



**Moseti (suing as Personal Representative of the Estate of the Late Chrisantus Ongeri)
& another v Onsase & 2 others (Environment and Land Case 1201 of 2016 &
396 of 2013 (Consolidated)) [2023] KEELC 20661 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND CASE 1201 OF 2016 & 396 OF 2013 (CONSOLIDATED)
M SILA, J
OCTOBER 12, 2023**

BETWEEN

**VINCENT MOSETI (SUING AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF THE LATE CHRISANTUS ONGERI) PLAINTIFF**

AND

CHARLES OMOKE ONSASE 1ST DEFENDANT

ZABLON GISEGE ABUGA 2ND DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE 396 OF 2013

BETWEEN

CHARLES OMOKE ONSASE APPLICANT

AND

**VINCENT MOSETI (SUED AS LEGAL AND PERSONAL ADMINISTRATOR
OF THE ESTATE OF THE LATE CHRISANTUS OKUMU
ONGERI) RESPONDENT**

JUDGMENT

A. Introduction and Pleadings

1. This is a combined judgment in respect of two suits. The first suit was commenced through a plaint filed on 24 June 2009 by Vincent Moseti Okumu (as the legal representative of Chrisantus Ongeri also known as Chrisantus Okumu Ongeri (Deceased)) who sued Charles Omoke Onsase and Zablou



Gisege Abuga in the High Court of Kenya at Kisii in the suit registered as Kisii HCCC No. 115 of 2009. In that suit, the plaintiff contended that Chrisantus Ongeru was the registered proprietor of the land parcel West Kitutu/Bomatara/3166 (the suit land) and that the defendants had trespassed into the said land and carried out various activities therein, including construction of structures. In the suit, the plaintiff sought an order of mandatory injunction to have the defendants vacate the suit land and to demolish all structures erected therein, damages for trespass, an order to remove a restriction that the defendants had placed, and costs of the suit. The defendants filed defence which they later amended on 20 July 2011 to include a counterclaim. They admitted that the suit land was registered in the name of Chrisantus Ongeru (Chrisantus) but pleaded that this registration was by error. They also pleaded that the suit was time barred. In the counterclaim they elaborated that in the year 1974, the 1st defendant, Charles Omoke Onsase, purchased from Chrisantus a portion measuring 0.6 Ha from the land parcel West Kitutu/Bomatara/1087. This land was subsequently subdivided, and one of the subdivisions was the suit land, i.e parcel No. 3166. However, the 1st counterclaimant was by mistake registered as proprietor of a land parcel West Kitutu/Bomatara/893 (Parcel No. 893).

2. It is pleaded that this error was established when the 2nd defendant, Zablun Gisege Abuga, went to purchase the Parcel No. 893 which was adjacent to the 1st defendant's land and sought to obtain title thereto. It is pleaded that the parties agreed for the 1st defendant to transfer the parcel No. 893 to the 2nd defendant on the understanding that the deceased would take steps to have the 1st defendant obtain title to the parcel No. 3166. It is pleaded that pursuant to this oral agreement, the 1st defendant transferred the land parcel No. 893 to the 2nd defendant but the deceased passed on before effecting transfer of the land he had sold to the 1st defendant (i.e the Parcel No. 3166). It is pleaded that the 1st defendant purchased the suit land and he has been in open peaceful occupation without any interruption since 1974. In the counterclaim, the defendants sought orders for a declaration that the 1st defendant has acquired rights over a portion measuring 0.6 Ha of the land parcel No. 3166 and that the same is an overriding interest within the meaning of Section 30 (f) of the *Registered Land Act*, Cap 300, Laws of Kenya; a permanent injunction to restrain the plaintiff from this portion of 0.6 Ha; and costs.
3. The second case is an Originating Summons filed by Charles Omoke Onsase, the 1st defendant in the earlier suit, which suit was filed on 25 September 2013 against the estate of Chrisantus Ongeru. It is a case for adverse possession where Charles seeks title to this portion measuring 0.6 Ha out of the land parcel West Kitutu/Bomatara/3166 based on the same explanation elaborated in the defence as I have set out above. This suit is opposed by a replying affidavit sworn by Vincent Moseki Okumu the administrator of the estate of Chrisantus Ongeru. He denied any sale as contended by the applicant and claimed that the applicant first started trespassing on the land in 2004 and planted maize. He deposed that in 2005, he constructed a mud house which was inhabited by his sons. That he further went and constructed a permanent brick house in which he conducted a retail shop business. He continued that in 2008, the applicant constructed a permanent residential house. He averred that these activities took place when his late father was sickly. In April 2008, the applicant, and Zablun, placed a restriction on the title of the suit land which led them to file the previous suit. He asserted that the applicant was a trespasser.
4. Through a ruling delivered on 25 July 2014, upon an application made to consolidate the two suits, Okong'o J, directed that the two suits be heard together since the issues were intertwined.
5. In the course of time, Charles Omoke died, and he was substituted through an order made on 20 February 2018.



B. Evidence of the Parties

6. PW-1 was Vincent Moseki Okumu. He testified that Chrisantus is his late father and that he died on 24 August 2008 in Nairobi. His mother predeceased him as she died in 1995. He testified that his father owned the land parcels West Kitutu/Bomatara/3166 and 690 (parcel No.3166 being the suit land). He testified that the defendants trespassed into the suit land in 2004 when his father was sickly and had become of unsound mind. The original 1st defendant (Charles Omoke) then started cultivating maize. He continued to state that the 2nd defendant (Zablon) was a neighbor and that he destroyed the boundary and put up a pit latrine on the suit land. He also planted trees on the northern part. He testified that Charles Omoke built two mud houses for his sons and a shop, and in 2008 started constructing a brick house. He stated that they occupy about half of the land. He denied that they purchased the land from his late father and that they did not have his permission to occupy the land. He stated that they placed a restriction, with the 1st defendant claiming a licensee interest and the 2nd defendant a purchaser's interest.
7. Cross-examined, he stated that he was born in 1970. He testified that he was residing in the land parcel No. 690 which is about 2 kilometres away from the suit land, but he put up a house in the suit land in 2007. He testified that he came to learn of the trespass in 2004 when the maize was cultivated in July that year. This maize was harvested. He testified that there were further acts of trespass leading to the developments. He stated that the first house was built in January 2005 by the 1st defendant. These were two mud houses and what followed was the permanent structure in March 2005 which was used as a shop and was then occupied by tenants. He affirmed that the 2nd defendant built a permanent pit latrine and planted many trees in 2007. He stated that he asked his father and he told him that they are trespassers but he could do nothing as he had no legal capacity. He claimed that his father was sick 'on and off' and that his illness affected his mental status. He did not have documents regarding his father's mental status in 2004. He had an elder brother called Richard, who he said was also aware of the trespass. He (PW-1) did not complain to the Chief or make a report to the police. He was not aware whether his father had lodged any complaint regarding the trespass. He stated that his relatives knew of the encroachment but did not complain. There was no resistance when Christopher started cultivating the property. He testified that they started raising objection in 2008 while his father was still alive, when the 1st defendant was putting up a permanent structure, but they never asked him the same question when he was putting up the other houses in the property. He testified that Zablon (2nd defendant) has a plot across the road where he has built a go-down which had been there for about 10 years. He acknowledged that the pit latrine in the suit land serves this go-down. He testified that he had no knowledge of his father entering into an agreement to sell the parcel No. 893 in 1985 and was not aware of the agreement dated 19 February 1985 which was put to him. He stated that he wouldn't know whether his father executed this agreement. He acknowledged that the suit land was a subdivision of the parcel No. 1087 and was aware that in 1995, his father sold a portion of the land parcel No. 1087 to one John Mochama Omwenge. This portion sold to Mochama is the parcel No. 3167.
8. With the above evidence, the plaintiff closed his case.
9. DW-1 was Zablon Mahaga Okari. He testified that he used to work for the 2nd defendant at his hardware shop in Kisii Town between 1983 and 1990. He is also a nephew of the 2nd defendant. In the year 1985, the 2nd defendant wished to buy some land. He was introduced to Chrisantus and they went to view the land. When they did a search it showed the name of the 1st defendant, though on the ground, it was Chrisantus using it. They subsequently held a meeting with the 1st defendant who confirmed that the land belonged to Chrisantus although it was in his name. He (1st defendant) had another parcel of land that was adjacent but was registered in the name of Chrisantus. An agreement dated 19 February 1985



was written and he was a witness to the same. The land being sold was the suit land. The 2nd defendant purchased the land for Kshs. 120,000/=. He testified that it was agreed that the 1st defendant would execute transfer in favour of the 2nd defendant in respect of the suit land and in return, Chrisantus was to execute transfer in favour of the 1st defendant for the land that was occupied by the 1st defendant though in name of Chrisantus. He testified that the 1st defendant had put up some buildings. Cross-examined, he testified inter alia that there were three witnesses to the agreement. They were himself, the 1st defendant, and one David Gisege Okari, a brother to the 2nd defendant. Chrisantus did not bring witnesses from his family and his wife and children were not present when the agreement was made.

10. DW-2 was John Omwando Tinga. He testified that Chrisantus was his uncle. He stated that in 1996, he had gone with his uncle to replace beacons for land that his uncle had sold to his step-brother, one John Mochama. While they were at it, his uncle showed him premises developed by the 1st defendant and he got interested in leasing the same to run a business. His uncle proceeded to introduce him to the 1st defendant and thereafter he negotiated a lease for the premises. He started renting the premises from the 1st defendant in 1996. He testified that this was a commercial building that was fully let out. At that time, he was not aware whether Chrisantus had any dealings with Zablon (2nd defendant). It was in 2001 that he came to learn that Chrisantus had also sold some land to Zablon. Cross-examined, he testified that the sale between his uncle and his step-brother (Mochama) developed into a dispute which led to his step-brother suing Chrisantus in court. He testified as a witness for his step-brother but denied having any enmity with Chrisantus.
11. DW-3 was Zablon Abuga Gisege, the 2nd defendant. He testified that Chrisantus approached him in 1985 as he was selling land. When he did a search, he discovered that the land being sold to him by Chrisantus was actually registered in name of the 1st defendant (Charles). Chrisantus then brought Charles to him and they agreed to have their titles rectified. An agreement was drafted where Charles agreed to effect transfer of the land to him. He produced the agreement dated 19 February 1985. He elaborated that in that agreement, it was agreed that Charles would transfer the parcel No. 893 directly to him (Zablon) and it was also agreed that Chrisantus would transfer a portion of the parcel No. 1087 to Charles. He testified that Charles transferred the parcel No. 893 to him on 28 May 1985 and he (Charles) did not receive any benefit for this transfer. The parcel No. 1087 was subsequently subdivided into the parcels No. 3166 and 3167 with Parcel No. 3166 being registered in name of Chrisantus. He testified that this parcel No. 3166 is occupied partly by the 1st defendant (Charles) and partly by the sons of Chrisantus. The 1st defendant occupies the upper side next to the road and the sons of Chrisantus occupy the lower portion. He testified that Charles had been in possession of the land since 1985 and Chrisantus never complained about his occupation. He testified that Charles was now deceased but his sons and widow have built residential houses on the land. The land parcel No. 893 abuts the parcel No. 3166.
12. Cross-examined, he testified that the parcel No. 893 got registered in name of Charles in 1978. Charles then transferred the land to him on 28 May 1985. He testified that he had a sale agreement dated 19 February 1985 with Chrisantus, and owing to the confusion on the registration of the parcels, they also signed a Memorandum of Understanding on 26 May 1985. He reiterated that this land parcel No. 893 was sold to him by Chrisantus though registered in name of Charles. He never paid money to Charles, thought the transfer indicated a consideration of Kshs. 10,000/=. He stated that the money he paid was Kshs. 275,000/= to Chrisantus as the purchase price. The sale agreement indicated Chrisantus as the seller of the parcel No. 893. He testified that Chrisantus did not understand English though the agreement was in English. He could understand Ekegusii. He took possession of the land and subdivided it. After he took possession in 1985, he developed the land. He built a petrol station on one side, go-downs and also his residential house. He testified that Chrisantus however did not transfer



- to Charles the land parcel No. 1087 as they had agreed. This is the land that was subdivided into two to bring forth the parcels No. 3166 and 3167. The subdivision was done on 30 July 2001 before Chrisantus died in 2008. Around this time, Chrisantus was unwell and he and Charles registered a restriction on the title. He stated that they had a good relationship and there was never any conflict.
13. DW-4 was Innocent Omwenga Omoke. He is a son of Charles Omoke Onsase, the original 1st defendant. Charles died in 2017. He (DW- 4) was born in 1973. He testified that all his life, they have been residing in the land parcel No. 1087 which was later subdivided into the parcels No. 3166 and 3167. He now resides in the parcel No. 3166. They have permanent structures on the land that are about 40 years old. There are houses and business premises. This land is separated into two by a road. He testified that the plaintiff and his brother live on the lower side of this parcel No. 3166 while he lives on the upper side. He testified that there was never a dispute between Chrisantus and his father. It is his father who subdivided the parcel No. 1087 while Chrisantus was still alive and Chrisantus never complained.
 14. Cross-examined, he testified that his father and Zablon put a restriction on the parcel No. 3166. He elaborated that his father held a title deed to the parcel No. 893 but this was not his land and he was not the one in occupation. This parcel No. 893 is about 0.9 Ha. His father (Charles) never bought land from Chrisantus. He purchased the land from the previous owner, one Nyangate. He stated that despite Nyangate holding title reading No. 893, she was actually in possession of the parcel No. 1087. He explained that Nyangate was of the same family as Chrisantus. The ancestral home of his father borders the parcel No. 893 and this is where his father was buried. He denied the claim that they developed the land after Chrisantus had died. He asserted that the developments were made in 1985. In 1987, their father split the land among his children. He stated that his father and Chrisantus were friends and they used to talk and that Chrisantus was willing to effect the transfer.
 15. With the above evidence, the defendants closed their case.

C. Analysis and Disposition

16. I invited counsel to file written submissions, which they did. Both Mr. Momanyi, learned counsel for the plaintiff, and Mr. Nyamurongi, learned counsel for the defendants, made elaborate submissions backed up by authorities. I am grateful for their industry. I have taken note of these submissions into account before arriving at my disposition.
17. In a nutshell, the case of the plaintiff is that the defendants have trespassed into the land parcel West Kitutu/Bomatara/3166 and inter alia made structures on it yet this property belongs to the estate of the late Chrisantus. He also contends that the defendants illegally placed a restriction on the title to that land. He wishes to have the defendants ordered to remove their structures and vacate the land. The suit was opposed by the defendants who filed a counterclaim, and the 1st defendant lodged a separate suit for adverse possession. The explanation given by the defendants is that the original 1st defendant (Charles) purchased from Chrisantus 0.6 Ha out of the land parcel West Kitutu/Bomatara/1087. However, Charles erroneously became registered as proprietor of the land parcel West Kitutu/Bomatara/893. They state that this confusion was discovered when Charles intended to sell land to the 2nd defendant (Zablon) in 1985. They aver that though Chrisantus was in occupation of the land parcel No. 893, the title was with Charles. So that Zablon could get title to what he was purchasing, they entered into a tripartite Memorandum of Understanding, where Charles would transfer the parcel No. 893 directly to Zablon, and Chrisantus would effect transfer of the 0.6 Ha out of the land parcel No. 1087 to Charles. The defendants contend that Charles effected transfer of the parcel No. 893 to Zablon but Chrisantus did not do his part, leaving Charles with no title. That is why Charles is now asserting title by adverse possession to the parcel No. 3166 which resulted from a subdivision of the parcel No. 1087.



