



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**CIVIL CASE NO 26 OF 2011 (O.S)**

**IN THE MATTER OF LAND REFERENCE NO. NDIVISI/NDIVISI/1640**

**AND**

**IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATIONS  
OF ACTIONS ACT**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**JOSEPH MUMERO WANYAMA ..... PLAINTIFF**

**VERSUS**

**JARED WANJALA LYANI ..... 1<sup>ST</sup> DEFENDANT**

**HESBORN MURULE LUSWETI ..... 2<sup>ND</sup> DEFENDANT**

**J U D G M E N T**

By an amended Originating Summons dated 19<sup>th</sup> May 2012 and filed on 24<sup>th</sup> May 2012 **JOSEPH MUMERO WANYAMA** (the plaintiff herein) and claiming to be entitled to the land parcel **NO NDIVISI/NDIVISI/1640** (the suit land) by way of adverse possession, sought a determination of the following questions: -

- 1. Whether or not the plaintiff herein has been in occupation of the land parcel NO NDIVISI/NDIVISI/1640 measuring 0.8 Hectares openly, continuously adversely and peacefully for a period exceeding 12 years.**
- 2 (a) Whether or not the title of JARED WANJALA LYANI (the 1<sup>st</sup> Defendant) over the said parcel of land has been extinguished by operation of law.**
- 3 (a) Whether or not the Court should order the plaintiff to be registered as the proprietor of the said land parcel number NDIVISI/NDIVISI/1640 in the place of the 1<sup>st</sup> Defendant.**
- 4. Whether or not the plaintiff has become entitled to all that land known as NDIVISI/NDIVISI/1640 by the concept of adverse possession.**
  - 4 (a) Whether the 1<sup>st</sup> Respondent has no good title to transfer to HESBORN MURULE LUSWETI (the 2<sup>nd</sup> Defendant).**
  - 4 (b) Whether the 2<sup>nd</sup> Defendant's entry on the suit land is unlawful.**
  - 4 (c) Whether the 2<sup>nd</sup> Defendant should be evicted from the suit land.**
- 5. Who should pay the costs of this suit?**

The Originating Summons was supported by the plaintiff's affidavit also dated 19<sup>th</sup> May 2012 to which were annexed his list of documents and witness statements.

In the said affidavit, the plaintiff has deponed, inter alia, that on 22<sup>nd</sup> May 1996 he purchased 2 acres of land from the 1<sup>st</sup> Respondent which was to be hived from the land parcel **NO NDIVISI/NDIVISI/1552**. The sale agreement is annexed as annexure **JMW – 1**. That the purchase price excluded the cost of trees and bananas which was to be agreed later but when the plaintiff went to occupy his portion in September 1996, he found that the 1<sup>st</sup> defendant had sold it to a third party and the 1<sup>st</sup> defendant showed him another portion next to the portion that he had sold him earlier. The plaintiff started cultivating his new portion in October 1996 where he has been growing maize, beans and vegetables but the 1<sup>st</sup> defendant has yet to transfer it to him although on 28<sup>th</sup> February 2011 he was shown the boundary. Later, the 1<sup>st</sup> defendant informed him that his portion was the suit land which he would transfer to him. However, on 12<sup>th</sup> March 2011, the plaintiff saw the 2<sup>nd</sup> defendant and other persons cultivating the suit land and when he enquired, the 2<sup>nd</sup> defendant informed him that he had purchased the same. The plaintiff had placed a caution on the suit land and does not know how it was removed since no notice was served on him as required in law.

That since 1996, he has occupied the suit land exclusively, and without interruption and is by law entitled to be registered as the proprietor thereof. That the 1<sup>st</sup> Defendant had no title to pass to the 2<sup>nd</sup> Defendant.

