REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELCA NO 8 OF 2018

MARY GATHONI GATHUO (Suing as the administratorof the estate

of Joseph Gathuo Githogori (Deceased) .....1st APPELLANT

JOSEPH WACHIRA WARUI.....2ND APPELLANT

VERSUS

DAVID KARIUKI MATHENGE.....RESPONDENT

BETWEEN

DAVID KARIUKI MATHENGE.....PLAINTIFF

-VERSUS-

JOSEPH GATHUO GITHOGORI .....1ST DEFENDANT

JOSEPH WACHIRA WARUI.....2ND DEFENDANT

(Being an Appeal against the Judgment/Decree of Hon. T Matheka Principal Magistrate (as she then was), Nyahururu delivered on 8th August 2012 in Nyahururu CMCC No 134 of 2003)

JUDGEMENT

1. Before me for determination on Appeal in a matter which was heard by *Hon.* Hon. T Matheka Principal Magistrate (as she then was), in the Chief Magistrate Court at Nyahururu CMCC No 134 of 2003 where the Learned Trial Magistrate *(as she then was),* upon considering the evidence of both parties, entered judgment for the Plaintiff/Respondent herein on the *8th August 2012 where a decree was subsequently entered on the 17th September 2012.*

2. The Appellants, being dissatisfied with the Judgment of the trial Magistrate, filed their Memorandum of Appeal at the Nakuru High Court being Nakuru Civil Appeal No. 168 of 2012 on the 7th September 2012.

3. On the 2nd December 2013, they subsequently filed their Notice of Motion under Certificate of Urgency dated the 2nd December 2013 seeking stay of execution of the Judgment and decree wherein the Court in its ruling of 10th December 2014 directed that there be stay of interim orders pending a status report from the police regarding who was in occupation of the suit land.

4. On the 26th January 2015, the firm of M/S Njuguna Kamanga & Company Advocates vide a letter dated the 22nd January 2015 filed the said report wherein counsel conceded to the fact that the 1st Appellant was in occupation of the suit land. He further conceded that the Appellant continues to occupy the portion he was currently occupying pending the hearing and determination of the Appeal.

5. A substantive a record of Appeal was then filed on the 19th July 2019 raising the following grounds;

i. That trial Magistrate erred in law and in fact directing (sic) the 1st Appellant landless without considering the sale agreement (sic) Nya/Ol-joro Orok Salient/1935, transfer of Land Control Board, Nyandarua District Land Disputes Tribunal case No. 65 of 1998 and

Central Province and Land Disputes Appeal case No. 30 of 1999.

ii. The learned trial Magistrate erred in law and in fact failing (sic) to give reasons justifying the conclusion trial he (sic) arrived at.

iii. The learned trial Magistrate mis-appreciated the applicable law and as a consequence he (sic) misdirected herself on the applicable standard of proof in civil matters

iv. The learned trial Magistrate distorted the evidence adduced by the Appellants and their witnesses as a result allow (sic) the Respondent(sic) case on her own set of facts which contradicted the evidence

v. The learned trial Magistrate erred in law and infact (sic) she mostly rely (sic) on contravention of Section 8(1) of the Land Control Board.

vi. The learned trial Magistrate erred in law and (sic) not taking in account that the Respondent sold the land to the 2nd Appellant and the 2nd Appellant sold a portion of 2 acres to the 1st Appellant later the Respondent came and bought the 2nd Appellant (sic) portion of 4.2 acres.

6. The Appellant thus sought for orders that:

i. This Appeal be allowed and the orders of the subordinate Court for eviction be set aside.

ii. Cancellation of the title deed Nya/Ol Ojoro Orok Salient/1935 issued to Daniel Kariuki Mathenge as the ruling/decision (sic) of Central Province Land Dispute Appeal Case No. 30 of 1999.

iii. The cost of the suit.

iv. Any other relief this honorable Court may deem fit to grant.

7. On the 22nd October 2019 following an opposed Application, the 1st Appellant now deceased, was substituted by his present legal representative Mary Gathoni Gathuo wherein leave was granted to the Appellants to file their supplementary record of Appeal which was filed on the 30th October 2019.

8. By consent, the parties agreed that the Appeal be disposed of by way of written submissions to which only the Appellants filed their submissions and despite leave having been granted to the Respondent to file their submissions in response, none were filed. I shall therefore proceed to address the Appellant's submissions as follows:

Appellant's submission

9. The Appellants submitted on the facts giving rise to the present suit being that at all material times the Plaintiff was the registered sole proprietor of all that parcel of land described as Nyandarua/ Ol joro orok Salient/1935. On or about 1989 the Defendant together with his family had been occupying, working, wasting and/or alienating the suit premises without any lawful or justifiable cause, at the detriment expense of the Plaintiff's quiet occupation and use conferred to him by virtue of Sections 27 and 28 of the Registered Land Act.

10. The 1st Defendant had denied the contents of the plaint by filing the defence and counter-claim dated 8th October 2010 where he had averred that the ownership of plot Nyandarua/ Ol joro orok Salient/1935 vested in the 2nd Defendant who had sold 2 acres to him and had acquired in his favor a letter of consent from the Ol-joro orok Land Control Board on the 13th March 1990.

11. That in the judgment dated the 5th August 2003 the learned Senior Principal Magistrate had restricted herself wholly to the judgment in Civil Appeal No.47 of 2000 where she had stated that the transaction between the Plaintiff and the 2nd Defendant never at any time, conferred any proprietary interests on the 2nd Defendant. The learned trial Magistrate further stated that the prayers as sought by both Defendants were not tenable thereby dismissing each of their counter claims with costs to the Plaintiff.

12. Having made the background of the matter in question, the Appellants framed their issues for determination as follows;

i. Whether the trial Court misapprehended and misapplied the law;

13. Their submission on this issue was that the Respondent's cause of action as contained in the Plaint occurred in 1989 wherein he had sought for remedy in the lower Court via a suit filed on 18th July 2003. That it was not in dispute that the 1st Appellant had been in occupation of the suit land before the year 1989.The Respondent thereof had 12 years to file for recovery of land but had waited for 14 years to file the suit after the date on which the right of action had accrued. This was in contravention of Sections 7 of the Limitation of Actions Act.

14. The Appellants relied on the decided case in **James Maina Kinya vs Gerald Kwendaka [2018] eKLR** where the case **of M'ikiara M'rinkanya & Another vs Gilberet Kabeere M'mbijiwe [2007] eKLR** was cited, to submit that there was a statutory bar in Section 7 of the Act for recovery of land including the recovery of possession of land after the expiration of 12 years.

15. That the reliance of the trial Magistrate on the High Court decision in Nakuru HCCC No. 47 of 2000 as the basis of the decision was wholly in error, as the honorable Judge (as he then was) had considered whether Ol-joro Orok Land Disputes Tribunal, and Nyeri Appeal Tribunal had the jurisdiction in the matter and whether the 2nd Appellant and a valid title which he could transfer to the 1st Appellant. The issue of limitation had never been considered therein.

16. That this being a Court of equity, it was guided by the maxim of equity one of which was Vigilantibus non dormientibus aequitas subvenit which translated to equity aids the vigilant, not the indolent. That the Respondent had slept on his rights and had gone to Court as an afterthought and even so had not disclosed sufficient reason why the Court should exercise its discretion in his favour.

ii. The 2nd issue for determination was whether there had been a valid sale between the 2nd Appellant and Respondent to which the Appellant submitted that;

17. By an agreement dated 15th of August 1984, the Respondent had agreed to sell to the 2nd Appellant the suit land at a consideration of Ksh 30,949/= which amount had been paid in full at the execution of the agreement where the Respondent had passed good title to the 2nd Appellant.

18. The 2nd Appellant and his family settled on the suit land and thereafter, on the 5th December 1986 parties had applied to the Ol joro orok Land Control Board for consent to validate the agreement wherein the Land Control Board had issued them with a letter of consent in respect to title No. Nyandarua/Ol joro orok Salient/1935 on the 9th December 1986, transferring the land from the Respondent to the 2nd Appellant.

19. In the year 1989 the Respondent and the 2nd Appellant agreed to enter into a fresh agreement to the effect that the 2nd Appellant would transfer 4.2 acres of the suit land and a kiosk at Kasuku Trading Center to the Respondent in exchange of plots No. SA 6881 Laikipia West farmers Company, measuring 5 acres. The 2nd Appellant's contention was that since he never got title to the suit land he should get back the 4.2 acres of land from the Respondent.

20. That upon the execution of the sale agreement, the Respondent had gone back to the suit land and had occupied 4.2 acres which he continues to occupy to date. On the other hand, the 1st Appellant has continued to occupy the two acres of land which he was sold to by the 2nd Appellant in 1986.

21. It was the 1st Appellant's contention that he bought 2 acres out of the suit land from the 2nd Appellant when the same was vested in exclusively to him where the Respondent had admitted that he had no claim of the same. That after the contract between the Respondent and the 2nd Appellant had been canceled at the behest of the 2nd Appellant, the Respondent and the 2nd Appellant had agreed to safe guard the interest of the 1st Appellant in the suit land which then gave rise to the letter of consent of the Ol joro orok Land Control Board dated 18th March 1990.

iii. On the principle of estoppel, which was yet another issue for determination:

22. The Appellant submitted that the same was well established in our legal system and firmly grounded in Section 120 to 123, part II of the Evidence Act.

23. They also relied in the case of **Doge vs Kenya Canners Ltd [1989] eKLR** and **Muti vs Kenya Finance Corporation & Another [2004]2EA 182** to submit that the trial learned Magistrate had ignored the facts and documentation tendered in Court thereby failing to appreciate the transfer agreements dated 15th March 1990 and the three consents therein issued. That the Respondent was thereby estopped from denying the sale of the suit property from himself to the 2nd Appellant as well as from denying the transfer of two acres of the suit property to the 1st Appellant since there was sufficient evidence tendered in the trial Court for one to ignore.

iv. On the issue of constructive trust;

24. The Appellants further submitted that pursuant to the payment in full of the purchase price to the Respondent by the 2nd Appellant and the taking of possession of the suit land thereafter, the Respondent had created a constructive trust in favour of the 2nd Appellant and the Respondent could not be allowed to claim ownership of the suit property after consideration had been paid and the suit property transferred to the 2nd Appellant. Reliance was placed on the case in **Willy Kimutai Kitiit vs Michael Kibet [2018] eKLR.**

v. Land Control Board consent:

25. That the Land Control Board consent had been obtained albeit after the time stipulated in Section 8(1) of the Land Control Act but this did not make the agreement void for it was not the failure to apply for consent within the time stipulated in Section 8(1) which rendered a controlled dealing void, but the refusal of the Land Control Board to grant the consent, as was held in the case of **Joseph Mathenge Kamutu vs Joseph Wainaina Karanja & Another [2015] eKLR.** The agreement between the Respondent and the 2nd Appellant to safeguard the interest of the 1st Appellant therefore stood as it was.

vi. Root of the title;

26. On this issue, the Appellants submitted that since both the Respondent and the 1st Appellant claimed to be the owners of the suit property, the Court was enjoined to investigate into the root to the suit land wherein a party whose title conformed to procedure and could properly trace its root without the break of chain would be considered as the rightful owner of the property as was held in the case of **Hurbet**

27. That in as far as this issue was concerned the Appellants had produced enough evidence which explained chronological event of their title and which evidence clearly pointed out to the fact that the Respondent was not the legal owner of the suit property.

28. The Appellants prayed that the Appeal be allowed and the orders of the trial Court be set aside, the Plaintiff/ Respondent's suit in the lower Court be dismissed and the Appellant/Defendant's counterclaim before the lower Court be allowed.

Analyses and determination.

29. I have considered the record, the judgment by the Trial Magistrate, the written submissions by learned Counsel for the Appellant as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the Trial Magistrate, of seeing and hearing the witnesses as they testified. ***(See Seascapes Ltd v. Development Finance Company of Kenya Ltd [2009] KLR, 384).*** *I* also remind myself that this Court will not normally interfere with a finding of fact by the Trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings she did. ***(See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982-88] 1 KAR 278).***

30. According to the proceedings herein, the Respondent herein instituted suit against the Appellants vide a plaint dated 8th July 2003 where he had sought for the following orders;-

i. A declaration that the Defendant is not entitled lay a claim for two (2) acres out of the suit premises against the Plaintiff herein.

ii. An order of eviction to issue against the Defendant/his agents/employees, and/ or servants from the suit premises.

iii. Cost of the suit together with interest at Court rate.

iv. Any other or further relied (sic) which this honorable Court may deem fit to grant.

31. The 1st Appellant filed his statement of defence and counterclaim dated the 8th October 2010 wherein he generally denied all the allegations set forward by the Respondent in his Plaint stating that he had occupied the suit land and had worked thereon since 1989 with the consent of the owner, the 2nd Appellant herein, who had also vested part of the suit land measuring two acres to him for a consideration.

32. In his counterclaim the 1st Appellant prayed for the following orders;

i. A declaration that the 1st Defendant is the rightful owner of two acres of land to which he had occupied since 1990 within title No. Nyandarua /Oljoro-Orok Salient/1935 and cancellation of the title deed aforesaid issued in favour of the Plaintiff herein.

ii. Cost of the suit plus interest

iii. Any other or further relief this honorable Court may grant to the Defendant.

33. The 2nd Appellant was enjoined to the suit vide an order of the 15th September 2004 following a successful application to be enjoined, wherein he filed his defence and counterclaim dated 28th September 2004 on the 29th September 2004.

34. In his counterclaim the 2nd Appellant sought for the following prayers against the Respondent;

i. A declaration that land reference No. Nyandarua/Oljoro orok Salient/1935 belongs to the 2nd Defendant and an order for the rectification of the register thereof to reflect the same.

ii. An order requiring the Plaintiff to deliver vacant possession of the suit land herein to the 2nd Defendant and/or eviction therefrom.

iii. Costs of the suit plus interest.

35. After the confirmation of the preliminaries, the matter proceeded for hearing before G.A M'Masi the Ag Principal Magistrate on the 15th February 2005 wherein directions were taken on the 12th February that the matter proceeds from where it had stopped wherein Hon T Matheka PM (as she then was) took over the further hearing of the matter and proceeded to enter judgment against the 1st Appellant for having not filed his defence. The matter proceeded for hearing and for formal proof as against him.

36. The Respondent's case was that as a squatter, he had been allocated a 6.2 acre piece of land being Nyandarua Oljoro Orok Salient 1935 (which land shall be for the purpose of this Appeal be referred to as the suit land) by the Settlement Fund Trustee vide a letter dated the 20th June 1982 where he had paid 10% being Ksh 325/- for it and he had been issued with a receipt on the 4th November 1982.

37. That vide an agreement of 15th August 1984, he had sold to the 2nd Appellant 5 acres at a consideration of Ksh 35,000/- to be excised from the said land.

38. That he had received Ksh 30,949/ and a balance of Ksh 4,100/- was to be paid to offset the Settlement Fund Trustee loan. That he had gone to the Oljoro- orok- Land Control Board after two years after the sale where they had procured the consent.

39. After the sale, he had moved to live with his family in Marmanet wherein after two years the 2nd Appellant had asked for a refund of his money or in the alternative for an alternative piece of land citing that the suit land was not fertile. Parties had agreed that the Respondent takes back his land wherein he had given the 2nd Appellant another land being No. 6881 in Kaiti which the 2nd Appellant took possession of and lives there to date. In addition to returning the suit land in Ojoro-orok, the 2nd Appellant also gave him a Kiosk in Kasuku which Kiosk, it later turned out was none-existent.

40. That upon executing this second agreement, the Respondent had returned to the suit land wherein he had discovered that the 2nd Appellant had not settled the Settlement Fund Trustee loan in regard to the suit land to which he had offset the same, was issued with a discharge of charge, and subsequently a receipt with which he used to collect his title to Nyandarua/Oljoro-Orok 1935, on the 28th April 1997.

41. That further upon his return to the suit land, he had also found the 1st Appellant settled thereon who claimed 2 acres of the suit land on an agreement he, the 1st Appellant, had entered into with the 2nd Appellant.

42. There arose a land dispute and the matter had been lodged with the Nyandarua District Land Tribunal via case No. 65 of 1998, where the Respondent had been directed to give the 1st Appellant 2 acres of land.

43. The Respondent had testified that he was willing to refund the Ksh 30,000/= to the 2nd Appellant if he was not satisfied with the Plot No.6881 Laikipia West if he was not satisfied with the same and for the eviction orders to issue to the 1st Appellant with whom the 2nd Appellant had exchanged land with.

44. PW2 a Land Registrar of Titles in the settlement department testified to the effect that Nyandarua/Oljoro-orok 1935 was allocated the Respondent wherein in the process of the documentation, the office had received a request for transfer of 5 acres of land to the 2nd Appellant which request had been rejected as the land was still registered to the Settlement Fund Trustee and the allotte had no capacity to transfer the same as he had only paid 10% which was an acceptance fee for the offer made to him.

45. That subsequently the Respondent had paid the requisite sums of money where he had been issued with a discharge of charge and the documents had been registered in his name and forwarded to the district on 6th March 1996.

46. It had been his evidence that the consent issued by the Respondent to the 2nd Appellant by the Land Control Board had been irregularly obtained because the documents in their office had been rejected and the land was still registered in their name.

47. On the 5th October 2020, by consent, and interlocutory judgment that had been entered against the 1st Appellant was discharged unconditionally by the Court after a successful application by the 1st Appellant seeking to file his defence and counterclaim.

48. The land transfer agreements of 15th March 1990 as well as the proceedings in Oljoro orok District Land Tribunal were also produced as exhibits by consent wherein the Respondent's case had been marked as closed.

1st Appellant's case.

49. The 1st Appellant's case was that he owned 2 acres on land parcel No Nyandarua/Oljoro-orok 1935, which land, via an agreement dated 5th June 1989, he had exchanged with the 2nd Appellant who had bought the same from the Respondent.

50. That after he had exchange his land with the 2nd Appellant, he had taken immediate possession of the same in the year 1989 where he had proceeded to cultivate it, plant trees and keep cattle until the Respondent started claiming ownership of the same.

51. That the matter had been reported to the Land Disputes Tribunal where the Elders had ordered that he be given his 2 acres of land for which he had paid for. That pursuant to the Elders finding, the Respondent had produced a judgment from the High Court which had held that the Tribunal had no jurisdiction to preside over the matter. That they had then proceeded to discuss the issue in a meeting with the District Officer Oljoro Orok in 1990 wherein by consent it had been agreed that he keeps his two acres of land which land he continued to occupy to date.

52. In his cross examination the 1st Appellant had confirmed that at the time the parties had exchanged the land, the same had no title deed and even when they got the consent, the land was still registered to the Settlement Fund Trustee.

2nd Appellant's Dcase

53. The 2nd Appellant's case on the other hand was that they had entered into an agreement on the 15th of August 1984 with the Respondent wherein he had bought from him 5 acres of land being No. Oljoro Orok 1935 via an agreement of an equal date to which he had paid Ksh up 850,000/-to the Respondent.

54. That subsequently they had made an application for consent where he had paid a further Ksh 35,000/-from where, on the 7th of March

1989, they had gone to the Land and Settlement for transfer. That he had then taken possession of the land where he had dug a 100ft borehole.

55. That since the 1st Appellant liked his land, they had agreed to exchange their parcels of land to which he gave the 1st Appellant his two acres of the suit land in exchange for his land in Wiyumierira, land which he subsequently sold.

56. That later the Respondent had decided to take back his land and since he had exchanged part of it with the 2nd Appellant, parties had entered into an agreement to the effect that the Respondent would occupy 4.2 acres on the suit land and that he would also get and a kiosk in Kasuku, in exchange for plot No.4 at Kaiti trading center and a 5 acre land in Olmoran.

57. That at the time, the parties had gone to the Land Control Board in Oljoro-orok where a consent dated 18th March 1990 had been given to the Respondent

58. He confirmed that the Kaiti plot was a temporary allocated plot and that he did not get the land in Olmoran which was still registered in the Respondent's name. The defence thus closed its case. Now

59. Pursuant to the delivery of the impugned judgment, a decree dated 17th September 2012 was subsequently issued against the 1st Appellant dismissing his counter claim and ordering for his eviction from the suit land wherein execution proceedings commenced thereafter to which the Appellants successfully filed an Application under Certificate of Urgency dated the 2nd December 2013 seeking stay of execution of the Judgment and decree. The Court in its ruling of 10th December 2014 directed that there be stay of interim orders pending a status report from the police as to who was in occupation of the suit land.

60. Having considered the pleadings, the evidence on record and the submissions filed, it is my view that the following are the issues for determination:

i. Whether the Respondent had a title to pass to the 2nd Appellant.

ii. Whether there was a valid sale agreement entered into between the Respondent and the 2nd Appellant

iii. Whether the 2nd Appellant is the rightful owner of land title No. Nyandarua/ Oljoro orok Salient 1935.

iv. Whether the 1st Appellant is the rightful owner of two acres of land within title No. Nyandarua /Oljoro-Orok Salient/1935 to which he had occupied since 1990.

v. Whether the learned trial Magistrate misapprehended and misapplied the law.

61. In order to make a determination on the above captioned issues, it is important to note that from the genesis of the matter in question, it is not in contention that the Respondent herein was allotted the suit parcel of land No 1935 measuring 6.2 acres by the Settlement Fund Trustee in the year 1982 where he paid 10% deposit on the 4th of November 1982 to signify acceptance of the allocation.

62. It is also not in dispute, that before completing the process leading to registration of the Respondent as the proprietor of the suit parcel of land, he and the 2nd Appellant herein had entered into a sale agreement, on the 15th August 1984, where they had agreed that the Respondent shall sell 5 acres, to being excised from the suit land, to the 2nd Appellant for a consideration of Ksh 30,949/= and that the 2nd Appellant would discharge the loan owed to the Settlement Fund Trustee on the suit land and that the transaction was subject to the consent of the Land Control and the Settle Fund Trustee. The Respondent confirmed that he had received Ksh. 30,949/= wherein he had moved out of the suit land to settle his family in Marmanet leaving the 2nd Appellant on the same.

63. It is also not in dispute that after two years, the 2nd Appellant had asked for a refund of his money and in the alternative for an alternative piece of land because the suit land was not fertile. This led to the turn of events of 15th March 1990, were parties rescinded the agreement of 15th August 1984 and entered into a new agreement to the effect that the 2nd Appellant transfers the suit land back to the Respondent together with a Kiosk in Kasuku in exchange for another land being No. 6881 in Kaiti, land which the 2nd Appellant took possession of and lives there to date.

64. It is also not in dispute that upon his return to the suit land, the Respondent had found 1st Appellant had settled thereon where he had claimed ownership of 2 acres on an agreement that he and the 2nd Appellant had entered into, this created a land dispute between the Respondent and the 1st Appellant.

65. That the loan had not been discharged by the 2nd Appellant wherein the Respondent had embarked on offsetting the same and had been given a discharge of charge and subsequently issued with title to Nyandarua/Oljoro-Orok 1935, on the 28th April 1997.

66. The land dispute between the Respondent and the 1st Appellant finally escalated to the High Court on Appeal from the Tribunal, wherein the Tribunal award was quashed via Nakuru HCCC No. 47 of 2000 and the same has never been appealed and this Court has no jurisdiction to sit on Appeal of the said finding of the High Court or reverse the same.

67. Having laid down the undisputed facts herein, I find that there is no dispute that the Respondent and the 2nd Appellant did enter into a

sale agreement on the 15th August 1984 for the sale and purchase of Plot No 1935 Oljoro Orok Scheme measuring 5 acres, the suit land herein, for a the consideration of Ksh. 30, 949/=

68. From the documents herein produced namely Pf Exh 13(a) which was a title deed to the suit land registered to the Respondent, it is clear that the same was issued on the 28th April 1997 almost 13 years after parties had entered into the agreement to sale. In essence therefore by the time parties had entered into the said agreement, the Respondent had no proprietary interest to pass to the 2nd Appellant as at the time he had no title to the suit land since he was not the registered owner of the suit property which was registered to the Settlement Fund Trustee and therefore was Government land. Any subsequent agreement therein before the Respondent attained his title in relation to alienation of the suit land to 3rd parties was void ab initio. To this effect it cannot be said that the 2nd Appellant was the rightful owner of land title No. Nyandarua /Oljoro-Orok Salient/1935.

69. It also follows that the 2nd Appellant having not obtained a valid and/or a good title from the Respondent, the Agreement between him and the 1st Appellant was therefore void ab initio as it directly flowed from an agreement that was void.

70. Having established that that the parcels of land in question were registered under the Registered Land Act, Act (Cap 300) which was repealed upon the passage of the Land Registration Act, 2012, the Respondent's registration was governed by the provisions of Section 26 (1) of the Land Registration Act of 2012 which provides as follows:-

> "The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all Court s as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except;-
>
> a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> b. Where the certificate of title has been acquired illegally, unprocedurally, or through a corrupt scheme.

71. There having been no allegations and evidence of fraud levelled againist the proprietorship of the Respondent herein in relation to parcel No Nyandarua/ Oljoro Orok Salient 1935, I hereby find and hold that the Respondent was the legally registered proprietor of the said parcel of land.

72. On the determination as to whether the 1st Appellant was the rightful owner of two acres of land within title No. Nyandarua /Oljoro-Orok Salient/1935, to which he had occupied since 1990, I find that the 1st Appellant in his counter claim and submission had indirectly invoked the principle of adverse possession to the suit land to the effect that he took possession and occupation of 2 acres within the suit land in 1989 where he had proceeded to develop it. That the Respondent herein filed his suit on 8th July 2003 and therefore the Respondent's suit for recovery of the 2 acres had been time barred pursuant to the provisions of Section 7 of the Limitation of Actions Act.

73. With due respect, the 1st Appellant could not make such a claim against the Respondent as time began running against the Respondent on the 28th April 1997 when he became the registered owner of parcel No. Nyandarua /Oljoro-Orok Salient/1935.

74. The Court of Appeal in **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** reminded themselves of the rationale of acquiring land by Adverse Possession as explained in the decision in **Adnam v Earl of Sandwich (1877) 2QB 485** that:

> "The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties"

75. Section 7 of the Limitation of Actions Act provides for this doctrine thus

> "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 1st accrued to some person through whom he claims, to that person."

76. Sections 37 and **38** of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

77. Section 37 provides that: -

> "(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, ***to land or easement or land comprised in a lease registered under any of those Acts, 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***."

78. It is clear that the 1st Appellant cannot benefit from this law as the Respondent was registered proprietor to the suit land on 28th April 1997 wherein he had filed suit to recover the land on the 8th July 2003 which was 6 years later and before the expiry of 12 years. Moreover,

before being registered in the Plaintiff's name, the suit land had been the property of Settlement Fund Trustees and therefore public land as opposed to private land. The property became private land upon registration to the Respondent.

79. Section 41 of the Limitation of Action Act Cap 22 Laws of Kenya excludes public land from the application of the Act. The Section provides as follows: -

> This Act does not—
>
> (a)enable a person to acquire any title to, or any easement over—
>
> (i) Government land or land otherwise enjoyed by the Government;
>
> (ii) mines or minerals as defined in the Mining Act (Cap. 306);
>
> (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
>
> (iv) water vested in the Government by the Water Act (Cap. 372);
>
> (v) land vested in the county council (other than land vested in it by Section 120(8) of the Registered Land Act (Cap. 300)); or
>
> (vi) land vested in the trustees of the National Parks of Kenya; or
>
> (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act

80. Having found that the Respondent was the proprietor of the suit land herein, I find that the 1st Appellant was a trespasser on the said land herein in respect of the above captioned findings. The learned trial magistrate (as she was) neither misapprehended nor misapplied the law. I see no cause to interfere with the holding of the trial Court. I uphold the said finding and proceed to dismiss this Appeal with no costs.

Dated and delivered at Nyahururu this 8th day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE