



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MURANG'A**

**E.L.C NO. 98 OF 2018(OS)**

**CHARLES MWANGI KIIRU.....PLAINTIFF**

**VERSUS**

**BONIFACE MAINA GICHOMO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MWANGI THUO.....2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH**

**ELC 97 OF 2018**

**STEPHEN MUYA KIIRU.....PLAINTIFF**

**VERSUS**

**BONIFACE MAINA GICHOMO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MWANGI THUO.....2<sup>ND</sup> DEFENDANT**

**AND**

**ELC 96 OF 2018**

**CYRUS MUCIRI KIIRU.....PLAINTIFF**

**VERSUS**

**BONIFACE MAINA GICHOMO.....1<sup>ST</sup> DEFENDANT**

**JOSEPH MWANGI THUO.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. This suit is the lead file upon consolidation of three claims namely Murang'a ELC Nos. 96, 97 and 98 of 2018. Vide his amended Originating Summons dated 19/10/2019, the Plaintiff sought orders that; -

a. A declaration that the title of the said Joseph Mwangi Thuo over a portion measuring approximately 0.16 hectares or thereabouts out of land parcel No.LOC.14/GAKURWE/314 on the eastern side and which portion is well defined and occupied by the Plaintiff, has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitations of Actions Act.

b.A declaration be made and issued that Joseph Mwangi Thuo acquired title to land parcel No.LOC.14/GAKURWE/314 subject to the rights the Plaintiff had acquired over the same and therefore his title thereto has been extinguished.

c. A declaration that the Plaintiff has acquired title to the said portion measuring approximately 0.16 hectares out of land Parcel No. LOC.14/GAKURWE/314 by his adverse possession thereof for a period of more than 12 years from the year 1996 or thereabouts to-date and therefore the 2<sup>nd</sup> Defendant holds the title thereto in trust for the Plaintiff.

d. An order for dissolution of the said trust and transfer of the said portion measuring approximately 0.16 hectares to the Plaintiff;

e. An order do issue requiring and directing the Land Registrar Murang'a to subdivide land Parcel No. LOC.14/GAKURWE/314 in such a manner that the portion of 0.16 hectares aforesaid is excised from the said land parcel and to register the portion in the name of the Plaintiff Charles Mwangi Kiiru in place of Joseph Mwangi Thuo and in place of any other person acquiring title to the land after filing of this suit;

f. The second Defendant be ordered to execute all necessary documents to effect all necessary registration of the said portion in the name of the Plaintiff and in case of default on his part the Deputy Registrar of the Court be authorized and directed to execute and all documents necessary in place of the 2<sup>nd</sup> Defendant.

g. The Land Registrar Murang'a be authorized and directed to dispense with production of the old title deed if the 2<sup>nd</sup> Defendant fails to surrender it to the Land Registrar.

h. The costs of this suit be borne by the Defendants jointly and severally.

2. The Plaintiff's case is that his father, Kiiru Waithaka, (Kiiru) purchased the suit land from Gichomo Kahu (Gichomo) in 1967. He was put in occupation, commenced developments and settled his family until his death in 1997. That he has lived on the land since 1996 when his father subdivided the suit land among him and his two brothers namely Stephen Muya Kiiru and Cyrus Muciri Kiiru (co-Plaintiffs). That he and his brothers have lived on the land for over 12 years and have acquired the right to land by way of adverse possession.

3. The claim is opposed.

4. The 1<sup>st</sup> Defendant's Replying Affidavit is sworn on 30/10/2019 by Joseph Wambugu Gichomo. He denied the purported acquisition of the suit land by adverse possession. He averred that the suit is res judicata in line with section 7 of the Civil Procedure Act since the Plaintiff's father had instituted a similar claim against his late father, Gichomo Kahu vide Nyeri Civil Case No. 365 of 1992. That upon the Plaintiff's father's death, no substitution was done leading to abatement of the suit and in any event no sale agreement has been produced to show the alleged purchase of the suit land.

5. The 2<sup>nd</sup> Defendant filed his Replying Affidavit sworn on 27/01/2020. He deponed that he is the registered owner of the suit land having purchased the same from the 1<sup>st</sup> Defendant vide copy of sale agreement dated 27/3/2019, annexure *JMT1*. That he carried out due diligence and obtained the Land control board consent and there was no one in occupation of the land at the time of the purchase. That he knew the land belonged to late Gichomo Kahu, the 1<sup>st</sup> Defendant's father and the former suit between Kahu and the Plaintiff's father had abated. That as a result a claim for adverse possession cannot arise and urged the Court to dismiss the summons.

