



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO. 284 OF 2017

DAVID GITAU KIARIE (Suing as the legal Representative

of the Estate of the late LUCY NYOKABI KIARIE)PLAINTIFF

V E R S U S

DAVID WAHOME GITONGA.....1st DEFENDANT

MARY NYAKIO KANINI.....2nd DEFENDANT

SETTLEMENT FUND TRUSTEES.....3rd DEFENDANT

KENYA COMMERCIAL BANK LTD.....4th DEFENDANT

JUDGEMENT

1. The original Plaintiff herein initially filed the present suit on the 22nd December 2009. Upon her demise, the suit abated in accordance to the provisions of Order 24 Rule 3 of the Civil Procedure Rules. Subsequently the present Plaintiff successfully filed an application to revive the same wherein vide a ruling delivered on the 26th April 2018, the suit was revived and the deceased Plaintiff was substituted by David Gitau Kiarie (the Present Plaintiff) The Court further directed that the Plaintiff be amended accordingly.

2. Pursuant to compliance of the said directives, the Plaintiff was amended on the 22nd January 2010, on the 20th June 2018 and finally on the 1st April 2019 wherein it was filed on the 2nd April 2019. In their further, further amended Plaintiff, the Plaintiff sought for the following orders:

i. A declaration that the Plaintiff's mother was the proprietor of that plot originally known Nyandarua/Ndemi/453 and now registered as Nyandarua/Ndemi/2224 and 2223 in the names of the 1st and 2nd Defendants respectively.

ii. An order cancelling the title No. Nyandarua/Ndemi/2224 and 2223 in the names of the 1st and 2nd Defendants respectively and reinstatement of the title Nyandarua/Ndemi/453 and registration thereof in the name of the Plaintiff's mother Plaintiff (sic) as a trustee for the estate of Lucy Nyokabi Kiarie (deceased)

iii. A declaration to the effect that the Charge on plot No. Nyandarua/Ndemi/2224 for Ksh 355,000/- and registered on the 2nd December 1997 is a nullity in law and illegal ab- initio and an order directing the 4th Defendant to surrender the same forthwith and unconditionally to the Land Registrar Nyandarua for purposes of having the same cancelled.

In the alternative

iv. A declaration that the late Lucy Nyokabi Kiarie was entitled to be registered as proprietor of title No. Nyandarua/Ndemi/2224 and 2223 by virtue of the doctrine of Adverse Possession and the suit land be registered in the names of the Plaintiff as a trustee for her estate.

v. In the alternative and without prejudice to prayer (iv) above, under order directing the 3rd Defendant to compensate the estate of Lucy Nyokabi Kiarie (deceased) for the suit land at the obtaining market rates to include all the developments thereon together with the general damages for breach of contract.

vi. Costs of the suit and interest.

vii. Any other or further relief that this honorable Court may deem fit and just to grant.

3. Despite service of the pleadings, the 1st and 3rd Defendants neither entered an appearance nor filed their defence and therefore did not take part in the proceedings. On the other hand, the 2nd Defendant filed her amended Defence and Counterclaim dated the 4th December 2019 on the 9th December 2019 wherein she denied the contents averred in the Plaintiff's Plaint. In her Counter-claim, she sought for orders that the Plaintiff, her agents and employees be evicted from No. Nyandarua/Ndemi/2223 forth with and for costs.

4. The 4th Defendant filed their further amended statement of defence on the 18th of June 2019 also denying the contents averred in the Plaintiff's Plaint.

5. Pursuant to the confirmation of compliance of the provisions of Order 11 of the Civil Procedure Rules by the parties the matter was set down for hearing.

Plaintiff's case.

6. The Plaintiff testified as PW1 to the effect that the case was filed by his late mother Lucy Kiarie who got sick and passed away on the 3rd August 2014. He produced her death certificate as Pf Exhibit 1. That he became her legal administrator via Succession Cause No. 47 of 2014 at the Nakuru High Court where he had been issued with the letter of administration Ad Litem dated the 16th March 2014 which letter he produced as Pf Exhibit 2.

7. That the suit was in relation to land Reg. No. Nyandarua/Ndemi/453 but which land was now No. 2223 and 2224 having been subdivisions of parcel No. 453, land which belonged to his mother.

8. That his mother had applied for land to the Ministry of Lands and Settlement in 1985 wherein she had been issued with a letter of offer for plot No. 281 in South Kinangop. He produced the application letter dated 4th June 1985 as Pf Exhibit 3 and the letter of offer dated 15th April 1986 as Pf Exhibit 4.

9. That according to the letter of offer, she was to pay an initial amount of Kshs.505/- to which she had paid and had been issued with a receipt dated 28th April 1986 herein produced as Pf Exhibit 5. That apart from the initial amount his mother had also paid Kshs.4,882/- which amount was to be charged as per the charge dated 25th April 1986 herein produced as Pf Exhibit 6.

10. That his mother had continued to pay the amount charged as evidenced by the receipts dated 27th December 1989 for 3,500/- and the receipt dated 25th September 1989 for Kshs.800/-, receipts which he produced as Pf Exhibit 7 (a) (b).

11. That his mother never got the plot after she had finished paying because she had been informed by the officers at the land's office that the plot was non-existence wherein she had been given an alternative plot No. 453 Ndemi in Nyandarua District via a letter of offer dated 30th May 1995 which he produced as Pf Exhibit 8. That his mother had paid a further Kshs.9,552.35/- as deposit of the acceptance of the offer, via a receipt dated 6th August 1996 herein produced as Pf Exhibit 9.

12. That she was to accept the offer within 90 days and because she had paid for the 1st plot, she was not supposed to pay for the 2nd plot as it was an alternative.

13. The Plaintiff further testified that his mother used to live in Eldama Ravine in Maji Mazuri and used to get letters from his uncle who lived in Naivasha. Those days they had no mobile phones and the letter of offer had been addressed as c/o Settlement Office Nyahururu Office where it had been sent to Naivasha thus the reason why it took so long to reach his mother who upon receipt, had paid the money required albeit late. That after the payments, she had been allocated plot No. 453 Ndemi wherein she had been shown the land while in his company by officers from the Ministry of Land Nyahururu.

14. Thereafter they had taken possession of the same in 1996, fenced it and had proceeded to develop it by building three houses which were still on the ground.

15. He testified that his mother never got the title to the land despite the many visits she had made to Ardhi House because the file went missing soon after the payment. The same was eventually traced after the plot had been subdivided into plot No. 2223 and 2224 both measuring 2.4 hectares. Plot No. 453 had already been closed after subdivision on the 20th June 1996 as per the green herein produced as Pf Exhibit 10 (a). That Plot No. 2223 had been allocated to Mary Nyakio Kanini wherein she had been issued with a title deed on 28th April 1997 at which time his mother had already paid for and settled on the plot. He produced the Green card for plot No. 2223 as Pf Exhibit 10 (b). That further plot No. 2224 was allocated to the 1st Defendant and a title deed issued on 5th September 1997 as evidenced by the green card which he produced as Pf Exhibit 10 (c).

16. He also produced the search certificates for plot No. 2223 and plot No. 2224 both dated 5th June 2018 as PF Exhibit 11 (a) & (b).

17. The Plaintiff testified that after his mother found that the plots had been sub-divided and allocated to other persons, she had gone to seek help from the Njonjo Commission of Inquiry where vide a letter dated 10th June 1988 herein produced as Pf Exhibit 12, from District Land Adjudgment and Settlement Office Nyahururu and addressed to the Director of Land and Adjudication Settlement Nairobi, the officers had been directed to take action after a visit to the suit land where they had found the 3 houses constructed by his mother and even confirmed that the fence had been vandalized.

18. That his mother had also written a letter dated 6th June 2000 to the commission of inquiry complaining about plot No. 453 to which it had been confirmed via a letter dated 7th July 2000, that she had been allocated the land. He produced both letters as Pf Exhibit 13 and 14 respectively.

19. The Plaintiff then produced the various letters of communication between his mother and the various officers in the lands office as follows:

i. The letter is dated 12th July 2000 from Ardhi House and addressed to the Director Land and Adjudication Ardhi House forwarding his mother's letter, produced as Pf Exhibit 15.

ii. A letter dated 9th June 2001 addressed to the Permanent Secretary Ministry of Lands – produced as Pf Exhibit 16.

iii. A letter dated 19th February 2001 to the Commissioner of Lands from the Permanent Secretary Ardhi House forwarding the letter dated 9th June 2001- as Pf Exhibit 17.

iv. A letter dated the 30th March 2001 from the Commission of Inquiry into the land systems of Kenya herein produced as Pf Exhibit 18.

v. He also produced three other letters from the Commission of Inquiry dated 6th June 2001, 20th September 2001 and 28th October 2002 as Pf exhibit 19, 20 and 21 respectively.

vi. From the Ministry of Lands he produced a letter dated 7th May 2003 as Pf Exhibit 22 which had confirmed that his mother had a good case against the Ministry.

vii. A letter dated 19th May 2000 from Ministry of Lands Office and addressed to the 1st – 3rd Defendants advising them to avail all the relevant documents to the suit land was also produced as Pf Exhibit 23.

viii. The last letter produced as Pf Exhibit 24 was dated 1st July 2003 and addressed to the Permanent Secretary Ministry of Lands from the Land adjudication and Settlement office-Nairobi

20. The Plaintiff proceeded to testify that the legal owner of the suit land was his mother but following her death, he was now the legal owner. That their family had been in occupation of the same since 1996 were nobody had ever evicted them. He also testified that the land did not belong to the 1st Defendant but to his mother whom the Defendants had denied title for which he now sought from the court. He also prayed for orders that the 1st, 2nd and 3rd Defendants be ordered to surrender the titles they held so that they could be cancelled, as well as the costs of the suit.

21. The 2nd Plaintiff witness, Lydia Muthoni Kiarie, a sister to the Plaintiff confirmed the Plaintiff's evidence to the effect that plot No. 453 which measured 8 acres belongs to their mother after having been allocated the same by the Government in 1995, land which she had been living on after the death of her brother Jesse Mburu Kiarie in 2001, wherein she had planted trees, cultivates on the same and has also kept cattle and goats. She also confirmed that nobody had ever tried to evict them from the same. The Plaintiff thus closed its case.

2nd Defendants' case.

22. The 2nd Defendant's case was that in 1995, she had applied to be allotted a piece of land by the Government in the Settlement scheme where she had been advised to come to Nyahururu because there was land in Ndemi Scheme.

23. She did just that and in the year 1996 or thereabout she had come to the Nyahururu lands office where they had first gone to visit the site with some officers who had showed her the portion of land.

24. That at that time, she had not seen any fence. She had then been informed that if she liked the land she was to pay some money. She had paid Ksh.6,927/- on the 7th December 1995 as per a receipt herein produced as Df Exhibit 1.

25. That after she had made the payment, she had been asked to pay legal fee at the Land's office for the title deed to be processed wherein she had paid Ksh. 765 on the 28th April 1997 and on the same day, she had been issued with a title for parcel to land parcel No. Nyandarua/Ndemi/2223 to which she produced a copy of it's the title deed as Df Exhibit 3.

26. DW1 proceeded to testify that upon receiving the title deed, she did not occupy it immediately but went to look for money to fence the land. That when she had been through with documentation, she had been prohibited from entering the land because there was a court case. That parties had been served through an advertisement in the Daily Nation of 28th June 2011 where she had been accused of trespassing on the land which she knew she was the legal owner. She sought that the Court grants her what was legally hers.

27. In cross – examination, the 2nd Defendant confirmed that she had disposed of all the documents pertaining to the suit land because she thought the title deed was the final document. That apart from the map of the land, she have nothing else.

28. She testified that before buying the land, she had applied for the plot, but could not remember whether the application had been in writing

or not, wherein she had been issued with an allotment letter which she also could not trace.

29. That after getting the title deed, in 1998, she had gone back to the lands office so that she could be shown beacons but when they went to the suit land, they had found someone was cultivating on the same.

30. She also confirmed that she had paid the whole amount in an outright purchase for plot No. 453 Ndemi Settlement Scheme and that the Plot indicted on the receipt being Plot No 452 was an error. The 2nd Defendant thus closed her case.

4th Defendant's case.

31. Jonnah Kipkemboi Tirop testified on behalf of the 4th Defendant to the effect that he was a credit Administrator for the 4th Defendant at Nyahururu Branch and that he wished to adopt his witness statement made on the 14th March 2019 as well as to rely on the list of documents dated 30th November 2018 as his evidence.

32. That the relationship between the 1st Defendant and 4th Defendant was that of the Chargor and Chargee. That the 1st Defendant had approached the bank on the 3rd October 1997 seeking for an overdraft facility of Kshs.355,000/-.

33. The application had been considered and granted by the bank vide an offer letter dated 4th November 1997. That to secure the money, the bank had a legal charge over two title documents being Nyandarua/Ndemi/2224 and Nyandarua/ Oljor Orok Salient/2061 both to the name of the 1st Defendant.

34. The 1st Defendant gave the bank the original title deeds to the parcels of land where the bank confirmed that they related to the 1st Defendant by conducting searches in the Lands Registry on the 9th December 1997 and 10th December 1997 respectively.

35. That having confirmed that the titles were clean, the bank proceeded and granted the facility to the 1st Defendant wherein after, in terms of the overdraft, there had been a conversation from the overdraft to a term loan via an application dated 2nd August 1999. That the term loan has yet to be paid by the 1st Defendant.

36. That the bank had not been informed of any fraud of the title it held and that at the time the bank conducted the due diligence, there had been no encumbrance on the land. That in his experience as a credit manager, it was not a requirement that the bank goes to the ground to confirm the title.

37. He produced the legal charge to parcel No. Nyandarua/Ndemi/2224 and Nyadarua/ Oljoro Orok Salient/261 dated 14th November 1997 as Df Exhibit 4 and the letter of offer to the 1st Defendant dated 10th November 1997 as Df Exhibit 5.

38. The application by the 1st Defendant to convert the overdraft through a letter dated 17th August 1999 was produced as Df Exhibit 6 while the searches undertaken on the properties which were conducted on the 9th December 1997 and 10th December 1997 respectively were produced as Df Exhibit 7 (a) (b).

39. The witness further produced the copies of the titles to the suit lands held by the bank as Df Exhibit 8 (a) (b) respectively where he stated that there had been a mistake on the charge documents in that it read a different number to the suit. The witness then sought that the legal charge executed by the bank be upheld as it would be prejudicial to the bank if the Plaintiff's prayer was granted.

40. He confirmed that the bank had prepared a charge before the according the loan application which was dated 3rd October 1997. He also confirmed that the legal charge normally took 2 months before it was executed.

41. The witness confirmed that the charge had been registered on 2nd December 1997 before the search had been conducted because they had considered that since the 1st Defendant was charging two properties, there was no possibility of the commission of a fraud. He also went on to state that this was a risk the bank always took in its business and that a legal charge had no expiry date. He informed the Court that the bank was still interested in the security.

42. Upon closure of the Defendants' Case, the Plaintiff, 2nd Defendant and the 4th Defendants filed their written submissions to which I shall herein summarize as follows;

Plaintiff's written submission;

43. The Plaintiff summarized the evidence that had been adduced in support of their case as well as the evidence adduced by the 2nd and 4th Defendants after which they framed their issues arising for determination thereto as follows:

- i. Has the Plaintiff proved ownership of the suit land?
- ii. Should the 1st and 2nd Defendants' titles be cancelled?
- iii. Should the Charge registered over parcel No. 2224 be nullified?

44. On the first issue for determination, it was the Plaintiff's submission that the original deceased Plaintiff was entitled to be registered as the absolute owner of the suit parcel having purchased the same for valuable consideration from the Settlement Fund Trustee. That they had produced the letter of offer dated 15th April 1986 for plot number 281 where the deceased Plaintiff had paid Ksh 505/- for the said suit land. That subsequently a Charge had been prepared and after payment of Ksh 3,500/-, the deceased Plaintiff had been offered a replacement for that title with plot number 453 wherein she had subsequently paid out the sum of Ksh 9,552/- which Settlement Fund Trustee had received signifying that a contract had been entered into between them. The Settlement Fund Trustee had then taken the Plaintiff's family to the suit land where the same had been identified to them and they had taken possession of the same immediately where they had proceeded to develop it. It was therefore the deceased Plaintiff's expectation that she would duly be issued with a title deed for the suit parcel. However this was not to be. Instead the 1st and 2nd Defendants had been registered as the proprietors of the suit land in unclear circumstances.

45. That although the 1st and 2nd Defendants claimed to be the current holders of title deeds for parcels No. Nyandarua/Ndemi/2223 and 2224, which were subdivisions of the deceased Plaintiff's parcel of land No. 453, and although the said titles were protected under Sections 28 and 27 of the Registered Land Act (now repealed), yet the said registration was subject to the provisions of Section 23(1) of the Registration of Titles Act (now repealed) which is a replica of the current Section 26(1) of the Land Registration Act and which provides that a registered title was subject to challenge on two grounds being;

i. On the ground of fraud or misrepresentation

ii. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

46. The Plaintiff's case was that the 1st and 2nd Defendant's titles had been acquired either by fraud, illegally, un-procedurally, or through a corrupt scheme reason being that they had not demonstrated how they had come to acquire their titles in comparison to the evidence adduced by the Plaintiff on how she had acquired the suit land.

47. That at this stage the burden of proof shifted towards the 1st and 2nd Defendants to prove that indeed their titles had been issued properly and without any irregularity or illegality. Both the Defendants failed to discharge their burden because they did not produce any letter of offer or acceptance of offer, did not provide any documentation to show that terms and conditions under which they had been issued with their titles and neither were there any receipts to prove that indeed they had paid any purchase price for their respective parcels of land.

48. That the absence of a letter of allotment/offer itself was suspect as it was a notorious principle that all government land is allocated through a letter of allotment. The Plaintiffs relied on the decided cases in **Joseph N.K Arap Ngok vs Justice Moiwo ole Keiwa & 4 Others CA Civil Appl. No. 60 of 1996** and **Wreck Motor Enterprises vs The Commissioner of Lands & 3 Others CA Civil Appeal No.71 of 1997 (Unreported)** to buttress their submissions.

49. It was the Plaintiffs further submission that where a document of title had been issued without the existence of a letter of allotment than the said title must have been issued illegally, un-procedurally and or through a corrupt scheme. The Defendants did not show the history and root of their titles thereof and the same was challenged by the Plaintiff. They placed their reliance on the decided case of **Munyu Maina vs Hiran Gathiha Maina Civil Appeal No. 239 of 2009**.

50. Further, the Plaintiff submitted that since the 2nd Defendant had not demonstrated that she had paid any valuable consideration to be granted the suit title, her title was subject to any unregistered interests which the transferor held, as per the provisions of Section 27 of the Land Registration Act which was a replica of Section 29 of the repealed Registered Land Act.

51. The Plaintiff submitted that since the deceased Plaintiff had accepted the offer by paying the sum of Ksh 9,552/- to the Settlement Fund Trustee which sum was accepted, a valid contract had been made and the Settlement Fund Trustee was obligated to transfer title to the property to the Plaintiff. That at the time the title was transferred to the 1st Defendant on the 5th September 1997 and to the 2nd Defendant on 28th April 1997, adverse interests had already been created in favour of the Plaintiff as against the Settlement Fund Trustee though not registered. That since the Defendants paid no valuable consideration, these unregistered interests against the transferor were never extinguished as per the provisions of Section 29 of the repealed Registered Land Act and Section 27 of the Land Registered Act.

52. The Plaintiff's further submission was to the effect that that notwithstanding, the deceased Plaintiff had acquired the suit parcels of land by the operation of the doctrine of adverse possession having taken actual occupation and possession of the same in 1996 and having been in exclusive, continuous and open possession, use and enjoyment of the parcel of land for almost 24 years. The said evidence was not challenged by either of the Defendants. In fact the said evidence had been confirmed by the 2nd Defendant to the effect that in the year 1998 when she went to the ground, she had found that somebody was already in possession wherein she had not taken any steps to have them evicted. That Sections 7, 13 and 17 of the Limitation of Actions Act had been fulfilled and therefore the Plaintiff ought to be declared as the owner of the subject parcels of land pursuant to the provisions of Section 38 of the said Act. That the Defendants could not now claim to recover the suit land from the Plaintiff as alleged in the 2nd Defendant's counterclaim.

53. That the 1st Defendant's cause of action arose in September 1997 after he had been issued with a title deed whereas the 2nd Defendant's cause of action had accrued in April 1997. By the time the Plaintiff instituted the suit in December 2009, the 12 years had already lapsed in both instances and therefore pursuant to the provisions of Sections 7 and 17 of the Limitation of Actions Act, the cause of action had already been extinguished by operation of law and therefore the 1st and 2nd Defendants have continued to hold the titles to the suit land in trust for the Plaintiff.

54. That Section 80(1) of the Land Registration Act empowered the Court to cancel a title and direct for the register be rectified where it had been demonstrated that registration had been obtained by fraud and/or by mistake. That since the Plaintiff had demonstrated, to the required standards, that the Defendants' titles had been procured either by fraud, illegality, irregularity and/or improperly and that no evidence had been provided to the contrary, that the registers the Defendants held ought to be cancelled as the same had met the criteria for cancellation set

in Section 80 of the Act. The Plaintiffs relied on the decided case in **Esther Ndegi Njiru & Another vs Leonard Gatei [2014] eKLR**

55. The Plaintiffs' submission on their 3rd issue of determination was that since they had demonstrated that title to parcel No. Nyandarua/Ndemi/2224 held by the 1st Defendant and now charged by the 4th Defendant had been obtained fraudulently and improperly, it was trite law that a person could only pass a good title as he himself processes and nothing more. The 1st Defendant did not hold any legitimate title to the said parcel of land so as to confer a proper Charge in favour of the 4th Defendant and that it was not open for the 4th Defendant to state that they were not aware of the fraud involved in obtaining the said title. The Plaintiff relied on the decided case in **Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC No. 609B of 2012** to buttress their submission and to submit further that charging a fraudulent title did not in itself sanitize the fraudulent act as was held in the case of **Alice Chemutai Too vs Nickson Kipkurui Korir & 2 Others [2015] eKLR**.

56. That the 4th Defendant failed to carry out due diligence by conducting a historical search on the title to ensure that the same was free of any adverse claim at the time before registering a Charge over the suit property, as was held in the case of **National Land Commission vs Afrison Export Import Limited & 10 Others [2019] eKLR**. The Plaintiffs urged the Court to find that the Charge held by the 4th Defendant over the suit parcel of land was defective and the same should be canceled. They further urged the Court to allow the prayers sought in their further, further amended Plaint dated the 1st April 2019 because they had proved their case to the required standard.

2nd Defendants submission.

57. The 2nd Defendant's undated submission was that she was the legally registered proprietor of Nyandarua/Ndemi/2223 having obtained an allotment from the 3rd Respondents thereto and having paid the requisite charges to the Government of Kenya where she had become the registered proprietor on 28th April, 1997 as per the produced copy of title deed, upon complying with the terms of the said allotment letter.

58. That being the registered proprietor therein, she was entitled to the said parcel to the exclusion of all others including the Plaintiff who should be evicted therefrom.

59. That the provisions of the law as to acquisition of land by limitation of action or adverse possession was where a person took possession, albeit wrongfully, the land after the expiration of a minimum of 12 consecutive years undisturbed.

60. That it had not been true that the Plaintiff had continued being in possession of the suit land from the year 1996 and that the said possession had been adverse to the Defendants' rights there by extinguishing their title.

61. That it had not been true that the Plaintiff had been in undisturbed possession of the suit land for at least 12 years from 1996 because when the 2nd Defendant had gone to assert her rights she had been served with Court papers in which the Plaintiff had not sought for adverse possession.

62. That further the Plaintiff had equally averred that the titles Nyandarua/Ndemi/2223 & 2224 which he sought to be entitled to by way of adverse possession were fraudulently obtained by the 1st and 2nd Defendants yet the law provided that one could not claim adverse possession against a title that was allegedly defective.

63. The 2nd Defendants relied on the decided case in **Joshua Ndiritu Nduhiu vs Francis Mwangi Maina (2020) eKLR** where the Court while guided by the Court of Appeal decision in **Haro Yonda Juanje vs Sadake Dzenzo Mbauro (2014) eKLR** held that one could not succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land.

64. That the effect of Registration of Lands is founded in the Provisions of Section 24 of the Land Registration where she was the registered owner of Nyandarua/Ndemi/2223 which title she had acquired rightfully. That although she had asserted their proprietary rights on the suit property wherein the Plaintiffs had continued stay thereon without eviction could not in any way amount to adverse possession. The 2nd Defendant submitted that the Plaintiff had not met and established all the legal requirements in a claim for adverse possession and cancellation of a title and therefore her claim sought to be dismissed.

4th Defendant's Submissions.

65. The 4th Defendant give a background history of the suit before framing their issues for determination as follows;

- i. Whether the Plaintiff is the rightful owner of parcel No. Nyandarua/Ndemi/2223 and 2224 (originally No. Nyandarua/Ndemi/453)
- ii. Whether the 1st and 2nd Defendants are the first registered proprietors of parcel No. Nyandarua/Ndemi/2223 and 2224.
- iii. Whether the Plaintiffs have met the condition of adverse possession
- iv. If so, whether the titles held by the 1st and 2nd Defendants should be cancelled.
- v. Whether the Charge registered over parcel No. Nyandarua/Ndemi/2224 should be nullified and
- vi. Whether the Plaintiff is entitled to the prayers sought in the amended Plaint.

66. On the first issue for determination, the 4th Defendant interrogated the Plaintiff's submissions and evidence herein to submit that the Plaintiff's deceased mother had paid Ksh 9,552/- on the 6th August 1996 which was one (1) year after the offer had been made by the Ministry of Lands and Settlement and way outside the 90 days provided for in the letter of offer. That by that time, the offer stood to have been cancelled.

67. That further, from the evidence adduced in Court, parcel No. Nyandarua/Ndemi/453 was opened on 2nd April 1992 in the name of the Settlement Fund Trustee and closed on 28th June 1996 upon subdivision resulting in parcels No. Nyandarua/Ndemi/2223 and 2224 which plots were still held by the Settlement Fund Trustee such that by the time the Plaintiff made payments to plot number 453, the same was nonexistent.

68. On the second issue for determination as to whether the 1st and 2nd Defendants were the first registered proprietors of parcel No. Nyandarua/Ndemi/2223 and 2224, the 4th Defendant's submission was that the evidence of the 2nd Defendant was to the effect that upon following up for her title which she had paid Ksh 6,528/- on 28th April 1997, she had been issued with tile No Nyandarua/Ndemi/2223. That although the 1st Defendant adduced no evidence, yet the documents on record showed that he had paid Ksh 6,528/- to the Settlement Fund Trustee on the 5th September 1997 wherein he had been issued with title to land parcel No. Nyandarua/Ndemi/2224 on an even date Two months later on the 2nd December 1997, a Charge had been entered on the title in favour of the 4th Defendant in consideration of a financial accommodation granted to the 1st Defendant. The 4th Defendant relied on the decided case in **Job Muriithi Waweru vs Patrick Mbatia [2008] eKLR** to submit that since 1st and 2nd Defendants were the first registered proprietors of parcel No. Nyandarua/Ndemi/2223 and 2224 respectively, their titles were not liable for cancellation or rectification. That any irregularities if any could only be perpetrated by the 3rd Defendant in the subdivision and first registration of the 1st and 2nd Defendants.

69. That the Plaintiff had merely pleaded instances of fraud but had failed to substantiate the same in evidence and therefore the Court could not be guided by pleadings which were not evidence in the circumstance. Reliance was placed on the decided case in **Gichinga Kibutha a vs Caroline Nduku [2018] eKLR**.

70. The 4th Defendant also submitted that for the doctrine of adverse possession to be applicable, the rightful owner ought to have known that he had been ousted and dispossessed of the parcel of land. That whereas it was not clear when the 1st Defendant became aware that he had been ousted from the suit land, the 2nd Defendant had become aware of the same in the year 1998 wherein time started to run. The present suit having been instituted in the year 2009, the 12 years threshold had not been attained as at the time the Plaintiff sought adverse possession.

71. The 4th Defendant submitted that having established that the 1st and 2nd Defendants' titles had not been tainted with fraud and/or mistake and further and that the Plaintiff had not attained the time frame required for an action of adverse possession, the titles were not ripe for cancellation and that the case in **Esther Ndegi Njiru** (supra) was distinguishable in the present circumstance.

72. The 4th Defendant's submission on the issue for determination as to whether the Charge registered over Nyandarua/Ndemi/2224 should be nullified, was to the effect that they had conducted due diligence in the Land Registry which had confirmed via a certificate of search that the 1st Defendant was the registered proprietor of the said parcel of land. Thereinafter, a Charge instrument had been prepared and registered on 2nd December 1977. That visiting the subject suit land as part of due diligence would have been watering down the purpose of the Torrens system of registration in land. Reliance was placed on the decided case in **Grace Wairimu Sorara (suing on behalf of the estate of Sorara Oloitip) & 2 Others vs Chaka Limited & 10 Others [2015] eKLR**

73. Their conclusion was that since the Plaintiff had failed to prove its case to the required standard despite the fact that the 1st Defendant had failed to enter appearance that the claim against the 1st Defendant could not be allowed to stand without meeting the threshold of evidence. That the 1st (sic) and 4th Defendants had adduced evidence to the effect that there had been no fraud on their part and therefore the Plaintiff suit ought to be dismissed with costs to the 4th Defendant.

Determination.

74. I have considered the matter before me the, evidence as well as the submission, the authorities and the applicable law. I have also noted that the 1st and 3rd Defendants neither entered appearance nor filed their defences to the suit wherein judgment had been entered against them. I also find that the Plaintiff's suit is founded on two prongs.

- i. The first being that 1st and 2nd Defendants obtained their titles to parcels No Nyandarua/Ndemi/2223 and 2224 fraudulently, illegally, un-procedurally or through a corrupt scheme.
- ii. The second prong which is the alternative of the first prong was that the deceased Plaintiff had acquired the suit land vide the doctrine of adverse possession.

75. Having considered the evidence adduced in the matter, the issues that come out clearly for determination are as follows:

- i. Whether the Plaintiff's deceased mother Lucy Nyokabi Kiarie was the proprietor of that plot originally known Nyandarua/Ndemi/453.
- ii. Whether there was fraud involved in the registration of the No Nyandarua/Ndemi/2223 and 2224 to the 1st and 2nd Defendants respectively.

iii. Whether the Charge registered over parcel No. Nyandarua/Ndemi/2224 should be nullified

iv. Whether the late Lucy Nyokabi Kiarie had acquired title to No. Nyandarua/Ndemi/2224 and 2223 by virtue of the doctrine of adverse possession.

v. Whether the title No. Nyandarua/Ndemi/2224 and 2223 in the names of the 1st and 2nd Defendants respectively should be cancelled and reinstated to Nyandarua/Ndemi/453.

76. On the first issue for determination, the Court finds that **Sections 107, 108 and 109 of the Evidence Act the same** clearly captures the aspects on the law of evidence as follows:-

77. Section 107 of the law of Evidence Act is on the burden of proof and provides that:

1. *whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

2. *When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.*

78. Section 108 of the Act is based on the incidence of burden and provides that: The of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

79. Whereas Section 109 of the Act is on Proof of particular fact wherein it provides that: The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

80. It is not in contention that the Plaintiff's case traced back the root of the tile to No. Nyandarua/Ndemi/453 by giving a chronological event of how the Plaintiff' deceased mother had applied for land vide a letter dated the 4th June 1985, wherein she had been allotted land parcel No. Nyandarua/South Kinangop/281 by the Settlement Fund Trustees in a letter of offer dated 5th April 1986. That it had been was after she had made payments of the initial amount for Ksh 505/- On the 28th April 1996 that Charge had been prepared to which she had discharged the same via receipts herein produced as Pf exhibit 7(a-b)

81. That after having made the prepayment of the loan to parcel No Nyandarua/South Kinangop/281, she had visited the Settlement Fund Trustee officers only to be told that the land she had paid for did not exist on the ground. She was thus offered land parcel No. Nyandarua/Ndemi/453 as an alternative on the 9th May 1995 to which she paid an outright purchase for a sum of Ksh 9,552/- on the 6th August 1996 wherein her family took possession of the same in the same year of 1996 land which they had lived on to date.

82. The Plaintiff's case had further been that when his mother went to pick the title deed, that she had learned that the said parcel of land had been closed upon subdivision on the 20th June 1996 resulting into parcels No. Nyandarua/Ndemi/2223 and 2224 wherein while parcel No. Nyandarua/Ndemi/ 2223 had been transferred to the 2nd Defendant on the 28th April 1997, the 2nd parcel No Nyandarua/Ndemi/2224 had been registered to the 1st Defendant on 5th September 1997 who had then charged it to the 4th Defendant for a sum of Ksh 355,000/-

83. I have however gained sight of the green card and/or register of parcel No. Nyandarua/Ndemi/453 herein produced as Pf exhibit 10(a) and note that the first entry in the said card was that suit parcel was 1st registered in favour of the Settlement Fund Trustee on the 2nd April 1992 wherein it had been subdivided on 20th June 1996. To this effect, it is clear that at the time the Plaintiff's deceased mother was making the outright purchase of the same on the 6th August 1996, that is almost 1 year after having failed to accept the letter of offer dated the 30th May 1995, the land parcel No. Nyandarua/Ndemi/453 had been extinguished through its subdivision and was no longer available for allocation. The resultant subdivisions were therefore available for allocation to any other person. I find that on the first issue for determination, the Plaintiff's deceased mother Lucy Nyokabi Kiarie was **not** the proprietor of parcel No. Nyandarua/Ndemi/453 since she had not been registered as its proprietor before its subdivision.

84. On the second issue for determination as to whether there had been fraud involved in the registration of the No Nyandarua/Ndemi/2223 and 2224 to the 1st and 2nd Defendants respectively, having pleaded fraud and illegality on the part of the 1st, 2nd and 3rd Defendants in the manner in which they obtained and/or allocated the suit lands, the onus was on the Plaintiff to prove those allegations. Fraud is a serious matter which must be proved to the required standard. In **R.G Patel vs Lalji Makanji 1957 E.A 314**, the Court of Appeal stated as follows:

“Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required”.

85. I have no doubt in my mind that the Plaintiff has herein distinctly pleaded the facts on which fraud is alleged against the Defendants. The next step however was for him to prove those allegations to the required standard. I will therefore interrogate this allegation of fraud as submitted by the Plaintiff.

86. It was the Plaintiff's testimony that having demonstrated the process to which his deceased mother had acquired the suit land, she had been entitled to be registered as the owner of the initial suit land herein being No Nyandarua/Ndemi/453. That since she had not been registered as the proprietor and there having been no proper grounds advanced as to why this did not occur, it followed that the titles had been issued illegally, un-procedurally, fraudulently and/or through impropriety and therefore the burden of proof had shifted to the 1st and 2nd Defendants to prove that indeed their titles had been issued properly and without any irregularity or illegality whatsoever.

87. Now that the root of the 1st and 2nd Defendant's title had been challenged, the Court is under duty to investigate whether the said title was procured after the Defendants had conformed to procedure and could properly trace its root without a break in the chain. And further whether the Defendants had demonstrated how they got their title starting with its root because no party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property.

88. 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**, their 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 Courts 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.

89. **Is the title impeachable by virtue of Section 26?** It thus follows that in order to challenge the 1st and 2nd Defendant's titles so as to have them cancelled as prayed by the Plaintiff, evidence according to Section 26 of the Act ought to have been led to prove that the Defendant's title to parcel No. Nyandarua/Ndemi/2223 and 2224 were acquired fraudulently, through misrepresentation, illegally, unprocedurally, or through a corrupt scheme.

90. Indeed the Court of Appeal in the case of **Munyu Maina (supra)** held as follows:

“...when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership.... the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal....”

91. The same reasoning was adopted in the case of **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR** where the Court held that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

92. There was no evidence tendered in Court by the 1st Defendant who neither entered Appearance nor filed his defence. The evidence tabled in Court by DW1, the 2nd Defendant however was that in 1995 she had applied to be allotted a piece of land by the government to the settlement scheme. She had thus been informed that there was a piece of land in Ndemi scheme where she visited and the officers from the lands office Nyahururu had showed her a parcel of land and had asked her to pay some money.

93. Subsequently she had paid Ksh 6,927/= on the 7th December 1995 for Ndemi settlement scheme No 452 and further legal fee of Ksh 765/- on the 28th April 1997 wherein she had been issued with a title deed for parcel No. Nyandarua/Ndemi/2223 on the same date. She had testified that she could not occupy the said parcel of land because there had been someone else already in occupation.

94. From the 2nd Defendant's evidence herein, it is clear that there had been no letter of allotment issued to her by the Settlement Fund Trustee, in default which she could not have complied with the conditions set out in the said letter of allotment. In the absence of evidence by the 2nd Defendant that she accepted the offer by paying the amount of money stipulated in the letter of offer, and further from the evidence that she had paid monies for outright purchase of parcel No Ndemi settlement scheme No 452, she could not claim to have any proprietary rights over No. Nyandarua/Ndemi/2223 that could be protected by the Court.

95. The Court of Appeal in **Joseph Arap Ng'ok (supra)** held as follows:

“It is trite that such a title to landed property can only come into existence after issuance of the letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of the title document pursuant to the provision of the Act under which the property is held.”

96. Going by the aforementioned decisions, it is quite clear that there was no evidence from either the 1st Defendant or the 2nd Defendant to demonstrate that they indeed satisfied the conditions laid down as a first step towards becoming the registered owners of land. It therefore follows that the registration of the 1st and 2nd Defendants in relation to parcels No. Nyandarua/Ndemi/2223 and 2224 was null and void.

97. Having found as above, on the issue for determination as to whether the Charge registered over parcel No. Nyandarua/Ndemi/2224 should be nullified, I find that indeed the evidence adduced was to the effect that on 3rd October 1997, the 1st Defendant had requested from the 4th Defendant an overdraft facility of Ksh 355,000/-. The 4th Defendant granted the application through a letter of offer dated 4th November 1997 wherein the Bank took a legal Charge over two title documents being LR No. Nyandarua/Ndemi/2224 and

Nyandarua/Olgoro Orok Salient/2061. That the 1st Defendant deposited the original title deeds where the 4th Defendant had conducted due diligence in the Land Registry on the 9th December 1997 and 10th December 1997 respectively which had confirmed through a certificate of search that the 1st Defendant was the registered proprietor of the said parcels of land. The 4th defendant had then prepared a Charge instrument which it had registered on 2nd December 1977.

98. That subsequently vide a letter dated the 17th August 1999 (Df exh 6), the 4th Defendant had entered into yet another contract with the 1st Defendant wherein his overdraft facility of Ksh 355,000/- had been converted into a term loan which was to be paid at the rate of Ksh 15,000/- per month over 36 months. The Offer was accepted by the 1st Defendant on the 27th September 1999 whereby he had appended his signature on the same.

99. The Court of Appeal in **National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited and Another [2002] 2.EA 503** held that a Court of law cannot rewrite a contract between the parties and that the parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.

100. At the risk of delving too much into the terms of the Contract between the 1st and the 4th Defendant herein and going contrary to the holding of the Court of Appeal in **Co-operative Bank vs Patrick Kangethe & Others [2017] eKLR** where the Court had held that matters of Charges and Mortgages were commercial transactions and therefore a preserve of the High Court, I find in summary from the factual background information, that the 4th Defendant was guilty of delay in recovering the outstanding loan, they slept on their rights for far too long and cannot be allowed to recover. The claim herein is in respect of a Charge which was executed on 2nd December 1997, the same was therefore not recoverable after 12 years under Section 19(1)(4) of the Limitation of Actions Act. In the premises the 4th Defendant's claim to the extent that it seeks to recover the principal sum and interest outstanding since 1997 is statute barred and hence illegal. I find the Charge herein registered over parcel No. Nyandarua/Ndemi/2224 having been nullified by operation of the law.

101. The second prong/alternative to the Plaintiffs suit is that they had acquired the suit land vide the doctrine of adverse possession which takes us to the 4th issue for determination to wit whether the late Lucy Nyokabi Kiarie had acquired title to No. Nyandarua/Ndemi/2224 and 2223 by virtue of the doctrine of adverse possession.

102. The doctrine of Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

'An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person'.

103. Section 13 of the Limitation of Actions Act aforesaid further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under Sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.

104. As was stated by the Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996:**

"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 possessor of the same at the expiry of 12 years of Adverse Possession of that land."

105. The onus is on the person or persons claiming Adverse Possession:

".. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration"

106. The main the elements of Adverse Possession that a claimant has to prove include : actual,

i. open,

ii. exclusive

iii. and hostile possession of the land claimed.

107. Has the Plaintiff herein demonstrated the said elements

108. The facts upon which the claim for Adverse Possession is made is that the Deceased Plaintiff and her family took actual occupation and possession of parcel No. Nyandarua/Ndemi/2224 and 2223 since 1996 to date where they had had exclusive, continuous, open possession and use and enjoyment of the parcel of land for almost 24 years. This evidence was not challenged by either the 1st or 2nd Defendants. In fact the same was confirmed by the 2nd Defendant whose evidence was to the effect that in 1998 when she went to the ground she had found that

somebody had already taken possession and she had not taken any steps to have them evicted.

109. I find that Indeed it is in evidence that from the time the Plaintiff occupied the suit property, that they had engaged in acts that were inconsistent with the Defendant's title, for instance putting up a fence on the suit property and building houses. There is nothing to suggest that that occupation was secret or that it was not known to the 1st and 2nd Defendant. The fact that the deceased Plaintiff developed the suit property is a demonstration of animus possidendi, (intention to possess) a clear mind and intention of dealing with the suit premises as if it was exclusively hers is and in a manner that was in clear conflict with the 1st and 2nd Defendant's rights. The Defendant was, as such dispossessed of the suit premises by those acts. The Plaintiff's acts were *nec vi, nec clam, nec precario* (that is, neither by force, nor secretly and without permission).

110. 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”

111. It follows therefore that by the time the Plaintiffs filed their further amended the Plaintiff on the 1st April 2019, the 1st and 2nd Defendant's titles to the suit premises had been extinguished.

112. The 1st and 2nd Defendants cannot claim to recover the suit land from the Plaintiff as alleged in the 2nd Defendant's counterclaim. The 1st Defendant's cause of action arose in September 1997 after he had been issued with a title deed whereas the 2nd Defendant's cause of action accrued in April 1997.

113. I find and hold that the Plaintiff has proved on a balance of probabilities that his right of action as against the 1st and 2nd Defendants had accrued as at the time of filing this suit for the suit property to be said to have fallen into her possession pursuant to the provisions of Section 38 as read together with Sections 7, 9 and 13 of the Limitation of Actions Act.

114. The end result is that I find in favour of the Plaintiffs having proved their case on a balance of probabilities in their main Plaintiff and proceed to dismiss the Defendants' defence and as well as the 2nd Defendants counterclaim altogether. I further make the following orders:

- i. There be and is declared that the late Lucy Nyokabi Kiarie is entitled to be registered as proprietor of title No. Nyandarua/Ndemi/2224 and 2223 by virtue of the doctrine of adverse possession.
- ii. An order is herein granted cancelling the title No. Nyandarua/Ndemi/2224 and 2223 in the names of the 1st and 2nd Defendants respectively and registration thereof in the name of the Plaintiff as a trustee for the estate of Lucy Nyokabi Kiarie. (deceased)
- iii. There be and is declared that the Charge on plot No. Nyandarua/Ndemi/2224 for Ksh 355,000/- and registered on the 2nd December 1997 is a nullity in law and illegal ab initio. The 4th Defendant do and is hereby directed to surrender the tile to the same forthwith and unconditionally to the Land Registrar Nyandarua for purposes of having the same cancelled.
- iv. The Plaintiff is herein granted the costs of the suit and Counter-claim plus interest thereon at Court 's rate

It is so ordered.

Dated and delivered at Nyahururu this 3rd day of June 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE