



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 382 OF 2017**

**(Formerly Machakos ELC Case No. 179 of 2014)**

**MESHACK KONDOY MATEE.....PLAINTIFF**

**VERSUS**

**STEPHEN KYENGO.....1<sup>ST</sup> DEFENDANT**

**MUOKI NZOLI.....2<sup>ND</sup> DEFENDANT**

**AS CONSOLIDATED WITH**

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 86 OF 2018**

**(Formerly Machakos ELC Case No. 32 of 2014)**

**WILLIAM MATEE OLE RISA.....PLAINTIFF**

**VERSUS**

**STEPHEN MUIA MBUNGO.....1<sup>ST</sup> DEFENDANT**

**MUTUA MALELU.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

The Plaintiffs filed their respective Plaints dated the 20<sup>th</sup> November, 2014 and 16<sup>th</sup> April, 2014 where they sought for various prayers. In the Plaintiff dated the 20<sup>th</sup> November, 2014, the Plaintiff sought for judgement against the Defendants jointly and severally for:

- a) An order of eviction directed to the Defendant ordering him to forthwith vacate the Plaintiff's parcel of land namely LR No. KAJIADO/ KAPUTIEI CENTRAL/ 3490.
- b) A permanent injunction restraining the Defendant, his family, kin, agents, employees or servants from trespassing upon, ingressing into, cultivating, selling, disposing off or in any other manner interfering with the Plaintiff's quiet possession and ownership of Land Reference Number KAJIADO/ KAPUTIEI CENTRAL/ 3490.
- c) General damages.
- d) Mesne profits from date of filing suit.
- e) Costs of this suit.
- f) Any other relief that this honourable court may deem just and fair to order.

In the Plaintiff dated 16<sup>th</sup> April, 2014, the Plaintiffs pray for judgment against the Defendants jointly and severally for:

- a) An eviction order directed to the Defendants ordering them to forthwith vacate the Plaintiff's parcel of land namely LR No. KAJIADO/ KAPUTIEI CENTRAL/ 3491.
- b) A permanent injunction restraining the Defendants, their families, kin, agents, employees or servants from trespassing upon, ingressing into, cultivating, selling, disposing off or any other manner interfering with the Plaintiff's quiet, possession and ownership of Land Reference Number KAJIADO/ KAPUTIEI CENTRAL/ 3491.
- c) General Damages.
- d) Mesne profits from date of filing suit.
- e) Costs of this suit.
- f) Any other relief that this honourable court may deem just and fair to order.

In ELC CASE NO. 382 OF 2017 the Defendants filed a Defence and Counterclaim where they denied the averments in the Plaintiff and contended that they had been on the suit land for over 20 years. Further, that they had invested on the land and have constructed permanent structures thereon, they sought for the following orders:

- a. A permanent injunction restraining the Plaintiff either by himself or agents and/or employees and/or servants from interfering with the Defendants' quiet possession and peaceful stay on their respective portions of land.
- b. A declaration that the subdivision caused by the Plaintiff, his family or his agents without consulting the Defendants who were then on the ground are invalid and the same revoked and therefore the title deed to land reference No. KAJIADO/ KAPUTIEI CENTRAL/3490 was therefore obtained fraudulently and/or is invalid and the title is not a good title.
- c. Costs of the counterclaim
- d. Any other and/or further relief that this court may deem fit and just to grant in the circumstances.

In ELC CASE NO. 86 OF 2018 the Defendants filed their amended Defence where they denied the Plaintiff's averments and contended that they have built permanent structures on their portions of land. They insist they have been living and cultivating their portions of land which they had bought from the Plaintiff's father. They deny that there has ever been a meeting between the Plaintiff, elders, chief and themselves relating to their occupation of the land. They reiterate that the Plaintiff's Certificate to the land was obtained fraudulently. Further, that they have lived on the land for over 12 years and an order of adverse possession would therefore issue. They sought for the Plaintiff's suit to be dismissed with costs and prayed for:

- a) A permanent injunction restraining the Plaintiffs agents, employees and/or servants from interfering with the Defendants quiet possession and peaceful stay on their portions of land.
- b) A declaration that the Defendants have acquired ownership by way of adverse possession of their respective portions of land whose some parts are variously comprised in Title No. Kajiado/ Kaputiei Central/ 3491.
- c) A Declaration that the subdivisions caused by the Plaintiff, his family and/ or his agents without consulting the Defendants were then on the ground are invalid and they be revoked and therefore the title deed of land reference No. Kajiado/ Kaputiei Central/ 3491 was therefore fraudulently obtained and/ or is invalid and therefore the title is not a good title.
- d) Costs of the Counterclaim.
- e) Any other relief that this Honourable Court may deem fit and fair to grant.

The Plaintiffs in the two suits filed a reply to Defence and Defence to Counterclaim where each reiterated his claim as per the Plaintiff. Each insisted adverse possession cannot be used as a defence in this instance. Further, that there is no privity of contract with the Defendants as each was not a party to the alleged contract.

The two suits were consolidated on 3<sup>rd</sup> July, 2018 and the ELC Case No. 382 of 2017 made the lead file.

The matter proceeded for hearing where the Plaintiffs called three witnesses while the Defendants had four witnesses.

### **Evidence of the Plaintiff**

The Plaintiff Meshack Kondoy Matee as PW1 testified that he is the proprietor of land reference number Kajiado/ Kaputiei Central 3490 measuring 21 acres which his father gave him. He explained that he had sued Stephen Kyengo and Muoki Nzoli who had trespassed on his land and claim his father sold land to them. He insists he was not party to the Sale Agreements which the Defendants have availed in court. He did not know his father had sold land as he was born in 1993. In cross examination, he confirmed the suit land was originally Kajiado/

Kaputiei Central/ 467 which was registered in his father's name. Further, that his father died in 2015 but his land is Kajiado/ Kaputiei Central/ 3490. He explained that he had not been born in 1990 and did not know if his father had agreements with the Defendants. He insisted the Defendants had not resided on the land from 1992 and 1993 respectively but only came thereon in 2015. Further, that Defendants are residing on the suit land., put up semi-permanent structures and are cultivating it. He contended that he had lodged a complaint with the Chief and Elders but did not have proof in court.

PW2 Paul Olee Matee who is a brother to the Plaintiffs' testified that his father subdivided his land and allocated portions to the nine (9) sons. He claimed at the time of subdivision there was no protest from anybody and the dispute over the suit land arose after their father had died. He did not know if the Defendants purchased land from their father. He contended that they reported the issue of encroachment on suit land to the Chiefs and Elders but the Defendants have declined to move out of the said land. He insisted the Defendants never came to claim land when their father was alive. In cross examination, he said Muoki Nzoli resided on his brother Meshack's land. He stated that beacons on the suit land were installed in 2014 but the Defendants encroached on the land in 2015 when their father had passed away. He did not witness any Sale of Land by their father and did not know if there were agreements between his father and the Defendants. He confirmed that the persons who encroached on the land are still there, they have built thereon and are cultivating it. Further, they also reside thereon with their families.

PW3 William Matee Ole Risa testified that he had sued Stephen Mbugo and Mutua Malelu who have encroached on his land. He confirmed getting land parcel number Kajiado/ Kaputiei Central/ 3491 from his father. He did not know if his father sold land to the Defendants and insisted people only came to encroach on his land after he got it. He claimed the Defendants first encroached on his land, resided thereon and started cutting down trees and burning charcoal. Further, he reported matter to the local chief and lawyer but they persisted in their encroachment. He explained that after subdivision, beacons were installed and Defendants never complained but they came thereafter and claimed they had purchased the land while their father was ailing. He referred to the Agreements and averred that the Defendants never indicated which portion of land they had bought. In cross examination, he confirmed Stephen Mbugo and Mutua Malelu still reside on his land and have put up mud houses thereon. Further, they started staying thereon in 2014 and cultivate the land to date. He confirmed that before subdivision the whole parcel of land was number Kajiado/ Kaputiei Central/ 467 and it belonged to their father. He did not know if there was an agreement between his father and the Defendants. Further, he reported to the Chief about the encroachment in 2014 but did not have the minutes in court. He explained that the Defendants encroached on the land one year after the beacons had been placed thereon and claimed to have purchased a portion of it from their father.

The Plaintiffs produced their respective Certificate of Titles as exhibits.

#### **Defendants' Evidence**

DW1 Stephen Kyengo Wambua stated that he resides in Kaputiei. It was his testimony that he purchased five (5) acres of land from Kajiado/ Kaputiei Central/ 467 for Kshs. 3000. Further, he paid Kshs. 15,000/= as total purchase price. He explained that the portion he purchased falls on Kajiado/ Kaputiei Central/ 3490. He contended that he entered into an agreement dated 29<sup>th</sup> September, 1992 and 16<sup>th</sup> October, 1992. Further, he finalized paying the purchase price and did another agreement dated the 16<sup>th</sup> November, 1992 which agreement he signed while the vendor had a witness. He produced the Sale Agreements as his exhibits. He claims to have taken vacant possession of the land in 1992 wherein he has put up a brick house and resides thereon with his family. Further, he insists he has never moved away from there. He avers that he was sued while still residing on the suit land. It was his testimony that it is the vendor who pointed out to him his portion but died before transferring the land to his name. He stated that he severally sought for the vendor to transfer the land to him but he failed to do so. He was not aware when beacons were placed on the land and only realized in 2014.

In cross examination, he was emphatic that the deceased Matee owned land parcel number Kajiado/ Kaputiei Central/ 467 but did not know if it still existed. He confirmed that in the Agreement dated 16<sup>th</sup> November, 1992 there was no parcel number but the said Agreement had witnesses. While in the Agreement dated the 29<sup>th</sup> September, 1992 his name and the vendor's name are indicated thereon but it is not signed. He insisted the Agreements confirmed he paid the purchase price. Further, he never went to the Land Control Board but once the vendor showed him the five (5) acres, he fenced it.

In re examination, he reiterated that he had witnesses to the Agreements and the dispute herein only arose after the vendor's demise. Further, he has been in peaceful occupation from 1990 to date.

DW2 Muoki Nzoli stated that he entered into a Sale Agreement dated 11<sup>th</sup> July, 1993 with Matee Ole Risa which was witnessed. He produced the Sale Agreement as his exhibit. He explained that when he purchased the five (5) acres of his land, it was vacant. Further, the purchase price was Kshs. 3000/= and he paid a total of Kshs. 15, 000/=. He contended that at the time he bought his land, the Plaintiff's title had not been issued on 28<sup>th</sup> October, 2014. Further, that beacons were placed on the land when he was residing thereon. He explained that in 1993 when he sought for the vendor to transfer the land to him, he averred that his title was in Kajiado and would transfer the same when he picked it. Further, that he sued Matee ole Risa at Machakos to issue him with his title. He insists Matee's son came to the land in 2014 when he was already occupying it. He reiterated that he has resided on the land from 1993 but vendor never informed him he had subdivided the land nor obtained his consent to do so. He stated that he has built brick houses thereon together with his two sons. He confirmed after subdivision, he occupies land which Meshack (the plaintiff) was given. Further, Meshack has never interfered with the portion of land he cultivates.

In cross examination he confirmed the mother title was in the name of Matee Ole Risa before subdivision. Further, Matee Ole Risa was the Plaintiff's father. He denied seeing Matee Ole Risa subdividing the land. He insisted the mother title was subdivided when he was already in occupation of his portion. He explained that in the Sale Agreement dated 11<sup>th</sup> July, 1993, the Plaintiff was not a party to it and no title was indicated thereon as there was none. Further, Agreement was written by one Simon who was Matee's witness. He confirmed not going to the Land Control Board. Further, it is Matee Ole Risa who measured out to him the five (5) acres of land he bought. He averred that they sued Matee Ole Risa and later received a demand letter to vacate the suit land. He never saw beacons being placed on the land. He has built on the land and planted trees thereon.

He re examination he reiterated that when they filed the Machakos suit, the Plaintiff had not been registered as owner of the suit land. They filed suit in 2014 and Matee died few months later. He further confirmed that Stephen Kyengo also bought land from Matee.

DW3 Stephen Muia Mbungo testified that he entered into a Sale Agreement with Mzee Matee for the purchase of four (4) acres of land at Ksha. 12, 000/=. Further, he finalized payment on 4<sup>th</sup> April, 1993 and signed a Sale Agreement after which Mzee Matee measured out the portion of the land to him on 17<sup>th</sup> April, 1993. He insisted Matee signed the Sale Agreement together with his witnesses. He confirmed having sued Matee. He produced the Sale Agreement as his exhibit. Further, that he sought for cancellation of the subdivisions because they were obtained without his knowledge. He explained that Mzee Matee promised to transfer the portion of land to him but he died before doing so. Further, he fenced and has resided thereon for a long time. He contended that he had put up brick houses, and water dam thereon as well as cultivated the remaining portion.

