



**Keter v Sambai (Environmental and Land Originating Summons  
E008 of 2022) [2024] KEELC 13538 (KLR) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13538 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2022  
EO OBAGA, J  
DECEMBER 2, 2024**

**BETWEEN**

**DAVID KIPTANUI KETER ..... APPLICANT**

**AND**

**BENJAMIN SAMBAI ..... RESPONDENT**

**JUDGMENT**

1. Through the Originating Summons dated 25<sup>th</sup> February, 2022 the Applicant seeks the following orders, that:-
  - a. The Honourable court do declare that the Respondents interest in the 4.0 Acres in the parcel of land known as Temblio/Elgeyo Border Block 10 (Kaptuktuk) 300 has extinguished by virtue of operation of the Limitations of Action Act.
  - b. Upon the declaration in prayer (1) above, that the proprietary interest for the 4.0 Acres is extinguished, the Applicant be registered as the proprietor thereof for 4.0 Acres in land parcel No. Temblio/Elgeyo Border 10 (Kaptuktuk) 300.
  - c. The land register be rectified and be registered as a proprietor of land known as Temblio/Elgeyo Border Block 10 (Kaptuktuk) 300 measuring 4.0 Acres.
  - d. Costs of this application be provided for.
2. The Originating Summons was supported by the Plaintiff's Affidavit sworn on 25<sup>th</sup> February, 2022. The Applicant's case is that the Respondent is the registered owner of Temblio/ Elgeyo Border Block 10 (Kaptuktuk) 300 (the suit property), which was purchased by one Mr. Birgen Samoei (now deceased). In 2001, the late Mr. Birgen agreed to exchange the suit property with the Applicant's land measuring 2.0 Acres and an additional payment of KShs. 100,000/-. The Respondent had at the time pointed out the suit land to the late Mr. Birgen who in turn pointed it out to the Applicant. It is the



- Applicant's case that he moved into the suit property at the time of the said exchange in the year 2001, and started using it by planting maize and wheat. Further, that in 2005 the Applicant planted blue gum trees which he has harvested twice and intends to harvest again.
3. The Applicant averred that since the exchange in 2001, he has been utilizing the land continuously, openly and uninterrupted as against the Respondent's interest. He deponed that he has extensively developed the land as shown in the annexed photographs. He alleges that he even sold murrum on 18<sup>th</sup> November, 2017 that he harvested from the land with no complaint from the Respondent. In May, 2021 however, it is alleged that the Respondent raised unfounded claims on the land necessitating a dispute that was addressed by the area Assistant Chief. Claiming that he has been in occupation for over 20 years, the Applicant, now seeks to be registered as the owner of the suit property by virtue of the doctrine of adverse possession.
  4. Opposing the Originating Summons, the Respondent filed a Replying Affidavit sworn on 12<sup>th</sup> April, 2022 and Amended on 5<sup>th</sup> July, 2023. He deponed that he is the registered owner of the suit property, his possession thereof had never been discontinued and if that had happened, he would not have consistently been paying rates. That his neighbour, Birgen Samoei who is the Applicant's father-in-law, had asked the Respondent to lease out to him a portion of his other parcel known as Tembilio/Elgeyo Border Block 306 but he was not willing. He alleges that he instead agreed to lease the suit property to Birgen Samoei to plant blue gum trees for KShs. 100,000/- which he paid in instalments to completion. According to the Applicant, the lease was to last for 5-8 years until maturity of the blue gum trees, but Birgen Samoei asked for numerous extensions and as a neighbour, he indulged him. Birgen Samoei then brought the Applicant herein to be using the land in his stead and the Applicant did not at the time indicate that he had bought the land.
  5. The Respondent alleged that the Applicant came to him seeking documents to enable him pay land rates, but he declined. The Respondent averred that the Applicant's father in law entered into and was using the suit land with his consent. The Respondent also denied the entry, usage and alleged occupation of the suit land as alleged by the Applicant, and averred that the excavation of murrum from the land by the Applicant was done without his consent. The Respondent averred that the Respondent then made a complaint to the Area Assistant Chief who referred them to the Area Chief. The Chief called for a meeting but they could not reach a settlement since there was no sale agreement. They were referred to the Assistant County Commissioner, but they are yet to be summoned there. The Respondent prayed that the claim for adverse possession be dismissed with costs as it is untenable.
  6. In response to the reply above, the Applicant swore a Supplementary Affidavit on 25<sup>th</sup> August, 2022 where he deponed that the Respondent had left the suit property prior to the exchange in 2001 having been dispossessed by the late Birgen Samoei for more than 12 years. The Applicant denied any knowledge of the alleged Lease Agreement between the Respondent and Birgen Samoei, who is not a party herein, or the alleged consent. He asserted that he is the one who planted the blue gum trees and with the Respondent's knowledge entered 2½ year lease for excavation of murrum which exercise cannot be done in secrecy. The Applicant averred that in his letter dated 18<sup>th</sup> November, 2017 the Area Chief confirmed that he was the one on the suit land. The Applicant deponed that the finding of the meeting held on 4<sup>th</sup> November, 2021 shows the history of the Applicant being on the land contrary to the Respondent's allegations. The Applicant deponed that the Respondent's Replying Affidavit is full of lies and half-truths intended to conceal the truth. He reiterated his prayer that his claim for adverse possession is merited.



