Kimaiyo & 5 others v Kimilot (Enviromental and Land Originating Summons 321 of 2016) [2025] KEELC 3917 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3917 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 321 OF 2016

CK YANO, J

MAY 15, 2025

BETWEEN

DAVID KIMAIYO ..... 1ST APPLICANT

RAEL KIMAIYO ..... 2ND APPLICANT

ALFRED KIMAIYO ..... 3RD APPLICANT

KIPKEMOI KIMAIYO ..... 4TH APPLICANT

BONIFACE KIMAIYO ..... 5TH APPLICANT

MICHAEL KIMAIYO ..... 6TH APPLICANT

AND

DAVID CHERUIYOT KIMILOT ..... RESPONDENT

JUDGMENT

1. By an Originating Summons dated and filed on 4th November, 2024 the Applicants are seeking a determination of the following issues:-

    a. Whether the applicants have been in open uninterrupted occupation and without consent of the respondent (sic) over 6 acres comprised in land parcel No. L.R. Uasin Gishu/ Kaptagat/150.

    b. Whether the applicant's occupation of the said 6 acres of the land parcel known as L.R. No. Uasin Gishu/Kaptagat/150 has been for a period of over 12 years.

    c. Whether the respondent's title to the said 6 acres of land comprised in L.R. No. Uasin Gishu/ Kaptagat/150 has been extinguished by the applicants' adverse possession.

d. Whether the respondent ought to convey the said 6 acres of land parcel L.R. No. Uasin Gishu/ Kaptagat/150 to the applicants failure which (sic) the Deputy Registrar of the Honorable High Court or such other officer as the court may designate do execute the said instruments conveying 6 acres to the applicants.

e. Whether the applicants are entitled to costs of the suit from the respondents.

2. The Originating Summons is supported by the Affidavit of even date sworn by the 6th Applicant, Michael Kimaiyo, with the authority of the other Applicants. He averred that they have been in occupation of L.R. No. Uasin Gishu/Kaptagat/150 (the suit property), which is registered in the name of the late Cheruiyot Kimilot who was their father's cousin. That the Defendant is the Administrator of the estate of the late Cheruiyot Kimilot, in whom the suit land now vests.

3. He deponed that their father and the late Cheruiyot Kimilot entered the land sometime in 1964 where they lived and shared the land peacefully. That their father occupied 6 acres of the land and thereon established his home where the Applicants were born and bred, and have been in peaceful, exclusive, uninterrupted possession for over 30 years without the owner's consent. He averred that they have on their own, acquired rights over 6 acres in their joint occupation after the death of the registered proprietor.

4. The 6th Applicant averred that there was no effort to evict them before the end of 12 years save for a suit filed in 2007, being Eldoret E&L Case No. 834 of 2012, in which the Defendant sought to evict them. That by virtue of the *Limitation of Actions Act*, the title of the Deceased and his dependants, including the Defendant herein, was extinguished in year 2004 which marked the end of 12 years. He alleged that the Defendant has been holding the land in trust for him and his siblings and prayed that the 6 Acres be excised and that title to the said portion be issued to them. Further, that a permanent injunction do issue to stop the Defendant from interfering with their continued occupation of the land.

5. The Respondent filed a Replying Affidavit dated 18th November, 2016 in response to the Summons, where he deponed that the Grant annexed by the Applicants was not sufficient for him to take over his father's property. He made reference to HCCC No. 202 of 2011 - Michael Kimaiyo vs David Cheruiyot, where the Court found that he is not the registered proprietor of the land, which position obtains to date. The Respondent deponed that the Applicants' father and his father were biological brothers. That his late father gave his brother 1 Acre to cultivate and feed his children, but on his father's demise, the Applicants' father started claiming a share of the land from him.

6. The Respondent deponed that after lengthy deliberations with a panel of elders, he agreed to give his uncle 2 Acres of land, and the 6th Applicant who was present signed the minutes. Further, that upon his uncle's demise, his uncles wife disregarded the decision of the elders and filed a reference, being Lands Disputes Tribunal in No. 9 of 2002 - Tamining Kimaiyo vs David Cheruiyot, where she was awarded 6 Acres of the suit property. He then referred the court to JR No. 175 of 2002, which challenged the decision of the Tribunal, and which was at the time still pending in court, alleging that this suit is a reaction to the JR Case.

