



**Omwamba v Nyarunda (Environmental and Land Originating Summons  
8 of 2021) [2024] KEELC 6655 (KLR) (8 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6655 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 8 OF 2021  
FO NYAGAKA, J  
OCTOBER 8, 2024**

**IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP OF THE LAND  
COMPRISING TITLE NUMBER KIMININI/MATUNDA BLOCK 4/ NYAMIRA/67**

**BETWEEN**

**AGNES NYANG'ANYI OMWAMBA ..... APPLICANT**

**AND**

**SAMUEL BOSIRE NYARUNDA ..... RESPONDENT**

**JUDGMENT**

1. By an Originating Summons dated 08/11/2021 the Plaintiff sued the Defendant, claiming that she was entitled to the land comprised in Title Number Kiminini/Matunda Block 4/Nyamira/67 by adverse possession. She posed the following questions for determination:-
  1. Whether the Plaintiff had acquired the title to the land comprised in Kiminini/Matunda Block 4/ Nyamira/67 measuring 0.8300 (sic).
  2. Whether the plaintiff had been in open, quiet, continuous, exclusive and adverse possession of the land comprised in the title Kiminini/Matunda Block 4/ Nyamira/67 for a period in excess of 12 years.
  3. Whether the defendant's title to land in title No. Kiminini/Matunda Block 4/ Nyamira/67 has been extinguished, and whether the defendant is holding the land in trust for the plaintiff.
  4. Whether the Plaintiff should forthwith be registered as the legal owner of the land comprised in title No. Kiminini/Matunda Block 4/ Nyamira/67.
2. She prayed for the following orders:



- a. A declaration be made that the Defendant's rights to the land comprised in title No. Kiminini/Matunda Block 4/ Nyamira/67 got extinguished by adverse possession upon the expiry of 12 years with effect from 6th March 2019 and during which time the plaintiff has. Field in open, continuous, exclusive and adverse possession of the Scotland.
  - b. A declaration be made that upon the expiry of 12 years with effect from the 6/03/2019, the defendant has been holding the land comprised in title No. Kiminini/Matunda Block 4/ Nyamira/67 in trust for the plaintiff.
  - c. An order be made under Section 38 of the *Limitation of Actions Act*, Cap. 22 of the Laws of Kenya that the name of the Defendant be cancelled and be replaced with the names of the plaintiff as the registered owner.
  - d. An order be made that the defendant do execute all such documents that would facilitate the transfer of title number Kiminini/Matunda Block 4/ Nyamira/67 to the plaintiff herein, failing which the Deputy Registrar of this Honourable Court do execute all such documents.
  - e. An order be made condemning the Defendant to pay the costs of this suit.
  - f. Such father or other order or relief that this honourable Court may deem fit to grant.
3. The Originating Summons were supported by the Affidavit of Agnes Nyang'anyi Omwamba which she swore on 08/11/2021. Its contents are given in the evidence of the Plaintiff summarized herein below, after the summary of the Defendant's deposition.
  4. The Defendant filed a Replying Affidavit to the Originating Summons. He swore it on 29/11/2021. He deposed that he was the registered owner of all that parcel of land known as Kiminini/Matunda Block 4/ Nyamira/67. He annexed as SBN 1 a copy of the title deed to that effect. Further, he deposed that the genesis of the case was that the land in question was that acquired by his late father through his nephew Zakaria Bogonko who secured six (6) shares of Kshs. 500/= each within Nyamira Farmers' Cooperative Society Limited, which was purely for members of West Mugarango. His late father was from Kitutu Chache, hence he did not qualify to apply for allocation of land in the scheme. He used his nephew the late Zacharia Bogonko Barongo who hailed from West Mugarango and was the defendant's cousin to secure the land for him. By that time the Defendant was still in school.
  5. In 1980 the Defendant's late father instructed Zakaria Bogonko to have the share in the subject land herein transferred to the Defendant's name. Zakaria Bogo accompanied the Defendant to the Nyamira Cooperative Society in Nyamira Town and got its name cancelled from the records of Nyamira Cooperative Society Limited and replaced with the Defendant's. He annexed as SBN 2 a copy of the Share Certificate to that effect.
  6. In the year 1982 Dishon Barongo Masereti, the Defendant's nephew, who was a brother to the Plaintiff approached the Defendant and requested that the Defendant gives him possession of the land in question so that he could maintain and sustain himself through it. Further, that all along the Defendant knew that he licensed Dickson Masereti to be on the land.
  7. In the year 2006 the Defendant wanted to take over the land from Dickson Masereti, only to find the Plaintiff on it. He asked her what she was doing on it, and she told him that she was there with the permission of Dickson Barongo. He wanted to plough the land, but she pleaded with him to give her more time to move out. In 2007, the Defendant obtained title to the suit land.



8. The Plaintiff was unwilling to give vacant possession of the suit land. The Defendant issued her with a Demand Notice to vacate. He annexed it as SBN 3. It was dated 18/10/2007. To evidence ownership he annexed as SBN 4 a copy of the green card to show that he was the registered owner of the suit land.
9. In the year 2007 he, Defendant, sued the Plaintiff for eviction but due to post-election violence or chaos, the suit was never prosecuted, and it was dismissed in the year 2015. Between the year 2007 and 2015 time against title did not run as there was Kitale HCCC No. 164 of 2007 which was pending. Time started running between 2016 and 2021, which were only five years.
10. He deponed further that the Plaintiff was a stranger to him since she never bought land from him, and she was never his licensee. Her occupation of the Defendant's land amounted trespass and a trespasser could not possess ownership rights over the land. The only remedy available was her eviction and damages for over the period she had been utilising the land without his knowledge and consent. He was not responsible for any unauthorized developments the Plaintiff made on the Defendant's land with her full knowledge that she never purchased the land from him and that she was on it without his permission. The Plaintiff's case was premature and an abuse of the law relating to adverse possession.
11. Further, he had never taken the Plaintiff to any Land Control Board within the acquired time. Furthermore, there was no contract between him, and the Plaintiff as stipulated under Section 3 of the *Law of Contract Act*. He wished to give the Applicant 0.3 acres on humanitarian grounds, but he refused. Being a trespasser on the land her case should be dismissed with costs.
12. He added a Counterclaim to the Replying Affidavit after joining issue with the Originating Summons. In the Counterclaim, he stated that at all material times he was the registered owner of the parcel of land known as Kiminini/Matunda Block 4/ Nyamira/67 measuring 0.8300 Hectares. He got the land in question out of a transfer of 6 shares of Kshs. 500/= each from Zakaria Bogonko in the year 1980. In 1982, he permitted Dishon Barongo Masereti to use the suit land in order to sustain himself. At all material times he, Defendant, knew that the suit land was under the care of Dishon Masereti as his licensee.
13. In 2006 he wanted to take over the land and plough it for his own use, only to find the Plaintiff on it. He wanted her to give him vacant possession, but she requested more time. He got registered as an owner in the year 2007. He gave notice to the Plaintiff to vacate, but she failed. In the year 2007, he filed suit, being HCCC No. 164 of 2007 for eviction. Due to post-election violence, the case was unprosecuted until the year 2015 when it was dismissed for want of prosecution. He was not privy to any contract with the Applicant and there was no valid agreement between them. She was also not his licensee. As far as he was concerned the applicant was a trespasser on his land. She had no ownership rights over his land that was now registered in his name. The only remedy against her was eviction and payment of damages for the period she used his land.
14. He deponed that there was no other Counterclaim or Cuit pending between himself and the Applicant except Kitale HCCC No. 164 of 2007 which was dismissed for want of prosecution. He prayed for eviction and a permanent injunction and general damages and mesne profits. He had issued a demand and notice to the Applicant to give vacant possession, but she failed and refused to move, hence the Counterclaim. This Court had jurisdiction to hear and determined the Counterclaim.
15. He prayed for the following reliefs:
  - a. An eviction order against the applicant from title add number Kiminini/Matunda Block 4/ Nyamira/67 by demolishing her structure and all the seemed to be demolished under the supervision of the OCS Kiminini Police Station.



- b. A permanent injunction restraining the applicant from reentering onto the suit land.
  - c. General damages and mesne profits over the suit land.
  - d. Costs of this suit.
  - e. Any other lift this court may deem fit to grant for the best interest of justice.
16. The Plaintiff testified as PW1. She stated that she resided in Kiminini, Nyamira Farm of Trans Nzoia. She knew the Defendant as her uncle. He had at one time gone to the suit land to tell her to vacate it. He was her uncle by virtue of being her mother's cousin.
17. She adopted the deposition in her affidavit, which she swore on 08/11/2021. In it she stated that she had been in occupation of the suit land since 17/04/1980 and was one of the members of the Nyamira Farm. Previously, the land had been allocated to her uncle Zakaria Barongo who subsequently gave it to her before he would pay the entire loan. She paid all the loans he owed to the Society. She had made a lot of developments on the land. She annexed as ANO 1 photographs to show the development. She also annexed a copy of the green card of the land and a bundle of receipts to evidence payments she had made. She said she had occupied the land for over 12 years since 06/03/2007 and was therefore in adverse possession. She said the Farm's Directors had on 22/10/2021 tried to give her three points of the land. She annexed copies of the proceedings to the affidavit. She stated that the Directors had no legal right to decide how the land should be shared.
18. Her further testimony was that the suit land was now registered as Kiminini/Matunda Block 4/ Nyamira/67. She had resided on the land since April, 1980, the year she moved onto the land upon invitation by her uncle. She stated that her husband died in 1974 which prompted her to go back home. Then in 1980 her uncle sent her back to go to the suit land and reside on it. She also was required to make further payment of unpaid sums of her uncle's shares of ownership of the land and then reside on it.
19. She testified further that by the time of filing suit, she had built on the land, planted trees, cultivated it, planted cypress and grevia trees which were mature. She produced photographs to show the houses she referred to and the trees. She also showed photographs of maize and bananas she had planted. Further, she stated that she had built a store and kitchen on the land and erected a water tank. She produced as P.Exhibit 1 (a)-(K) the photographs evidencing the said developments.
20. PW1 stated that she paid the debt the uncle owed the Nyamira Cooperative Society. She evidenced it by production of original receipts of which one was dated 04/09/1987 for Kshs. 600/=, another 20/08/1992 for Kshs. 1300/=, a third 20/04/1991 for Kshs. 2400/=, the fourth 25/04/1993 for Kshs. 662/=. The last one was for survey fees. She produced the receipts as P.Exhibit 2(a)-(e).
21. She stated that on the 06/03/2007, the Defendant went onto the land and destroyed her items thereon. He got himself registered as owner and obtained title to the suit land while she still occupied it. She produced a copy of the green card of the suit land to show that before the Defendant got registered, the government owned the suit land. She produced the green card as P.Exhibit 3.
22. After the Defendant obtained title, he destroyed her trees and he filed a case in the year 2007, praying for his eviction. It was Kitale High Court Case No. 164 of 2007. She filed a Defence to it. She produced both the Plaintiff and Defence as P.Exhibit 4(a) and (b). The case was dismissed on 13/04/2015.
23. On 22/10/2021, the Defendant went to the land and caused her to be summoned by the Area Chief whom she met in the company of the Directors of the Cooperative Society. They held a meeting in



- which the Cooperative awarded her 0.3 acres. She objected the decision. She produced copies of the proceedings as P.Exhibit 5.
24. She continued that the Defendant had never resided on the land. Further, that from 06/03/2007 to 2021, it was a period of 16 years since the 12 years period ended on 06/03/2019. She stated that from 2007, the Defendant had never resided on the land. She had been peacefully occupying it since. She prayed that the land be declared hers by way of adverse possession, the court declares the title held by the Defendant cancelled and she be issued with one instead. She also prayed for the costs of the suit.
  25. She denied the Defence that Bogonko held the land in trust for him. She stated that was not her problem since Bogonko gave her the parcel of land. The land initially belonged to Zakaria Bogonko. Further, that Bogonko was not supposed to apply for a land control board consent for the land to be hers. She refuted a claim that time didn't started running from 13/04/2015 and therefore their 12 years had not elapsed by the time she filed suit. Rather, she insisted, time started running from 2007.
  26. Upon being referred DMFI 16 (now D.Exhibit 16), a copy of receipts one of which one was dated 08/07/1978, the Plaintiff pointed out that the name of Zacharia Bogonko which appeared on it was crossed and changed to read, Samuel Bosire. Further, the change was not countersigned. She stated that the receipt serial No. 1287 dated 20/01/1980 issued by the Nyamira Farmer's Coop. Soc. Ltd showed Samuel Bosire paid money yet another name of Zakaria Bogonko was indicated as the one who paid. Also, on the one dated 25/05/1980 the payment was by Z. Bogonko Nyarunda.
  27. She repeated that the title deed was issued to the Defendant on 06/03/2007 yet DMFI 17 showed that he made a report on 23/03/2022 that he lost receipts to the land. She questioned how the Defendant could have gotten the title to the land without the receipts. She denied that Z. Bogonko the Defendant the land because he could not have given it to her too.
  28. She admitted knowing Dishon Barongo who was her brother. She refuted the Defendant's claim that Dishon requested Samuel to permit him to reside on the land while he lived in Lamu. Further, she refuted the Defendant's claim that he knew all along that it was Dishon who resided on the land. She stated that Dishon was only called upon by her uncle who gave her the land to build for her the house he did in March, 1980. Upon completing the house, she (Plaintiff) followed him onto the land a week later and has since been residing in it.
  29. On cross-examination, the Plaintiff repeated that the land belonged to her uncle Zakaria Bogonko who was the Defendant's cousin. His permission of her to occupy the land happened in 1980. It was a difference of 15 years between when she was given the suit land and the time the Defendant came to claim it. She stated that the Chairman of the Cooperative Society was her grandfather. He was the one who gave her one Jason Nyakoe Mong'are to direct her to the land when she went to occupy it. The said person died the year before her testimony. She understood that Title Deeds for parcels of land in the area were issued in January, 2007. The Society's records showed the land as her uncle's. The Chairman of the Society asked her to wait for the records until titles would be issued. After some time, he handed over to another Chairman.
  30. Upon being shown DMFI 8, the area list, she confirmed that it showed the Defendant, Mr. Bosire, was the owner of Plot No. 67. She stated she had papers to show that her uncle gave her permission to be on the land. Further, the Chairman handed the records over to the Committee which advised her to wait for title deeds. She repeated there was neither house nor structure on the land when she entered it in 1980. She denied knowledge of her brother being given land to care for it.
  31. When the Plaintiff was cross-examined on the receipt dated 26/06/2004, she stated that she paid a contribution for the Quarry on behalf of the owner of plot No. 67 although the receipt did not show



- as much. She stated that each member of the Society was required to contribute some amount. The Quarry was indicated as Plot No. 75. She did not pay to be given land in the quarry. She paid as a member of the Cooperative about the receipt dated 04/09/1987. She indicated that the sum was for refunding each member of the Society who had not gotten land in it. Each bona fide member was asked to contribute money to be refunded.
32. Regarding P.Exhibit 2(c), the receipt dated 29/04/1991, PW1 stated it was part of the refund on behalf of Mr. Zakaria Bogonko who was a member. He asked her to pay the debt, and she did, because she was occupying plot No. 67. She contributed to the land expenses because she was rightly staying thereon. Upon being shown P.Exhibit 3, the green card for the parcel of land she stated it showed the parcel was initially owned by government and in 2007 the Defendant got registered as owner to it. After that he sued her, but the case was dismissed in 2015. She denied that he did not move on to the land in 2006 as he claimed. Instead, he only destroyed her property in 2007 and she reported it to the police, but he did not appear. She denied ever going to the Defendant's father to ask them to transfer the land to her or Zakaria Bogonko.
  33. On re-examination she stated that the refunds she made were for people who did not receive land and therefore each member of the Cooperative Society was required to contribute some money so that they could be refunded. She said the time for her adverse possession claim did not stop due to the suit filed in 2007. Therefore, she prayed that the court issues an order that the Defendant gives her his title to the land since he held it trust for her.
  34. The Plaintiff called PW2, one Dishon Barongo Masereti who stated that he was a farmer resident in Narok. He adopted as evidence in-chief his statement he wrote on 25/04/2023. He wrote that the Defendant was his cousin. The Plaintiff had been married and her husband died sometime in 1974 and her in-laws started disturbing her and she moved back to their home. Their uncle Zakaria Bogonko had shares in the Nyamira Farm. He decided to give the land to her. That was in 1980. That the Defendant, in collusion with the Directors of the Nyamira Farm caused the land to be registered in the Defendant's name while the Plaintiff was in possession. He, PW2, had assisted the Plaintiff to construct a house on the land when she moved on to it. In 2007, the Defendant sued the Plaintiff but the suit was dismissed in 2015. He only showed up in October, 2021 to start claiming the land once more. As far as he, PW2, was concerned the land belonged to the Plaintiff.
  35. He testified that the Plaintiff was his sister and the Defendant, his uncle. He denied the allegation that the Defendant had given him the land for occupation and use. He stated that instead it was his uncle who sent him to the land to go and build a house for the Plaintiff. Further, the Plaintiff was given the land by their uncle. On his part he only went to build the house for Agnes (the Plaintiff) in 1980 and she had been residing on the land to date. He repeated that the Defendant never gave him land to care for it and neither did he go to ask the Defendant for permission to reside on the land. The Defendant had no relationship to the land and had never decided on it. Also, he had never evicted the Plaintiff from it.
  36. On cross-examination he stated that he was shown the land by Zakaria Bogonko. He went onto it first. He did not get onto the land by the Defendant's invitation. When he visited the land, it was the Directors of the Cooperative Society who showed him the parcel to occupy and build the house he did. He too denied ever going to the Defendant's father to ask for documents of transfer.
  37. With that evidence the Plaintiff closed her case.
  38. The Defendant testified, as DW1. He stated that the Plaintiff was his niece. He adopted the depositions in the Replying Affidavit which swore on 29/01/2021 as his evidence in-chief. He also said he had a Counterclaim in the Affidavit in which she adopted the evidence thereto. In the written statement he stated that the plaintiff was a stranger to him until 2006, when he discovered that she was on his



land without his knowledge and consent. The land was registered in his name in the year 2007. It was acquired by his father Thomas Nyarunda through his nephew Zacharia Bogonko Nyarunda. By then he was still school-going.

39. Further, in 1980 his father directed Zakaria Bogonko to transfer the records of the suit land to the Defendant's name. Subsequently, Zachariah's name was replaced by the Nyamira Cooperative Society Limited as per the share certificate. He wrote the rest of the deposition as he would later testify orally in Court save that he added that he had never taken the Plaintiff to the Land Control Board within the six (6) month's period that the law required. The Plaintiff was a trespasser on his land. Further, that time started running in the year 2007 and by 2015, High Court No. 164 of 2007 was still pending hence 12 years had not elapsed.
40. He testified further that the suit land was in Nyamira Farm of Kiminini of Trans Nzoia County. It was Kiminini/Matunda Block 4/Nyamira/67 and he was the registered owner. He was registered as such in 2007. He produced the original title deed as D.Exhibit 3.
41. His further testimony was that the land was bought by his late father Thomas Nyarunda through his nephew Zakaria Bogonko who was a son to his father's sister. The land was initially restricted to persons who hailed from West Mugirango. His father was from Kitutu Chache, but his nephew was from West Mugirango. He had a share certificate to show that Zachariah Bogonko bought the land in April, 1978. The shares were 6 for Kshs.500/= each. He produced it as D.Exhibit 2.
42. He continued that when he was registered as an adult his father instructed the nephew to transfer the shares to him. He went to the office of Nyamira Farm. He changed the records upon paying 20 shillings. The office was in Kisii. It was the Secretary of the firm who changed the share certificate and countersigned it. The originals of the documents got lost. He reported the matter to the police. He produced the Abstract as D.Exhibit 4.
43. Further, his name was inserted in the Area List as No. 67. He marked the Area List as DMFI 8. A copy of it was certified by the Lands Office.
44. He stated that he started occupying the land in 1980. He put a live fence around it and erected a mud house. He used it in 1981 and 1982. Then he left his nephew Dishon Maserati, PW2, to use it. Dishon approached his parents and brothers to give him permission to use the land and they referred him to the Defendant, who was then working in Ruaka. The Defendant gave Dishon Barongo, PW2, a go ahead to use the land. In 2006 he went to use the land and found the Plaintiff on it. She said she was permitted to use it by Dishon.
45. The Defendant told her he wanted to use his land. He cultivated all of it but the Plaintiff planted it. That was in 2007. He then instructed his lawyers to write a demanded notice on 18/10/2007 which he produced as the D.Exhibit 6. He sued the plaintiff but the case was dismissed in 2015. He then approached the Chief and Directors who resolved the case and awarded 0.3 acres to the Plaintiff. He produced as P.Exhibit 5 the elder's decision. Later, the Plaintiff sued him but he was still willing to give her the 0.3 acres awarded to her. He prayed for the order of dismissal of the suit and the costs thereof.
46. Upon cross-examination the Defendant stated that he had built a temporary structure of house but he did not have any photos to that effect. He admitted the Plaintiff was in possession of the suit land for a period he did not know. He only discovered that she was on the land in 2006. When he discovered she was on the land she had built only a house with iron sheets on it. He became the registered owner on the 06/03/2007 as shown by D.Exhibit 3. He admitted that the Plaintiff was still on the land. He sued her in November, 2007, but the case was dismissed for want of prosecution. He counted the period between 06/03/2007 and November, 2021 as 14 years. He stated that he did not agree to give



the plaintiff the 0.3 acres but since it was the elder's decision to which he agreed he would. The Plaintiff signed the document but refused to take the 0.3 acres. He admitted that the Plaintiff had since put up a permanent house made of bricks and had trees on the land. But he insisted that he was the one who planted the trees in 1981. On further cross-examination, he admitted that he had not mentioned the planting of trees in any other evidence since he did not see the importance of doing so. He admitted further that he did not put the issue in his written statement.

47. His further testimony was that the land was first given to Zakaria Bogonko who was his cousin, as evidenced by D.Exhibit 2. It was the Secretary of the company (sic) who crossed the name of Zakaria Bogonko and wrote his name as Samuel Bosire. The signature was not countersigned. He stated that he did not know if the Company held a meeting to authorize the change of the name, but it was done a week after he went to ask for the change. He had no Minutes to show that his name was changed. He admitted that the first name had been crossed to insert his name on the share certificate. And that his identity card was not inserted. He denied changing the name or countersigning it. He could not tell when the change was made.
48. Regarding the loss of receipts, he stated that he only discovered the previous year although he had written about the loss of documents in the statement that he did in 2021 and that the receipts were among other documents that he had lost. He admitted further that the police abstract dated 23/02/2022 showed the documents were lost. He stated further that when he went to be registered as owner of the land and obtain his title deed, he had all the receipts. He gave the receipts to the land's office. He repeated claim that the land was his.
49. On re-examination he stated that it was the office of the Cooperative Society that changed the name on the certificate. It changed only the two names on it. Further, the change was countersigned by only the Secretary and not both the Chairman and the Secretary.
50. He called David Agwata Bogonko who testified as DW2. He stated he was the son to Zakaria Bogonko. He adopted the statement he wrote on 29/11/2021. His written statement was that the Defendant was his uncle by virtue of the fact that Zakaria Bogonko was his first cousin. He was aware that during the lifetime of the Respondent's late father he bought shares in Nyamira Cooperative Society Limited which was formed to buy land for the benefit of people of West Mugirango. Subsequently, six (6) shares were bought by his late father on behalf of the Respondent's late father. The shares were transferred to the Respondent's name under the direction of the late father. The family of Zachariah Bogonko had never laid a claim over the land. One Dishon Barongo was the one who was permitted cultivate land.
51. He stated orally that the Defendant was his uncle, and their fathers were first cousins. He knew of the suit. The land was originally registered in his father's name because he bought it with other people who hailed from Nyamira. His father's uncle approached the father to buy the land. The uncle was known as Nyarunda Momanyi. He said he was aware that the Defendant was the one in occupation of the land. He repeated that the family still had a claim to the land. He knew Dishon Barongo as his first cousin. He denied that his father ever gave the land to Dishon. Rather, it was the uncle who gave it to him. He could not tell how the Plaintiff got to start occupying the land.
52. On cross-examination, he said he had since been informed by the Defendant that it was the Plaintiff who was in occupation, and the Defendant had only used the land for two years. He neither knew the Plaintiff had been in possession of the land since 2007, nor would he know whether the Defendant ever evicted her.
53. DW3, one Nyarunda Momanyi Zephaniah, testified that he knew the Defendant, his younger brother. He adopted as evidence in-chief his written statement made on 29/11/2021 and filed on 08/12/2021 as his evidence in-chief. The statement was almost of similar content as Agwata's. He only added that the



- Plaintiff had no right over the suit land and she be evicted therefrom. The written statement was that the Defendant was his uncle. His late father bought shares in Nyamira Cooperative Society Limited through Zacharia Bogonko. The shares were transferred to DW3's younger brother and the family (siblings) had no issue with that. That all along he knew the suit land was under the care of Dickson Barongo Masereti through the permission of the Defendant. The Plaintiff had no claim over the same and should be evicted from it as her claim was unfounded.
54. He stated the land was owned by the Defendant. His father gave it to him. His father bought it through one Zakaria Bogonko, the nephew. His brother moved onto the land, situated in Kiminini, and took a vacant possession. He testified he knew Dishon Barongo Masereti as their nephew, and therefore was their father's grandson. He repeated that Dishon was invited by Bosire to occupy the land and care for it. He knew that because Zakaria Bogonko brought Barongo to their home and requested that Barongo goes to take care of the land. He was present when that request was made. His father informed Dishon Barongo that he had given the land to Bosire, and so he sent him to Bosire. The witness only came to learn later that Barongo (PW2) had taken vacant possession of the land.
  55. On cross-examination he stated the land was bought by his father through his nephew. His father was Nyarunda Momanyi. However, he did not have any evidence that his father had bought the land. He admitted that the Plaintiff had been residing on the land all along. He did not know how she got into the occupation. He admitted that his brother, the Defendant, resided on the land shortly in the early 1980s and left the same to Dickson Barongo. Since then, he would only visit and go back to Nairobi. He did not know who, between the Plaintiff and the Defendant, developed the land. He admitted that the Defendant did not have a house on the land. He did not witness the Plaintiff pull down or destroy the Defendant's house. He only learned from the Defendant that his house was not on the land anymore.
  56. On cross-examination, he stated that the Defendant was the one who informed him that he had built a house on the land.
  57. The Defendant called DW4, one Victor Monda Nyakundi. He said he recorded a statement on 29/11/2021. He adopted it as his evidence in-chief. The statement was that his father was among the founding members of Nyamira Farmers Cooperative Society Limited whose objects were to buy land for its members. It finally bought land in Kiminini Sub-county of Trans Nzoia. He, DW4, moved on to the land in 1984 and was elected Secretary in 1986. The suit land was 100 meters from the witness' land. He had been made to understand that the Plaintiff was brought onto the land in 1983 by one Dishon Barongo. But the Area List did not contain her name. Before the instant suit was filed he was one of those who wanted to reconcile the Plaintiff and the Defendant and the Defendant willingly intended to give the Plaintiff 0.3 of an acre of the land although they did not have any contract between themselves.
  58. Further, he had been resident in Nyamira Farm in Kiminini since 1984 when he was 19 years old, just after completing his Fourth Form (Form 4). He was brought there by his father, Donald Ombene Nyakundi, who owned parcel No. 143. He later bought his parcel No. 156. He said he had been the firm's Secretary since 1986 until members had titles issued to them. The Defendant was a member of the Farm, as shown by the Area List. He signed the Area List as Secretary in 2002. The copy he had in Court was obtained from the Land Registrar who had the original. It showed the Defendant owned parcel No. 67 on the Nyamira Farm. His name was indicated as Samuel B. Nyarunda who was later issued with a title deed, D.Exhibit 3. Further, plot number 75 was for a Quarry and at no time was anyone allocated the same.
  59. He testified that the area list was prepared between 1997 and 1998. He signed the Area List. He denied the Plaintiff ever paid for plot No. 67 as her name did not feature anywhere in the Area List. He



- understood that the Plaintiff was brought on to the land by her brother Dishon Barongo but the Defendant was the owner.
60. Regarding the preparation of the Area List, he testified the company used the original share certificates and Identity Cards. If a member was not around (understood to mean, a member did not wish to be registered as owner) he would be required to avail with him a child to whom he wished the land to be transferred to.
  61. When the witness was shown the share certificate of Samuel Nyarunda he confirmed it was the one the company issued to him. He said, if a share certificate did not bear the logo of the Company (at the left corner) it was not an original one (authentic).
  62. Regarding transfers of land, he stated other owners would do so from the main office in Nyamira and the changes would still be accepted on the ground. He stated that when the bearer went to their office with the share certificate and the name was cancelled the Society office would turn him back to go and come with the one the person originally indicated on the certificate. For the instant case, the owner confirmed he did not have an issue with the name change. He never complained that it was changed. When one confirmed a change, the Society accepted it easily. He produced the Area List D.Exhibit 8.
  63. On cross-examination he stated the share certificate was originally for Zachariah Bogonko. His name was cancelled by the Secretary of the Kisii main office. The witness admitted he did not know the name of the Secretary of the Kisii office. On his part he was Secretary of the Company farm. He admitted the signatures against the cancellation on the share certificate document were supposed to be of both the Chairman and Secretary. He said the insertion of the name of Samuel Bosire Nyarunda was countersigned by one person only, the Secretary. He gave the full name of Nyarunda as Zakaria Bogonko Nyarunda. Further, that after the cancellation and insertion of another name which was done by a different pen the change was supposed to be signed against by two people. He could not tell why only one person countersigned. He stated that the changes were made in 1978. He said the original owner had written a document to the effect that he did not have a problem with the cancellation. He stated, however, he did not have it in court. He admitted that the Area List did not show anywhere that it was prepared in 1998. But on the last page it was indicated as 12/05/1998. But it was certified by both the Area Chief and the District Officer (DO).
  64. He stated further that when the List was being prepared the Company did not put identity cards against people's names because that was how the chief did it. He admitted that the Plaintiff had been in occupation of the suit land from a time before he became the Cooperative Society secretary in 1986. In 2007, the Defendant ploughed the land, but he had never been in possession.
  65. On cross-examination the witness confirmed that on the share certificate the last name was Nyarunda. Further, he was not the secretary in the Nyamira office. He repeated there was a written document by the original owner that he accepted the change. He changed his mind and said there was no written document by the original owner to sanction or accept the change. That instead he confirmed that the transferee was the proper owner. To confirm that the transferee was the proper person to be given a specific parcel the Society used to send the presenter to go and come with the owner to confirm. In the instant case the Defendant went to the office with Zakaria Bogonko. The Area List was not rejected because it did not bear identity cards. It was the one used to issue title deeds to owners of parcels of land.
  66. Upon being asked by the Court to clarify about the preparation of the Area List, he said the one he had in court was a typed one. He stated that the handwritten one could be at the Land Registrar's office, but he was not sure where the original was. He stated it could be in the Nyamira office of the Society. He admitted he was not present when the original List was made. He admitted the one he produced was made based on the members who were on the Farm. He admitted the Plaintiff was on the Farm.



He stated she did not have any document to show she was the owner, even when they inquired about it from her.

67. The Plaintiff and Defendants filed written submissions, with the Plaintiff filing hers dated 10/01/2024 on 11/01/2024 and a Further one dated 14/02/2024 on the same date. The Defendant filed his dated 06/02/2024 on the same date.

### **Issue, Analysis And Determination**

68. This Court has considered the pleadings, the facts, the evidence, the law and the rival submissions. It has carefully infused the submissions in the analysis and determination in the judgment. The following issues commend themselves for determination:

- a. Whether the Plaintiff entered onto the parcel No. Kiminini/ Matunda Block 4/ Nyamira/67 with the permission of the Defendant.
- b. Whether ownership of the parcel of land commenced at the issuance of the title deed
- c. Whether the institution and existence of Kitale HCCC. No. 164 of 2007 interrupted time from running.
- d. Whether the Defendant acquired title to Kiminini/ Matunda Block 4/ Nyamira/67 by fraud.
- e. Whether the Defendant's registration as owner of parcel No. Kiminini/ Matunda Block 4/ Nyamira/67 should be cancelled.
- f. Whether the Counterclaim is merited.
- g. Cost,

69. Before setting forth to analyze the issues, this Court wishes to summarize a few undisputed facts. The Plaintiff's claim of adverse possession against the Defendant was based on the ground that the former had resided on the suit land since 17/04/1980. In her pleadings, specifically at paragraph 6 of the supporting affidavit, she also averred that the Defendant secretly got himself registered as owner even when he knew she was in occupation. The Defendant claims he is the registered owner of the land since 2007, and he too relied on the green card, produced as P.Exhibit 3, which showed he was registered as owner on 06/03/2007. These contending positions obligate the Court to ultimately determine two definitive issues of the ones indicated above, namely, whether adverse possession, and fraud have been proved.

70. However, a number of important undisputed facts need to be pointed out at this stage. The Defendant has never occupied or used the disputed land since 1982 although on the part of the Plaintiff the period is from 1980 when she settled on the land. This Court regards the period of the Defendant's non-occupation of the land to be from the one admitted in evidence by the Defendant. Thus, it is clear that save for the short "disturbance" in 2007 when the Defendant wanted to take over the land but did not, he has never resided on it. The other undisputed fact is that the Defendant is registered as the owner of the suit land. Further, both parties stated in evidence that the Plaintiff has done extensive developments on the land without permission of the Defendant. That fact, as put forth by the Plaintiff, is clearly admitted explained by Defendant who prays that the Plaintiff be evicted from the land and removes her structures. With these facts being clear, the Court now proceeds to determine the issues set forth above systematically.



### **Whether the Plaintiff entered onto the parcel No. Kiminini/ Matunda Block 4/ Nyamira/67 with the permission of the Defendant**

71. The Plaintiff stated that she entered the suit land in 1908. She stated that she was permitted by her uncle, one Zakaria Bogonko Nyarunda, whose part of the loan on land to the Cooperative Society she paid, as evidenced by P.Exhibit 2(a)-(e). She called PW2 who confirmed that indeed he was instructed to go and put up a structure on the suit land for the Plaintiff to use. He did so in 1980. He stated that it was not him who permitted the Plaintiff to occupy the land. Further, that at no time did the Defendant give him permission to occupy the land and use it.
72. On his part the Defendant testified that PW2 approached him in 1982 for permission to use the land to sustain himself. He permitted him to do so since he resided and worked in Lamu. He denied ever permitting the Plaintiff to occupy and use the land. He termed her as a stranger to him (yet she was his niece).
73. From the evidence, this Court finds that it was not the Defendant who permitted PW2, Dishon Masereti, to occupy the suit land but rather the uncle to both PW2 and the Plaintiff. Consequently, there was no connection between the Plaintiff's occupation of the land and the Defendant's permission. Furthermore, the Defendant's own testimony was that at no point in time did he permit the Plaintiff to occupy the land. Thus, even if by any stretch of imagination one were to find that the Defendant permitted PW2 to occupy the suit land, there is overwhelming evidence from the Defendant's own testimony that the Plaintiff never occupied the suit land with the Defendant's permission, whether as owner before or after his registration as such.

### **Whether ownership of the parcel of land commenced at the issuance of the title deed**

74. The issue of ownership of land in Kenya has a long and winding history. Therefore, in so far as the person who asserts ownership of land has followed the right and lawful process from the inception, and completed the steps and conditions that would be used to cause a transfer of a parcel of land to him/her to him but for one reason or other has not done so by the time the dispute arises, constructively he is the owner of the land. Registration of the land to him/her after following the lawful process is only a final product of cumulative ownership steps. For that reason, a number of documents may be used to prove ownership of land at various stages of that process.
75. In *Hebron Orucho Gisebe & 2 others v Joseph Ombura Gisebe & Another* [2022] eKLR the learned Lady Justice Onyango J held as follows:

“Since the suit property is still unregistered, the only way the trial Magistrate could establish whether the Appellant had ownership rights over the suit property was by examining of all documents presented before her including the plot card.”
76. Similarly, in *Caroline Awinja Ochieng & Another v Jane Anne Mbithe Gitau & 2 others* [2015] eKLR Onguto J stated that:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only



genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’’: per Nourse LJ in *Sen v Headley* [1991] Ch 425 at 437. The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al. The instant case is no exception. It is for the Court to interrogate the evidence, especially documentary evidence and ascertain who between the two antagonists that is to say the Plaintiffs on the one hand and the 1<sup>st</sup> Defendant on the other hand, is the true owner of the suit plot. For the court to conduct this rather wearisome and intricate task, it is proper that the documents unless otherwise agreed are produced in their original form or format.”

77. Also, in *Danson Kimani Gacina & another vs. Embakasi Ranching Company Ltd* [2014] eKLR, J.L. Onguto, J. (as he then was) observed that:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the Court must be left in no doubt that the holder of the documents proved is the one entitled to the property.”

78. The Plaintiff, on the one hand, testified that her uncle was the owner of the suit land by virtue of having acquired the same through membership by way of shares in the Nyamira Farmers’ Cooperative Society Limited. He later, in 1980, gifted it to her but had not completed the payment of loans due from him to the Society. She completed them. The Defendant, on the other hand, testified that the suit land was bought by his late father through his nephew Zakaria Bogonko who secured six (6) shares of Kshs. 500/= each within Nyamira Farmers’ Cooperative Society Limited. Then in 1980 the Defendant’s late father instructed the nephew transfer the share to the Defendant’s name. The nephew accompanied the Defendant to the Nyamira Cooperative Society in Nyamira Town (understood by this Court to be in the then Nyamira District, now Nyamira County) where he got his name cancelled from the records of Nyamira Cooperative Society Limited and replaced with the Defendant’s. This was the share certificate that the Defendant produced as D.Exhibit 8, which DW2 and DW3 also testified that it was the one transferred to the Defendant.

79. From the above, the common ground is that one Zakaria Bogonko Nyarunda initially owned the land in form of shares with the Society. But what is not common ground is how this share certificate was finally transferred to the Defendant’s name.

80. The question that this Court needs to answer as it delves further into the claims of ownership of the suit land by both the Plaintiff and Defendant is about when the ownership rights over the same began. Was it in 2007, when the Defendant got registered as the owner or when the share certificate was issued, and if so, was it was in 1980 when, according to the Defendant, the father instructed the uncle to transfer



the ownership of the share to him and he did? This is particularly important in regard to Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya, which reads that,

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”.

81. The evidence by both the Plaintiff and the Defendant point to the assertion of the rights of ownership of the suit land dating prior to 1980. When 1980 dawns, according to the Plaintiff she is given the greenlight by the uncle to proceed to occupy and use the land, and clear the loan arrears thereon as she owns the same. Then, according to the Plaintiff, the Defendant in collusion with the officials of the society got registered as owner fraudulently on 06/03/2007. As for the Defendant, the dawn of 1980 ushered in the father's instructions to the nephew to transfer 'his' share (allegedly he owned it by proxy - the nephew) to him. To him, it was upon the transfer that he, having been owner, permitted PW2 to enter and use the land.
82. If the claim by both the Defendant and the Plaintiff is anything to go by, then the fact of the Defendant being registered as owner, as evidenced by D.Exhibit 3, the green card, was only a formalization of the ownership rights which are traced back to 1980. According to him, his nephew transferred the land and the share certificate to him in 1980. From my finding above, and being persuaded by the holdings of the learned judges in the cases of Hebron Orucho (supra), Caroline Awinja (supra) and Kimani Gacina (supra) the alleged transfer, subject to the finding below as to whether it was lawful or fraudulent, conferred, according to the defendant's claim, ownership rights on him. This was the time he should have begun asserting his right, of occupation and use and exclusion of any trespassers, including the Plaintiff, from the suit land. He did nothing before the lapse of 12 years, which should have been in either 1992 (according to the Plaintiff's evidence) or 1994 (going by the Defendant's evidence that he permitted PW2 to occupy and use the land).
83. At this point this Court makes a finding that it did not find the Defendant's testimony and that of his witnesses, DW2 and DW3 credible about the Defendant having permitted the Plaintiff, through Dishon, to use the land whether from 1982 or at all. Moreover, the evidence of DW2 and DW4 regarding the alleged process of transfer of the share certificate from Zakaria to the Defendant was at best inadmissible hearsay. There is no independent proof or evidence to corroborate the said evidence, more so when the Share Certificate, D.Exhibit 2 was manually cancelled and the cancellation and insertion or change of the name of the original owner thereof was not countersigned by ALL the required officials to authenticate the originality of the Certificate and therefore subsequent transfer, and the suspicious change was not backed by any other document such as Minutes by the Company (Nyamira Farm Cooperative Society) or even receipts to keep an audit trail of the transactions thereto if genuine.
84. Therefore, in view of the above, this Court is prepared to hold that the time of the Plaintiff's entry onto the land began to run from April, 1980 (whether at the beginning of that month or end it is immaterial if the end of the twelve year period by April of 1992) for the Defendant to recover the land was part of a period much longer than it. And from the evidence of both parties, the Defendant issued a Demand Notice, annexed as SBN 3, for the Plaintiff to relinquish the land but she did not, and he sued her in the year 2007.
85. Even if the Defendant's testimony and that of DW2 and DW3 about the him permitting Dishon Maesereti, PW2, to occupy and use the land is to be believed that he did so in 1982, and given that PW2's evidence and that of the Plaintiff is clear that PW2 only entered the land temporarily to, according to him and the Plaintiff, built a structure for the Plaintiff to reside in, the Defendant ought to



have asserted his claim over the land from 1982, soon after Dishon vacated it leaving it for the Plaintiff, or when the Plaintiff entered it without his permission to the end of twelve years afterwards. Even if the Defendant's evidence was believed that he licenced Dishon to be on the land, the licence could not extend to the Plaintiff through Dishon since the principle of delegatus non potest delegare (a delegate cannot subdelegate) applies mutstis mutandis.