6. The Plaintiff called 5 witnesses. PW1, Charles Mwangi Kiiru relied on the amended originating summons dated 19/10/2019 and Supporting Affidavits sworn on 17/12/2018 and 18/10/2019 as his evidence in chief. He stated that he was born in 1953. That his father bought the suit land from the 1<sup>st</sup> Defendant's father in 1967 and was put in possession whereupon he settled his family and developed the land by planting coffee (1968) and subsistence crops.

7. That in 1996 towards his sunset years his father demarcated the suit land amongst his three sons, the Plaintiffs herein. That he died in 1997. That his portion lay on the easterly side while Stephen and Cyrus are in the middle and westerly side respectively.

8. That his father had temporary structures on the land which were removed when he died in 1997. That his father owned land adjacent to the suit land that shared a boundary where he planted coffee, macadamia and subsistence crops. That he lives on his father land but farms on the suit land. That the coffee from the suit land and that of his father was supplied to the factory vide out grower No 4320.

9. That trouble stirred in 2017 when it was rumored in the village that the 1<sup>st</sup> Defendant's brother namely Wambugu was selling the suit land and on further investigation discovered that the suit land was now registered in the name of the 1<sup>st</sup> Defendant in 2017 pursuant to a succession cause in respect to the estate of Gachomo.

10. That since 1996 he and his brothers have occupied the suit land and the 1<sup>st</sup> Defendant never interfered with his occupation. That he was allocated 54 coffee trees and on his own practices subsistence farming including planting nappier grass.

11. That the title was transferred from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant whilst the suit was pending in Court in 2019 and destroyed the crops on the land as seen in the valuation report produced in evidence.

12. PW2, Stephen Muya Kiiru the Plaintiff in ELC 97/2018, also relied on his Supporting Affidavits sworn on 17/12/2018 and 10/12/2019 in seeking similar prayers as PW1 regarding his portion of 0.16 Ha in the suit land.

13. He reiterated the evidence of PW1. That his father died on 23/8/1997 leaving them on the suit land. That he occupies the middle portion of the land but the three brothers occupy the other portions of the land equally. That he was allocated 60 coffee trees by his father which he permitted PW1 to tend and pick alongside the coffee on his portion of the land.

14. He informed the Court that he knows both the 1<sup>st</sup> Defendant who lives in the neighbourhood. That he came to know the 2<sup>nd</sup> Defendant in 2019 when he entered the suit land and destroyed crops in an attempt to evict them. That the 1<sup>st</sup> Defendant has never interfered with his occupation on the suit land but the 2<sup>nd</sup> Defendant uprooted his coffee, nappier and maize in May 2019.

15. The third witness was Cyrus Muciri Kiiru the Plaintiff in ELC 96/2018 who also relied on his Supporting Affidavits sworn on 17/12/2018 and 10/12/2019. He testified and adopted the evidence of PW1 and PW2 and added that his portion is on the western side of the suit land.

16. Beatrice Wanjiku testified as PW4 and adopted her witness statement dated 18/2/2020 as evidence in chief. She stated that she knew the Plaintiffs and their late father and that they having been utilizing the suit land since 1970s with their father and that after his demise in 1997, they continued utilizing the suit land on their own planting maize, nappier grass, coffee and bananas. That her land is adjacent to the suit land (separated by a road) and always knew the suit land to belong to Kiiru. That the coffee was uprooted in 2019.

17. The last witness, Joseph Kamau Maina also adopted his statement dated 18/2/2020 as his evidence in chief. He stated that he knew all the parties in this suit with the exception of the 2<sup>nd</sup> Defendant. That since 1968 he saw Kiiru farming on the land and assumed it belonged to him. And after his death his three sons continued farming on the land growing bananas, coffee nappier grass and subsistence crops.

18. He stated that he did not know Gichomo in person but heard about him. That the three brothers have their family land next to the suit land.

19. With that the Plaintiffs closed their case.

20. Joseph Wambugu Gichomo testified as DW1 on behalf the 1<sup>st</sup> Defendant, his brother on the basis of a power of Attorney produced as DExh.1.

21. He said the suit land is currently registered under the 2<sup>nd</sup> Defendant having purchased it from the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant was the owner of the suit land having succeeded the estate of their late father, Gichomo Kahu who died in 1961. He denied any sale of the suit land by their father to the late Plaintiffs' father. He also denied the Plaintiffs' occupation of the suit land and referred to the Nyeri suit – HCCC No. 365 of 1992 (Originating Summons) between the late Waithaka and the 1<sup>st</sup> Defendant which case was dismissed for want of prosecution. He adduced copies of the suit and the Replying Affidavit marked a DExh. 2 &3.

22. In cross-examination, DW1 explained that the 1<sup>st</sup> Respondent donated the Power of Attorney to him because he is indisposed and actually sold the land to offset his medical expenses. He maintained that the Plaintiffs have never occupied the land and instead it is the family of Gichomo that have variously utilized the land. For instance, one Robinson had planted coffee thereon until his demise in prison in 2004. That his mother occupied the land until her death in 1986. That the 1<sup>st</sup> Defendant occupied the land until he could not cultivate anymore and sold it to the 2<sup>nd</sup> Defendant.

23. That the 1<sup>st</sup> Defendant currently lives on his (DW1) farm at LOC.5/GATHUKIINI/315. With respect to the sale of the suit land, he stated that he was present in the negotiations and transaction leading to the sale of the land to the 2<sup>nd</sup> Defendant and all the legal processes including obtaining Land Control Board consent were complied with.

24. The witness contradicted his evidence when he stated that there was no coffee on the land in 2017 on his visit and later states that there were patches of coffee managed by the 1<sup>st</sup> Defendant.

25. The 2<sup>nd</sup> Respondent Joseph Mwangi Thuo took the stand as DW2. He testified that he's a businessman and registered owner of the suit land and a neighbor to the Plaintiffs' family. That he is an innocent purchaser for value having bought the suit land from the 1<sup>st</sup> Defendant after conducting the necessary due diligence and obtaining relevant consent. He also admitted knowing the Plaintiffs' father as a village tailor and the Gichomo's family as well. That when he entered the suit land, there was no human activity thereon but had neglected nappier grass, eucalyptus trees and maize plantations. He produced copies of the sale agreement, chief's letter, Land Control Board consent and Title deed issued on 9/4/2019. He admitted destroying coffee and trees on the suit land and further added that he permitted the wife of Cyrus to harvest maize and subsistence crops growing on the land.

26. Parties filed their respective Written Submissions dated 18/03/2021 and 1/4/2021.

27. On behalf of the Plaintiffs, it was submitted that the suit land was originally registered under the 1<sup>st</sup> Defendant's late father Gichomo Kahu as per the green card annexed to PW1'S Affidavit sworn on 10/6/2019. That Gichomo Kahu sold the land to Kiiru Waithaka the Plaintiffs' father around 1967 but failed to effect transfer. That Kiiru Waithaka nevertheless took occupation of the suit land and remained on it even after Gichomo's death. That in 1996, Waithaka then subdivided the land into 3 portions for his 3 sons and have been in exclusive possession until 3/5/2019 when the 2<sup>nd</sup> Defendant forcibly entered the suit land and destroyed their crops. They emphasized that their claims are based on their occupation since 1996 to the date of filing this suit being a period of more than 12 years.

28. On the issue of res judicata, they denied the same and maintained that the current suit is not between the same parties nor on the same cause of action. That their claim is as of their own right for 22 years and has nothing to do with their late father's occupation. Accordingly, they argued that Gichomo Kahu's title and his successors was extinguished by adverse possession and therefore the 2<sup>nd</sup> Defendant purchased a bare title subject to the Plaintiffs' overriding interests. They beseeched the Court to allow their claim with costs.

29. On the other hand, the Defendants refuted the Plaintiffs' capacity to institute their claims and argued that a claim for adverse possession

cannot arise where occupation was permitted by their parents as was held by Justice Githinji (*as he then was*) in the case of **James Kamau Kimani vs. James Gichuru Gaturu [2000] eKLR**. They highlighted that none of the claimants adduced evidence for picking and supplying coffee for a period of 12 years as alleged. That the Plaintiffs have not proved their case as even PW5 could not tell who the original owner of the suit land was. Reliance was placed on the Court of Appeal case of **Joseph Mutafari Situma vs. Nicholas Makhanu Cherongo[2007] eKLR** where the Court dismissed an Appeal challenging the trial Court finding that the Appellant failed to prove adverse possession.

30. The main issue for determination is whether the Plaintiffs have proven their claims for adverse possession.

31. Before I delve into the key issue for determination, I will address two issues that were raised by the 1<sup>st</sup> Defendant and by extension the 2<sup>nd</sup> Defendant in this case. The first is whether this suit is resjudicata in view of HCCC No 365 of 1992 Original Summons between John Kiiru Waitthaka and Robinson Kiora Gichomo (sued as the personal representative of Gichomo Kahu, deceased). The second is whether this suit is fatal on account that HCCC No 365 of 1992 (OS) abated by dint of Order 24 Rule 7 of the Civil Procedure Rules.

32. On resjudicata, Section 7 of the Civil Procedure Act provides as follows no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

33. Under para 8 of the Replying affidavit the 1<sup>st</sup> Defendant under a Power of Attorney DW1, led evidence that the suit was dismissed on the 27/7/2001 for want of prosecution. Be that as it may, it follows that HCCC No. 365 of 1992 was not heard and finally determined by the Court and it is my considered view that this suit is not resjudicata.

34. In HCCC No. 365 of 1992 the parties were John Kiiru Waitthaka and Robinson Kiora Gichomo, the legal representative of the late Gichomo Kahu. It is the Defendant's argument that this case abated in 1998 following the none substitution of the Plaintiff who died in 1997. That by dint of Order 24 Rule 7 of the Civil Procedure Rules and on account that HCCC No. 365 of 1992 abated, this suit ought not to have been filed. It is commonly acknowledged that Kiiru died in 1997. It is also clear that the Plaintiffs herein have not filed suit on behalf of the estate of their father but on their own behalf. They are adverting a claim of adverse possession on their own right and are not dependent on their fathers past occupation of the land. In that regard going by the Defendant's position that the suit was dismissed for want of prosecution, this point is moot.

35. According to the certified copy of the green card, the suit land was registered in the name of Gichomo in 1966. In 2017 it became registered in the names of Joseph Wambugu Gichomo (DW1) and the 1<sup>st</sup> Defendant pursuant to transmission upon conclusion of succession proceedings. No explanation was given why DW1 was not sued together with the 2<sup>nd</sup> Defendant and yet the former was a joint owner of the suit land. Parties being the masters of their own case and noting that no issue was raised around it, I say no more.

36. On 9/4/19 while the suit was still subsisting the title became registered in the name of the 2<sup>nd</sup> Defendant. A restriction was registered on the suit land restricting all dealings until the suit is determined on the 23/4/2019.

37. The Plaintiffs case is that they have occupied separate and distinct portions of the suit land namely the easterly, middle and westerly side since 1997 todate openly, exclusively continuously and as of right for a period in excess of 22 years and that they are entitled to be declared as title holders thereof by way of adverse possession.

38. The 1<sup>st</sup> Defendant has contended that he has been in occupation of the suit land which land was left to him by his late father Gachomo. He denied the Plaintiffs' claim. That he acquired the land through transmission and he sold it to the 2<sup>nd</sup> Defendant in 2019.

39. The 2<sup>nd</sup> Defendant opposed the Plaintiff's claims and averred that he is the registered owner of the suit land having purchased it from the 1<sup>st</sup> Defendant in 2019 and immediately was put in vacant possession. That he was unaware of any overriding interest over the suit land and averred that based on the strength of a letter from the Chief Kamacharia and the land control board he proceeded to seal the deal. That the land was unoccupied when he took possession and only learnt of the suit when he was served with an application for joinder in the suit in 2019. That he comes from the area and knew the land to belong to the Gichomos.

40. In the case of **Kweyu v Omutut [1990] KLR 709 at page 716** the Court held as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period of 12 years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality).

Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation.

To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

41. In the Court of Appeal decision in **Mtana Lewa –v Kahindi Ngala Mwangandi (2005) Eklr** the Court held that it is also a well settled principle that a party claiming Adverse Possession ought to prove that his possession was “*nec 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.

42. The doctrine is anchored in interalia Sections 7, 17 and 38 the Limitation of Actions Act Chapter 22 Laws of Kenya.

43. Further Section 7 of the Land Act, 2012 recognizes prescription as a method of acquiring land. Section 28(h) Land Registration Act recognizes adverse possession as an overriding interest protected under the said Act.

44. In the Court of Appeal case of **Sisto Wambugu –v-Kamau Njuguna [1983] eKLR**, the Court held that adverse possession contemplates two concepts; possession and discontinuance of possession and that further whether the claimant proved that the title holder has been dispossessed, or has discontinued his possession of the land in question for the statutory period.

45. For possession to be adverse, it must start with a wrongful dispossession of the rightful owner of the land in a peaceful and open manner; must be continuous and exclusive for over a period of twelve years, with a clear and manifest intent by the claimant of asserting his or her right of ownership of the land in question so as to defeat that of the registered owner. See the recent Court of Appeal decision in **Ravji Karsan Sanghani v Pamur Investment Limited [2021] eKLR**.

46. Have the Plaintiffs proved occupation that is adverse to the Defendants? It is on record that the suit land belonged to Gachomo as seen in the certified copy of the green card. DW1 led evidence and annexed pleadings in HCCC No 365 of 1992 where in Kiiru sued Gachomo’s son Robinson Kiora Gichomo, the legal representative of Gachomo seeking title to the suit land by way of adverse possession. In Para 3 of his affidavit, Kiiru deponed that he purchased the suit land from Gachomo vide an agreement dated the 27/4/67 at a price of Kshs 1200/- which he paid in full. That he was put in possession of the suit land in 27/4/67. That he planted 200 coffee trees, bananas and trees and subsistence crops. That he fenced the land and built three houses in 1967. He averred that Robinson, Gichomo’s son had threatened to evict him while he had never been in occupation since 1967 hence the filing of the suit.

47. The evidence of DW1 as set out above is in agreement with the evidence led by PW1-3 to the extent that their father entered the suit land through a purchase from Gichomo. This evidence is further buttressed by the replying affidavit of Reuben Muiruri Kimani Advocate dated 28/10/1993 when he stated on behalf of Robinson that there was no Land Control Board with respect to the alleged sale agreement and also accused Kiiru of not taking steps to enforce the agreement. The long and shot of this is an implied acceptance that there was indeed an agreement between Waithaka and Kiiru.

48. The Plaintiffs have led evidence that they entered the suit land with their father, Kiiru. That their claim is of right and that it accrued from 1997 onwards after the death of their father.

49. Evidence has been led that Kiiru died in 1997 and left his three sons on the land. PW1-3 led evidence that before their father died he allocated them equal portions of the land. That their family land is next door where they have built houses. That they farmed coffee bananas and subsistence on the suit land. The activities on the land were confirmed in evidence by PW4 and 5. It is not disputed that the Plaintiffs do not reside on the land but carry out farming thereon. That their father had built temporary houses which were removed after his death. PW4 and 5 who live in the neighborhood attested that they have seen the Plaintiffs utilize the land since the 1970s first with their father and later on their own after the death of their father in 1997. PW4 stated that she always believed the land belonged to Kiiru because of the long occupation and use by the said Kiiru family.

50. The 1<sup>st</sup> Defendant has argued that he lived on the land. DW1 led evidence that he is the brother of the 1<sup>st</sup> Defendant and he lives in Sagana. He informed the Court that the 1<sup>st</sup> Defendant had lived on the suit land after the death of Gachomo. That currently he lives on Parcel LOC.5/GATHUKIINI/315 which belongs to him (DW1). That they (Gachomos) share a boundary with the Plaintiffs and he knows the area well. That the family of Gichomo have occupied the land; their mother until 1986 when she died; Robinson until he died in prison in 2004; Boniface until he could not cultivate and sold it in 2019.

51. The evidence of DW1 when matched with that of PW1-5 and read together with the pleadings in HCCC No 365 of 1992 pales in weight on the scale. I say so because in 1992 Robinson though he was said to have been in possession was in prison as stated in his pleadings from as far back as 1992 to 2004 when he is said to have met his demise there. No evidence was led to support the mothers’ occupation until 1986 and neither was Boniface occupation firmed in evidence. This is buttressed further by DW1’s admission that he was aware of the HCCC No 365 of 1992 in which Kiiru was seeking title by way of adverse possession. It is said that Kiiru had approached the probate Court for letters of administration of the estate of Gachomo, perhaps in an effort to get himself registered as the owner of the land that he occupied and to protect his purchaser’s interest in the suit land.

52. I have said much about the occupation of Kiiru. This case is on the occupation of the Plaintiffs as of their right. From the above analysis I can conclude that the Plaintiffs were in occupation of the land. This is further confirmed by DW2 when he admitted that he destroyed coffee trees and other subsistence crops on the land belonging to the Plaintiffs.

53. Was the occupation of the Plaintiffs adverse? Section 13 (1) of the Limitation of Actions Act states 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 (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.

54. My finding is that as at 1997 when the father of the Plaintiffs died the consent with which the Plaintiffs occupation the suit land ceased. Time started running afresh in favour of the Plaintiffs against the estate of Gichomo that as was demonstrated by the DW1 had been succeeded way back in 1992 or thereabouts.

55. Section 16 of the Limitation of Actions Act states that 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. That the estate of Gichomo was succeeded in 1992.

56. It therefore follows that adversity run from 1997 and to the full cycle of 12 years and by the year 2009 adverse possession had accrued, crystalized and vested in favour of the Plaintiffs. The estate of Gachomo therefore held the title in trust for the Plaintiffs as its title had been extinguished in favour of the Plaintiffs.

57. Can the suit land be ascertainable on the ground? In the case of **Gerishon Muindi Baruthi -Vs- Willays Gatinku Mukobwa & another CA No. 98 of 1998** the Court held that the Plaintiff/ Claimant has a duty also to prove that the land he was claiming was definite and identifiable. It was held thus:

“Exclusive possession of a portion of parcel of land which is definite would entitle the Appellant to establish his claim on ground of adverse possession provided the period of 12 years has run”.

58. PW4 led unchallenged evidence that the land is separated by a life hedge on the ground and that the Plaintiffs occupy the suit lands in the easterly, middle and westerly parts. This evidence supports the evidence as led by the Plaintiffs. It is the Plaintiffs’ case that they are entitled to the land in equal portions thus leaving no doubt as the sizes and the delineations of the suit land being claimed.

59. The Plaintiffs led evidence and supported by their witnesses that their father planted coffee trees which in 1996 distributed to them alongside the portions of the land on the ground. This goes to show their animus possidendi (intention to possess) on the land as to their intent to occupy the land as of right and in against the interests of the Defendants.

60. Is the 2<sup>nd</sup> Defendant a bonafide purchaser for title? Recently the Court of Appeal in Peris Wanjiku Mukuru suing as the legal representatives of the estate of **Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020]Eklr** reiterated who a bona fide purchaser for value is and stated;

“As to whether the Respondent was a bona fide Purchaser for value without notice, the Black’s Law Dictionary 9th Edition defines a bona fide purchaser as:

“One who buys something for value without notice of another’s claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller’s title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.”

In **Katende v Haridar & Company Limited [2008] 2 E.A.173** the Court of Appeal in Uganda held that;

“For the purposes of this Appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongfully. For a purchaser to successfully rely on the bona fide doctrine ... (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.”

61. Similarly, **Samuel Kamere v Lands Registrar, Kajiado [2015] eKLR** held that;

“Accordingly, having failed to conduct a proper due diligence on the ownership of the suit property, or prove how he acquired his title we find that the appellant has not demonstrated that he was a bonafide purchaser, and further having failed to prove that he paid any consideration for the suit property, we find that he was not a bona fide purchaser for value. As a result, we consider that, the learned judge rightly ordered the rectification of the register to restore the Plaintiff as the registered proprietor.”

62. The 2<sup>nd</sup> Defendant informed the Court that he carried out due diligence before purchasing the land. Further that he comes from the area and knows the land and the parties well. That he learned of the suit after he was served with an application for joinder. Asked why he procured the Land Control Board consent before the agreement of sale was executed, he informed the Court that;

“ I was in a hurry because I had paid a deposit and I wanted to get a title to secure my money. ... That I uprooted the coffee and allowed the wife of Cyrus Kiiru to harvest the maize on the land.”

63. The conduct of the 2<sup>nd</sup> Defendant cannot be taken as a bonafide purchaser without notice. It shows that he purchased the land knowing that there was an occupant(s). He allowed the wife of Cyrus to harvest the maize because he knew that the Plaintiffs were in occupation and farming on the land.

64. Resultantly the 2<sup>nd</sup> Defendant acquired no interest from the 1<sup>st</sup> Defendant because the title was encumbered with an overriding interest in favour of the Plaintiffs. The seller of the land held the title in trust for the Plaintiffs and was incapable of transferring any better title than that held by the Plaintiffs. Guided by section 80 of the Land Registration Act, this title is therefore a candidate for cancellation. It is hereby ordered cancelled.

65. From the evidence led and the analysis, it is my finding that the Plaintiffs have proved their case on a balance of probabilities and I enter judgement in their favour as prayed.

66. The costs of this suit be borne by the Defendants jointly and severally.

**67. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>TH</sup> DAY OF JUNE 2021**

**J G KEMEI**

**JUDGE**

**Delivered in the presence of:**

Kirubi HB for Gichuki

Wangari HB for Mrs. Kimani for Defendants

Court Assistants: Alex