



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 318 OF 2009 (O.S)

SAMUEL KIMINTAE MPARO.....1ST PLAINTIFF
WANGUI KIMINDAI JOSEPH.....2ND PLAINTIFF
ANNA MBENEK.....3RD PLAINTIFF
ALBERT LEMPARO.....4TH PLAINTIFF
RICHARD TURERE MPARO.....5TH PLAINTIFF
ANDREW SAIBULU KIMINTAE.....6TH PLAINTIFF

VERSUS

MATHARE INVESTMENTS & PROPERTIES LIMITED.....DEFENDANT

JUDGMENT

Introduction:

1. In the Originating Summons dated 21st October, 2009, the Plaintiffs have prayed for the following orders:

- a) The Plaintiffs be declared to have become entitled by adverse possession of over twelve (12) years all that piece or parcel of land registered under the Registered Land Act Chapter 300 of the Laws of Kenya and comprised in Title Number Kajiado/Kaputiei-South/45 measuring approximately 999.6 acres and situate in Kajiado.*
- b) The said Plaintiffs be registered as the proprietors of the said piece or parcel of land namely Title Number Kajiado/Kaputiei-South/45 in the place of the above named Mathare Investments & Properties Limited in whose name the said parcel of land is registered.*
- c) In the event that any execution of any documents is required, then the Registrar of this Honourable Court to do so on behalf of the Defendant.*
- d) Such further orders or reliefs as this Honourable Court may deem just.*
- e) The costs of this suit be awarded to the Plaintiffs.*

2. The Originating Summons is supported by the Affidavit of the 1st Plaintiff who has deponed that parcel of land known as Kajiado/Kaputiei-South/45 measuring approximately 999.60 acres was registered in favour of the late Joseph Kimintae Ole Mparo (deceased).

3. It was deponed that the said parcel of land number Kajiado/Kaputiei-South/45 (the suit property) is a sub-division of Kajiado/Kaputiei-North/35 and that the deceased used the title number Kajiado/Kaputiei-North/35 as security to secure a loan with Agricultural Finance Company Limited in 1974.

4. According to the 1st Plaintiff, in August 1977, parcel number Kajiado/Kaputiei- North/35 was under unclear circumstances sold and transferred by the Agricultural Finance Company Limited to one Melton Melita Ole Shani who subsequently sub-divided it into two parcels of land, namely, parcel number Kajiado/Kaputiei-South/44 and 45 respectively.

5. The 1st Plaintiff deponed that on 3rd September, 1982, the Defendant was registered as the proprietor of Kajiado/Kaputiei-South/45 (*the suit property*); that the 2nd and 3rd Plaintiffs are his mother and step-mother respectively whereas the 4th, 5th and 6th Plaintiffs are his brothers and that the deceased was his father.

6. That 1st Plaintiff deponed that all the Plaintiffs, including himself, have occupied and have been in possession of the suit premises since 1969 without hindrance, objection, authority or permission of the Defendant and that each of the Plaintiffs has his or her own home on the suit property.

7. Other than the Plaintiffs being in possession of the suit property, it was deponed that they have constructed homes and settlements on the land; that they keep livestock and graze on the suit property and that they grow subsistence crops on the suit land.

8. The 1st Plaintiff deponed that they have been in continuous, exclusive and uninterrupted possession and occupation of the suit property for over 35 years and that the Defendant has never been in possession, use or occupation of the suit premises since the year 1982.

9. The 1st Plaintiff finally deponed that the Defendant's title was extinguished in or about 1994 by their continuous and exclusive adverse possession for a period of more than twelve (12) years and that the Plaintiffs are entitled to be registered as the owners of the suit premises in place of the Defendant.

10. The Defendant's Directors did not file an Affidavit in reply to the Originating Summons. However, a Surveyor, one Jacob Ngondoki Arimi and an Assistant Chief, Kitoipei Tumpei Lesira, filed their Affidavits on 19th February, 2015. I will refer to these Affidavits later on.

The Plaintiffs' case:

11. The 1st Plaintiff, PW1, informed the court that he lives in Sultan Hamud; that he is a farmer and works with the Ministry of Water and that the 2nd Plaintiff is his mother, PW1 stated that the 3rd Plaintiff is his step-mother while the 4th-6th Defendants are his brothers.

12. PW1 stated that parcel of land known as Kajiado/Kaputiei-South/45 measuring approximately 999.60 acres (*the suit property*) is a sub-division of parcel of land known as Kajiado/Kaputiei-North/35 which was originally granted to his deceased's father; that his late father used the Title Deed as security to secure a loan from the Agricultural Finance Company Limited in 1974 and that in 1977, the land was sold in unclear circumstances to Melton Melita Ole Shani.

13. PW1 informed the court that Melton Ole Shani sub-divided parcel number 35 into parcels known as Kajiado/Kaputiei-South /44 and 45 respectively; that the Defendant was registered as the proprietor of parcel of land known as Kajiado/Kaputiei-South/45 (*the suit property*) on 3rd September, 1982 and that they have all lived, occupied and been in possession of the suit premises since 1969 without any hindrance, objection, authority or permission of the Defendant.

14. It was the evidence of PW1 that the 4th Plaintiff was born in 1971; that the 5th and 6th Plaintiffs were born in 1974 and that they have all lived on the suit premises since then.

15. Besides the individual exclusive and adverse possession, use and control of the suit property, PW1 testified that they have openly and conspicuously constructed homes; kept livestock; grown subsistence crops; buried their dead and kept off intruders on the land.

16. It was the evidence of PW1 that the Plaintiffs have never left the suit premises even after the purported sale of the land by the Agricultural Finance Company Limited; that the photographs annexed on the Originating Summons shows the developments that they have made on the land and that he is not aware that the suit land was sub-divided. According to PW1, when his father died in 1994, he was buried on the suit property.

17. PW1 testified that the Defendant has never been in possession, use or occupation of the suit premises or any part thereof since 1982; that the title that was issued to the Defendant was extinguished in or about 1994 by their continuous and exclusive adverse possession for a period of twelve (12) years and that the Plaintiffs are entitled to be registered as the proprietor of the land.

18. In cross-examination, PW1 stated that his father originally owned parcel of land number Kajiado/Kaputiei-North/35 which was sub-divided into parcels number 44 and 45; that he does not know in whose name parcel number 44 was registered and that the Plaintiffs have never been evicted from the suit property.

19. It was the evidence of PW1 that they have sub-divided and allocated the suit land amongst themselves using hedges and that not the entire land measuring 1000 acres has hedges. It was the evidence of PW1 that their homestead is spread on the entire land and that it is not true that they have only developed a small area of the suit land.

20. PW1 stated that he has fifty (50) cattle and goats on the land; that he usually cultivates approximately 6 acres of the suit land and that AFC sold the land for non-payment of the loan by his late father. PW1 stated that he knows Kitoipei Tumpei who is his neighbour and was an Assistant Chief and a Chief for many years and that they have a water pen on the suit property. It was the evidence of PW1 that they have between 160-200 acres each and that each Plaintiff uses his portion of land.

21. PW2 stated that he was the Chairman of Nkama Group Ranch for seven (7) years; that on 26th June, 1982, he was appointed the Assistant Chief of Nkama Location and served in that position until the year 1987 when he was promoted as a Chief. It was the evidence of PW2 that he knew the 1st Plaintiff's father, Joseph Kimintae Ole Mparo (*deceased*) who hailed from his Location and that he owned parcel of land known as Kajiado/Kaputiei-North/35.

22. It was the evidence of PW2 that parcel number Kajiado/Kaputiei- North/35 share a boundary with Nkama Group Ranch; that the deceased secured a loan with Agricultural Finance Company Limited and used the original land as security and that when the deceased was unable to service the loan, Agricultural Finance Company Limited sold the land.

23. PW2 stated that even after the original land was sold in an auction, the Plaintiffs and their late father continued living on the land and that when the deceased died, he was buried on the suit land, that is Kajiado/Kaputiei-South/45 (*the suit property*).

24. It was the evidence of PW2 that the deceased and his family have developed the suit land and that no one has ever claimed the suit land from the deceased and the Plaintiffs. PW2 stated that the Defendant is a stranger to him and that the Defendant has never been in possession of the suit land.

25. PW2 stated that each of the Defendant has his/her own distinct portion of land on the suit land; that when the 1st Plaintiff's father died, he was buried on the suit property and that he was not aware that parcel number 35 was sub-divided after the same was sold by Agricultural Finance Company Limited to Mr. Ole Shani Melton who was also known to him. PW2 stated that all the six (6) Plaintiffs have built their respective houses on the suit land although he does not know when they built the houses.

26. PW3 stated that the late Joseph Kimintae Ole Mparo (*deceased*) belonged to his age group; that he had known the deceased since they were young boys and that he acquired parcel of land known as Kajiado/Kaputiei-North/35 in 1969. According to PW3, when the late Joseph Kimintae Ole Mparao acquired parcel number 35, he found him already settled on his land, which is adjacent to his and that he acquired his land in 1959.

27. PW3 informed the court that the deceased had two wives and several children; that the deceased acquired a loan from Agricultural Finance Company Limited and used parcel number 35 as security and that when he was unable to service the loan, Agricultural Finance Company Limited sold the land to one Melton Meleta Ole Shani. However, the deceased and his family continued living on the land.

28. It was the evidence of PW3 that all the Plaintiffs live on the suit land; that when the deceased died, he was buried on the land and that the Plaintiffs have developed the land, which they cultivate and graze on. The evidence of PW4, another neighbour, was similar to the evidence of the other Plaintiffs' witnesses.

The Defence case:

29. The Defence called two witnesses. DW1 informed the court that he is a land surveyor by profession; that in 1986, while working with Gatome and Associates, he was instructed by the Defendant to carry out a reconnaissance of parcel of land known as Kajiado/Kaputiei-South/45 (*the suit property*) which the Defendant had purchased and that he traversed the entire land measuring approximately 1000 acres.

30. It was the evidence of DW1 that he inspected the physical boundaries of the land, including the rivers and the railway line and that he obtained the plans and the Reference Index Maps defining the railway line, the boundaries of parcels number 44 and 45 and the neighbouring land belonging to Nkama Group Ranch.

31. It was the evidence of DW1 that he was instructed by the Defendant to demarcate the suit property into 770 plots each measuring a minimum of $\frac{3}{4}$ of an acre; that he hired casuals in Sultan Hamud to assist him in the sub-division of the suit land and that he traversed the entire land which was bushy and covered with Acacia trees.

32. DW1 stated that the entire land was vacant; that the land neither had a temporary structure or a permanent one and that they peacefully fixed beacons for 400 plots on the suit property. It was the evidence of DW1 that in November, 1987, about six buses were hired to transport the Defendant's members to the suit property; that him, together with his assistant, took the Defendant's members around the suit land and that again in December 1989, he took a group of the Defendant's officials to the suit land.

33. DW1 stated that the Defendant decided to sell the suit land; that in the year 1991 and 2001, together with some prospective buyers, he went to the suit land and that on both occasions, there were no signs of human activity on the suit land, neither were there any structures on the land and that he was re-engaged by the Defendant in February, 2009.

34. According to DW1, in February, 2009, he re-established the boundary of parcels of land number 44 and 45; that he saw four structures on the suit land, with three of the four structures being in the same compound and the fourth structure being 200 metres away from the other three and that one acre of the suit land had been cultivated around the said structures.

35. According to DW1, he met two men who told him that they had moved on the land about four (4) years ago after being informed that the Defendant's members had declined to move on the land; that between March, 2009 to May, 2009, he was forcibly prevented from carrying out any authorized activities on the land and that in May, 2009, the Defendant's advocate did a letter to the trespassers directing them to move out of the suit land.

36. It was the evidence of DW1 that between 1986 and 2009, there were no structures on the suit land; that the first time he saw structures on the land was in March, 2009 and that the Plaintiffs have not been in continuous exclusive and uninterrupted possession and occupation of the suit land for 35 years as alleged.

37. In cross-examination, DW1 stated that he did not have the written instructions to represent the Defendant in this suit; that he was working under Gatome and Associate Surveyors who were instructed by the Defendant and that he obtained the consent of the Land Control Board to sub-divide the land into 770 plots.

38. DW1 informed the court that all the Directors of the Defendant have since died; that he last dealt with the said Directors in the year 2009; that the list of the Defendant's members was with the Defendant's then advocate, Kapila and Company Advocates and that he was on the suit land as a Surveyor representing the Defendant.

39. The Assistant Chief of Gama Location, DW2, testified after being compelled by this court to attend court. The compulsion of DW2 to attend court arose after the court was informed by the Defence that despite swearing an Affidavit on 14th April, 2010, which was filed in court on 19th February, 2015, the said witness had declined to attend court to testify.

40. DW2 denied having sworn the Affidavit on 14th April, 2010 before Wilfred Nyamu Mati advocate and filed in court on 19th February, 2015. DW2 admitted that he had instructed an advocate in the firm of Koin Lompo & Company Advocates to author the letter dated 13th May, 2019 which was addressed to the Defendant's advocate and copied to this court and the Plaintiffs' advocate. I shall refer to this letter later.

41. Having denied swearing the Affidavit filed on 19th February, 2015, DW2 informed the court that in the year 2015, he was an Assistant Chief; that he was born in Gama Location, Sultan Hamud and that the suit property belongs to the late Mparo.

42. It was the testimony of DW2 that the family of the late Mparo, the Plaintiffs herein, have always lived on the suit land and that he was not aware that the late Mparo had borrowed money from AFC and used the land as security; that he heard that Melton Ole Shani had purchased the suit land and that he does not know the acreage of the land that the Plaintiffs occupy.

43. DW2 informed the court that DW1 went to his office and informed him that he wanted to sub-divide the suit land; that he has never met the Directors of the Defendant and that his advocate did a letter after he was served with the Summons to attend court. DW2 stated that he was an Assistant Chief since 1996 and that he was promoted to the position of a Chief in the year 2016.

Submissions:

44. The Plaintiffs' advocate submitted that the Plaintiffs' claim is based on the principles of adverse possession; that there is uncontroverted evidence that the Plaintiffs have been in actual physical possession of the suit land since 1969 and that the Defendant's title to the suit land was extinguished in the year 1994.

45. Counsel submitted that there is uncontroverted evidence showing that the Defendant has never been in possession, occupation or use of the suit property and that the immense developments carried out by the Plaintiffs, ranging from permanent residential houses, farming and livestock keeping are acts done by the Plaintiffs, which are inconsistent with the Defendant's enjoyment of the soil for which he intended to use it. Counsel relied on the case of *Virginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau (2013) eKLR* where the court held that the actions of the adverse party must change the state of the land. Counsel submitted that the Plaintiffs have adduced evidence showing how they have utilized the suit land by not only carrying out substantial developments, but also informally sub-dividing it amongst themselves.

46. The Defendant's advocate submitted that the evidence of PW3 shows that Ole Shani forcibly took possession of parcel of land known as Kajiado/Kaputiei-North/35 and sub-divided it; that upon sub-division, the land changed its character and the suit land came into existence in the year 1982 and that it is clear that the Plaintiffs were evicted from the suit property.

47. The Defendant's advocate submitted that the evidence of DW1 that he had been on the suit land with a view of sub-dividing it into numerous titles was confirmed by the evidence of DW2, who was a hostile witness, that DW1 had been in his office to inform him about the sub-division of the suit land.