86. The finding above then renders inconsequential the Plaintiff's contention that time for her claim for adverse possession of the suit land started running in the year 2007 because the question that remains unanswered by the Defendant is, by when should he have filed a claim for recovery of the land from the Plaintiff? This Court is alive to the legal position that for adverse possession to firm, the Defendant has to be registered as owner of the land, and that explains why under Order 37 Rule 7(2) of the Civil Procedure Rules, 2010, the claimant for adverse possession has to annex an extract of title to the Affidavit in support of the claim. That being the position then, in terms of the Limitation of Actions Act, and by way of registration, the Plaintiff had between 06/03/2007 and the end of twelve (12) years to file a claim for adverse possession and that period ended on 06/03/2019. But he was estopped from filing a suit for recovery after the end of twelve years from April, 1980 (or at the worst after 1982). His claim for recovery of the land was extinguished. In essence, even when a person has not obtained title to any land, where he claims possessory rights subject to registration of the same as required by law he can lose the possessory rights and hence the right to claim from one who is in adverse possession if he does not interrupt the twelve-year period of the open, quit and uninterrupted adverse possessor. The above finding moves this Court to determining the next issue.

**Whether the institution and existence of Kitale HCCC. No. 164 of 2007 interrupted time from running**

87. The answer to the above question has the basis of the Plaintiff's claim over the suit land by way of adverse possession. Thus, the starting point is to understand the meaning and ingredients of adverse possession. It is an age-long concept in Common Law. Three elements found a successful claim thereof. They have been restated in our jurisdiction in a number of decisions.
88. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

89. In *Kisumu Civil Appeal No. 27 of 2013; - Samuel Kihamba v Mary Mbaisi* [2015] eKLR the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.”



90. In *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau* (Suing in her capacity as the administrator of the estates of *Kimingi Wariera* (Deceased) and of *Mwangi Kimingi* (Deceased) [2022] eKLR, it was held that:

“Adverse possession on the other hand is about occupation of land belonging to another, and asserting a right to be given title to it on the basis of the prolonged occupation of the said property. In the instant case, there was no evidence that the filing of the Succession Cause was for eviction of the Applicant from the suit property or was meant to assert rights over the land. Adverse possession accrues to land and not title and unless the Respondent took steps to evict the Applicant from the suit land, which he did not. The mere act of claiming ownership on does not stop time from running.”

91. In *Eldoret Civil Appeal No. 212 of 2012;- Isaac Cypriano Shingore v Kipketer Togom* [2016] eKLR the Court held:

“By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28th April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent’s possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.”

As the Court held in *Githu Vs. Ndeete* [1984] KLR 776 “Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire’s Modern Law of Real Property*, 11th edition at p 894. In my view the giving of notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”

92. It is not enough for the owner to send a demand notice. He should assert his right of entry or file suit for the assertion of the right. As was held in *Mount Carmel Investments Ltd vs. Peter Thurlow Ltd* and another [1988] 3All ER 12g, the Court of Appeal, in England held:

“The mere assertion by the true owner of a claim to possession of land in a letter sent to a squatter was not sufficient to prevent the squatter obtaining title by adverse possession. Accordingly, the letter sent to the defendants by the plaintiff’s solicitors did not have the effect of causing the defendants to cease to be in possession for the purposes of acquiring title by adverse possession.”

93. It follows from the above that the filing of a suit for recovery of possession from the person in possession other than the owner before the twelve years lapse interrupts the period for adverse possession. It is to be clear that the suit filed must be by the owner against the adverse possessor and it should be for no other purpose than asserting his right of entry that has been denied hence for eviction of the defendant. Other reliefs may, of course, be sought in addition to the one of eviction in order for the court to determine all issues in controversy.



94. It was the evidence of DW1, DW2 and DW3 that the Defendant got registered as owner of the suit land on 06/03/2007. This fact was admitted by the Plaintiff in her testimony. Further, the Defendant testified that he filed High Court suit No. 164 of 2007 which was finally dismissed on 13/04/2015. He contended that time therefore started running from the time of dismissal of the suit. He testified further and argued that by the time the instant suit was filed the 12 years as required by law had not elapsed.
95. On her part the Plaintiff testified that time started running from 2007 when the Plaintiff got registered as owner of the land. Further, that the filing of the suit did not interrupt the period.
96. However, as noted above, if the time for recovery of the suit land was to be taken to run from the time of registration of the land in the name of the Defendant, then it froze in between 2007 and 13/04/2015 when the Kitale High Court suit No. 164 of 2007 was dismissed for want of prosecution. But this Court doubts as to whether the dismissed suit, even if it was to be prosecuted, would have seen the light of day given that it was instituted twenty-seven (27) years from the time the Plaintiff would have asserted a claim for recovery of possession from the Plaintiff: it was not almost 15 years after the 1980 as the Plaintiff testified. Section 7 of the *Limitation of Actions Act* is precise on the point that for one to successfully recover his land by way of a suit (or re-entry for that matter) from a trespasser or adverse possessor he must do so within 12 years. Otherwise his title to the land is extinguished, in terms of Section 17 of the Act. This includes any right of ownership he may have wished to exercise.

#### **Whether the Defendant acquired title to Kiminini/Matunda Block 4/ Nyamira/67 by fraud**

97. Although the parties did not raise this issue directly, the Plaintiff contended that the Defendant got himself registered as owner of the suit land by collusion with the officials of the Cooperative Society. This called on the Court to examine the evidence regarding the registration herein. This is because, guided by the Court of Appeal authority of Chege (Represented by Apollos Mwangi Chege the personal representative) v Kibet & 2 others; Mwangi (Interested Party) (Civil Appeal 116 of 2015) [2023] KECA 932 (KLR) (21 July 2023) (Judgment) in the interest of justice this Court can consider the issue of fraud which emanated clearly and distinctly from the evidence adduced although not pleaded. The Court is enjoined to promote and give justice to parties when in the course of evidence it turns out that injustice would result if the issue borne out by the facts is not found in favour of the party it points to:

“The appellant did not file a counterclaim in adverse possession to the respondents’ suit, her explanation being that such a claim is not permissible as a claim of adverse possession cannot be raised in a counterclaim—a position that is not correct...

59. The final substantive issue relates to the appellant’s contention that the trial court erred in making an award of mesne profits of Kshs. 8,000,000 against her. Her contention is that mesne profits, which are in the nature of special damages, were neither pleaded nor proved. This argument, however, is not borne out by the pleadings and the evidence on record.

It is not in dispute that where a person is wrongfully deprived of property by another, he or she is entitled to mesne profits for loss suffered as a result of the property being wrongfully held by another, for the period that the property was so held- see Attorney General v Halal Meat Products Limited [2016] eKLR. The trial court had found that the appellant had no right to the suit property, and was a trespasser...



62. Taking into account the pleadings and evidence before the trial court, I find no basis whatsoever to interfere with the trial court's findings with respect to the mesne profits."

98. Further, Section 26(1) of the *Land Registration Act* provides that

"(1) 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, 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."

99. In the instant case, the Defendant testified that the suit land was transferred to him by his nephew through instructions of his father on whose behalf the Plaintiff bought the land. He stated that it happened in 1980. He called on three witnesses to confirm the assertion, namely DW2, DW3 and DW4.

100. He produced as D.Exhibit 2 the original of the Share Certificate to show that Zacharia Bogonko Nyarunda transferred the suit land to him by giving him the original of the Certificate. He stated further that the name of the original owner was changed on the Certificate by the Society. When asked about the alleged change he admitted that indeed the name of the original owner which, as per the P.Exhibit2, was printed by machine as Zacharia Bogonko Nyarunda had the first and second name crossed by hand and on top of them handwritten as Samuel Bosire, giving the full name as Samuel Bosire Nyarunda. The change was counter signed by only the Secretary of the Society rather than both the Secretary and the Chairman as was initially done. Further, the Certificate was issued or dated the 25/04/1978 but it did not bear the date of the change.

101. With the above glaring change, it was incumbent on the Defendant to avail evidence of the change having been genuine or not fraudulent. His oral testimony was that the change was done procedurally, having been effected in the office of the Cooperative Society in Nyamira, and the records were brought to the office on the ground. He stated that he had receipts evidencing his payments for the transaction, including a receipt of Kshs. 20/= for the transfer.

102. For further analysis on this conspicuous fraud, this Court reiterates the findings on paragraphs 83 and 84 above.

103. He testified that lost the receipts and that was why he could not avail them in Court to support his case. Instead he produced as D.Exhibit 4 an original of Police Abstract, that is to say, "Abstract From Police Records", dated 23/03/2022 issued by the Kegogi Police Station. It indicated that the report on the lost items was made on 23/03/2022 vide OB No. 07/23/03/2022. The OB was in reference of a loss of items listed as:

- (1) Five (5) payment receipts of Nyamira Society Limited
- (2) 2 K.R.A. PIN
- (3) Voters Card



(4) 2 Birth Certificates

104. Before this Court makes a finding on the import of the Abstract, it needs to point out that this case was instituted on 09/11/2021. The Originating Summons was served and the Defendant entered a Memorandum of Appearance on 24/11/2021. Simultaneous to the Appearance he filed a Replying Affidavit that he swore on 23/11/2021. To the Replying Affidavit he annexed copies of four documents, namely, copies of the Title deed and Green Card (SBN 1 (a) and (b), a Demand Letter (SBN 2), a copy of the Plaint in respect of Kitale High Court No. 164 of 2007 (SBN 3) and a copy of the Share Certificate (SBN 4). He neither mentioned that he had in his possession any receipts to evidence payments he or any other person had made in respect of the ownership of the suit land. He even wrote a Witness Statement on 29/11/2021. He never mentioned these documents.
105. The only time he mentioned the 'existence' of the lost documents was when he testified and produced the Abstract. This brings into sharp focus the truthfulness of this evidence of lost documents. The Question is, why did the Defendant never mention the documents at all when he stated his Defence and Counterclaim through Replying Affidavit?
106. The fact of the existence of a Report made to a police station and an Abstract issued thereto is not evidence at all of the stated fact. It can never be conclusive proof of the fact stated. A mere report made at the police station about loss or destruction of documents, just like a report made about an alleged offence, does not magically turn the report into the truth about the loss or destruction. Many unscrupulous individuals have endlessly used this route to defraud, con, mislead and misrepresent facts or conceal the truth. In like manner as an offence has to be proven in a Court of law as having been committed, a report about loss has to undergo thorough investigation and be proven beyond doubt that it indeed happened. Put in another way, the report only becomes proof of the fact when the police have investigated the matter fully and made a conclusion which can be either challenged (successfully) in a Court of law and proven to be so or the investigation is admitted by the adverse party or against whom it is sought to prove a fact as conclusive prove of the facts stated therein.
107. For a long time, the use of Police Abstracts many matters as prove of the facts stated has caused a lot of lies and fraud and been channels and conduits of injustice in the justice system of Kenya to great a misery of many innocent and unsuspecting or weak citizens. It is not lost sight of this Court the often Kenyans have witnessed cases where police have been compromised or acted in complicity of injustices or have failed to properly investigate complaints or reports made to their offices, and then people have walked out of their offices armed with Occurrence Book Numbers (OBs) or Police Abstracts and waived them on the face of the intended recipients and walked away with it.
108. Take the case of the instant piece of evidence before me, how can this Court ever believe the existence or loss of such documents as listed? Does it leave more questions than answers? Someone walks into a police station, reports that his items, crucial as they may be, are lost. In a moment or so he walks out of the station waving an Abstract which purports to be credible evidence of the existence or otherwise of the items! Should a judicial body exercising its mind judiciously take this to be gospel truth, particularly, when such items are form the central nerve of a very contentious matter brought already before it? What did the Police in Kegogi Station do when the report was received, to satisfy themselves that indeed such documents existed or were lost? Whose were they? When, where and how were they lost? What efforts had been made to replace them, and so on? Since the receipts listed as item (1) in the Abstract related to the suit land, how come they may not have been stored together with the title deed and the Share Certificate which were not lost? If they were together, why were the receipts which would form the history or chronology of the acquisition of the title to the suit land the only documents lost, leaving the final products (title and certificate)?



109. In any event, a KRA PIN document is the simplest document to obtain a replacement in Kenya in this era of technology. Could it not be replaced? The Nyamira Farmers Cooperative Society Limited exists to date. It even sent a representative, on behalf of the Defendant, as a witness, DW4, to court. If the receipts ever existed, could the Society not have made copies of the same subsequent to the loss and produced them as evidence? Why, other than collusion or skewed evidence or favoritism, would the Society rubbish the copies of the receipts produced by the Plaintiff in respect of payments made to it by her but stand in support or solidarity with a party, the Defendant, who does not have any receipts whether issued to the original owner or himself or even certified copies of the same?
110. This Court is intelligent enough to tell the truth and differentiate it from afterthoughts and choreographed stories designed to fit into a form of evidence aimed at misleading it. I reject the content of the Abstract.
111. The content of the Abstract aside, the Court carefully examined the evidence of DW2 and DW3 whose testimony it has earlier on found the evidence not credible and inadmissible hearsay on the issue of how the alleged transaction of the transfer of the ownership of the Share Certificate took place: the two witnesses were not present when the alleged 'transactions' took place.
112. DW3 indicated that he was present when Zakaria Bogonko brought PW2 to their home for PW2 to ask the father to the Defendant to grant him permission to use the land. He stated that it happened in Nyamira, and that the said father informed him that he had since given or transferred the land to the Defendant. Further that the said father referred him to the Defendant.
113. This evidence contradicted sharply that of the Defendant who testified that his father directed the said Zakaria Bogonko to transfer the land to him in 1980. That Zakaria Bogonko transferred the land to him then. He accompanied Zakaria to Nyamira offices where the transfer was done. Then he began occupying the land up to 1982 by which time he had built a structure on it. He left the house to Dishon to use when Dishon asked for the use of the land. By then the Defendant was working in Ruaka.
114. If, indeed, the evidence of DW3 or even that of the Defendant is to be believed, that Zakaria Bogonko who was the registered owner of the land before had, by 1980, transferred the land to the Defendant, why would he have taken PW2, Dishon, two years later to the father of the Defendant to make a request that the said father gives PW2 the land to occupy and use? Why would he not have taken the said Dishon to the Defendant to whom the land belonged by then? What had Zakaria to do with the suit land two years after he had transferred it to the Defendant? This Court does not believe both witnesses on this issue.
115. Then comes DW4 whose evidence was supposed to shed light on the entire transaction but it failed to measure to the required standard on a balance of probability on credibility. First, he stated that he moved on to the land in 1984 when he was 19 years old and was elected Secretary in 1986 and was as such to date. He stated he was made to understand that the Plaintiff was brought onto the land in 1983 by one Dishon Barongo. He did not state how he got this information. Thus, this was inadmissible hearsay.
116. He stated that the Area List did not contain her name. He made signed the Area List in 2002, and the Defendant was a member of the Farm as per the List, appearing Samuel B. Nyarunda. The area list was prepared between 1997 and 1998. Further, that in preparing the Area List, the company used the original share certificates and Identity Cards. He stated that other owners would transfer their land from the main office in Nyamira and the changes accepted on the ground. He produced the Area List D.Exhibit 8.



117. This Court examined the evidence of the witness carefully. It noted that the witness did not produce the original or handwritten Area List which bore the names of shareholders from the inception of the Society. He only produced a typed List which did not show who transferred his shares to who and how that was done. Further, he did not show which records were originally held by the Nyamira Office in the then Nyamira County or those held at the Nyamira Farm in Trans Nzoia. He even did not know the name of the Secretary of the Kisii office. He admitted that the change or cancellation on the Share Certificate should have been countersigned by both the Chairman and Secretary rather than the latter alone. He admitted further that the changes were made in 1978. He said the original owner had written a document to the effect that he did not have a problem with the cancellation. But he did not produced such a document. He did not have Minutes to support the change in 1978 when he was not in the office as an officer. Furthermore, he admitted in cross-examination that last page of the Area List indicated as the date of preparation as 12/05/1998. He admitted that it was the Area Chief who made the List and that was why he omitted the Identity Cards of the owners.
118. After being pressed in cross-examination he changed his mind and said there was no written document by the original owner to sanction or accept the change. He repeated his inadmissible hearsay evidence that for the Far Office to confirm that the transferee was the proper person to be given a specific parcel the Society used to send the presenter to go and come with the owner to confirm. Then he stated that in the instant case the Defendant went to the office with Zakaria Bogonko. But this Court finds this evidence absolutely contradictory in the sense that he was not in office when the change took place, further, he stated it happened in 1978 yet the Defendant and DW2 and DW3 stated that it was in 1980. These other glaring contradictions called for other evidence of clarification through support of documentary evidence, but the Defendant did not avail any.
119. Moreover, upon being asked by the Court to clarify about the preparation of the Area List, he said the one he had in court was a typed one. He stated that the handwritten one could be at the Land Registrar's office, but he was not sure where the original was. With the incompleteness of the content of the Area List which he produced and the fact that it was only typed, it behooved the witness to tender evidence of the handwritten one to confirm if indeed the Plaintiff's name was not in the original members' List.
120. The totality of the above evidence is that the registration of the Defendant as the owner of the land was done through a fraudulent scheme. The title is not clean and cannot stand.

**Whether the Defendant's registration as owner of parcel No. Kiminini/Matunda Block 4/ Nyamira/67 should be cancelled**

121. Section 80(1) of the *Land Registration Act* provides that,
- “(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”
122. This Court has, in the immediate issue above, found that the title registered in the name of the Defendant was obtained by fraud. In the circumstances it must order that the same be cancelled and the register amended.
123. Even assuming that the conclusion above was not correct hence the title was to be found to have been legally acquired, given the provisions of Section 17 of the *Limitation of Actions Act* and the finding under issue number (b) above, the title of the Defendant was extinguished by virtue of him not having



moved the Court to recover his land, or taking actual possession and removing the Plaintiff from the parcel of land, within 12 years of the period the Plaintiff moved onto the land.

### **Whether the Counterclaim is merited**

124. The Defendant Counterclaimed for an order of eviction against the Plaintiff from the suit land, a permanent injunction restraining her from reentering the suit land, general damages and mesne profits over the suit land and costs of the suit.
125. The legal position regarding recovery of land by an owner from a trespasser or other person who is on it without his permission is stipulated in Section 7 of the *Limitation of Actions Act* as read with Section 17 thereof. Section 7 provides that the suit for recovery should be brought within 12 years of the stranger's entry onto or possession of the land. Section 17 clarifies the position to the effect that where the suit for recovery is not filed within the stipulated time, the claimant's title is extinguished. It basically means that irrespective of whether the party in adverse possession of the parcel of land has brought a suit for such a claim or not, the owner is estopped from raising a claim for recovery of the same. It means, further, that the owner's proprietary right to the land is lost by effluxion of time: he cannot claim it, and if the adverse possessor decides to assert his legal claim to the land he will succeed while the owner has no valid defence to such a claim.
126. In the instant suit, this Court has extensively analyzed, above, the factual position of the claimant and the Defendant. It has found that despite the fact that the Defendant was registered as owner of the suit land on 06/03/2007 he claimed rights of ownership of the same from 1980. Given that the Plaintiff entered on the land from that time too, the Defendant had twelve years from that time to file suit for recovery of the same, irrespective of whether he had been registered as owner or not. He had possessory rights which ultimately would give rise to ownership rights by way of registration. He did not do so. His claim to the land, although the Court did not find his evidence in support together with that of his witnesses convincing, started to run from either 1980 or April, 1982. Again, his evidence was that the uncle bought the land in April, 1978 and was given a certificate of ownership then. If his evidence is true, then he became owner subject to registration (in the lands office) from 1980 or 1982. Once the Plaintiff began occupying his land and resided on it for more than 12 years from then, his claim over the land as an owner is thus extinguished by virtue of the lapse of time, being the twelve years he should have claimed it from the claimant. He cannot raise the same now, by way of Counterclaim. Further, the fact that the Plaintiff's claim for adverse possession may not have succeeded, the Defendant's right of recovery of the land was lost after twelve years passed from when the Plaintiff first occupied the land, continuously, without dispossession.
127. In my humble view, in *Chege (Represented by Apollos Mwangi Chege the personal representative) v Kibet & 2 others; Mwangi (Interested Party) (Civil Appeal 116 of 2015) [2023] KECA 932 (KLR) (21 July 2023) (Judgment)* the Court of Appeal was of the view that the Court can, in certain circumstances, give reliefs not prayed for but meant to give effective remedies in the determination of matters. I believe this is a proper case for that because, of the Defendant's right to recovery of the land from the Plaintiff is lost, as indeed is, and the Plaintiff is not granted the relief of registration of the land in her name, of what value is this judgment to the parties? It would mean leaving a gap which would require that at some point in time to come the Plaintiff would have to move the Court for registration of the land in her name. That would mean that the Court would not have determined all issues in controversy as between the parties herein. A cardinal issue between the parties herein is, who between them should be registered as the owner of the suit land? This the Court must decide after all evidence has been adduced. And the court finds the Plaintiff to be entitled to that registration in her favour.



## Final Disposition

128. The upshot is that the Plaintiff's claim over land parcel No. Kiminini/Matunda Block 4/ Nyamira/67 by way of adverse possession is not successful. However, she has proven that she has been in continuous occupation of the parcel of land, to the exclusion of the Defendant, since 1980. Therefore, in terms of Section 17 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, the Defendant's title, if any, and hence his registration as owner and his claim, of the suit land by way of possessory rights, is lost since the same were extinguished. The Defendant's Counterclaim is thus lost. Since it is lost, he cannot claim it. Since by that token he is estopped from claiming recovery of the parcel he cannot, even if he could have been legally registered as owner, continue to be registered as owner.
129. This Court therefore enters judgment for the Plaintiff against the Defendant on the following terms:
- a. The Defendant's registration as owner of all that parcel of land known as No. Kiminini/Matunda Block 4/ Nyamira/67 is extinguished and is hereby cancelled forthwith and be replaced with the name of the Plaintiff as the registered owner.
  - b. The Plaintiff is hereby declared owner of all that parcel of land known as No. Kiminini/Matunda Block 4/ Nyamira/67 and is hereby to be registered forthwith as such.
  - c. A declaration is hereby issued that the Defendant's rights, if any, to the land comprised in title No. Kiminini/Matunda Block 4/ Nyamira/67 got extinguished limitation of actions upon the expiry of 12 years with effect from 1980 and during which time the Plaintiff was in open, continuous, exclusive and adverse possession of the parcel of land.
  - d. A declaration is hereby made that so far as the Defendant remains registered as proprietor of land parcel No. Kiminini/Matunda Block 4/ Nyamira/67, he holds the registration in trust in trust for the Plaintiff.
  - e. An order is hereby made that the Defendant does execute forthwith all such documents to facilitate the transfer of Title Number Kiminini/Matunda Block 4/ Nyamira/67 from his name to that of Plaintiff, failing which the Deputy Registrar of this Court shall be at liberty immediately after the expiry of thirty (30) days from the date of this judgment execute all such documents in favour of the Plaintiff.
  - f. Each party shall bear its costs.
130. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA THE TEAMS PLATFORM  
THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. DR. IUR F. NYAGAKA,  
JUDGE, ELC KITALE**

In the presence of:

B. N. Munialo Advocate-----for the Plaintiff

M. Kaosa Advocate-----for the Defendant

