



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISII

ELC NO. 364 OF 2016

KEVIN MOINDI NYAKANGO.....1ST PLAINTIFF

EDWAIN MONDI OMWONYA.....2ND PLAINTIFF

JUDY KERUBO MOINDI.....3RD PLAINTIFF

THADDEUS MOINDI NYAKUNDI.....4TH PLAINTIFF

MARTHA BOSIBORI NYAKANGO.....5TH PLAINTIFF

VERSUS

SIMON OMANWA OSORO.....1ST DEFENDANT

FRANCIS MOINDI OBIYE.....2ND DEFENDANT

J U D G M E N T

1. The 1st to the 4th Plaintiffs are children of the 5th plaintiff who is their mother. The 2nd defendant is the father of the 1st to the 4th plaintiffs and the husband of the 5th plaintiff. The 1st defendant purchased a portion of land from the 2nd defendant's land parcel Central Kitutu/Mwabundusi/595 which portion after excision was registered as Central Kitutu/Mwabundusi/804 and transferred to the 1st defendant on 21st December 1989. The plaintiffs claim the sale and transfer of the portion of land to the 1st defendant by the 2nd defendant was invalid and unlawful.

2. The plaintiffs by an originating summons dated 3rd November 2016 have urged the Court to determine the following questions:-

1. Whether the 2nd defendant rightfully sold part of L.R No. Central Kitutu/Mwabundusi/759, being ancestral land, to consent /concurrence?

2. Whether the registration as proprietor by the 1st Defendant of part of L.R No. Central Kitutu/Mwabundusi /759, being the property known as L.R Central Kitutu/Mwabundusi/759, was lawful and legal?

3. Whether the 1st Defendant claim to title to the possession of L.R No. Central Kitutu/Mwabundusi/804 have been extinguished by virtue of the Limitation of Actions Act, Chapter 2(2), 2(3),7,9,13,17,23,24,37 and 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya.

4. Whether the plaintiffs have been in possession of the property land known as L.R No. Central Kitutu/Mwabundusi/804 peacefully, openly, and continuously without interruption for a period exceeding twelve (12) years?

5. Whether the plaintiffs are entitled to a declaration that the peaceful, open and un-interrupted use and occupation of L.R No. Central Kitutu/Mwabundusi/804 for a period exceeding twelve (12) years entitles them to registration as proprietors thereof through prescription of law (adverse possession).

6. In the alternative, and without prejudice to the foregoing

(a) Whether the plaintiff's are entitled to an order for resurvey of the property known as title number L.R No. Central Kitutu/Mwabundusi/759 (before the alleged sub-division and hiving off of the property known as title Number L.R No. Central Kitutu/Mwandusi/804) to establish the true boundaries thereof; and

(b) Subsequent to (a) above, whether the plaintiffs are entitled to an order for the re-subdivision of the said property known as L.R No. Central Kitutu/Mwabundusi/759 to ensure that any portion thereof; that may be due to the 1st Defendant is hived off in a manner that does not affect the existing structure's on the land.

(c) Whether the Plaintiffs are entitled to such further order as this Honourable may deem just in the circumstances.

3. The originating summons was supported on the grounds set out on the body of the application and a detailed supporting affidavit sworn by Kevin Mondy Nyakango, the 1st plaintiff herein.

4. The 1st and 2nd defendants each filed a replying affidavit in response to the originating summons which were both dated 16th November 2016 and filed in Court on 18th November 2016. The replying affidavit by the 1st defendant incorporated what he described as a counterclaim. The 2nd defendant in his response stated that in 1975 he and the 5th plaintiff separated and lived apart until 1996 when the 5th defendant came back to his home together with the 2nd, 3rd and 4th defendants and he accepted and welcomed them. He stated that during the plaintiff's absence he sold to the 1st defendant a portion of his land to be able to take care of his mother who was ailing. He affirmed that following subdivision and demarcation the 1st defendant's land portion became Central Kitutu/Mwabundusi/804 which he took possession of

5. The 2nd defendant stated that contrary to the plaintiffs averments it was the plaintiffs who had trespassed onto the 1st defendant's parcel of land.

6. The 1st defendant for his part, deposed that he on 3rd November 1986 entered into an agreement to purchase a portion of land from the 2nd defendant. He averred that following subdivision the portion of land he purchased, was demarcated and its boundaries delineated and he was issued with a title dated 28th December 1989 as per annexure "S00-3" to his replying affidavit. The 1st defendant stated that he had lawfully purchased the land from the 2nd defendant and had appropriately fenced the same to keep away trespassers. He however stated sometime in October 2016, the plaintiffs unlawfully entered into his plot damaged his fence and constructed a structure thereon without his authority or permission. By way of counterclaim he sought a declaration that he was the bonafide owner of Central Kitutu/Mwabundusi/804, an order of eviction against the plaintiffs and an order of permanent injunction directed against the plaintiffs, their agents and/or servants restraining them from trespassing, constructing thereon and/or in any other manner dealing with land parcel Central Kitutu/Mwabundusi/804.

7. On 22nd November 2016 the Court gave directions respecting the hearing and disposal of the originating summons. It was directed that the originating summons be converted to a plaint and the replying affidavits to defences and that the evidence be adduced orally. The parties were further directed to exchange their respective bundles of documents and witness statements. The matter was heard before me on diverse dates. Five witnesses testified in support of the plaintiffs case while two witnesses testified in support of the defendants case

8. PW1 Steve Mokaya was the Land Registrar, Kisii County. The Witness produced in evidence the records, of land parcel Central Kitutu/Mwabundusi/804 and 759. He stated that as per the records the original registered owner of land parcel Central Kitutu/Mwabundusi/804 was Francis Moindi Obiye, the 2nd defendant herein. He stated the 2nd defendant was registered on 16th June 1989 and that the property was transferred to the 1st defendant on 21st December 1989 and title was issued to the 1st defendant on 28th December 1989. The Land Registrar stated the Transfer in favour of the 1st defendant was signed by the Executive Officer One (EO1) Kisii High Court on behalf of Francis Mondy. The copy of the transfer was produced as " PEX1". He however stated the copy of the Court order was not amongst the documents in the parcel file though it should have been there. He stated there was a charge registered against the title on 4th June 1990 but was discharged on 2nd May 1995.

8. The Land Registrar further stated a new title was re issued on 4th April 2016 though there was no evidence that a Gazette Notice had been issued. He stated there was however an affidavit verifying the loss of the title and a police abstract evidencing the loss. He further explained there was a court order dated 4th November 2016 for maintenance of status quo registered against land parcel 804 on 17th August 2017 and caution registered against land parcel 759 on 21st October 2016 by the plaintiffs. He stated that as per the records land parcels 759 and 804 originated from land parcel 595 following a partition. He stated as per the mutation exhibited by the defendants land parcel 595 measured 2.6 Hectares and was subdivided into 15 portions.

9. PW2 Elijah Magera was the Assistant Chief Mwamosioma Township sub location. He testified that sometimes in 2016 he participated in attempting to resolve a property dispute involving the parties . He said the 1st defendant had claimed to have bought some land from the 2nd defendant. He stated he invited the disputing parties to his office on or about 16th October 2016 for a meeting where the 2nd defendant acknowledged having sold some land to the 1st defendant but the 2nd defendant's sons and his wife denied any knowledge of such sale. He stated he and the wazees who were at the meeting decided to visit the disputed land which they did on 20th October 2016. At the site he stated there was a mabati structure and a pit latrine while there was a storeyed house on the adjacent land. He affirmed the mabati structure was on land parcel 804 but not the storeyed house. He stated the mabati structure on land parcel 804 was constructed by the 1st plaintiff . The witness stated they did not pass any verdict but advised the parties to seek assistance from the court since the issue was one of ownership and the 1st defendant held a title to the disputed land.

10. Pw3 Yohana Nyakundi adopted his witness statement filed in Court on 23rd February 2017 as his evidence. It was his evidence that the 1st plaintiff was his nephew and that he was surprised that his brother the 2nd defendant had sold part of his family land. He stated he did not know who had purchased the land. The witness stated it was the plaintiffs who had been using the land in dispute. He denied the 1st

defendant had ever resided on the suit land. He stated the 1st plaintiff had built a house on the family land and that he, and other members of the family attended a house opening party of the 1st plaintiff at which the 2nd defendant was present.

11. PW4 Peter Mangara Omwenga was the 2nd defendant's step brother. He adopted his witness statement dated 20th February 2017 as his evidence in chief. It was his evidence that the 2nd defendant never consulted him as his elder brother when he sold a portion of land to the 1st defendant. He stated he had not known the 1st defendant until 2016 when the dispute about the land the 1st defendant had bought arose. He stated that when they met with the 1st defendant and the 2nd defendant with his sons, the 2nd defendant insisted he had sold the portion of land to the 1st defendant and he was not going to change his mind. The witness stated that the land the 1st defendant said he had purchased was not delineated and/or fenced. He stated the 1st plaintiff had a house and some rental houses on the land. The witness was not aware that the 1st defendant had obtained title for the portion he had purchased.

12. The 1st plaintiff, Kelvin Moindi Nyakango, testified as PW5 and was the last witness in support of the plaintiffs' case. Like the other witnesses he relied on the witness statement filed in court on 28th February 2017 as his evidence. He also relied on the bundle of documents filed on behalf of the plaintiffs ('PEX1-6'). In his evidence he stated the plaintiffs were residing on the suit land in 1986 and that the land was comprised in land parcel Central Kitutu/Mwabundusi/595 owned by his grandfather and 4 other families. He stated his father inherited a portion of land parcel 595 from his grandfather and that his father was registered as owner of land parcel 759. He said he was not aware that land parcels 595 was subdivided and boundaries fixed. He stated he was the one who fenced his father's portion of land in 1988. The witness stated that it was only in 2016 that the 1st defendant came around claiming he had bought a portion of land in 1986 from his father and wanted his father to show him the land. The witness demanded that the 1st defendant had fenced off any portion of land claiming that it was only in October 2016 that the 1st defendant attempted to put up a fence after he failed to agree with the plaintiffs.

13. PW1 further stated that the only fence that existed is the one he had put up and he stated the photographs exhibited by the 1st defendant showed the fence that he had put up and the rental houses that he had constructed on the property. PW5 further testified that in 1975 his mother separated with his father but stated his mother and himself returned in 1978/79 and ever since they had resided on the land. He said it was not true that he and his mother came back in 1996 as claimed in the replying affidavit sworn by his father.

14. Under cross examination PW5 stated that he and his siblings and his mother have come to court because the 1st defendant had taken part of their ancestral land which he had no right to take. He stated it was his right to inherit ancestral land. He said he was aged 14 years in 1986 when his father sold the land to the 1st defendant. He maintained his father had no right to sell the land to the 1st defendant. The witness further stated that parcel 759 was registered in his grandfather's name though it is now registered in his father's name. The witness further said he was aware that the 1st defendant was registered as the owner of land parcel Central Kitutu/Mwabundusi/804 though he said he first saw the title to the land when the 1st defendant filed his bundle of documents in court. He further said the 1st defendant put up a mabati structure on the land in 2016. The witness stated they did not know how the title of land parcel 804 came into being.

15. The 2nd defendant, Francis Moindi Obiye, testified as DW1. In his evidence he admitted he sold a portion of land measuring 25 feet by 100 feet in 1986 to the 1st defendant from land parcel Central Kitutu/Mwabundusi/595 (the witness in evidence in chief had given the parcel as 759 but in cross examination he clarified it was parcel 595). He stated the consideration was Kshs 18,000/= and that the funds were for purposes of taking care of his mother's medical bills as she was sickly. He stated the portion he sold was delineated on the ground. The witness placed reliance on the bundle of documents filed in court on 29th March 2019 as per list dated 16th March 2019 ("DEX1-7").

16. The witness explained that at the time of sale his children (plaintiffs 1-3) were young while the 4th plaintiff was born out of wedlock. He stated that he and the 5th plaintiff (his wife) separated in 1982 and that the plaintiff came back with the children in 1995 and therefore he was not living with them in 1986 when he sold the land to the 1st defendant. He stated that land parcel 595 was registered in the name of his father and following succession he was awarded land parcel 759. The 1st defendant was given land parcel 804 and he was issued a title in 1989. He stated that the 1st defendant took possession of the portion he sold to him and later erected a structure thereon. He explained that when his children came back and wanted to put up their homes he pointed out to them the land that belonged to them. The witness however stated that while the 1st plaintiff had put his house on the family land, he constructed rental houses on a portion of the 1st defendant's land. The 1st defendant also has a structure on land parcel 804. The witness maintained the plaintiffs had no valid claim against him and/or the 1st defendant.

17. In cross examination by Mr. Mshweshwe advocate for the plaintiffs, the 2nd defendant reiterated that he sold the land to the 1st defendant in 1986 and that the portion he sold formed part of land parcel 595 and not 759. He affirmed that parcel 595 was registered in the name of Barnabas Nyakundi, Chrisantus Nyakundi, Samuel Moseki Nyakundi and Peter Omwenga Nyakundi. He stated Barnabas Nyakundi was his father and the others were his father's brothers. The witness stated there had been a civil case Kisii HCCC No. 194 of 1988 where he was sued as one of the defendants and a consent order was made which resulted in the subdivision of land parcel 595 and he was registered as the owner of the land parcel 759 a resultant subdivision from land parcel 595.

18. The 2nd defendant further stated the 1st defendant never came to live/reside on the portion of land he sold to him. He as well was not staying on the property. The witness stated he could not tell exactly when the structures on the suit land were built but in October 2016, the 1st defendant called him to inquire who had put up a structure on his land. He stated the 1st plaintiff had not planted any trees on the land belonging to the defendant. The witness affirmed that efforts to resolve the dispute through the local administration failed to yield any positive results.

19. DW2 was Simon Omanwa Osoro, the 1st defendant. He testified that he purchased a portion of land 25 feet by 100 feet from the 2nd defendant. The portion of land after subdivision became land parcel 804 and the transfer of the same to him was authorized by the court. He stated he took possession and commenced utilizing the same until the 1st plaintiff invaded the land and put some structures thereon which

prompted him to make a report to the police. The 1st defendant stated he entered into a formal agreement exhibited as “DEX1” and that the transaction was completed and he was issued a title deed for the land. He stated the plaintiffs have their own land where the 1st plaintiff had constructed his house. He sought orders that the plaintiffs move from his land.

20. The 1st defendant further in cross examination stated he constructed a house on the plot though he could not remember the date. He stated he did not know when the 1st plaintiff constructed the structures on his plot though he came to learn of the construction in 2016. He maintained he fenced the plot immediately after purchase. The witness said he could not remember what transpired in HCCC No. 194 of 1988. He however said he was awarded the land by the court.

21. After the closure of the trial the parties filed their final closing submission as directed by the Court. Having considered and reviewed pleadings, the evidence and the submissions of the parties the following are the issues that arise for determination.

1. *Whether land parcel Central Kitutu/Mwabundusi/759 and 804 were subdivisions from land parcel Central Kitutu/Mwabundusi/595?*
2. *Whether the 1st defendant was lawfully and validly registered as the owner of land parcel Central Kitutu/Mwabundusi /804?*
3. *Whether the plaintiffs have adversely possessed land parcel Central Kitutu/Mwabundusi/804 such that the 1st defendants, title if any, can be said to have been extinguished by virtue of the doctrine of adverse possession by reason of the plaintiffs having occupied and adversely possession the land for a period of 12 years or more?*
4. *What orders/reliefs should the Court grant.*

