



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC CASE NO. 67 OF 2013

TERAH JORAMPLAINTIFF

VERSUS

NAHASHON DAUDI KISIERO1ST DEFENDANT

BENJAMIN NDULULU MEINY KISIERO2ND DEFENDANT

YONA BRAMWEL MUSEE.....3RD DEFENDANT

ANN DAUDI4TH DEFENDANT

PHYLIS CHERUBET NDIEMA 5TH DEFENDANT

SIMEON CHANGWANI NDIEMA6TH DEFENDANT

ANN KAIBEI TENDETI7TH DEFENDANT

LAWRENCE CHERUI 8TH DEFENDANT

JONES CHERUI 9TH DEFENDANT

HAILA CHERUBET10TH DEFENDANT

BEATRICE KIMIYEL..... 11TH DEFENDANT

JOHN CHEPKONYI KIMKUNG 12TH DEFENDANT

BUGAA A.I.C PRIMARY SCHOOL13TH DEFENDANT

J U D G M E N T

TERAH JORAM (the plaintiff herein) moved to this Court by his plaint dated 13th march 2013 seeking Judgment against **NAHASHON DAUDI KISIERO, BENJAMIN NDULULU MEINY KISIERO, YONA BRAMWEL MUSEE, ANN DAUDI, PHYLIS CHERUBET NDIEMA, SIMEON CHANGWANI NDIEMA, ANN TAIBEI TENDETI, LAWRENCE CHERUI** and **JONES CHERUI** (the 1st – 9th defendants respectively) in the following terms with respect to the land parcel **NO ELGON/KAPSOKWONY/478** (the suit land):-

a. Eviction of the defendants by themselves, their agents, servants and/or workers from titled NO ELGON/KAPSOKWONY/476.

b. Costs

c. Interests

The basis of the plaintiff's claim is that at all material times to this suit, he is the sole registered owner of the title **NO ELGON/KAPSOKWONYI/478** having been so registered on 28th February 1984. That on 1st April 2013, the defendants jointly and severally did forcibly enter unto the suit land and have remained there despite protests from the plaintiff. That the defendants have constructed houses on the suit land and embarked on ploughing the same and this act of trespass has exposed the plaintiff to loss and damage.

The particulars of trespass are pleaded in paragraph 4(i) to (iv) as follows: -

- i. Forcibly entering unto the title NO ELGON/KAPSOKWONY/478.**
- ii. Failure to vacate from title NO ELGON/KAPSOKWONY/478.**
- iii. Forcibly erecting houses on title NO ELGON/KAPSOKWONY/ 478.**
- iv. Ploughing on title NO ELGON/KAPSOKWONY/478.**

The plaintiff filed the following three (3) statements in support of his case: -

- 1. Statement dated 15th March 2013.**
- 2. Statement dated 9th April 2018.**
- 3. Statement dated 30th November 2019.**

The statement dated 15th March 2013 is brief and simply confirms that he is the registered proprietor of the suit land which the defendants forcibly invaded on 4th January 2013 and started constructing thereon.

In his statement dated 9th April 2018 and filed in response to the defence, he denies that **CHARLES KAIBEI TENDET** the deceased husband to the 7th defendant had purchased 7 acres out of the suit land. He further denies that the 7th defendant has been in peaceful possession thereof. He also denies that the said **CHARLES KAIBEI TENDET** had filed against him **BUNGOMA HIGH COURT CIVIL CASE No 24 of 2001 (O.S)**. He also denies that the 8th defendant purchased from him 3 acres out of the suit land and has been in peaceful possession thereof or that the late **BON CHEROP NDIEMA** the late father of the 6th defendant purchased from him 2 acres out of the suit land. He also denies that the late **BON NDIEMA** had filed against him **BUNGOMA HIGH COURT CIVIL CASE No 24 of 2001 (O.S)**. He denies further that the late **DAVID MEIN KISIERO** the late father of the 1st defendant had purchased from him 13½ acres out of the suit land or had also filed **BUNGOMA HIGH COURT CIVIL SUIT No 24 of 2001 (O.S)**.

In his last statement dated 30th November 2019 he denies that **HAILA CHERUBET, BEATRICE KIMIYEI** and **JOHN CHEPKONY KIMKUNG** who had been enjoined in this suit as the 10th, 11th and 12th defendants respectively had purchased land from him adding that the sale agreements filed by them are false since he is blind and can only thumb print documents due to his blindness which started in 1970. He also denies the statement of **JAMES KITENYWO BERA** the Headmaster of the 13th defendant to the effect that in 2000 the said **BUGAA PRIMARY SCHOOL** was a recipient of land donated to it by one **MOSES KIMUTAI CHESIARI** and one **ZELDA KEYO** who had bought it from the plaintiff.

The plaintiff also filed the following documents in support of his case.

1: LIST DATED 15TH MARCH 2013: -

- **Green Card for title NO ELGON/KAPSOKWONY/478.**

2: LIST DATED 8TH JUNE 2018: -

- **Pleadings in BUNGOMA HIGH COURT CIVIL CASE No 24 of 2002.**
- **Pleadings in BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 188 of 2011.**
- **BUNGOMA HIGH COURT MISCELLANEOUS CIVIL APPLICATION No 201 of 2006.**
- **BUNGOMA CHIEF MAGISTRATE'S CIVIL CASE MISCELLANEOUS APPLICATION No 19 'B' of 1999.**
- **ORDER IN KIMILILI LAND CASE No 19 of 1999.**
- **WESTERN PROVINCIAL TRIBUNAL APPEALS CASE No 120 of 1999.**
- **BUNGOMA HIGH COURT ELC MISCELLANEOUS APPLICATION No of 158 of 2013.**

3: LIST DATED 30TH NOVEMBER 2019: -

- **CHAMBER SUMMONS APPLICATION IN BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 129 of 2003.**

- **LETTER DATED 25TH OCTOBER BY ESHIKHONI AUCTIONEERS.**

4: LIST DATED 3RD DECEMBER 2019: -

- **PROCEEDINGS IN MT ELGON LAND DISPUTES TRIBUNAL CASE No 4 of 1999.**

The 1st to 9th defendants filed a joint statement of defence and Counter – Claim dated 2nd April 2013. They commenced by correcting some of their names to read as follows: -

1st defendant – DAVID CHEMWOO ARAP MIEN alias NASHON KISIERO CHEMWOO

6th defendant – SIMON CHONGWONYI NDIEMA and

7th defendant – ANNE KAIBET TENDET.

They pleaded that the plaintiff sold portions of the suit land to them directly or to their family members through whom they have acquired possession thereof. That the 1st, 2nd, 3rd and 4th defendants acquired possession of their parcels through **DAUDI MEIN KISIERO** (now deceased) who was the father to the 1st and 2nd defendants, grandfather to the 3rd defendant and husband to the 4th defendant and who had purchased 13 ½ acres thereof from the plaintiff in 1988 and settled thereon. That the 5th and 6th defendants acquired possession through one **BON CHEROP NDIEMA** (now deceased) who was the husband of the 5th defendant and father to the 6th defendant and who had purchased 2 acres of the suit land from the plaintiff in 1988. That the said **BON CHEROP NDIEMA** settled his family thereon and when he died in 2004, he was buried on that portion where the 5th and 6th defendants have continued to live to – date. That the 7th defendant acquired a portion of the suit land measuring 5 acres through her late husband **CHARLES KAIBEI TENDET** who purchased it from the plaintiff in 1988. That the 8th defendant who is the husband to the 9th defendant similarly purchased 2 acres of the suit land from the plaintiff in 1990 and is in occupation and possession of the same to – date.

The 1st to 9th defendants pleaded therefore that they have been in possession of the suit land for more than 12 years and the plaintiff's suit is barred by the provisions of **Section 7 of the Limitation of Actions Act – CAP 22 Laws of Kenya**. That the 1st, 6th and 7th defendants have a suit pending against the plaintiff being **BUNGOMA H.C.C.C No 24 of 2002 (O.S)** and this suit offends the provision of **Order 4 Rule 1(1) of the Civil Procedure Rules 2010**.

In their Counter – Claim, the 1st, 6th, 7th and 8th defendants joined issues with the plaintiff and reiterated the contents of their plaint. They added that either directly or as personal representatives, they have been in occupation of portion of various portions of the suit land for more than 12 years and are entitled to be registered as proprietors thereof by way of adverse possession as follows: -

- a. 1st defendant as legal personal representative of the late DAUDI MEIN KISIERO – 13½ acres.**
- b. 6th defendant legal personal representative of the late BON CHEROP NDIEMA – 2 acres.**
- c. 7th defendant as legal personal representative of the late CHARLES KAIBEI TENDET – 5 acres.**
- d. 8th defendant – 2 acres**

They therefore Counter – Claimed by way of adverse possession the above parcels of land and sought the dismissal of the plaintiff's suit.

The 1st to 9th defendants also filed the statement of the following: -

DAVID CHEMWOO arap MEIN alias NAHASHON DAUDI KISIERO (DW 1) -THE 1ST DEFENDANT

In his statement dated 27th November 2018, he stated that he is the son of the late **DAUDI MEIN KISIERO**. That the 2nd defendant is his brother, the 3rd defendant his nephew and the 4th defendant his step – mother. That his late father purchased from the plaintiff 13 ½ acres of land out of the suit land in 1988. And at the same time **BON NDIEMA, LAWRENCE CHERUI** and **CHARLES KAIBEI TENDET** also purchased various portions of the suit land from the plaintiff and took possession thereof. That when his father died on 10th July 1991, he applied to be the Administrator of the Estate on 19th June 1998. However, when in 1999 he and other purchasers requested the plaintiff to give them title deeds for their portions of land, he was reluctant. They therefore filed a claim at the **KAPSOKWONY LAND DISPUTES TRIBUNAL** and were awarded their parcels as follows: -

- a. BEN C. NDIEMA - 2 acres**
- b. LAWRENCE CHERUI – 3 acres**
- c. DAVID CHEMWOO arap MEIN – 13 ½ acres.**

d. CHARLES KAIBEI TENDET – 5 acres.

The **TRIBUNAL**'s award was adopted as a Judgment of the Court in **KIMILILI RESIDENT MAGISTRATE CIVIL CASE No 19 of 1999**. The plaintiff was not satisfied with the award and filed an appeal at the **PROVINCIAL LAND DISPUTES APPEAL TRIBUNAL CASE No 120 of 1999**. The appeal was dismissed and the award was adopted as a Judgment of the Court on 12th June 2003. There has been no further appeal and those orders are still in place. The plaintiff's suit should therefore be dismissed.

ANN DAUDI (DW 2) - THE 4TH DEFENDANT

In her statement dated 27th November 2017 she confirmed that she is the widow of the late **DAUDI MEIN KISIERO** and the 1st defendant is her step – son and she adopts his statement filed in support of the defendants' case.

PHYLIS CHERUKUT CHEROP (DW 3) – THE 5TH DEFENDANT

She is the 5th defendant and told the Court that she had been wrongly referred to as **PHYLIS CHERUBET NDIEMA**. She recorded her statement dated 2nd June 2018 in which she confirmed that she is a widow to the late **BON CHEROP NDIEMA** and mother to the 6th defendant. She adopted the 6th defendant's statement as her evidence.

SIMEON CHANGWANI NDIEMA (DW 4) - THE 6TH DEFENDANT

He recorded a statement dated 19th December 2019 confirming that he is a son of the late **BEN CHEROP NDIEMA** and the 5th defendant.

He added that his late father purchased 2 acres of land from the plaintiff in 1988 out of the suit land but died before the title had been transferred to him. However, his parents took possession of the said land immediately and he and his mother still occupy it to – date.

That in 2001, his later father filed **BUNGOMA H.C.C.C No 24 of 2010 (O.S)** seeking the said title but died before the suit was determined.

That he thereafter applied for Letters of Administration in respect of his late father's Estate and the plaintiff is fully aware of the existence of **BUNGOMA H.C.C.C No 24 of 2001 (O.S)**.

ANN CHEMUTAI KAIBEI (DW 5) – THE 7TH DEFENDANT

She is the 7th defendant and has been referred to as **ANN KAIBEI TENDETI**.

In her statement dated 19th December 2017 she confirmed that she is the widow of the late **CHARLES KAIBEI TENDETI** who on 9th July 1998 had purchased 2 acres from the plaintiff and on 9th October 1988 he also purchased another 3 acres from the plaintiff out of the suit land thus making a total of 5 acres. That they took possession of the 5 acres immediately and have continued to use the said land since then.

That her late husband filed **BUNGOMA H.C.C.C No 24 of 2001 (O.S)** in which he sought the title thereto by way of adverse possession but the suit is yet to be determined. She therefore applied for Letters of Administration in order to represent his Estate.

That the plaintiff filed this suit while fully aware that her late husband had a subsisting suit against him. It is therefore just and equitable that the 5 acres be transferred in her names as pleaded in the Counter – Claim

BENJAMIN NDULULU KISIERO – (DW 6) – THE 2ND DEFENDANT

He is the 2nd defendant and a brother to the 1st defendant. Both are sons to the late **DAUDI MEIN KISIERO**.

In his statement dated 27th November 2018, he states that he adopts the 1st defendant's statement filed herein.

The 3rd, 8th and 9th defendants recorded statements but did not testify during the plenary hearing. However, the 3rd defendant claims the same land with the 1st, 2nd and 4th defendants.

The 1st to 9th defendants also filed the following as their documentary evidence as per the list dated 2nd April 2013: -

- 1. Grant of Letters of Administration to the Estate of DAUDI MEIN KISIERO.**
- 2. Land purchase agreements dated 8th July 1990 and 7th November 1990.**
- 3. Limited Grant of Letters of Administration of the Estate of CHARLES KAIBEI TENDET.**
- 4. Land purchase agreements dated 9th July 1988 and 9th October 1988.**

5. Limited Grant of Letters of Administration of the Estate of **BON CHEROP NDIEMA**.

6. Land purchase agreement dated 3rd November 1988.

7. Land purchase agreement dated 6th April 1990.

8. Land purchase agreement dated 1st May 1991.

9. Land purchase agreement dated 18th May 1993.

10. Although the list indicates that these were

11. photographs, no such photographs were annexed.

