



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 140 OF 2017 (O.S)**

**FLORENCE CHERUGUT.....PLAINTIFF**

**VERSUS**

**CHEPTUM MUREI ANNAH.....DEFENDANT**

**JUDGMENT**

1. The plaintiff filed an originating summons dated **16<sup>th</sup> August, 2017** supported by her sworn affidavit seeking orders declaring that the defendant's right to the suit land got extinguished after **12** years with effect from **11/5/2005**, a declaration that the defendant has been holding the suit land in trust for her, that the name of the defendant as registered owner be cancelled and be substituted with the plaintiff's name and that the defendant do execute all documents to effect the transfer of the suit land to her. She further prays that the Deputy Registrar of this court be mandated to effect the transfer in default by the plaintiff. She also sought costs of the suit.

2. The grounds on which the plaintiff has brought the said originating motion are that on **6/8/1991**, she purchased **2** acres of land from one *Fatuma Noor* who intimated to her that she had purchased the **2** acres she occupied from the defendant; that the **2** acres formed part of **36.6** acres owned by the defendant; that the plaintiff then took vacant possession and has remained in such possession to date; that the **2** acres were adjacent to her land and she planted trees while still operating from her other land; that the land was then subdivided and the parcel that the plaintiff occupies was allocated **Title No. Kitale Municipality Block 15/Koitogos/1956**, with the defendant being registered as the sole proprietor thereof on **11/5/2005**. The plaintiff avers that her occupation was with the knowledge of the defendant, was continuous, exclusive and adverse to the defendant. The plaintiff avers that her workman lives on the suit land; she discloses that she had filed **Kitale HCCC No. 27 of 2009 (OS) Florence Cherugut vs Cheptum Murei Annah** where the court in its decision dismissing the suit stated that as at the time she filed the suit **12** years had not elapsed with effect from **11/5/2005**. It is averred that the defendant has never commenced any action to remove the plaintiff from the suit land. A certified copy of the register attached to the summons shows that the defendant is the registered proprietor of the suit land.

***The Defence.***

3. The defendant filed a replying affidavit dated **21/9/2017** on the same date. Her response to the claim is that the suit is *res judicata* by virtue of the decision in **Kitale HCCC No. 27 of 2009 (OS) Florence Cherugut vs Cheptum Murei Annah**, that the plaintiff has not been in possession of the suit land and is only a neighbour; that if the plaintiff occupied her land, she did so without the defendant's consent; that she first met the plaintiff in **2004** when she claimed at a land control board meeting that she had bought the land; that she has never sold her land; that she had sold land to *Fatuma Noor* but that sale was subsequently cancelled and *Fatuma* refunded her money; that the plaintiff's attempts to take possession of the land forcibly were repulsed; that the plaintiff then lodged a caution over the title. That she and not the plaintiff first planted trees on the suit land, but the plaintiff came and planted trees in between her rows later on. It is denied that there are any houses of the plaintiff on the land and, alternatively, if there are any, they were built after the year **2014**. Adverse possession is denied.

4. Hearing began on **31/7/2019** when the plaintiff (**PW1**) and **Frederick Makase Chemen (PW2)** testified under oath. The plaintiff then closed her case. The defence case proceeded on **28/1/2020** when the defendant (**DW1**) and **Collins Kipruto (DW2)** testified under oath.

***The plaintiff's evidence.***

5. The plaintiff adopted her supporting affidavit filed with the Originating summons and produced documentary evidence and was cross examined by Ms. Muniolo for the defendant. From her cross examination is turned out that the defendant was not involved in her agreement with *Fatuma Noor*; that the defendant had sold *Fatuma* the land; that *Fatuma* had structures on the land but left the country in **1991**; that the plaintiff took possession in **1991**; that one *John Wafula* her worker resides on the suit land; that she built a permanent toilet on the land and planted trees in **2008**; that the parties went to the Land Registrar for a dispute over the caution she had lodged over the title and he resolved that the caution do remain registered over the title; that **Kitale ELC 27 of 2009** which she had instituted against the defendant was unsuccessful and she had filed a notice of appeal; that she resides on the adjacent plot which she has developed with **2** permanent houses and **2** temporary houses standing thereon; that the houses on the suit land were already built by the time of the sale agreement with *Fatuma*; that she never filed a substantive appeal; that there was a dispute that had been brought before the chief over the suit land.

6. **PW 2** adopted his written statement dated **14/5/2018**. His evidence is that he resides on plot number **340**; that the plaintiff and her husband *Reuben Butaki* are well known to him; that they own Kitale **341**; that the two acre plot adjoining **plot 341** is cultivated by the plaintiff and the same had been owned by one *Fatuma Noor*; that *Fatuma* and her husband were well known to him; that they had fenced the plot and erected a semi-permanent residential structure and a toilet on the land; that the plaintiff and her family took up the two acres in **1999** and have remained in possession to date; that the plaintiff cultivates the land, has planted trees and has erected a permanent toilet thereon; that he has never witnessed the defendant working on the suit land and her home is about **700** metres from the suit land.

#### ***Evidence of the defendant.***

7. **DW1 Elizabeth Cheptoo Murei**, daughter to the plaintiff, testified on **28/1/2020** and adopted the affidavit evidence of her mother contained in the affidavit dated **21/9/2017** whose contents were set out earlier herein.

8. Relying on the agreement produced by the plaintiff she testified that the plaintiff bought land the suit from *Fatuma* and not from her mother. She stated that her mother never owned any land known as **LR No 1555/3** and only *Fatuma* and the plaintiff were parties to the agreement and that the plaintiff's signature does not appear on the agreement. She denied that the plaintiff has ever occupied the suit land and stated that her family planted the trees on the land in **2004**. She stated that the house on the suit was built by the defendant for use by her workers, and that her mother resides elsewhere on the same land. She denied that the plaintiff has tenants residing in the house on the suit land. She stated that the plaintiff also planted some trees on the land after her family planted theirs; she denied that plot no **1956**, which the plaintiff was registered as proprietor of in **2005**, is a subdivision of **LR No 1555/3**. She averred that she is aware of the Land Registrar's decision that the caution registered over the land remain in place as the dispute was resolved elsewhere. She produced various documents in evidence including the plaintiff's notice of appeal, the letter requesting for proceedings, a copy of the caution, the District Land Registrar's letter to the defendant and the proceedings before the Land Registrar. She maintained that the plaintiff purchased another parcel and not the suit land. On cross-examination she stated that her mother's land parcel measures **36.6 acres** and had been assigned the number **144**, and it was subdivided later; she also stated that *Fatuma Noor* and *Shah Mohamed* were leasing the land from the plaintiff and had not purchased it. She however failed to produce any lease agreement. She also identified *Reuben Butaki* as husband to the plaintiff; she stated that the defendant's homestead which has several houses is situate on plot number **1952**; that parcel number **1956** was not one of the resultant parcels arising from subdivision of **parcel no 144**.

9. **DW2, Collins Kipruto**, a clerical officer at the Kitale Law courts gave sworn evidence and produced the original file in respect of **Kitale ELC No 27 of 2009- OS**.

10. The defendant then closed her case.

#### **DETERMINATION**

##### ***Issues for determination.***

11. The issues that arise for determination in the instant suit are therefore as follows:

**a. Whether the plaintiff is entitled to be registered as proprietor of the suit land by virtue of the doctrine of adverse possession.**

**b. Who should bear the costs of the suit?**

12. The issues are discussed herein under.

**a. Whether the plaintiff is entitled to be registered as proprietor of the suit land by virtue of the doctrine of adverse possession.**

13. In order to establish that she is entitled to be registered owner of the land by virtue of the doctrine of adverse possession, the plaintiff must establish that she has been in open, continuous and exclusive possession of the suit land for a period of at least **12** years; such possession should not have been obtained by force or with the consent of the defendant. These pertinent sub-issues are addressed as herein after.

***i. Was the plaintiff in possession of the suit land as at the date of commencement of the suit and is she still in possession?***

14. Referring to **page 3** of Ms Munialo's submission that there was contradiction in the evidence of the Plaintiff's witnesses this court must assert that it is much too aware of the possibility that to the laymen who appeared in this case as witnesses, the plain meaning of the word "*occupy*" may be confined to mere residence in a dwelling house and not encompass the practice of subsistence farming or growing of trees. Faulting them for this ignorance will not do. Instead the court will rely on the finer details of the evidence that can be relied on to infer possession on the part of any of the parties. In this court's view the overarching observation with regard to possession that must hold fast through the proceedings is that if the plaintiff had already established her residence on plot number **341** by the time she allegedly purchased Plot **1956** from *Fatuma*, the contiguity of plot number **341** may have rendered it unnecessary to erect any other dwellings on plot **no 1956**. Indeed this was the plaintiff's evidence in this matter. From the documents filed and the evidence of the parties herein it is clear that the plaintiff resides on parcel **no 341** which borders the suit land while the defendant resides on plot number **1952** which is some distance away from the suit land.

15. Ms Munialo for the defendant has submitted that the agreement dated **6/8/1991** was *not* signed by the plaintiff and that that was the finding of the court in **Kitale ELC 27 of 2009** which should not be revisited in this suit. However, whether it is the plaintiff or *Reuben Butaki* who signed it, **DW1** has already acknowledged that the said *Reuben Butaki* and the plaintiff are husband and wife. That objection also

appears to be quite peripheral and of no consequence considering that this court is in this case concerned only with the date of taking possession of the land by the plaintiff, whether it arose by virtue of that agreement or by any other means and whether 12 years have elapsed from that date. This court can not therefore be deemed to be sitting on appeal against that decision as submitted by Ms Munialo.

16. The further argument by Ms Munialo is that the court in **Kitale ELC 27 OF 2009** ruled that the land the plaintiff purchased from *Fatuma* is not the same land she is claiming from the defendant. I have perused the relevant excerpt of the judgment in that case which states as follows:

**“Also the land she was purportedly selling may not have been the suit property but another portion of land and if it was indeed the suit property then legal ownership of the land had not been acquired by the defendant who in accordance with the green card (PEXh 5(b)) became the registered proprietor on 11<sup>th</sup> May 2005 and was issued with a title deed (DEXh 3) on 23<sup>rd</sup> December 2008.”**

17. From a plain reading of the reproduced excerpt above it appears to this court that the court in **Kitale ELC 27 of 2009** did not arrive at a conclusion as to the real identity of the land sold by *Fatuma*. The court having not made a firm finding on the issue of whether the land sold by *Fatuma* to the plaintiff is the same land the plaintiff now claims from the defendant, this court is not precluded in any way from making a finding of fact on the issue. In my view, the holding in the cited decision of the Court of Appeal in **Eldoret Express Limited Vs Tawai Limited Eldoret Civil Appeal No 118 of 2017 2019 eKLR** does not apply to this case.

18. It is also submitted by Ms Munialo for the defendant that the plaintiff never presented evidence in this suit to the effect that Plot No 144 was a subdivision of **LR No 1555/3** and that the extract of title does not reflect the latter number anywhere. However, I will easily dispose of this submission by stating here that parties are bound by their pleadings, and in this case the defendant’s pleading which is the replying affidavit never denied the plaintiff’s contention at **paragraph 6** of her supporting affidavit **16/8/2017** to the effect that the two parcels are so related; without such denial it must be taken to have been admitted that parcel No 144 was a product of subdivision of **LR NO 1555/3**. In any event, from the affidavit evidence and annexures in **Kitale ELC 27 of 2009** whose original file record forms part of this record as an exhibit, it is evident that parcels nos **1952** and **1956** are subdivisions of parcel no **144**. The fact that the agreement states **1555/3** as the land reference number does not alter the fact that the land the plaintiff took possession of is the land that had been in *Fatuma*’s possession and which is identified in the agreement by whatever land reference number. In this court’s view Ms Munialo’s submission that a surveyor should have been called by the plaintiff is erroneous since all evidence in the suit identifies the suit land as the land sold and left to the plaintiff by *Fatuma*.

19. The plaintiff’s claim to possession of the suit land is premised on her alleged practice of working on the suit land, her having planted trees and placing workers on the land to the exclusion of the defendant. The further basis of the plaintiff’s claim in the present suit is that the defendant allowed the plaintiff to continue with her stay on the land uninterrupted after the judgment in **Kitale ELC 27 of 2009** was issued on **11/2/2014** and time therefore continued to run in the plaintiff’s favour. The plaintiff considers her collective occupation of the land, both in the period before and after that judgment to have attained the threshold of **12** years upon which the claim of adverse possession may be lodged.

20. The evidence of the defendant in her sworn replying affidavit in the instant suit differs from the evidence in **Kitale ELC 27 of 2009** in one material respect. In the instant suit she admits that she sold some land to one *Fatuma Noor*. She however contends that the sale was cancelled and the consideration refunded to *Fatuma*. In the former suit she stated that the houses on the land in question in the suit were erected by one *Shah Mohamed* with her consent. She stated that *Shah Mohamed* had expressed his interest to purchase the land and paid **ksh 40,000/=** as consideration but he fell sick and the sale never went through and she refunded *Shah* the said sum in full. She also testified that *Shah Mohamed* had a wife and one child. The witness **DW2** in the former suit confirmed that the two, *Shah Mohamed* and his wife, had agreed to purchase land from the defendant.

21. It does not escape the notice of this court that whether the sale transaction fell through or not, the defendant has not demonstrated that the land sold to either *Shah* or *Fatuma* was land other than the suit land; she has also not given any evidence of the refund of the consideration.

22. In view of the evidence of the plaintiff and the defendant in both suits and of **DW2 in Kitale ELC 27 of 2009** the land allegedly sold to *Fatuma* (as alleged by the defendant in this case) or to *Shah* (as alleged by the defendant and **DW2 in Kitale ELC 27 of 2009**) is the same land that the plaintiff now claims, that is, **Parcel No 1956**. There is no doubt then that the agreement produced as **PEXh 1** refers to the suit land and not any other.

23. It is evident that possession of the suit land was granted to the plaintiff by virtue of and upon execution the agreement produced as **PEXh 1**. The defendant failed to provide any evidence of refund of the purchase price to either *Fatuma* or *Shah*, either in litigation in **Kitale ELC 27 of 2009**, in the instant case, or before the Land Registrar.

24. Evidence of a refund of the purchase price could have convinced this court that none of the two had any interest in the suit land to dispose of to the plaintiff. I find it a plausible submission by the plaintiff’s counsel that if the transaction had ended with a refund, then the plaintiff could not have ever obtained possession. In the absence of such evidence this court is convinced that the plaintiff took possession of the suit land in **1992**.

25. Another twist in the evidence for the defendant is that notwithstanding the concession by the defendant that there was a sale agreement between her and *Shah* and *Fatuma* (also referred to herein as “the *Mohameds*,”) **DW2** asserted in her oral evidence that *Fatuma Noor* never purchased land from her mother and that the *Mohameds* were in fact leasing the land from her mother. However this evidence which is inconsistent with the contents of the defendant’s sworn replying affidavit was not supported by any documentary evidence in the form of a lease. This is not the only evidence of **DW1** that conflicts with the defendant’s version; **DW1** also stated that the defendant planted trees on the suit land in **2004** while the receipts she had produced showed a date in the year **2009**. Coming from the principal witness of the defence, this piece of evidence is quite detrimental to the defence case as it reveals that **DW1** is either completely ignorant of the material facts or she was prone to mendacity in the matter. This court will accord her a margin of doubt and prefer to believe she is merely ignorant of the facts

since in any event upon cross-examination she admitted during some of the material events such as obtainance of title to plot **144** which gave rise to the suit land occurred while she was still away at school.

26. The evidence of the plaintiff's neighbour, **PW2** is that *Fatuma* and *Shah* were known to him, and that they developed the suit land with a fence and houses before selling it to the plaintiff's family, the latter who took up possession in **1992**. His further evidence is that the plaintiff and her family have been in occupation of the suit land to date on which they graze their animals and cultivate maize. He testified that he has never seen the defendant work on the suit land. This is the same witness who testified that the defendant's homestead is about **700** metres away from the suit land. His evidence was not shaken on cross-examination and I find him to be a quite credible witness. However I have also given consideration to Ms Munialo's submission that there was some discrepancy between **PW2's** evidence-in-chief and evidence on cross-examination in **Kitale ELC 27 of 2009**. I find that that discrepancy related to numbers only and that his evidence that the plaintiff was utilizing the land remained unshaken.

27. **DW1's** evidence must also be assessed in regard to the issue of possession. She stated that the plaintiff has never occupied the land and that it has been in her mother's possession; that her family planted trees thereon in **2004**; that the house on the land was built by her mother for her workers who now reside in it, and that her mother stays within the same property but on another location. It is noteworthy that this evidence is unreliable because it introduces new matter which in view of its consequence, ought to have been included in the pleadings for an answer to be availed by the plaintiff. The allegation that the defendant's workers reside in the house on the land and that the defendant resides on another part of the suit land is not admissible and is in any event incorrect; it must be held to be incorrect because in **paragraph 9** of her replying affidavit the defendant admitted to residing on *one of her properties* without identifying it by number while her children resided on other land parcels registered in her name. She never asserted that she or any of her children or workers reside on the suit property. In her oral evidence **DW1** did not assert that her mother or any of her siblings reside on the suit land. In the absence of evidence that the defendant and her children do not reside on the suit land, nothing would have been easier for the defendant than calling as witnesses her workers who she alleges live on the land and she never did so.

28. In this court's view the defendant has failed to effectively challenge the plaintiff's assertion that she took possession of the land. She has also failed to establish that she or any of her family members or agents are in possession of the land.

29. This court agrees with the holding in **Machakos Misc Appl 1 Of 2004 Charles Matheka Vs Haco Industries 2008 eKLR** and the decision in **Kimani Ruchine & Another Vs Swift Rutherford Co Ltd & Another 1977 KLR 10** that possession can take many forms, including occupation through relatives workers or otherwise.

30. The commencement of **Kitale ELC 27 of 2009** was due to the fact that the plaintiff was in possession. It was open for the defendants to bring the plaintiff's occupation of the land to an end after the judgment in that case but there is no evidence presented in this case to show that they did so. It is the finding of this court that the plaintiff is still in possession of the suit land.

**ii. Was the plaintiff's possession of the suit land obtained by force or consent of the defendant?**

31. It is this court's view that the issue of the plaintiff's possession arose before other fora such as the Chief and the Land Registrar and that that possession was with the knowledge of the defendant. Besides it was established that the defendant sold land to the *Mohameds*, and they left long ago and subsequently the plaintiff succeeded them in possession of the suit land by virtue of a sale transaction. The defendant is presumed to have known the extent of her land, at least by **2004**. That is the year she concedes to having met the plaintiff and her husband at the land control board. Therefore by **2005** when the defendant was registered as owner of the suit land she knew that the plaintiff was in possession but did nothing about it. Nothing testified to this fact better than the mere institution of the former suit, **Kitale ELC 27 of 2009**. It is clear that the plaintiff's possession was not obtained by force (*per vim*) or by consent of the defendant which would invalidate the claim under adverse possession.

**iii. Was the plaintiff's possession of the suit land open, continuous, and hostile to the defendant so as to constitute dispossession of the defendant.**

32. The third question that arises is whether the plaintiff's possession has been open, continuous, and hostile to the defendant so as to constitute dispossession.

33. This court finds no ground to disbelieve that the taking of possession by the plaintiff, having been authorized by the agreement with *Fatuma*, was not secretive. Neither was her continued stay on the land. There is credible evidence from her neighbour **PW2** that she worked the land, planted crops and grazed her animals thereon. Besides, she even constructed a toilet on the land and planted trees. She had workers and tenants living on the suit land at various times. That, to this court, amounts to possession without secrecy.

34. As to whether it was continuous and hostile to the defendant, it has already been noted above that it was her possession of the land that enabled the plaintiff to commence the former suit. Her possession of the land was devoid of any consent from the defendant. Her activities on the land as described earlier evinced a clear *animus possidendi*, or intention to dispossess the defendant of the suit land.

**iv. Does the existence of the Kitale ELC 27 of 2009 per se bar the claim for adverse possession?**

35. The submission of Ms Munialo for the defendant is that **Kitale ELC 27 of 2009** was dismissed on several other grounds including that the suit was filed prematurely. However I find that the former suit foundered only on the ground that from **2005** to the date of its inception the requisite period of **12** years necessary for declaration of adverse possession had not elapsed.

36. It is clear from the defendant's evidence of the parties' tussle at the land control board that as from **2004** the defendant knew that the plaintiff was in possession of the land. As observed by the court in **Kitale ELC 27 of 2009**, the computation of time must therefore commence from the year **2005** when the defendant obtained paper title to the suit land, and since the **12** year period had not elapsed by the

time of filing that suit, it was premature. Indeed the court stated as follows:

**“... the plaintiff can not be heard to lay claim over the suit land on account of adverse possession . This can only be done after the expiry of 12 years from the year 2005 thereby rendering this suit premature.”**

37. A perusal of the record in **Kitale ELC 27 of 2009** reveals that the defendant did not lodge a counterclaim in that suit for eviction of the plaintiff and no order of eviction was therefore issued.

38. The matters raised by Ms Munialo for the defendant, that is the lodging of a caution, the presentation of the dispute to the Land Registrar, and the taking of the dispute before the Chief could not stop time from running in favour of the person in possession of the suit land, the plaintiff.

39. In my view, the holdings in the case of **Nairobi Civil Appeal No 49 Of 1996 William Gatuhi Murathe Vs Gakuru Gathimbi**, the case of **Eldoret HC Kipketer Togon Vs Isaac Cipriano Shingore 2012 eKLR** and **Gerishon Baruthi Vs Willays Gatinku Mukobwa and Robert Njogu Nyeri Civil Appeal No 98 Of 1998** cited by Mr Kiarie for the plaintiff are appropriate for the instant suit in respect of the events that may or may not have stopped time from running in favour of the plaintiff.

40. I therefore agree with the submission by the plaintiff's counsel that time has never stopped running in favour of the plaintiff for the purposes of adverse possession.

41. Ms Munialo's submission is that this suit is *res judicata* by virtue of **Kitale ELC 27 of 2009**. However in this court's view, the instant suit is not *res judicata* since it raises different issues for determination. These issues include whether as at the date of the commencement of this suit the 12 year period has elapsed so as to entitle the plaintiff to title by prescription. The former suit raised the issue as to whether by the time of its commencement the 12 year period has elapsed so as to entitle the plaintiff to title by prescription. The former suit was dismissed solely for being premature and as observed herein earlier, time continued running in favour of the plaintiff as no termination of possession was effected or suit for eviction filed. This in effect is an entirely new suit and not a replication of **Kitale ELC 27 of 2009**.

**v. Does the filing of a notice of appeal in Kitale ELC 27 of 2009 bar the plaintiff from claiming adverse possession in this suit?**

42. An appeal was supposed to have been filed within **60** days from the date of the filing of the notice of appeal. The notice of appeal was filed on **21/2/2014**. An appeal was therefore to have been filed by **20/4/2014**. The parties agree that no appeal was filed. Relying on the case of **Benson Ngugi Vs Francis Kabui Kinyanjui & 3 Others Nakuru Civil Appeal No 1 Of 1986** and the decision in **Civil Appeal No 991 Of 1958, The Trustees Of The Port Of Aden Vs Gohra Bint Salme & Others 1959 EA 87**, Ms Munialo, in a further argument urges that in **Kitale ELC 27 of 2009** the issue of ownership had been determined and the parties and the land which features in that case were the same. The plaintiff never wrote to the court to withdraw the notice of appeal.

43. In this court's view, the decision in **Kitale ELC 27 of 2009** and the filing of a notice of appeal can not bar the plaintiff's claim in this suit for three reasons.

44. First, in this court's view according to **rule 83** of the **Court Of Appeal Rules** the notice of appeal is deemed to have been withdrawn upon the expiry of the **60** days if no substantive appeal is filed within that time span. It matters not whether the same was withdrawn by the intended appellant or not. It is a presumption of the law.

45. Secondly, the notice of appeal was merely a notice of intention to commence further proceedings. It was initiated by the plaintiff. The only action that can stop time from running in favour of the plaintiff for the purposes of adverse possession is positive action by the defendant herself in the form of termination of the plaintiff's possession or by lodging proceedings for an order of eviction as earlier stated in this judgment.

46. Thirdly, the cause of action in that suit differed from the cause of action in this suit and the two must be held as totally different in that each suit sought a declaration that the plaintiff had attained the requisite **12** year period of possession by the respective dates of the commencement of each suit and not as at a common date. This suit and **Kitale ELC 27 of 2009** are therefore distinct suits bearing very a principal difference: the date on which the cause of action is said to have accrued for the purpose of adverse possession. The case of **Benson Ngugi (supra)** must be distinguished as the claim of ownership therein revolves around the doctrine of a *resulting trust* which relies on hard and fast facts and not on effluxion of time as in adverse possession. The judgment on adverse possession in **Kitale ELC 27 of 2009** did not preclude the plaintiff from claiming adverse possession later at a different date, as long as possession continued and the **12** year period could be proved to have elapsed from the commencement date set by the court in its judgment. Consequently also, a substantive appeal in that former case, perchance it had been filed, would have related to a totally different issue not having a bearing on the issue arising in the instant suit, and would not have affected these proceedings in any way. The cases of **The Trustees of the Port of Aden (supra)** should be distinguished because the appellants had claimed that the respondent be restrained from trespassing on the suit premises on the ground that his employment and therefore his licence had terminated. The appellants argued that the respondent was not protected under the **Rent Restriction Ordinance** and so omitted to claim for recovery of possession thereunder; upon a second, similar suit the court held that an alternative claim to recover the premises under the Ordinance ought to have been included in the first suit. In the instant case, as I have indicated before, the attainment of **12** years of uninterrupted possession is a milestone dependent on the happenings between the parties and effluxion of time; this means that one may successively bring the same kind of claim under the same doctrine but based on a different date of accrual of cause of action. The fact that the court dismissed **Kitale ELC 27 of 2009** as prematurely filed meant that as long as possession was retained, time could continue running, and in this case it did. In the circumstances I do not see in the instant suit any alternative claim that the plaintiff herein could be deemed, like the appellants in **The Trustees case (supra)**, to have omitted from the first suit and which could render the instant suit *res judicata*.

47. In the final analysis, I find that the plaintiff has established her claim against the defendant on a balance of probabilities.

***b. Who should bear the costs of the suit?***

48. In the circumstances of this case I find that the defendant should bear the costs of the suit.

**CONCLUSION.**

49. Consequently I hereby issue the following orders :

**a. The plaintiff's originating summons dated 16/8/2017 is hereby allowed.**

**b. A declaration that the defendant's right to the land comprised in Kitale Municipality Block 15 /Koitogos/1956 was extinguished upon the expiry of 12 years of the plaintiff's possession of the land with effect from the date 11/5/2005.**

**c. A declaration that from the date of expiry of a 12 year period computed with effect from 11/5/2005 the defendant has been holding the title to the land comprised in Kitale Municipality Block 15 /Koitogos/1956 in trust for the plaintiff.**

**d. An order that the registration of the land comprised in Kitale Municipality Block 15 /Koitogos/1956 be cancelled and the same be registered in the name of the plaintiff.**

**e. The defendant shall pay to the plaintiff the costs of this suit.**

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 30<sup>th</sup> day of June, 2020.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**