



**Nyagaka v Mogire (Civil Suit 2 of 2021)
[2023] KEELC 19954 (KLR) (20 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 2 OF 2021
M SILA, J
SEPTEMBER 20, 2023
IN THE MATTER OF LAND TITLE DEED NUMBER
WEST KITUTU/BOGUSERO/2138
IN THE MATTER OF SECTIONS 37 & 38 OF THE
LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF THE LAND REGISTRATION ACT NO.3 OF 2012 (AS AMENDED)
AND
IN THE MATTER OF ORDER 37 RULES I AND 7 OF THE CIVIL PROCEDURE RULES-2010
BETWEEN
LEONIDA NYABOKE NYAGAKA PLAINTIFF
AND
VICTORIA BOSIBORI MOGIRE DEFENDANT**

JUDGMENT

A. Introduction And Pleadings

1. The applicant (referred to herein as ‘the plaintiff’) filed an Originating Summons on 2 March 2021 seeking to be declared as the absolute owner, by way of adverse possession, of a portion of land measuring approximately 65 feet by 330 feet forming part of the land parcel West Kitutu/Bogusero/2138 (the suit land) registered in the name of the respondent (herein referred to as ‘the defendant’). She also wants the defendant to be compelled to transfer this portion to her, and in default



the Deputy Registrar to sign the transfer forms. She further seeks to have the defendant, and any person claiming under her, to be permanently restrained from this portion of land or interfering with her quiet possession.

2. In her affidavit in support of the summons, the plaintiff averred that sometimes in the year 1980 she got married to one Samuel Onsongo Rwenyi (Samuel) as a second wife. She deposed that Samuel bought for her the disputed land from one Mogire Onchiri (now deceased). She stated that her husband then erected for her a matrimonial home on this land and that she moved into it and settled on it as her land. She deposed that Mogire Onchiri became very sick and later died before he took her to the local Land Control Board (LCB) for the subdivision and transfer of the disputed land. She mentioned that she was blessed with 6 children, (4 girls and 2 sons) but two of her daughters (Marcella and Kerubo) died and were buried on the said portion of land. It was her deposition that her two sons erected houses in the said portion of land, and that together with her house and separate kitchen, there are a total of four houses standing on the suit land. She claimed that they have also planted various trees, and perennial crops such as bananas and fodder, on the said portion. She contended that annually she has been planting food crops such as maize, beans, sorghum, finger millets, sweet potatoes and various types of vegetables on the portion. She averred that she planted a live fence along the boundary of the portion, making it distinct and identifiable on the ground. The plaintiff decried that over the years, she had been requesting the defendant, the only widow of Mogire Onchiri, to apply for Letters of Administration in respect of the estate of her late husband but she had been informing her that she was not ready to do so. In March, 2021 officers from the Directorate of Criminal Investigations (DCI), Nyanchwa Police Station, called her and informed her that the defendant had reported that she was illegally occupying, possessing and cultivating part of her land, and that she wanted her to be evicted and/or charged in Court for the offence of forceful detainer. The plaintiff stated that she visited the DCI and explained her long occupation of the portion of the suit property, after which the DCI advised her to obtain an order of Court, lest she be arrested following the defendant's claim. This is what necessitated the filing of this suit.
3. The Plaintiff contends that she has lived, occupied, possessed and used the claimed portion of land since 1981, peacefully without any interruption whatsoever. She deposed that the defendant has been fully aware of her long occupation of the suit land given that she attended the funeral of her two daughters who were buried in it. She states that the defendant is her immediate neighbor and is fully aware of all her developments on the suit land since 1981. She thus asserts that she has occupied the suit land openly and without interruption for a period of 40 years.
4. In response to the summons, the defendant filed a Replying affidavit sworn on 12 April, 2021 wherein she controverted the averments by the plaintiff. She asserted that at no point has the plaintiff ever been in possession of the land in dispute since 1981 as claimed because at that time she was not married to Samuel. She contended that the plaintiff got married as second wife to Samuel around 1987. She deposed that it is absurd for the plaintiff to claim absolute ownership of the suit land yet her husband, who is alive, warned her and informed her that he never purchased the said land. She contended that the plaintiff has her own portion of land and is her immediate neighbor and they share a fence. She asserted that it is on that land that the plaintiff resides and buried her children. She denied that there is any house erected on the disputed land, but claimed that what is there is a maize crop, and that the plaintiff and her sons have forcefully deposited sand and building stones with intention to commence construction. She claimed that her late husband was called Yuvinalis Mogire Onsase and not Mogire Onchiri as mentioned by the plaintiff. She stated that the suit land was initially registered in name of her late husband before it was transferred to her name after his death. She thus asserted to be the proprietor of the land. She averred that when her husband died, he left one son from his first wife and four other children, and he never indicated that he had sold any portion of the suit land. She averred that the



plaintiff is her relative. That the land in dispute was given to the plaintiff's husband (Samuel) by her (defendant's) husband back in the days when he had not married her and had a small family i.e only one son with his first wife. After her (defendant's) husband died, Samuel returned the land to her in 1990. She contended that since 1990 she (defendant) is the one who has been occupying the disputed portion peacefully and without interruption until December 2020, when the plaintiff trespassed into the land and forcefully erected a barbed wire fence and two gates. She averred that about three years to the filing of the suit, the plaintiff started acting mischievously; that she destroyed the fence around the suit land and started claiming that she owns the disputed portion. She claimed that in 2020, the plaintiff reported to the police that she (defendant) had refused to give her a title deed to the disputed portion and that the police visited the land and found her allegations to be unfounded. She stated that it is then that the plaintiff and her sons put up the barbed wire fence in December 2020 and she reported to Nyanchwa Police Station.

5. In addition to her affidavit, the defendant also filed an affidavit sworn by Samuel (the plaintiff's husband), where he denied purchasing the suit land.
6. The plaintiff filed a supplementary affidavit where she more or less asserted what was in her previous affidavit. On the affidavit of her husband, she claimed that during the lifetime of Mogire Onchiri, a meeting was held between himself, the defendant (Victoria), and Samuel, to discuss transfer of the disputed land either to Samuel or herself, but Mogire did not do so, because Samuel had not fulfilled a condition given to him by Mogire. She insisted that her homestead is on the suit land. She denied that Samuel returned the land to Mogire in 1990 as claimed. She contended that Samuel has been trying to chase her away with her children and wished to have her evicted from the suit land so that he can sell it. She reported him to the Chief who tried to mediate the matter in vain. She added that some potential buyers have been trying to intimidate her from occupying the land and she reported these incidents.
7. Directions were taken for the suit to be heard by way of *viva voce* evidence.

B. Evidence Of The Parties

i. Plaintiff's Evidence

8. The Plaintiff testified and called 5 witnesses.
9. The plaintiff relied on a statement which more or less repeats what I have set out above as contained in the supporting affidavit to the Originating Summons. She testified that she got married in December 1980 and she first lived with her husband in a school that he was teaching before he settled her on the suit land in 1981. She claimed that the land had a live fence and her husband had planted sugarcane in it. She testified that she created a compound in the middle of the disputed portion and planted crops on the rest of the land. She stated that she also planted trees and coffee around the boundary. She added that there are three houses on the disputed land, an external kitchen, a well, cowshed, and a pit latrine.
10. Cross-examined, she affirmed that she is second wife of Samuel, and her father in law was Rwenyi Onchiri (Rwenyi). Mogire Onchiri (Mogire), the husband to the defendant (Victoria), was brother to Rwenyi. The defendant therefore happens to be her aunt. She testified that her father in law did not grant land to Samuel, but sold him a portion of his land, which is where Samuel settled his first wife, one Agnes. Her father in law, owned the land parcel No 931. She stated that the disputed portion in the parcel No 2138 was sold to Samuel by his uncle Mogire, and it abuts where Agnes was settled. Victoria also lives on this land parcel No 2138, which, as a whole, measures about 2 acres. She explained that Victoria lives on its lower portion whereas the disputed portion is on the upper side. She was cross-examined on the alleged sale of the land to Samuel and she testified that she has never seen a sale agreement regarding it. She denied that Samuel was only permitted to use the land by his uncle Mogire



and that he was to surrender it. She denied that she filed the case because her co-wife, Agnes, has bigger land than she has. She testified that Samuel wished to sell the land in 2017 and brought in surveyors and asked her to vacate the land. She marked where she resides on a surveyor's sketch. It emerged that there are three houses. One is wholly in the parcel No 931 and the others traverse both parcel No 931 and the suit land. She elaborated that her compound falls partly within the land parcel No 931 (her father-in-law's land) and the land parcel No 2138. She averred that she uses part of the parcel No 931 and part of the parcel No 2138 (the disputed portion) where they about each other. These were marked as portions A (the suit land) and portion B (land parcel No931) in the surveyor's sketch. She testified that her husband wishes that she vacates the disputed portion and only occupy the land of her father in law (portion B) but she claimed that it was too small to build a house.

11. PW-2 was Fidelis Oeri Nyaata, the Chief of Bogusero South Location in Mosoch area, where the suit land is located. He had served as Assistant Chief from 1998 until 2011 when he was appointed the Chief. He testified that the family had lived together peacefully but in 2017 the plaintiff went to his office complaining that her husband wanted to send her away from the land where she lives and cultivates. He called a meeting of elders which meeting was held in the suit land. He testified that they realized that the main issue was a problem within their marriage and that Samuel stated that he cannot give the plaintiff land that he purchased, but was willing to grant her the land given to him by his father. He stated that this land of the plaintiff's father in law is however small as it measures 28 by 46 feet tapering to 65 feet. He testified that they held the view that the plaintiff should remain where she was. Victoria was however not in this meeting. He testified that he wrote several letters including to the police when some people came to the land to survey it and that there was a threat to attack the plaintiff. He claimed that the plaintiff had been on the disputed land since 1981 and that Victoria had no problem with this, and that issues cropped up because of the differences between the plaintiff and her husband. He testified that on the disputed land are two graves, a cattle boma, mature grevillea trees, and a house.
12. Cross-examined, he affirmed that Samuel has two wives, i.e Agnes and the plaintiff. He stated that the plaintiff came to be in possession after being given the land by her father in law. He had thought that it was one parcel of land, but when they went to the ground, they discovered that what the plaintiff occupies covers two titles. He was cross-examined on the alleged sale of the land to Samuel and he conceded that he has never seen a sale agreement. He also affirmed that Victoria never attended any of the meetings that they held to resolve the land dispute. He stated that he was not aware that she was the registered proprietor of the suit land as they thought that the land is owned by the plaintiff's husband. Re-examined, he testified that the plaintiff's husband wanted to take away this land from the plaintiff and either sell or put it to his own use. He averred that this was the land given to her when she got married.
13. PW3 was one Christopher Makori Oyugi, the Community Policing Chairman of the area. He testified that he got a report from Nyanchwa Police Station regarding the dispute between the Plaintiff and the Defendant. He proceeded to meet the defendant who informed them that the plaintiff's husband wants to sell the land occupied by the plaintiff. He mentioned that the defendant stated that the plaintiff has lived on the land for over 40 years and she was wondering whether to give the title to the plaintiff or to her husband. Cross-examined, he affirmed that the plaintiff and her husband did not have a good relationship. He also never saw any agreement between the plaintiff's husband and the defendant.
14. PW-4 was James Nyamweya Nyariki, a pastor and a village elder. He testified that he was 60 years old and he found the plaintiff living on the suit land. He claimed that she lived in it since 1981 and he never encountered any quarrel between her and the defendant until 2021 when the defendant wished to evict the plaintiff. He testified that the issue started in 2017 when the plaintiff's husband wanted to sell the



- land. The plaintiff made a report and they called a meeting of elders which resolved that Samuel should not sell the land and should live peacefully with the plaintiff. He believed that the issue was between the plaintiff and her husband who wished to sell the land, and that Victoria had no problem (with the plaintiff's possession). Cross-examined, he claimed that Samuel had bought the land from Mogire, which information, he stated, he got from Samuel himself. He has never seen any sale agreement and could not tell whether Samuel had only leased the land. He affirmed that the dispute that came before them was between the plaintiff and her husband as the latter wished to sell the land. The defendant was not present in the meeting/s and they did not even know that she had title to the land.
15. PW-5 was Kennedy Makori Mogire, a neighbour. He had a pre-recorded witness statement which he relied upon. In it, he stated that the plaintiff got married to Samuel in 1981 and he built for her a house on the suit land which is where she resides with her children. He stated that he attended a circumcision ceremony on the land in 1992 and also the burial of two children of the plaintiff in 1993 and 1995. He stated that during the funerals, the defendant and her entire family, and also Samuel, were present. He added that he assisted build a small house for one of the sons of the plaintiff after his circumcision, upon being invited by Samuel to do so in 1998. He stated that the ceremonies were organized by Samuel and took place on the suit land. Cross-examined, he testified that he is related to Samuel, but he could not clarify the relationship. He testified that Samuel would call them to prune sugarcane on his land. The portions A and B were put to him and he testified that the activities he mentioned were undertaken in the portion B (land of plaintiff's father in law). Re-examined, he stated that there is no real boundary between A and B portions.
 16. PW6 was Wilfred Bob Onsongo. He is son to the plaintiff and Samuel, and a High School teacher. He was born in 1984. He appeared to have a testy relationship with his father as he lamented about his failure to pay his school fees and claimed to have completed his education under great difficulty. On the family, he testified that his mother had 6 children; that two died in 1993 and 1995, and were buried on the disputed portion. He testified that there is no boundary separating his grandfather's land and the disputed portion, which is name of the defendant, and that there are mature grevillea trees around the portion that they occupy. He referred to the sketch of the land and pointed at the houses therein, one for himself, the other of his siblings, and the other of his mother. He testified that they have never moved away from this land and that he even underwent initiation on this land in 1995. In 2017, his mother informed him that their father wanted them to move out as he wished to sell the land but his father was prevailed to drop the intention. However, the issue cropped up again in 2018 when his father brought surveyors. It is then that his mother reported the matter to the Chief. He stated that the issue recurred in 2019 more viciously and the matter reported to the police. He testified that they have enjoyed continuous and peaceful use of the land without complaint being raised by the defendant. According to him, his father purchased this portion though he admitted in cross-examination not to have seen any sale agreement. He complained that his father has been selling land indiscriminately.
 17. With the above evidence, the plaintiff closed her case.

ii. Defendant's Evidence

18. DW-1 was the defendant (Victoria). Her evidence was that the plaintiff has her portion of land which is where she buried her children. She was not aware that the plaintiff's husband purchased any land from them nor was she was aware of any dispute referred to the Chief. She asserted that this was her land for which she has title to and was keen to retain it.
19. Cross-examined, she testified that the plaintiff found her already married and that there was a fence separating her land and that of the plaintiff which the plaintiff removed around two years back. Asked about the mature trees, she stated that her husband planted three trees and the plaintiff planted the



rest. She stated that the plaintiff's husband built a house for her on her side of the land (father-in-law's portion) but the plaintiff has now planted maize and bananas on her (defendant's) land after filing this suit. She denied that the plaintiff's children were buried on the disputed portion. She denied that she ever discussed with the plaintiff about filing a succession cause in respect of her husband's estate. She testified that she got registered as proprietor of the suit land in 2009 and got the title deed in 2014. She denied that they have been living peacefully but affirmed that she has never asked the plaintiff to vacate. She testified that what she did was to ask Samuel, the plaintiff's husband, to vacate the land and that he left. She could however not recall the year that she claimed Samuel left the land. She stated that Samuel left the land but the plaintiff refused to move out. She could not recall for how long she has lived on the land; she has never given her consent to be on it. She stated that her late husband allowed Samuel to use the land before the plaintiff got married and that he planted sugarcane on it.

20. Re-examined, she stated that the plaintiff has been cultivating the land for about 7 to 8 years and that she has been telling her to vacate.
21. DW-3 was Samuel Onsongo, the husband of the plaintiff. He was previously employed as a teacher before retiring in 1997. He affirmed that the plaintiff was his second wife and they have four children. He contended that he married her in 1996 and that is when she came to his home. He refuted an affidavit that had been sworn by him on 27 September 2006 deposing that he married the plaintiff in 1980, insisting that he married her in 1996. He denied purchasing part of the defendant's land. He testified that he borrowed this land from his uncle (defendant's husband) to plant sugarcane. He subsequently vacated the land and informed the plaintiff. This, according to him, was between the years 1998-2000. He testified that the plaintiff never cultivated the land since he was the one planting sugarcane. He claimed that when he left the land, he told the plaintiff not to tamper with it. He asserted that the plaintiff ought not to get title to the land because he did not buy it. He stated that if he had purchased it, his name would be in the title deed. He testified that he did not know when the plaintiff moved into the disputed land as he lives about 2km away.
22. He was cross-examined on the affidavit sworn on 27 September 2006 and he confirmed that he was the deponent. In it, he deposed that the plaintiff was his wife and that they got married in 1980. He claimed that insertion of the year 1980 was an error. He affirmed that the defendant's husband was his uncle but could not recall the year of his death. He testified that he asked him to allow him use of the land around the years 1995-1998 but nothing was put down in writing. He stated that he asked to be allowed to plant sugarcane and that he planted cane for about 7 years and vacated around the year 2002. He was cross-examined on his witness statement wherein he had stated that he harvested cane in 1990 and pressed, he now changed his evidence to say that he left the land in 1990 and not 2002 as earlier stated. He again changed his evidence to state that he asked the plaintiff to vacate the land in 1990 and that in 1990 the plaintiff was residing where she resides to date. He admitted that two of his children with the plaintiff died and he showed the site for them to be buried. He claimed that they were buried on the land of his father. He admitted building the plaintiff's house which straddles both his father's land and the disputed land and that after he left, the plaintiff continued residing in it. This, according to him, was now in the 1990s. He stated that he vacated the land after his uncle died and handed it over to the defendant. He stated that after he left, his wife forcefully took over the land. He denied purchasing the land or owing one cow from the sale agreement. He denied that the defendant has been willing to transfer to him the land and denied that the defendant asked him to help her file a succession cause so that she could give the plaintiff title. He denied taking a surveyor to the land with intention to sell it. He claimed that Victoria got married in the 1980s or 1990s and found him on the land and that he surrendered the land to Victoria after his uncle died. He admitted planting the mature trees around the land and that there are also coffee trees on the land.



23. The court questioned the witness and he insisted that he married the plaintiff in 1996 after which they got children together. Coincidentally, his daughter, Dorine Mongina, was in court and her ID card showed date of birth as 8 September 1983. His second born, Wilfred Bob Onsongo, was also present and his ID card showed 1984 as his date of birth. His position was that he could not recall their dates of birth.
24. Re-examined, he testified that the plaintiff has been cultivating the land without permission after he vacated it. He stated that he left the land in the 1990s but could not recall when. At the time he vacated the land, the children had been born.
25. DW-3 was Peter Nyakweba Ongondi, a retired school teacher. He testified that he knows the parties as the defendant is wife of his step-brother thus the plaintiff is her sister-in-law. He testified that the disputed land was owned by Mogire and came to be owned by the defendant upon his death. He averred that he does not know when the plaintiff started occupying the land; he was not involved in the meetings called to resolve the dispute. He affirmed that Victoria's husband was Mogire Onchiri, also known as Yuvinalis Onsase Mogire. Cross-examined, he testified that he does not go to the land and does not know what is on it and that it is Samuel who informed him that he has a dispute with his wife and wished him to be a witness. He stated that Samuel told him that he did not buy the land. He affirmed that the plaintiff's children are buried on the disputed land though he changed this bit of evidence to now claim that they were not buried on it.
26. DW-4 was Julius Nyamamba. He identified both the plaintiff and defendant as his aunties. He was 61 years old. He testified that he does not know if Samuel purchased the disputed land but was aware that the plaintiff uses part of Victoria's land. He stated that she started using the disputed land in the 1980s and has been using it to date. He affirmed in cross-examination that at no time has she vacated the land.
27. DW-5 was Joseph Nyangaresi Mogire; he lives in Nakuru. The defendant is his step-mother and he testified that it is she who raised him. He disputed that Samuel purchased the suit land. He claimed that Samuel asked his father to give him land to use, which wish was granted, and he proceeded to plant sugarcane. He testified that after his father got ill, he asked for the land to be handed back so that he can give it to Victoria. He stated that the land now stopped being cultivated and Victoria started using it to graze cattle and goats. He stated that in 2017 Victoria started cultivating the land and it is then that the plaintiff emerged to claim it. He did not know when the plaintiff started using the land as he was not around. When he lived there in the 1990s, there was sugarcane on the land. He testified that it was when sugarcane stopped being planted that Victoria took over the land and the plaintiff never used it thereafter. Cross-examined, he testified that he left Kisii in 1984 and worked in Nairobi and Nakuru. He has been in Nakuru since 1984. He sold a portion of his land in Kisii and settled in Nakuru. The small portion he left was about ½ acre which he has allowed other people to use and he has done this since 1984. He testified that he was not there when the plaintiff got married. He was also not there when his father gave Samuel the land to use and did not know when Samuel was given the land. His father, Mogire, died in 1997, at which time he had asked Samuel to vacate the land. He claimed that Samuel vacated the land in 2017 and it is then that the plaintiff moved in forcefully. He thought that Victoria would not be saying the truth by claiming not to have used the land. He affirmed that he does not visit the land often as he lives in Nakuru.
28. With the above evidence, the defence closed its case.

C. Analysis And Disposition

29. I invited counsel, Mr. Momanyi for the plaintiff, and Mr. Ochoki for the defendant, to file written submissions, which they did, and I have taken these into consideration before arriving at my



disposition. I have also taken note of the authorities they relied on in their submissions, and though I may not mention all of them in this judgment, I have duly read and considered them.

30. This is a suit for adverse possession and both counsel adequately addressed me on the law regarding adverse possession and indeed referred to some authorities outlining this doctrine. Both counsel are in agreement, and indeed that is the law, that in a suit for adverse possession, the claimant needs to demonstrate a possession that continuously runs without interruption for a period of at least 12 years. Such continuous, uninterrupted possession must be without the permission of the owner and must be open and peaceful. This doctrine is ably captured in the maxim *nec vi, nec clam, nec precario*, that is, that the continuous uninterrupted possession for 12 years must be without force, without secrecy, and without permission of the registered proprietor of the land. In affirmation that counsel were on fours in appreciation of these principles of law, both Mr. Momanyi for the plaintiff, and Mr. Ochoki for the defendant, referred me to the Court of Appeal decision in the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2005) eKLR where the Court of Appeal pronounced itself as follows on the adverse possession doctrine:

“Adverse possession is essentially a situation where a person takes possession of the land, 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 of time, in Kenya, 12 years.

It is also a well-established principle that a party claiming Adverse Possession ought to prove that the possession was “*nec vi, nec clam, nec precario*” that is peaceful, open and continuous (*sic*). The possession should not have been through force, nor secrecy and without the authority or permission of the owner.”

31. There is another element in adverse possession, which is critical, and that is *animus possidendi*, that is, occupation with intention to keep the land.
32. These principles of law being out of the way, we now need to turn to the facts in order to discern whether the plaintiff has met the test of adverse possession. There are of course some uncontested and some contested facts. One of the important facts, which is not contested, is that at the time of filing suit, the plaintiff had been in possession of the suit land.
33. The next question to ask is whether this possession has been continuous for a period of at least 12 years. On this, I am persuaded that the evidence demonstrates that the plaintiff has been in continuous and uninterrupted possession for at least 12 years. I am persuaded that the totality of the evidence demonstrates that she came into possession of the land immediately she got married to Samuel. Despite Samuel claiming that he married her in 1997, this cannot be true. That is in fact belied by his own affidavit which he swore on 27 September 2006. He admitted swearing this affidavit but wished to allege that the year 2006 was an error. I of course do not believe him. This affidavit was sworn for purposes of having an identity card issued to the plaintiff and was not sworn with the land dispute in mind. The affidavit clearly states that the plaintiff and Samuel got married and have lived together as husband and wife since the year 1980. There is no way that the plaintiff got married to Samuel in 1997 because at least two of their children were born in the early 1980s, that is 1983 and 1984, and Samuel admitted that they were born after he had already married the plaintiff. It cannot also be that they got married in 1997 as two of their children died around about the year 1995. The evidence is truly overwhelming that the plaintiff got married to Samuel in the year 1980 or thereabouts and not in the year 1997 as alleged by Samuel in his evidence. The possession of the plaintiff has thus been for more than 12 years, for 1980 or thereabouts to the time the suit was filed, is certainly about 40 years, give or take.



34. What the plaintiff has been occupying for all this years is partly the disputed portion and the neighbouring portion which comprises of the land parcel No 931 owned by her father in law. The nature of her possession was not only captured in the oral evidence presented but also in the sketch produced as an exhibit. The same elaborates that the house of the plaintiff straddles both the suit land and the land parcel No 931. There are mature banana plants and trees, and part of the plaintiff's compound is within the disputed portion. I am not in doubt about the possession of the disputed land by the plaintiff and her children.
35. Has the possession been continuous ? Again, the evidence is overwhelming that the possession of the plaintiff on the suit land has never been interrupted by the defendant or by any other person. This is where the plaintiff has lived since she got married and has never parted with possession of the land. This was indeed affirmed by her son, PW-3. Even the defendant and her witnesses, save for DW-5, never claimed that the plaintiff has ever parted with possession. The evidence of DW-5 cannot be believed. First, it goes contrary to all other evidence presented, and most importantly, DW-5 does not reside within the area, having vacated in 1984 to go and settle in Nakuru. At no time did the defendant contend to have used the land or resided in it. I am persuaded that the possession of the plaintiff has never been interrupted since she commenced possession.
36. The possession of the land by the plaintiff is quite interesting. It is important to first appreciate that the plaintiff came into possession curtesy of her husband. This is where Samuel settled her and built for her a matrimonial home. It is the case of the plaintiff that her husband purchased this land from Mogire and that is how he got into possession. This is of course disputed by the defendant, who alleges that Mogire only allowed the plaintiff's husband to use the land, and later on asked for it to be returned. It is also contended that the land was indeed returned in the 1990s.
37. I certainly do not have any evidence of a sale agreement, but in the same vein, I do not have evidence of a lease agreement. Save for DW-2 (Samuel), none of the other parties were privy to the dealings between DW-2 and his uncle, Mogire. DW-2 of course contends that he was only permitted to use the land and he returned it after he was asked to do so by Mogire, before his death, which we have gathered occurred in 1997. Whatever the case, what is clear is that at some point Mogire and Victoria allowed the plaintiff's husband, together with the plaintiff and her children, to use the land. Samuel used the land to plant sugarcane which he stopped but his wife (the plaintiff) continued using it.
38. It appears to me, irrespective of whether the land was sold or leased, or merely licenced, that Mogire and the defendant lost interest in the land. First, whatever structures were built partly traversed the suit land. If they still had interest in the land, you would have expected them to complain that developments have gone beyond the land of the plaintiff's father-in-law. Secondly, despite assertion by the defendant that the plaintiff's children were not buried on the land, the evidence is overwhelming that the grave sites are actually on the disputed land. This is discernible from the sketch of the suit land. That sketch points out the graves and they are certainly in the disputed land. If the defendant wished to challenge this, she ought to have produced her own sketch, showing exactly where the two children of the plaintiff were buried, but she had none. The fact that Mogire and the defendant raised no complaint when the two children were buried also affirms the fact that they had ceased having interest in the disputed land. There is also evidence of trees having been planted around this land by Samuel and/or the plaintiff without Mogire or the defendant raising any issue. The plaintiff used this land together with the land given to her from her father-in-law as one parcel.
39. The defendant in her evidence stated that she never permitted the plaintiff to use the suit land. That is well and good. It would mean that the possession of the land by the plaintiff was not with the permission of the owner of the land. Indeed, as far as I can see, the plaintiff used the land with complete



intention to keep it for herself. She thought that her husband had purchased it. There is evidence that Samuel vacated the land and asked the plaintiff not to use it after he had harvested his sugarcane. He harvested his sugarcane in the 1990s. It would mean that thereafter, the plaintiff was occupying the land by herself, not under the umbrella of her husband. She wished to keep this land for herself and her family hence had the requisite animus possidendi. It follows that the plaintiff has been in possession, by herself, independent of her husband's possession, for more than 20 years to the time she filed suit, even if we are to use the cut-off period of the year 1999 as the time that Samuel vacated the land and the time that he asked the plaintiff to give vacant possession to Victoria.

40. In his submissions, Mr. Ochoki attempted to submit that the plaintiff's occupation has not been peaceful because of conflicts between her and her husband. These were merely domestic quarrels that cannot be considered as making possession of the plaintiff not peaceful. In any event, they are not disturbances from the registered proprietor. For all intents and purposes, and I have already canvassed this, the defendant does not appear to ever have had any interest in the land. From what I can see, her interest was aroused around the year 2020, and I think this was an interest triggered by the plaintiff's husband, who, because of their poor relationship, wished to have the plaintiff out of the land. In fact, it does appear that he was keen to sell it, so that the plaintiff gives vacant possession.
41. I am persuaded to find that because of the sour relationship that the plaintiff had with her husband, the husband conspired with the defendant and other of his close relatives to kick the plaintiff out of the land. The defendant, and the other relatives, in a manifestation that blood is thicker than water, proceeded to support him. It is therefore just about the year 2020 that the defendant started raising issue of trespass despite having become registered as proprietor in the year 2009. I think, independently, she had no issue with the plaintiff's possession, as she had lost interest in the land, but because of being cajoled by the plaintiff's husband, she decided to join the fray. I am afraid that she joined the arena too late. By the time she was trying to kick out the plaintiff, the plaintiff had been in possession of the land, independent of her husband's possession, for more than 20 years. That possession was never interrupted. It was peaceful and without force and was without the permission of the registered owner.
42. In a nutshell I am persuaded to find, on a balance of probabilities, that the plaintiff has proved her case that she has acquired the land by way of adverse possession. I order the defendant to proceed and carve out the portion occupied by the plaintiff in the land parcel West Kitutu/Bogusero/2138. There can be no doubt over this portion, for it is the portion depicted in the sketch produced in this suit. I order the defendant to cooperate with the plaintiff to have a mutation form drawn and to have this portion transferred to the plaintiff. This be done within the next 90 days. In default the Deputy Registrar of this Court to ensure that this, and all other processes needed to transfer the disputed land to the plaintiff, are undertaken, and see to it that the plaintiff obtains title to the land in dispute. In addition, I issue an order of permanent injunction to stop the defendant and any person claiming under her, from interfering with the possession of the plaintiff and her children in the disputed land.
43. The final issue is costs. I appreciate that the parties are relatives. However, this dispute was necessitated by the defendant interfering in land that she had clearly lost interest in, and as I have mentioned, with an intention to side with the plaintiff's husband against her. Her sudden interest in the land was thus ill-informed. I have in my judgment above, directed the defendant to execute all requisite documents within the next 90 days. If the defendant obliges by cooperating and executing all required documents as directed, there will be no orders as to costs. However, if she fails, and the process of transferring the land has to be undertaken by officers of this court, then she will pay the costs of the suit.
44. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 20TH DAY OF SEPTEMBER 2023.



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT AT KISII

