



**Sambu & 3 others v Kemboi (Environment & Land Case 152 of 2021)
[2023] KEELC 16256 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 152 OF 2021**

MN MWANYALE, J

MARCH 7, 2023

BETWEEN

MATILDA CHEPKEMBOI SAMBU 1ST PLAINTIFF

ANGELINE CHEPTUM CHELULEI LIMO 2ND PLAINTIFF

**CHEPKEMBOI SAMBU (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF CLEMENTINA JEBET CHELULEI (DECEASED)) 3RD PLAINTIFF**

**CHEPTUM CHELULEI (SUING AS THE ADMINISTRATOR OF THE ESTATE
OF CLEMENTINA JEBET CHELULEI (DECEASED)) 4TH PLAINTIFF**

AND

JOSEPH KIPLIMO ARAP KEMBOI DEFENDANT

JUDGMENT

1. The two Plaintiffs, Matilda Chepkemboi Sambu and Angeline Cheptum Chelulei Limo sued on their own right and as administrators of the Estate of Clementina Jebet Chelulei, their deceased mother, vide their originating summons dated November 18, 2021,
 - a. Seeking to be declared as legal owners of land reference number Nandi/Kilibwoni/375 by adverse possession.
 - b. That they be registered as joint absolute proprietors of Land Reference Number Nandi/Kilibwoni/375 by adverse possession in place of Joseph Kiplimo arap Kemboi the registered owner.
 - c. That the Respondent do execute all the necessary documents in favour of the Applicant's and in default the Deputy Registrar of the Court do execute all the necessary documents to facilitate registration of the Applicants as joint absolute proprietors of Land reference Nandi/Kilibwoni/375.



- d. Such other relief or further remedy and orders as the Honourable Court may deem fit to grant within the circumstances of this sit.
- e. Costs of this suit.
2. The suit having been commenced by an originating summons, parties took directions on May 26, 2022 as follows.
3. The originating summons dated November 18, 2021 to be converted to a plaint. The Replying Affidavit dated February 14, 2022 converted to a defence.
4. The Plaintiff and Defendant were directed to file their witness statements and lists of documents and the matter was to proceed by way of viva voce evidence.

Plaintiffs case and evidence: -

5. It was the Plaintiff's case that sometimes in 1972, their grandmother the late Christine Toiye Kirwa acquired LR Number Nandi/Kilibwoni/869 in favour of their mother the late Christina Jebet Chelulei which parcel is adjacent to the Respondent's residential property, land reference number Nandi/Kilibwoni/41 shortly thereafter the Respondent acquired LR Nandi/Kilibwoni/375 which is approximately a half kilometre away from his residential property.
6. That the Respondent and their late mother agreed to exchange LR No Nandi/Kilibwoni/375 measuring 3.0 hectares with land reference number Nandi/Kilibwoni/869 measuring 2.4 hectares for mutual benefit and convenience. The Respondent was thus to consolidate his residential property into one big portion at same portion.
7. The Respondent therefore did not take possession or occupy LR No Nandi/kilibwoi 375 upon acquisition. The Plaintiffs mother took possession in 1972, occupied an existing old hut, fenced the property, cultivated the land for subsistence and commercial purposes and practiced animal husbandry; while the Respondent occupied and utilised land reference number Nandi/Kilibwoni/869.
8. The Plaintiff's aver that their late mother built a permanent house sometimes in 1978 without any objection from the Respondent; and had peaceful and continues possession of the suit property for 14 years without any interference, resistance or license from the Respondent until her demise on August 5, 1986.

The Plaintiff aver that before her demise her right of ownership by adverse possession had already accrued; the Plaintiff state that their mother was buried on the suit land without any objection from the Defendant.

9. It is the Plaintiff's further case that after the demise of their mother, in 1986, they took possession of the suit property, refenced the same, planted tea bushes, planted additional trees, dug a new well and a fish pond, planted crops and employed farm hands without any objection from the Respondent and have thus in open, exclusive continuous and notorious possession for 35 years since 1986 without licence, consent, permission from the Respondent and have exercised all rights of an owner over the property.
10. The Plaintiff further plead that in 2020, the village elders and Assistant Chief held a meeting which was attended by 35 people the Respondent included and meeting resolved that the suit property belonged to the Plaintiff's.
11. The Plaintiff further aver that their late grandmother was buried in the suit property without any objection from the Respondent.