In cross examination, he confirmed that there was no indication of the four acres of land he purchased, Kshs. 14, 000 purchase price nor the title number. He explained that at the point of purchase, the parcel did not have a title. Further, in the Agreement the vendor Matee recorded his name and thumbprinted thereon. He insisted Kajiado/ Kaputiei Central/ 467 was subdivided when Matee was very old. Further, it is Matee who measured out the land to him and he knows the boundary of his portion. He confirmed that his portion is within Kajiado/ Kaputiei Central/ 3491. He explained that he was never refunded his purchase price and that is why he sued Matee Ole Risa in Machakos which case is still pending.

In reexamination he clarified that in the Agreement dated the 4<sup>th</sup> April, 1994, the vendor indicated his name and thumbprinted it. Further, Mzee Matee told him he never sent William to his land to subdivide it and he never consented to the subdivision. When they sued Mzee Matee title for Kajiado/ Kaputiei Central/ 3491 had not been issued .

DW4 Mutua Malelu relied on his Sale Agreements dated the 28<sup>th</sup> October, 1995 and 25<sup>th</sup> May, 1997 which he produced as exhibits. He explained that the said Sale Agreements were between him and Matee Ole Risa who sold him six (6) acres of land at a cost of Kshs. 20,000/= which he paid in full but a transfer was never effected to him. He contended that he has been utilizing the said land from 1997 to date. Further, he has dug a water pan, built a brick house, bakes bricks and cultivates thereon. He insisted that when he took possession of his land, it was vacant and the Plaintiff obtained his title when he was already residing thereon. He sued Matee Ole Risa and wants the Plaintiff to leave his land as he has been thereon for 27 years.

In cross examination, he clarified that he bought land in 1995 and paid Kshs. 26,000/= and not Kshs. 20,000/=. He confirmed that none of his witnesses signed the Sale Agreements but their names are indicated thereon. Further, neither the vendor nor himself signed the same as he is illiterate. He insisted the Agreement is valid as he paid the purchase price and the vendor died when he had just been sued but in 2013 he was alive. Further, he subdivided his land and allocated the sons who sought to evict them after vendor's demise. He averred that there are no beacons on his land and they never went to the Land Control Board.

In re examination he stated that when they entered into the Sale Agreement, the vendors sons were not present. Further, the vendor never told him he gave land to his sons. He reiterated that both the vendor and himself recorded their Identity Card Numbers on the Sale Agreement which confirms there was a transaction between them. Further, the vendor never told them to move from the suit land.

The parties thereafter filed their respective submissions.

### **Analysis and Determination**

Upon consideration of the Plaints, Defences including Counterclaim, Witness Testimonies and Exhibits, the following are the issues for determination:

- Whether the Defendants have trespassed on land parcel numbers Kajiado/ Kaputiei Central/ 3490 and 3491 (suit lands) and should be evicted therefrom.
- Whether the Defendants have acquired the suit lands through adverse possession.
- Who should bear the costs of the suit.

The Plaintiffs in their submissions reiterated their claim and contended that they are bona fide owners of land parcel numbers Kajiado/ Kaputiei Central/ 3490 and Kajiado/ Kaputiei Central/ 3491 as they hold their respective titles which they produced as exhibits. To buttress their averments, they relied on the case of **Reuben K. Arap Serem V Zipporah Meli (2017) eKLR**. They insist the Defendants have no legal claim over the land as none of the Sale Agreements was executed by any party nor the witnesses. Further, that the same is invalid and unenforceable. The Defendants have not produced any consent from the Land Control Board hence the transaction is void. They submit that the Defendants claim for adverse possession is not grounded on law since they have not been in uninterrupted possession of the suit lands as they invaded the same in 2014. They insist the Defendants have not proved they occupied the suit lands from 1993 and 1997 respectively. To support these arguments, they relied on the case of **Koach Kangogo V Chebii Yego (2018) eKLR**. Further, that the Defendants failed to prove the allegations of fraud. They reiterated that the Defendants should hence be evicted from the suit lands and relied on the case of **John Chelimo Seguton V Joseph Kitur Kiplangat (2018) eKLR**.

The Defendants in their submissions insist the Plaintiffs father sold to them their respective portions of land from land parcel number Kajiado/ Kaputiei Central/ 467 as evidenced in the Sale Agreements but failed to transfer the same to them. Further, that he received their purchase price and became a trustee holding the land for them. They insisted that they had demonstrated during trial that they took immediate and vacant possession of their respective portions of land where they have been in uninterrupted, peaceful and continuous occupation since 1992, 1993 and 1995 respectively, which is a period of over twelve (12) years. They contend that they are hence entitled to the land by way

of adverse possession. To support this argument, they relied on the case of **Peter Mbiri Michuki V Samuel Mugo Michuki Civil Appeal No. 22 of 2013**. They reiterated that the Plaintiffs fraudulently caused the subdivisions of Kajiado/ Kaputiei Central/ 467 into Kajiado/ Kaputiei Central/ 3490 and Kajiado/ Kaputiei Central/ 3491 respectively.

I will proceed to tackle all the aforementioned issues jointly as they are intertwined. The Plaintiffs contended that they are the owners of the suit lands and produced Certificates of Title to that effect. I note the suit lands are resultant subdivisions of Kajiado/ Kaputiei Central/ 467 which was owned by one Matee Ole Risa, the Plaintiffs' father. The Defendants insisted they had purchased their respective portions of the land from Matee Ole Risa and produced various handwritten Sale Agreements to that effect. PW1 said Defendants invaded his land in 2015. PW2 stated that the Defendants encroached on the land in 2015 while PW3 claimed the Defendants came on the land in 2014 one year after the beacons had been put. They all confirmed that their late father subdivided his land and allocated each of them a share and it is at that point that the Defendants trespassed thereon. The Defendants in their respective testimonies explained that upon entering into their respective Sale Agreements with Matee Ole Risa, they all paid the full purchase price; he is the one who measured out their various portions to them which they have occupied to date. DW1 explained that he entered the suit land in 1990; DW2 stated that he entered in 1993; DW3 also contended that he entered the suit land in 1993 while DW4 entered the land in 1997. I note they all claimed to have entered the land before the subdivision of 467 when Matee Ole Risa was still alive. All the Defendants' witnesses claim to have constructed houses thereon and cultivated the land. I note the Plaintiffs claimed the Defendants put up mud houses on the land and yet the Defendants explained that they had brick houses thereon. I note DW3 Stephen Muia Mbungo produced a Sale Agreement dated the 4<sup>th</sup> April, 1993 which was actually thumb printed by the vendor Matee Ole Risa. Further, in the Agreement dated the 8<sup>th</sup> September, 1993, the parcel of land is actually indicated as Plot. 467. I further note that the Plaintiffs did not deny that their father had actually been sued vide Machakos CMCC No. 423 of 2014 in respect to the land parcel number Kajiado/ Kaputiei Central/ 467 prior to his death which suit was still pending as he was yet to be substituted. Further, that in the said suit the Plaintiffs sought for injunctive reliefs as against the vendor and his children as well as adverse possession. From a perusal of the Sale Agreements which were all disputed by the Plaintiffs, I note the vendor therein was Matee Ole Risa. Further, the Plaintiffs were not parties to the said Agreements and actually admitted that they were young when their father allegedly entered into the said agreements. The Plaintiffs did not deny that they sued some of the Defendants for eviction once they were aware their father had been sued over the land parcel number Kajiado/ Kaputiei Central/ 467. I note the Sale Agreements produced as evidence were all entered into in the 1990s prior to the amendment of Section 3(3) of the Law of Contract Act in 2003, which read as follows: **'(3) No suit shall be brought upon a contract for disposition of an interest in land unless the agreement upon which, the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorized by him to sign it; Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of a contract- (1) Has in part performance of the contract taken possession of the property or any part thereof; or (11) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.'**

Based on this law including the evidence before me and from the Sale Agreements which were produced in Court, I find that the same were valid as even if they were challenged for lack of signatures from all the parties; they were written down when the Plaintiffs were absent, there were witnesses and the vendor allowed the purchasers therein to take possession of their respective portions of land they claimed to have purchased. From the Agreements, to my mind, I believe the Plaintiffs cannot dispute them since they were not parties to it, and were too young during that time. Further, noting that there was indeed a lawsuit against their father, which they never stated in their evidence, I find that there was intent on the part of the vendor to sell the land to the Defendants which he did and received the full purchase price. The Defendants confirmed it is actually the vendor Matee Ole Risa who measured out their respective portions of land to them.

Sections 107 and 109 of the Evidence Act, provides that: **107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. 109. "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person".**

The Plaintiffs insist the Defendants entered the suit land in 2014 but have not disputed that they have constructed brick houses thereon. Further, they have not explained why the said Defendants sued their father nor why he had various Sale Agreements with them with one he even thumb printed. They have also stated different times when the Defendants entered the suit lands. To my mind, I find that they have failed to discharge their burden of proof as stipulated in section 107 and 109 of the Evidence Act, on how the Defendants entered the suit lands which were resultant subdivisions of land owned by their father. In the circumstances, I find that the Defendants lawfully entered their respective portions of suit lands as claimed, by virtue of their various Sale Agreements.

As to whether the Defendants have acquired the land through adverse possession. Adverse possession is governed by Section 38 (1) and (2) of the Limitation of the Actions Act which stipulates thus: **' 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.'**

In the case of **Wambugu V Njuguna (1983) KLR 173** the Court of Appeal articulated the requirements a party is expected to fulfill in a claim for adverse possession and held thus: **' Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.'**

In the case of **Public Trustee – v- Wanduru, (1984) KLR 314 at 319** Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.

In the evidence presented herein the Defendants have occupied the portions they purchased from 1992, 1993 and 1997 respectively and these

suits which were consolidated were all filed in 2014 after the twelve years limitation period had since elapsed.

Further, in the case of **Peter Mbiri Michuki V Samuel Mugo Michuki Civil Appeal No. 22 of 2013**, the Court of Appeal held that: 'It is our considered view that when the appellant entered into a sale agreement with the plaintiff in 1964 and received the purchase price for the suit property, the appellant became a trustee holding the suit property in favour of the plaintiff. The Plaintiff having paid the purchase price and took possession acquired an equitable beneficial interest in the suit property. Section 18 (4) of the Limitation of Actions Act applies in the instant case and the right to recover the suit property was not extinguished by death of the plaintiff. The plaintiff having been in possession of the suit property, Section 13 (1) of the Limitation of Actions Act applies as it provides that 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.'

From the evidence presented before this court, which I have no reason to doubt, I find that the Defendants indeed entered the original parcel Kajiado/ Kaputiei Central/ 467 before the same was subdivided and allocated to the Plaintiffs by their late father. Insofar as they never produced consent of the Land Control Board, as the vendor had told them to be patient as he was to transfer the titles to their names but failed to do so and instead proceeded to subdivide the land to the sons. To my mind, the vendor seems to have wanted to defeat the rights of the Defendants which were prescriptive and already attached to the land parcel number Kajiado/ Kaputiei/ Central/ 467 and it was immaterial whether the same was subdivided or not. Further, all the Plaintiffs witnesses alleged there were meetings with the chief as well as elders on the Defendant's invasion on the land but never produced any witnesses to that effect. Based on the evidence presented in court while associating myself with the decisions cited above, I find that the Defendants have indeed proved they acquired their respective portions of land which they bought from Matee Ole Risa (deceased) through adverse possession.

On who should bear the costs of the suit. I find that since the Defendants are the inconvenienced parties, they are entitled to costs which I award them.

It is against the foregoing that I proceed to dismiss the Plaintiffs' suits and enter judgement as per the two Counterclaims and proceed to make the following final orders:

- i. A permanent injunction be and is hereby issued restraining the Plaintiffs either by themselves or agents and/or employees and/or servants from interfering with the Defendants' quiet possession and peaceful stay on their respective portions of land.
- ii. A declaration be and is hereby issued that the subdivision caused by the Plaintiffs, their families or their agents without consulting the Defendants who were then on the ground are invalid and the same revoked and therefore the title deed to land reference No. KAJIADO/ KAPUTIEI CENTRAL/3490 and 3491 were therefore obtained fraudulently and/or is invalid and the titles are not a good titles.
- iii. A declaration be and is hereby issued that the Defendants have acquired ownership by way of adverse possession of their respective portions of land which are variously comprised in Title Nos. Kajiado/ Kaputiei Central/ 3490 and Kajiado/ Kaputiei Central/ 3491.
- iv. The Plaintiffs be and are hereby directed to effect transfer to the Defendants of the respective portions of land they occupy to wit: Mutua Malelu – 6 acres from Kajiado/ Kaputiei Central/ 3491; Stephen Kyengo – 5 acres from Kajiado/ Kaputiei Central/ 3490; Muoki Nzoli – 5 acres from Kajiado/ Kaputiei Central/ 3490; Stephen Muia Mbungo – 4 acres from Kajiado/ Kaputiei Central 3491.
- v. Costs of the counterclaim are awarded to the Defendants.

**DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 3RD DAY OF MAY, 2021**

**CHRISTINE OCHIENG**

**JUDGE**