ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 511 OF 2017

(FORMERLY NAKURU ELC NO 104 OF 1999)

STEPHEN NJOROGE KIBOLI.....PLAINTIFF

VERSUS

DAVID MWAELE NGULI & JOSEPH NDINI NGULI

(sued as legalrepresentatives of the Estate of

DANIEL NGULI KYALO deceased 1st Defendant).....1st DEFENDANT

LABAN NDOVA MASAI & STEPHEN JESINGA MASAI

(sued as legal representatives of the Estate of

MASAI ITUMO the deceased 2nd Defendant.....2nd DEFENDANT

JUDGEMENT

1. This case was originally filed at the Nakuru High Court on the 12th March 1999 vide a Plaint of the same date, as Civil Case No. 104 of 1999 wherein the same was amended on the 17th May 2000 where the Plaintiff herein sought for the following:

    i. An order that the 1st defendant is evicted for lR No. Laikipia/Nyahururu/1950 and a permanent injunction restraining the defendants and their family members from occupation, entering, cultivating, passing thorough, alienating or in any other way interfering with LR No. Laikipia/Nyahururu/1945 and 1950 in perpetuity.

    ii. Costs of this suit plus interest.

    iii. Any other or better relief this honorable court might deem just and fit to grant.

2. On the 6th May 1999 judgment was entered against the Defendants for failing to enter appearance and/or file their defence, which Judgment was set aside by consent on the 5th October 1999. Thereafter, the Defendants filed their statement of defence and counter claim on the 15th October 1999 wherein they denied each and every averment and allegations contained in the plaint stating that the suit was statutorily barred. There was also a counter claim of adverse possession wherein they prayed for the Plaintiff's suit to be dismissed.

3. The Plaintiff in their defence to the counterclaim faulted the procedure in which the Defendants had brought a claim for adverse possession.

4. The matter then proceeded for hearing of the Plaintiff's case on the 9th May 2005 wherein after, he was stood down for cross examination. While awaiting further hearing of his case, both the initial Defendants passed away, and were substituted on the 4th July 2014.

5. The matter was subsequently transferred to the Nyahururu Environment and Land Court upon its establishment wherein by consent, parties took directions that the matter proceeds from where it had stopped.

Plaintiff's case.

6. Briefly, the Plaintiff's case was that although the original suit land No. Laikipia/Nyahururu/237 measuring 96 acres belonged to their family yet it had been registered to their mother before it was sub divided to give rise to seven parcels of land being No 1944-1950, two of which was registered in his name and which form the subject suit of this case. He gave their reference numbers as Laikipia/Nyahururu/1945 measuring 14.96 hectares and Laikipia/Nyahururu/1950 measuring 11.26 hectares and produced the title deeds as Pf exh 1(a-b) respectively. He also testified that he lived on parcel No 1943 but cultivated on the disputed parcels of land.

7. He also testified that both the Defendants were his neighbors and that he had been seeing the original 1st Defendant who used to live on a plot neighboring his but in Subukia within Nakuru County since, 1984.

8. That in the year 1997, after removing the beacons which demarcated their respective parcels of land as per the photograph produced as Pf exh 2(b), the 1st original Defendant built a house on his parcel of land No. 1950.

9. The Plaintiff further testified that the original 1st Defendant's wife having been a member to a women's group, the said Women's group built a water tank on his land as seen in Photograph produced as Pf Exh 2(c), on the 13th May 1998. That subsequently, as evidenced by photograph produced as Pf exh 2(d), and in the pendency of the suit, when there were restraining orders, the 1st original deceased Defendant had constructed other houses on his land.

10. That the matter had been reported to the area chief whom upon his advice, a District land surveyor from Nanyuki had been called to the ground to fix and/or identify the boundaries, which was done on the 12th August 1998. All parties including both chiefs of Subukia and Igwamiti location were present when the boundary was fixed wherein they made their reports herein marked as MFI 3(a & b) which reports were to the effect that the 1st original deceased Defendant had built 2 houses and the water tank on the Plaintiff's land. He was given up to the end of 1998 to remove the offending structures as well as the growing crops, directives he chose to disobey.

