



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mose v Mogaka (Environment & Land Case E002 of 2023)
[2024] KEELC 6637 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE E002 OF 2023**

JM KAMAU, J

OCTOBER 3, 2024

BETWEEN

ABEL MOKAYA MOSE PLAINTIFF

AND

LINET BOSIBORI MOGAKA DEFENDANT

JUDGMENT

1. The Plaintiff vide Plaintiff filed in this Suit on 7/3/2023 pleaded that he is the registered proprietor of the parcel of land known as North Mugirango/Magwagwa 1/3512. He averred that without any colour of right and/or permissions from the Plaintiff the Defendant trespassed onto the Plaintiff's parcel of land known as North Mugirango/Magwagwa 1/3512 whose particulars were set out as:
 - a. Entering the Plaintiff's parcel of land without the Plaintiff's permission.
 - b. Refusing to exit the Plaintiff's parcel of land notwithstanding demands by the Plaintiff to do so.
 - c. Threatening to use violence to harm the Plaintiff either by taking his life or harming his limbs.
2. The Plaintiff accordingly prayed for Judgment for:-
 1. A Declaration that the Defendant has trespassed onto the Plaintiff's property registration no. North Mugirango/Magwagwa 1/3512.
 2. Damages for trespass.
 3. Eviction orders to issue to remove the Defendant from the Plaintiff's property registration No. North Mugirango/Magwagwa 1/3512.
 4. Mesne profits.



5. Costs and interest.
3. The Defendant on the other hand filed a Defence dated 5/4/2023 and while she claimed that the suit is defective, malicious and vexatious and that the same falls short of the express requirements of the relevant statute and/or law gave Notice that she was going to raise a preliminary objection at the hearing and apply to have the same struck out. In the aforesaid Defence, she denied the Plaintiff's claim of trespass and ownership of the suit land including the particulars of trespass attributed to her in the said Plaint. She claimed that the registration of the suit land in the name of the Plaintiff was through fraud and listed the particulars of the alleged fraud as:
 - a. Claiming ownership of land he knows belongs to the Defendant.
 - b. Causing the land to be registered in his name while knowing the same does not belong to him.
 - c. Misrepresenting to the Defendant that he will cause the land to be registered in her name.
 - d. Having the land registered in his name for the sole purpose of filing this suit.
 - e. Using his position as Member of County Assembly to threaten the Defendant with eviction.
 - f. Falsifying records at the Lands Office to reflect himself as the owner of the land belonging to the Defendant 's family.
4. The Defendant contemporaneously filed a counter-claim where she sought:-
 - a. A declaration that the Defendant 's rights to recover all that parcel of land known as LR No. North Mugirango/Magwagwa 1/3512 measuring 2/72Ha is barred under the limitations of actions Act, Chapter 22 of Laws of Kenya, and his title thereto extinguished on the grounds that the counter-claimer herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period of exceeding 12 years.
 - b. There be an order that the counter-claimer be registered as the proprietor of all that parcel of land known as L.R No. North Mugirango/Magwagwa 1/3512 measuring 2.72Ha in place of the Defendant who currently holds the title to the suit land.
 - c. There be an order restraining the Defendant either by himself, agents, servants and/or employees from interfering with the counter-claimer's peaceful possession and occupation of all that parcel of land known as LR No. North Mugirango/Magwagwa 1/3512 any manner whatsoever and/or howsoever.
 - d. A declaration that the counter-claimer is rightfully in possession of the parcel of land known as L.R. No. North Mugirango/Magwagwa 1/3512.
 - e. A declaration that the Defendant is holding LR No. North Mugirango/Magwagwa 1/3512 in trust of the counter claimer.
 - f. An order of permanent injunction to restrain the Defendant either by himself, his agents/ servants from entering upon, trespassing onto and/or otherwise interfering or dealing howsoever with LR No. North Mugirango/Magwagwa 1/3512.
 - g. An order of eviction against the Defendant, his agents, servants and/or employees or anybody claiming for and on his behalf for the parcels of land known as L.R Nos. North Mugirango/ Magwagwa 1/3512.
 - h. Costs of this suit be borne by the Defendant.



- i. Such further and/or other relief as the Honourable Court may deem fit and expedient to grant.
5. She based her claim on her assertion that the suit land, the parcel of land known as North Mugirango/Magwagwa I/3512, was carved out of North Mugirango/Magwagwa I/724 which the late Plaintiff's father Mose Ocharo sold to her late father in law, Isoe Ongeri vide sale agreements dated 25/10/1970 and 13/11/1970 respectively 2 portions out of North Mugirango/Magwagwa I/724 which can now be traced on North Mugirango/Magwagwa I/3512. She claims to have later married Isoe's son Isaac Mogaka Isoe (now Deceased as well) in 2003 and immediately settled on the suit land. But that to her surprise, and unknown to her, the parcel of land known as L.R. No. North Mugirango/Magwagwa 1/724 was subdivided and new titles created as a result. And that amongst the new titles created out of the sub-division is L.R. No. North Mugirango/Magwagwa 1/3512 which is now registered in the name of the Plaintiff fraudulently and she repeats the aforesaid particulars of fraud as the basis for the said registration.
6. On 3/5/2023, the Plaintiff filed a Reply to Defence and Defence to Counter-claim, denying all the contents of the Counter-Claim and re-iterating the contents of the Plaintiff.
7. After the case had been certified ready and mature for hearing the Plaintiff, took to the witness box on the 11/7/2023 testified on oath. He said he lives in Magwagwa and described himself as the member of the County Assembly of Nyamira representing Magwagwa Ward. He adopted his statement dated 7/3/2023 in which he said that he knows the Defendant "very well." He testified that he is the registered owner of the parcel of land known as North Mugirango/Magwagwa I/3512 into which the Defendant had trespassed without any colour of right and without permission and had refused to exit even after being asked to do so. She had further threatened to apply physical violence and harm the Plaintiff and even take away his life. To buff up his case, the Plaintiff produced a copy of the Title Deed showing that the parcel of land North Mugirango/Magwagwa 1/3512 measuring 2.72 Hectares is registered in his name, Abel Mokaya Mose with effect from 24/1/2023. The same is a sub-division of North Mugirango/Magwagwa I/724. Attached to the copy of Title Deed is a copy of official search of 7/3/2023 that supports the registered ownership of the suit land. The Plaintiff testified that he inherited the land from his mother, Jane Gesare Mose who had also got the land from her mother (the Plaintiff's grandmother), Kemunto Ocharo. He said that the Defendant, alongside others was his mother's licensee on a small (very negligible) portion of the land which is not even 50 feet by 50 feet in size. All the other licensees left save the Defendant whose license legally terminated upon the sub-division terminated upon the North Mugirango/Magwagwa I/724 and transfer of North Mugirango/Magwagwa I/3512 to the Plaintiff herein on from 24/1/2023. On cross-examination by Mr. Ochoki for the Defendant, the Plaintiff said that the land was initially registered in the name of his grandfather, one Ocharo Nyambeta who had only 2 children, the Plaintiff's father and his aunt, Nyabokey Ocharo. By then it was 7 Hectares and known as North Mugirango/Magwagwa I/724. Then on 4/12/1984 it was transferred to his grandmother Kemunto Ocharo and subsequently on 15/8/1996 to his mother Jane Gesare Mose who is still alive. Kemunto Ocharo died in 2007, more than 20 years after the land had already been transferred to Jane Gesare Mose. Still on cross-examination, Mr. Mose testified that on 16/1/2023 the land was sub-divided into 7 parcel of land and North Mugirango/Magwagwa I/3512 – 2.72 Hectares was registered in his name while all the other 6 parcels were registered in his mother's (Jane Gesare's) name. On the Plaintiff's parcel of land there is a tea plantation which he himself plucks. He also said that he was born in 1980 long after the land had been transferred to his mother's name. On re-examination by his Advocate Mr. Nyamweya, the Plaintiff said that the register in respect of the parcel of land North Mugirango/Magwagwa I /724 was opened on 13/7/1973 in the name of Ocharo Nyambeta.



8. The close of the Plaintiff's case paved way for the Defendant's evidence where DW1, Eliud Ondari Mbere, a 74 year old who contradicted his recorded statement dated 7/8/2023 even to the extent that his name was not Eliud Onderi Turungi but Eliud Onderi Mbere. He also said that he never witnessed any sale agreement between the late Isoe Ongeru purchasing land from Mose Ocharo. At the request of the Defendant's Advocate, he was stood down as a witness.
9. After the matter was referred to mediation and the same yielded no result, the same came back to Court and by consent of both parties the Plaintiff was allowed to re-open his case and call one more witness, Elijah Mogoi Turungi who had recorded a statement filed in Court on 28/11/2023 which was adopted as his evidence in chief. He is a neighbour to the Plaintiff. He testified that he was born in 1950. He said that he bought a piece of land from Kemunto Ocharo in 1989 where he lives to date. The same was witnessed by the Plaintiff's parents Mose Ocharo and Jane Mose. The same was never the property of Mose Ocharo. He said that he was aware that Isoe Ongeru, the Defendant's father in law, used to lease land from Kemunto Ocharo's property for brewing Chang'aa and finally left for Bonyegwe 1 sub-location where he was buried, and where his 2 wives and children live. He testified that the Defendant, wife to Isaac Isoe, who was ostracized by the community when her husband died in 2019 was given a place to live in by Jane Mose limited to less than 25 by 50 feet but was later asked to leave. He also produced a copy of Title Deed and Sale Agreement showing that he bought 0.33 Hectares from Kemunto Ocharo initially North Mugirango/Magwagwa I/724 which had become registered as North Mugirango/Magwagwa I/3511. He also produced a copy of the Death Certificate showing Mose Ocharo died on 8/2/1991 aged 46 years and who he says was a witness to the agreement of sale between himself (Turungi) and Jane Mose in respect to North Mugirango/Magwagwa I/3511. On cross examination by Mr. Neriko for the Defendant, Mr. Turungi said the land belonged to Kemunto Ocharo who later gave the same to Jane Mose and on re-examination he said that Mose Ocharo was son to Kemunto Ocharo.
10. The Defendant, a farmer who lives in Magwagwa, took oath and adopted her statement dated 5/4/2023 as her evidence in chief. In her statement the Defendant, Linet Bosibori Moyaka described herself as suing in her capacity as personal representative of the Estate of her late father in-law, Isoe Ongeru who died on 5/4/2017 having obtained Letters of Administration Ad Litem in respect of the said Estate on 29/3/2023 in Chief Magistrate's Court, Nyamira CM Succession Cause No. E029 of 2023. The same was produced in Court together with a copy of Death Certificate of the late Isoe Ongeru issued to her on 17/3/2023. She testified that the late Isoe Ongeru together with "other family members" purchased "portions" of land measuring 2.72 Hectares out of L.R. NO. North Mugirango/Magwagwa I/3512 and that consideration was paid "as agreed" and immediately thereafter her father in-law took possession and started farming activities which included planting tea thereon. She also testified that she married Isaac Mogaka Isoe (a son of the late Isoe Ongeru) who is also now deceased. And after her marriage, she and her late husband settled on the suit parcel and put up a semi-permanent house where they have peacefully lived and sired children who have also lived there as well.
11. She was later shocked to learn that L.R. NO. North Mugirango/Magwagwa I/724 had been subdivided and new Titles created and transferred without her knowledge, including Title No. L.R. North Mugirango/Magwagwa I/3512 which she claims to be "our parcel of land" now registered in the name of Abel Mokaya Mose (the Plaintiff). The Defendant concluded that the Estate of her late father had acquired adverse possession over the subject parcel of land as at 2023 when this suit was filed. She also produced a copy of a letter from Bonyegwe 1 chief dated 17/3/2023 addressed "to whom it may concern" indicating that "she is the wife of the late Isaac Mogaka Isoe". She equally produced the Green Cards to show the history of North Mugirango/Magwagwa I/724 from 13/7/1973 and the sub-divisions thereof till 16/1/2023. There are also copies of agreements in Kiswahili language dated



25/10/1970 and 13/11/1970 respectively, a share certificate of one Isoe Ongeri in Gandore Tea Factory Co. Ltd issued on 19/3/2007 and finally photographs of the semi-permanent building. She was quick on examination- in chief to say that she doesn't know on what acreage she lives but that she lives on North Mugirango/Magwagwa I/724. She said that she doesn't know from whom her father in-law bought the land. Her husband died in 2018, one year after his father and that she has planted maize, coffee, tea and trees and that she didn't come to the land on her own. On cross-examination she said that her husband, Isaac Isoe was buried on his grandfather's land elsewhere in Borangi sub-location far away from where the suit land is situate (Magwagwa). She later said that he was buried in Bonyengwe sub-location and not Borangi. Her father in-law had equally been buried in Bonyengwe 1 sub-location on his father's land. Among her father in-law's 11 sons and the entire family, she is the only one who has built on the suit land. All the rest live on the ancestral land. None of the 2 widows of her late father in-law (who are still alive) to date has ever lived on the suit land. She also admitted that she has no Letters of Administration in respect of her husband's (Isaac Osoe's) Estate. She also admitted that none of the houses whose photos she produced in Court (taken, as she claimed in 2023) was semi-permanent. She said that she planted the trees on the suit land in 2017 and that she did not have anything to show that she grows coffee or that she is a member of a coffee factory or society where she delivers coffee. Nor did the witness have any photo to show that she grows the said crop nor coffee card. Not even a tea card. She repeated that she doesn't know on what acreage her house is. Linet admitted that the letter of introduction dated 17/3/2023 originated from the Chief of Bonyengwe and not from Magwagwa 1 where the suit land is situate and which is over 40 kilometers away. On re-examination by her Advocate Mr. Neriko, the Defendant said that she got the letter of introduction from the Chief of Bonyengwe where her father in-law used to live. Answering a question from the Court, the Defendant said that she was claiming the suit land because her father in-law had bought the same and that she didn't know how big the land is. She also said that she didn't know how many acres she wanted. She said that ".....my father in-law had been permitted to take occupation of the land by the person who sold it to him. That is what my father in law told me"

12. DW2, Amos Nyario Isoe, a retired teacher relied on his statement dated 6/6/2023 and filed in Court the following. He testified that the Defendant is known to him and that she is his sister in-law having married his brother, Isaac Mogaka Isoe who is now deceased. He claimed to have bought ½ Acre out of L.R NO. North Mugirango/Magwagwa I/724 (now L.R NO. North Mugirango/Magwagwa I/3512) from Jane Gesare Mose at Kshs. 48,020/= in May 1996. He did pay the entire consideration in 3 instalments of Kshs. 44,500/=, 3,000/= and 500/= respectively. That on 8/6/1996 he again bought from the same Vendor what he referred to as "....measuring 4 metres at a consideration of Kshs. 2,500/= only" which according to his own words he paid Kshs., 2,500/= on the date of the agreement and the balance of Kshs. 1,500/= later. After the sale, he started farming activities. That his father had also bought land from the same Vendor. He also produced a copy of the acknowledgements of receipts of consideration in respect to both transactions. He surprisingly asks this Court to have the Title Deed North Mugirango/Magwagwa I/3512 to be sub-divided so that he can get his Title Deed. On cross-examination by Mr. Nyamweya for the Plaintiff, the witness admitted that he was only a witness in the case but not a party and that what he produced in Court does not show the L.R Number of the property forming the substance of the transaction he was talking about. On questions from the Court, the witness said that he was not aware that his father had bought land as claimed by the Defendant and that he doesn't stay on any part of the suit land nor does he know the acreage occupied by the Defendant.
13. The last witness in this case, Lewis Nyamweya Isoe, another brother in-law to the Defendant who described herself as a small farmer in Magwagwa, told the Court through his statement dated 6/6/2023 and in answer to further questions in Court that he was born on the suit land. He said that his late



father and DW2 bought from Kemunto Ocharo a total of 6.7 Acres. He said that the Defendant got into the suit land with the permission of Kemunto Ocharo and Mose Ocharo “after the sale.” He added that his father was living on the suit land when he died, but was buried in Bonyengwe. Among the children of Isoe, only the Defendant lives on the suit land but the rest only grew coffee, tea, trees, maize and beans thereon. He finally testified that they have been on the suit land for over 50 years now. On cross-examination by Mr. Nyamweya, Mr. Isoe said that his mother and step-mother are still alive but are not witnesses in the case. He admitted that the “agreement” produced in Court shows the transaction was in 1970 and the Vendor was Ocharo Mose and not Kemunto Ocharo. Though the Green Card was opened on 13/7/1973 and the first registered owner was Ocharo Nyambeta and Kemunto Ocharo got registered as the owner of the land in 1984. He said that he is not aware of the acreage the Defendant occupies and that his father’s house was removed and transferred from the suit land in the year 2000. He also said he doesn’t know what acreage any of his brothers was given by his late father nor when they were given the same. On answering questions from the Court, the witness said that he doesn’t know whether his father obtained consent from the Land Control Board and that his mother has 3 Acres elsewhere in Bonyengwe where she lives and where their father was buried.

14. The last witness Daniel Sironga Onger, a farmer in Magwagwa stood by his statement of 6/6/2023 as his evidence in chief. He said that he is a step-brother of the late Isoe Onger. He testified that the suit had belonged to Isoe Onger who brought it from Mose Ocharo but that he was not there when the transaction was taking place and that when the Defendant got married to Isaac she was brought to the suit land. On cross-examination, he said that he doesn’t know the Defendant’s mother nor her father. He even doesn’t know where she comes from. Although he claimed to have been 18 years old in 1970 his National Identity card showed he was born in 1957 which means that when the transaction was taking place in 1970 he was only 13 years old.
15. To begin with, one cannot claim adverse possession and at the same time ownership as a result of purchase. The 2 are exclusive and cannot co-exist unless pleaded in the alternative.
16. The first issue before the Court is whether the Plaintiff is lawfully registered the proprietor of the suit property which was opened on 13/7/1973 in the name of Ocharo Nyambeta. And if so, whether he has lost this right of proprietorship through adverse possession in favour of the Defendant. Thirdly, who should be restrained from occupying the said land and lastly, who should be condemned to pay the costs of the suit.
17. On his assertion of right of proprietorship, the Plaintiff has proved that the parcel of land known as North Mugirango/Magwagwa I/3512 measuring 2.7 Hectares or thereabout is registered in his name having been curved out of North Mugirango/Magwagwa/724 measuring 7 Hectares first registered in the name of his grandfather one Ocharo Nyambeta. On 4/12/1984 it was transferred to his grandmother Kemunto Ocharo and then to his mother one Jane Gesare Mose on 15/8/1996. Kemunto Ocharo, the Plaintiffs’ grandmother died in the year 2007 about 11 years after having transferred the land to the Plaintiff’s mother on 15/8/1986. WEST MUGIRANGO/MAGWAGWA/724 was sub-divided into 7 different parcels on 16/1/2023 all registered in Jane Gesare Mose’s name save North Mugirango/Magwagwa/3512 which was registered in the Plaintiff’s name at his request to his mother who even gave him a portion bigger than any of the other 6 and since then nobody in his family has ever complained about his taking a bigger share. Not even his siblings, who are aware of this. The Plaintiff testified that nobody raised any objection during the land adjudication against the registration of L.R North Mugirango/Magwagwa/724 in the name of his grandfather



Ocharo Nyambeta. Section 26(1)(a) &(b) of the [Land Registration Act](#), 2012 guides me on the need to protect the sanctity of a Title Deed but limits me where there is darkness: -

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner.....”

18. The Plaintiff denied that his late father ever sold the suit property to anyone and this Court finds this could not have been possible since his father Mose Ocharo never owned North Mugirango/Magwagwa/724 nor North Mugirango/Magwagwa/3512. He therefore lacked capacity to dispose of the land. Indeed, the Plaintiff produced Death Certificate serial number 366422 showing that his father, Mose Ocharo died on 8/2/1991 which was issued by the Registrar General on 19/10/1992.
19. Among the Defendant’s own produced documents are Green Cards which shows that the original parcel of land North Mugirango/Magwagwa I/724 was registered in the name of Ocharo Nyambega on 13/7/1973, then transferred to Kemunto Ocharo on 4/12/1984, to Jane Gesare Mose on 15/8/1996 and the same closed on 16/1/2023 upon sub-divisions into North Mugirango/Magwagwa I/3506,3507, 3508, 3509, 3510,3511 and finally 3512. Before these sub-divisions and after the transfer in favour of Jane Gesare Mose and issue of Title Deed to her, there was a Caution in favour of the Plaintiff claiming a beneficiary’s interest, restrictions by the Land Registrar and the removal of both on 23/6/2008, 28/10/2022, 28/10/2022 and 28/10/2022 respectively. The Defendant also produced Green Cards issued on 16/3/2023 showing that the sub-divisions each measuring various acreages were all registered in the name of Jane Gesare Mose on 16/1/2023 and that North Mugirango/Magwagwa I/3512 measuring 2.72 Hectares was on 27/1/2003 transferred and registered in the name of the Plaintiff and a Title Deed issued to him. These documents do support the registration of the suit property in the name of the Plaintiff.
20. To defeat the title of land in the name of the person who appears on the face of it, one has to show that the same was registered either by mistake or by fraud. The proviso to the above sacred Section 26(1) (a) &(b) of the [Land Registration Act](#), 2012 provides that the same is subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
21. And this is exactly what the Defendant claims. She testified that the registration of parcel number North Mugirango/Magwagwa I/3512 was registered in the name of the Plaintiff though the latter knew that the land never belonged to himself and after misrepresenting to the Defendant that he would cause the land to be registered in her name and after falsifying documents at the land’s office and using his position as a member of County Assembly to achieve this purpose. However, the Defendant does not state which documents were falsified nor does she explain how the parcel of land North Mugirango/Magwagwa I/1523 belonged to her or any agreement between her and the Plaintiff to the effect that the land was to be registered by the Plaintiff in the name of the Defendant. Nor has the Defendant shown to the Court any transfer documents in her favour. And in any case the transferor should not have been the Plaintiff Jane Gesare Mose who transferred the property to her son. Jane has not disputed this and should the Defendant want the Court to believe that the transfer from Jane (who



is still alive) was to be in her (the Defendant's) favour, she ought to have made her a party in the suit or sued her. In any case, the Defendant does not say that she bought the suit property from the Plaintiff.

22. How then could the Plaintiff have swindled her. If she has any claim it ought to have been directed at Jane Gesare. Having not done so she then cannot follow the transferee from Jane. In all the handwritten sale agreements dating way back to 25/10/1970 the Defendant's name does not appear anywhere. But since she has come to Court as personal representative and Administrator of the Estate of Isoe Ongeru who died on 5/4/2017 having been granted Letters of Administration Ad Litem, she has right to claim the entitlement of the Deceased. She testified that Isoe Ongeru bought 'a portion of L.R.NO. North Mugirango/Magwagwa 1/724 from Mose Ocharo 25/10/1970. To this end she has produced copies of handwritten agreements in Kiswahili language between Mose Ocharo and Isoe Ongeru over 2 acres of land at KShs. 1,900/= . The sale agreements are to start with tampered with. Why do I say so? Nowhere in the bodies of all the agreements is the parcel number indicated. But on the top right corner of the agreement of 25/10/1970, "Magwagwa I /724" appears. You only need to compare the 2 'w' and 2 "g" in the word "Magwagwa" with the rest of the same letters in the body of the agreement and even without being a handwriting expert you will tell that the one at the top is from a different author. In the agreement of 13/11/1970 the same was initially "478", later cancelled and another number substituted. It is difficult to even tell whether the new number is "224" or "724". But away from the comparisons. the initial land was first registered on 13/7/1973. The first agreement and even the second were made in 1970, 3 years before registration. There are no correspondences from the Lands Office or Settlement Funds Trustees. How did the parties to this agreement know that the land would ever bear this number- "724." Finally, on this issue, did Mose Ocharo at any time ever own the land? The answer is in the negative. Did he then have capacity to dispose of the land? Certainly not. The said agreement, if at all, is therefore null and void for want of capacity by the alleged Vendor. Due to the above reasons, I will not delve into the issue of the Land Control Board Consent although the same was in existence since 1967.
23. Having failed to prove fraud or any purchase, let us now come to the second limb of the Defendant's claim which forms the substance of her Counter-claim. That she is entitled to the ownership of parts of the parcel of land by way of adverse possession having taken possession of the land first, after purchase by her late father in-law and later by herself following her marriage in 2003 and tracing such possession to one of the sub-titles of the parcel of land North Mugirango/Magwagwa I /724 as North Mugirango/Magwagwa I/3512 which is now registered in the name of the Plaintiff. From the onset, the Defendant claims to have had her father in-law gained possession by way of purchase. For a claim of Title by agreement to turn into a claim of adverse possession as set out in the case of KIMANI RUCHIRE VS SWIFT RUTHERFORDS & CO. LTD 1980 K.L.R 10 where it was held that:-
- ".....Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment....."
24. When was the last instalment paid in this case, if at all? The Defendant was unable to tell.
25. The evidence of the Defendant sparks of somebody who seems to have no knowledge of what she is pursuing. It is hard to believe that the Defendant and/or her late husband resides or has ever resided on the suit land or any part thereof. Nor her late father-in-law. She may be excused for not knowing from whom the land was allegedly bought because (in her own words) she was not yet married into the family when the sale transaction allegedly took place. But even having recorded a statement, she cannot remember when she got married and started occupying part of the suit land. She also could not explain



why her husband was buried in Bonyengwe sub-location where his father was buried a year earlier in 2017 yet she told the Court that her husband was given the land on the suit premises whereas the land at Bonyengwe was bequeathed to her brothers-in-law. No wonder, DW1, Eliud Ondari Mbere, contradicted his recorded statement and said that he never witnessed any sale agreement between the late Isoe Ongeru purchasing land from Mose Ocharo and at the request of the Defendant's Advocate, he had to be stood down as a witness. Although the Defendant claimed that she has planted coffee on the suit land, she admitted that she doesn't belong to any Coffee Co-operative Society and she doesn't have a card. Where then does she deliver the 2 produces yet she does not have a tea or coffee factory of her own. Even the letter of introduction dated 17/3/2023 leading to the acquisition of the Ad Litem Letters of Administration came from the Chief in Bonyengwe. How would the chief in Bonyengwe where she has not lived for over 20 years know her or that she was a daughter-in-law to the late Isoe who also lived in Magwagwa and not Bonyengwe. One can never be consistent when being untruthful. She later contradicted herself by saying that her late father-in-law was living in Bonyengwe and not in Magwagwa. This therefore confirms that her father-in-law's occupation of the suit land in Magwagwa, if at all, had long terminated and therefore nobody knew him there (at Magwagwa) When asked by the Court, the Defendant said she didn't know what acreage she was seeking but was also quick to say that she was seeking the land her father in-law had bought. In the Case of Ravji Karsan Sanghani v Peter Gakunu [2019] eKLR the Court held that;

“In my view, adverse possession can only run against the title of a registered proprietor and in the instant case the Defendant was first registered as proprietor of the suit land on 16th January 1990. Time could only run from that date.”

26. In the case of Mbarak Said Ali & another ...Vs... Sultan Palace Development Limited [2020] eKLR the Court held that;

“the key test for a claim of adverse possession would be whether the registered owner of the land was dispossessed or has on his own discontinued possession for the period of 12 years.”

27. Lewis Nyamweya Isoe, another son of Isoe equally said that he doesn't know what acreage the Defendant was given “nor do I know what acreage she occupies.” Nor when his siblings were given part of the land by his late father. The 4th Defence witness, a step-brother to the late Isoe Ongeru, admitted that Isoe Ongeru and Mose Ocharo were very friendly families and logically this could explain how the said Isoe Ongeru came to occupy part of the suit land as a licensee and in the case of Wanje -vs-Saikwa (no.2)Civil appeal Number 72 of 1982 [1984]KLR Justice Chesoni JA , as he then was, at page 288 quoting Megarry's manual of the laws of real property held that:-

“If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title.....in order to acquire by the statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

28. Justice Chesoni went on to say at page 289:

“A person who occupies another person's land with that other person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of his land and the possession is not illegal. Again, there is no adverse possession when land is occupied under a license until the license has been determined”.



293. In the current case, it is evident that the late Isoe Onger, Defendant's father-in-law must have entered into some arrangements courtesy of which Isoe Onger occupied part of the land which he later vacated long before he died after which the mother to the Plaintiff allowed the Defendant to occupy a small portion of the land after the latter was ostracized and chased away from where she was living in Bonyengwe. This I am convinced because the Defendant who claims to have tea on the suit land, delivers her tea 40 kilometers away in Bonyengwe where she had come from when there is actually a nearby factory. She was not able to explain this to the late. The Defendant must be occupying a small portion of the suit premises with the permission of the Plaintiff's mother's to cultivate the same therefore making her a licensee. This evidence from the Plaintiff was not subjected to any cross-examination. It is also the Defendant's evidence, that she was not using the suit land exclusively but was cultivating a few portions whose total acreage she could not tell. The Plaintiff's family together with other people have been cultivating the rest of the suit land since 1970. It is therefore not in dispute that the Plaintiff has never been dispossessed of the suit land but have in actual fact been cultivating most of the suit land. In fact the biggest headache for this Court if the Defendant would have proved her case on a balance of probabilities is to decide what acreage to give her since she and her witnesses do not know how much space she occupies.

30. Section 38 of the Limitation of Actions Act which the Defendant has invoked in his counter-claim states that:

“Where a person claims to have become entitled by adverse possession to land registered under any of this Act cited in Section 37 of land comprised in a lease registered under any of these Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.

31. In MAWEU VS LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 – K.L.R 430. In KIM PAVEY & OTHERS VS LOISE WAMBUI NJOROGE & ANOTHER 2011 e K.L.R, the Court of Appeal said:-

“Thus to prove title by way of adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also necessary to prove that the possession claimed was adequate in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”

32. In the Court set out in the case of KIMANI RUCHIRE VS SWIFT RUTHERFORDS & CO. LTD 1980 K.L.R 10 where the Court held that:-

“..... the Plaintiff s have to prove that they have used this land which they claim, as of right; nec vic, nec clam, nec precario The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by way of recurrent consideration”

.....The occupation of the land by the intruder must be without permission from the true owner of the land. Permissive occupation or where possession was consensual or contractual cannot be called adverse. Any kind of permissive use, as a tenant, licensee, contract purchaser in possession, or easement holder is rightful and not hostile.....The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other



people. Exclusive possession means that the exercise of dominion over the land must not be shared with the owner. The owner ceases to be in occupation by reason of dispossession or discontinuance of possession. Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where a person in possession goes out and another person takes possession, in other words the owner has given up, ceases to use and abandons the land and ceases occupation. The fact that nothing has been done on the land to improve is not evidence that the owner has abandoned the possession or has been eliminated from it. The mere fact that for 12 years or more has been no suit brought against a squatter or the mere fact that for 12 years a squatter has been in actual possession of the land is not enough to make *Limitation of Actions Act* operative. The Act is operative only where there has been exclusive possession for the statutory period for the person to be protected by the statute. It must be shown that the title holder has been dispossessed or has discontinued his possession of the land for the statutory period. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession.....

33. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of land where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land and the adverse possessor remained in actual possession for the whole statutory period without a break in the block period: Smith, J, in the Court of Appeal of Eastern Africa in *Hassanali Mamuji V Alibhai Ebrahimji Dar & Sons* (1935) 2 EACA 111 at 116 said.

“..... To prove title by Adverse Possession it is not sufficient to show that some acts of Adverse Possession have been committed; the possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the rightful title owner. It must be actual, visible, exclusive, hostile, open and notorious. There has to be a total ouster of the owner from the title and there is no room for tenancy in common or joint tenancy. It is all or nothing.....The plea of Adverse Possession is always based on facts and they must be asserted, pleaded and proved. The person claiming Adverse Possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession went on, whether his possession was open and undisturbed. Unless these questions are asserted and proved, a plea of Adverse Possession must fail.....”

34. The evidence on record, from the Defendant herself, shows that the Plaintiff was at all material times in actual possession of the suit property.
35. In the case of *N’gati Farmers Co-operative Society Limited –vs- Codicillary Ledidi & Others* the Court of Appeal held that the claim for adverse possession requires:-

“that the owner has been in possession but is now out of possession (either because he has been dispossessed or because he has simply discontinued possession).”

36. This position was also followed by the Court of Appeal in the case of *Waweru –vs-Richu* (C.A.122of 2001)where it was held at page 406 that :

“it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise;



374. In the case of *Jandu vs Kirpal & Another* [1975] ICA 225(HCK) it was held that for adverse possession to be proved :-

1. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner, it must be actual, visible, exclusive, hostile, open and notorious.
2. The permissive occupation of those relatives would continue until something occurred to make it adverse and that the onus lay on them to show how and when the possession ceased to be permissive and became adverse.
3. The rule on “permissive” possession is that possession does not become adverse before the end of the period during which he is permitted to occupy the land.
4. One who holds possession on behalf of another does not, by a mere denial of that other’s title, make his possession adverse so as to give himself the benefit of the statute of limitations.
5. There must be some “adverse act” so that if the possession has commenced and continued in accordance with “any contract, express or implied, between the parties in and out of possession to which the possession may be referred as legal and proper, it cannot be presumed adverse.
6. As long as possession can be referred to a right consistent with the subsistence of ownership in being at its commencement, so long must the possession be referred to that right, rather than to a right which contradicts the ownership.
7. The party claiming to hold adversely must go on to prove that it was in denial of the other’s title that he excluded him from enjoyment of the property. According to the English cases there be something amounting to ouster of the person against whom adverse possession is claimed.
8. If there be no adverse act nothing overt and no unmistakable ouster, or taking of possession, and all that is done is referable to, or consistent with and susceptible of explanation by, some title which does not impugn but recognize the right of the person seeking to recover possession, then there can be no possession adverse to that person without notice or intention to him of some kind, that an adverse claim has been set up in opposition to his right theretofore recognized.

38. Another thing to be established is that the adverse possessor must prove the location of the distinct portion of land he is claiming or its acreage In the case of *Kasuve –vs- Mwaani Investment Ltd & Others* (C.A.No 35 of 2002),the Court of Appeal held at page 87:-

“.....Moreover, the Appellant did not prove the location of the distinct portion of land he is claiming or its acreageIn the circumstances ,there was no concrete evidence that the Appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 acres”

39. Further, at page 293 Justice Nyarangi Ag. JA as he then was said:-

“.....the Appellants have been cultivating the land and reside on the land and those activities, constitute adverse possession. However, the cultivation and the residence was with express permissive possession and did not become adverse during the time the Appellants were allowed to occupy the land.....”

40. In our case here, none of the Defendant’s witnesses including herself was able to tell what acreage the Defendant occupies nor its location.



41. As to who is on the suit land, the Defendant admits that the Plaintiff occupies part of the suit premises and that he occupies small portions of the land which none of the Defendant's witnesses could not quantify even when asked by the Court. And therefore she fails to establish adverse possession as was held in the case of Davery and another –vs- Njoroge and another, Nairobi case No 217 of 2005 where the Court of Appeal at page 250 and 251 stated: -

“Possession which applies to small portions of land is not sufficient

42. Further, in Mbira vs Gachuhi Nairobi HCCC No. 2826 of 1997 Kuloba J. held: -

“Another key fact in the evidence is that the Plaintiff and the Defendant enjoyed in common the use of the land owned by the Defendant .On this last mentioned fact ,I take it to be the law, that if there are two persons in a piece of land having one of the persons as the registered proprietor , and each asserting that the piece of land is his ,and each doing some act in the assertion of the right of possession , if the question is , which of those two is in actual possession , the person who has the title is in actual possession , and the other person is a trespasser . This has been the law at least since Jones v Chapman 2 Ex 803 at 821, Maule J.It is also an elementary principle that possession and use of land for the requisite statutory period do not in themselves give rise to the Defence or claim of adverse possession. It has always been the law that permissive or consensual occupation is not adverse possession. The possession must be adverse. Adverse possession is occupation inconsistent with the title of the true owner; inconsistent with and in denial of the right of the true owner of the premises. If one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse..... You enter or remain on my land under lineal consanguinity or by affinity; you must remain there as such under the presumed or actual permissive or consensual entry and accommodation , and occupation remains permissive and consensual for whatever period I am disposed to allow you to be thereAs it is common knowledge within the legal profession ,a person who seeks to acquire title to land by the method of adverse possession by possession for the applicable statutory period, must prove non consensual actual , open, notorious ,exclusive and adverse use by him or those under whom he claims ,for the statutorily prescribed period without interruptionClearly, the occupier must have “adverse “, as distinct from “permissive” or “consensual”, must be in possession which is inconsistent with and in denial of the title and right of the true owner of the land It must be shown by the occupier, that there was dispossession of the proprietor, or discontinuance of possession by the proprietor.” Dispossession ‘means the adverse possessor comes in and drives out the person in possession from the possession of the land; while “discontinuance” is where the person in possession goes out and is followed into possession by another.A person does not necessarily discontinue possession of it merely because he does not use his land, either by himself or by some person claiming through him..... So, one must show the mode of repudiation; the knowledge by the true owner, of the assertion of the adverse claim; the date and the mode in which the adverse claim was brought to the knowledge of the true owner. If occupation originally taken with the permission or agreement of license of the true owner, then you must show that on a certain (stated)specific date after the permissive or consensual entry or occupation, the possession began to become adverse; or that on such and such a date, the proprietor deliberately abandoned the land..... The fact that a person whom I permit to



use a part of my land cultivates it or builds on it during the time I have no need for that particular site does not mean dispossession or discontinuance. An owner of land may at one time leave one side to lie fallow or to be temporarily used by someone else. When the need arises he may then put the other portion to use. But it would be dangerous to suggest that any part which he does not presently use becomes someone else's land. Here the Plaintiff used a portion of the Defendant's land with his permission for as long as he did not need that portion. She did not dispossess him of it, and he did not discontinue his possession of it. There has been no absence of possession by the Defendant As I said earlier in this judgment, if there are two persons in the piece of land (as it is being asserted in relation to the portion of the suit land in this case), and each doing some act in the assertion of the right of possession, and the question arises as to which of those two rival claimants is in actual possession, the person who has the title is in actual possession, and the other person is a trespasser or a possessor with permission of the title holder.. That way, the doctrine of adverse possession did not come into play. Kinship, more than anything else, is what arises here. There was never a repudiation of the Defendant true owner's title.....A suit founded on adverse possession is inappropriate in the circumstances and on the fact of this case. All that has been proved is long permissive or consensual possession by kindred. That alone is not sufficient. The suit fails, and it is dismissed.”

43. In *Mbui vs Maranya Meru HCCC No. 283 of 1990*, Justice Kuloba went to great heights to explain the circumstances and conditions that found a claim for adverse possession by stating as follows: -

“It is possible to define “adverse possession “more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or some other person, in opposition to, and to the exclusion of all others including the true owner out of possession and that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes of which the owner intended to use it.

..... If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, it cannot be presumed adverse..... The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evidence unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owners as well as the other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an animus possidendi for the requisite time. An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession.The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession.....The adverse possession must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil..... Where it cannot be said that the possession was exclusive, where the true owner and others were free to use the ground in question, and there was no assertion of title, a case of adverse possession is not made out.



It is not sufficient that there should be an actual possession by the person claiming title by adverse possession; there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by incoming person. A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in title against the past twelve or more years. It is not enough to show a mere going out of the possession by the owner. There must also be exclusive possession for the statutory period by the person to be protected.....It is incumbent on the person alleging a right by adverse possession to show, not only that his possession has lasted twelve or more years, but also that it has all the time been in open conflict with the title on which the owner relies. He must show that his possession was of such a nature, and involved the exercise of rights so irreconcilable with those claimable by the owner of the land, as to give the owner occasion to dispute that possession.And it has been held many times that acts done under license or permitted by the owner do not give a licensee a title under the limitation Time therefore, does not run against a true owner whose purpose are not prejudiced by the intruder's acts possession may be interruptedThroughout the decided cases, the recurrent theme is that possession to be adverse must be actual, open, notorious regular, continuously uninterrupted, hostile, exclusive occupancy held with a cherished animus possidendi under a claim or right held in good faith, without any form of permission from a knowing rightful owner entitled to immediate possession, for the statutory period. Out of these cases, the typical formulation of rules as to the nature of the interest conferred by adverse possession have also been judicially stated.The process takes place by operation of law, as a general rule, time does not run against a person who is under some legal disability. The land, or portion of land, adversely possessed must be a definitely defined or at least an identifiable portion, with a clear boundary or identification. For this purpose, that which can be ascertained is certain; that which is definitive is positive. It must at least be so plotted that if not certain it can be made certain.....This proposition means that the plea of adverse possession is always based on facts, and the facts must be asserted, pleaded and proved. The factual proof requires the person who claims adverse possession to show on what date he took occupation of the premises, the nature of his possession or the possessory acts, whether the factum of his possession was known to the owner of the land, how long the possession went on, whether his possession was open and undisturbed. All these are questions of fact and unless they are asserted and proved a plea of adverse possession must fail. a cause of action accrues when there is, in existence, a person who can sue and another who can be sued. The question always is this: when could the owner have first maintained an action to a successful result to repel the actual possession with a notorious hostile claim of exclusive title?

44. The upshot of the above is that although the Defendant has occupied unspecified portions of the suit land for some time, she did so with permission and had the intention of doing so at the owner's wish. This permission never came to an end and therefore her use of the land was not adverse to the owner(s). She also cultivated the suit land not exclusively but together with its rightful owners. And as Kuloba J. stated in the case of Mbira –vs- Gachuhi (H.C.C.C.2826 OF 1997) this was a case of a person being shown generosity but later turns around to want to benefit from the common law principle of adverse possession when in actual fact she never put in motion any circumstances or facts that were adverse to the actual owners. Accordingly, the Defendant's Counterclaim dated 5/4/2023 is hereby dismissed with costs the Plaintiff succeeds in this case and is granted Judgment as follows:



1. A Declaration that the Defendant trespassed onto the Plaintiff's property registration no. North Mugirango/Magwagwa 1/3512 with effect from 24/1/2023.
 2. The Defendant is hereby ordered to vacate from the Plaintiff's property registration No. North Mugirango/Magwagwa 1/3512 failure to which she be evicted therefrom in accordance with the provisions of Section 152 of the Land Act, No. 6 of 2012 as amended vide the Land Laws (amendment) Act No. 28 of 2016.
45. I decline to grant Orders of General Damages and Mesne Profits since none were proved. Each party shall bear its own costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 3RD DAY OF OCTOBER, 2024.

MUGO KAMAU

JUDGE

In the presence of: -

Court Assistant – Brenda

Plaintiff's Counsel – Mr. Nyamweya

Defendant's Counsel – Mr. Neriko alongside Mr. Ochoki