12. On the strength of the above averments the Plaintiffs sought for the prayers set out at paragraph 1 of this judgment.
13. The Plaintiff's called a total of 5 witnesses. The 2nd Plaintiff, Angeline Cheptum Chelulei, Limo, testified as PW1. She adopted her witness statement dated June 29, 2022 as part of her evidence in chief. She equally produced the documents in her list of documents dated June 29, 2022 as P Exhibits 1 to 14 and identified minutes as PMFI.
14. It was her testimony that Nandi/Kilibwoni/375 was registered to the Defendant as confirmed by P Exhibit 1, a copy of the title and a copy of the green card as P Exhibit 5.
15. That Nandi/Kilibwoni/869 was registered in the name of their grandmother who swapped in with the Defendant as it was near the Defendants residential property Nandi/Kilibwoni/41. The Plaintiff produce a map as P Exhibit 6, as well as a search P Exhibit 2 to confirm that Nandi/kilibwoni 41 and 869 were adjacent and that Nandi/Kilibwoni/41 belonged to the Defendant. The witness produced as P Exhibit 3, a copy of the green card of Nandi/Kilibwoni/869.
16. The witness stated that the exchange made by her grandmother and the Defendant was to enable the Defendant utilise 869 which was more convenient as it was near his other property Nandi/Kilibwoni/41 while 375 was about half a kilometre away. It was her further testimony that her mother took possession in 1972 after the exchange and that in 1978, she (the 2nd Plaintiff) constructed a semi-permanent house for mother; and she produced the photographs as P Exhibit 7a and 7c.
17. She testified that the house was constructed with the help of Mr Keter who would source the material and oversaw the constructions.
18. It was her further testimony that she undertook normal farming activities thereon and built a detached kitchen and a toilet, towards this end she produced P Exhibit 8 (a) photograph of toilet, 8 (b) photograph of the kitchen, and P Exhibit 8 (c) a maize store.
19. It was her testimony that her mother had secured the property by way of fence and she reinforced the same.
20. The witness further stated that both her mother and grandmother were buried on Nandi/Kilibwoni/375 and she produced as P exhibit number 10 (a) picture of Clementina Chelule, her mother's grave and her death certificate as P Exhibit 9.
21. The funeral and burial of Clementina was planned in Nandi/Kilibwoni/375 and there was no objection from the Defendants. At time of her mother's death, the witness stated that her mother had lived on the property for 14 days.
22. It was the Plaintiff's further testimony that her grandmother died in 2010 and was buried on the same plot without any objections from the Defendant.
23. The witness stated that she and her sister planted tea bushes and are managing the property, since the demise of their mother in 1986; whilst the Defendant has all the while lived on 869.
24. It was her further testimony that the occupation on 375 was not with permission from the Defendant as they did not seek permission to construct or during the burials. The tea bushes were uprooted because they (Plaintiffs) could not manage the property and the only graves on the site was her mother's and grandmother's.
25. On cross – examination by Mr Sambu the witness stated that in 1972 she was 17 years old, and that when her mum left her matrimonial home with the youngest son, the witness's youngest brother. They



would rotate the two homes. She knew that her mother went to her mother's home and did not live with the Defendant's.

26. She was not present when the negotiations for the exchange were done but her mother had moved to Nandi/Kilibwoni/375 in 1972; because she was in form five then. She stated that the green card for 375 was opened on April 26, 77. She confirmed constructing the house as exhibited on P Exhibit 7 a, but did not build any other property.
27. On further cross – examination she stated that her younger brother had lived on property till he passed on. In 2008, and he was buried in the share he had been given in their late father's estate. She stated that her grandmother also lived on the property, and the succession cause in respect of her mother had not been finalised. She stated further that the title deed for number 375 was issued on March 18, 2015.
28. The witness stated in further cross- examination that the Defendant came in 2020 when the succession process had commenced and the matter went to the chief. With regard to PMFI, minutes of the meeting held by elders, the witness stated that 10 participants of the meeting were her relatives, while the rest were neighbours.
29. She was not aware whether the Defendant's sister had been buried thereon, but she was aware that the Defendant had bought the property from Kapmuten family. She stated that she lived in Eldoret but has a farm hand on the property, and she had been working and staying in her work place and in her matrimonial home.
30. The witness stated that the farm hand has been there for over 47 years and she attained sentimental value over the property although she had other properties.
31. In re-examination, she stated that the Defendant did not notify them that she had obtained a title. She stated that she had been occupying the property since 1986 after her mother's death and are the current occupier, with crops, animals therein.

The property was sentimental to her because her kin were buried there. During registration she was in school and only learnt about it recently. Nandi/kilibwoni 869 was occupied by the Defendant.

32. PW2, Matilda Chepkemboi Sambu, the 1st Plaintiff testified. She adopted her witness statement dated June 29, 2022 as part of her evidence in chief. It was her testimony, that the Defendant has not been given them any permission to occupy the parcel; that her sister (PW1) and her do farming and rear cattle on the suit property, they had a fish pond which was in active. It was her further testimony that they had lived on the suit property since 1970's and that two of their kin were buried thereon, being her mother and grandmother. On 869, the Defendants have been living thereon and utilising the same.
33. From 1986 when their mother died, they lived thereon without any objection till 2020, when the Defendant told their farm hand that he would be using the property. When they visited the Defendant, he told them that 375 belonged to him and they reported the matter to the Assistant Chief, and a meeting called by the Area Chief resolved that the property belong to her sister and her.
34. She stated that the property had sentimental value since their mother lived there and prayed that the plaint be allowed.
35. In cross – examination, she stated that in 1972, she was in form 6 about 18 years, when her mother left the matrimonial home.
36. She stated that her mother had moved to her grandmothers and she was not aware whether her mother stayed with the Defendants. She learnt of the exchange in 1974, but she did not know the exact location of the other property.



37. When shown P Exhibit 7(a) the photograph of the house, she stated that the same was constructed by her sister (PW1) for her mother. She stated that her younger brother remained in the property after her mother's demise as the property was their home. They managed the property and the tea bushes was a joint venture but after their brother's death, their sister in law relocated to Nandi Hills, and they continued to carry on with farming activities on the suit property.
38. She was not present during the negotiations for the exchange. Tea bushes were uprooted after death of her brother as they were neglected. She confirmed that there were old structures from the previous owners who had sold to the Defendants. 375 was registered in the Defendant's name while. 869 was registered in her mother's name.
39. She stated that the exchange was not perfected by legal transfer but there was occupation. The Defendant has not interfered with their occupation until 2020, and they were not living on the property with the Defendant's permission.
40. In re-examination, she stated that the old structure did not belong to the Defendant, no legal transfer was done for the exchange, but there was occupation as per the exchange with no objection from the Defendants.
41. In 869, Joseph Kemboi occupied the same, tea bushes were uprooted because they wanted to plant easier crops to manage, they have planted maize, planted trees and reared animals including fish pond and were the current occupiers of the property.
42. PW3, was Julius Kimurugor Arap Chelulei, a retired senior chief of Kilibwoni Location, who adapted his witness statement dated July 14, 2022 as part of his evidence in chief. It was his testimony that the occupant of 869 was Joseph Kemboi the Defendant and 869 belonged to the Defendant.
43. It was his testimony that he had participated in the burial of the late Clementina Chebet in 1986. His role was as the brother of the late husband of the late Clementina Chebet. At the said funeral he was the family spokesman and he was tasked with asking any debtors and/or creditors to come forward.
44. He learnt of the objection by the Defendant in 2020 and the area Assistant Chief called a meeting of elders where the meeting stated that the Plaintiffs were the rightful owners of the parcel 375 and parcel number 869 belonged to the Defendant.
45. On cross – examination by Mr Sambu for the Defendant, the witness stated that he had been the chief from 1996 to 2007, prior to which he had been a teacher. It was his reply that the late Clementina had moved to the parcel in 1972 although he was not involved with her movement. That when the late Clementina disagreed with her husband, she moved to her parents in law about 1969 to 1970. She did not move to the Defendants home. The witness stated further that the late Clementina had lived in a grass thatched house in parcel 357. He was not part of any negotiations that were carried out.
46. It was his answer that the meeting of 2020 was convened by the present Assistant Chief but the said Assistant Chief was not present at the meeting. Prior to 2020 he was not aware that parcel number 869 belonged to the Plaintiffs.
47. He was not aware about the exchange either. 869 was arable land but part of it was swampy. It has been fenced by the Defendant; who also grazes his cattle thereon.
48. He stated that the Plaintiffs had planted tea and uprooted the same. There was no dispute between the Plaintiff and their sister in law, the Plaintiffs brother was buried at Tinderet. He stated that the Plaintiff are the occupiers of the property.



49. In re-examination, he started that when one owns the property he can visit the property. He stated Plaintiff are the occupiers of the property though not physically but carry out farming activities, as well as grazing the cattle.
50. That there are two graves on the property one belonging to the Plaintiff's mother Clementina Chelulei and other the belonging to Christina Kirwa the Plaintiff's grandmother who died in 2010.
51. It was his further testimony that in the meeting called by the Assistant Chief they were 7 elders and the elder's resolved that the land parcel belonged to the Plaintiffs.
52. PW4, Mr Philip Kipkemboi Sang Boit, also testified; and he adopted his witness statement dated July 14, 2022 as part of his evidence in chief.
53. It was his statement that the Plaintiff and Defendant were his neighbours, and upon being shown the map (Plaintiff Exhibit 6), he stated that he shared a boundary with the Plaintiffs who occupy parcel number 375; while the Defendants occupied parcels 41 and 869, while his parcel was parcel number 45.
54. It was his testimony that the Plaintiffs have been on Nandi/Kilibwoni/375 since he was born. The Plaintiffs have a permanent house and a detached house. When shown P Exhibit 7, a; b and c as well as P Exhibit 8, a, b, and c which were photographs, he confirmed that those structures were on Nandi/Kilibwoni/375. He stated that the structures were developed by Angeline (2nd Plaintiff and Matilda (1st Plaintiff). Earlier structure had been developed by Clementina.
55. The witness stated that he attended the burial ceremony of Clementina in 1986; as well as the burial of Christine Cherop in 2010.
56. In accordance with the traditions, before any burial, the M.C asks whether there is anyone owing the deceased and/or was owed by the deceased to state their claim.
57. He stated that there are two graves on the property. In 2020 he attended a meeting as the Plaintiff were surveying their property. The meeting had about 30 elders, where it was resolved that the property number 375 belonged to the Plaintiffs.
58. The witness stated that the current occupiers are the Plaintiffs who have employed a farm hand.
59. On cross – examination, he stated that he was not related to neither the Plaintiff nor the Defendants.
60. He stated that he was born in 1968 and found the Plaintiffs on the suit land. The late Clementina used to stay on the property and the Plaintiffs would visit. He stated that the Plaintiffs were married and he did not know where they lived but they did not stay on the property on a day to day basis.
61. He stated that Defendant was not present at the time of burial of Clementina but his wife and children were present. The witness stated that the Plaintiffs brother lived in the property till he passed on in 2008 and was buried in Tinderet. The 1st Plaintiff has remained on the property, there were tea bushes planted by the Plaintiff brother but know that caused the same to be uprooted.
62. The witness stated that prior to 2020 he did not know that the Defendant was the registered owner. He only knew that the Plaintiff were living on the suit land but was not privy on how they entered the suit land. The witness stated that the structures were built by Angeline who send someone to build the same for her mother. The witness did not know where the Plaintiff lived before they moved therein. The witness was invited by the village elders to attend the meeting in 2020.



63. On re-examination by Mrs Kirui the witness stated that the person utilising the property was Matilda and Angeline, and that Alex Kimurgor Keter was the one who built the structures paying fundi and buying materials. The witness stated that he saw the construction of the house in 1978.
64. PW5 was Alex Kimurgor Keter testified and adopted his witness statement dated July 14, 2022 as part of his evidence in chief. He indicated that he knew the Plaintiffs since childhood as they grew in the same neighbourhood and went to the same primary school; and they joined university at same time.
65. It was his testimony that after graduation Angeline decided to construct a house for her mother and Angeline (PW1) requested the assistance of PW5 in the construction. PW1 would send him money to buy materials for construction, which happened between 1978 to 1979 on Nandi/Kilibwoni/375.
66. He confirmed that the photographs P Exhibit 7 a, b, c and 8 a, b, and c were the houses that he helped construct. There was no complaint from any person during the construction; and the Plaintiffs mother was living on the property.
67. The witness stated that after their Plaintiffs mother died, the property now belongs to Angeline and Matilda; and that the Plaintiffs have a farm hand on the property.
68. The witness stated that he had participated in the burial of the Plaintiffs mother Clementina Chelule. It was only in 2020, that he was made aware that the property belonged to someone else. He attended the meeting convened by elders who deliberated and resolved that the land belonged to the Plaintiffs.
69. On cross – examination by Mr. Sambu. The witness stated that the Plaintiff were his childhood friends, but he had no relationship. That he supervised the constructions of the buildings since he lived nearby and had faster legs as he was about 25 year then.
70. The witness did not know how Clementina entered the property. He stated that the mode of remittance of the money was through the post office, and the money was sent on need basis for the construction.
71. He stated that the structure was semi-permanent and it was plastered. The construction was for Angeline's mother. The witness stated that PW1 was eventually married and lives in Eldoret. At time of the construction, adjudication was ongoing and demarcation had been done, but the witness was not aware of the plot number at that time. He stated that he attended the burial of Clementina Chelule but could not remember the year, and that the youngest son remained there after the Plaintiffs mother died. He stated that there are two graves on the suit property.
72. In 2020, he was invited to the meeting of the elders, the basis of the resolution was the evidence adduced before the elders.
73. On re-examination, he stated that the property where he supervised the construction was Nandi/Kilibwoni/375 which was utilised by the Plaintiffs.
74. With the testimony of the 5 witnesses the Plaintiffs case closed.

Defence case and evidence: -

75. The Defendants replying affidavit dated February 14, 2022 was converted as the Defence. In his defence the Defendant avers that;
76. He is the registered owner of Nandi/Kilibwoni/375 registered on April 26, 1977 and title issued to him on March 18, 2015.
77. That the Plaintiffs have not been in possession of the suit land from 1972 to date as they claim.



78. That Christine, the Plaintiffs grandmother had approached him to accommodate her daughter Clementina Chelulei the Plaintiffs mother in 1980's and he accommodated the Plaintiffs mother.
79. There was no exchange of the parcels but he had allowed the Plaintiffs mother to live in Nandi/Kilibwoni/375 until her death. In 1986 and the right to adverse possession had not crystallised.
80. That he further permitted Christine to live on the said parcel after death of Clementine together with her grandson.
81. That after the death of the Plaintiffs brother he took possession of the property and that the occupation has all along been with his permission and consent.
82. The Plaintiffs are living in Eldoret with their families and not on the property.
83. The Plaintiffs had not developed the property, only their mother had developed with his permission. That he is the one in occupation of the property.
84. DW1 Joseph Kiplimo Kemboi, adapted his witness statement dated July 21, 2022 as part of his evidence in chief and he produced the documents listed in his list of documents as D Exhibits 1 to 8.
85. It was his testimony that he is the registered owner of Nandi/Kilibwoni/375 and as D Exhibit 1. He stated that he had been registered on April 26, 1977 but the title was issued on 18th March 2015 and the property measures 3.0 Hectares.
86. It was his further testimony that Nandi/Kilibwoni/869 belongs to the late Clementina Chebet and he produced the green card as (D exhibit 2). It was registered on April 26, 1977; while the title deed had not been issued. The approximate area is 2.4 Ha. It was his testimony thus that the two properties are not the same size, Nandi/Kilibwoni/375 is the larger one.
87. The witness stated that in 1976, the mother of Christine requested him to allow Clementina to live on the property. There was no agreement for the exchange of two properties. It was his testimony that in 1976, he was working and his parents were living on 375 and a child was buried thereon, but they moved upon the death of the child the child was called Jepsong Bot John.
88. He bought 5 acres so that the same became 7 acres. He bought from Kipsanga thus he had 3 properties Nandi/Kilibwoni/38, 41 and 375.
89. The Plaintiffs mother entered the property 375 after her mother had requested him to allow her to live. 869 border his property 41 and it is swampy and he uses it to graze the cattle thereon and he now needed his property.
90. He stated that he wanted his property so as to distribute and he went to assert his rights in 2019. The Plaintiffs are still on the property and hence this case. He was not aware of the lower Court case. He wanted back his property.
91. In cross- examination, he stated that he had bought 375 from Kipsanga in 1974. He did not have agreement neither the death certificate for Jepsong Bot John. He stated that he allowed Christine to live on the property in 1976. He did not lessee the same. He took the tile in 2015, he had lived in the other properties in number 38 and 41. He stated that burial of a person on a property does not translate to ownership. He did not object to the burial of the two people. He wanted to distribute the property. He indicated that 375 there was a farm hand, but did not counterclaim and sure for eviction.
92. He stated that properties 41 and 869 were adjacent, and he grazed his cattle thereon. He stated that the Plaintiffs had built a semi-permanent house while he was in Mandera.



93. She did take any steps to evict Clementina in 1980 but she stayed thereon. He was born in 1936 on the property and current lived in property number 381, 41 and not on 375.
94. On re-examination, he stated that he had bought the property, he did not have an agreement but the owners had not claimed it. He stated that he had claimed it. He stated that he had allowed Clementina and her mother to live thereon. He wanted back his property so as to distribute it to my children.
95. DW2 Wilfreda Jemesunde Ngetich adopted her witness statement dated July 21, 2022 as part of her evidence in chief. She testified that she knew the Plaintiffs who were the children of Clementina and grandchildren of Christine. Clementina and Christine had requested for permission to live on Joseph's land and lived thereon. She stated the Plaintiffs did not live on the property as they were married, and she knew this as she was a neighbour.
96. On cross – examination, she stated that she lives near where the Defendant currently lives, which is not far from where the suit property is. She stated that she did not know when Clementina moved on the suit property. She did not know who lived on the suit property after death of Kipchirchir the Plaintiff's brother but Joseph did not live on the suit property. It was her testimony that Joseph's cattle grazed near his home. Clementina and Christine were buried on Joseph's property. She stated that she was not present when Joseph gave permission but she was told by Joseph's wife. She could not remember how long Clementina and Christine lived on the suit property, but they lived thereon during their lifetime, she stated that the Defendant does not live on the property.
97. Re-examination of Mr Sambu she witness stated that she did know the boundary of the plot 869 and 41. She knew that Joseph grazes his cattle on plot number 41.
98. DW3, was Theresia Jematia Kemboi, who adopted her witness statement dated July 21, 2020 as part of her evidence in chief.
99. It was her testimony that the Defendant was her father and she was born in 1960. She stated that she knew the late Christine and Clementina who were their family friends. That when Clementina left her matrimonial home, her mother Christine sought refuge on her behalf in their home. That they lived together until they moved to 375. She stated that they wanted their property 375 back as the Plaintiffs property was 869. The Plaintiff's farm hand lives on the property.
100. On cross – examination she stated that the Plaintiffs came to live in their property around 1975. She did not know how Christine and Clementina gained entry to the property. She stated that her parents allowed Christine and Clementina to occupy 375. She was not aware whether her father raised a complaint at the burial of the two, ie Clementina and Christine. She stated that a farm hand lived on the property and her father did not live there.
101. DW4, Stephen Kipkemei Limo testified and adopted his witness statement dated July 21, 2022 as part of his evidence in chief. He stated that the Defendant was his father and that he knew the Plaintiffs as children of Clementina. The said Clementina was not related to them but a family friend. He stated that 375 belonged to his father Joseph Kemboi, he stated that Clementina and his mother came to seek refuge in their home and later on moved to 375.
102. That when the Plaintiffs wanted to survey 375 their dad told them to vacate to 869; he prayed that the Plaintiff move to 869 and they get back to 375.
103. On cross – examination, she stated that he was born in 1964, he did not know when Clementina and Christine moved to 375. It was his testimony that he had been told by his aunty, that there was animosity between Clementina and his brother, and Christine came to seek refuge. Both Clementina and Christine lived on the property till their death. He stated that 375 was where the Plaintiffs utilise



while 869 was where they grazed their cattle 869 was where they grazed their cattle and that they have not lived on 375.

104. The last defence witness was Benayo Limo, who adopted his witness statement dated July 21, 2022 as part of his witness statement. It was his statement that the Defendant was his father and he knew the Plaintiffs who are children of their neighbours. He was not aware of another case between the Plaintiff's and his father. He knew Oscar Kipchirchir who was the son of Clementina and the Plaintiff's brother and after his death his wife went to Tinderet where Oscar was born. There is a farm hand who lives on the property and that the Plaintiffs have never lived there as they lived in Eldoret.
105. In cross examination he stated that he was told how Clementina had been hosted in their home; as he had not been born. He had not lived in 375 and neither had his father. He stated that his father grazed cattle on 869. He stated that Clementina and Christine were buried on 375 and there was no complaint.
106. After the testimony of defence witnesses. The defence case was closed and parties directed to file submissions.

Issues for determination: -

107. In their submissions the Plaintiff has identified 3 issues for determination and submitted on the same.
The issues are;
 - i. Whether the Defendants proprietary interest over L.R. No. Nandi/Kilibwoni/375 was extinguished.
 - ii. Whether the Plaintiffs have acquired land reference number Nandi/Kilibwoni/375 though adverse possession.
 - iii. Where the Plaintiffs are entitled to the prayers sought.On his part the Defendant framed two issues for determination.
 - i. Whether the Plaintiff has proved adverse possession against the Defendants over the suit land.
 - ii. What are the appropriate reliefs?
108. Having analysed the pleadings, the evidence of the witnesses and the submissions of the parties, the court frames the following as issues for determination.
 - i. Whether or not the Plaintiff has proved adverse possession against the Defendants over the suit land.
 - ii. Whether the Defendants proprietary interest has been extinguished
 - iii. What appropriate reliefs ought to issue?
 - iv. Who bears the costs of the suit?

Analysis and determination: -

109. As set out in paragraph 1 of this judgment, the Plaintiffs claim is twofold; - on the first instance they are claiming adverse possession on their own right and in the second instance claiming the same as administrators of the Estate of Clementina Jebet Chelulei.
110. In order to determine adverse possession the Court has to determine when time stated running and whether each element of adverse possession has been proven. In James Mwangi and others v



Mukinye Enterprises Nairobi Civil case No 3912 of 1986, quoted in the decision in *Karuntim Riaji v M'makinya*, the Court summarised the adverse possession as here follows:-

“a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years. There are two issues relevant to the claim of adverse possession in this matter. First is the date from which the 12 years should be calculated, second, did the Respondent have a peaceful occupation based on a claim of right and without consent of the Appellant?”

111. Turning on when time started running with regard to the claim as administrators of the Estate of Clementina Jebet Chelulei, the Plaintiffs indicate that their mother's entry on Nandi/Kilibwoni/375 was pursuant to an exchange agreement for her to settle on Nandi/Kilibwoni/375 and for the Defendant to take Nandi/Kilibwoni/869.
112. The 1st and 2nd Plaintiffs place their mother's entry in the year 1972. When they were in their advanced level of education with the first Plaintiff being in form 6 and the second Plaintiff being in form of 5. This year of entry was pleaded in the originating summons now plaint and in stated testimony.
113. The Defendant in his Replying Affidavit now defence places the entry in the 1980's as per evidence he indicated that the 2nd Plaintiff had constructed a house for his mother between 1978 and 1979, while he (the Defendant) was working at Mandera.
114. All the Plaintiffs witnesses also indicated the house exhibited in P Exhibit number 7 (a) (b) and (c) was constructed in 1978. The Plaintiffs were consistent in their evidence as to the entry by their mother on the suit land as they tied it to their school events; while the Defendant and his witnesses could not tell the exact time of the entry.
115. The Court finds that the entry of Clementina Jebet must have been before the construction of the house in 1978. In Civil Appeal No 110 of 1997, *Francis Gitonga Macharia vs Muiruri Waithaka* the Court of Appeal held that “limitation period for purposes of adverse possession only starts running after registration of the property in name of the Respondent.”
116. In this case Nandi/Kilibwoni/375 having been registered to the Defendant on April 26, 1997 as was confirmed by P Exhibit 5 the green card and the Defendant in his testimony.
117. Hence for purposes of adverse possession in this matter, and in relation to the Estate of Clementina Jebet, time started running in 1977, and the entry in 1972 or otherwise is irrelevant as the parcel of land had not been registered before 1977 as it was Government land.
118. The issue of the exchange of the properties and the issue of permission equally featured in the case and a determination of the same ought to be made. The Plaintiffs were not present when the alleged exchanged occurred and the same is not proven. On the issue of consent, the same seems like an afterthought, as if the Plaintiff's mother had her own land Nandi/kilibwoni 869, why would she have been permission to live in Nandi/Kilibwoni/375. In the same neighbourhood.
119. The Plaintiffs equally constructed a semi-permanent house, and they did not seek permission and constructed the same on their own right, referenced the property after their mother's death, planted crops including tea bushes, which they later uprooted. Buried their grandmother on the suit land. The above actions by the Plaintiff point to the use of the property as by owner and not a licensee.
120. It follows that there was no consent and/or permission that the Defendant gave the Plaintiffs in respect to the above actions.



121. The Plaintiffs mother passed on in 1986, and since time started running in 1977, 12 years had not lapsed as at time of the Plaintiffs mothers death, hence in respect of her Estate adverse possession had not crystallised.
122. Thus the claim of adverse possession in respect of the Estate of Clementina Chelulei has not been proven.
123. As indicated in paragraph 1 of this judgment, the Plaintiffs also claim adverse possession in their own right and the Court shall now determine the Plaintiffs claim. In paragraph 119 above the Court found that actions of the Plaintiffs mentioned therein negated permission as they were consistent with actions of a land owner and not a licensee bearing in mind that no objection by the Defendant was made against the said utilisation of his property, the Court finds that the Plaintiffs started using the property in 1986 after the demise of their mother and their right crystallised in 12 years later in 1998.
124. From 1986 to 1998 the Plaintiffs and their late brother utilised the property to the exclusion of the Defendant. The Defendant was required to assert his right before the crystallisation of the period. In *Mwangi Githu vs Livingstone Nderitu*, the Court of Appeal stated; “time ceased to run under the Limitation of Action Act either when the owner asserts his right or when his right is admitted by the adverse possessor, assertion of rights is when the owner takes legal proceedings or makes an effective entry into the land.”
125. In the period between 1986 to 1998 the Defendant did not assert his right, he did not protest the burial of Clementina Jebet, the occupation by the Plaintiffs brother, the planting of the tea bushes and other crops. The Plaintiffs were thus in constructive occupation of the suit land as was confirmed by the Defendant who indicated that he has never utilised Nandi/Kilibwoni/375 but utilised Nandi/Kilibwoni/869 to graze his cattle.
126. The Defendant stated that he wanted back his property so as to distribute to his children. The children testified equally stating that land belonged to their father.
127. The Defendant did not take any action to claim ownership of the property for those than 12 years and the Court finds the occupation by the Plaintiff uninterrupted for more than 12 years and the same was public as was confirmed by the Plaintiff and defence witnesses as well as the meeting called by village elders in 2020.
128. The Plaintiff has thus proved adverse possession against the Defendant and the Court answers issue number in the affirmative.
129. On issue number 2, the Court having found that the Plaintiff has proved adverse possession, it follows that the Defendants interests and title to Nandi/Kilibwoni/375 has by virtue of Section 17 of the Limitation of Action Act being extinguished.

DISPOSITION: -

130. The Court has found that the Plaintiff’s own claim of adverse possession in respect of Nandi/Kilibwoni/375 has been proved upon the required standard of proof and enters judgment for the Plaintiff jointly and severally in terms that;
 - i. The Defendants title to Nandi/Kilibwoni/375 be and is hereby extinguished by provision of Section 17 of the *Limitation of Actions Act* and it is thus cancelled.SUBDIVISION -ii.



The Land Registrar Nandi County to rectify the register by registering the Plaintiffs Matilda Chepkemboi Sambu and Angeline Cheptum Chelulei Limo jointly as the new owners thereof and issue a title to them accordingly.

iii.

The Plaintiffs as administrators of the Estate of Clementina Jebet Chelulei, having renounced their rights over Nandi/Kilibwoni/869 to effect a transfer in favour of the Defendant Joseph Kiplimo Arap Kemboi.

iv.

Each party to bear its own costs.

Dated At Kapsabet This 7th Day of **March, 2023.**

Hon. M. N. Mwanyale,

JUDGE

In the presence of;

Ms. Kirui for the Plaintiffs

Mr. Sambu for the Defendant

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