7. The Respondent deponed that he filed E&L No. 834 of 2012 seeking an eviction order against the Applicants from a portion of the land not belonging to them, which suit is still pending and thus he has no eviction orders or legal authority to throw them out yet. He averred that adverse possession cannot lie where an applicant entered the land by permission of the owner. Further, that it cannot also lie where there have been several suits showing that the Applicants never enjoyed peaceful possession of the land, and he listed all the above mentioned suits, including Succession Cause No. 152 of 2002 where the Applicants were objectors.

8. The Respondent further deponed that the Applicants have land in their original home where they came from, and that instead of seeking to inherit their father's land, they were after his father's land having overstayed the welcome granted by the Respondent's father. He added that he has no interest in the 2 Acres he agreed to give them through their father, but was disputing the additional 4 Acres which they had illegally taken. He averred that the suit is wanting and prayed that it be dismissed.

Hearing and Evidence:

Applicants' Case;

9. This suit as heard on 12th February, 2025 with Michael Kimaiyo testifying under oath as PW1. He adopted the Supporting Affidavit to the Summons as his evidence-in-chief. He testified that he was claiming part of the suit property registered in the name of the late Cheruiyot Kimilot and that the Respondent is the administrator of his estate. He produced a Certificate of Official Search as PEXb1 and a Grant of Letters of Administration as PEXb2.

10. PW1 testified that he has lived on the land since 1974 when he was born, together with his siblings, who all continued to live thereon even after the owners demise in 1992, and there are 5 houses thereon belonging to them. He also testified that they have been occupying 6 acres of the land since the year 2000, on which they are cultivating, rearing animals and have planted cypress trees and fenced using cedar posts and barbed wire. That his father, Kimaiyo Samoei Kimilot and mother Tamining Kimaiyo, died in 2001 and 2004 respectively and are buried on the 6 acres, as are his siblings. He explained that his father had lived on 6 acres of the land since 1964 and had contributed towards settling the loan, but was never given his 6 acres.

11. PW1 further testified that their deceased parents left no agreements over the land which measures 20 Acres, but after their demise, the Respondent asked them to vacate the land as they had no right to it. He added that they filed their claim in Succession Cause No. 152 of 2002 but were advised to file a civil suit. PW1 testified that they had been on the land for 25 years without the Respondent evicting them. He told this court that HCCC No. 202 of 2011 and ELC Case No. 834 of 2012 have since been dismissed, and this is the only suit pending in court. He asked the court to award them the 6 acres of the land.

12. He was cross-examined by the Respondent and testified that the land is registered in the Respondent's father's name and that he has lived thereon since birth. He testified that he had no agreement allowing him to stay on the land or to show his share thereof. He stated that he sold milk to repay the loan through the registered owner who was the account holder. He said that their parents who lived in peace until their demise, died before subdividing the land. He had no agreement to show that their fathers agreed to repay the loan through delivery of milk, but said that they acted on trust.

13. On the size of land claimed, PW1 testified that he knew it is 6 Acres because he is cultivating on the land, and that his father's land was measuring 6 Acres. PW1 conceded that the entire 20 Acres of land was registered in the Respondent's father's name. Further, that Case No. 9 of 2002 was filed by his mother, Tamining Kimaiyo, and he did not know why she filed it.

14. PW1 was re-examined and stated that in Tribunal Case No. 9 of 2002, his mother sued David Kimilot and that she is the only one who knew about that case.

15. PW2 was Cornelius Kiptoo, who testified under oath and adopted his witness statement dated 27th June, 2024 as his evidence-in-chief. He then testified that the parties herein are his cousins who live on Parcel No. 150 in Kaptagat. That the Applicants and the Respondent all live on the said land

measuring 20 Acres. He however did not know how many Acres each occupied, but testified that the Applicants have their houses on the land where they live with their families. He testified that they also have developments thereon such as trees, fences, crops and cattle.

16. PW2 was cross-examined by the Defendant and testified that he only knew of the land as a block where all the parties live and not everyone's acreage. He also did not know who owned the land. There was no re-examination for PW2 and this marked the close of the Applicants' case.

Respondent's Case;

17. On the same day, the Respondent testified under oath as DW1 and testified that he lives on his father's land, being Plot No. 150 in Kaptagat Scheme. His father is Cheruiyot Kimilot who died in 1992. He adopted his Replying Affidavit dated 18th November, 2016 and statement dated 30th September, 2024 as his evidence-in-chief. DW1 produced the documents on the Replying Affidavit and the documents in the List of Documents dated 30th September, 2024 and 27th January, 2025 which were marked as DEXb 1-12 respectively.

18. DW1 was cross-examined by Mr. Mwetich and he conceded that the Applicants have been living on his father's land since 2002. That they cultivate the land, rear their animals, have planted Cypress trees which they replace after cutting. He testified that there are only 3 houses belonging to Michael Kimayo, Alfred Kimutai and David Kimaiyo (Deceased) where they live with their families. He told the court that he also lives on the land with his family. He said that he had not evicted the Applicants from the land as he has no eviction order to do so. He testified that he had earlier agreed to give the Applicants 2 Acres to live on but now he objected to that also. He explained that the Applicants had not agreed to the 2 Acres as they were claiming 6 Acres. DW1 further stated that he would not agree to giving the Applicants 6 Acres, but would not evict them from the 6 acres unless the court decided so.

Submissions:

19. At the end of the hearing, the Parties were asked to file their final written submissions and they complied.

Applicants' Submissions;

20. In the Submissions dated 1st April, 2025 Counsel for the Applicants submitted that the consent to live on the suit property was between the deceased brothers and the Respondent herein ought to have shared the property with them. Counsel cited Odakha & Another vs Lubia (Environment & Land Case E028 of 2021) (2023) KEELC (KLR), where it was held that a claim for adverse possession can be maintained between family members. Counsel referred to Sections 7 and 38(1) of the Limitations of Actions Act being the law on adverse possession. He argued that there was no indication from the proprietor that they had agreed to have his brother occupy the land temporarily. Counsel added that any consent between the deceased brothers ended upon their demise in 1992 and 2002 respectively. Further, that the Applicants herein were born on the land and had made their own developments thereon having been in occupation since 2002 without consent from the estate of the deceased proprietor.

21. It was submitted on behalf of the Applicants that they had been in occupation since 1992 for over 30 years, and that despite several cases in various courts, their occupation has never been interrupted to date, and neither has any legal notice to vacate the land been issued to them. Counsel relied on Registered Trustee, Catholic Diocese of Murang'a vs Micere Njau & 3 Others (2022) eKLR and Mary Wangari Macharia (Suing in her Capacity as the Administratrix of the Estate of Macharia Gutu

Thungu (Deceased) vs Edwin Onesmus Wanjau (Suing in his Capacity as the Administrator of the Estates of Kimingi Warieta (Deceased) and Mwangi Kimingi (Deceased) (2022) eKLR.

22. Citing the case of Mtana Lewa vs Kahindi Ngala Mwagandi (2015) eKLR, Counsel also submitted that the parties are all aware that the land was in the name of the Defendant and that they were occupying it with his knowledge. He added that there is no evidence that the Defendant took possession of the land, or that he removed or ousted them from the land. Counsel argued that notice to vacate the land does not amount to interruption, therefore the Applicants' possession runs from 1992 to date. That they are thus entitled to the land by adverse possession and they should be registered as the legal owners thereto. On Costs, Counsel submitted that the same is awarded at the discretion of the court, and urged that costs be awarded to the Applicants.

Respondent's Submissions;

23. The Respondent's Submissions are dated 17th March, 2025. He submitted that there is no documentary evidence to support the claim that the Applicants' father assisted his father in repaying the Settlement Fund Trustee (SFT) Loan. He submitted that the initial occupation was with the permission of the Respondent's father. He argued that permission does not become adverse before the end of the period which the possessor is permitted to occupy the land. That therefore, the Applicants' occupation under a familial agreement is not adverse until the permission is revoked. Counsel cited Mtana Lewa vs Kahindi Ngala (Supra) and Sisto Wambugu vs Kamau Njuguna (1983) eKLR.

24. The Respondent added that the existence of previous legal proceedings over the same subject matter indicates that the Applicants' possession was contested and was neither peaceful nor uninterrupted, negating the adverse possession claim. He argued that the Applicants' claim is thus barred by these previous proceedings over the suit land. He prayed that the Applicants' claim for adverse possession be dismissed and that costs of this suit be awarded to him.

Analysis and Determination:

25. Having considered the pleadings, evidence adduced and the parties' submissions, the court finds that the issues for determination;

    i. Whether the Applicants have acquired the suit property by virtue of adverse possession;

    ii. What is the extent of the Applicants' entitlement over the suit property in light of the decision of the Burnt Forest Lands Dispute Tribunal adopted as CMCC Award No. 52 of 2002?

    iii. Who should bear costs of the suit?

a. Whether the Applicants have acquired the suit property by virtue of adverse possession

26. The doctrine of adverse possession in Kenya is founded under the *Limitation of Actions Act*, CAP 22 Laws of Kenya. The relevant provisions are underpinned in Sections 7, 13 and 38 of the Act, with Section 7 barring any actions to recover land after 12 years from the date the right accrued.

27. The requirements for adverse possession have been set out in the Court of Appeal case of Samwel Nyakenogo vs Samwel Orucho Onyaru (2010) eKLR, where it was held that:

> "In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by his having

discontinued his possession of it. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then 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 has been in possession for the requisite period. See *Wambugu vs Njuguna; Civil Appeal No. 10 of 1982*.

Adverse possession means that a person is in possession in whose favour time can run. Not all people in possession can have time run in their favour. Time can run in favour of a tenant at will by virtue of section 12 of the *Limitation of Actions Act* but it cannot run in favour of a licensee, therefore a licensee has no possession (Hughes v. Griffin [1969] 1 WLR 23)."

28. The onus therefore is on the person claiming adverse possession to prove that they are an intruder, who has been in unlawful occupation for a period of over 12 years to the time of filing suit and that the claim is against the registered owner. A claimant must also clearly demonstrate that the owner has discontinued possession or that they have dispossessed the owner, and that their occupation is not only without the permission of the owner, but also within his knowledge. In deciding such a claim, a court must be certain that the claimant has met all the elements of adverse possession.

29. To start off, this court must determine whether the Applicants are in actual possession of the portion of the suit property claimed. The Applicants allege that they have been in occupation of the suit property from 2002 when their father died. They also allege that they have up structures on it, planted trees and actively cultivated it, but they did not adduce any evidence to prove their occupancy. Despite this, the Respondent did accede to the fact that the Applicants live on the suit land, although he disputed the extent of their occupation.

30. In Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & Another (2015) eKLR, the Court of Appeal explained that:-

> " The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu vs Ndele (1984) KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."

31. The fact of their presence on the suit land is thus confirmed. As to the portion occupied by the Applicants, there is no proof that indeed it measures 6 acres as claimed. Despite the Respondents allegation that they only occupy 2 Acres of the land, the Applicants did not produce a surveyor's report to ascertain the extent of their occupancy and that they actually occupy the 6 acres as alleged.

32. That being settled, the court now needs to determine whether the possession of the suit property by the Applicants was without the permission of the registered owner. In Gabriel Mbui vs Mukindia Maranya (1993) eKLR, the learned judge extensively explained the concept of non-permissive possession in the following words:-

> (3) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse

possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called "adverse". Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner's will accompanied the occupier's possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as "hostile" possession, to emphasize that "hostility" is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (Cobb v Lane [1952] 1 All E R 1199; Denning, MR, in Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd [1974] 3 All ER 575 at p 580; Chanan Singh, J, Jandu v Kirpal and another (1975) EA 225 at pp 233, 234, 237; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1[1976] Kenya LR 253, at pp 257, 258);

33. From the evidence tendered by both sides of the suit, it is clear that the Applicants' possession of the suit property was indeed initially, with permission of the then registered proprietor, the late Cheruiyot Kimilot. The Respondent explained that his father gave the land to his brother to cultivate and feed his children.

34. I note that at paragraph 6 of the Supporting Affidavit to the Summons, the 6th Applicant deponed as follows: -

> " THAT our late father and the deceased registered proprietor were cousin brothers and they lived in the suit land upon entering occupation sometime in 1964 and continued to live and share the land peacefully."

35. What can be deduced from this one statement is that the Applicants gained entry into the land with consent of the registered owner granted to their father. Their entire family lived on the land from 1964, by virtue of this consent, which was not withdrawn during the lifetime of the deceased registered proprietor.

36. I am again guided by Kuloba J, as he then was, in his judgment, in the case of Mbui vs Maranya (Supra), when he stated as follows:

> " Now, in this country, go to the country side, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.
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> To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given this things, because the owner knows that it does not matter for how long you borrow this things, he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession... I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.
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> The keeping on our land of landless relatives, clansmen... for long periods of time until they are able to buy their own land is a custom we all know... The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society."

37. In Rodgers Mwambonje -vs- Douglas Mwambonje (2014) KEELC 114 (KLR), the Court held that:-

> " Taking a cue from the sentiments of the court in the Mbui case (supra), which I am in agreement with, this court cannot overlook the fact that in the African cultural set up, a brother will more often than not allow his brother or sister to stay on his land whenever necessary.
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> In my view, where a relative, like a brother, a sister, a father, a mother, or even an uncle lives on one's land, unlike in a case of a stranger, there is a rebuttable presumption that consent has given consent. The burden of proving that the consent or permission was not given will be on the person claiming the relative's land by virtue of the doctrine of adverse possession."

38. If the Respondent is to be believed, problems arose after his father's demise when the Applicants' father asked for a larger share of the land from him than what had initially been granted by the late Cheruiyot Kimilot.

39. Even then, the Respondent, being the Administrator of the registered owner's estate, did not revoke the consent, and instead allowed them to continue staying on the land while they approached different judicial fora to resolve the disputes over the suit land. This includes the agreement recorded before the Village Panel of Elders meeting held on 13th September, 2002 where the Respondent herein gave further consent to the Applicants' and their families to use 2 Acres of the land.

40. There can be no doubt therefore, that the fact of their occupation was known to the Respondent. This knowledge is made clear by his participation in the various suits filed in relation to the suit land, as well as the meetings with Village elders and the Applicants' families on the possible sharing and use of the suit property.

41. Nevertheless, although there was such permission issued initially and the Respondent condoned the Applicants' occupation of the suit property, the Respondent later commenced Eldoret ELC Case No. 834 of 2012. This court has seen a copy of the plaint in that suit and it is clear that the Respondent primarily sought for their eviction from the suit land. This court has seen no evidence that the said suit was determined and the eviction orders sought issued.

42. By law therefore, whereas the said suit did not amount to an interruption of the Applicants' occupation or possession of that portion of the suit land, it is this point that marks the end of the permission granted to the Applicants and their family members to occupy the land. It is after this suit therefore that their possession became adverse to the title of the registered proprietor and/or his estate.

43. In addition, the Applicants ought to have shown that their occupation was peaceful, notorious and uninterrupted for at least twelve (12) years. This court has already established that time for a possessor who went in with permission of the registered owner starts to run after the permission has been revoked. Thus, in this case, from the year 2012 when the permission was withdrawn to the time this suit was filed in 2016, only 4 years had lapsed. For the avoidance of doubt, the period of 12 years required under the *Limitation of Actions Act* had not lapsed.

44. As to whether the Applicants' possession of the land was peaceful, it is the Respondent's case that the Applicants' possession of the land has been neither quiet nor peaceful as alleged. He maintained that there have been multiple law suits over the suit land and referred to Judicial Review No. 175 of 2001, Burnt Forest Land Disputes Tribunal No. 9 of 2002; Succession Cause No. 152 of 2002 in which the Applicants allegedly filed an objection but were unsuccessful; HCCC No. 202 of 2011 and Eldoret ELC Case No. 834 of 2012.

45. The Applicants have not denied these suits or that they relate to the suit property herein. However, of the aforementioned suits, only JR No. 175 of 2001 and ELC Case No. 834 of 2012 were commenced by the Respondent herein to assert his rights over the suit land. It is my view that, seeing as time started to run after the year 2012, it is safe to say that the Applicants' stay from the year 2012 when the permission was withdrawn was peaceful. There were no violent altercations between the Applicants herein and the Respondent in his bid to get them to vacate the land, nor was any other suit filed by the Respondent since 2012 for eviction of the Applicants' from the land.

46. It is trite that for an adverse possession claim to succeed, the claimant has to meet not one but all the elements of adverse possession. The Applicants have established that they are indeed in possession of the suit property. It is also clear that the Applicant's occupation of the land after end of the period of permissive possession was peaceful. The Applicants have however failed to demonstrate that they have been in possession of the land adversely for the requisite number of years required under the *Limitation of Actions Act*.

47. The Applicants have not proved their claim on adverse possession to the required standard. For this reason, the Applicants' claim herein must fail.

b. What is the extent of the Applicants' entitlement over the suit property in light of the decision of the Burnt Forest Lands Dispute Tribunal adopted as CMCC Award No. 52 of 2002?

48. The Limitations of Actions Act at Section 4(4) that:-

> (4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears

of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

49. The copy of the judgment of the Tribunal indicates that it was delivered on 15th May, 2002. The said decision was adopted vide Award No. 52 of 2002 as a judgment of the Chief Magistrate's Court and a decree issued thereupon on 12th July, 2002. Even though the said award granted the Applicants' mother a 6 Acre portion out of the suit property, it would appear that the said determination was never implemented. The order to subdivide the land to comply with the award was also not implemented.

50. In the circumstances, and by virtue of the said Section 4(4) of the *Limitation of Actions Act*, the said judgment and the decree arising out of it have since lapsed by operation of law. The portion of land therefore granted thereunder thus reverted back to the estate of the deceased registered owner of the suit land.

c. Who should bear costs of the suit?

51. Section 27 of the *Civil Procedure Act* provides: -

> 27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;
>
> Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

52. It is well recognized that costs are not meant to penalize the parties, but to compensate the successful party for the trouble taken in prosecuting or defending the case. Moreover, costs are awarded at the discretion of the court, which discretion, is explained the Halsbury's Laws of England, 4th Edition (Re-issue), (2010), Vol. 10. para 16 as follows:-

> " The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice."

53. The proviso to Section 27 allows a court, for good reason, to depart from this general rule that costs follow the event. Whereas such good reasons will vary from case to case, the exercise of discretion on costs depends on the facts of each case. Some of the factors that may be taken into consideration when determining the costs of suit were said in Morgan Air Cargo Limited vs Everest Enterprises Limited (2014) eKLR, to include:

a. the conduct of the parties

b. the subject of litigation

c. the circumstances which led to the institution of the proceedings

d. the events which eventually led to their termination

e. the stage at which the proceedings were terminated

f. the manner in which they were terminated

g. the relationship between the parties and

h. The need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.

54. Since the above list is inclusive, courts must also be guided by other matters including likely consequences of the order for costs. It is clear in this instance that the Respondent had no hand in the Applicants' action of filing an adverse possession claim that had not matured. However, as is evident, the parties herein are family members who have fought several legal battles over the suit property herein. And even though the Applicants have lost this claim, it is not lost on the court that they may now be forced to move out of the land which they have always known as their home.

55. Therefore, although the Respondent is entitled to compensation for the expenses accrued in defending this suit, it would be punitive to condemn them Applicants to costs knowing that they now have to find an alternative place of abode. For this reason, and for the sake of peace and the possibility of reconciliation and future good relations between them, if at all that is still possible, this court will not condemn the Applicants to pay the costs of this suit.

Orders:

56. Consequently, I find that the Applicants failed to prove that they acquired the suit property by way of adverse possession. For this reason, the Originating Summons dated and filed on 4th November, 2024 has no merit and is dismissed with no orders as to costs.

57. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 15TH DAY OF MAY, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

ELC, JUDGE

In the presence of;

Ms. Jeruto holding brief for Mwetich for Applicants/Plaintiffs.

Respondent/Defendant present in person.

Court Assistant - Laban.