



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 60 OF 2018

RICHARD NAMIN KIPSOI..... 1ST PLAINTIFF

PAUL YEGO KIPSOI..... 2ND PLAINTIFF

DAVID SANG KIPSOI.....3RD PLAINTIFF

VERSUS

ELIUD EMOJONG.....1ST DEFENDANT

DANIEL EMOJONG.....2ND DEFENDANT

J U D G M E N T

RICHARD NAMIN KIPSOI, PAUL YEGO KIPSOI, DAVID SANG KIPSOI and ROBERT SERONEI KIPSOI (the 1st, 2nd, 3rd and 4th plaintiffs respectively) are the children of the late **KIPSOI NGEIYWO NAMUDOGO (KIPSOI)** who was registered as proprietor of the land parcel **NO NORTH MALAKISI/WEST SASURI/96** (the suit land) on 20th September 1999. Following his demise, the plaintiffs were registered as the proprietors of the suit land and the title deed was issued in their joint names on 30th October 2000. However, the Green Card to the suit land shows that it was first registered in the names of **PAPA IMODOI (IMODOI)** on 15th January 1979 before his name was cancelled from the register apparently upon implementation of the decision of the Minister.

By a plaint filed on 23rd October 2018, the plaintiffs sought the following substantive remedies against the defendants herein i.e. **ELIUD OMOJONG** and **DANIEL EMOJONG**: -

(a) An eviction order to issue evicting the defendants, their agents and/or servants from the land parcel NO NORTH MALAKISI/WEST SASURI/96.

(b) A permanent injunction to issue restraining the defendants, their agents, servants or any other person from entering in, leasing, selling, dealing putting structures or in any manner whatsoever interfering with the plaintiffs' ownership and/or interest of the land parcel NO NORTH MALAKISI WEST SASURI/96.

(c) Costs and interest.

The basis of their claim is that they are beneficiaries of the Estate of their late father **KIPSOI** and acquired ownership of the suit land by way of transmission. That in the year 2014, the defendants without any colour of right and/or justification whatsoever forcefully invaded the suit land, erected structures thereon and have been using the same and interfering with the plaintiffs' ownership, possession and use of the said land thus necessitating this suit.

The plaintiffs also filed their separate statements dated 22nd October 2018 and a list of documentary evidence being: -

- 1. Copy of the Identity Card for RICHARD NAMIN KIPSOI the 1st plaintiff.**
- 2. Letter of Authority allowing the 1st plaintiff to plead on behalf of the other plaintiffs.**
- 3. Certificate of Confirmation of Grant issued to the plaintiffs in respect to the Estate of KIPSOI.**
- 4. Application by the plaintiffs to be registered as proprietors of the suit land through transmission.**

5. Copy of the title deed to the suit land.

6. Copy of the Certificate of Search in respect to the suit land.

And although the demand letter is listed as part of the plaintiffs' documents, it was not filed.

The contents of their statements were the same. They confirmed that they are the registered proprietors of the suit land measuring 3.8 Hectares and which originally belonged to their late father **KIPSOI** before they acquired it by way of transmission. That in or about 2014, the defendants forcefully and without any colour of right, invaded the suit land erected structures thereon and have been using it thus interfering with their ownership and possession of the said land. That they have continued to do so despite demands and entreaties made to them.

The defendants filed a joint defence on 7th January 2019 long after a request for Judgment had been made. However, following a consent dated 13th May 2019, that defence was admitted though filed late.

In their defence, the defendants denied having invaded the suit land or forcefully erected structures thereon and put the plaintiffs to strict proof thereof. They pleaded that in 1977, their late father **MUSA E. JUMA (MUSA)** purchased the entire suit land from **IMODOI** and was granted vacant possession thereof which he exclusively enjoyed until his demise. That their late father **MUSA** sub – divided the suit land into portions which he allocated them and where they reside. That the plaintiffs (in the defence there is a typographical error referring to them as defendants) have never resided on the suit land at all and their registration as owners thereof was done secretly without the knowledge of the defendants who are the persons in actual possession thereof. That as a consequence of the foregoing, the plaintiffs hold the suit land in trust for the defendants whose prescriptive rights thereon have crystallized.

The defendants also made a Counter – Claim seeking the following remedy in paragraph 12: -

12: A declaratory order that the plaintiffs' right and/or interest in the suit land was extinguished by law and that they hold the same in trust for the defendants and for an order directing them to transfer the said land to the defendants and in default, the Executive Officer or any other official appointed by the Court do execute the transfer documents on their behalf to vest the suit land in the names of the defendants.

The basis of their Counter – Claim is that since 1977 to – date, they have been in open, continuous peaceful and exclusive occupation of the suit land without any interruption. That they have settled their families and even buried their relatives on the said land for a period of over 40 years and therefore, the plaintiffs' rights have been extinguished by operation of law and their claim be dismissed and the Counter – Claim allowed.

The defendants also filed their statements and those of their witnesses **EVANS BARASA EKISA (DW 3)** and **OMUSE MUSERERA BENSON (DW 4)**.

They also filed the following documents: -

- 1. Sale agreement dated 5th March 1977.**
- 2. Sale agreement dated 6th November 1977.**
- 3. Sale agreement dated 2nd May 1978.**
- 4. Sale agreement dated 24th December 1978.**
- 5. Sale agreement dated 18th March 1979.**
- 6. Sale agreement dated 8th June 1984.**
- 7. Green Card for land parcel NO NORTH MALAKISI/WEST SASURI/96.**
- 8. Death Certificate for PAPA IMOTEI OKAMILIO.**

By a supplementary list of documents dated 12th June 2019, the defendants filed the following documents: -

- 1: Copy of letter dated 23rd February 2011.**
- 2: Bundle of photographs.**

In their statements dated 20th November 2018 and which are similar in contents, **ELIUD EMOJONG** and **DANIEL EMOLONG** (1st and

2nd defendants respectively) state that the plaintiffs' suit is misconceived and that the suit land belonged to their late father **MUSA** who purchased it from his paternal uncle **IMODOI** in 1977 and took possession thereof. That **IMODOI** was also buried on the suit land where the defendants have lived in their respective portions allocated to them by their late father **MUSA**. That the plaintiffs have never stayed nor set foot on the suit land and instead, it is the defendants who have lived thereon peacefully and no issue has ever been raised about their occupation of the suit land even after the demise of their father. They denied having entered the suit land in 2014 adding that they have constructed houses where they live with their families. They wondered how **KIPSOI** could have been registered as the proprietor of the suit land on 20th September 2000 in execution of the Minister's decision when the then registered owner **IMODOI** had passed away in 1983. They pleaded that the said registration could only have been irregular null and void and asked that they be registered as the proprietors of the suit land since the plaintiffs' rights have been extinguished.

In his statement also dated 20th November 2018, **EVANS BARASA EKISA (DW 3)** states that he knows the defendants as the sons of **MUSA** who passed away in 2015 and who had purchased the suit land from his uncle **IMODOI** in 1977. That when he passed away in 1983, **IMODOI** was buried on the suit land.

That the defendants have extensively developed the suit land by putting up houses and by planting trees and crops in addition to those that their father **MUSA** had planted soon after acquiring the land in 1977. That the defendants who are his neighbours have occupied the suit land peacefully and without interruption until this case was filed.

OMUSE MUSESERA BENSON (DW 4) also recorded his statement dated 20th November 2018 and which echoed the statement of **EVANS BARASA EKISA (DW 3)**.

The plaintiffs filed a reply to the Counter – Claim and described it as inept, fatally defective, incompetent and not disclosing any cause of action against them. They denied all the averments therein and maintained that the defendants are trespassers to the suit land and have no right recognized either in law or equity and should be evicted therefore. They urged that the defendants Counter – Claim be dismissed with costs and Judgment be entered as prayed in the plaint.

The hearing commenced on 22nd June 2021 when the 1st plaintiff **RICHARD NAMIN KIPSOI (PW 1)** testified on behalf of the plaintiffs while the defendants also testified and called their two witnesses **EVANS BARASA EKISA (DW 3)** and **OMUSE MUSESERA BENSON (DW 4)** in support of their case. They all adopted as their evidence the statements contents of which I have already summarized above. They were then cross – examined and re – examined by Counsel.

Submissions were thereafter filed both by **MR TETI** instructed by the firm of **TETI & COMPANY ADVOCATES** for the plaintiffs as well as by **MR MURUNGA** instructed by the firm of **J. O. MAKALI & COMPANY ADVOCATES** for the defendants. I have considered the evidence by all the parties as well as the submissions by Counsel.

Both Counsel identified what they consider to be the issues for this Court's determination and they are basically in agreement. I adopt the issues as identified by Counsel and set them out as follows: -

1. **Whether the plaintiffs are the registered proprietors of the suit land.**
2. **Whether the plaintiffs' title to the suit land is subject to the defendants' rights recognized under the provisions of both the Land Act and the Land Registration Act 2012.**
3. **Whether the defendants and their families and, before them their father MUSA have been in open, continuous peaceful and exclusive occupation and possession of the suit land since 1977 or if in fact they only trespassed thereon in 2014 and have not met the threshold of adverse possession and should be evicted therefrom.**
4. **Whether the plaintiffs are entitled to the orders sought in their plaint.**
5. **Whether the defendants are entitled to the orders sought in their Counter – Claim.**
6. **Costs.**

It is not in dispute that the plaintiffs were registered as the proprietors of the suit land on 8th August 2000 and the title thereto was issued to them on 30th October 2000. That title deed and the Certificate of Official Search are part of the documents filed by the plaintiffs herein. Under **Section 26(1)** of the **Land Registration Act**, such title deed is prima facie evidence that the person named therein is the absolute and indefeasible owner of the land subject to the encumbrances, easements and restrictions set out therein. As the registered proprietors of the suit land, the plaintiffs are entitled to all the rights and privileges belonging or appurtenant thereto. Those rights and privileges no doubt include the right to eject trespassers and that is basically the plaintiffs' contention.

That notwithstanding, the plaintiffs' registration as the proprietors of the suit land is subject to the overriding interests set out in **Section 28** of the **Land Registration Act** and the relevant one is provided for in paragraph **(h)** as follows:-

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(a) –

(b) –

(c) –

(d) –

(e) –

(f) –

(g) –

(h) Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

Similarly, **Section 7** of the **Land Act** provides that: -

“Title to land may be acquired through –

(a) –

(b) –

(c) –

(d) Prescription.”

It is these prescriptive rights that the defendants are agitating in their defence and Counter – Claim. They claim that the plaintiffs are mere trustees holding the suit land on their behalf and further, that they have been in open, peaceful, quiet, open and un – interrupted occupation of the suit land from the time their late father **MUSA** purchased it in 1977. They have denied that they invaded and trespassed thereon in 2014 as pleaded by the plaintiffs.

Section 25 of the **Land Registration Act 2012** which recognizes and protects the rights of a registered proprietor has a proviso in **Sub – Section (2)** that: -

“Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

The thrust of the defendants’ Counter – Claim, however, is that the plaintiffs title to the suit land has been extinguished by operation of the law and that they have acquired it by way of adverse possession. I shall now therefore determine issue No 3.

Before I do so, I must interrogate one important issue raised by the defendants with regard to the registration of the plaintiffs as the proprietors of the suit land on 8th August 2000 and the subsequent issuance of the title thereto in their names on 30th October 2000. In paragraph 5(a) of their defence and Counter – Claim, the defendants have questioned the regularity of the registration of the suit land in the plaintiffs’ name stating that it was done ***“secretly and without any knowledge or reference to the plaintiffs who are persons in actual occupation of the land.”*** And in paragraphs 14 and 15 of his statement the 1st defendant (**ELIUD EMOJONG**) states as follows: -

14: “That I have looked at the certified copy of the Register herein where it is indicated that KIPSOI NAMUTOKO was registered on 20/9/2000 in execution and/or implementation of the Ministries (sic) decision.”

15 “That the said decision must have been irregular null and void as at the said time it was being made by PAPA IMODOI who was the earlier registered owner had already passed on in 1983 and there was no way he could have been a party to the said proceedings.”

My evaluation of the evidence herein suggests that the plaintiffs did not in fact obtain a valid title to the suit land. The Green Card shows that although the plaintiffs obtained the registration of the title in their names on 8th August 2000 and thereafter the title on 30th August 2000, the first registered proprietor of the suit land was **IMODOI** on 15th January 1979, that registration was however cancelled on 20th September 1999 in favour of **KIPSOI** allegedly on the implementation of the Ministers decision. A copy of that decision has not been availed. However, it is trite law that only a Court can cancel title to land. The registration of **KIPSOI** as the proprietor of the suit land was therefore a nullity. And since a nullity begets a nullity, it follows that **KIPSOI** had no interest in the suit land which he could pass on to the plaintiffs. Having said so, however, the registration of land in the name of any proprietor is a matter of fact to be gleaned from the title itself and the defendants are not questioning the propriety of that registration. Their claim is premised on the doctrine of adverse possession.

Section 38(1) of the **Limitation of Actions Act** provides as follows: -

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 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 **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR 184**, the Court of Appeal set out what a party claiming land by way of adverse possession must prove. It said: -

“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – WANJE .V. SAIKWA (No 2) 1984 KLR 284.”

The proper way of proving that a party has acquired land by adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period – **WAMBUGU .V. NJUGUNA 1983 KLR 173**.

The burden of proving that a party is entitled to land by way of adverse possession is with the claimant who must lead cogent evidence to prove that fact. In the case of **ABDULKHALL MOHAMED ABDULKHALIK MAZRUI & OTHERS .V. JOSIAH KAFUTA J. MTLA & ANOTHER 2021 eKLR**, the Court said: -

“The burden of proving that a party is entitled to land by way of adverse possession lay with the 1st respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse, open, peaceful, without the consent of the 1st and 2nd appellants and for an uninterrupted period of 12 years expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord HOFFMAN put it in *R.V. OXFORDSHIRE COUNTY COUNCIL Ex. P. SUNNINGWELL PARISH COUNCIL [2000] AC 335 at 350*, “not by force, nor stealth, nor the licence of the owner. See also *KIMANI RUCHINE .V. SWIFT RUTHERFORD & CO LTD 1980 KLR on this point*.”

It is also important to note from the decision of the Court of Appeal in **GITHU .V. NDEETE 1984 KLR 776** that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.

From the evidence on record, it is not in doubt, in fact it is conceded by the plaintiffs, that the defendants are in occupation and possession of the suit land. Indeed, that is why the plaintiffs’ first prayer is for the eviction of the defendants, their servants and agents from the suit land. However, whereas the plaintiffs claim that the defendants trespassed onto the suit land in 2014, the defendants’ case is that in fact their late father **MUSA** purchased the suit land in 1977 and took possession and they have been in open, peaceful, continuous and exclusive occupation thereof. In support of their claim that they have been in occupation of the suit land since 1977, the defendants produced as part of their documentary evidence what they refer to as a sale agreement between their late father **MUSA** and **IMODOI**. Most of them are actually acknowledgement slips documenting when and what **MUSA** was paying for the suit land between 5th March 1977 and 8th June 1984. Those documents were drawn by lay persons. However, it is manifestly clear that it was pursuant to the contents thereof that **MUSA** took possession and occupation of the suit land in 1977. There has been a suggestion by the plaintiffs that the said documents refer to a different parcel of land and not the suit land. This is how counsel for the plaintiffs has put it in paragraph 25 of his submissions: -

25 “Lastly, we wish to submit as follows: that the documents produced by the defendants do not support their case. First, the sale agreements produced before this Honourable Court refer to plot No 96 while the suit land is land title number N. MALAKISI/W/SASURI/96 which in this case is a different parcel of land. Second, the Certificate of Death produced before this Honourable Court belongs to one PAPA IMOTEI OKAMILLIO and not PAPA IMODOI who the defendants claim to have sold the suit land to the defendants’ father. Third, the defendants have not demonstrated to this Court their relationship between them and the so called MUSA E. JUMA. No death certificate of the deceased was produced nor has the Certificate of Confirmation of grant in relation to the Estate of the deceased been produced to demonstrate that the defendants related to one MUSA E. JUMA (deceased) who purportedly purchased plot No 96 in 177 and therefore they cannot argue that they have been in possession of the suit land since the year 1977. Fourth, the defendants fully took possession of the suit land in the year 2014. The defendants have not proved to the required standard when they took over possession. It is important for this Honourable Court to be informed in clear terms when the defendants took over possession of the suit land in order to calculate the 12 years’ timeline.”

With regard to the identification of the suit land, it is true that the documents produced by the defendants refer to it as plot No 96 whereas it is in fact parcel **NO NORTH MALAKISI/WEST SASURI/96**. However, there is nothing to suggest that other than the suit land, there is another different parcel of land known as plot No 96 and which the said **MUSA** purchased and which the defendants should be occupying instead of the suit land. There is also evidence from **EVANS BARASA EKISA (DW 3)** and **OMUSE MUSESERA BENSON (DW 4)** who are independent witnesses that **JUMA** purchased and took possession of the suit land from **IMODOI** in 1977. Further, it is instructive to note that the suit land was first registered on 15th January 1979 and could only have been known as plot No 96 as at 5th March 1977 when **IMODOI** received the first payment towards the purchase. Lastly, the Court has not heard any evidence from the family of **IMODOI** to the effect that he did not sell the suit land to **MUSA** in 1977. Nothing therefore turns on that submission. This Court is satisfied that plot No 96 and parcel **NO NORTH MALAKISI/WEST SASURI/96** refer to one and the same property and that is the suit land which the defendants occupy and from which the plaintiffs want them evicted.

And in relation to the fact that the Death Certificate refers to the deceased as **PAPA IMOTEI OKAMILIO** and not **PAPA IMODOI**, I did not hear the plaintiffs say that **PAPA IMOTEI OKAMILIO** is a different person and not the **PAPA IMODOI** referred to in the documents filed herein. To me, I consider that to have been caused merely by mispronunciation of names which is common in our rural set – up and I am not in the least persuaded to believe that it was done for purposes of perpetrating any fraud.

It has also been submitted that the defendants have not produced any Certificate of Confirmation to demonstrate that they are related to **MUSA** who purchased the suit land. Again, the defendants and their witnesses led evidence that their father was **MUSA EMOJONG**

JUMA and that he purchased the suit land from **IMODOI** in 1977. Among the documents produced by the defendants is a letter dated 23rd February 2011 addressed to **MUSA ECHUMA EMOJONG** by the plaintiffs' then Advocates **WALTER WANYONYI & CO ADVOCATES** demanding from him mesne profits for the illegal occupation of the suit land. And when he was led in his evidence in chief by his Counsel **MR TETI**, this is what the 1st plaintiff said: -

“There is a letter dated 23rd February 2011 addressed to the defendants’ father called MUSA ECHUMA EMOJONG by our then advocate WALTER WANYONYI. The defendants had invaded the land and were planning to sell it.”

That is an affirmation that the defendants are indeed sons and heirs of **MUSA**. Most importantly however, the defendants have not filed their pleadings as representatives of the Estate of **MUSA**. They have come to Court seeking orders in their own capacities as the persons in occupation and possession of the suit land from the time that their father **MUSA** purchased it in 1977 and settled therein. They did not therefore require any Grant before approaching this Court.

As to when the defendants entered the suit land, it is the plaintiffs' case that in fact they only invaded it in 2014 and have not occupied it since 1977 as alleged. When he was led in his evidence in chief, the 1st plaintiff said: -

“It is not true that the defendants have lived on the land since 1977. I am not aware that they purchased the land. It is me and the other plaintiffs who live on the land in dispute. They only invaded it in 2014 after our first born LAWRENCE KIPSOI died.”

If indeed the plaintiffs have been living on the suit land as claimed, nothing would have been easier than to produce photographs of the houses in which they live on the suit land. Instead, it is the defendants who produced photographic evidence showing their houses and crops on the suit land and I did not hear the plaintiffs claim that those photographs in fact show their houses and not those of the defendants. The defendants on the other hand were emphatic that not only was **IMODOI** buried on the suit land but further, that the plaintiffs have never lived thereon. In paragraph 7 of his statement, the 1st defendant states: -

7: “That the plaintiffs herein have never stayed nor set foot on LR NO N. MALAKISI/W. SASURI/96.”

The same is repeated in paragraph 8 of the 2nd defendant's statement as follows: -

8 “That the plaintiffs herein are total strangers to me and have never stayed on or set foot on this parcel of land ever since.”

Their witnesses **EVANS BARASA EKISA (DW 3)** and **OMUSE MUSESERA BENSON (DW 4)** confirmed this in paragraphs 9 and 8 respectively of their statements wherein they say that the defendants who are their neighbours have always been in peaceful occupation of the suit land until this suit was filed. And when he was cross – examined by **MR MURUNGA** Counsel for the defendants, the 1st plaintiff said: -

“I live in KITALE at a place called KOYI KOYI FARM since 1965 when we bought the land there. We bought the land together with my father KIPSOI NGEIYWO NAMUDOGO. So, since 1975, we have been living at KOYI KOYI FARM. I even obtained my Identity Card there.”

Clearly therefore, even though the plaintiffs were registered as proprietors of the suit land on 8th August 2000 and their father **KIPSOI** on 20th September 1999, they have never occupied the suit land. They have been dispossessed of the same for a period well in excess of the 12 years required for the defendants to be entitled to the suit land by way of adverse possession.

The defendants are also required to have been in occupation and possession of the suit land peacefully as that is an important ingredient of the doctrine of adverse possession. In the case of **ROBERT SHUME & OTHERS .V. SAMSON KAZUNGU KALAMA 2015 eKLR**, the Court of Appeal said thus: -

“By dint of Section 7 of the Limitation of Actions Act, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent’s title for a period of twelve (12) and more years. Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was nec vi, nec clam, nec precario, that they were in exclusive possession of the property, that their possession was open, continuous, peaceful and notorious with the knowledge but without the permission of the owner.” Emphasis added.

The 1st plaintiff told the Court that the defendants' occupation of the suit land has not been peaceful and in support of that, he cited the letter dated 23rd February 2011 addressed to the defendants' father by the plaintiffs' advocate. This is what he said in his evidence in chief: -

“It is not true that the defendants have lived there peacefully for a long time. There is a letter dated 23rd February 2011 addressed to the defendants’ father called MUSA ECHUMA EMOJONG by our advocate WALTER WANYONYI.”

That letter came too late to interrupt the defendants' occupation of the suit land. By the time it was dispatched to the defendants' father, he and his family had been in occupation and possession of the suit land for 34 years and by that time, the 12 years had already run out. In any event, as was held in **NJUGUNA NDATHO .V. MASAI ITUMO & OTHERS C.A CIVIL APPEAL No 231 of 1999 [2002 eKLR]**, the **“mere writing of letters”** does not interfere with the occupation of the adverse possessor. What **KIPSOI** the then registered proprietor of the suit land should have done was to assert his right by making an effective entry on the suit land or by taking legal action against the

defendants – **GITHU .V. NDEETE 1984 KLR 776**. When he was cross – examined by **MR MURUNGA**, the 1st plaintiff referred to a dispute between his father **KIPSOI** and **IMODOI**. This is what he said: -

“I know PAPA IMODOI because he had a land dispute with my father which started in 1975 upto 1981. Then there was an appeal. The dispute was at the LAND ADJUDICATION OFFICE. PAPA IMODOI was living on the land.”

No proceedings of any such legal dispute were availed for my perusal. Besides, if there was any dispute between **IMODOI** and **KIPSOI** over the suit land, it did not involve the defendants or their father **MUSA**. Such a dispute could not therefore interrupt the defendants’ occupation and possession of the suit land. It is also clear from the decision in **GITHU .V. NDEETE** (supra), that the change of ownership of the suit land from **KIPSOI** to the plaintiffs did not interrupt the defendants’ adverse possession of the same. For purposes of adverse possession, time started to run from 20th September 1999 when the suit land was registered in the names of **KIPSOI** and not before. Therefore, by 2018 when this suit was filed, the plaintiffs’ rights over the suit land had been extinguished by operation of the law.

In view of all the above, it is obvious to me that the plaintiffs have no legal or equitable right over the suit land to justify the eviction orders sought against the defendants. Their rights had already been extinguished long before they filed this suit. Their claim must therefore be dismissed.

On the other hand, the defendants have led cogent evidence to support their claim that they are entitled to the suit land by way of adverse possession. It is clear that from the year 1977 when their father **MUSA** took possession of the suit land, their family has been in open, continuous, exclusive, peaceful and un-interrupted occupation of the suit land. Their Counter – Claim is for allowing.

On the issue of costs, the defendants neither sought the orders that the plaintiffs’ suit be dismissed with costs or that their Counter – Claim be allowed with costs. Earlier in this Judgment, I set out the main prayer that the defendants sought in paragraph 12 of their defence and Counter – Claim. There is no reference to an award of costs. In the final paragraph of their defence and Counter – Claim, they pleaded as follows: -

“Reasons wherefore the defendants pray that the plaintiffs’ suit be dismissed and Judgment be entered in their favour as prayer for in their Counter – Claim.”

As I have already stated above, there was no prayer for cost in the Counter – Claim. The issue of costs was therefore neither pleaded nor canvassed at the trial. To award the defendants costs would be to turn this Court into a charitable institution. Courts do not award freebies and during these hard times brought about by the **COVID – 19** pandemic, it will be an unfair exercise of my discretion to award the defendants costs when they have not asked for them. Whereas it is provided under **Section 27** of the **Civil procedure Act** that costs follow the event, such costs are also at the discretion of the Court. Costs are therefore not granted automatically and the discretion whether or not to grant a party costs must be exercised judicially and for good reasons. In **HALSBURY’S LAWS OF ENGLAND 4TH EDITION (2010) VOL 10 PARAGRAPH 16**. It is stated that: -

“..... where the 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”

In my view, the rule that costs follow the event is only a general guide. Its application must take into account the peculiar circumstances of each case. In the circumstances of this case where the defendants did not plead for the award of costs nor lead any evidence in that regard, it will not be a proper exercise of my discretion nor in the interests of justice to award them costs. The cause of justice will best be served if I order that each party meets their own costs.

Ultimately therefore and having considered all the evidence in this matter, I enter Judgment for the defendants in the following terms: -

1. The plaintiffs’ claim is dismissed.

2. The defendants’ Counter – Claim is allowed as follows: -

(a) The defendants have acquired by way of adverse possession the land parcel NO NORTH MALAKISI/WEST SASURI/96.

(b) The plaintiffs’ interests in the land parcel NO NORTH MALAKISI/ WEST SASURI/96 have been extinguished by operation of the law.

(c) The plaintiffs shall within 30 days of the delivery of this Judgment execute all the relevant documents to transfer the land parcel NO NORTH MALAKISI/WEST SASURI/96 in the joint names of the defendants.

(d) In default of (c), the Deputy Registrar shall be at liberty to execute the said documents on behalf of the plaintiffs and the Land Registrar Bungoma shall rectify the register accordingly.

3. Each party shall meet their own costs.

BOAZ N. OLAO.

J U D G E

21ST SEPTEMBER 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 21st day of September 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

21ST SEPTEMBER 2021.