## Hearing and Evidence:

7. The Originating Summons was heard by way of viva voce evidence. The Applicant testified on oath as PW1 and adopted his witness statement dated 10<sup>th</sup> July, 2023 as part of his evidence. He produced the green card, which indicates that the land was registered in the name of the Respondent on 14<sup>th</sup> December, 1994 as PEXb1. He testified that he entered the land in 2000, has been cultivating it and planted the blue gum trees in 2005 on a 1.3 Acre portion that is swampy. He produced copies of photographs showing the said trees as PEXb 2(a), (b) and (c). He also produced a copy of the 2018 Lease Agreement between him and China International Cooperation (CHICO) for excavation of murrum as PEXb3. He testified that vide cheque dated 18<sup>th</sup> November, 2017 he was paid KShs. 700,000/- under that agreement, a copy of the cheque was produced as PEXb4. He testified that the Respondent did not stop him from utilising the land. That he went to ask the Respondent for documents but he refused, he then reported him to the chief who recorded the minutes, which the Applicant marked as PMFI1. He prayed that the court orders that he be registered as the owner of the land.
8. On cross-examination, PW1 stated that he entered the land in 2000 and has remained thereon with the knowledge of the Respondent. He explained that he exchanged his land with his father-in-law, Birgen Samoei, but he did not ask him whether he had been given title. PW1 testified that he has harvested the blue gum trees three times. He clarified that he went to the Respondent after the County Government waived land rent, and that the Respondent did not sign any transfer forms. On re-examination, PW1 testified that he has been on the land for 23 years. That he had come to court to be registered as owner of the suit land. Further, that he had not been charged with any offence relating to the suit property.
9. Simon Kipkering Kipkorir, the Assistant Chief Kaptuktuk Sub-location, testified as PW2 and adopted his witness statement as his evidence-in-chief. He testified that both the Applicant and his late father-in-law resided in his location. He testified that the Applicant had reported at his office that he had requested for transfer documents from the Respondent but he refused. PW2 recalled that at the time the Applicant wanted the land for excavation of murrum, he (PW2) went to the Respondent's home and the Respondent confirmed that he had no objection to the exercise. PW2 testified that he witnessed the Agreement between the Applicant and CHICO. He testified that later, the Respondent claimed that he had not sold the land. That they convened a first meeting on 22<sup>nd</sup> July, 2021 with the elders whose minutes he produced as PEXb5. The second meeting happened on 4<sup>th</sup> November, 2021 and was attended by the Area Senior Chief and the minutes thereto were produced as PEXb6. He confirmed that the Applicant has been on the suit property for 23 years. He explained that the Respondent's claim that he did not sell the land came after the death of Birgen Samoei.
10. PW2 was cross-examined and he testified that he did not witness any sale agreement between Birgen Samoei and the Respondent. He testified that he leased 1 Acre from the Applicant and that he is the one who gave him the seedlings which he planted. He explained that the minutes were not signed since the parties did not agree; that there has to be a written agreement when parties deal with land. On re-examination, PW2 testified that the Applicant came to court because he had been on the land for 23 years. He clarified that it is the Plaintiff who planted the blue gum trees; and that he was not aware of any other case other than this one.
11. The Applicant also called Abraham Chirchir Serem, a farmer in Kaptuktuk Sub-location as PW3. He was sworn and adopted his statement dated 11<sup>th</sup> July, 2023 as his evidence in chief. His statement is to the effect that he has known the Applicant, who is his neighbour, since childhood. He testified that Birgen Samoei informed him about the exchange of the suit land between himself and the Applicant. PW3 testified that the Applicant's land to be exchanged measured 2.8 Acres and the Applicant was



thus to add money, and PW3 confirmed that he witnessed payment of KShs. 90,000/-. The Applicant entered the land, fenced it with barbed wire, planted blue gum trees on the wetlands and maize as well as other crops on the arable part. PW3 testified that he went to the suit land with the Area Chief for the murrum excavation agreement. PW3 also testified that the murrum was excavated for 3 years and it was in the public domain that the murrum was from the suit land. He told this court that he is the village elder and secretary to the farm and the Respondent has never developed the land. He also testified that the Respondent only started claiming the land after the death of Mr. Birgen. PW3 confirmed that the land was sold at KShs. 25,000/- per Acre.

12. On cross-examination, PW3 testified that he was present when the Applicant planted the blue gum trees but he had no photographs to confirm the existence of crops on the land. That he is aware the Respondent is the registered owner of the land. That he did not see any agreement between Birgen Samoei and the Respondent. PW3 was re-examined and he confirmed that the photographs produced as PEXb 2(a), (b) and (c) were taken on the suit land. He clarified that he was secretary to Kaptuktuk B, and that the Applicant had occupied the suit property since 2000.
13. The Applicant's last witness was Hosea Kipserem Tirop (PW4), who was sworn and adopted his witness statement dated 11<sup>th</sup> July, 2023 which is a repetition of PW3's statement, as his evidence-in-chief. PW4 was cross-examined and he testified that Birgen Saoei did not have title to the suit property. He testified that it is the Applicant who told him Birgen Samoei had purchased land from the Respondent. Further, that the Area Chief asked him to confirm if the suit land belonged to the Applicant when the Chinese Contractors wanted to excavate murrum. He also testified that it is the Applicant who complained about the suit property. On being re-examined, he testified that he is a village elder and that the Applicant has been on the suit property for long. After the testimony of PW4, the Plaintiff closed his case.
14. The Respondent testified in support of his case as DW1, giving a sworn testimony and adopting his witness statement dated 5<sup>th</sup> July, 2023 as his evidence-in-chief. He produced a copy of the title to the suit property as DEXb1, a bundle of receipts which he produced as DEXb2(a)-(k) respectively, as well as medical records which he produced as DEXb3(a)-(h).
15. DW1 was cross-examined and he testified that he had an unwritten agreement with Birgen Samoei to lease the suit property to him to plant blue gum trees. He testified that they did not agree on the number of years but they intended that he would use the land for 5 years. It is DW's testimony that Birgen paid him money but they did not record the agreement that the money was subject of. He confirmed that the blue gum trees appearing in PEXB2(a)-(c) are the ones growing on the land and that they were planted in 2005. He admitted that the excavation and transportation of the murrum was openly done but he only found out after he recovered from an illness. He also admitted that Birgen brought the Applicant to him two years after he had leased the land to him, informing him that his son-in-law would be harvesting the blue gum trees. He confirmed that the blue gum trees had been harvested 3 times. He admitted that he did not see Birgen harvest the trees the first time, but that the Plaintiff harvested the 2<sup>nd</sup> and 3<sup>rd</sup> times. He also testified that the harvests are done after every 5 years.
16. DW1 testified that he reported the sand harvesting to the chief and thereafter asked Birgen to move out of the land, but no verdict was reached at the Chief's meeting. He then turned around and testified that he had asked Birgen to move out after harvesting the blue gum trees. He also admitted that he did not sue Birgen and his son-in-law, and admitted that it is the Applicant who complained to the Assistant Chief. DW1 testified that the Plaintiff was staying on his land by force with the help of the Assistant Chief. He could not remember when Birgen Samoei died. He reiterated that he is the one who has been paying land rent. DW1 revealed that he had been suffering from diabetes and explained that he had only been admitted once at a clinic near his home. Further, that when the condition worsened, he



