



**Odera (Suing through Janes Agola Mwa holder of power of Attorney)Agola Mwa Holder of Power of Attorney v Obiero (Environment & Land Case 54 of 2017) [2023] KEELC 20932 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20932 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 54 OF 2017**

**MN KULLOW, J  
OCTOBER 6, 2023**

**BETWEEN**

**MARGARET ACHIENG ODERA (SUING THROUGH JANES AGOLA MWA HOLDER OF POWER OF ATTORNEY)AGOLA MWA HOLDER OF POWER OF ATTORNEY ..... PLAINTIFF**

**AND**

**DANIEL ASAMBO OBIERO ..... DEFENDANT**

**JUDGMENT**

1. This judgment relates to ELC Case No. 54 of 2017 (formerly Kisii ELC case No. 88 of 2013 O.S) and Kisii Civil Suit No. 192 of 2013 which were consolidated vide an Order of the Court as they both relate to the same subject matter. It was agreed that the lead file would be ELC Case No. 54 of 2017.
2. The Plaintiff herein commenced this suit by way of an Originating Summons dated 26/02/2013 and Amended on 22<sup>nd</sup> March, 2019 against the Defendant for a determination of the following ISSUES: -
  - i. A Declaration that the Defendant rights to recover a portion measuring 6 Acres of L.R. No. Kanyamkago/ Kawere II/ 2650 is barred under the Limitations of Actions Act, Cap 22 Laws of Kenya, and his title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of the parcel of land for a period exceeding 44 years.
  - ii. There be an Order that the Plaintiff be registered as the proprietor of the portion measuring 6 Acres of L.R. No. Kanyamkago/ Kawere II/ 2650, in place of the Defendant, who currently holds the title of the suit land.
  - iii. There be an Order restraining the Defendant by himself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said portion of



the parcel of land, that is, L.R. No. Kanyamkago/ Kawere II/ 2650, in any manner whatsoever and/or howsoever.

- iv. The Deputy Registrar and/or the Executive Officer of the Honourable Court be directed and/or ordered to execute the Transfer Instruments and all attendant documents, to facilitate the transfer and registration of the portion measuring 6 Acres of L.R. No. Kanyamkago/ Kawere II/ 2650, in favor of the Plaintiff.
  - v. Costs of this Originating Summons be borne by the Defendant.
  - vi. Such further and/or other Orders be made as the court may deem fit and expedient in the circumstances of this case.
3. The Originating Summons is premised on the 19 grounds thereof and on the Plaintiff's Supporting Affidavit sworn on 22.03.2019 by Janes Ogola Mwa, holder of Power of Attorney, donated by the Plaintiff. The Plaintiff avers that the original land parcel No. L.R. No. Kanyamkago/ Kawere II/ 853 was jointly registered in the names of Peterlis Oguto Bwana, Aringo Bwana & Alex Owiti Oyoo, who is since deceased and was the Plaintiff's husband. The said Alex Owiti Oyoo and the Plaintiff developed their homestead on a portion of the original parcel No. 853 where they have remained to date.
  4. He further stated that in the year 1998 the original land parcel was subdivided into 3 portions to wit, L.R. No's. 2649, 2650 and 2651 and each of the original owners were entitled to a portion thereof. Unfortunately, only 2 of the original owners were registered as the owners of the new parcel numbers arising from the subdivision and the deceased Alex Owiti Oyoo was never registered as the proprietor of any portion of the land.
  5. It is his contention that the Plaintiff's homestead fell on and constituted part of parcel No. L.R. No. Kanyamkago/ Kawere II/ 2650; which was jointly registered in the names of the Defendant and one Charles Obiero Okusa. It is his claim that notwithstanding the said registration of the suit parcel; the Plaintiff has resided and remained in the suit property since 1998 and she annexed copies of the photographs as proof thereof. He further averred that the Plaintiff's occupation and use of the suit land has been for a period of over 44 years including the period prior to the subdivision and establishment of the new suit parcel numbers.
  6. He maintained that defendant has never taken any steps towards recovering the portion of land occupied by the Plaintiff and consequently, having been in occupation of the suit land for a period of over 44 years; the Defendant's rights to recover the said portion extinguished. It was therefore his position that the Plaintiff had acquired prescriptive rights over the portion of the suit land measuring 6 Acres capable of registration. He thus urged the court to allow the Originating Summons and grant the reliefs sought.
  7. The Originating Summons was opposed, the Respondent filed a Replying Affidavit sworn on 12<sup>th</sup> April, 2013 in response to the allegations levelled against him. He admitted that the original parcel No. 853 was jointly owned by Alex Owiti Oyoo, Peterlis Oguto Bwana and Aringo Bwana. The said land was later subdivided into 3 portions; Kanyamkago/ Kawere II/ 2649, 2650 and 2651
  8. It was his claim that pursuant to the said subdivision, the three original owners sold and transferred 2 portions; No. 2650 and 2651 to his late father Charles Obiero Okusa. Parcel No. 2650 was jointly registered in his name and that of his father, who is since deceased while parcel No. 2651 was jointly registered in his father's name and that of his brother, one Nicholas Odemo Obiero. The original owners retained parcel No. 2649 and which is currently being occupied by one Janes Agola while the Applicant herein relocated to Ndhiwa, where she lives to date.



9. In response to the claims of possession and occupation of the suit land by the Applicant, it was his claim that the plaintiff has never occupied or used any portion of the suit land No. 2650 as alleged and dismissed the photographs annexed to her affidavit as belonging to one Alfred Amdavi, on parcel No. 2651. He accused the said Alfred Amdavi and Jossam Onubi Zedekiah; who have been sued in Civil Case No. 192 of 2013, as using, colluding and conspiring with the Plaintiff to lodge the instant suit with the intention of defeating justice.
10. In conclusion, he urged the court to dismiss the Applicant's claim which was marred with falsehood and the same amounted to an abuse of the court process.
11. The suit was consolidated with ELC No. 192 of 2013; in which the Defendant herein had sued Alfred (1<sup>st</sup> Defendant) and Jossam Onubi (2<sup>nd</sup> Defendant) for trespass over the suit parcel herein. The Plaintiff filed a Plaint dated 12<sup>th</sup> April, 2013 against the defendants seeking the following orders: -
  - i. Permanent Injunction restraining the Defendants by themselves, servants, agents or otherwise howsoever from trespassing upon Title Numbers Kanyamkago/ Kawere II/ 2650 and 2651
  - ii. Eviction Orders
  - iii. Costs of the suit
  - iv. Interest at commercial rates.
12. It was the Plaintiffs' case (Daniel Asambo Obiero) that they are the registered owners of the suit parcels; parcel No. 2650 having been jointly registered in the 1<sup>st</sup> Plaintiff's name and that of his late father while parcel No. 2651 was jointly registered in the 2<sup>nd</sup> Plaintiff's name together with their deceased father. It is their claim that the said parcels were purchased from the 3 joint owners of the original parcel No. 853; which was subdivided into three portions No. 2649, 2650 and 2651. Upon sale of the 2 portions, the said owners retained parcel No. 2649 which measures approx. 5.8Ha while they took possession of parcel Nos. 2650 and 2651.
13. Their claim against the Defendants is that; sometimes in the year 2010 without lawful cause or consent, the 1<sup>st</sup> Defendant trespassed into a portion of parcel No. 2651 measuring approx. 4 Acres while the 2<sup>nd</sup> Defendant trespassed into a portion measuring 2 Acres deriving 1 Acres each from the 2 land parcels No. 2650 and 2651. He outlined the particulars of trespass and the loss suffered as a result of the Defendants' actions and urged the court to allow the suit as prayed.
14. The suit was opposed; the 1<sup>st</sup> Defendant filed a Statement of Defence dated 24/07/2013, wherein he averred that the registration of the plaintiffs as proprietors of the suit parcel was done with the knowledge of the 1<sup>st</sup> Defendant's occupation of a portion measuring 4 acres. Further, it is his claim that the said registration in the joint names of the 2<sup>nd</sup> Plaintiff and Charles Obiero was done in the circumstances which connote the existence of constructive trust; for and on his behalf and outlined the particulars of trust thereof.
15. He thus contends that the registration of the plaintiff as proprietors thereof was undertaken on the face of subsisting overriding interests in his favour, owing to his occupation and possession of the suit land for a period of over 12years.
16. Consequently, he denied the claims of trespass and maintained that he entered and took possession of the portion of what is now parcel No. 2651 in the year 1978, pursuant to a lawful sale agreement relating to a portion of L.R No. Kanyamkago/ Kawere II/ 853



## **Trial**

17. On 27.11.2019 the Plaintiff's case proceeded for hearing. Janes Agola Mwa, holder of Power of Attorney testified as PW1. He maintained that the suit land belongs to the Plaintiff Margaret Achieng Odera. He also produced the following documents as exhibits in support of his case as follows;
  - a. Power of Attorney dated 20/2/2019 – Pexhibit 1
  - b. Copy of Green Card of L.R. No. 853 – Pexhibit 2
  - c. Copy of Mutation Form giving rise to parcel Nos. 2649 – 2651 – Pexhibit 3
  - d. Copies of Green Card of L.R. No. 2650 – Pexhibit 4(a)
  - e. Certificate of Official Search dated 09/10/2012 in respect to L.R. No. 2650 - Pexhibit 4 (b)
  - f. Bundle of Photographs– Pexhibit 5
18. On cross-examination, he stated that he was not aware that the plaintiff's deceased husband and the 2 other original owners of the suit land sold parcel Nos. 2650 and 2651. He further conceded that the Plaintiff Margaret had no house on the suit land and that the main house in Pexh. 6 belonged to while the damaged house belonged to the plaintiff.
19. It was further his contention that the plaintiff cultivates the suit land but he conceded that he had no photos to prove the same. He also stated that he had lived with the plaintiff Margaret for a period of around 3 years.
20. Joseph Oluoch Obuya, the area Assistant Chief testified as PW2; he adopted his witness statement dated 30/01/2021 as his testimony in chief. He further stated that the plaintiff had occupied and used the suit land since 1960's to date.
21. On cross-examination, he conceded that he did not adduce any photographs to prove that the plaintiff had been occupying and using the suit land. The plaintiff thereafter closed her case.
22. The matter proceeded for Defence Hearing on 07/06/2021. The Defendant testified as DW1 wherein he gave evidence in respect to both suits; No. 54 of 2017 and Kisii No. 192 of 2013. He relied on his Replying Affidavit dated 12/4/2013 as his evidence in chief.
23. It was his testimony that the plaintiff Margaret Achieng Odera had moved and relocated to Ndhiwa and only emerged in the year 2013 to claim a portion of the parcels of land No. 2650 and 2651. It was further his claim that the photographs produced as Pexh. 6 are in respect to the defendants in case No. 192 of 2013 and the same do not disclose the Plaintiff's homestead.
24. He maintained that the plaintiff does not occupy or use the portion measuring 6 Acres as alleged but the same is being used by the Defendants in case No. 192/2013, who trespassed into the said portion sometimes in the year 2010. He thus urged the court to dismiss case No. 54 of 2017 and allow his claim on trespass against the Defendants as per the reliefs sought in his Plaint.
25. He also produced the documents on his List of Documents dated 12/4/2013 as DExhibits 1-10, Limited Grant of Administration Ad-Litem dated 10/10/2012 as Dexh. 11.
26. On cross- examination; he maintained that his father bought the 2 parcels of land in the year 1998 and at the said time, the defendants in case No. 192 of 2013 were not in possession or occupation of any part of the original land. He reiterated that Pexh. 6 showed the homestead of the defendants in the consolidated suit.



27. Alfred Amudavi testified as DW1 in respect to suit No. 192 of 2013. He stated that he lives on parcel No. 2650, which he purchased from one Alex Owiti Oyoo in the year 1983. That at the time of sale, the suit land parcel was originally No. 853 and was jointly registered in the names of Aringo Bwana, Alex Owiti and Vitalis Ogutu.
28. It was his further his testimony that he signed a sale agreement with Vitalis Ogutu dated 13/4/1983 and the same was marked as 'DMFI 1'. That upon payment of the consideration price, he took possession and started cultivating and has remained on the suit land since 1984. The purchased portion measured approx. 4 Acres. The said sale agreement was however not produced as defence exhibit.
29. He produced the following documents as defence exhibits in support of his case as follows;
  - a. Photographs of his home –Dexhibit 2
  - b. Mutation Form– Dexhibit 3
  - c. Green card – Dexhibit 4
  - d. Certificate of Official Search - Dexhibit 5
30. On cross-examination, he conceded that he did not have a title deed to his parcel and reiterated that his claim is on parcel No. 2650. He stated that both him and the Plaintiff in case No. 54 of 2017 were claiming the same parcel; he was claiming a portion measuring 4 Acres while the Plaintiff was claiming the entire parcel No. 2650. He confirmed that the 1<sup>st</sup> house on the picture was no longer there, the 2<sup>nd</sup> house belonged to Jotham Anubi while the 3<sup>rd</sup> house was his.
31. On re-examination, he clarified that the 1<sup>st</sup> house was destroyed by Daniel after the death of Margaret's husband. The Defence thereafter closed their case.
32. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have read and taken into account in arriving at my decision as hereunder;

### **Analysis and Determination**

33. I have carefully considered the pleadings filed in both suits and the various responses filed thereto, the respective exhibits and the rival submissions in totality. On that account, it is my considered opinion that the following issues arise for determination: -
  - a. Whether the Applicant in ELC Case No. 54 of 2017 has proved her claim of Adverse Possession to the required standard and is entitled to the reliefs sought.
  - b. Whether the Plaintiff in Kisii ELC Case No. 192 of 2013 has proved his claim on trespass to the required standard and is entitled to the reliefs sought.
  - c. Who should bear the costs of the respective suits.

#### **i. Whether the Applicant in ELC Case No. 54 of 2017 has proved her claim of Adverse Possession to the required standard and is entitled to the reliefs sought.**

34. Adverse possession is essentially a situation where a person takes possession of land and asserts his rights over it and the person having title and rights to the said land neglects to take action against such person in assertion of his title for a period of twelve (12) years.



35. The legal framework for adverse possession is provided in Sections 7, 13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act*.
36. The requirements for adverse possession were reiterated in Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR where the court held as follows: -
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”
37. It is not in dispute that the suit land herein is registered in the name of the Respondent – Daniel Asambo Obiero together with his deceased father Charles Obiero. This has been confirmed in the pleadings filed in court, Pexh. 4(a) and 4(b) produced by the Applicant as well as the copies of title produced by the Respondent as Defence exhibit 9. With the guiding principles in a claim of adverse possession in mind, I will proceed to address the issue of possession and occupation, which are the key elements in a claim of adverse possession and to determine whether the Applicant has proved her claim to the required standard.
38. As outlined above, possession and occupation must be open, continuous, uninterrupted for a period of 12 years, with the intention to dispossess the actual owner.
39. The Applicant claims that she has been in continuous and interrupted possession and occupation of a portion of the suit parcel measuring approx. 6 Acres for a period of over 44 years. She contends that while the initial entry of the suit land was permissive and by consent of the 3 joint owners of the original land No. 853, her subsequent occupation and use of the said land after the subdivision of the original land into 3 portions Nos. 2649, 2650 and 2651 in the year 1998 was not. That upon transfer and registration of parcel No. 2650 in the name of the Respondent and his deceased father, her continued occupation was not consensual/ permissive.
40. It is her claim that despite the registration of the said portion of parcel No. 2650 measuring 6 Acres, she continued occupying and using the land for a period of over 15years and she has consequently acquired prescriptive rights and interest over the said portion.
41. The Respondent on the other hand; denied the claims of possession and use of the suit parcel as alleged by the Applicant. He maintained that upon purchase of the suit land by his deceased father, the plaintiff and his deceased husband relocated to Ndhiwa and have been staying there since then. It was his claim that the Applicant does not live on the suit land and therefore the claims of continuous and uninterrupted occupation are false and misleading. It was further his contention that the photographs annexed in the Applicant’s Supporting Affidavit as proof of her use and occupation are not photos of her house but that the same belonged to the Defendant in case No. 192 of 2013.
42. I have critically considered the rival claims by the parties with regards to the claims of possession and occupation. It is trite law that for one to plead Adverse Possession, they must be in actual possession of the suit land. While this possession is not necessarily limited to physical occupation of the suit land; an Applicant must demonstrate his occupation or use of the said parcel for uninterrupted period of 12 years as statutorily required and the same must be with the intention to dispossess.
43. PW1 in his testimony maintained that the suit land belonged to the plaintiff Margaret and produced Pexh. 5 as proof of her occupation and use of the suit land. However, on cross- examination, he



conceded that the plaintiff Margaret does not live on the suit land and further that the photos used are of houses belonging to one Alfred and Jotham.

44. It is important to note that the said Alfred in his testimony in court also confirmed that the houses in Pexh. 6 belonged to him and one Jotham. It is therefore clear that the Plaintiff/ Applicant does not live on the suit land as alleged and she has not adduced any evidence to prove that she is in actual possession and/or use of the said portion of the suit land. He who alleges must prove, the Applicant herein has not discharged the burden of proof by satisfying the necessary elements in a claim of adverse possession to the required standard.
45. In the premises, it is my finding that the Applicant has failed to sufficiently prove her claim on adverse possession to the required standard and consequently she is not entitled to the reliefs sought.

**ii. Whether the Plaintiff in Kisii ELC Case No. 192 of 2013 has proved his claim on trespass to the required standard and is entitled to the reliefs sought.**

46. The Plaintiff's in case No. 192 of 2013 is that sometimes in the year 2010, the Defendants trespassed into portions of their lawful parcels of land Nos. 2650 & 2651, without consent and/or permission and have refused to vacate the same. They outlined the particulars of trespass and loss suffered.
47. It is their contention that the joint owners of parcel No. 853; Alex Owiti, Aringo Bwana and Peterlis subdivided the said land into 3 portions; Nos. 2649, 2650 and 2651. They thereafter sold and transferred 2 portions Nos. 2650 and 2651 to his deceased father Charles Obiero. Parcel No. 2650 was jointly registered in the name of the 1<sup>st</sup> Plaintiff and his deceased father Charles while parcel No. 2651 was jointly registered in the name of the 2<sup>nd</sup> Plaintiff and their deceased father. Pursuant to the said sale, they took possession and remained thereon until sometimes in the year 2010 when the Defendants trespassed into portions of both parcels collectively measuring 6 Acres.
48. The 1<sup>st</sup> Defendant on the other hand denied the allegation levelled against him in respect to parcel No. 2650. He maintained that he purchased a portion of suit parcel measuring 4 Acres from one Alex Owiti sometimes in the year 1983. It was his contention that if indeed there was any sale in favour of the Plaintiffs, then the same was done with the knowledge that he was in possession of 4 Acres thereof.
49. He further averred that the registration of the suit land in favour of the Plaintiffs connotes the existence of constructive trust in his favour and maintained that he has been in occupation of a portion measuring 4 Acres of the suit parcel since 1983.
50. I have keenly considered the rival claims herein. It is the Plaintiffs' claim that they are the rightful owners of the suit parcels Nos. 2650 and 2651 and they produced copies of Title Deed (exh.9), Transfer Forms (exh. 7), Mutation Forms (exh. 6) and Certificates of Official Search (exh. 2-5) as evidence to that effect. It is their claim that the said parcels of land were sold to their deceased father by the 3 joint original owners in the year 1998. Pursuant to the said sale, the parcels were transferred and registered in their names jointly with that of their deceased father.
51. From a look of the said documents; the Transfer Form (exh. 7) dated 11/2/1998 in respect of parcel No. 2650 is duly signed by the 3 original owners, Petalis Ogutu Bwana, Alex Owiti and Aringo Bwana, in favour of the 1<sup>st</sup> Plaintiff and Charles Obiero, who is since deceased. The Transfer Form dated 12/2/1998 in respect of parcel No. 2651 in favour of the 2<sup>nd</sup> Plaintiff and their deceased father. The Letter of Consent adduced also mirrors the exact position as stated by the Plaintiff.
52. The 1<sup>st</sup> Defendant in his defence stated that he had purchased a portion of the original land No. 853 measuring 4 Acres prior to its subdivision, sometimes in the year 1983. He took possession in the year 1984 and has remained thereon to date. It is his claim that the land was sold by one Alex Owiti.



However, in his testimony in court, he stated that the land was purchased from Vitalis Ogotu, this is a clear contradiction of his claim as contained in the statement of defence and his testimony in court. Further, no such sale agreement was adduced in court as an exhibit in support of his claim as alleged.

53. The 1<sup>st</sup> Defendant's also claimed that at the time of the alleged sale, transfer of the suit parcels Nos.2650 and 2651 and registration thereof in the names of the plaintiffs; the same was undertaken with the knowledge of his occupation and the same thus connotes the existence of a constructive trust.
54. The law never implies and the Court never presumes a trust unless in instances of absolute necessity. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing or for unjust enrichment.
55. The Court of Appeal in the case of Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR, while dealing with the issue of trust stated as follows: -

“....A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...”

56. Having defined and explained the concept of constructive trust and how it arises, the question that follows is whether the same can be implied in the instant case. It is the 1<sup>st</sup> Defendant claim that he is the rightful owner of the said portion of land having purchased the land from the original owners, Alex Owiti. He thus maintained that he was duly entitled to the said land pursuant to the valid sale and the Plaintiff who is registered as the owner of the suit land, held the same as a trustee.
57. As stated herein above, constructive trust will be imposed by the court against one who has acquired property by wrong doing. In the instant case; there was no demonstration by the Defendant that at the time of sale between the Plaintiff's deceased father and the 3 original owners there was an intention to create trust in his favor or that the Plaintiff illegally acquired the said parcel of land for his sole benefit and unjust enrichment. The Plaintiff adduced all the necessary documents to show the process of his acquisition and registration of the suit land in their joint names, the defendant on the other hand only stated that he bought the land but did not adduce a copy of the said sale agreement or even a title deed in his favor. There was no evidence of any wrong doing on the part of the Plaintiffs or their deceased father or demonstration that at the time of the sale and registration that the Defendants were in actual occupation and the Plaintiffs were aware of the same. I therefore find that constructive trust cannot be implied in the present case.
58. Further, it was the 1<sup>st</sup> Defendant's contention that the said parcels of land were sold with encumbrances and overriding interest by virtue of his possession of 4Acres of the original land; he however did not adduce any evidence of such encumbrances or overriding interests as alleged; long and exclusive possession does not necessarily amount to adverse possession. In the absence of proof, the said claims by the 1<sup>st</sup> Defendant remain unsubstantiated with no probative value. Moreover, the 1<sup>st</sup> Defendant did not file a Counter- claim to ventilate his issues and/or claims of prescriptive and overriding rights with regards to the said portion of land in dispute.



59. The *Land Registration Act* has made provisions for the rights of a proprietor of land at section 25(1) of the Act which provides that:

‘The rights of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all the privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.’

60. Section 26 of the *Land Registration Act* further provides that:-

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme

61. The Plaintiff produced a copy of suit parcel’s title deed as Dexh. 9 showing that he is the registered owner of the suit land and the said title has not been challenged to have been acquired through fraud or misrepresentation on the part of the Plaintiff, his title remains indefeasible. See *Elijah Makeri Nyangw’ra vs. Stephen Mungai Njuguna & Another* (2013) eKLR

62. In the absence of any contrary proof challenging the evidence adduced by the Plaintiff on the ownership of the land and further justifying the 1<sup>st</sup> Defendant’s continued use of the suit land, I do find that the Plaintiffs have proved their claim against the Defendants and the Defendants have no basis to continue occupying the said portion of land.

63. Consequently, I find that the Plaintiffs have proved their case to the required threshold and are entitled to the reliefs sought in the Plaint dated 12<sup>th</sup> April, 2013.

### **III. Who should bear the costs of the respective suits**

64. It is trite law that costs follow event, having held in favour of the Respondent in ELC Case No. 54 of 2017 and in favour of the Plaintiffs in Kisii Case No. 192 of 2013, I find that he is entitled to costs of the suit.

### **Conclusion**

65. The upshot of the above is that the Plaintiff/ Applicant has failed to prove her case on adverse possession on a balance of probabilities and consequently, the Amended Originating Summons dated 22<sup>nd</sup> March, 2019 is dismissed with costs to the Defendant/ Respondent.

66. Further, with regards to Kisii ELC Case No. 192 of 2013; I find that the Plaintiffs have proved their case to the required standard and I accordingly allow the Plaint dated 12<sup>th</sup> April, 2013 on the following terms;



- a. An Order of Permanent Injunction be and is hereby issued, restraining the Defendants by themselves, servants, agents or otherwise howsoever from trespassing upon Title Numbers Kanyamkago/ Kawere II/ 2650 and 2651.
- b. Further, the 1<sup>st</sup> Defendant is hereby ordered to vacate a portion of L.R. No. Kanyamkago/ Kawere II/ 2650 measuring 4 Acres while the 2<sup>nd</sup> Defendant is hereby Ordered to vacate a portion of the L.R. No. Kanyamkago/ Kawere II/ 2650 and 2651 measuring 1 Acre from each within 90 days from the date of this Judgment
- c. Any Eviction to strictly comply with the Statutory Provisions as outlined in Section 156E of the *Land Act*.
- d. Costs of the suit be borne by the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 6<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

.....for the Plaintiff

.....for the Defendant

Court Assistant - Tom Maurice/ Victor

