the court frames the following as issues for determination: -
 - i. Issue number 1, relates to the evidential value of the Agreement for Sale produced as P.Exhibit 2, which the court alluded to its challenge at paragraph 8 of this judgment, thus issue number 1 is what is the probative value of P.Exhibit 2.
 - ii. Issue number 2, emanates from paragraph 4 of this judgment and relates to the admissibility or otherwise of the survey report, common Exhibit 1 that is subject of the pending application 11th November 2024, hence issue number 2, whether or not the court should rely on the survey report dated 11.11.2024.
 - iii. Issue number 3; whether or not the Plaintiff has proven the elements of adverse possession and thus proven his case
 - iv. Issue number 4, where the Defendant's defence and counter-claim have been proved and should be upheld.
 - v. Issue number 5, what reliefs ought to issue
 - vi. Who should bear the costs of the suit.

Analysis and Determination

61. On issue number 1, on the probative value of P.Exhibit 1. The court notes that P.Exhibit 1 is the same document that the Defendant also produced as D.Exhibit4, the Agreement dated 11.07.1995.
The Defendant submits placing reliance on Section 19 of the stamp duty which prohibits production of evidence in civil proceedings of any unstamped document.
62. The Plaintiff submits that the P.Exhibit1 is of probative value as unstamped documents can be relied upon in evidence and the court can order payment of the stamp duty afterwards, as was held in Paul Njoroge Vs. Abdul Sabuni Sabanyo (2015) eKLR.
63. The issues sought to be proved by P.Exhibit 1 which is the same document the Defendant exhibited as D.Exhibit 4, are no longer contested as at paragraph 57 of this judgment, The court listed the issues that were settled during trial and among the issues was the issue of purchase by the plaintiff of the initial 0.7 acres from the Defendant as captured in P.Exhibit 1, and D.Exhibit 4.
64. The probative value of the said documents, having been settled by the parties during trial is no longer an issue for determination as doing so would be an academic exercise. The court had to frame the same as it was raised during the testimony of PW1, but by the time the Defence produced D.Exhibit 4, the same was settled and was no longer a contentious issue and the court shall not dwell on the same.
65. On issue number 2, the purpose of the survey report that was ordered by the court was to confirm occupation of the plaintiff on the suit property. The survey report as filed was ordered pursuant to the provisions of Order 18 Rule 11. The Defendant contests the survey report on grounds set out at paragraph 57 of this judgment and filed an application dated 11.11.2024.



66. In the course of the evidence by PW1, PW4, PW5, and PW7, as well as DW1, DW2 and DW3, their evidence was to the effect that the plaintiff had fenced off his property and that there was a neighbour between the Plaintiff and the Defendant, their evidence therefore identified the suit property occupied by the plaintiff as being distinct from the ones occupied by the Defendant. The survey report is being challenged on the grounds that it did not identify the Applicant's homestead, and the other neighbours were not present and that the chief was in attendance and having testified she was biased. Having already heard evidence on the occupation from the witnesses, the survey report was meant to give the actual acreage occupied by the plaintiff and since the chief had already testified, the court does not view her participation as prejudicial to the Defendant, she attended the survey report as an area Administrator and not a witness and to impeach the said document based on that, would be to miss the point. Accordingly, the court admits the survey report and dismisses the application dated 11.11.2014 challenging its production.
67. The survey report has observed the Plaintiff as occupying 2.08 acres and not 2.1 acres as he claims and the court finds the occupation of the Plaintiff thus to be the 2.08 acres in Nandi / Chepterit/794
68. On issue 3, relates as to whether the Plaintiff has proved his claim of adverse possession; under this issue the court shall examine: -
- i. When time started running for purposes of adverse possession.
 - ii. Whether the Plaintiff had met the requirements of adverse possession as set out in various judicial decisions
69. On when time started running for purposes of adverse possession. Before the court, examines this issue the court shall examine the issue as to whether a purchaser can claim adverse possession?
70. The Respondent submits placing reliance on the decisions in the case of Wilfred Kegonye Babu Vs. Henry Mose Onuko Civil Appeal No. 82/2014 as well as Mungania Vs. Imanyara (1985) KLR, that the entry of the Plaintiff was under an Agreement as a purchaser thus not adverse.
71. In the decision in Mungania Vs. Imanyara cited by the Defendant, the court further held until the agreement is terminated or rescinded possession is not adverse to anyone as required by section 7 and 13 of the Limitation of Action Act.
72. In Kasuve V. Mwaani Investments Limited quoted in the decision of Wilson Kazungu Katana and 101 Others Vs. Salim Abdalla Bakswwon and Another 2005, the court of Appeal stated inter alia that "it is 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 continuous 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, sch applicant would be perfectly entitled to sue on account of adverse possession."
73. The court of Appeal in Miki Waweru Vs. Jane Njeri Ruchu (2007) eKLR stated as follows: -
- "In our view where a purchaser of lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor or lessor pending completion and the transaction thereafter becomes void under Section 6(1) of the *Land Control Act*, for lack of the Land Control Board consent such permissions is terminated by operation of law and the continued possession is if not illegal becomes adverse from the time that transaction became void"



74. The court of Appeal reasoning in the case of Mungania Vs. Manyara is replicated in its decision in the case of Miki Waweru Vs. Jane Njeri Richu, as stated above and is applicable in the circumstances of this case, and the court thus finds that the Plaintiff as a purchaser entered the property vide the Agreement for sale (P.Exhibit 2) and the subsequent oral agreements till 2003, and being a controlled transactions, where no Land Control Board consent was obtained, the Agreements became void by operation of Law and were terminated and the Plaintiff continued stay on the suit land become adverse.
75. It is to be noted that prior to 2003 oral agreements for the disposition of an interest in Land were permissible and they have been excepted under section 3(7) of the *law of Contract Act* as was held in the decision in the case of Peter Mbiru Michuki vs Samwel Mugo Michuki (2014) eKLR where the Court observed as follows; “paragraph 25 It is our view that Section 3 (7) of the *law of contract act* makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3(3) of the *law of Contract Act* came into effect in 2003 and does not apply to oral contracts for sale concluded before Section 3(3) of the Act came into force. The provision to Section 3 (3) of the *law of contract act* applies in this case and we hold that the sale agreement between the Appellant and the Plaintiff did not violate or offend the provisions of the *law of Contract Act*.”
76. As to when time started running, the Plaintiff places the same in 2005 when he first bought a portion of the suit property. The Respondent submits that in 2004, he demanded payment of the balance from the Plaintiff hence that was a forcible entry and an assertion of his rights over the suit property.
77. No evidence was led as to whether the Plaintiff made the payment in 2004, although he and his witnesses indicated that they purchased additional acreage in 2004 and took possession thereof by moving the fence, it would thus be that in 2004, that the last purchase was made, as was held in the case of Peter Mbiru Michuki Vs. Samuel Mugo Michuki which quoted the decision in the case of Public Trustee Vs. Wanduru (1984) where the court held inter alia that the adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years if the purchaser takes possession of the property because from this date, the true owner is disposed 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” The Respondent has submitted the date of last demand to have been made on 28.11.2004, 6 months after the Agreement became a nullity and hence time started running from the year 2005, as submitted by the Plaintiff.
78. In 2004 the suit property had already been registered in the name of the Defendant’s father and although the same was not registered in the name of the defendant till 2008, time for purposes of adverse possession could run as change in ownership does not affect time for purposes of adverse possession as was held in the case of Mwangi Githu vs Livingstone Ndeete (1980) eKLR.
79. Was there interruption of the period? The Defendant submits that in the year 12.02.2021 the Respondent visited the Plaintiff forcefully and therefore interrupted the continued peaceful occupation. However, from 2005 12 years period crystallized in 2017 and the forcible entry in 2021 did not interrupt the quiet possession. The Defendant did not call the witnesses, he indicated were present during the forcible entry he alluded to and there was thus no action taken by him to interrupt the occupation by assertion of his rights. In Mwangi Githu Vs. Livingstone Ndeete (1980) eKLR the court held that “assertion by an owner occurs or makes an effective entry into the land giving Notice to quit cannot be an effective assertion of right for purposes of stopping time to run under the *limitation of Actions Act*”. The actions of the Respondent seeking payment of balance in 2012 did not constitute an assertion of his rights.
80. The court finds that time started running from 2005 and the right was not interrupted and crystallized in 2017.



81. Has the Plaintiff proved entitlement to the suit property by adverse possession, in Mtana Lewa Vs. Kahindi Ngala Mwagandi (2015) eKLR, the Court of Appeal defined adverse possession as follows;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights on it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

82. The court has already found that the 12-year period crystallized in 2017 from 2005, when time started running. Equally the court has already found that there was no interruption and the period was in continuity, and will now evaluate whether the Defendant was disposed of the acreage occupied by the Plaintiff.

83. The evidence from the Plaintiff's witnesses as well as the Defendants witnesses is that the Plaintiff has been living in a fenced section of the property, which he had planted trees, grown tea and built a home to the exclusion of the Defendant as was evidenced by the photographs, and that is therefore dispossessing of the owner. This occupation is in the public domain as the Plaintiff's neighbour's as well as the Area chief testified to this effect.

84. The Court finds that the plaintiff has proven on a balance of probabilities the ingredients of adverse possession and has thus has is entitled to the reliefs sought and that the Defence and Counterclaim by the defendant have not succeeded as the Defendants claim is statute barred under section 7 of the [Limitation of Actions Act](#) the plaintiff having successful proven Adverse possession.

Disposition

85. Accordingly, Judgment be and is hereby entered in favour of the plaintiff against the Defendant in terms as follows:

- i. A declaration hereby issues that the defendants title and interests in 2.08 acres in Nandi/ Chepterit /794 currently occupied by the Plaintiff is extinguished under section 17 of the Limitations of Actions Act.
- ii. Declaration hereby issues that the Plaintiff Richard Kipserem Sugut has acquired interests and title of 2.08 acres in Nandi/ Chepterit/ 794 by adverse possession.
- iii. The County Surveyor Nandi County to subdivide Nandi/ Chepterit 794 and hive out 2.08 acres thereof in occupation by the plaintiff, and upon the said subdivision the County Land Registrar Nandi County to Register the plaintiff Richard Kipserem Sugut as the proprietor of the 2.08 acres within 90 days from the date hereof.
- iv. The Defendant shall execute all the necessary documents so as to give effect to the subdivision and the registration of the Plaintiff as the owner of 2.08 acres in Nandi/ Chepterit /794 within 45 days of the date hereof including surrendering of the Original title for this purposes, in default the Deputy Registrar of this court to execute the said documents within 60 days of date hereof.
- v. Costs of the suit and the counterclaim are awarded to the Plaintiff.

DATED AND DELIVERED AT KILGORIS AT THIS 6TH DAY OF FEBRUARY 2025



HON. M.N.MWANYALE

JUDGE

In the presence of:

Mr. Kiprono for the Plaintiff

Mr. C.F Otieno for the Defendant.

C/A. Emmanuel/ Slyvia