12. Green Card to the suit land.

By a reply to defence and defence to the Counter – Claim, the plaintiff joined issues with the defendants and reiterated the contents of his plaint.

He denied the contents of the plaint adding that the defendants are trespassers on the suit land. He also denied that they have been in occupation of the suit land for more than 12 years and are therefore not entitled to be registered as proprietors thereof by way of adverse possession. He also denied that the 1st, 6th and 7th defendants are the legal representatives of the Estates of **DAUDI MEIN KISIERO, BON CHEROP NDIEMA** and **KAIBEI TENDET**. He added further that the 1st, 6th and 7th defendants are not entitled to 13½ acres, 2 acres and 5 acres respectively as pleaded in the Counter – Claim and that a Preliminary Objection would be taken challenging the defendants' locus standi in this case. He therefore sought the dismissal of the defendants' Counter – Claim with costs.

By a Notice of Motion dated 1st March 2019 and filed herein on 8th March 2019, **HAILA CHERUBET, BEATRICE KIMIYEI, JOHN CHEPKONY KIMKUNG** and **BUGAA A.I.C PRIMARY SCHOOL** applied to be enjoined in these proceedings as defendants on the ground that they too were purchasers of various portions of the suit land. Although the plaintiff filed grounds of opposition to that application dated 20th March 2019, the application was subsequently allowed by consent on 29th April 2019. And although neither the plaintiff nor the 1st to 9th defendants amended their respective pleadings, the said Interested Parties became the 10th to 13th defendants respectively following that consent.

The 10th to 13th defendants thereafter filed their statements all dated 12th November 2019 in support of their respective claims to the suit land and in defence of the claims against them.

HAILA CHERUBET (10TH DEFENDANT)

She is the widow of one **BENSON KIMAWA KIMOBO** who passed away in 2001. In her statement, she states that her later husband had in 1993 and 1995 purchased one plot and 3 acres of land from the plaintiff. That they paid the plaintiff for the land in full and when her husband died, he was buried thereon. That although they put up their home on the land, the plaintiff has never given her the title and so in 2006, she approached the **KAPSAKWONY LAND DISPUTES TRIBUNAL** but although the **TRIBUNAL** issued an order in their favour, it was later quashed by the high Court. However, she is still in occupation of the suit land and even when the Court visited it on 10th November 2017, she was present and lodged her claim but was advised to make a formal claim in Court. So she and three others applied to be joined in these proceedings. She therefore seeks an order that the plaintiff be ordered to issue her with the title to her 3 acres.

BEATRICE KIMIYEI (11TH DEFENDANT)

She states in her statement that she is a widow to the late **CHARLES KIMIYEI** and has obtained a Limited Grant in respect to his Estate following his death on 9th December 2013.

That between 1992 and 1999, she and her late husband purchased 4 plots from the plaintiff next to **BUGAA PRIMARY SCHOOL** but have never been issued with title deeds. That she raised her claim with the Court during the visit to the locus on 16th November 2017 but was advised to lodge her claim and so she applied to be enjoined in this suit.

JOHN CHEPKONY KIMKUNG (12TH DEFENDANT)

In his statement, he states that in 2000, he purchased 2 acres of land from the plaintiff, paid the full purchase price and took possession thereof. He is living on the land which is next to **BUGAA PRIMARY SCHOOL** but is yet to receive his title deed. He raised his claims to the 2 acres when the Court visited the disputed land and was advised to lodge his claim in Court. He therefore applied to be enjoined in these proceedings. He therefore seeks orders that the Court directs the plaintiff to give him his title for the 2 acres.

JAMES KITEYWO BERA HEADMASTER BUGAA A.I.C PRIMARY SCHOOL (13TH DEFENDANT)

JAMES KITEYWO BERA is the Headmaster of **BUGAA A.I.C PRIMARY SCHOOL** which has been sued as the 13th defendant. In his

statement, he states that the school has been in existence since 2000 and sits on 4 acres of land some of which was directly sold to it by the plaintiff while some was donated to the school by **MOSES KIMUTAI CHESIARI** and **ZELDA KEYO** who had bought it from the plaintiff. That when the Court visited the suit land on 10th November 2017, the school raised its claim to the 4 acres but was advised to lodge its claim in Court. And so in March 2019, the school and other parties sought to be enjoined in this suit. He asked that the plaintiff be ordered to give the school the title to its 4 acres.

The 10th to 12th defendants filed their list of documentary evidence dated 14th November 2019 comprising the following sale agreements: -

1. Agreement dated 4th November 1993.
2. Agreement dated 18th May 1995.
3. Agreement dated 22nd July 1997.
4. Agreement dated 6th July 1992.
5. Agreement dated 13th September 1992.
6. Agreement dated 2nd May 1999.
7. Agreement dated 23rd March 1999.
8. Agreement dated 11th September 1999.
9. Agreement dated 25th March 2000.

The hearing commenced on 11th December 2019 with the plaintiff being the only witness in support of his case.

He adopted his statements herein as part of his evidence and also produced the list of documents referred to above as his documentary evidence.

The 1st, 2nd, 4th, 5th, 6th and 7th defendants similarly adopted as their evidence the contents of their statements referred to above.

Although the 3rd, 8th and 9th defendants did not testify, the 3rd defendant's case was prosecuted by the 1st, 2nd and 4th defendants.

HAILA CHERUBET (10th defendant), **BEATRICE KIMIYEI** (11th defendant), **JOHN KITEYWO BERA** who is the **HEADMASTER OF BUGAA A.I.C PRIMARY SCHOOL** (13th defendant) also adopted as their evidence their respective filed herein and also produced as their documentary evidence the various agreements filed herein.

Submissions were thereafter filed both by **MR BWONCHIRI** instructed by the firm of **OMUNDI BW'ONCHIRI ADVOCATES** for the plaintiff and by **MR J. S. KHAKULA** instructed by the firm of **J. S. KHAKULA & COMPANY ADVOCATES** for all the defendants.

I must at this stage point out that with the consent of the parties, the Deputy Registrar of the Court **HON. E. N. MWENDA** visited the suit land on 10th March 2017 at 12:30 pm and prepared a report dated 16th May 2017 which was filed as part of the record herein. Indeed, it was during that visit that the Interested Parties herein became aware about this suit and raised their respective claims with the Deputy Registrar who advised them to apply to be joined in these proceedings. That explains why they joined these proceedings late in the trial. It must be remembered also that the visit to the suit land was done before the Interested Parties (later 10th to 13th defendants) were joined in these proceedings.

Further, **BUNGOMA HIGH COURT CIVIL CASE No 24 of 2002** is not pending. It was dismissed by **MUKUNYA J** on 14th November 2016 for want of prosecution.

The plaintiff's case is that whereas he is the registered proprietor of the suit land, the defendants have forcibly entered thereon and embarked on constructing houses and ploughing and should therefore be evicted. The defendants' Counter – Claim is that they entered various portions of the suit land after they were purchased from the plaintiff by their deceased fathers, spouses and other relatives in the 1980's and 1990's. That they have therefore acquired their various portions of the suit land by way of adverse possession and should be registered as the proprietors and be issued with titles. Further, that the plaintiff's suit is statute barred.

Before I consider the parties' respective claims, an issue of law was raised by the plaintiff in response to the defendants' Counter – Claim which I must first determine. In paragraph 8 of his reply to defence and defence to the Counter – Claim, the plaintiff pleaded that he would raise a Preliminary Objection to the effect that the defendants have no locus standi to institute this suit on behalf of their deceased kin. He therefore sought orders striking off the said Counter – Claim. That issue was not canvassed as a Preliminary Objection which ideally ought to have been raised at the earliest opportunity because if, it is sustained, the defendants' Counter – Claim will be struck out. I must nonetheless consider it even at this late stage.

The term locus standi is defined in **BLACK'S LAW DICTIONARY 10TH EDITION** as: -

“The right to bring an action or to be heard in a given forum.”

In **NJAU .V. COUNCIL OF NAIROBI 1983 KLR 625**, the Court of Appeal defined the term as follows (per **HANCOX J.A** as he then was)

“The term locus standi means a right to appear in Court and, conversely, as is stated in JOWITT'S DICTIONARY OF ENGLISH LAW, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding.”

In this case, I understand the plaintiff to be pleading in paragraph 8 of his reply to the defence and Counter – Claim that the defendants have approached this Court as representatives of their deceased kin, perhaps without the necessary Grant of Letters of Administration in respect to their deceased kins' Estates and therefore lack the locus standi to prosecute their Counter – Claim. It is clear from the documents herein that some of the defendants have obtained the necessary Grants of Letters of Administration with respect to the Estates of their deceased kin while others have not. At least three (3) Grants of Letters of Administration were produced as exhibits by some of the defendants. These are: -

- 1. Limited Grant of Letters of Administration Ad Litem issued to SIMON CHONGWONY NDIEMA (6th defendant) in respect of the Estate of BON CHEROP NDIEMA in BUNGOMA HIGH COURT P & A CAUSE No 251 of 2011.**
- 2. Grant of Letters of Administration Intestate issued to DAVID CHEMWO ARAP MEIN alias NASHON KISIERO CHEMWO (1st defendant) in respect of the Estate of DAUDI MEINI KISIERO in BUNGOMA HIGH COURT SUCCESSION CAUSE No 87 of 1996.**
- 3. Limited Grant of Letters of Administration and Colligenda bona issued to ANNE CHEMUTAI KAIBET (7th defendant) in respect to the Estate of CHARLES KAIBET TENDET in BUSIA HIGH COURT SUCCESSION CAUSE No 389 of 2011.**

Some of the defendants did not therefore avail any such Grants. However, lack of any such Grants of Letters of Administration does not take away any of the defendants' right to approach this Court because although the parcels of land they now seek were purchased by their deceased kin, they have approached this Court as persons who are now in occupation and possession of various portions of the suit land. Indeed, in paragraph 4 of their defence, the defendants have pleaded as follows: -

4: “Paragraph 5 of the plaint is denied. The defendants aver that they have been in possession of the suit land for more than 12 years. The plaintiff is barred by the provision of Section 7 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya from barring (sic) this suit against them.”

And in paragraph 10 of their Counter – Claim, they have pleaded that: -

10: “The 1st, 6th, 7th and 8th defendants, either directly or as personal legal representatives, aver that they have been in occupation of portions of the suit land for more than 12 years and are entitled to be registered as proprietors thereof by reason of the doctrine of adverse possession.....”

And following their joinder in these proceedings, it became clear from the statements of the 10th to 13th defendants that they are claiming various portions of the suit land by virtue of their occupation and possession thereof.

It is clear therefore that the defendants have a direct interest in various portions of the suit land even though they were purchased by their deceased kin.

Therefore, the plea of lack of locus standi on the part of the defendants is without merit and must be dismissed.

The issues that call for my determination in this matter are: -

- 1. Whether the defendants or their deceased kin forcibly entered the suit land and should therefore be evicted.**
- 2. Whether the plaintiff's right to the suit land has infact been extinguished by operation of the law and the defendants are entitled to various portions of the suit land by way of adverse possession.**
- 3. Who shall bear the costs of this suit.**

It is common ground that the plaintiff is the registered proprietor of the suit land measuring 15.5 Hectares (38.3 acres) since 28th February 1984 having been the first proprietor as per the Green Card annexed to his supporting affidavit and which was also produced by the defendants. Prima facie therefore and in terms of the provisions of **Section 26(1)** of the **Land Registration Act 2012** and **Section 27(a)** of the repealed **Registered Land Act** which was the applicable law at the time of the registration of the suit land, the plaintiff is the **absolute and indefeasible owner thereof**. He enjoys the rights and privileges that belong or are appurtenant thereto. These include the right to eject trespassers. That is the main remedy which the plaintiff seeks from this Court.

In paragraph 4 of his plaint, the plaintiff has pleaded as follows: -

4: **“That on the 4.1.2013 the defendants jointly and severally did forcibly enter into the plaintiff’s parcel and have remained thereto despite protests from the plaintiff. The defendants’ acts on the plaintiff’s parcel amounts to trespass and has indeed exposed the plaintiff into loss and damages. The defendants have constructed houses on the suit parcel and have embarked on ploughing the same.**

PARTICULARS OF TRESPASS

- 1(i) **Forcibly entering unto title number ELGON/ KAPSOKWONY/478.**
- (ii) **Failure to vacate from title number ELGON/ KAPSOKWONY/478.**
- (iii) **Forcibly erecting houses on title number ELGON /KAPSOKWONY/478.**
- (iv) **Ploughing on title number ELGON/ KAPSOKWONY/478.”** Emphasis added

Did the defendants forcibly trespass into the suit land as the plaintiff alleges? The evidence before me does not suggest so. There is cogent evidence that in fact the plaintiff did on various dates enter into land sale agreements with the fathers and spouses of some of the parties herein for the sale of portions of the suit land. Indeed, some of the agreements filed were entered into between the plaintiff and persons who are not even parties in this suit. For instance, there is the agreement dated 3rd November 1988 between the plaintiff and **BON CHEROP NDIEMA** by which the latter sold to the former 2 acres out of the suit land at a consideration of Kshs. 44,000/= of which Kshs. 10,000/= was paid at the signing of the sale agreement and the balance of Kshs. 34,000/= was paid and receipt thereof acknowledged on 3rd April 1989 and the said **BON CHEROP NDIEMA** who was the father to the 6th defendant and husband to the 5th defendant took possession of the 2 acres. There is also a land sale agreement dated 9th July 1988 between the plaintiff and **CHARLES KAIBEI TENDET** by which the plaintiff sold 2 acres out of the suit land to **CHARLES KAIBEI TENDET** at a consideration of Kshs. 20,000/=. This agreement was even witnessed by the plaintiff’s own wife, one, **ESTHER TERAH**. The said **CHARLES KAIBEI TENDET** was the husband to **ANN CHEMUTAI KAIBEI** the 7th defendant herein and who has been sued as **ANN KAIBEI TENDET**.

There is also a sale agreement dated 18th May 1995 by which the plaintiff sold to **BENSON KIMAWA KIMOBO** the late husband to **HAILA CHERUBET** (10th defendant) a portion measuring 3 acres out of the suit land at a consideration of Kshs. 126,000/=. The purchaser was to take possession on 1st January 1996 upon payment of the final balance. Incidentally, that agreement was drawn and signed by **FATUMA SICHALE (now J.A)** then practicing at Kitale. There are other sale agreements between the plaintiff and the kin of the defendants herein which I shall re – visit when considering the defendants’ Counter – Claim. What is important at this point is that there is a trove of agreements and affidavits evidencing the fact that the plaintiff did in fact sell portions of his land to kins of the defendants herein. When he was cross – examined on this by **MR KHAKULA**, he said: -

“They entered the land as my tenants. They were leasing portions of land from me. Since I was not able to see, our agreements were oral. I used to be assisted by my daughter NELLY CHEPKWEMOI. She is still alive. It was the Police of KAPSOKWONY who brought the defendants and others to my land. So I went to the PROVINCIAL POLICE COMMISSIONER KAKAMEGA (PPO) JAMES KITHUKA and complained to him.”

The plaintiff is therefore denying contents of those agreements which are self-explanatory and bear his thumb print and Identity Card No 1036025/64. Surely if he did not execute those sale agreements, one would have expected him to call his daughter **NELLY CHEPKWEMOI**, who was alive at the time of the trial, to support his testimony. The fact that he did not do so is clear evidence that the said **NELLY CHEPKWEMOI** would have vouched for the authenticity of those agreements. Further, if the defendants really trespassed onto the suit land in the 1990’s as he would want this Court to believe, it is strange that it took him upto 2013 (some 20 years later) to notice that there were trespassers on his land. When further cross – examined by **MR KHAKULA**, he said that when he complained to the Police at Kakamega, he **“was given papers by the Office of the PPO.”** No such papers were produced to support that claim.

Trespass is defined in **BLALCK’S LAW DICTIONARY 10TH EDITION** as: -

“An unlawful act committed against the person or property of another esp. wrongful entry on another’s real property.”
Emphasis added.

In the same dictionary, trespass to land (trespass quare clausum fregit) is defined as: -

“A person’s unlawful entry on another’s land that is visibly enclosed. This tort consists of doing any of the following without lawful justification: (1) entering onto land in the possession of another (2) remaining on the land, or (3) placing or projecting any object on it.” Emphasis added.

In view of the verifiable documentary evidence herein which shows that the plaintiff did enter into sale agreements with some of the defendants’ kin for the sale of various portions of the suit land to them, it cannot be correct that the defendants **forcibly** entered the suit land or that such entry was **unlawful**. The entry was pursuant to sale agreements freely executed by him. It cannot also be correct for the plaintiff to plead, as he has done, that the defendants forcibly entered the suit land on 4th January 2013. Some of them like **HAILA CHERUBET** (10th defendant) even buried their kin on the suit land as far back as 2001.

It is clear therefore that neither the defendants nor their kin entered the suit land by force nor are they trespassers thereon. They took possession of their various portions of the suit land pursuant to sale agreements freely executed by the plaintiff.

The plaintiff's claim to have the defendants, their agents, servants and/or workers evicted from the suit land is devoid of merit and is hereby dismissed.

The defendants' Counter – Claim is premised on adverse possession of the various parcels of suit land which they occupy the same having been purchased by their deceased kin. As stated above, the defendant's registration as the proprietor of the suit land goes back to 28th February 1984. The title thereto was subsequently issued to him on 9th March 1984. However, that registration was always subject to any of the overriding interests recognized in **Section 30** of the repealed **Registered Land Act** the applicable law then and which include, under **Section 30(f)**: -

“rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

A similar provision is found in **Section 28(h)** of the new **Land Registration Act 2012** which is now the applicable law. It is also provided in **Section 7(d)** of the new **Land Act 2012** that: -

“Title to land may be acquired through: -

- a. –
- b. –
- c. –
- d. **Prescription.”**

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

38(1) “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 I KLR 184**, the Court of Appeal said as follows with regard to a claim for land by adverse possession: -

“And in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation by the owner on his own volition.”

A person claiming land by way of adverse possession must also prove that his occupation and possession of the land which he claims has been **nec vi nec clam nec precario** i.e. without force, secrecy or evasion – **KIMANI RUCHINE .V. SWIFT RUTHERFORD & COMPANY LTD 1980 KLR 10**.

In the recent decision of **RICHARD WEFWAFWA SONGOI .V. BEN MUNYIFWA SONGOI 2020 eKLR**, the Court of Appeal held thus: -

“A person who claims adverse possession must inter alia show: -

- a. **on what date he came in possession.**
- b. **What was the nature of his possession?**
- c. **Whether the fact of his possession was known to the other party.**
- d. **For how long his possession has continued and,**
- e. **That the possession was open and undisturbed for the requisite 12 years.”**

In **KWEYU .V. OMUTO 1990 KLR 709**, the Court of Appeal said: -

“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 (12 years), it confers an indefeasible title upon the possessor.”

Adverse possession can also be claimed for only a part of the land in dispute. Further, the possession must also be peaceful – **GRACE WAIRIMU SOROMA .V. CHAKA LTD & OTHERS 2017 eKLR**. Such possession can only be interrupted when the owner thereof makes an effective entry or he takes legal action to assert his right against the adverse possessor – **GITHU .V. NDEETE 1984 KLR**.

It is also settled that a claim to land by way of adverse possession can be made where the possessor gained entry to the land in dispute by way of purchase. In **PUBLIC TRUSTEE .V. WANDURU NDEGWA 1984 eKLR** the Court of Appeal (per **MADAN J.A** as he then was) said: -

“A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run”

I shall interrogate the defendants’ Counter – Claims guided by the above precedents among others.

The first issue is whether the defendants are in occupation and possession of the various portions of the suit land which they claim. I think the answer to that has been provided by the plaintiff himself when he seeks orders to evict them. He could not be beseeching this Court to grant him the remedy of eviction if the defendants were not on the suit land. And even when the 10th to 13th defendants joined these proceedings and exhibited the various sale agreements showing how their kin purchased various parcels of the suit land from him, he filed a further statement dated 30th November 2019 in which his sole response was that those agreements were all **“forgeries”** and that following his blindness which started in 1970, he only thumb printed documents but did not sign. However, among the documents produced herein is an agreement between him and one **BENSON KIMAWA KIMOBO** the late husband to the 10th defendant and dated 18th May 1995 which he signed at the Offices of **SICHALE & CO ADVOCATES**. I have no reason to doubt that the plaintiff did later in life lose his sight. Indeed, when he testified before me on 11th December 2019, I recorded the following: -

Court: “Court notes that the plaintiff is visually impaired.”

That notwithstanding, I have no doubt in my mind that the plaintiff signed the agreement dated 18th May 1995 before **F. SICHALE ADVOCATE** (now a Judge in the Court of Appeal). In any event, as I have already stated above, the plaintiff has himself stated that his daughter **NELLY CHEPKWEMOI** used to assist him and I do not see how she could allow the defendants to take advantage of his handicapped father. Indeed, some of the sale agreements are witnessed by his own wife **ESTHER TERAH**. The plaintiff does not appear to be an honest witness. While dismissing the plaintiff’s application for a temporary injunction, **A. OMOLLO J** described him as follows in her ruling delivered on 11th July 2013 at page 3: -

“The Applicant is therefore not being candid to the Court. An injunction is an equitable remedy and he who comes to equity must come with clean hands. From the content of the annexures in the replying affidavit, it clearly shows the Applicant has approached the Court with unclean hands.”

The annexures that **A. OMOLLO J** was referring to are the same agreements that I have already alluded to elsewhere in this Judgment. That says a lot about the veracity of the plaintiff’s testimony in this case. There is no doubt in my mind that the defendants herein are in occupation and possession of the various parcels of land comprised in the suit land and which they claim by way of adverse possession.

Counsel for the plaintiff **MR BW’ONCHIRI** has submitted, citing the case of **ISAAC NGATIA KIHAGI .V. PAUL KAIGA GITHUI 2017 eKLR**, that the defendants did not obtain the necessary Land Control Board for their various transactions as required by **Section 6(1)** of the **Land Control Act** and therefore those transactions are null and void and the defendants cannot remain on the plaintiff’s land and he is entitled to evict them. The short answer to that submission is that the defendants are, by their Counter – Claim, pursuing orders in adverse possession. They do not seek to enforce the various agreements between them and the plaintiff. A claimant seeking land under adverse possession does not need any consent from the **Land Control Board** and therefore, the provisions of the **Land Control Act** are inapplicable – **PUBLIC TRUSTEE .V. WANDURU** (supra). See also the case of **GATIMU KINGURU .V. MUYA GATHANGI 1976 eKLR** where **MADAN J** (as he then was) addressed that issue as follows: -

“Does a successful claim under the doctrine of adverse possession as in this case amount to a disposal or dealing with agricultural land? Do the expression “transfer” or “dealing include acquisition of the title by adverse possession (taking into account the definition of “dealing” in the Registered Land Act which states that “dealing” includes disposition and transmission and also in the Registration of Titles Act which states “dealing means any transaction of whatever nature by which land is affected)? I think that even though the land affected is agricultural land and there is a change of ownership without the consent of the Land Board the acquisition of title by adverse possession is neither a disposal or nor a dealing in land. The process takes place by operation of land and not by a voluntary act or by agreement between parties or by a dealing in land by parties which in my opinion is the notion inherent in and is a pre – requisite for Section 6(1) and is the type of dealing covered by it. The consent of the land board is not required to a change in ownership occurring by adverse possession. To fall within Section 6(1) a dealing in land requires a free and voluntary act of parties involving disposition of land.”

That is the route which superior Courts in this country have continued to follow. In the case of **ISAAC NGATIA KIHAGI .V. PAUL KAIGA GITHUI** (supra) which Counsel for the plaintiff has cited, the plaintiff was pursuing a claim to enforce a sale agreement for the purchase of land. That is not the claim which the defendants are pursuing in this case.

As to whether the defendants’ occupation and possession of the various parcels of land they claim has been open, exclusive peaceful and with the knowledge of the plaintiff for the requisite 12 years without interruption, it is clear that each of the defendants’ kin went into occupation and possession of their various parcels at different times. Therefore, as to whether the defendants have met the 12 years’ threshold will be determined on a case by case basis shortly. However, I have no doubt in my mind that the defendants’ occupation of their

various portions of the suit land has been open, exclusive, peaceful, without interruption and with the knowledge of the plaintiff. On the issue of peaceful occupation, **MR BWONCHIRI** has submitted that in view of the several cases filed with respect to the suit land since 1999, the defendants' occupation of the suit land has not been peaceful. It is true as far back as 1999, **BON C. NDIEMA, LAWRENCE CHERUI, DAVID C. ARAP MEIN** and **CHARLES KAIBEI TENDETI** who are relatives to some of the defendants herein had moved to the **KAPSOKWONY LAND DISPUTES TRIBUNAL** seeking to be awarded various portions of land which they had purchased from the plaintiff. Their claims were up – held and adopted as a Judgment of the Court. The plaintiff later however moved to the High Court and filed **BUNGOMA HIGH COURT CIVIL APPLICATION No 129 of 2005** seeking orders in Judicial Review to quash the award. There are of course several other cases involving the suit land but the 1999 case appears to be the earliest one. Relying on those cases, Counsel for the plaintiff has submitted on page 15 as follows: -

“Your Lordship, from the above, it is clear that before the lapse of 12 years, the defendants and the plaintiff have since 25.2.1999 when Mt Elgon Tribunal Case No 4 of 2019 (sic) was filed being filing case after the other over the parcel hence has not been peaceful.

From the plaintiff's list of documents produced as exhibit No 2 as a bundle reveal that over 7 cases were filed between the defendants and the plaintiff over the suit property.

Your Lordship, all the defendants when cross – examined were in agreement that their stay on the suit parcel has not been peaceful due to the conflict they have had with the plaintiff over the parcel.”

The case that Counsel must have had in mind is case No 4 of 1999 (not 2019). That case, as I have already stated above, was filed by some of the kin to the defendants herein and what they were seeking was to be issued with title deeds to their respective portions of the suit land. The suit was not filed by the plaintiff seeking to assert his title as against the defendants which is what he was supposed to do – **GITHU .V. NDEETE**. There is nothing to suggest that prior to the filing of that suit, there was any conflict between the plaintiff and the defendants' kin. Indeed, in paragraph 5 of his supporting affidavit filed in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE MISCELLANEOUS CIVIL APPLICATION No 19B of 2003**, **DAVID CHEMWOO ARAP MEIN** deponed as follows in an application seeking to maintain the status quo on the suit land pending any appeal after the **TRIBUNAL's** award had been adopted as a Judgment at the Court: -

5. “That we all occupied and used our portions of land peacefully until 1999 when we requested the respondent title deeds.”

My understanding of the above is that the plaintiff did not take any action either to evict the defendants from the suit land or even complain about their presence thereon. Basically, when some of the defendants' kin moved to the **TRIBUNAL** vide case No 4 of 1999, they were telling the plaintiff that he was obliged to execute the necessary documents to enable them get their respective title deeds. During the plenary hearing, the plaintiff suggested that the defendants had been taken to the suit land by the Police and that he complained to the **Provincial Police Commissioner**. However, he does not show when and has no single document to show for it. As the proprietor of the suit land, the onus was on him to show that he had demonstrated his displeasure to the presence by the defendants and their kin on the suit land. He did not do so. Instead, it was the defendants' kin who decided that enough was enough and went to the **TRIBUNAL** so that they could acquire their title deeds from the plaintiff. The irresistible conclusion is that if the defendants had not first moved to the **TRIBUNAL** in 1999, the plaintiff was contented with their occupation of the suit land. Even the second suit relating to this matter was **BUNGOMA HIGH COURT CIVIL CASE No 24 of 2002 (O.S)** in which **CHARLES KAIBEI TENDET, DAVID MEIN** and **BON CHEROP NDIEMA** sought against the plaintiff orders that they had acquired various portions of land comprised in the suit land by way of adverse possession. The plaintiff has referred to **BUNGOMA HIGH COURT MISCELLANEOUS APPLICATION No 201 of 2006** as among his list of documents dated 8th June 2018 but I could not see any pleadings for that case in the bundle of documents. The first case filed by the plaintiff against some of the defendants with respect to the suit land appears to be **BUNGOMA CHIEF MAGISTRATE'S COURT CIVIL CASE No 188 of 2011** which appears not to have been prosecuted and if it was, the results are un – known. What is important however is that that case came too late to interrupt the defendants' occupation and possession of their various parcels of the suit land which had long crystallized. I am satisfied that the defendants' occupation and possession of the various portions of the suit land was open, exclusive, peaceful, un – interrupted and with the knowledge of the plaintiff who took no action to assert his ownership thereof by making any effective entry or taking legal action against the defendants.

Counsel for the plaintiff has also submitted at page 15 of his submissions that: -

“Your Lordship, the interested parties did not file any claim against the plaintiff and thus this Honourable Court cannot act in a vacuum.

It is thus our submission that you dismiss the defendants' Counter – Claim with costs to the plaintiff.”

Earlier in this Judgment I stated that the Interested Parties were enjoined in these proceedings after their application dated 1st March 2019 was allowed by consent on 29th April 2019. In that application, the Interested Parties had sought the main order that they be joined in this suit as defendants. Ideally therefore, the defence and Counter – Claim ought to have been amended to reflect that the Interested Parties had now been added as the 10th to 13th defendants. However, although that was not done, I have indicated in the proceedings and this Judgment that the 1st to 4th Interested Parties are now the 10th to 13th defendants. They had made it clear in their application that the grounds upon which they sought to be joined in the suit is that they too are purchasers of portions of the suit land and their presence was necessary for purposes of determining this suit expeditiously. And when they filed their statements, it was clear that each of them has a claim of part of the suit land. For all practical purposes therefore, they adopted the pleadings filed earlier by the 1st to 9th defendants including the Counter – Claim. I did not hear any of the parties allege that they have been prejudiced. Each of them clearly knew what case they were required to meet. I shall now consider the defendants' Counter – Claim.

Each of the 13 defendants have a specific claim to the suit land. That is clear from the documents filed herein. I shall therefore consider them separately.

CLAIM BY THE 1ST, 2ND 3RD AND 4TH DEFENDANTS: -

Their claim is well captured in the statements of **DAVID CHEMWO ARAP MEIN** alias **NAHASHON DAUDI KISIERO** (1st defendant), **BENJAMIN NDULULU KISIERO** (2nd defendant) and **ANN DAUDI** (4th defendant). Together with **YONA BRAMWEL MUSEE** (3rd defendant) who however did not testify but whose claim is similar, they state that they are relatives to the late **DAUDI MEIN KISIERO** as his children and spouse who in 1988 purchased 13½ acres from the plaintiff to be carved out of the suit land. Following the death of the said **DAUDI MEIN KISIERO** on 10th July 1991, the 1st defendant obtained a Grant of Letters of Administration and became the Administrator of his Estate. The family occupied the 13½ acres until 1999 when they moved to the **KAPSOKWONY LAND DISPUTES TRIBUNAL** to agitate for the title. That means that by the year 2000, the plaintiff's right to the said 13½ acres of the suit land had been extinguished because, as I have already stated above, the 1st, 2nd, 3rd and 4th defendants' occupation and possession of the said portion is also confirmed by the fact that the plaintiff is seeking their eviction therefrom.

The 1st, 2nd, 3rd and 4th defendants are therefore entitled to the orders sought in their Counter – Claim.

CLAIM BY THE 5TH AND 6TH DEFENDANTS: -

They are the spouse and son respectively of the late **BEN CHEROP NDIEMA**. Their testimony as captured in their statements filed herein is that the late **BON CHEROP NDIEMA** purchased from the plaintiff a portion measuring 2 acres out of the suit land in 1988. They produced as part of their evidence a land sale agreement dated 3rd November 1988 between him and the plaintiff and added that they still occupy the said 2 acres to – date.

The 5th and 6th defendants are therefore entitled to the said 2 acres as sought in their Counter – Claim because by the year 2000, the plaintiff's right in the said portion and from which he now seeks to evict the 5th and 6th defendants had been extinguished by operation of the law.

CLAIM BY THE 7TH DEFENDANT: -

This claim was prosecuted by **ANN TAIBEI TENDETI** also known as **ANN CHEMUTAI KAIBEI**. She confirmed in her testimony that she is a widow to the late **CHARLES KAIBEI TENDETI** who by an agreement dated 9th July 1988 purchased 2 acres out of the suit land from the plaintiff and later by another agreement dated 9th October 1988 purchased another 3 acres making a total of 5 acres which they occupied immediately and have continued to do so ever since. Both agreements were exhibited herein. Again, the fact that the plaintiff seeks to evict them from the suit land lends credence to that claim.

The claim by the 7th defendant to a portion measuring 5 acres out of the suit land is therefore merited because by 2000, the plaintiff's right to that portion had been extinguished by operation of the law.

CALIM BY THE 8TH AND 9TH DEFENDANTS: -

LAWRENCE CHERUI and **JONES CHERUI** the 8th and 9th defendants respectively did not attend Court for trial and therefore they did not testify in support of their claims and neither were their cases prosecuted by any of the other defendants.

Their Counter – Claims are therefore dismissed.

CLAIM BY THE 10TH DEFENDANT (HAILA CHERUBET): -

HAILA CHERUBET was enjoined herein as the 10th defendant and in her statement dated 12th November 2019 she confirms that her late husband **BENSON KIMAWA KIMOBO** who died in 2001 had in 1993 and 1995 purchased from the plaintiff one plot and 3 acres. The sale agreements dated 4th November 1993 (for the plot) and 18th May 1995 (for the 3 acres) were produced and confirm those transactions. She added that she is still in occupation and possession of the plot and 3 acres where she buried her late husband. The fact that the plaintiff also seeks her eviction is in itself an affirmation of her occupation and possession of those portions of the suit land.

The 10th defendant is therefore entitled to the orders sought in the Counter – Claim as confirmed by her statement and documentary evidence.

CLAIM BY BEATRICE KIMIYEI (11TH DEFENDANT): -

She is the widow of **CHARLES KIMIYEI** who died on 9th December 2013. In her testimony, she adopted her statement dated 12th November 2019 to the effect that between 1992 and 1999 her late husband had purchased 4 plots from the plaintiff. She produced the following documents: -

1. Agreement dated 6th July 1992 between the plaintiff and **CHARLES K. KAPJOFTI** I.D No 0904411/63 for a plot measuring 132' by 38'.
2. Agreement dated 13th September 1992 between the plaintiff and **CHARLES B. K. KAPJOFTI** for a plot measuring 132'

by 38’.

3. The agreements dated 2nd May 1999 and 23rd May 1999 and 23rd May 1999 are not really sale agreements. They are infact acknowledgment slips for money received.

4. Agreement dated 23rd march 1999 between the plaintiff and CHARLES B. K. KAPJOFTI for a plot measuring 50’ by 100’.

5. Agreement dated 11th September 1999 between the plaintiff and CHARLES B. K. KAPJOFTI for a plot measuring 50’ by 100’.

I have no doubt in my mind that the said CHARLES B. K. KAPJOFTI and CHARLES KIMIYEI the 11th defendant’s husband refer to one and the same person. The witness added in her statement at paragraphs 5 and 6 as follows: -

5: “Between 1992 and 1999 my late husband and I purchased 4 plots of land from the plaintiff.”

6: “We paid him in full for all the plots but were given possession of only one.”

And when she was cross – examined by MR BW’ONCHIRI she said: -

“I don’t live there. There is someone who lives there.”

Later on, she added as follows in cross – examination: -

“We lived briefly on the suit land with my husband but moved.”

Given those circumstances, it is not possible to conclude with any certainty if her “*brief*” occupation was for a period of 12 years. Her Counter – Claim must therefore be dismissed.

CLAIM BY JOHN CHEPKONY KIMKUNG (12TH DEFENDANT): -

His testimony is that in the year 2000, he purchased 2 acres form the plaintiff and took possession. He paid for the 2 acres in full but is yet to get a title thereto. He produced a sale agreement dated 25th March 2000 between himself and the plaintiff as proof of that transaction. Therefore, by 2013 when this suit was filed, the plaintiff’s interest in the 2 acres had been extinguished by operation of the law.

There 12th defendant is similarly entitled to the orders in adverse possession for those 2 acres.

CLAIM BY BUGAA A.I.C PRIMARY SCHOOL (13TH DEFENDANT): -

The testimony of JAMES KITEYWO BERA the HEADMASTER of the school is that it came into existence in 2000 on land donated by one MOSES KIMUTAI CHESIARI and ZELDA KEYO who had bought it from the plaintiff. In addition to those donations, the school purchased more land from other persons who had also land from the plaintiff. The presence of the school on the suit land was confirmed by the plaintiff during his oral testimony. Infact it would appear from his evidence that he had no intention of suing the school. He seems to have resigned himself to it’s presence on the suit land. This is what he said in his evidence in chief: -

“I know BUGAA PRIMARY SCHOOL. It was also constructed on my land and I complained to the Chief. I had not sued the said school.”

Indeed, BUGAA PRIMARY SCHOOL is among the four (4) parties that sought to be enjoined in this suit. There is no evidence that the plaintiff wrote to the school to complain about it’s occupation or possession of the 4 acres which it claims. Neither did he file any suit against it to assert his ownership of the said land since 2000. His title to the said 4 acres was therefore extinguished by operation of the law in 2012.

The BUGAA A.I.C PRIMARY SCHOOL is therefore entitled to the orders sought in the Counter – Claim.

On the issue of costs, they follow the event. The Court will be guided accordingly.

Having considered all the evidence herein, the Court makes the following disposal orders: -

1. The plaintiff’s suit is dismissed with costs to the 1st, 2nd, 3rd, 4th, 5th, 6th 7th, 10th, 12th and 13th defendants.

2. The Counter – Claims by the 8th, 9th and 11th defendants are dismissed with costs to the plaintiff.

3. There shall be Judgment for the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th, 12th and 13th defendants as per their Counter – Claims as follows: -

a. The 1st, 2nd, 3rd and 4th defendants have acquired by adverse possession a portion of land measuring 13½ acres out of the land parcel NO ELGON/KAPSOKWONY/478. The same shall be registered in the names of the 1st defendant DAVID CHEMWOO ARAP MEIN to hold in trust for the family of the late DAUDI MEIN KISIERO.

b. The 5th and 6th defendants have acquired by adverse possession a portion of land measuring 2 acres out of the land parcel NO ELGON/KAPSOKWONY/478. The same shall be registered in the names of the 6th defendant SIMEON CHANGWANI NDIEMA to hold in trust for the family of the late BON CHEROP NDIEMA.

c. The 7th defendant has acquired by adverse possession a portion of land measuring 5 acres out of the land parcel NO ELGON/KAPSOKWONY/478. The same shall be registered in the names of ANN CHEMUTAI KAIBEI to hold in trust for the family of the late CHARLES KAIBEI TENDET.

d. The 10th defendant HAILA CHERUBET has acquired by adverse possession portion of land measuring 3 acres and a plot measuring 132 feet by 38 feet out of the land parcel NO ELGON/KAPSOKWONY/478. The same shall be registered in the names of the 10th defendant HAILA CHERUBET to hold in trust for the family of the late BENSON KIMAWA KIMOBO.

e. The 11th defendant JOHN CHEPKONY KIMKUNG has acquired by adverse possession a portion of land measuring 2 acres out of the land parcel NO ELGON/KAPSOKWONY /478. The same be registered in his names.

f. BUGAA A.I.C PRIMARY SCHOOL the 13th defendant has acquired by adverse possession 4 acres out of the land parcel NO ELGON/KAPSOKWONY/478. The same shall be registered in the name of CABINET SECRETARY TREASURY RESERVED FOR BUGAA A.I.C PRIMARY SCHOOL.

4. The plaintiff shall within 30 days of this Judgment execute all the relevant documents to facilitate the registration of the above portions of land into the names of the named proprietors.

5. The Land Registrar and Surveyor Bungoma shall thereafter ensure that the register to the land parcel NO ELGON/KAPSOKWONY/478 is rectified accordingly.

6. In default of (4) above, the Deputy Registrar shall be at liberty to execute all the relevant documents on behalf of the plaintiff.

7. The 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 10th, 12th and 13th defendants are also entitled to the costs of their Counter – Claims.

BOAZ N. OLAO.

J U D G E

17TH DECEMBER 2021.

Judgment dated, signed and delivered at **BUNGOMA** this 17th day of December 2021 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines and with notice to the parties.

Right of Appeal explained.

BOAZ N. OLAO.

J U D G E

17TH DECEMBER 2021.

Explanatory notes: -

This Judgment was first due on 26th November 2020. However, on 19th November 2020 in the course of drafting the Judgment, I noticed that **BUNGOMA HIGH COURT CIVIL CASE No 24 of 2002 (O.S)** had been referred to by the defendants in their pleadings. I thought it prudent to have it traced in case it had a bearing on this case. Later, Counsel for the plaintiff also requested that other files be availed. It took a while tracing the various files from other Courts. But it was important to do so.

That explains the delay which is regretted.

BOAZ N. OLAO.

J U D G E

17TH DECEMBER 2021.