



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 180 OF 2017 (O.S.)**

**ABRAHAM LUCHELI LUVONGA (SUING AS THE ADMINISTRATOR OF THE**

**ESTATE OF BUSHASHA LUCHERI (DECEASED).....PLAINTIFF**

**VERSUS**

**FRED OKEA, ALIAS FRED OKEYA.....1<sup>ST</sup> DEFENDANT**

**KIPKORIR ROTICH CHEBOI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff filed the Originating Summons herein on the 15<sup>th</sup> November 2017. He seeks the following orders:

*(a) A declaration that the late Bushasha Lucheri has acquired 2 acres /Kapcherop/1700 by way of adverse possession;*

*(b) An order directing the County Land Registrar Elgeiyo Marakwet County to amend the register of parcels to have Title Deed No Cherangany /Kapcherop/1700 registered in the name of the late Bushasha Lucheri after cancelling the name of the 2<sup>nd</sup> respondent herein as the registered owner.*

*(c) Costs of the suit.*

*(d) Any other relief.*

**PLEADINGS**

**The Originating Summons**

2. The plaintiff's case is contained in the originating Summons, the supporting affidavit and the oral evidence that he gave at the hearing of this suit on 28/5/2018.

3. In the supporting affidavit he avers that that he is the biological son and also the administrator of the estate of the deceased Bushasha Lucheri who died on 5/11/2009 and exhibits a copy of the Limited Grant to that effect. He further avers that in 1983 the deceased had purchased 2 acres of land from the 1<sup>st</sup> respondent who had bought the same from the 2<sup>nd</sup> respondent and that the deceased and his family took vacant possession of the suit land in the same year. He states that they stayed thereon uninterruptedly, openly and without interference from anybody till Bushasha Lucheri died in the year 2009 while still living on the suit land. After the demise of Bushasha Lucheri the plaintiff continued living on the suit land, and that he has been living on that land for 36 years now. The land is as at present registered in the name of the 2<sup>nd</sup> respondent, (this may have changed upon the issuance and execution of the decree of this court as the plaintiff averred in his evidence that the decree had been effected, though no conclusive evidence was availed in support of that averment) and records show he was so registered in 1994. It is the averment of the plaintiff that efforts by the deceased to have the land transferred to him were in vain and he died before the transfer was effected.

**The 1<sup>st</sup> Defendant's Response.**

4. The 1<sup>st</sup> defendant did not file any response to the Originating Summons.

## The 2<sup>nd</sup> Defendant's Response.

5. The 2<sup>nd</sup> defendant filed a sworn replying affidavit to the Originating Summons on **18/2/2019**. His response to the plaintiff's claim is that he owns the suit land which he refers to as **Cherangany Kapcherop/1700** in respect of which he was issued with title in **2016**; that he admits that the plaintiff is the biological son to the late **Bushasha Lucheri**; that in **1983** he had sold this land to the 1<sup>st</sup> defendant; that the 1<sup>st</sup> defendant later approached him with a view to revoking the agreement; that the said agreement was rescinded vide a memo written on the back page of the agreement; that to his knowledge Bushasha was only one of the agents of the 1<sup>st</sup> defendant and the 1<sup>st</sup> defendant never engaged in any transaction with Bushasha after the rescission; that by virtue of the rescission the plaintiff's father also lacked any more interest in the land and he left; that after some time the plaintiff's father claimed that he had bought the land from the 1<sup>st</sup> defendant; that through arbitration at the local administration offices it was resolved that the plaintiff's father vacates the land which he allegedly did in the year **1994**; that sometime in the same year that is **1994** Bushasha's son came and tried to forcibly occupy the land but village elders convened and resolved that he should also vacate the land; that the plaintiff came to the land in the year **2015**, allegedly taking advantage of the 2<sup>nd</sup> defendant's advanced age and again the local administration was engaged to remove him but to no avail; that Bushasha and his family have never been in any peaceful and open occupation of the suit land as alleged and the occupation of the plaintiff has been illegal and thus his claim in adverse possession does not lie. In his supplementary affidavit filed on **23/2/2021** the 2<sup>nd</sup> defendant averred that he continued to plough the land even as the plaintiff was residing on the suit land; that **12 years** have not elapsed since **2016** when he obtained title to the suit land; that he was evicted in **2018** by virtue of an order issued by this court.

## The Plaintiff's Evidence.

6. The plaintiff testified on the **10<sup>th</sup> May 2021**. He reiterated much of what is in the Originating Summons and the supporting affidavit. He produced documents including a copy of a death certificate, a copy of the grant of letters of administration, a copy of the sale agreement dated **4/9/1983**, a Certificate Of Official Search in respect of the suit land and the chief's letter dated **26/7/16**. The plaintiff added that he schooled as a day-scholar in Kapsambach Primary School and later on at Kamoi Secondary School which were within the locality. He stated that when the desire to possess a title deed grew in him he sought the 1<sup>st</sup> defendant who asked him to settle a Ksh **1000/=** debt; that in **2016**, he settled that alleged debt which had accrued interest to become **Ksh 4880/=**; that the 2<sup>nd</sup> defendant has never evicted him from the land and that the 2<sup>nd</sup> defendant has also never been in possession of the land; that his father built the first house on the land; that however the 2<sup>nd</sup> defendant always knew that the plaintiff lived on the suit land; that though the title in the name of the 2<sup>nd</sup> defendant was issued in the year **2016** the register to the suit land in his name was opened in **1994**; that the 2<sup>nd</sup> defendant never claimed the land for all the time the plaintiff lived thereon which is more than **12 years**. He prayed that the land do remain registered in his late father's name.

7. When cross-examined by Mr. Arusei he admitted that he had brought the claim on behalf of his late father and on his own behalf; he admitted that his father was allowed to enter the suit land by Fred who was not the registered owner of the land. He denied knowledge that Fred had not paid the full consideration and he stated that he believed there was no balance outstanding between the two.

8. He maintained that his father was not informed of any refund by Rotich, however he also admitted that he was young and in Form Three by **1983** and had limited knowledge of what had transpired of them. He did not know of any sitting by elders which resolved that his father vacates the land and that his father has never vacated the land. He maintained also that he has lived on the suit land ever since he was young. He denied that the 2<sup>nd</sup> defendant farmed on the land in **1994**. He stated that his brother was buried on his own land at Kapsoya while his father was buried on his own land in Nandi. He denied that his father was evicted from the suit land and maintained that he left after falling sick and becoming blind and due to the need to be taken to hospital in his original home area. He also stated that he obtained an order in **2016** in the instant suit but when he became sick and went to hospital the 2<sup>nd</sup> defendant invaded the land, which the plaintiff had ploughed, and planted crops on it; however the 2<sup>nd</sup> defendant never harvested the crops he had planted. He maintained that his father, mother, sister and brother had lived on the land.

9. **PW2, Charles Wanyama Simiyu** testified on the same day as **PW1**. He stated that he stayed at Kipsambach sub-location in Kapterit location, Kapcherop division in Elgeyo Marakwet; that he is village elder. He adopted as evidence in chief his written statement written on **14/4/2021**. He stated that he knew the plaintiff's father who found him in his vicinity when he came to buy land in **1983**; that he built a house on the land and became an area elder; that he worked with him as a village elder until his health failed; that the plaintiff schooled at a nearby primary school; that the plaintiff's father was in occupation of the suit land but when he died, he left the plaintiff on the suit land. His further evidence was that the 2<sup>nd</sup> defendant sold the suit land to Fred who sold it to the plaintiff's father. He averred that the 2<sup>nd</sup> defendant lives some distance away from the suit land and across the river and that he has never lived on the suit land. He maintained that the plaintiff's family still stays on the suit land. Upon cross-examination by Mr. Bungei, he denied knowledge of any unpaid consideration or any refund by the 2<sup>nd</sup> defendant to Fred. He maintained that the plaintiff's father left the land only due to sickness and not strife and that the 2<sup>nd</sup> defendant has never entered the suit land. However, he also stated that the 2<sup>nd</sup> defendant tried to furtively build a structure on the land at night on one occasion but he later fled when he was discovered. He stated that he was present when parties met at the DO's office Kapcherop where the 2<sup>nd</sup> defendant said that he has no quarrel with the plaintiff's father and where Fred promised not to interfere with the land and further asked that the 2<sup>nd</sup> defendant do allow the plaintiff's father to have the land.

10. **PW3** testified on the same day as **PW1** and **PW2**. His name is **Jackson Kamau Mwangi**. He adopted his statement dated **14/4/2021**; he referred to the plaintiff as his neighbour and stated that he bought his land in **1994** and that the plaintiff's father lived on the land neighboring his; that the plaintiff's father fell ill and was buried way from the land; that the plaintiff schooled at Kipsambach primary school and later at Kamoi secondary both of which are within the vicinity; that when he participated in the census, the plaintiff's father was living on the land; that during his tenure as a village elder the 2<sup>nd</sup> defendant never brought any dispute to him. To his knowledge, the land belongs to the plaintiff's father. Upon cross-examination he stated that his land is located nearby and close enough for him to see the home on the suit land from his home and that Fred Okea is still alive.

## The Defendant's Evidence

**11. DW1 –Wellington Munyasia Makokha** testified on **20/5/2021**; he stated that he lives at Kapolet Sub-location and that he had been the Assistant Chief of Lobol location since **2012**. He adopted his written statement dated **18/2/2021** as his evidence-in-chief. His evidence is that in **2016** the 2<sup>nd</sup> defendant brought a dispute over the suit land to his office stating that someone had invaded his land yet he had refunded Fred the purchase price; that he summoned the plaintiff and Fred; that the plaintiff brought his agreement with Fred; that Fred brought his agreement with the 2<sup>nd</sup> defendant; that it was true that the plaintiff was on the land by virtue of his father’s agreement with Fred. However he maintained that the 2<sup>nd</sup> defendant had refunded Fred the consideration in **1993** and that Fred never informed the plaintiff’s father of that refund; that Fred had told the 2<sup>nd</sup> defendant that the Plaintiff’s father was his friend and that would vacate his land. However he never met the plaintiff’s father after being appointed as the assistant chief because his home is far away from the suit land; he claimed to know the plaintiff from the time they were together in school at Kamoi secondary school in **1994** when he was in Form One and the plaintiff in Form Four; he was generally aware the plaintiff lived at his sister’s place somewhere in Kipsambach but he did not know the actual home of the plaintiff’s sister; that after school he only came to meet the plaintiff during the interview for the position of assistant chief in **2012**; that in **2016** he summoned a village elder over the dispute who stated that the plaintiff’s brother, a police man, stayed on the suit land after the father’s death and that after that brother died the plaintiff continued living there. However he does not know who has been staying on the land since **2016** and he does not know when the plaintiff entered the land. Upon cross-examination by Mr. Kaosa he admitted that his knowledge regarding where the plaintiff stayed at his sister’s place was mere hearsay and that he never knew the plaintiff’s father. He admitted that when he held the meeting over the suit land at his office between Rotich and Fred, the plaintiff was absent; he admitted that the plaintiff’s father bought the land in **1983**; he also admitted that he wrote the plaintiff a “*chief’s letter*” that was requisite for seeking a grant of letters of administration over the plaintiff’s late father’s estate; he stated that he wrote the letter signed and stamped it; that he knows the plaintiff’s father by name as well as his children; he stated that he knew where the plaintiff lived; he further stated that the plaintiff was staying on the suit land as at the date of the hearing and that the 2<sup>nd</sup> defendant lives **50** meters away from the suit land; that he is aware that the 2<sup>nd</sup> defendant tried to build a structure on the land in **2016**.

**12.** Upon re-examination by Mr. Bungei; he stated that he could identify the suit land purchased by the plaintiff’s father.

**13. DW2 Mariko Kiplagat** testified on **24/5/2021** and adopted his witness statement dated **18/2/2021** as his evidence-in-chief. He stated that he schooled with the plaintiff at Kipsambach primary school and that the plaintiff used to live at “*Madam Kogo’s*”; that “*Madam Kogo*” had bought her own land and that **DW2** thought that he was her first son but he later came to know that they were brother and sister; that a police man stayed on the suit land with his family on one occasion but the plaintiff never lived there on. However he never met the plaintiff’s parents but he knew **PW3** who migrated in to the area in **1994** when he was still an adult. On that basis he maintained that **PW3** could not have met the plaintiff’s parents.

**14.** Upon cross-examination by Mr. Kaosa **DW2** stated that while in primary school in standard **4** the plaintiff was three classes ahead of him and that he was five years old while in standard one. He dropped out of school in standard **7** in **1990**; that his village is called Chelachi which is about **3** kilometres away from suit land where he had land and house; he admitted that plaintiff currently lives on the land. However the only dispute he knows is between Fred and the 2<sup>nd</sup> defendant.

**15. DW3, Joseph Kimisto** testified on **7/6/2021** and adopted his witness statement dated **18/2/2021**. His evidence is that he is a village elder at Uma; that when the dispute arose in **2016** the chief of Kapolet summoned him; that the plaintiff, Fred and Rotich were present and Rotich claimed that Fred was occupying his land and that the agreements of the parties were produced for viewing; that Fred said that he had been refunded the consideration and the chief ordered the parties to take their disputes to the DO who ordered that Rotich the 2<sup>nd</sup> defendant do take back his land; that Rotich then build a house on the land but chaos ensued; that Rotich planted a maize crop in **2018** and harvested the maize from the suit land. He maintained that Fred defrauded the plaintiff’s father. He stated that he was in Form One while the plaintiff was in Form Four; and that the plaintiff lived with his sister a “*Madam Kogo*” that he became an elder in **2012** and that the plaintiff is his friend; that Charles Wanyama **PW2** is from Kipsambach; that Jackson Kamau **PW3** came to the area much later; that the person living on the land at present is the plaintiff and his deceased brother was the police man who had threatened the 2<sup>nd</sup> defendant.

**16.** Upon cross-examination by Mr. Kaosa he stated that the plaintiff was not present at the meeting held at the chief’s office; that he comes from Kapolet sub location while the plaintiff’s village is called Siyo. However he maintained that Fred bought the land from the 2<sup>nd</sup> defendant and sold it to the plaintiff’s father in **1994**.

**17.** Upon re-examination he stated that **PW2** lives **2000** metres away from the land while **PW3** lives about **1500** metres away near Kipsambach primary school.

**18. DW4 – Rotich Cheboi** testified on **31/7/2021**; he stated that he lived at Kipsambach and works as a carpenter and adopted his witness statement. His evidence is that in **1983**, Fred came to him and asked him to sell to him **2** acres and he agreed and an agreement was written down. By that agreement Fred was required to pay Ksh.**6000/=** for the two acres; however he only had Ksh.**4000/=** which **DW4** took leaving a balance of Ksh.**2000/=**. The agreement, **2DExh1** was dated **23/8/1983**; that Fred took possession of the land in **1983** and said he would pay the balance when he got more money and he also placed his people on the land; that **DW4** waited for the balance of the purchase price until **1993** when Fred requested for a refund of Kshs.**4,000/=**; that **DW4** refunded the Ksh.**4,000/=** which refund was acknowledged at the back of the agreement [**2DExh1(b)**]; that it was cut up into two to show that the money was refunded to the buyer; that after refunding the consideration **DW4** returned on the land but there was someone on the land so he returned to Fred and asked him who that occupier was; that Fred said it was a watchman; that **DW4** asked Fred to visit the watchman and Fred visited the “*watchman*” and explained that he had been refunded his money; that the “*watchman*” said he thought that Fred had sold him the land; that that “*watchman*” turned out to be none other than the plaintiff’s father; that a meeting of village elders and assistant chiefs was called where Fred said he had **2** acres in Trans Nzoia to give to plaintiff’s father; that the elders told the plaintiff’s father to go with Fred so that Fred could show him that land in Trans Nzoia and so the plaintiff’s father left for Western Kenya and the 2<sup>nd</sup> Defendant took possession of the suit land in **1993**; however the plaintiff’s brother was angry and left his job and came to live on his suit land by force and forbid the **DW4** ever from ever stepping into the land; that **DW4** reported to the chief and the chief instructed him to go to the DO and wrote a letter addressed to the Chief who transmitted it to the plaintiff’s brother. However, the plaintiff’s brother refused to vacate and insisted that his father had bought the land from Fred; the DO then summoned Fred. **DW4** further stated that the plaintiff’s brother left in **2014** and **DW4** resumed his possession of the land; however the plaintiff came and took possession from **DW4** and **DW4** reported a dispute at the chief’s office where upon Fred was summoned; the chief and the village

elders were present at that meeting where upon inquiries Fred said that he would give the plaintiff land elsewhere. The elders instructed that the plaintiff be shown the land Fred would give him and the plaintiff agreed with that decision; however soon thereafter the suit was filed. **DW4** maintained that he had a title deed issued in **2016 [2DExh.2]**; he stated that the parties had a dispute before the chief in **2016** after the plaintiff allegedly entered the land; that **DW4** was summoned in DO's office; that by **2016 DW4** could not enter the land as the plaintiff was already hostile; that the plaintiff should go and take up the land promised by Fred.

**19.** When cross-examined by Mr. Kaosa he stated the he took the plaintiff's father to the chief in **1993** but he had nothing to show for it. When shown **2DExh4** he stated that in **2016** the plaintiff's father had left the land and therefore his name could not feature in that document; however he maintained that the plaintiff and Fred alongside himself were present at chief's office when the dispute was entertained in **2016**; he denied that there was any dispute that was subsequently entertained by the DO and that the DO just wrote the letter through the chief; he stated that he never had any dispute with the plaintiff's father before the chief; he stated that he did not know he could report the dispute to the chief; he maintained that the plaintiff's brother evicted him from the land, brought building materials and built houses thereon. He admitted that Fred had houses on the land and that the plaintiff's father had occupied those houses; that he went to the chief because the plaintiff's brother was armed. He stated that **PW3** entertained the dispute over the suit land in **1993**. He further stated that the land which he lives on now was inherited from his father.

**20.** Upon re-examination he stated that Charles Wanyama lives at Kipsambach. At that point the defendants' case was closed.

## **DETERMINATION**

**21.** I have considered in depth the Originating Summons and the affidavits filed by the parties and their oral evidence which I have deliberately set out in great detail herein and the documentary evidence as well as their written submissions.

**22.** The main issue that arises in this suit is whether a declaration should issue to the effect that the late Bushasha Lucheri had acquired **2 acres** of land comprised in **Title Number Cherangany/ Kapcherop/ 1700** by way of adverse possession.

**23.** Before that question is being investigated it hereby important to point out here that the evidence emanating from both parties at the hearing is that Bushasha's family is still in possession of the suit land to date. As to whether there has ever been interruption of that possession on several occasions as alleged by the 2<sup>nd</sup> defendant is an allegation to be considered against the evidence available.

**24.** It is the plaintiff's submission that his father purchased the land from the 1<sup>st</sup> defendant who had purchased it from the 2<sup>nd</sup> defendant and that the family of the late Bushasha had occupied the suit land between **1983** up to the present; that the late Bushasha left his family in actual possession thereof.

**25.** The plaintiff's submissions emphasize on the evidence of **PW2** who described himself as a village elder who lives within the vicinity of the suit land and whose evidence is also that he welcomed Bushasha to the area in **1983**. **PW2** also stated that he and Bushasha were fellow village elders in the area. His further evidence is that the plaintiff, Bushasha's son, schooled in a neighbouring primary school.

**26.** The plaintiff also laid great emphasis that the area assistant chief, **DW1**, confirmed during his cross-examination that he wrote the administrator's letter, normally required for taking out of a grant of letters of administration, in respect of the family of the late Bushasha and which the plaintiff used to file succession proceedings to obtain the grant enabling him to lodge the instant suit in **2017**. That letter confirmed that the late Bushasha hailed from **DW1's** sub-location and that he was survived by the plaintiff and other family members upon his demise.

**27.** The plaintiff avers that the 2<sup>nd</sup> defendant has never occupied the suit land from the time that he sold it to the 1<sup>st</sup> defendant. He dismissed the allegations that the 2<sup>nd</sup> defendant took possession in **1994** when the late Bushasha allegedly vacated the suit land, and maintains that the late Bushasha only left the land in **2009** and only due to sickness, evidence that was also corroborated by two defence witnesses.

**28.** He states further that though the 2<sup>nd</sup> defendant avers that he regained possession of the suit land in **2014** when the plaintiff's brother allegedly left, he has not demonstrated how the plaintiff later regained possession thereof. He submits that the 2<sup>nd</sup> defendant has not demonstrated that he has any houses on the suit land, and that he tried to obtain possession in **2017** when this case was pending. He avers that the 2<sup>nd</sup> defendant only filed a defence in the matter when the title to the suit land was about to be registered in the name of the plaintiff pursuant to a judgment of this court.

**29.** The 2<sup>nd</sup> defendant on the other hand stated in his very bold, spirited and detailed submissions that a claim for adverse possession can not co-exist alongside a claim for purchase's interest. He avers that all through the evidence the plaintiff restricted himself to the agreement between the plaintiff's father and the 1<sup>st</sup> defendant (**PExh 2**), and therefore showed that the plaintiff's father was a licensee under the 1<sup>st</sup> defendant. He cites the cases of **Samuel Miki Waweru vs Jane Njeri Richu CA NO 122 of 2001 (UR)**, **Wambo Vs Njuguna 1983 KLR 172** and **Hyde Vs Pearce 1982 ALLER 1029**. His further submission is that the 1<sup>st</sup> defendant was in the land under licence from the 2<sup>nd</sup> defendant and that when the contract of sale was allegedly repudiated between the two, the plaintiff's father was asked to leave and he did do and that his son came back and forcefully evicted the 2<sup>nd</sup> defendant. Besides, he stated, Bushasha had not been in continuous possession of the land as he left in **1993** after which his son took possession by use of force. Citing the case of **M'Mbaoni M'Thaara vs James Mbaka 2017 eKLR** he further avers that the plaintiff should have sued the 1<sup>st</sup> defendant for a refund or damages. He also cited the case of **Sisto Wambugu Vs Kamau Njuguna , NBI Civil Appeal No 10 Of 1982** for the proposition that possession with licence of the owner can not translate into adverse possession. In his view no adverse possession had been proved by the plaintiff

**30.** I must first address the defendant's contention that the claim of adverse possession and that of a purchaser lie side by side in this suit. The most telling document is the Originating Summons which seeks only the declaratory prayer for adverse possession and a supplemental order to assist in the effectuation of registration in the plaintiff's name. There is no claim under contract. In this case the averments and the evidence as to existence of a contract appear to be relevant only in so far as they assist the court to know how the plaintiff's family came to

be on the suit land and also that the 2<sup>nd</sup> defendant knew the manner in which they came to be in possession. There is consequently no need for this court to delve into the merits of the question as to whether the claim of adverse possession and the claim under a contract for the purchase of land can co-exist in the same suit. The only issue to investigate that remains is that of whether the plaintiff has satisfied the conditions requisite for adverse possession.

31. The 2<sup>nd</sup> defendant admits that he sold the 1<sup>st</sup> defendant the suit land vide **DExh 1** and ceased having possession thereof. From the evidence of the various witnesses in these proceedings there is no doubt that the 1<sup>st</sup> defendant took possession of the suit land and later sold it to the plaintiff's father. The 2<sup>nd</sup> defendant admits that the plaintiff's father was exclusively in possession after purchasing the land from the 1<sup>st</sup> defendant since he stated in his evidence that he was aware of Bushasha's presence at the time of the alleged refund of the consideration the 1<sup>st</sup> defendant had paid. It also appears that the 1<sup>st</sup> defendant was not inclined to oppose the plaintiff's claim.

32. One great setback to the 2<sup>nd</sup> defendant's defence is that the plaintiff's father was not involved in the refund exercise that is alleged to have occurred in **1993**. It is also evident that if the refund took place then the 1<sup>st</sup> defendant never informed the plaintiff's father of it. Nothing could explain this further than the fact that the plaintiff's father continued to reside on the suit land; he never lost possession to the 2<sup>nd</sup> defendant. There is no evidence of what action the 2<sup>nd</sup> defendant took to remove Bushasha from the land and his evidence that Bushasha left the land lacks credibility.

33. The other fact is that there was no privity of contract between the plaintiff's father and the 2<sup>nd</sup> defendant. There is no basis then to conclude that the refund and repudiation of the agreement between the 1<sup>st</sup> and the 2<sup>nd</sup> defendant affected the rights of the plaintiff's father so as to terminate the agreement between him and the 1<sup>st</sup> defendant. The agreement between the plaintiff's father and the 1<sup>st</sup> defendant required express repudiation which never took place.

34. The plaintiff states that he grew up on the suit land. Indeed this court was not availed credible evidence by the defendant's witnesses who alleged so to support their claims that the plaintiff used to live with his sister who lived within the vicinity. However no credible evidence was given by the defence of the existence of his sister's home nearby. It is striking that both the plaintiff's and the defendant's witnesses knew that the plaintiff schooled in a primary school within the sub-location and this implies that his home was nearby. His father is also identified by **PW 2** as having been a village elder.

35. Further, as submitted by the plaintiff, there is no explanation as to how, if the 2<sup>nd</sup> defendant had regained possession of the land at any given time after the same was sold to the plaintiff's father as he claimed, the 2<sup>nd</sup> defendant thereafter lost possession of the land.

36. I must disregard the 2<sup>nd</sup> defendant's attempts to obtain possession made after **2017** for the reason that if it happened, its timing was during the pendency of the instant suit. What this court would have considered to be relevant would have been dispossession of the plaintiff or his father before this suit was instituted, or a claim for eviction of the occupants of the suit land. However, there was no evidence presented that the plaintiff's father was ever dispossessed of the land just as there is no evidence of the institution of a suit seeking eviction.

37. Any assumption of possession by the 2<sup>nd</sup> defendant may have led to the removal of the main evidence of the plaintiff's family's hegemony over the suit land- their dwellings thereon. However this court can deduce from the photographs in the record that those houses, which look fairly old, have been standing on the suit land for a long time. I am persuaded that there was uninterrupted possession by the late Bushasha and subsequently his family continued with such possession and it was notorious enough draw the attention of persons within the locality, including the local administrators.

38. As to whether that possession was quiet, there is no evidence of any recorded dispute that was taken before the administrators involving the late Bushasha. The earliest recorded memoranda of the dispute are dated **2016**. Why the 2<sup>nd</sup> defendant failed to take possession of the land between the alleged date of refund to the 1<sup>st</sup> defendant in **1993** and the date of demise of the late Bushasha in **2009** cannot be understood. His struggle to obtain possession of the suit land which has in any event been unsuccessful commenced quite late in the day and the instant suit still found him without possession. There are not even structures on the suit land that can be attributed to his possession and occupation. One can surmise that it was because he had land that he had inherited from his father nearby on which he lived and did not need the suit land.

39. The plaintiff in his submissions rightly points to the fact that the 2<sup>nd</sup> defendant was quite lethargic in his response to the suit and that it was after the first judgment was entered in this suit and the decree extracted that the 2<sup>nd</sup> defendant emerged to defend the suit. In the application for setting aside judgment the 2<sup>nd</sup> defendant claimed non- service; however, this court while taking the view that he was not personally served with summons and while according him the benefit of doubt and setting aside the judgement against him dated **12/6/2018**, also stated that there was no clear evidence that he was not aware of the existence of the present suit. It would seem that the defendant had resigned himself to the dispossession by the late Bushasha and his family.

40. Instead of filing suit the 2<sup>nd</sup> defendant resorted to going to the chief to report the dispute and in this court's view, previous Court Of Appeal decisions that such resort to non-court fora can not amount to interruption of the adverse possessor's possession of the suit land still holds.

41. The upshot of the foregoing is that the plaintiff has established that he deserves the orders sought in his originating summons. Consequently the Originating Summons dated **15/11/2017** succeeds and I hereby enter judgment in favour of the plaintiff against the defendants and I issue the following final orders:

***(a) A declaration is hereby issued declaring that the late Bushasha Lucheri acquired 2 acres of land comprised in Cherangany /Kapcherop/1700 by way of adverse possession;***

*(b) An order directing that if the land has not already been so registered pursuant to the earlier decree made by this court, then the County Land Registrar Elgeyo Marakwet County shall cancel the registration of the 2<sup>nd</sup> defendant as proprietor of and amend the land register in respect of Cherangany/Kapcherop/1700 to have the same registered in the name of the Estate of the late Bushasha Lucheri and the title deed issued accordingly.*

*(c) The 2<sup>nd</sup> defendant alone shall bear the costs of the instant suit.*

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 8TH DAY OF DECEMBER, 2021.

MWANGI NJOROGI

JUDGE, ELC, NAKURU.