48. Counsel submitted that DW2 lied to this court when he claimed not to have signed the Affidavit of 14th April, 2010; that DW2 was the Assistant Chief of the area and a neighbour to the suit land and that DW2 signed the Affidavit based in his personal knowledge of the suit land. Counsel submitted that the Plaintiffs trooped back to the land in the year 2004 and that DW1 saw them for the first time in the year 2009. Counsel relied on several authorities which I have considered.

Analysis and findings:

49. The Plaintiffs in this matter are seeking to be declared to have become entitled by adverse possession of land known as Kajiado/Kaputiei-South/45 measuring approximately 999.6 acres. The suit land is situate in Kajiado County.

50. It is not in dispute that parcel number 45 is a sub-division of land known as Kajiado/Kaputiei- North /35 which was originally registered in the name of Joseph Kimintae Ole Mparo (*the deceased*) in 1970. According to the evidence of the Plaintiffs, the deceased who died in 1994 secured a loan from the Agricultural Finance Company Limited in 1974, and charged parcel number 35.

51. When the deceased failed to service his loan, parcel number 35 was sold by AFC to one Melton Melita Ole Shani, who subsequently sub-divided it into two portions, namely Kajiado/Kaputiei- South/44 and 45. Parcel number 45 is the suit property.

52. The Plaintiffs produced in evidence the copy of the Abstract for parcel number Kajiado/Kaputiei-North/35. The said Abstract of the register shows the title for parcel number 35 was transferred by AFC Ltd to Melton Melita Ole Shani on 29th August, 1977 for Kshs.

185,000, who then sub-divided it into two parcels on 1st September, 1982. The Abstract of the register for parcel number Kajiado/Kaputiei-South/45 shows that Melton Melita Ole Shani transferred the said land to the Defendant herein on 3rd September, 1982.

53. The 1st Plaintiff is the son of the deceased, while the 2nd and 3rd Plaintiffs are the two wives of the deceased. The 4th, 5th and 6th Plaintiffs are the sons of the deceased. According to the Plaintiffs, they have lived on the suit land as a family since 1969, and that even after the suit land was sold to Ole Shani, they were never evicted from the land. It is for that reason that they want to be declared the owners of the land for having lived on the suit land for more than twelve (12) years continuously, peacefully and without the permission of the Defendant.

54. Indeed, the law pertaining to adverse possession is now settled. Section 7 and 38(1) of the Limitation of Actions Act states as follows:

“7. An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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.”

55. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of *Kimani Ruchine vs. Swift Rutherford & Co. Ltd [1980] KLR*, the court held as follows:

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario...The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration”.

56. In *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) eKLR*, the Court of Appeal held as follows:

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

57. In *Benjamin Kamau Murima & Others vs. Gladys Njeri, Civil Appeal No. 213 of 1996*, the Court of Appeal held as follows:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possession of that land”

58. The Supreme Court of India, in *Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779*, stated as follows:

“In the eye of 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 of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of 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 continuous. 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.”

59. The only issue for determination in this matter is whether the Plaintiffs have been in continuous occupation of the suit land for twelve (12) years, and whether the said occupation has been adequate in continuity and in extent to show that their possession is adverse to that of the Defendant.

60. The evidence on record shows that the late Ole Mparo was registered as the owner of land known as Kajiado/Kaputiei-North/35 measuring approximately 857 Ha (*approximately 2,142.5 acres*) on 6th April, 1970. He charged the said land to AFC. When he was unable to service the loan, parcel number 35 was sold to Malita Ole Shani who sub-divided the land into parcels number Kajiado/Kaputiei-South/45 and 44. The Abstract for parcel number 45 (*the suit property*) was produced in evidence. The Abstract shows that the land measures 404.7 Ha (*approximately 1,010 acres*). This is the land that Melita Ole Shani transferred to the Defendant on 3rd September, 1982.

61. The Plaintiffs' evidence was that they have settled on parcel number 45. When asked about the other land that arose from the sub-division of parcel number 35, that is Kajiado/Kaputiei-South/44, they said they have no idea about the said land. It was the evidence of PW1 that the Plaintiffs have no idea on who the registered owner of parcel number 44 is. PW1 further informed the court that they do not know the Defendant, neither have they ever met the Defendant's officials.

62. PW1 informed the court that each of the Plaintiff has his or her portion of land on the suit property, and that those portions are fenced using hedges. It was his evidence that they had tilled only 6 acres of the entire land and that the entire land has permanent two houses while the remaining houses are made of iron sheets.

63. In cross-examination, PW1 admitted that the photographs annexed on the Supporting Affidavit do not show the hedges separating their respective portions of land. Indeed, although PW2 stated that the six houses occupied by the six Plaintiffs have hedges, none of the

photographs produced showed that to be the position.

64. PW2, who was the Chief of the area for ten (10) years since 1982, and also a neighbour of the Plaintiffs, stated that he did not know when the Plaintiffs put up their respective houses on the land. It was his evidence that the deceased's two wives have always been on the land. The two wives of the deceased, who are the 2nd and 3rd Plaintiffs, did not testify in this matter.

65. If the Plaintiffs had lived on the suit property since the land was acquired in 1970, why is it that the 2nd and 3rd Plaintiffs, who are the wives of the deceased, never testified? Indeed, the evidence of the two Plaintiffs was critical in this matter. I say so because it is the two wives who have the history of how they settled on the suit land, if at all, and the circumstances under which the land was sold to Ole Shani, and what happened after Ole Shani sub-divided the land and sold it to the Defendant. The failure by the two Plaintiffs to testify clearly shows that their evidence would have been prejudicial or contrary to the evidence of PW1- PW4.

66. Indeed, the failure by the 2nd and 3rd Plaintiffs, who are critical in the present claim, to file their respective Affidavits in supports of the Originating Summons, leads credence to the evidence of DW1 that as at the year 2009, the suit land was not occupied by any one, and that he sub-divided the land into small portions in 1986, and that he visited the land in the year 1987 and 1989 and that it was only in the year 2009 that he was chased away from the land by the Plaintiffs.

67. DW2, who is the Chief of Gama Location where the suit land is situated, and who was compelled by the court to testify, having recorded an Affidavit, denied that he swore an Affidavit on 14th April, 2010 which was filed in court on 19th February, 2015. He however admitted that he instructed his advocate to author the letter dated 13th May, 2019 and addressed to the Defendant's advocate. The letter was also copied to the Deputy Registrar of this court and the Plaintiffs' advocate.

68. In the letter dated 13th May, 2019, the advocate for DW2 stated as follows:

“That, he (DW2) wrote a statement and an Affidavit filed in court on 19th February, 2015 and subsequently you wrote to him on the 5th February, 2018 requesting him to attend court to give evidence. When you appeared in court, you requested the court to issue Summons for his attendance. The Summons were served on him on 4th May, 2009 on a Saturday. Our Client has sought and obtained independent legal advice and have (sic) instructed us to write to you informing you that he has retracted his statement and the Affidavit and therefore he shall not appear to give evidence in favour of your client (the Defendant).”

69. DW2, through his advocate, admitted in writing that he had sworn the Affidavit that was filed in court on 19th February, 2015. Although his advocate stated that he had retracted the said Affidavit which is already on record, he did not give the reasons for the purported retraction. That being the case, and the Affidavit being on record, it forms part of the court record and evidence.

70. In the Affidavit of DW2 that he swore on 14th April, 2010 and filed on 19th February, 2015, DW2 stated he was the Assistant Chief of Sultan Hamud Sub-location, Gama Location, Kajiado County; that he has been an Assistant Chief since the year, 1996 and that he was born in Sultan Hamud in 1959.

71. DW2 stated on oath that he was aware that parcel number Kajiado/Kaputiei-South/45 located in Sultan Hamud is owned by the Defendant and that the land was initially owned by the late Ole Mparo who lived on it with his family.

72. DW2 stated in his Affidavit that he was present when Melton Ole Shani, who had purchased the land in the late 1970's, told the late Ole Mparo and his family to move out of the suit land and that he is aware that Ole Mparo vacated the land together with his family.

73. DW2 deponed that Ole Shani bought 80 bulls to rear on the suit property and that Ole Shani employed him (DW2) as a farm manager of the said parcel of land. It was his deposition that the land had a wood and iron sheets structures where he lived with a herder and that after six months, Ole Shani sold all the livestock on the land and terminated his services.

74. DW2 deponed that Ole Mparo stated living at Sultan Hamud together with his family in the late 1970s; that in the year 2004, Ole Mparo's family's son, PW1, enquired from him if he could move back to the suit property which was idle, and that he allowed him to go back to the land.

75. It was the deposition of DW2 that between 1987, when six buses with people visited the land, upto the year 2004, when the 1st Plaintiff approached him and requested to be allowed to re-enter the suit land, there was no human activity on the suit property; that there was no structure on the land and that the Plaintiffs were not living on the land.

76. DW2 finally deponed that the total area that the Plaintiffs now occupy is not more than 4 acres; that there is one permanent structure and three semi-permanent structures on the said land and that the family of Samuel Kimintae and his family have not been in continuous, exclusive and uninterrupted possession of the suit property for over 35 years.

77. The above depositions that were given by DW2 on oath represent, in my view, the correct status of the suit land. Indeed, those depositions also tally with the evidence of DW1, the Defendant's Surveyor, and the photographs produced by the Plaintiffs.

78. The deposition of DW2 in the Affidavit he swore in the year 2010, when he was the Assistant Chief of the area, and the failure by PW1 to call his mother and step-mother to testify in this matter, together with the photographs produced by PW1 and the evidence of DW2, has convinced me that the family of Ole Mparo was evicted from the suit property in the late 70's and only went back to a portion of the land in 2004. Indeed, upon going back on the land, they only occupied a small portion of the suit land, measuring not more than six (6) acres.

79. The eviction of the family of Ole Mparo must have preceded the sub-division of parcel number 35 into parcel numbers 44 and 45 on 1st September, 1982, and before the land was sold to the Defendant in the same year. Consequently, the purported possession of the suit land by the Plaintiffs was interrupted in the 1970's and was not adequate in continuity.

80. What is interesting is that although PW1 informed the court that he was not aware what happened to parcel number 44 after the sub-division of parcel number 35, while conducting my research for the purpose of writing this Judgment, I came across a Judgment in ***Samuel Kimintae Mparo & 5 others vs. Arvind Kanji Patel, Kajiado ELC Case No. 662 of 2017 (O.S)***. The Plaintiffs in that matter are the same Plaintiffs in this matter, with a different Defendant.

81. The Judgment in the Kajiado case shows that the Plaintiffs herein were claiming to be declared as the owners of parcel of land known as Kajiado/Kaputiei-South/44 measuring 453.2 acres, which is a sub-division of Kajiado/Kaputiei-South/35, by way of adverse possession.

82. From the Judgment, the evidence that PW1 gave in the Kajiado matter is the same evidence that he gave in this matter, word for word. However, in the Kajiado case, the Plaintiffs were claiming that they had lived on parcel number 44 for more than twelve (12) years.

83. The Plaintiffs never informed the court in Kajiado that they had filed a similar claim, albeit with a different parcel number, in this court. Indeed, even in this court, the Plaintiffs never informed the court that they had filed the Kajiado matter. This concealment of a material fact by the Plaintiffs was meant to only put the court into disrepute, but to be registered as the owners of the two parcels of land. In my view, this dishonesty on the part of the Plaintiffs only shows that they never lived on either of the two parcels of land as pleaded.

84. The Plaintiffs in this matter did not prove on the required standards that they had lived on the suit land for twelve (12) years before this suit was filed *nec vi, nec clam, nec precario*.

85. For those reasons, the Plaintiffs' Originating Summons dated 21st October, 2009 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15TH DAY OF MAY, 2020.

O.A. ANGOTE

JUDGE