



**Wainaina & another v Kiberenge & 49 others; Wainaina & another  
(Third party) (Environment & Land Case 76 of 2015 & 305 of 2016  
(Consolidated)) [2022] KEELC 3227 (KLR) (8 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3227 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**  
**ENVIRONMENT & LAND CASE 76 OF 2015 & 305 OF 2016 (CONSOLIDATED)**  
**SM KIBUNJA, J**  
**JUNE 8, 2022**

**BETWEEN**

**ISAAC MWANGI WAINAINA ..... PLAINTIFF**

**AND**

**WILLY KIBERENGE ..... 1<sup>ST</sup> DEFENDANT**  
**JAMES BIWOTT ..... 2<sup>ND</sup> DEFENDANT**  
**DAVID LETING ..... 3<sup>RD</sup> DEFENDANT**  
**WILSON K. CHEBII ..... 4<sup>TH</sup> DEFENDANT**  
**JOEL KIMAIYO BORE ..... 5<sup>TH</sup> DEFENDANT**  
**ABRAHAM KOMEN ..... 6<sup>TH</sup> DEFENDANT**  
**ISAAC MUTAI ..... 7<sup>TH</sup> DEFENDANT**  
**KIPKORIR ARAP SAMOEI ..... 8<sup>TH</sup> DEFENDANT**  
**WILLIAM K. KOECH ..... 9<sup>TH</sup> DEFENDANT**  
**PHILEMON K. ROTICH ..... 10<sup>TH</sup> DEFENDANT**  
**GILBERT MAICH KORONYA ..... 11<sup>TH</sup> DEFENDANT**  
**STEPHEN MARITIM SANGAI ..... 12<sup>TH</sup> DEFENDANT**  
**ZAKAYO KIBIY CHEPKWONY ..... 13<sup>TH</sup> DEFENDANT**  
**KIPRONO KIBORE ..... 14<sup>TH</sup> DEFENDANT**  
**SIMEON CHUMBA ..... 15<sup>TH</sup> DEFENDANT**  
**LEAH CHEROTICH BIRGEN ..... 16<sup>TH</sup> DEFENDANT**



AVITA MATUNDURA ..... 17<sup>TH</sup> DEFENDANT  
LUCY CHEPKOSGEI SAWE ..... 18<sup>TH</sup> DEFENDANT  
SELY JEBET KIPRONO ..... 19<sup>TH</sup> DEFENDANT  
ROSE KANGOGO ..... 20<sup>TH</sup> DEFENDANT  
BARNABAS ARAP KIPRONO ..... 21<sup>ST</sup> DEFENDANT

AND

DAVID NJOGU WAINAINA ..... THIRD PARTY  
NJOROGE WAINAINA ..... THIRD PARTY

AS CONSOLIDATED WITH  
ENVIRONMENT & LAND CASE 305 OF 2016

BETWEEN

BARNABAS ARAP KIPRONO ..... PLAINTIFF

AND

WILLY KIBET KIBERENGE & 29 OTHERS ..... DEFENDANT

JUDGMENT

1. Isaac Mwangi Wainaina, the plaintiff, commenced his claim against the defendants through the plaint dated the 16<sup>th</sup> March 2015, in ELC Suit No. 76 of 2015, seeking for the following orders:
  - a. “An order for permanent injunction restraining the Defendants by themselves, their servants and/or agents from interfering, trespassing, intermeddling, cultivating, selling and /or in any other manner dealing with the Plaintiff’s use, possession and/or ownership of all that land parcel number Tarakwa/lang’wai Block 1 (Koriomat) 88 measuring 17.61 Ha or thereabout.
  - b. An eviction order against the defendants.
  - c. Costs of the suit.”

The Plaintiff contends that he is the *bona fide* and registered owner of the suit property measuring 17.61 ha or thereabout, and that he is holding the said property in trust of the dependents, and/or the family of the late Samuel Wainaina Thanga, deceased. He pleads that the Defendants encroached on the suit property and unlawfully occupied it sometimes around the years 1992 to 1998 or thereabout, to the detriment of the family of Samwel Wainaina Thanga, which the Plaintiff represents. His rendition is that neither his father, nor himself as the administrator of his late father’s estate, sold or permitted the Defendants to settle on or use the suit property. The Plaintiff maintains that as a result of the Defendants’ forceful and illegal occupation of the suit property, the Plaintiff and his siblings have been displaced. That though he had obtained a grant in his late father’s estate, in Eldoret High Court Succession Cause No. 27 of 2007, the 1<sup>st</sup> to the 20<sup>th</sup> Defendants have lodged an objection.



2. The Plaintiff's claim is opposed by the 1<sup>st</sup> to 20<sup>th</sup> Defendants through their statement of defence and counterclaim dated 18<sup>th</sup> of May, 2015, and amended defence and counterclaim filed on the 23<sup>rd</sup> March, 2017. The defendants assail the Plaintiff's claim of ownership of the land, asserting that they have acquired ownership of the specified portions of the land by adverse possession, after being in occupation thereof continuously, uninterrupted, without secrecy and without force for over 12 years. The said defendants pray for the following;
  - a. "That the plaintiff's suit be dismissed with costs.
  - b. A declaration and a finding that the 1<sup>st</sup> – 13<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 20<sup>th</sup> defendants have been in occupation of portions of the suit property continuously, uninterrupted, without secrecy and without force for over 12 years under the doctrine of adverse possession and are entitled to be registered as owners of the portion of the suit property.
  - c. That there be an order directing the County Land Surveyor to subdivide the suit property and curve out the portions occupied by the 1<sup>st</sup> – 13<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, and 20<sup>th</sup> defendants, ..... and an order directing the County Registrar to transfer and issue titles to the defendants in their respective parcels.
  - d. That without prejudice and in alternative the 3<sup>rd</sup> parties be ordered to compensate the 1<sup>st</sup> – 13<sup>th</sup>, 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 20<sup>th</sup> defendants for loss of the land.
  - e. Costs of the counterclaim."
  
3. Barnabas Arap Kiprono, the Plaintiff in ELC No. 305 of 2016, moved the court by way of the plaint dated the 14<sup>th</sup> September 2016, seeking for the following prayers against the 30 named defendants;
  - a. "A declaration that the plaintiff is the absolute owner of the whole of that parcel of land known as Tarakwa/Langwai/Block1(Koriomat/88 and the defendants action amount to an interference with the plaintiff's proprietary interest over the suit land.
  - b. An order of eviction directing that the defendants, their servants and or agents be evicted forthwith from the land parcel number Tarakwa/Langwai Block 1(Koriomat)/88.
  - c. An order of permanent injunction to permanently either acting jointly or severally from trespassing into, wasting, transferring, subletting, interfering with and/or any other way or manner on howsoever dealing with land number Tarakwa/Langwai Block 1(Koriomat)/88.
  - d. Mesne profits.
  - e. Costs of this suit.
  - f. Any other relief as the court may be pleased to grant."

The plaintiff avers that he is the registered owner of Tarakwa/Langwai Block 1(Koriomat)/88, the suit land, measuring 17.6 hectares. That the defendants have without his consent, unlawfully and forcefully trespassed onto the suit land and hence this suit.
  
4. That through the order issued on the 14<sup>th</sup> November 2016 the court consolidated the two suits, being ELC No. 76 of 2015 and 305 of 2016, and further directed that "the Plaintiff and Defendants in 305 of 2016, who are also parties in 76 of 2016 will be defendants in 76 of 2016, 76 of 2015 to be amended to reflect the parties." That pursuant to the said order, Barnabas Arap Kiprono, the plaintiff in ELC No. 305 of 2016 became the 21<sup>st</sup> defendant in ELC No. 76 of 2015 and that made his plaint a defence and counterclaim.



5. During the hearing, Isaac Mwangi Wainaina, the Plaintiff testified as PW1. He adopted his witness statement dated the 16<sup>th</sup> March, 2015 and lamented that the persons he has sued had occupied his land violently, and despite reporting to the chief and his advocates, they have declined to vacate. That he had sold a piece of land to Mr. Bernaba Arap Keter, the 21<sup>st</sup> Defendant, but the buyer could not take possession due to occupation by the other defendants. That the defendants have been served with notices, and the court should grant him relief, principally, a declaration that the disputed property belongs to him, that he holds the same in trust for the family of the late Samwel Wainaina Thanga, and an eviction order be issued.
6. Wilson Kemboi Chebii, James Barusei Biwott, Arita Matundura, Leah Cherotich Birgen, Willy Kibet Kiberenge, William Kiplagat Koech, Kipkorir Arap Samoei, Zakayo Kibiy Chepwoy, Stephen Maritim Sangai, Isaac Mutai, Phillomen Rotich, and David Letting Bore, the 4<sup>th</sup>, 2<sup>nd</sup>, 17<sup>th</sup>, 16<sup>th</sup>, 1<sup>st</sup>, 9<sup>th</sup>, 8<sup>th</sup>, 13<sup>th</sup>, 12<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, and 3<sup>rd</sup>, defendants, testified as DW1 to DW12 respectively, in defence of the 1<sup>st</sup> to 20<sup>th</sup> defendants' case. Barnabas Kiprono, the 21<sup>st</sup> defendant, testified as DW13 in support of his case. They explained the basis of their claims to the suit land. DW1, contends that he came to the parcel of land measuring 1 ½ acre after buying the same from Saul Njoroge Wainaina in 1990 and has been in possession since. He contended that Wainaina has never come to the land and was aware that he is in occupation of the land, and is therefore entitled to it under adverse possession. DW2 testified that he lives on Block No.22 and he has lived on the 0.8acre land since 1997, after buying it from one David Njogu Wainaina. That he has constructed on it, built a store and planted trees thereon. DW3, testified that she has constructed three houses on the piece of land and has lived there since 1988. DW4, stated that she lives on the Parcel Number 22, and that she bought the land in 2002 from David Wainaina, the Plaintiff's brother. That the Plaintiff has never told her to vacate from the land. DW5 testified that he entered the land in the year 2000 pursuant to a sale agreement with David Wainaina. He stated that he has dug a borehole, farms on the land and that he has never been told to vacate. DW6, testified that he entered the land in 2006 on a lease basis, and in 2013 bought the portion from one Jonah Tanui, who had initially bought the piece from David Wainaina. That he has constructed 2 houses on that piece of land measuring 0.25 acres. DW7 to DW12 testified that they bought their portions of the suit land from a brother to the Plaintiff named Njoroge Wainaina.
7. DW13, Barnabas Kiprono, the 21<sup>st</sup> defendant, adopted his statement dated the 16<sup>th</sup> March, 2016 as his evidence in chief. He told the court how he bought the suit land that measures forty (40) acres from the Plaintiff through the sale agreement of 4<sup>th</sup> December, 2014. That he had done due diligence, including visiting the land and only found some people grazing on it. That some of the people grazing there later started constructing houses after he became the registered proprietor, and hence his suit. That he does not know the total acreage of the suit land, but confirmed he had only bought 40 acres at a purchase price of Kshs. 18 million. That his title documents over the suit land shows it was subdivided from parcel number 22.
8. That after close of the parties' cases, the learned counsel for the Plaintiff, 21<sup>st</sup> Defendant, 1<sup>st</sup> to 20<sup>th</sup> Defendants filed their written submissions dated the 30<sup>th</sup> December, 2021 9<sup>th</sup> February, 2022 and 1<sup>st</sup> March, 2022 respectively.
9. The Plaintiff's Counsel submitted that the sale agreements relied upon by the 1<sup>st</sup> to 13<sup>th</sup>, 16<sup>th</sup> to 18<sup>th</sup> and 20<sup>th</sup> Defendants were illegal, void and unenforceable, for reason that the land subject matter of the agreements was in the name of a deceased person, the late Samuel Wainaina Thanga. That the vendors in the said agreements had no capacity to dispose of the land. That a grant of representation had to be obtained first before the alleged vendors could be clothed with capacity of entering into any valid agreement. It was further submitted that any dealings by the alleged vendors and the defendants



on the suit property only amounted to intermeddling with the property of the deceased which is a criminal offence by dint of section 45 of the Law of Succession Act. Counsel relied on the case of Gitau and 2 Others v Wandai and 5 others (1989) KLR 23 to buttress this point. He also relied on the case of Re Matter of the Estate of David Julius M'itbinji(Deceased). The Plaintiff submitted that the actions of the parties to those agreements were in contravention of the Law of Succession Act, and have occasioned untold suffering to the dependents of the deceased, who have even been displaced from their inheritance. The Plaintiff urged that justice would only be served by ensuring that the eviction order is issued against the 1<sup>st</sup> to 20<sup>th</sup> Defendants. It was further submitted that the Defendants have not met the threshold for adverse possession and cited the case of Mbira v Gachubi (2002) IEALR, where the Court held that;

“... a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”

Counsel contended that the 1<sup>st</sup> to 13<sup>th</sup>, 16<sup>th</sup> to 18<sup>th</sup>, and 20<sup>th</sup> Defendants' entry into the suit property is based on the fact that they obtained the disputed possession from the illegal land sale agreements, and not by adverse possession. Counsel argues that the tenets of adverse possession is that the entry has to be non-permissive, or non-consensual, which is not the case according to the testimonies of the 1<sup>st</sup> to 13<sup>th</sup>, 16<sup>th</sup> to 18<sup>th</sup> and 20<sup>th</sup> Defendants, who seemed to believe that their right to acquire the parcels adversely had crystallized. Counsel submits that the defendants' statements and testimonies support the position that their illegal entry and/or possession of the suit property cannot be based on adverse possession. The counsel cited the case of Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR at paragraph 12 where the learned judge held that: -

“ 12. It is also a well-settled that a party claiming Adverse Possession ought to prove that this Possession was “*nee vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner,”

In urging the point that adverse possession cannot arise out of an illegal Land Sale Agreement, Counsel referred to the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR where justice R.C.N. Kuloba at page 26 stated that:-

“One issue that the parties required the court to decide was whether adverse possession may arise out of a sale agreement. The answer is this. “Yes”, if nothing subsequent to the sale agreement is in contravention of any law or equity. But if the entry or continued possession is in violation of a statute or is not consonant with equity, then such possession cannot be a basis for claiming title by adverse possession. No Court shall aid the breaking of the law, or promote unconscionable conduct. Moreover, if the basis of the claim under adverse possession is a sale agreement, the doctrine will not apply because the sale agreement postulates consent, and consent and adverse possession are not bed-fellows’

Counsel submitted that having already demonstrated that the alleged Land Sale Agreements contravened the provisions of section 45 of the Law of Succession Act, the court should find that adverse possession cannot apply in the circumstances of this case. That as regards the 21<sup>st</sup> Defendant it was the counsel's position is that he legally purchased the suit property from the Plaintiff after the latter legally obtained the Grant of Administration of the estate of his father, the late Samwel Wainaina Thanga, through Eldoret High Court Succession Cause No. 271 of 2007. That the suit property was later



transferred to the 21<sup>st</sup> defendant's name in accordance with the law as the suit herein was on-going. That the court should grant the plaintiff's prayers, and find that the 1<sup>st</sup> to 20<sup>th</sup> Defendants had intermeddled with the free property of the estate of the said deceased.

10. The learned counsel for the 21<sup>st</sup> Defendant submitted that after the death of late Samwel Wainaina Manga, the plaintiff obtained a grant in the estate and got registered as proprietor of the suit land on the 19<sup>th</sup> November, 2014. That the plaintiff then sold the land to the 21<sup>st</sup> defendant on the 4<sup>th</sup> December, 2014, and transferred it to him on the 22<sup>nd</sup> June, 2016. The counsel submitted that the 21<sup>st</sup> Defendant's title to the land is protected under section 24 and 26 of the [Land Registration Act](#) No. 3 of 2012. That the 1<sup>st</sup> to 20<sup>th</sup> defendants' claim under adverse possession has not be established. The counsel relied on the following decisions; [Wambugu v Njuguna](#) (1983) Klr 173, [Mbira v Gachuhi](#) (2002) 1EALR 137, [Jandu v Kilai & Another](#) (1975) EA 225, [Mtana Lewa v Kabindi Ngala Mwangandi](#) (200) eKLR and [Park Towers Ltd v John Mithamo Njiku & 7 Others](#) (2014) eKLR. Counsel urged the court to award the 21<sup>st</sup> defendant 20,000,000 as general damages against the 1<sup>st</sup> to 20<sup>th</sup> defendants for preventing him from utilizing the land, grant an order of their eviction and demolition of their structures.
11. For the 1<sup>st</sup> to 20<sup>th</sup> Defendants, the learned counsel submitted that neither the Plaintiff nor the 21<sup>st</sup> Defendant had lodged a defence to their counterclaim. That as such the averments and content of the counterclaim ought to be deemed to have been admitted the defendants thereof. They argued that the Counterclaim is a suit in itself as was observed in the case of [Kenyariri & Associates Advocates v Salama Beach Hotel Limited and 4 Others](#) in which the court held:

"A Counterclaim contains assertions that a defendant could have made by starting a lawsuit if the Plaintiff had not already begun an action. It is governed by almost the same rules that regulate a claim made by a Plaintiff except that it is a part of the answer that the Defendant files in response to the Plaintiffs claim. A Counterclaim is therefore in all respects a suit by the Defendant."