In addition to the said affidavit, the plaintiff also filed a witness statement dated 26<sup>th</sup> June 2014 in which he added that the purchase price was Kshs. 120,000/= excluding the cost of the bananas and trees and so when he was later shown a different portion, the terms of the previous agreement became irrelevant as that portion had no bananas or trees. That he leased the suit land to **ROSE MUSAMBAI** who later told him that the 1<sup>st</sup> defendant had sold the land to the 2<sup>nd</sup> defendant. That the original portion was later sold to one **JOSEPH BARASA MUTINYI** who subsequently sold it to **DAVID AYOI** in 2009. That it was only after being served with the summons in the case that the 1<sup>st</sup> defendant forged a letter purporting to have sent it to him on 12<sup>th</sup> February 2002 using the address **P .O. BOX 88 KIMILILI** which the plaintiff has never used. That the plaintiff has been in occupation of the suit land for well over 12 years and is entitled to the orders sought by way of adverse possession.

The Originating Summons is opposed and both defendants filed their replying affidavits and list of documents.

In a replying affidavit dated 28<sup>th</sup> April 2011 and filed on the same day, the 1<sup>st</sup> Defendant admitted having entered into the sale agreement with the plaintiff dated 22<sup>nd</sup> May 1996 but added that the plaintiff breached clause 3 thereof by not paying for the bananas, trees and other developments and did not even utilize the land other than destroying the said crops and thereafter leasing the land. That by a letter dated 12<sup>th</sup> February 2002, he beseeched the plaintiff to pay him the Kshs. 78,000/= being the value of the crops and developments but instead of paying the said sum, the plaintiff un – justifiably cautioned the land prompting the 1<sup>st</sup> defendant to write to the Land Registrar on 28<sup>th</sup> March 2011. Meanwhile, the 1<sup>st</sup> defendant sold the suit land to the 2<sup>nd</sup> defendant and applied for the necessary consent from the Land Control Board. That the 2<sup>nd</sup> defendant is currently in occupation of the suit land and it is therefore a blatant lie for the plaintiff to allege that he has been in occupation of the suit land since 1996 or that his occupation has been exclusive, open continuous, adverse and un – interrupted. That the plaintiff is therefore not entitled to the orders sought in his Originating Summons. The 1<sup>st</sup> defendant also filed his list of documents.

The 2<sup>nd</sup> defendant filed a replying affidavit dated 8<sup>th</sup> November 2016 in which he deponed, inter alia, that he purchased the suit land on 14<sup>th</sup> March 2011 from the 1<sup>st</sup> defendant having conducted a search and found the title to be clean. That he paid the purchase price and took possession of the suit land where he has constructed his house and conducts farming. That the plaintiff is simply fishing in this Court and if he bought land from the 1<sup>st</sup> defendant, then it must be a different title which has nothing to do with him. He also annexed to his replying affidavit the sale agreement dated 14<sup>th</sup> March 2011, the application to the Land Control Board and the consent.

Directions having been taken; the trial commenced on 26<sup>th</sup> November 2019 after a previous ex – parte Judgment had been set aside.

The plaintiff called as his witnesses **PATRICK SIMIYU SITINI (PW 2)** and **ROSE NALIKA MUSAMBAI (PW 3)** who both adopted their statements in evidence.

The plaintiff adopted as his testimony the contents of his supporting affidavit which I have already summarized above.

In his witness statement dated 26<sup>th</sup> June 2014, **PATRICK SIMIYU SITINI (PW 2)**, who is a brother –in - law to the plaintiff, states that in April 1996, the plaintiff requested him to help him buy land. So, he visited one **STANLEY SITUMA LIANI** a brother to the 1<sup>st</sup> defendant who informed him that the 1<sup>st</sup> defendant had land which he wished to sell. A meeting was arranged and on 21<sup>st</sup> May 1996, the plaintiff, the 1<sup>st</sup> defendant, his brother **STANLEY SIFUMA LIANI** and the witness met on the land parcel **NO NDIVISI/NDIVISI/1552** and the plaintiff agreed to purchase 2 acres' part of which had banana crop and trees. The purchase price of Kshs. 120,000/= was agreed upon and on 22<sup>nd</sup> May 1996, the parties and their witnesses met at **WEBUYE COURT** where their agreement was executed. It was agreed that the costs of the bananas and trees would be discussed later.

However, when the witness accompanied the plaintiff to the land in August 1996, they were informed by the 1<sup>st</sup> defendant's brother **STANLEY SIFUMA LIANI** that the portion with bananas and trees had been sold to someone else and so the plaintiff was shown another portion which he started cultivating. The plaintiff thereafter made several visits to the 1<sup>st</sup> defendant to have him execute the transfer documents but to no avail. Since the plaintiff was living in **KIMININI** and it was becoming difficult for him to cultivate the suit land, he decided to lease it to **ELIUD MUSAMBAI** and his wife **ROSE MUSAMBAI**. In March 2011, the plaintiff informed him that he 1<sup>st</sup> defendant had sold the suit land to someone else and that he was going to lodge a caution thereon at the Land's Office. He therefore advised the plaintiff to file this suit.

**ROSE NALIKA MUSAMBAI (PW 3)** similarly adopted as her evidence the statement dated 25<sup>th</sup> October 2019 which the Court admitted though filed late following a ruling delivered on 11<sup>th</sup> December 2019.

In that statement, she has stated that she lives on land parcel **NO NDIVISI/NDIVISI/1930** which neighbours the suit land and which she has been leasing from the plaintiff from 2006 to 2010. That she is aware that the 1<sup>st</sup> defendant sold the suit land to the plaintiff and later to the 2<sup>nd</sup> defendant. That the plaintiff has been in occupation of the suit land for over 12 years and is entitled to be registered as the proprietor of the same.

The defendants adopted as their evidence their respective replying affidavits contents of which I have already summarized above.

Submissions were thereafter filed both by **MS MUMALASI ADVOCATE** for the plaintiff, **MR SICHANGI ADVOCATE** for the 1<sup>st</sup> defendant and **MR OMUKUNDA ADVOCATE** for the 2<sup>nd</sup> defendant.

I have considered the evidence by all the parties and the submissions by counsel.

The plaintiff's case is hinged on a claim to the suit land by way of adverse possession. **Section 38(1) of the Limitation of Actions Act** provides as follows: -

*“where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of those acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”*

In **KASUVE .V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 K.L.R.**, the Court of Appeal set out what a person claiming to be entitled to land by way of adverse possession should prove. It said: -

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

It is now well established that the combined effect of the relevant provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996.**

The new land laws promulgated after the 2010 Constitution also recognize the doctrine of adverse possession. **Section 28(h) of the Land Registration Act 2012** identifies some of the overriding interests as: -

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

Similarly, **Section 7 of the Land Act 2012** provides that: -

*“Title to land may be acquired through: -*

*(a) -*

*(b) -*

*(c) -*

*(d) prescription.”*

A party claiming land by way of adverse possession must also prove that he has occupied the land neither by force nor secretly and without permission i.e. *nec vi nec clam nec precario* – **KIMANI RUCHINE .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10.**

Such possession must also be peaceful. In **ROBERT SHUME & OTHERS .V. SAMSON KAZUNGU KALAMA 2015 eKLR**, the Court of Appeal held that: -

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

In **GRACE WAIRIMU SORORA .V. CHAKA LTD & OTHERS 2017 eKLR** the Court of Appeal also emphasized on the need for the

adverse possession to be peaceful. It said: -

***“What the Appellant need to prove was that her occupation was continuous, open and peaceful without permission of the owner.”*** Emphasis added.

In a recent exposition on the doctrine of adverse possession, the Court of Appeal stated as follows in the case of **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL NO 56 OF 2014 MALINDI [2015 eKLR]**:-

***“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential pre – requisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act .....”*** Emphasis added

The owner of the land must also have been dispossessed of the same before the Claimant can successfully plead ownership through adverse possession. In **SISTO WAMBUGU .V. KAMAU NJUGUNA C.A CIVIL APPEAL NO 10 OF 1982 [1983 eKLR]** **CHESONI Ag J.A** (as he then was) cited **LINDLEY MR** in **LITTEDALE .V. LIVERPOOL COLLEGE 1900 1 CH 19** as follows: -

***“In order to acquire by the statute of Limitations a title to land which has a known own, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it .....*”**

In adverse possession therefore, the owner of the land must have been dispossessed or parted with the land and the adverse possessor taken possession thereof which must be open, notorious continuous, hostile, exclusive, peaceful and with the intention of depriving the owner of the use of the said land. There must therefore be a complete ouster of the owner of the land by the adverse possessor and such possession must be without the permission of the land owner.

I shall be guided by the above legal provisions and precedents among others in determining this dispute.

It is clear from the Certificate of Search in respect to the suit land and which is part of the documents herein dated 10<sup>th</sup> March 2011 that although the 1<sup>st</sup> defendant sold the suit land to the 2<sup>nd</sup> defendant by an agreement dated 14<sup>th</sup> March 2011, the same is still registered in the names of the 1<sup>st</sup> defendant although the necessary consent for transfer has been issued by the Land Control Board. It must however be remembered that a claim for adverse possession, as provided under **Section 38 (1) of the Limitation of Action act**, can only be made against the registered proprietor of the land in dispute or his successor. Clearly therefore, no orders in adverse possession can be made as against the 2<sup>nd</sup> defendant with respect to the suit land.

It is common ground that by an agreement dated 22<sup>nd</sup> May 1996, the 1<sup>st</sup> defendant sold to the plaintiff a portion measuring 2 acres out of the then land parcel **NO NDIVISI/NDIVISI/1552** at a consideration of Kshs. 120,000/= . According to paragraph 3 of the sale agreement, that portion had some **“trees, bananas and other developments”** whose cost was to be negotiated later before transfer. The agreement did not have any completion date. The plaintiff’s case is that when he came to occupy the portion in September 1996, he found that the 1<sup>st</sup> defendant had already sold it to someone else and he showed him another portion which had no trees and which is the suit land. However, on 12<sup>th</sup> March 2011, the plaintiff found the 2<sup>nd</sup> defendant and other strangers cultivating it. It was then that he learnt that the 2<sup>nd</sup> defendant had purchased it.

The 1<sup>st</sup> defendant states however that not only did the plaintiff fail to pay the Kshs. 78,900/=being the value of the trees and bananas but he also leased the suit land to one **ELIUD MUSAMBAI** and so on 12<sup>th</sup> February 2002, the 1<sup>st</sup> defendant stopped **ELIUD MUSAMBAI** from utilizing the suit land and put it under the custody of **STANLEY SIFUMA** until it was sold to the 2<sup>nd</sup> defendant.

What is clear therefore is that the agreement dated 22<sup>nd</sup> May 1996 was frustrated but the parties did not enter into any other new agreement with respect to the suit land. Indeed, that is well captured in paragraph 5 of the plaintiff’s own affidavit wherein he has deponed: -

***“That we agreed with the first Respondent and I occupied the portion of land next to the one I had originally (sic) shown. This new portion did not have any trees or bananas hence the terms of the agreement in respect of trees and bananas was deemed as irrelevant.”***

The 1<sup>st</sup> defendant however makes no mention of this new portion of land. His case is that the plaintiff did not pay for the trees and bananas and instead leased the land to **ELIUD MUSAMBAI**. The plaintiff admitted in cross – examination by **MR SICHANGI** that he did not pay for the trees and bananas. This is what he said: -

***“I bought two (2) acres from the 1<sup>st</sup> defendant for Kshs. 120,000/= on 22<sup>nd</sup> May 1996. It had bananas and Eucalyptus trees. We agreed that I would pay him the value of the bananas and trees so that he transfers the land to me. The land was NDIVISI/NDIVISI/1552. I did not pay him for the trees and bananas because I found the had already sold that portion to another person.”***

The proper test or proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the Claimant has proved that he had been in possession for the requisite number of years – **SISTO**

**WAMBUGU .V. KAMAU NJUGUNA** (supra). In the circumstances of this case, it is clear that the plaintiff never dispossessed the 1<sup>st</sup> defendant of the suit land or even the initial portion the subject of the agreement dated 22<sup>nd</sup> May 1996. This is well demonstrated by the fact that notwithstanding the sale agreement of 22<sup>nd</sup> May 1996 by which the 1<sup>st</sup> defendant sold a portion of the land parcel **NO NDIVISI/NDIVISI/1552** to the plaintiff followed thereafter by the other arrangement by which the 1<sup>st</sup> defendant (according to the plaintiff) showed him the suit land in exchange for the previous parcel which had been sold to another person, the 1<sup>st</sup> defendant still remained in possession of both the two parcels of land. The plaintiff's evidence in support of his claim to the suit land by way of adverse possession appears to me to be rather tenuous. He has not demonstrated exclusive possession of the suit land which is an important ingredient of a claim based on adverse possession.

Further, the plaintiff was required to demonstrate that his occupation of the suit land has been peaceful. The term peace is defined in **BLACK'S LAW DICTIONARY 10<sup>TH</sup> EDITION** as: -

***“A state of public tranquility, freedom from civil disturbance or hostility.”***

As part of his evidence, the 1<sup>st</sup> defendant produced a letter dated 12<sup>th</sup> February 2002 which he said he wrote to the plaintiff complaining to him that he (plaintiff) was leasing the suit land to **ELIUD MUSAMBAI** yet he had not paid the Kshs. 78,900/= being the value of the trees and bananas. In the said letter, he warns the plaintiff to pay the said sum to enable the 1<sup>st</sup> defendant transfer the suit land to him otherwise the same would be sold to someone else.

However, in his statement dated 26<sup>th</sup> June 2014, the plaintiff describes the said letter as a forgery purportedly sent to him through **P .O. BOX 80 KIMILILI** which has never been his address. However, as part of his own documents, the plaintiff produced the Certificate of official Search in respect of the suit land dated 23<sup>rd</sup> March 2011 and the remarks under inhibitions, cautions and restrictions read as follows: -

***“14.3.2011 CAUTION IN FAVOUR OF JOSEPH MUMELO WANYAMA ID 5725143 BOX 80 KIMILILI CLAIMING PURCHASER'S INTEREST”***

It cannot therefore be correct for the plaintiff to allege, as he has done in his witness statement dated 26<sup>th</sup> June 2014, that: -

***“It was after being served with the summons herein that the 1<sup>st</sup> defendant forged a letter purporting to demand from me the value of the trees and bananas saying that I had sold the trees and bananas to somebody who had destroyed them and therefore that I had breached the agreement.***

***Infact the said letter is dated 12/02/2002 and was purportedly sent to me via P .O. Box 80 KIMILILI which has never been my address.”***

In view of his own document showing his address as P .O. Box 80 **KIMILILI**, he cannot now claim that it ***“has never been”*** his address. One cannot approbate and reprobate at the same time.

It is also instructive to note that when the plaintiff's application dated 28<sup>th</sup> March 2011 seeking injunctive and inhibitory orders against the 1<sup>st</sup> defendant came up before **MUCHELULE J**, he made the following remarks with regard to the said letter in his ruling dated 8<sup>th</sup> November 2011 in which he dismissed the said application.

***“The Applicant states that he had been on the suit land continuously and without interruption since 1996. The Respondent states that on 12.2.2002 he wrote to the Applicant to pay Kshs. 78,900/= as per the agreement failing which he would consider the agreement breached and would re – sell the land. The Applicant does not dispute that he received the letter.***

***He states that he considered the request for payment as being irrelevant given that the Respondent has taken him to a portion different from what had been agreed on. He did not, however, respond to the letter.”***

Clearly therefore, the issue of whether or not the plaintiff received the letter dated 12<sup>th</sup> February 2020 is now water under the bridge. He cannot run away from it. The import of that letter is to demonstrate that the plaintiff's possession of the suit land was also not peaceful. The penultimate paragraph of the said letter reads as follows: -

***“That you have leased my parcel to MR ELIUD MUSAMBAI without even informing me. Which means you are doing business in my parcel, therefore I want you to come and clear my money for items you sold and also I have sub – divided my parcel and sold them and done transfers.***

***So please come and pay my money to enable me transfer portion to you. Failure to payment I shall sale the portion to someone else and refund your money minus the above amount. It will mean you have broken the agreement.”***

The tone of this letter is not really one that describes the plaintiff's possession of the suit land as one of tranquility. It also reinforces the fact that although the plaintiff was leasing the suit land to third parties, he never really dispossessed the 1<sup>st</sup> defendant who was still able to re – enter and give possession to other persons including the 2<sup>nd</sup> defendant.

It is also important to remind myself of what I stated in my earlier ruling in this matter. In that ruling delivered on 23<sup>rd</sup> May 2019 following

an application by the plaintiff seeking a vesting order in respect to the suit land and two applications by the defendants seeking to set aside the ex – parte Judgment herein, I made the following observation in respect to the letter dated 12<sup>th</sup> February 2002: -

*“From the tone of the above letter, it is clear to me that whereas the plaintiff’s occupation of the suit land at least from 1996 to 2011 cannot be disputed, it was not peaceful because six (6) years into the agreement, the 1<sup>st</sup> defendant was still complaining to the plaintiff about the compensation for the banana, trees and other development. There is nothing on record to show that the plaintiff responded to that letter. In MTANA LEWA .V. KAHINDI NGALA MWAGANDI 2015 e KLR, the Court of Appeal stated that an essential pre – requisite of adverse possession is that it should “neither be by force or stealth.” While I am cautious not to appear to be determining this case at this stage, it is clear that the 1<sup>st</sup> defendant’s defence raises triable issues.*

*And should the 1<sup>st</sup> defendant be able to demonstrate that the plaintiff’s occupation of the suit land was not peaceful, then that would defeat the plaintiff’s claim in adverse possession meaning that the 2<sup>nd</sup> defendant was able to acquire a proper title. Those will be issues for the trial.”*

At the time of that ruling, I had not had the advantage of hearing the defendant’s case. Having done so now, it is clear to me that the plaintiff’s occupation of the suit land was neither exclusive nor peaceful. Most importantly, the plaintiff did not dispossess the 1<sup>st</sup> defendant of the suit land. His claim to the suit land by way of adverse possession cannot therefore be sustained. It must be dismissed.

The plaintiff also sought the determination of the following issues with regard to the 2<sup>nd</sup> defendant: -

**4 (a) Whether the 1<sup>st</sup> defendant has no good title to transfer to the 2<sup>nd</sup> defendant.**

**4 (b) Whether the 2<sup>nd</sup> defendant’s entry on the suit land is unlawful.**

**4 (c) Whether the 2<sup>nd</sup> defendant should be evicted from the suit land.**

The plaintiff’s claim to the suit land by way of adverse possession having collapsed, it is clear that the plaintiff’s case against the 2<sup>nd</sup> defendant could only be premised on quick sand. Earlier in this Judgment, I stated that a claim in adverse possession can only be directed at the registered proprietor of the suit land. **Section 38(1) of the Limitation of Actions Act** is very clear on that. And although the 1<sup>st</sup> defendant has sold the suit land to the 2<sup>nd</sup> defendant, he is still the current registered proprietor thereof at least upto the period when this suit was filed. As the registered proprietor of the suit land, the 1<sup>st</sup> defendant enjoys all the rights and privileges belonging or appurtenant thereto and that includes the right to transfer it to 3<sup>rd</sup> parties. That right is protected by **Section 24 of the Land Registration Act**. A similar provision was found in **Section 27 of the repealed Registered Land Act** which was the applicable law when the 1<sup>st</sup> defendant sold the suit land to the 2<sup>nd</sup> defendant by the sale agreement dated 14<sup>th</sup> March 2011. There is nothing to suggest that the 1<sup>st</sup> defendant’s title to the suit land can be impugned on the ground of fraud, illegality or any unprocedural or corrupt scheme in the manner in which it was obtained. Therefore, the 2<sup>nd</sup> defendant’s entry onto the suit land cannot be declared unlawful because it was transferred to him by the legal owner. There can be no basis upon which the 2<sup>nd</sup> defendant can be evicted from the suit land under those circumstances. Therefore, the issues raised by the plaintiff in paragraph 4(a) (b) and (c) of his plaint can only be answered in favour of the 2<sup>nd</sup> defendant.

The up – shot of the above is that the plaintiff’s suit against both defendants is dismissed with costs.

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**

**Judgment dated, delivered and signed at Bungoma this 27<sup>th</sup> day of May 2020.**

**Boaz N. Olao.**

**J U D G E**

**27<sup>th</sup> May 2020.**

This Judgment was due on 11<sup>th</sup> June 2020. However, in view of the measures restricting Court operations following the **COVID – 19** pandemic, and in light of the directions issued by the Honourable Chief Justice on 23<sup>rd</sup> April 2020, it is brought forward and delivered through electronic mail with notice to the parties.

**Boaz N. Olao.**

**J U D G E**

27<sup>th</sup> May 2020.