22. The issue whether land parcel central Kitutu/Mwabundusi /804 was a part of land parcels Central Kitutu/Mwaundusi/595 and/or 759 arises because by their pleadings and by their evidence in court the plaintiffs have averred that the land parcel was part of land parcel 759. The 1st defendant and the 2nd defendant adduced evidence to the effect that indeed land parcel 759 and 804 were subdivisions from land parcel 595. The defendants produced in evidence a copy of the agreement of sale dated 5th November 1986 between the 2nd defendant and the 1st defendant (“DEX1”) which was clear that the 1st defendant was buying a portion of 25 feet by 100 feet which was to be excised from land parcel Central Kitutu/Mwabundusi/595. The plaintiffs and the defendants admitted there had been a Civil case namely Kisii HCCC No.194 of 1988 *M/s Mwanchani Trading Co. Lt – vs- Masira Bitutu Obiye & 4 others* in which both the 1st and 2nd defendants were parties. The parties requested for the production of the said Court file for perusal by the court. The Deputy Registrar was directed to avail the Court file and the same was duly availed. The court has perused the file record of Kisii HCCC No. 194 of 1988 and the following salient facts emerge.

1. *That the plaintiff sued the defendants jointly as the beneficiaries of land parcel No.Central Kitutu/Mwabundusi/595 and was claiming portions of land it had purchased out of the said land parcel.*
2. *The 1st defendant in the present suit Simon Omanwa Osoro, by an application dated 25th January 1989 applied to be enjoined in the suit as a plaintiff as he was claiming against defendant, Francis Moindi Obiye who was also the 2nd defendant in the earlier suit a portion of the land*
3. *On 16th February 1989 the 1st defendant herein was enjoined by consent as a plaintiff in the suit and the parties further recorded an elaborate consent settling the suit. Inter alia under paragraph 4, 6, and 7 of the consent recorded by V V Patel, J provided as follows:-*

(4) The 3rd defendant (Nyamari) to transfer 50 Feet by 260 feet to Simon Omanwa Osoro, the 2nd plaintiff from the above land parcel forthwith. And the 2nd defendant to transfer to said Osoro 25 Feet by 100 Feet.

(6) Should any party refuse or neglect to execute any document to effect the above transfer the same be executed by E.O of this court.

(7) The Surveyor and Land Registrar to survey and subdivided the above portion for transferring to the plaintiffs and the costs thereof be paid by the said two plaintiffs respectively.

23. Although the extracted typed Court order in the file is not signed, the original hand written record of the file, the order was counter signed by all the parties and the Judge. It does appear that this court order was executed. The defendants have exhibited a copy of the mutation form for land parcel 595 (DEX2) which showed the parcel of land was subdivided into 15 subplots which included land parcels 759 and 804 . The mutation form dated 13th June 1989 was signed by all the defendants in the suit. The E.O Kisii High Court executed a transfer in respect of land parcel Central Kitutu/Mwabundusi/804 in favour of Simon Omanwa Osoro pursuant to the consent order issued on 16th February 1989. The search and abstract of title tendered in evidence in regard to land parcels 804 show that the 1st defendant was registered as owner on 21st December 1989 following the registration of the 2nd defendant on 16th June 1989 upon the registration of the mutation form for land parcel 595. The abstract of title shows parcel 804 resulted from partition of land parcel 595. On the evidence I am therefore satisfied that land parcel 759 and 804 resulted from partition of land parcel 595 as ordered by the court in Kisii HCCC No.194 of 1988.

24. I have in my analysis and evaluation of the evidence above disposed of the first issue which in a way disposes the second issue. The registration of the 1st defendant as the owner of land parcel Central Kitutu/Mwabundusi/804 was pursuant to a court order in Kisii HCCC No.194 of 1988. The Court order effectively validated the sale agreement entered into between the 1st defendant and the 2nd defendant respecting a portion of 25 feet by 100 feet of land parcel Central Kitutu/Mwabundusi/595. There is no evidence that the orders

issued by the Court were ever varied reviewed and/or set aside on appeal. This Court cannot ignore them and neither can this court purport to review or vary the same as no such an application is before the Court. At any rate such an application can only be made within the same cause where the orders were made. In the premises I have to come to the determination that the 1st defendant was lawfully and validly registered as the owner of land parcel Central Kitutu/Mwabundusi/804.

25. Having determined the 1st defendant was validly registered as the proprietor of land parcel Central Kitutu/Mwabundusi/804 the pertinent issue to determine is whether his title had become extinguished by reason of the plaintiff having adversely possessed the suit property uninterrupted for a period of over 12 years. Whether or not a party has acquired title by adverse possession is a matter of evidence and the person who wishes to be declared as having acquired title by adverse possession bears the burden of proof.

26. This court sitting at Kisii in the case of **Fred Okeyo Olande – vs- Ruth Otieno Otiango (2018) eKLR** in commenting as to what constitutes adverse possession stated at paragraphs 30 and 31 of its judgment as follows :

30. *The law on adverse possession is now settled. Adverse possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years. According to Halsbury's Laws of England, 4th Edition Volume 28, paragraph 768:*

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

31. *The Court of Appeal in the case of Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui [2017] eKLR while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of Kamataka Board of Wakf -vs- Government of India & Others [2004] 10 SCC 779 where the court stated thus;-*

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.” [Emphasis added].

27. In the case of **Wambugu -Vs- Njuguna (1998) KLR 173** the Court of Appeal held thus : -

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or having discontinued his possession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purposes of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

28. In the present case the plaintiffs have alleged that they have utilized the suit property owned by the 1st defendant openly and without interruption for a period in excess of 12 years such that the title held by the 1st defendant has been extinguished by application of the doctrine of adverse possession. The evidence adduced affirms that the 1st plaintiff has constructed his permanent house on land parcel Central Kitutu/Mwabundusi/759 and not 804. On parcel 804 the 1st plaintiff has constructed some temporary mabati rental houses as was evident from the photographs exhibited. The evidence of PW2, the Assistant chief was clear on the point. He stated thus:-

“The mabati structure and pit latrine are on plot 804 but the storeyed building save for the frontage (parking) is not on parcel 804”.

29. DW1 the father of the 1st plaintiff was categorical that he had sold land parcel 804 to the 1st defendant and he had informed his family as much. He was clear that the 1st plaintiff constructed the rental units in 2014/2015. It is evident before the 1st plaintiff constructed the rental mabati units land parcel 804 had remained idle and/or furrow. The photos exhibited did not show any evidence of any other developments on the parcel of land apart from the mabati structures. I am cognizant of the fact that land parcel 804 is a mere 0.02 Ha (about 1/20th of an acre) and one cannot talk much about farming on it or planting trees. It is a portion of land that would only be perhaps suitable for a building. When the 1st defendant found in October 2016 that the plaintiffs had put up a structure thereon he immediately took action by reporting to the police and the local administration.

30. In my view adverse possession by the plaintiffs commenced when the 1st plaintiff put up the rental units on the 1st defendant's parcel of land. That constituted a hostile act against the 1st defendant title. The 2nd defendant was the only witness who indicated when the 1st plaintiff constructed the rental units as 2014/2015 and there was no other evidence to show the rental units had been constructed earlier. The 1st plaintiff had in fact constructed his house on land parcel 759 during the same period and the family members were invited for its opening.

31. In the circumstances and having carefully evaluated the evidence I am not satisfied that the plaintiffs have proved that they have adversely possessed the 1st defendant's land parcel Central Kitutu/Mwabundusi/804 for the prescribed statutory period of 12 years as to be entitled to be declared as owners of the subject land . Accordingly it is my determination that the plaintiffs are not entitled to the reliefs

sought in the originating summons. The plaintiffs should accordingly vacate and deliver vacant possession of land parcel Central Kitutu/Mwabundusi/804 to the 1st defendant within the next 60 days from the date judgment failing which the 1st defendant shall be entitled to an order of eviction against the plaintiffs upon application.

31. On the question of costs, I have considered that this was a matter involving family members and the 1st defendant was caught in the crossfire. The 1st defendant could also have properly secured the plot once he bought it to stave off easy encroachment. It is doubtful he did so. Considering all the factors and in exercise of my discretion I order that each party bears their own costs of the suit.

32. Orders accordingly.

Judgment dated signed and delivered electronically at Nakuru this 20th day of May 2020.

J M MUTUNGI

JUDGE