The Learned Counsel invited the Court to consider the provisions of Order 6 Rule 9(1) which provides; "Subject to sub-rule (4) any allegation of fact made by a party in his pleadings shall be deemed to be admitted by the opposite party unless it is traversed by that party in his pleadings or a joinder of issue under rule 10 operates as a denial of it". He cited the case of [Katiba wholesalers Agency\(K\) Ltd v United Millers Ltd](#) Nairobi civil appeal No. 140 of 2002(C.A) where the Court of Appeal held as follows:

".....where a defence contain an allegation of fact.....it is necessary for the plaintiff to deny in the reply any allegation in the defence which he intends to dispute. If he fails to do so, then he is deemed to have admitted the defence allegation"

The counsel submitted that the court can grant orders of adverse possession on the basis of their defence and counterclaim, and referred to the case of Malindi Court of Appeal No. 17 of 2016 [Between Chevron \(k\) Ltd v Harrison Charo Wa Shutu](#) (2016) eKLR the court observed;

"..... the courts, have since this decision, held that a claim by adverse possession can be brought by a plaintiff. See [Mariba v Mariba](#) Civil Appeal No. 188 of 2002, counter-claim or defence as was the case here. See [Wabala v Okumu](#) (1997) LLR 609 (CAK). In [Gulam Mariam Noordin v Julius Charo Karisa](#), Civil Appeal No 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated the law as follows: "Where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when [Chevron \(K\) Ltd v Harrison Charo Wa Shutu](#) [2016] eKLR the party applies to be



registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons. It has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of fact and law. Be that as it may, and to answer the question, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of *Wabala v Okumu* [1997] LLR 609 (CAK), which, like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* [1998] LLR 813 where the plaintiff made no specific plea of adverse possession, the plea was nonetheless granted."

It was further submitted that sections 24 and 25 of the *Land Registration Act* provide for the rights of a registered person which is to the effect that the rights of a proprietor are not liable to be defeated except as provided in the Act and the rights, privileges and appurtenances belonging thereto are subject to liabilities, rights and interests as affect the same and declared by section 28 not to require noting in the register. He further argued that section 28 of the Act provides for the overriding interest and under section 28(h) of the *Land Registration Act*, the rights acquired or in the process of being acquired by virtue of any written law relating to the *Limitation of Actions Act* or by prescription.

The Defendant submitted that the 1<sup>st</sup> - 20<sup>th</sup> Defendants averred in their pleadings and through the evidence adduced that they have been in occupation of suit land for over 12 years, and have acquired the suit land by dint of the doctrine of adverse possession. Counsel, further argues that, the plaintiff in his evidence conceded that the defendants have been on the land for about 23 years. It was submitted that section 7 of the *Limitation of Actions Act* provide that a person may not bring an action;

"...to recover land after the end of twelve years from the date on which the right of action accrued to him, or, if it first accrued to some person through whom he claims, to that person".

That on the implication of section 7 of the *Limitation of Action Act*. Chapter 22 of the laws of Kenya in an action to recover land, the counsel relied on the decision in the case of *William Gatubi Murathe v Gakuru Gathimbi* (1999) eKLR:

"Section 7 of the Limitation of Action Act provided that such an action may not be brought after the end of twelve years from the date on which the right accrued. This means that the appellant, having bought and +having been registered as the proprietor of the suit land and therefore claiming ownership in the suit land, could seek to recover it from the respondent, but only if he did so within twelve years after he acquired the suit land".

The counsel, further argued that the question whether the 1<sup>st</sup> to 20<sup>th</sup> defendants were in adverse possession of the property was a matter of evidence.

That the sale agreements by the 1<sup>st</sup> to 20<sup>th</sup> defendants are relevant to their right to adverse possession claim. That the said defendants came into possession of suit land when they purchased their portions from the Plaintiff's brothers, who as submitted by the Plaintiff, lacked the capacity to enter the agreement. That the agreements between the third parties and the 1<sup>st</sup> to 20<sup>th</sup> defendants were not valid, and therefore did not constitute permission or consent of the owner or his administrator. The agreements were void ab initio, and as such time for purposes of computation of adverse possession started running when they entered and assumed possession in 1992. Counsel cited the decision by the Ccourt of Appeal in *Samuel Miki Waweru Vs Jane Njeri Richu* [*supra*], where the court observed that permission is terminated by the operation of law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void. Counsel further submitted that where a claimant



pleads the right to land under an agreement, and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. That in such a situation, a claimant will succeed under adverse possession upon occupation of at least 12 years after such payment. Regarding the Plaintiff's argument that the Defendants intermeddled with the estate of the deceased contrary to section 40 of the Law of Succession Act, the counsel submitted that the Law of Succession Act is not applicable before the Environment and Land Court, as the proceedings before this court are not succession proceedings, but relate to the use and or occupation to land as provided for under Article 162(2) of the Constitution. That the issue of intermeddling of the estate is a creature of the Succession Act, and as such ought to be dealt before the Succession Court. The counsel submitted that there was no interruption of time between the registration of the deceased and the plaintiff in respect of the said land's title and cited the Court of Appeal decision in Titus Kigoro Munyi v Peter Mburu Kimani, Nyeri CA No. 28 of 2014(2015) eKLR where the Court of Appeal cited with approval the case of Peter Thuo Kairu v Kuria Gacheru (1988) 2 KLR 111, where it was observed that the law relating to prescription affects not only the present holders of the title but their predecessors. As regards the 21<sup>st</sup> Defendant's case, Learned Counsel submitted that he is the registered proprietor of the suit property, and had during the hearing admitted that he got registration of suit land from the Plaintiff by way of sale and transfer. That the 21<sup>st</sup> Defendant had also admitted that at the time he purchased the suit land, the 1<sup>st</sup> to 20<sup>th</sup> Defendants were in occupation of the suit land. That the 21<sup>st</sup> Defendant's acquisition of suit land could not, and did not, affect the 1<sup>st</sup> to 20<sup>th</sup> defendants' right to assert adverse possession, and as such the 21<sup>st</sup> Defendant's right to suit land are subject to 1<sup>st</sup> to 20<sup>th</sup> defendants' rights. Counsel referred the court to the case of Mweu v Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430 where it was stated that:

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”

Finally, Counsel implored this Court to find that the plaintiff and the 21<sup>st</sup> Defendant did not establish the elements to justify the eviction of the 1<sup>st</sup> to 20<sup>th</sup> defendants, in view of the plea of adverse possession by the said defendants, and in particular bearing in mind that the plaintiff did not file defence to the 1<sup>st</sup> to 20<sup>th</sup> Defendants' counterclaim. The Counsel therefore urged the court to decline orders of eviction as sought by the Plaintiff and the 21<sup>st</sup> Defendant. Counsel further urged the court to allow the 1<sup>st</sup> to 20<sup>th</sup> Defendants' counterclaim and to order that the portions occupied by the 1<sup>st</sup> to 20<sup>th</sup> Defendants be hived out from the suit land, and be transferred to, and titles be issued to them. Counsel also urged the court to award costs of the counterclaim to the 1<sup>st</sup> to 20<sup>th</sup> Defendants.

12. The following are the issues for the court's determinations;
  - a. Whether the plaintiff has made a reasonable case for issuance of an order of permanent injunction and eviction against the 1<sup>st</sup> to the 20<sup>th</sup> defendants.
  - b. Whether the 1<sup>st</sup> to 20<sup>th</sup> defendants have acquired titles to the portions of the suit land under adverse possession, or alternatively whether they are entitled to be compensated for the loss of their respective parcels.
  - c. Whether the 21<sup>st</sup> Defendant is the absolute proprietor of the suit land, and if so, whether he has made a case for issuance of eviction and permanent injunction orders against the defendants.
  - d. Whether the 21<sup>st</sup> defendant is entitled to mesne profits, and if so, how much.



- e. Who pays the costs in the two suits and counterclaim.
13. The court has carefully considered the parties' pleadings, evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations;
- a. That it is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show their possession is adverse to the true owner. Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile and continuous possession of it, to the exclusion of its true owner for the period prescribed by law, which is 12 years as per the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya According to *Halsbury's Laws of England*, 4<sup>th</sup> Edition Volume 28, paragraph 768.

"No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land."

The doctrine of adverse possession is one of the ways of land acquisition in Kenya. The following are some of the statutory provisions that underpin the doctrine as set out in the Limitations of Actions Act Chapter 22 of Laws of Kenya and the *Land Registration Act* No 3 of 2012.

Section 7 of the *Limitation of Actions Act* states that

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"

Further in section 13;

- "(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land".



And section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

While section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, section 38(1) and (2) provides;

- “(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

The combined effect of the above sections is to extinguish the title of the proprietor of the land in favour of the adverse possessor, at the expiry of 12 years of occupation of the suit land. That section 28(h) of the *Land Registration Act*, No. 3 of 2012 recognizes the overriding interests on land, some of which are “rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions, or by prescription”. Under section 7 of the *Land Act*, No. 6 of 2012, prescription is one of the ways of acquisition of land.

- b. The Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR sought to define what constitutes adverse possession. The court stated as follows: -

“From all these provisions, what amounts to adverse possession.” First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1KLR 184 and *Wanje v saikwa (2)* (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the *Wanje* case, the Court went further and took the view that in order to acquire by statute of



limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. “

What these authorities are emphasizing is that for one to successfully stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered on the parcel of land more or less as a trespasser, as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land.

- c. That it is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent, and the applicant does not leave but continues to occupy the land, and the owner takes no steps to effectuate the termination of the consent for a period of twelve years, then such applicant would be perfectly entitled to sue on account of adverse possession.
- d. That besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land, and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, and exclusive as already stated above. The burden of proving all these is on the person asserting adverse possession. It follows that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated, or before the expiry of the period permitted, the owner of the land takes steps to assert his title to the land. In the case of *Samuel Miki Waweru v Jane Njeri Richu*, Civil Appeal No. 122 of 2001, the court stated that:

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

- e. A person relying on adverse possession must show clear possession, lack of consent on the part of the owner, and an uninterrupted occupation for more than 12 years. It is quite apparent from the testimonies tendered by DW1 to DW12 in their defence, and in support of their counterclaim that they entered onto the portions of the original plot number 22, from which the suit land was subdivided, as purchasers. The persons they had allegedly bought the portions of the land from are brothers to the Plaintiff, whom they believed were owners, or entitled to those portions. The vendors were joined in the suit as the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties to the Defendants' counterclaim, but they did not participate in the proceeding. The court has perused the record and noted that there is no affidavit of service to confirm that the Third Parties were ever served with the said counterclaim or any other court processes. Therefore, the court wishes not to say any more, or make any final determinations against the two Third Parties in this proceeding as it is not clear whether they were given an opportunity to be heard in the counterclaim.



- f. That further, the defendants have not tendered evidence to confirm when their entry onto the suit property became adverse, or when the consent or permission to enter, that was given by the vendors, that they believed to be the owners of the land, was terminated or withdrawn, for the court to know when time for adverse possession started running in their favour. That though the defendants have indeed shown that they have been in occupation of their portions of plot number 22 for a period of over 12 years, the evidence presented by themselves show their entry was with authority of the alleged land owners, brothers to the plaintiff, who were the vendors. That the court therefore finds the time for adverse possession could not have started to run in favour of the said defendants, until after the registered owner, the Plaintiff, asked them to vacate around 2014, and they declined. That that being the case, by the time this suit was filed in 2015, only a period of about one year of their being in adverse possession had lapsed, and not twelve years.
- g. That a perusal of the 1<sup>st</sup> to the 20<sup>th</sup> defendants Amended Defence and Counterclaim filed on the 23<sup>rd</sup> March, 2017 shows they did not include the 21<sup>st</sup> defendant and the Plaintiff as defendants in the counterclaim. That all the paragraphs containing their averments on the counterclaim and prayers has not pleaded anything against Barnabas Arap Kiprono, the 21<sup>st</sup> defendant, yet by then he was the one in whose name the title to the suit land was. It has also not indicated that their claim was over Tarakwa/Langwai Block 1 (Koriomat)/88, the suit land herein. That even if the defendants had included the Plaintiff and 21<sup>st</sup> Defendant in their counterclaim, their claim would not have succeeded for failure to specify the land they had sued for in their pleadings.
- h. That further to the finding in (g) above, the documents of ownership of plot number 22, from which the 1<sup>st</sup> to the 20<sup>th</sup> defendants' claim portions of in their counterclaim, have not been availed for the court to confirm who was the registered owner at the time of the alleged sale transactions or time of filing the claim. That coupled with the fact that their counterclaim did not specify the parcel number or reference from which their claim of adverse possession was directed buttresses the court's finding that their claim was a non-starter, despite the strong evidence they presented to the court in support thereof.
- i. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time would not affect his title. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. In the case of *Karuntimi Raiji v. M'Makinya M'itunga* (2013) eKLR the Court of Appeal observed:
- “...Another issue raised by the appellant is that a claim for Adverse Possession does not survive a deceased person. Section 30 (f) of the *Registered Lands Act* and Section 2 of the *Law Reform Act* provide an answer to the issue. Section 30 provides that:
- “Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same without them being noted on the registers:
- a. ....;
- b. ....;
- c. ....;
- d. ....;



- e. ....:
- f. rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

Under the doctrine of adverse possession, a claimant's claim to the land runs against the title and not necessarily against the current holder of the title. The defendants' submissions that they continued occupying the land even after the death of the owner of the estates holds water."

That in deciding the issue of adverse possession, the primary function of the court is to draw legal inferences from proven facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question of whether that possession is adverse or not, is a matter of legal conclusion to be drawn from the findings of facts as was determined in *Kweyu v Omutu*, C A Civ Appeal 8 of 1990 (unreported). That whereas there is no dispute that the Plaintiff got registered with the suit land that was subdivided from parcel number 22, on the strength of grant issued in Eldoret HC Succession Cause No. 271 of 2007, before transferring it to the 21<sup>st</sup> defendant following a sale transaction, the court finds the claim of title by the 1<sup>st</sup> to 20<sup>th</sup> Defendants under adverse possession has not been proved to the standard required.

- j. The defendants who testified as DW1 to DW12, presented evidence that they have been using portions of plot number 22, through planting, tending crops, growing trees, residing on and subsistence farming. The plaintiff and 21<sup>st</sup> defendant who testified as PW1 and DW13 respectively, reluctantly confirmed knowledge of the said defendants' presence on the land. That indeed the 21<sup>st</sup> defendant admitted during cross-examination that when he visited the suit land he found some of the defendants grazing there, and that they later erected houses. The foregoing shows that the suit land was evidently not vacant when the 21<sup>st</sup> Defendant allegedly bought it from the Plaintiff. That the Plaintiff and his family needed to first address how to resolve the alleged sale transactions entered between his named brothers, who the court take to be among the beneficiaries to their late father's estate, and some of the 1<sup>st</sup> to 20<sup>th</sup> Defendants, before attempting to dispose the suit land to the 21<sup>st</sup> defendant or anybody else for that matter.
- k. That the sale agreement between the Plaintiff and the 21<sup>st</sup> defendant entered on the 4<sup>th</sup> December, 2014, confirms that though the land was about 43 acres, the sale was for only 40 acres. There is no evidence adduced to confirm whether the Land Control Board consents for subdivision, and transfer thereafter, were applied for and obtained. It is therefore baffling how the plaintiff effected transfer of the whole parcel to the 21<sup>st</sup> defendant before subdivision, and without obtaining the said consents. That notwithstanding, the copies of the green card, title deed and certificate of official search in respect of Tarakwa Langwai



Block 1 (Koriomat)/88, the suit land, confirms the land was first registered on the 19<sup>th</sup> September, 2014 in the name of the Plaintiff, and transferred to the 21<sup>st</sup> Defendant on the 22<sup>nd</sup> June, 2016. It further shows that it is a subdivision from plot No.22. That as this suit was filed on the 19<sup>th</sup> May, 2015, then as admitted by the Plaintiff, the transfer of the suit land to the 21<sup>st</sup> Defendant was made when this suit was already pending in court. The foregoing leads the court to find the transaction between the plaintiff and the 21<sup>st</sup> defendant over the suit land, when this suit was pending before the court to was contrary to the doctrine of les pendens. The transaction was aimed at defeating the counterclaim raised by the 1<sup>st</sup> to the 20<sup>th</sup> defendants through their defence and counterclaim. The title of the 21<sup>st</sup> defendant to the suit land is therefore not protected by the law, as it was not obtained procedurally, and the title should revert to the Plaintiff.

14. That the forgoing shows that the Plaintiff, 1<sup>st</sup> to 20<sup>th</sup> Defendants', and 21<sup>st</sup> Defendant's claims have not been established to the started required by the law. The court therefore orders as follows;
- a. That the two suits by the plaintiff and 21<sup>st</sup> Defendant and counterclaim by the 1<sup>st</sup> to 20<sup>th</sup> Defendants are hereby dismissed.
  - b. That the parties are to bear their own costs in the two suits and counterclaim.
  - c. That the upon receipt of a copy of this order, the County Land Registrar is hereby directed to rectify the register of land parcel Tarakwa/Langwai Block 1 (Koriomat)/88, by deleting entries number 3 and 4 both of 22<sup>nd</sup> June 2016, and call for cancellation of the original title deed issued thereof to Barnabas Arap Kiprono, the 21<sup>st</sup> Defendant, and revert the proprietorship of the said land in the name of Isaac Mwangi Wainaina, the plaintiff, as in entry number 1 of 19<sup>th</sup> September, 2014.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 8<sup>TH</sup> DAY OF JUNE, 2022**

**S.M.KIBUNJA,J.**

**ENVIRONMENT & LAND COURT – ELDORET**

In The Virtual Presence of;

Plaintiff: .....Absent.....

Defendants: .....Absent.....

Third Parties: .....Absent.....

Counsel: .....Mr. Okara for Plaintiff, Mr. Korir for 1<sup>st</sup> to 20<sup>th</sup> Defendants & Mr. Mathai for 21<sup>st</sup> Defendant  
.....

Court Assistant: Oniala

**S.M.KIBUNJA,J.**

**ENVIRONMENT & LAND COURT - ELDORET**