18. There is actually no contention that the disputed land Parcel No. 3166 is registered in name of Chrisantus. The plaintiff would therefore be entitled to judgment as prayed unless this court is persuaded that the defendants have demonstrated that the case of the plaintiff is time barred and they have acquired an overriding interest over the suit, and particularly that the 1st defendant is entitled to the suit land through the doctrine of adverse possession. I will therefore proceed to interrogate the case of the defendants so as to establish whether they have succeeded in demonstrating that the case of the plaintiff is time barred and that they have met the test for a claim by adverse possession.
19. It is trite that under Section 30 of the [Registered Land Act](#), provided for overriding interests and one of them, under Section 30 (f) were :
- (f) rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.
20. Section 7 of the [Limitation of Actions Act](#) prescribes a period of 12 years to file an action for recovery of land. It provides that :
7. An action may not be brought by any person to recover and 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.
- Section 17 of the [Limitation of Actions Act](#) does prescribe that if no action is brought within the specified period to recover land, then the title of the proprietor is extinguished.
- Under Section 37 of the [Limitation of Actions Act](#), a person claiming to be entitled to land by way of adverse possession may file suit for an order that he be registered as proprietor of the land.
21. The 1st defendant has indeed applied, through the Originating Summons filed in the suit Kisii ELC No. 396 of 2013 to be granted an order that he is in adverse possession of the suit land. What does one need to prove in a case of adverse possession ? It is trite, and it is not necessary to present any authority, that to succeed in a case of adverse possession, the applicant needs to demonstrate quite, peaceful possession, for an uninterrupted period of at least 12 years. It is also added that such possession must be accompanied by the intention to keep the land as one's own to the exclusion of others (animus possidendi). I stand guided by this test and it is with this in mind that I assess the case of the defendants.
22. First, we need to appreciate that the dispute herein is not over the land parcel No. 893 which is owned by the 2nd defendant. The land in dispute is the parcel No. 3166. The 2nd defendant does not claim any part of the disputed land as he is fully in occupation of the land parcel No. 893 which he has even subdivided. I think he was sued because he and the 1st defendant registered a restriction over the suit land. It is the 1st defendant who asserts title to the suit land by way of adverse possession. However, the determination of the issues herein appear intertwined with the title of the 2nd defendant to the parcel No. 893.
23. The case of the 1st defendant in support of the case for adverse possession, is elaborated in the Originating Summons and the supporting affidavit thereto. In the supporting affidavit, the original applicant (Charles Omoke Onsase) deposed that in 1974, he purchased a portion of land parcel No. 893 measuring 0.6 Ha from one Nyangate Nyangori. He deposed that at the time of purchase, Nyangate was however mistakenly resident in the land parcel No. 1087. He deposed that after the purchase, he took possession and fenced off the land and planted crops, put up a home, sunk latrines and erected a permanent business premises which he leased to members of the public. He obtained registration as proprietor of parcel No. 893. He deposed that in 1985, Chrisantus wished to sell his land to the 2nd defendant. When they did a search, it was established that he (Charles) occupied a portion



of the parcel No. 1087 while Chrisantus occupied the parcel No. 893. What was being sold was thus this parcel No. 893. Because of this confusion, the parties entered into a tripartite agreement so that he would transfer to Zablun the parcel No. 893 and Chrisantus would give him title to the parcel No. 1087 that he was in occupation of. He deposed that he did transfer the parcel No. 893 to Zablun and he remained in occupation of the 0.6 Ha of the parcel No. 1087. Subsequently, the parcel No. 1087 was subdivided into two, i.e parcel No. 3166 and 3167. Chrisantus kept registration of parcel No. 3166 and occupied part of it while he continued occupying 0.6 Ha of this land. He asserted that what he occupied is what he has been in occupation of since 1974.

24. I am persuaded by the oral and documentary evidence that the three parties, that is Chrisantus, Zablun and Charles Omoke, had some knowledge of the issues relating to the original land parcels No. 893 and 1087. For sure, Charles Omoke did transfer this land to Zablun. However, the two never had any written agreement. The written agreement that is there is done by Chrisantus and Zablun. I am persuaded that there was some confusion on the ground occupation. If there was none, then there would be no need for the three parties to converge, and Charles Omoke would have simply proceeded to enter into an agreement directly with Zablun for the parcel No. 893 without involving Chrisantus. There would also have been no need for there to be an agreement between Zablun and Chrisantus, for Chrisantus was not the registered owner of the land parcel No. 893, yet it was this land which was being sold. The parties however appear to have entered into an agreement dated 19 February 1985 where Chrisantus was named as seller of the land parcel No. 893. That agreement partly states as follows :

That : Both Mr. Chrisantus Okumu Ongeru and Mr. Charles Omoke Onsase have agreed to co-operate and transact : Mr. Charles Omoke to transfer No. 893 direct to Zablun Abuga whereas Chrisantus Okumo to do the same to Charles Omoke Onsase.

The above paragraph is preceded by clauses stating that Chrisantus was owner on the ground of the parcel No. 893 and there is mention of Charles Onsase having settled on ground that was “wrongfully drawn as part of an extension of parcel No. 1087.” It is thus apparent that the three persons were referring to parcels No. 893 and 1087 as being confused on the ground such that Chrisantus had settled on the parcel No. 893 (which he had no title to but he held title to parcel No. 1087) and Charles Omoke had settled on the ground of the parcel No. 1087 (for which he had no title to but which title was with Chrisantus). The agreement was home-made and could have been more elegantly drafted, but I am not in doubt that this is the tenor of the agreement. In essence, what Chrisantus was admitting in this document was that Charles Omoke was in possession of the land parcel No. 1087 registered in his name.

25. In his submissions, Mr. Momanyi urged that this agreement of 19 February 1985 was a forgery *inter alia* because it was written in English language which Chrisantus did not understand and that the ID number of the 1st defendant in the agreement differed from that in the title. I am not persuaded by these arguments. Merely because the document was written in English does not mean that Chrisantus did not understand its contents. It is common knowledge that there are many documents written in English and are signed by parties who may not fully understand that language. Even our ID cards are written in English and are signed by persons who may not understand English. So long as a document is signed, the person signing is deemed to understand the contents thereof even if written in a different language. In any case, there is the other document dated 26 May 1985 which is in Ekegusii language, between Chrisantus and Charles Omoke, where they state that they “will continue with discussions concerning the land which has a mix-up” and that “Chrisantus has said that I give Mr. Zablun Gisege Abuga.” In my opinion, the two complement each other. Mr. Momanyi also raised that it does not make sense for the document of 26 May 1985 to come later. To me, it makes perfect sense. At first, there is the agreement, then there follows a document confirming that the transfer can actually be



effected to Zablou even as the parties discuss on how to sort out the mix-up. The transfer to Zablou was indeed signed shortly thereafter on 28 May 1985. No evidence was called by the plaintiff to contest that the documents do not bear the signatures of Chrisantus and no alternative signature of Chrisantus was presented to discount the signature of Chrisantus. I also see no issue regarding the ID cards. It is correct that the ID card number in the register of the parcel No. 893 is different from the ID card in the documents. I do not wish to speculate why, and this ought to have been the subject of cross-examination, which it was not, but there was no problem when the transfer was effected meaning that the Land Registrar was comfortable with identity card numbers. It could be change of numbers out of change of generations of IDs.

26. My persuasion is that these agreements do confirm that Chrisantus was aware that Charles Omoke was in occupation of the land parcel No. 1087 as at 1985. Charles himself deposed that he had taken possession in 1974. This is supported by the evidence of the defence witnesses who testified that Charles had developed the suit land. DW-1 did state that when Zablou was purchasing the parcel No. 893, the original 1st defendant had already constructed the land that he occupied. This was supported by all other defence witnesses including DW-2 who actually leased the business premises constructed by Charles in the year 1996.
27. Even the plaintiff himself affirms that there are developments on the land and that is why he is seeking an order of mandatory injunction to have them removed. His case however, is that these buildings came up after the year 2004. I don't believe him. Significantly, his evidence on the issue of possession was oral and was not supported by any other witness. It does not add up that he and his brother/s could not take action if indeed the original 1st defendant invaded the land in the year 2004. They were grown ups and it is unusual for them not to have taken any action yet their land was being taken over by somebody else. I do not buy their excuse that they did nothing because their father was sickly. Nothing stopped them from making a report to the police, or even to the Chief. In fact, if indeed their father was sickly at that time, then you would expect that it will be the plaintiff and his siblings taking the lead to protect their father's property. Their inactivity makes me disbelieve the evidence of PW-1 that possession of the land by the original 1st defendant came in 2004 or after. I am of opinion that the evidence is overwhelming that the original 1st defendant was in occupation of the land at least from the year 1985. This is more than 20 years before this suit was filed. There is no evidence that this possession was not peaceful or that it was ever interrupted. I therefore hold the view that the 1st defendant has proved that he is entitled to adverse possession of the portion that he occupies out of the land parcel No. 3166.
28. Given the foregoing, the plaintiff cannot succeed in his case. The title of Chrisantus had already been extinguished by the time the plaintiff was filing suit in 2009 to claim the land for the estate of the deceased. I therefore proceed to dismiss the plaintiff's case. I will enter judgment for the applicant in the Originating Summons and order that he be given title to the land that he occupies out of the land parcel West Kitutu/Bomatara/3166 which should be 0.6 Ha or thereabouts. I order the plaintiff to proceed to carve out this land and issue title to the applicant. If he fails to do so, the Deputy Registrar of this court to ensure that the applicant obtains the title and all costs appurtenant thereto to be borne by the plaintiff.
29. The last issue is costs. They will follow the event. I will award costs to the defendants against the plaintiff. Costs will be for only one file and not two, for the question of adverse possession could as well have been pleaded in full within the original suit Kisii HCCC No. 115 of 2009.
30. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 12 DAY OF OCTOBER 2023

JUSTICE MUNYAO SILA



**JUDGE, ENVIRONMENT AND LAND COURT
AT KISII**