could not walk or see, but this lasted for only one year. DW1 told this court that the Applicant's blue gum trees were still on the land, and that he had not sold his land.

17. On re-examination, DW1 testified that it is Birgen who asked to be allowed to harvest the blue gum trees for a second time. That he allowed the Applicant to remain on the land because he was brought by Birgen. That he went to the Assistant Chief to complain, and the Applicant also did the same.
18. John Sitienei testified under oath as DW2 and adopted his witness statement dated 5<sup>th</sup> July, 2023 as his evidence-in-chief. It is explained in the said statement that he is the Respondent's Cousin. DW2 stated that sometime in 2019 the Respondent was sick and visited hospital frequently, during that time the Respondent complained to him about the Applicant excavating murrum from his land without permission. Further, that the Respondent called him to a meeting at the Assistant Chief's office upon a complaint brought by the Applicant, however, the issue was not resolved, and even after several meetings on the same no settlement was reached.
19. DW2 was cross-examined and testified that the Respondent purchased Plot No. 300, which has blue gum trees planted on it. He testified that the said trees were planted by the person who leased Plot No. 300 and not the Respondent. He also testified that he did not know the person who harvested sand from the suit property, but that the permission to harvest was given to the Applicant. He admitted that the Assistant Chief found that the Applicant was the owner of the suit property. DW2 testified that he never met Birgen Samoei and had never met the Applicant before the filing of this suit. It was his testimony that they appeared before the Assistant Chief in 2021 but no verdict was reached. When shown the PEXb5, DW2 admitted that his name did not appear on the minutes. He also admitted that he did not know who had been utilising the land. Upon being re-examined, DW2 testified that the minutes were not stamped. He confirmed that they appeared before the Assistant chief who wrote the letter dated 18<sup>th</sup> November, 2017.
20. The Respondent also called Peter Kiptanui as DW3, he testified on oath, adopting his witness statement dated 5<sup>th</sup> July, 2023 as his evidence-in-chief. In his statement, DW3 testified that in 2021 the Respondent, who is his uncle, invited him to a meeting at the Assistant Chief's Office in Kaptuktuk Sub-location. The meeting was to resolve a land dispute between the Respondent and the Applicant herein, they were both heard but no resolution was reached. He testified that he attended two other meetings over the same land dispute but the Applicant could not avail proof to support his claim over the land in question.
21. On cross-examination, DW3 testified that he only came to know the Applicant in 2021 after the Respondent told him that he wanted to take over his land, although he could not recall the parcel number of the said land. He was unaware that the Applicant was on the suit land, but the Respondent had informed him that he had leased the land to an old man to plant blue gum trees. He testified that he was aware murrum had been excavated from the suit property, but that he did not witness any lorries carrying it away. He told this court that he attended the meeting at the Assistant Chief's office with John Sitienei, but no verdict was reached. DW3 was re-examined and he reiterated that no consensus was reached at the Chief's office.
22. DW4 was Ezekiel Kimeli Some, who testified under oath and adopted his witness statement as his evidence-in-chief. His testimony is that he is a village elder at Chemugen Village, and the Respondent asked him to attend a meeting to hear a land dispute at the Assistant Chief's Office at Kaptuktuk sub-location alongside several village elders. No agreement was reached at the first meeting, and the parties were advised to bring their clansmen to the next meeting. It is DW4's testimony that he attended the second meeting, which also bore no fruits. The Applicant was then asked to bring the family of Birgen Samoei to a third meeting, and he brought the wife of Birgen, yet again, no settlement was reached.



23. When cross-examined, DW4 testified that the Respondent used to utilize the land before the Applicant came in, however, he could not tell when the Applicant started utilising it. He clarified that he is not a village elder of the area where the suit land is situated, and explained that the Respondent lives about 2-3 kilometres from the suit land. DW4 testified that he knew that murrum had been excavated from the land by Chinese but he did not know who sold it. Further, that the blue gum trees had been harvested once although he did not know who harvested them. DW4 also testified that he attended the meeting at the office of the Assistant chief in 2022 although he had nothing to prove his attendance. He confirmed to the court that his name was not in the minutes produced as PEXb5. DW4 told the court that the Applicant is not on the suit property but also confirmed that it is the Applicant who fenced the suit land. He insisted that the Respondent has been utilising the land for 15 years and reiterated that he did not know about the Applicant utilising the suit land. DW4 was not re-examined.
24. Cheruiyot Arap Mutai testified under oath as DW5 and also adopted witness statement dated 5<sup>th</sup> July, 2023 as his evidence-in-chief. According to DW5, the Respondent who is his neighbour told him that someone had excavated murrum from his land without consent when he was sick and frequently in hospital. Further, that he attended the three meetings held at the Assistant chief's office, which all ended without any settlement. On cross-examination, DW5 testified that he knew the land belonged to the Respondent and that the Applicant was using the land, he however could not tell how long the Applicant had been using it. Further, that the Applicant did not live on the suit land. DW5 did not know who planted or harvested the blue gum trees. He also added that the excavation and ferrying of the murrum was sometimes done during the day. On re-examination, DW5 testified that he did not see when the trees were cut down.
25. The last witness was Kemboi Tendenei (DW6), who also testified under oath and adopted his witness statement dated 5<sup>th</sup> July, 2023. He acknowledged that the Respondent is his brother. His testimony is that he was invited by the Respondent to the Assistant Chief's Office for a meeting on the land dispute. He attended the first and second meetings, but no resolution was reached on the dispute. When he was cross-examined, DW6 testified that the land belonged to one Mnandi who is now deceased. He testified that the blue gum trees were planted by the Applicant but it is Mnandi who cut them down. He acknowledged that Mnandi is a nickname, however, that it did not refer to the Applicant. DW6 also did not know who was paid for the excavation of the murrum. DW6 testified that he was not aware the Applicant had been living on the land for over 20 years. Upon re-examination, DW6 testified that the Applicant is the son-in-law of Mnandi.

#### **Submissions:**

26. At the close of the Respondent's case, the court directed that parties file their written submissions. They both complied with the Applicant's submissions dated 2<sup>nd</sup> October, 2024 while the Respondent's submissions are dated 10<sup>th</sup> October, 2024.

#### **Applicant's Submissions;**

27. The Applicant anchored his adverse possession claim on Sections 7, 9, 13, 17, 37 and 38 of the *Limitation of Actions Act*, CAP 22 LOK. Counsel cited the cases of Kiptanui A. Chuma vs Kibor A. Kolil (2014) eKLR, Tabitha Waitherero Kimani vs Joshua Ngángá (2017) eKLR, and Kimanu Ruchine vs Swift Rutherfords & Co. Ltd, which described the principles governing the doctrine of adverse possession. It was submitted that the Applicant's entitlement to the suit property is established by the fact that he fenced the suit land, planted blue gum and eucalyptus trees in 2005, farmed different crops yearly, openly and with the Respondent's knowledge and leased the land to CHICO to extract murrum.



28. Counsel argued that the evidence adduced demonstrates that the Applicant has, on a balance of probability, cemented his claim over the land. That upon the exchange agreement with Birgen Samoei, the Applicant took immediate, exclusive possession and occupation of the suit land and undertook extensive developments. Counsel prayed for judgment in the Applicant's favour as per the prayer's in the originating summons. To bolster his arguments, Counsel also relied on *Loice Kaluma Ngwili vs Eliud Mutengu Makau* (2017) eKLR, *Mathew Kiprop Tonui vs Kimutai Arap Too & 4 Others* (2018) eKLR and *Robert Otieno Agok vs Paskal Oor* (2019) eKLR.

### **Respondent's Submissions;**

29. In the Respondent's Submissions, it was acknowledged that the late Birgen Samoei took the Applicant to the Respondent as the person who would be using the suit land, thus his entry into the land was consensual and permitted by the Respondent. It was submitted that the Applicant had not proven his alleged actual and continued occupation of the suit land as there is no evidence of houses or crops, and the claim that he planted the blue gum trees has been disputed. Counsel for the Respondent further submitted that Applicant had not demonstrated the nature of his possession. Counsel anchored his arguments on Section 107 of the *Evidence Act*.
30. Counsel submitted that adverse possession is not established merely because the owner abandoned possession, it must be coupled with the claimant taking possession of the land and asserting rights that are inconsistent with those of the owner of the land. Counsel added that possession is a matter of fact. Counsel prayed that the claim for adverse possession is not merited and the same ought to be dismissed. He relied on *Joseph Macharia Kairu vs Kenneth Kimani Muiruri* (2021) eKLR, *Abdirashid Adan Hassan vs Estate of WHE Edgley* (2022) eKLR and *Samuel Miki Waweru vs Jane Njeru Richu*, Civil Appeal No. 122 of 2001.

### **Hearing and Determination:**

31. I have considered the pleadings, the witness testimonies, the evidence adduced and the rival submissions by the parties. The issue for determination is whether the Applicant has proved the requirements for adverse possession. The legal framework on Adverse possession is stipulated under Section 7 of the Limitations of Actions Act, Chapter 22 of the Laws of Kenya, which provides:
- “An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”
32. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR, the Court of Appeal defined adverse possession as:-
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, which in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
33. It therefore follows that a person claiming adverse possession has to prove use and occupation of the land, with actual or constructive knowledge of the owner and such possession must not be broken



or interrupted for a period of twelve years. The possession must be open and notorious and must also demonstrate the intention to defeat the registered owner's title. With regards to the nature of occupation, it has been held that the occupation by the claimant must be with the clear intention of excluding the owner from the property. The Applicant herein was required to establish the requisite animus possidendi to succeed in this claim for adverse possession.

34. The court in *Haro Yonda Juaje vs Sadaka Dzenzo Mbauro & Kenya Commercial Bank Limited* (2014) KEHC 6665 (KLR), explained that to establish animus possidendi, one must show that he either dispossessed the owner the land or the owner of the land discontinued his possession. Dispossession is where a person comes in and drives another out of the land while discontinuance of possession is where a person in possession goes out and another person takes possession. The court cited the decision *Wambugu vs Njuguna* (1983) KLR 173, where the Court of Appeal held as follows:

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

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

35. The Applicant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the registered owner discontinued his possession. In the instant suit, both parties have claimed possession and occupation of the suit land, the Applicant by virtue of the alleged oral exchange agreement and the Respondent by virtue of being the registered owner. The Applicant however claims that having exchanged the land with Birgen Samoei, who had allegedly purchased from the Respondent herein, his possession and occupation of the land has been adverse to the rights of the registered owner. It is clear however, from the testimonies adduced, that it is actually the Applicant who has had actual possession of the land and has been utilising it.
36. I agree with the Respondent's submission that a party claiming adverse possession must establish that they had asserted such rights over the subject land as were inconsistent with the registered owner's rights. To that end, I have looked at the evidence before the court. The parties as well as all their witnesses agree that there are blue gum trees on the suit property. Both the Applicant and the Respondent are in agreement that the trees were planted in the year 2005. The question is who planted them on the suit property. In his witness statement, the Respondent informed this court that he leased the suit property to the late Birgen Samoei in the year 2001. When he was cross-examined, he testified that the late Birgen Samoei brought the Applicant to him 2 years after he leased the property, to inform him that the Applicant would be the one using the land.
37. This means that the Applicant was taken to the Respondent in the year 2003, lending credence to the Applicant's allegation that he has been on the land way before the year 2005. As per the Respondent's testimony, in the year 2005 when the blue gum trees were planted, the Applicant was already in occupation of the land. On a balance of probabilities, I am convinced that being on the land at the time, it is the Applicant who planted the trees. See also the testimony by PW2 confirming that he is the one who gave the Applicant the seedlings to plant.



38. Moreover, PW3 and PW4 both testified that the Applicant is the one who planted the blue gum trees. In addition, the Respondent confirmed that the blue gum trees had been harvested 3 times, and while he did not see Birgen harvest the trees the first time, that the Plaintiff harvested the 2<sup>nd</sup> and 3<sup>rd</sup> times. None of the Respondent's witnesses stated with clarity that the Applicant did not plant the blue gum trees as alleged. DW4 on the other hand testified that he knew it was the Applicant who was on the suit land, save that he could not be certain when the Applicant started utilising the land. He further clarified that the Respondent utilised the land before the Applicant's entry thereon, and that it is the Applicant who fenced the suit property. I am thus convinced that the Applicant is indeed in possession of the suit property.
39. There can be no doubt that the above actions by the Applicant coupled with the Lease to CHICO to excavate murrum for 3 years are actions inconsistent with the Respondent's right over the suit property. Indeed, the cheque issued by the Chinese Company in regards to the excavation of murrum was made out to the Applicant herein and not the Respondent. The Respondent claimed that he did not know of the excavation because he was in and out of hospital. That may be the case, however, the medical documents annexed are dated between 11<sup>th</sup> December, 2018 to 11<sup>th</sup> December, 2020. The Respondent testified that he was admitted only once at a clinic near his home, but no proof of such admission was adduced. It is his testimony that he used to attend the local clinic initially before he was referred to the Moi Teaching and Referral Hospital. He cannot therefore claim to have been totally ignorant that murrum was being harvested from his land.
40. In any event, the Lease agreement for excavation of murrum was entered into on 18<sup>th</sup> November, 2017 a year prior to the alleged hospitalisation of the Respondent. This court has been told that the excavation and transportation of the murrum was done during the day. It is clear that the Respondent had enough time to raise any objection to the murrum excavation but he never did. He was clearly aware of it since he informed his witnesses herein that sand was being harvested from his land without his consent but he equally never took any action to stop it. Even the dispute at the Assistant Chief's office arose out of a complaint by the Applicant and not because the Respondent was interested in reclaiming his land. These actions thus demonstrate the animus possidendi required in a claim for adverse possession.
41. I have no doubt that the Applicant took possession of the suit land and planted trees which even the Respondent has admitted have been harvested three times. It is also evident that the Applicant's possession was actual, physical and with the knowledge of the Respondent who has not demonstrated that he at any point attempted to re-enter the suit land to break the Applicant's continuous possession or to assert his rights thereto in any way.
42. As to the submission that there are no houses or developments on the suit property to prove possession, I am persuaded by the decision in *Wilson Njoroge Kamau v Nganga Muceru Kamau* (2020) eKLR, the court held that:-

“ 40. The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated his animus possidendi in developing the suit land through Planting and tending tea bushes, growing trees and practicing subsistence farming on the suit land as though it was as of right. That he has done this since 1971 to date openly and without interruption by anyone, least of all, the Defendant, is not under challenge. Evidence was led that the Defendant had knowledge of the Plaintiff's occupation of the suit land.”

43. From the above finding, the court was satisfied that the Plaintiff in that case had proved adverse possession and allowed her claim. Similarly, all the witnesses herein testified to the fact that there are



blue gum trees on the suit property which the Respondent admitted were the very ones exhibited in the photographs produced by the Applicant. The trees have been there since they were planted in 2005. Their presence, even on the absence of houses and other developments, are sufficient to show possession by the Applicant.

44. It is also trite that the occupation by the claimant must be non-permissive. See the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Muhambi Katana & 15 others* (2018) eKLR, where the Court held 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 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”

45. The Respondent argued that the occupation of the land by the Applicant was with his permission. However, he then went to great lengths to prove that he never allowed the Applicant onto his land. Nevertheless, the parties both agree that the late Birgen Samoei took the Applicant herein to see the Respondent and informed him that he would be the one utilising the land. Since the Respondent testified that this meeting happened 2 years after he had leased the suit land to Birgen Samoei, this court has estimated that the Applicant likely gained entry into the land in the year 2003. It was also the Respondent’s testimony that his agreement with the late Birgen Samoei was in 2001, and further that it was for a term of 5 years. Five years from the year 2011 ended in 2006, by this time, the Applicant had already been introduced to the Respondent and had been on the land for 3 years.
46. It is unlikely that the late Birgen Samoei would have approached the Respondent to extend the time within which he was to be allowed on the land to harvest the blue gum trees. This is contrary to the Respondent’s own testimony that the Applicant was introduced to him 2 years after the lease with Birgen Samoei as the person who would be harvesting the trees. Since the lease was for 5 years, the alleged permission by the Respondent lapsed in the year 2006. The Respondent cannot therefore be heard to say that he kept extending the term of the alleged lease for Birgen Samoei, yet he was fully aware at the time that he was not the one in occupation of the suit property or the one harvesting the trees, it is the Applicant that was in fact in occupation and use of the land. I do not buy into the alleged oral agreement to extend time for harvesting of the blue gum trees. I finding that the alleged lease, if at all it existed lapsed five years after it was made, in the year 2006, and with it any consent/permission granted by the Respondent to occupy the suit land.
47. The Applicant is also required to prove that the possession was continuous and uninterrupted for a period on 12 years. This court has already made the finding that the permission granted to the Applicant through his deceased father-in-law lapsed in 2006. Twelve years calculated from the year 2006 when the consent of the Respondent lapsed, would fall in 2018. Therefore, by the time this suit was filed in 2022, the Applicant had been in such adverse possession of the suit land for 16 years, well over the statutory time limit for claims such as this one.
48. I am convinced that the Applicant herein has demonstrated that he has been in exclusive, open and continuous possession and occupation of the suit property herein for over 12 years. The Respondent, being the registered proprietor of the land as shown in the copy of title produced in court, has not made any effort to regain entry into his land. The Applicant is still in possession of the land, the said possession not having been interrupted in any manner or form. He is therefore entitled to the orders sought herein.



49. With regards to costs, it is trite that costs follow the events. The Applicant has successfully proved his claim to the required standard. No justifiable reason has been shown why the court should not exercise its discretion under Section 27 of the Civil Procedure Act and award him his costs. The Applicant is therefore entitled to costs of this suit and he ought to have them.
50. Consequently, the following orders shall thus issue from this court:-
- a. A declaration be and is hereby issued that the Respondent's interest in the 4.0 Acres in the parcel of land known as Tembelio/Elgeyo Border Block 10 (Kaptuktuk) 300 has been extinguished by virtue of operation of the Limitations of Action Act.
  - b. That an order be and is hereby issued directing that the land register be rectified and be registered as a proprietor of land known as Tembelio/Elgeyo Border Block 10 (Kaptuktuk) 300 measuring 4.0 Acres.
  - c. The Applicant shall have the costs of this suit.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 2<sup>ND</sup> DAY OF DECEMBER, 2024.**

**E. O. OBAGA**

**JUDGE**

In the virtual presence of:-

M/s Langat for Defendant.

Court Assistant –Laban

**E. O. OBAGA**

**JUDGE**

**2<sup>ND</sup> DECEMBER, 2024**