11. That the disobedience by the 1st original deceased Defendant led to the filing of this suit in the 1999.

12. The Plaintiff testified that although the 2nd original deceased Defendant had not built any structures on his land, yet he had been trespassing upon his parcel of land No 1945 to draw water from the well thereon despite him having a well of his own.

13. That vide demand notices dated the 29th January 1999 herein produced as Pf exh 4(a & b), he had asked both the deceased Defendants to cease their illegal activities on his respective parcels of land which notice was responded to vide a letter dated the 12th February 1999 herein produced as pf exh 5. Defendant did not cease his illegal activities of trespass.

14. The Plaintiff testified that he was not aware of the Nakuru High Court case No 159 of 1992 because he was not a party and did not know the outcome therein because the parcels of land involved were LR Subukia/10474 and 6718 which he lay no claim.

15. It was his testimony that as at the 20th March 2001 when the court issued injunctive orders, herein produced as Pf exh 6, the 1st deceased Defendant had been in occupation of 2 acres of his and but as at the time he was testifying, the said Defendant was now in occupation of about 7 acres. That the acts complained of began in the year 1996 and 1997 respectively and that it was not true that both the Defendants had been in occupation of his land 20 years prior to the filing of the suit.

16. That in the year 2002, vide an order produced as Pf 7, the court had ordered for a report from the District surveyors of both Laikipia and Nakuru which report was filed in court on the 28th May 2002.

17. The said surveyor's report dated the 11th June 2002 was produced by Pw2 the as Pf exh 8 while the survey plan, folio Ref No. 89/89 for the suit land was produced as Pf exh 9. It was the surveyor's evidence that the 1st Deceased Defendant had encroached onto the Plaintiff's parcel of land and that this had been the second time that such a report had been made. It was further his evidence that the fixed boundary between Laikipia and Nakuru counties, which boundary had been gazetted, had always been removed to create a dispute. The Plaintiff closed its case after leading Pw2 in his evidence.

Defence case

18. The 1st Defendant's case was that he was the son to the original 1st deceased Defendant, Daniel Kyalo. He confirmed that the original parcel of land No 237 had belonged to the Plaintiff's mother one Julia and that parcel No. 1945 and 1950 were as a result of the subdivision of the said parcel of land. That they had lived on parcels No 1944 and 1950, together with their parents, from the year 1971 to date and had never left.

19. He further testified that the Nakuru High Court Case No 159 of 1992 had been filed by his father the 1st Deceased against Njuguna Ngogo and Masai Itumo over the same piece of land. That the case had proceeded to the court of Appeal, wherein it had been dismissed and they had been given 20 acres of land. He testified that it was the Plaintiff's sisters who were his neighbors and not the Plaintiff.

20. That despite the Plaintiff having testified that they had started using the suit land in 1997, the truth of the matter had been that they had started using the original suit land in the year 1971 wherein they together with the other neighbors also draw water from a spring that runs through the Plaintiff's land.

21. The 1st Defendant testified that whereas his mother's house, seen in the photograph produced as Pf exh No 2(b) was built in the year 1986, the tank in Pf ex 2(c) was put there by the Women's group in the year he could not remember but which time the Plaintiff had not raised any objection.

22. That the house in Pf exh 2(d) was his step mother's house which was built in the year 1971. In regard to Pf exh 6, it was the 1st Defendant's evidence that the houses were not built in the year 2001.

23. That in regard to the surveyor's report herein marked as Pf Exh 8, the 1st Defendant testified that although his name was missing on the report, yet he had been on the ground alongside his father when the surveyor paid them a visit, and sought to know where the boundary that separated Nakuru and Laikipia lie wherein they had placed their beacons and left. That this was not the first visit by the surveyor. That he was shocked to learn that he was in Laikipia County and not Nakuru where he always thought they lived.

24. When the Defendant was referred to Pf exh 1(a-b), he testified that although the said titles had been issued on the 20th November 1995 and 21st November 1995 respectively, the Defendants were already in occupation of the suit parcel of land.

25. He further confirmed that parcel No. 10474 belonged to Daniel Nguli and Masai Itumo the 1st and 2nd original Defendants, but that alongside parcel No 1950 and 1945, they also lived together on parcel No 6718 measuring about 40 acres. He denied having interfered with the boundaries stating that the whole area had no beacons although there were holes marking the boundaries.

26. The 2nd Defendant also testified that he was the administrator of his father's estate, the original 2nd Defendant in this case. That he was aware of the outcome of the Nakuru High Court Civil case No 159 of 1992 as well as the subsequent Court of Appeal case No. 231 of 1999 judgments which he produced as Df exh 2 and 1 respectively. That the cases concerned land parcels No. 10474 and 6718 upon which they had been given 20 acres of land which was to be excised from parcels No. 10474 and 6718, land which boarded parcel No. 237.

27. That the Plaintiffs' evidence and claim that they had taken possession of the suit land in 1985 was not true because they had entered on to suit land in 1971 when he was in form 1 and that the Plaintiff had procured the titles after the Judgment in Nakuru HCCC No 152 of 1992.

28. He also confirmed the evidence by DW1 that the community had been using a spring that run through the Plaintiff's land since 1971, to fetch water and also to water their livestock, which spring was not a dam as the Plaintiff sought to make the court believe. That he and his family consisting of 17 siblings had been living on the suit lands being No.10474, 6718 and 237, land which they had been cultivating and developing for more than 47 years.

29. His evidence was that they had not trespassed on the Plaintiff's land because there was a public road on plot No 237 which led to the stream which was the only source of water.

30. After the Defence closed it case, parties filed their respective submissions as herein under.

Plaintiff's submission.

31. The Plaintiff herein summarized the entire evidence adduced at the trial and formulated their issue of determination as follows:

i. Whether the 1st Defendant occupies the Plaintiff's land parcel No. Laikipia/Nyahururu/1950.

ii. If the answer to (i) above is affirmative, whether the 1st Defendant is liable to be evicted thereafter.

iii. Whether the Plaintiff is entitled to an order of permanent injunction against the Defendants.

iv. Whether the Defendants are entitled to the orders sought in the counter claim.

v. Who is liable to the costs of the suit and counterclaim.

32. On the first issue, it was the Plaintiff's submission that based on the joint surveyor's report produced by Pw 2, the same was clear to the effect that the 1st Defendant was in occupation of the Plaintiff's land. No other expert report was produced to counter or contradict the said report which had been prepared pursuant to an order of the court. The surveyor's report thus ought to be taken as conclusive of this issue.

33. The Plaintiff's submission on the second issue for determination was that he was entitled to an order of eviction as against the 1st Defendant. That based on the evidence adduced in court to the effect that the 1st Defendant had started constructing on the portion of the suit land in the year 1996 and 1997 as per the photographs produced in evidence and further that the tank had an inscription of the year 1998 as the date of construction, tallies with the Plaintiffs evidence.

34. That from the 2nd Defendant's evidence that they had been awarded 20 acres of land from parcels No 10474 and 6718 in the Nakuru HCCC No. 159 of 1992 a matter in which the Plaintiff was not party to, it could therefore not be possible that they could also be in possession of the Plaintiff's parcel of land No. 1950.It therefore goes without saying that the Defendant trespassed into the plaintiffs land in the years 1996/1997 and not in 1971 as claimed and therefore they should be evicted.

35. The Plaintiff submitted that he was entitled to orders of permanent injunction as against the Defendants herein. That the Defendants having been awarded 20 acres of land from parcels No 1047 and 6718 in the Nakuru HCCC No. 159 of 1992, they cannot now extend the boundaries by encroaching into the Plaintiff's land and claiming that they were entitled to be on parcel No 1950 as they did during their defence hearing. That parties were bound by their pleadings. That since the Plaintiff had demonstrated that he was the registered proprietor of the suit lands, he was entitled to all rights conferred by Section 24 of the Land Registration Act one such right being the exclusive possession

therefore against all other claimants including the Defendants.

36. As to the orders sought in the counterclaim, it was the Plaintiff's submission that the Defendants had invoked a procedure that was alien to the law. That Section 31 Rule 7 of the Civil Procedure Rules provides that an application under section 38 of the Limitation of Actions Act shall be made by an Originating Summons, a matter which was echoed in the decided case of **Njuguna Ndatho vs Masai Itumo & 2 Others [2002] eKLR.**

37. It was further their submission that even if the counter claim was proper before court, the evidence adduced was not to the required standard of proving adverse possession as was held in the cases of **Gabriel Mbui vs Mukinda Maranya [1993] eKLR** and the case of **Wines & Spirits Kenya Limited & Another vs George Mwachiru Mwango [2018] eKLR**

38. That further, the Defendants in the present case could not only tell what portion of the Plaintiff's land they occupy, but they had not proved their claim of adverse possession to the required standard. Further, no evidence of the existence of trust was adduced either.

39. The 2nd Defendant was not on the parcel of land but had been sued as trespasser on to the land. The plaintiff prayed for his suit to be allowed with costs.

Defendants' Submission.

40. The Defendants' submission was that although the Plaintiff had sought for orders against them, and had even tendered evidence in support of his claim, yet he had no locus standi to bring the present suit in regard to land parcel No. Laikipia/Nyahururu/237 land which was registered to another person's name being Julia Wangechi his mother.

41. That the Plaintiff had ulterior motive when he confirmed that he had been seeing the Defendants whom he knew since the year 1986 and that the trespass started on the 13th August 1998, yet the Plaintiff's mother who was the registered proprietor of parcel no 237 never attempted to evict the 1st Defendant or stop the 2nd Defendant from trespassing on her land in search of water from the well that was situate on parcel No 1945.

42. That the Plaintiff never moved the court soon after obtaining title to the two parcels of land on the 20th November 1995 and further that it was not clear when the Plaintiff occupied the suit land as he had discovered that the Defendants were in possession only after the boundary was fixed by the surveyor in the year 1998, a surveyor who was no called to testify.

43. That it was clear in their defence and counter claim that they were not in occupation of the Plaintiff's parcel of land No. Laikipia/Nyahururu/237 which land was not even owned by the Plaintiff at the time he filed suit in the circumstance

44. The Defendant's submission was that the original Defendants had entered onto the suit land in the year 1971 wherein they have been to date. That the Plaintiff on realizing that he could not succeed in procuring orders against them using the original title to the suit land, decided to amend his plaint.

45. That in contradiction of the evidence adduced by the surveyor, the Defendant's position was that they had occupied the whole parcel No 1950 wherein the surveyor who testified as Pw2 had testified that they had encroached on a portion of the Plaintiff's land.

46. That in regard to the 2nd Defendant's evidence, it was clear that he had acquired an easement over the Plaintiff's parcel of land after a long usage. That the road referred to by the Plaintiff was indeed a public road that was used by members of the public to access water and therefore the Plaintiff's claim that there was trespass on his land should fail.

47. That since the Defendants had been on the suit land for more than 29 years, the suit before court was statutory barred as was held in the case of **Aquila Properties Ltd vs Bhupendra Patel, Nbi ELC No. 173 of 2012.**

48. It was further the submissions by the Defendants that the Plaintiff had not proved their case on a balance of probabilities for reason that his testimony was full of contradictions which were not corroborated, further that he was unable to prove proprietorship of parcel No. 237

49. That the 2nd Defendant and his family had been in use of the water spring continuously since the year 1971 and without permission of the owner and therefore had created an easement.

50. That the cause of action had arisen in the year 1971 wherein the suit was filed in the year 1999 well after 28 years, that the provisions of Section 7 of the Limitation of Action Act was applicable in the circumstance in which the Plaintiff's suit was time barred.

51. That granting the Plaintiffs permanent injunctive orders would be denying them the fruits of the Judgment in case No Nakuru HCCC 159 of 1992 and Court of Appeal Civil Appeal No.231 f 1999. It was therefore their humble prayer that since the Plaintiff's suit was an abuse of the court process, the some ought to be dismissed with costs.

Analyses and Determination.

52. I have considered the evidence adduced in court as well as the submissions, herein submitted, the authorities annexed as well as the applicable law. To begin with, I must point out that the Defendants herein have been sued as the sons and legal representatives of the original Defendants who have since passed away. It is also not in dispute that the suit lands herein were a sub-division of parcel of land No.

Laikipia/Nyahururu/237 registered to the Plaintiff's mother.

53. I therefore will be addressing this matter in terms of both the Original Defendants and the current Defendants and the original parcel of land.

54. I find that the matters that arise therein for determination being as follows;

i. Whether the Plaintiff herein is the proprietor of parcel of land No. Laikipia/Nyahururu/1945 and 1950.

ii. Whether the suit is time barred by operation of the law.

iii. Whether the 1st Defendant has acquired the said parcels of land by adverse possession.

iv. Whether the 2nd Defendant has acquired an easement on land parcel No 1950.

55. On the first issue for determination, I have considered the evidence adduced herein as well as the amended plaint dated the 17th May 2000 and the Pf exh 1(a-b) wherein I find that indeed the Plaintiff has established proprietorship of land parcels No. Laikipia/Nyahururu/1945 and No. Laikipia/Nyahururu/1950 through the production of title deeds to the same, certificates which were issued on the 20th November 1995 and which were not challenged by the Defendants herein.

56. Having found that the Plaintiff has established proprietorship of the suit parcels of land, the next issue for determination would be whether the suit is time barred by operation of the law. From the evidence adduced in court, by the Plaintiff, both the original Defendants and the current Defendants herein were his neighbors and the acts complained of began in the year 1996 and 1997 respectively. The Defendants on the other hand testified that the original Defendants had entered onto the suit land in the year 1971. The present suit was filed on the 4th May 1999 which was according the above evidence, after a period of 3, 4 and 28 years respectively.

57. Let us look at the issues affecting the 2nd defendant first. It was the Plaintiff's complaint against the 2nd Defendant that they had been trespassing on the suit lands in the process of fetching water a fact which was confirmed by the 2nd Defendant who testified that since the year 1971, he alongside the whole community had been using the public road that run through the original plot No 237 to fetch water. And that unlike the evidence of the Plaintiff that the said water was a dam, it was the 2nd Defendant's case that the water was natural water following from stream. The source of the water is neither here nor there, what the court is concerned with is whether the acts of trespass by the 2nd Defendant had created an easement over the Plaintiff's land.

58. Trespass to land is the unlawful intrusion of an individual to another's land voluntarily. Involuntary intrusion does not amount to trespass. Maxim "*cui us est solum, eius est usque ad coelum et ad infernos*" –whoever owns the land, owns it all the way to the heavens and to hell.

59. According to the Black's Law Dictionary 6th Edition trespass *is described as follows;*

"An unlawful interference with one's person property or right.

At common law trespass was a form of action brought to recover damages for any injury to one's person on property or relationship with another…..

Any unauthorized intrusion or invasion of private premises on land of another"

60. The evidence adduced is to the effect that there had been a road created through the Plaintiff's land so as to provide a path for the community, the 2nd Defendant included, to have passage for people and animals to have access to the dam/stream to fetch and/or drink water, a path which had been used over the years and or as the 2nd Defendant put it, since 1971.

61. I therefore find that the entry onto the Plaintiff's land was not an **unauthorized intrusion or invasion of private premises.**

62. ***Black's Law Dictionary*** describes easement as;

"An interest in land owned by another person consisting in the right to use and control the land or on area above and below it for a specific limited purpose"

63. An easement may be binding either as a "legal" or "equitable" easement. A legal easement, which is the most common, is one that is registered on the legal title to the property over which the easement has effect. If an easement is not registered in this way, it is an equitable easement.

64. Section 32 of the **Limitation of Actions Act provides as follows:**

(*1) Where—*

(a) the access and use of light or air to and for any building have been enjoyed with the building as an easement; or

(b) any way or watercourse, or the use of any water, has been enjoyed as an easement; or

(c) any other easement has been enjoyed,

peaceably and openly as of right, and without interruption, for twenty years, the right to such access and use of light or air, or to such way or watercourse or use of water, or to such other easement, is absolute and indefeasible.

(2) The said period of twenty years is a period (whether commencing before or after the commencement of this Act) ending within the two years immediately preceding the institution of the action in which the claim to which the period relates is contested.

65. From the evidence adduced in court, there is no doubt that the 2nd Defendant has been enjoying the passage to the water point through the Plaintiff's parcels of land wherein from the year 1971 to date, more than 40 years later. By virtue of Section **32** of the **Limitation of Actions Act,** I find that an easement was created on the suit lands.

66. The Plaintiff's claim against the 2nd Defendant was therefore based on the encroachment of his property which is a claim on trespass. **Section 4(2) of the Limitation of Actions Act**, classifies trespass as a *tort which may not be brought after the end of three years from the date on which the cause of action accrued.*

67. In regard to the complaint against the 1st Defendant, whilst it is the evidence of the 1st Defendant that the original 1st Defendants got onto the land in 1971 land which was then No. Laikipia/Nyahururu/*237, the Plaintiff evidence was that he had known both the original Defendants since 1984 wherein whilst the 1st Defendant had used land adjacent to his land, the 2nd Defendant used to trespass through his land to draw water.*

68. It cannot therefore be true that the Defendants stated committing the acts complained about in the year 1996 and 1997 respectively. What came out clearly is that the original Defendants started using the original parcel of land way before the same was sub- divided wherein they had established themselves and settled thereon

69. *It is also clear that after parcel No.* Laikipia/Nyahururu/237 was subdivided and the Plaintiff was registered as proprietor of the suit land that filed suit citing the original Defendants for the acts so complained. Acts which he claimed had been *committed on his Parcels of land* No. Laikipia/Nyahururu/1945 and land parcel No. Laikipia/Nyahururu/1950, in the years 1996 and 1997 respectively.

70. I have considered the surveyors report which was produced as Pf exh 8, a report which was prepared pursuant to an order of the court dated the 18th April 2002 and which report was for the surveyor to fix the boundary between No. Laikipia/Nyahururu/1950 and LR No. 10474 Subukia the latter being the original Defendant's land.

71. I have also noted that there had been a previous Suit in Nakuru High Court Civil suit No 159 of 1992 which Judgment was produced as Df exh 2, and which matter escalated to the court of Appeal being Civil appeal No 231 of 1999 Df exh 1, wherein of interest is the subject suit land hence LR No. 10474 Subukia. That in that case, the original Defendants had claimed that they had been on the parcel of land since before the year 1973 which is the same period of time the present Defendants have maintained that they had been on the suit land. I thus find credence in their evidence that indeed the Defendants have been on the suit land since 1971. Having found as such, it therefore goes without saying that limitation time started running against the Plaintiff 12 years from 1971 and stopped in 1983 or thereabout. The present suit was filed after the end of twelve years from the date on which the right of action accrued which run afoul the provisions of Section 7 of the Limitation of Actions Act.

72. Section 7 of the Limitation of Actions Act provides 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*

73. *In essence, this provision is to the effect that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that going by the evidence of the Defendants that they got onto the land in 1971 the said suit would be caught up by the provisions of Section 7 of the Limitation of Actions Act*

74. Having found that the suit for trespass against the 2nd Defendant was time barred by virtue of the provisions of Section 4(2) of the Limitation of Actions Act, and further the suit against the 1st Defendant herein was also time barred by virtue of the provisions of Section 7 of the Limitation of Action Act, I am compelled to rely on the case of ***Bosire Ongero vs Royal Media Services [2015] eKLR*** *where* the court had held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

75. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is

without jurisdiction.'

76. Clearly, this Court lacks jurisdiction and the matter is at its end in regard to the Plaintiff's suit against both Defendants.

77. The 1st Defendant raised a defence and counterclaim of adverse possession in his statement of defence which procedure was objected to by the Plaintiff to the effect that the Defendant had invoked a procedure that was alien to law. That Section 31 Rule 7 of the Civil Procedure Rules provided that an application under section 38 of the Limitation of Actions Act ought to be made by an Originating Summons. The next issue for determination therefore would be whether the 1st Defendant is entitled to orders of adverse possession over land parcel No. Laikipia/Nyahururu/1945 and 1950.

78. The court of appeal in **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** held as follows when faced with a similar situation.

> *The courts, have since this decision, held that a claim by adverse possession can be brought by a plaint. 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 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 plaint made no specific plea of adverse possession, the plea was nonetheless granted."*

79. In the case of ***Mtana Lewa vs Kahindi Ngala Mwagandi [2015] eKLR,*** *the court of appeal held 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 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.**

80. I find that the 1st Defendant's defence and counterclaim on **the claim for adverse possession was not erroneous in the circumstance.**

81. From the evidenced herein adduced, and my finding above it is not in dispute that the 1st original Defendant and his family moved onto the original suit land in the 1970's wherein they built their houses and started farming thereto, and have never left the suit land, a fact which was confirmed by the surveyors' report herein produced as Pf exh 8 and which report had confirmed that indeed there had been semi-permanent houses constructed therein, several grass thatched houses and a water tank constructed on the Plaintiffs land wherein the 1st Defendant established a homestead thereon.

82. The onus was on the Plaintiff to lead evidence to support his assertion that the structures on the suit land were put up in 1996 and 1997 respectively and not earlier, to rebut the Defendant's contention that he has been on the suit premises since 1971, and that the permanent structures were not newly constructed in the light of the defendant's evidence that the houses thereon had been mud structures put up in 1971 and 1986 and which had been improved upon as time went by.

83. It is thus clear from the evidence adduced that the 1st Defendant and their families have been in possession of the suit premises for over 12 years as at the time the suit to evict them was instituted in 1999.

84. It is a settled principle that a claim for adverse possession can only be maintained against a registered owner. By building structures on the suit premises and cultivating thereon, without obtaining permission from the original owner of the suit land and the Plaintiff, the 1st Defendant manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the original owner of land parcel No. 237 and Plaintiff's rights hence dispossessing the original owner and Plaintiff of the suit premises by those acts. The 1st Defendant acts were *nec vi, nec clam,nec precario (*that is, neither by force, nor secretly and without permission).

85. It is also clear from the finding above that when the original parcel of land No. Laikipia/Nyahururu/237.was sub divided the Defendants were already in possession therein and committing the acts complained of. What therefore was the effect of subdividing land that is occupied under the doctrine of adverse possession and could such subdivision defeat the overriding interest of a person occupying under adverse possession?

86. In the case of **Githu vs Ndeete 1984 KLR 776** the Court of Appeal stated as follows:-

> *"The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession"*

87. Change of title of land occupied under adverse possession cannot defeat the overriding interest. Subdivision of land occupied under

adverse possession into various parcels as in this case could not defeat the overriding interest by the 1st Defendant so possessing. Once an overriding interest matures such portion occupied by the person in possession is no longer the property of the registered proprietor. The title is extinguished by operation of law. The person who takes over from the registered proprietor has his title barraged and subject to the interest of the person having an overriding interest.

88. The court of Appeal in the case of **Chevron (k) supra** held as follows

> *The last matter for us relates to the final orders. We alluded at the beginning of this judgment to a statement in the trial court's judgment to the effect that the respondent was not entitled to an order directing that he be registered as the proprietor of the suit premises for the reason that the claim was not brought by suit pursuant to* ***section 38 (1)*** *of the Act. We reiterate that section 38 provides that whenever an adverse possessor claims to have become entitled to land he* ***"may apply to the High Court for an order that he be registered as the proprietor…."***

89. In the case of **Gulam Mariam Noordin v Julius Charo Karisa, Civil Appeal No 26 of 2015,** the court of Appeal held as follows;

> *"When the respondent elected to raise the defence of adverse possession without a counter-claim, he denied himself the opportunity to apply to be registered the proprietor of the suit property. The power of the court to do substantive justice is today wider than before. We see no harm to make appropriate orders flowing from a finding that the respondent's occupation of the suit property was adverse to that of the appellant; and that the latter's was so extinguished."*

90. Since the 1st Defendant herein filed a defence and counter claim of adverse possession and in pursuance to the finding of the Court of Appeal herein above, which finding is binding on this court and therefore proceed to find that;

i. The upshot of this is that the Plaintiff has not proved his case on a balance of probability as against the Defendants and his suit is herein dismissed

ii. I however find in favour of the 1st Defendant's defence and Counter claim and direct that the Plaintiff shall subdivide and transfer to the 1st Defendant the identifiable portion of land that he occupies at the latter's expense within 60 days from the date hereof, failing which the Deputy Registrar of the Court at Nyahururu shall execute, on behalf of the 1st Defendant the necessary transfer documents.

iii. Costs to the Defendants herein.

Dated and delivered at Nyahururu this 9th day of July 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE