REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELC NO. 183 OF 2017

ROMAN NYOIKE MUGACIA ..... 1ST PLAINTIFF

GATHUA MUNYU .....2ND PLAINTIFF

SIMON KIINGATI ..... 3RD PLAINTIFF

MARY NJOKI NJUGUNA ..... 4TH PLAINTIFF

MARY MUGURE..... 5TH PLAINITIFF

VS

MAKINDI BANKS LIMITED..... DEFENDANT

JUDGMENT

1. On the 3/11/18 the Plaintiffs filed suit against the Defendant by way of an Originating Summons seeking title to a portion of 100 meters of the Defendant's land LR No 5991 by way of Adverse of Possession.

2. With leave of the Court the said Originating summons were later amended and converted into a plaint and filed on the 12/5/17. The Plaintiffs are residents and landed owners of properties situate in Nguthuru Village, Muruka location in Kandara sub county of Muranga County to wit; LOC 4/NGUTHURU/473, 376, 4 1017 and 1016 respectively. That these properties share a common boundary which is River Makindi with that of the Defendant. That they have been utilizing their portions upto the river bed for many years. That in 1985 the survey established that contrary to their long-held belief that their boundaries were separated by the river Makindi, it was found that the beacons of the Defendant's land were running into 100 meters inside the Plaintiffs' parcels from the river bed. That despite an unsuccessful attempt by the previous owners of the Defendant's land to evict them they have continued to occupy the 100 meters portion for a period of 12 years and claim adverse possession over the said portion.

3. The Plaintiffs sought the following orders;

a. A declaration that the Plaintiffs have been in occupation of the portions of land parcel No 5991 approximately measuring 100 meters from Makindi River bed encroaching into the Plaintiffs respective parcels of land openly peacefully and as of right without any interruption by the Defendant for a period of 12 years preceding the filing of this suit in Court.

b. A declaration that the Defendant 's rights and or interest over the said portion of land in parcel 5991 occupied by the Plaintiffs have been extinguished under the Provisions of section 7 of the Limitations of Actions Act cap 22 of the Laws of Kenya and the Plaintiffs have adversely acquired the said portions of land.

c. An order that the Defendant do transfer the said portions of land in to their respective names of the Plaintiffs.

d. An order that upon failure and or refusal of the Defendant to transfer the said portions of land into the names of the Plaintiffs the Registrar of this honorable Court be at liberty to transfer the same into the names of the Plaintiffs.

e. That the costs of this suit be paid by the Defendants.

4. The Defendant denied the Plaintiffs' claims vide statement of defence dated the 6/6/17 and in particular that the shared boundary is marked by beacons and not the river. That the river has never been recognized as a common boundary as alleged by the Plaintiffs. It denied

that the Plaintiffs have occupied the suit land in excess of a period of 12 years. That the Plaintiffs own and occupy their own parcels of land listed as LOC4 /NGUTHURU/473, 376, 4, 1017 and 1016 respectively. To the contrary, the Defendant contended that the Plaintiffs since their eviction in 1985 have never tilled or cultivated the Defendant's 100-meter portion of land until they led an invasion by a group of villagers on 21/12/16. Their efforts were partly repulsed by security and the incident was reported to the Gatanga police station vide OB No 20/21/12/2016.

5. The Defendant further added that it allowed the Plaintiffs access to the river for purposes of drawing water. That the boundaries of the Plaintiff's land are clearly demarcated and have heavily cultivated their portions and built their homes thereon whilst the disputed portion is virtually unutilized. That the 100-meter stretch is an allowance left by the Defendant for the river since it is prone to changing its course when it floods. That the Defendant has continuously resisted the Plaintiffs attempts to encroach on the disputed land.

6. The evidence of the Plaintiffs was led by the 1st Plaintiff on his own behalf and that of the 4 co -Plaintiffs. He relied on his witness statement dated the 11/5/17 as his evidence in chief.

7. He stated that he was born and bred at Nguthuru village 77 years ago and the co-Plaintiffs are his neighbours. That vide a resolution dated the 12/10/14 a group of 14 farmers who owned land touching on Makindi river and bordering the Defendant's land L. R 5991 held a meeting and resolved interalia to file suit against the Defendant and claim adverse possession over portions of land each one of them occupied within the Defendant's land. In the said meeting the farmers resolved to authorize him to represent them in the suit however at the time of filing this suit only 5 managed to do so because the rest did not possess letters of administration for the estates of the deceased original registered owners. He informed the Court that about 6 of the farmers had passed by the time the suit was filed.

8. He informed the Court that in pre-independent Kenya, the Makindi river was the boundary between the Kikuyu Native land units (occupied by the locals) and the white settler farms for which the Defendant 's land was one of them. That the river was commonly regarded as the boundary and even during the demarcation of the lands in central Kenya in 1959 the river continued to be observed as the boundary between the settler farms and the Nguthuru village farms as shown on the cadastral map No 75247 marked as PEX5. He pointed out on the map the then settler farms and the land named Kikuyu Native Land unit which was occupied by the locals. The two lands lie opposite each other separated by the River Makindi in between. That both the settlors and the local farmers confined their activities on either side of the river.

9. That even during the second land demarcation in 1966-68 the river was still regarded as the boundary of the farms. He produced the PEX6 RIM sheet No 12 in respect to Muruka Location – Nguthuru Unit in support of his evidence.

10. The witness testified that with the river being treated as the boundary he and his co-Plaintiffs utilized the land upto the river bed drawing water for domestic and irrigation purposes as well as cultivation.

11. The witness informed the Court that in 1983 he sought for approval of a water permit from the Water Apportionment Board to draw water from the Makindi River which enabled him to built and install a water pump house a few meters from the river (see PEX No 7 & 8). That the pump house is within the disputed area and it stands there todate. That he did not seek permission from the Defendant to install the pump house because he believed his land parcel LOC4/NGUTHURU/473 extended to the river. That equally the Defendant did not raise any objection at all. The pump house is powered from the electricity transformer based on the Defendant's land. He informed the Court that he also granted a wayleave consent in favour of Kenya Power & Lighting Company Limited over the disputed area to facilitate the connection of power from the pump house to his residence (see PEX No 9), without any objection from the Defendant. He informed the Court that two of his neighbours namely Samuel Kamau Waweru and Gichuhi Kageche too installed pump houses along the area in dispute.

12. That in 1985 after re-establishment of the beacons by the Methi & Swani (the predecessors of the Defendant's land), it was found that the boundary of the Defendant's land and other settler farms that is to say Methi & Swani, Gitimae, Othaya and Kandara Holdings, and that of the Nguthuru farmers was 100 meters across the river encroaching into the Plaintiffs lands. That Methi informed them of the encroachment which drew protest from the farmers who sent two representatives (Kariuki Kabiri and Muiruri Nganga) to the District Officer in Kandara to lodge a boundary dispute because they thought the survey by the settler farms' surveyors was erroneous. That the joint findings of the settler and District surveyors confirmed that the beacons separating the Nguthuru farmers farms and the settler farms jumps across the River Makindi encroaching approximately 100 meters into the plots of the farmers. In addition, the Surveyor's report advised that the Nguthuru farmers could apply to acquire for the land upto the river under adverse possession having peacefully occupied for a long time.

13. That Methi and Swani, the previous owners of the Defendants land sought to evict them but the farmers resisted and the matter went quiet until 2014 when the Defendants attempted to establish the beacons unsuccessfully. On the day of the exercise, the District Surveyor in the presence of the Defendant, the Plaintiffs, local chief and the Police re-established two beacons on the Defendant's land bordering the Plaintiffs. Once again, the beacons were found to be 100 meters away from the river. That the exercise was peaceful and devoid of violence contrary to the Defendant's pleadings. He admitted that though the Defendant wanted to fence its land, they are aware that they would still be given access to the river. That they also heard that the Defendant wanted to evict them in the process from the disputed land hence their action of filing suit.

14. To demonstrate their continued occupation and use of the disputed land by the Plaintiffs, the witness took the Court through photographs **PEX10 a- n** showing the Plaintiffs farms vis a vis the 100 meters portion, the water pump and pasture belonging to the 1st Plaintiff, various portions under cultivation, the houses and lands of each Plaintiff including the portions they claim in this suit. Also shown on the Photographs are the Defendant's fish ponds, the Makindi and Thugge Rivers, the chain link fence on the Defendant's land and the gate leading to the fish ponds.

15. In cross examination by Mr Wanjohi, the Advocate for the Defendant, the witness informed the Court that the boundary dispute of 1985 was raised by two farmers namely Kabiri and Nganga who owned parcel Nos 55 and 778 respectively. That the Plaintiffs were not complainants.

16. Referring to PEX 10 (e), the witness informed the Court that he did not know the size/acreage of the land portions within the 100 meters strip that each Plaintiff was claiming. He stated that the 100 meters strip is the portion between the river and the Defendant's beacons (marked as the yellow line). He was categorical that the river is their source of water for domestic purposes and the access road to the river is provided for as shown on PEX10 (K). In addition, the Plaintiffs use the land for cultivation of majorly season crops such as vegetables and Napier grass during the dry season and abandon it in the rainy season because of the frequent floods. That none of the Plaintiffs have constructed on the claimed portions except him who has put up a pump house. That the 2nd pump house showed on the photograph is owned by Gichohi Gathecha is built on public land and not the 100 meters strip. He denied that their cultivation on the land started in 2016 but have been doing so from time immemorial. He concluded that though the Defendant acquired the land in 1995 it has never evicted them from the portion they are claiming.

17. The defence case was led by Francis Mwangi Kirugu who introduced himself as the Director of the Defendant Company. He relied on his witness statement dated the 7/6/17 together with replying affidavits of the 9/1/17 and 7/6/17 as his evidence in chief.

18. He testified that the Plaintiffs own lands across the river and share a commonly demarcated boundary with beacons and labelled yellow in the maps presented to Court for purposes of identification and not the river Makindi. He added that they acquired the land in 1995 from the Cooperative Bank Limited and took possession in February 1996 after being shown the beacons. That the area under dispute is marshy and floods during the rainy season and is overgrown with reeds and other natural vegetation. That that is the reason why they have not utilized the portion of the land. He produced several photographs marked as DEX 1-12 taken on the 23/12/16 after the suit had been filed. The pictures showed the disputed areas, the fresh cultivation, freshly burned (scotched) portions and tilling of the land ongoing, clearance of reeds and vegetation interalia.

19. In respect to PEX10a, he testified that these are the photographs taken in October 2017 and shows the fish ponds and the river. The 1st beacon is at the confluence of rivers Makindi and Thugge. That the Defendant's land extends to the yellow line across the river bordering the Plaintiff's parcels. Taking the Court through the PEX 10 (a-n) he pointed out the lands belonging to the Plaintiffs, the disputed area, the cultivation of nappier grass and vegetables, the beacons labeled as yellow line, the pump house interalia. That some portions are as small as 10 meters in length. That there are other parties that cultivate vegetables on the strip during the dry season other than the Plaintiffs as explained by the various portioned out patches on the ground. That the occupation of the land was recent that is to say 2016 and not earlier. He contrasted the pictures taken in December of 2016 and those of Nov 2017 which showed more overgrowth in the earlier one.

20. In respect to the boundary dispute raised in 1985, he testified and informed the Court that none of the parcels indicated as between parcels LOC4/NGUTHURU/ 22- 352 refer to the Plaintiffs' land. That the Plaintiffs were not parties to the complaint as shown by the correspondences produced by the Plaintiffs in Court. He refuted that any case was ever filed against it in pursuance of the resolution dated 12/10/14 and raised doubt whether the alleged authorization to the 1st Plaintiff referred to the current suit.

21. He added that in 2014 the goal of identifying the beacons was to facilitate the fencing of the part of the land bordering that of the Plaintiffs. He produced copies of searches of the Plaintiff's titles and reiterated the point that none of the Plaintiffs were owners of the said parcels in 1985 as they became registered proprietors between 1992 and 2008.

22. Further, the witness added that in 2016 he reported the invasion of the Plaintiffs onto the portion of the suit land to Gatanga police station but no arrests were made.

23. Under cross examination by Mr. Gichachi, the learned counsel for the Plaintiffs, the witness stated that the portion in dispute is a wetland fit for conservation. That the land was owned by Mehti & Swani Limited. That he was unaware of the boundary dispute lodged by the two farmers in 1985 nor location of parcels referred to as parcel 51 and 778. That the Plaintiff's lands are not subject to the encroachment referred to in the boundary complaint which was in respect to parcels No.s LOC4/NGUTHURU/22-352. In respect to the findings of the surveyors on the boundary dispute, he informed the Court that the river has never been the boundary between their farm and that of the Plaintiffs. That the boundary is 100 meters across the river. That the beacons were pointed out to the Defendant at acquisition by Olweny & Associates Surveyors and the 2014 exercise was to re-establish the beacons that were lost/misplaced. In respect to the pump houses the witness stated that the Defendant has no issue with the pump house and has never demanded that the 1st Plaintiff removes it. That neither has he refused the Plaintiffs and their neighbours to draw water from the river. He reiterated that the farming activities as captured in PEX10 a-n commenced in 2016 and not earlier. He stated that these activities are carried out by the Plaintiffs and other third parties not in Court. He explained that he fenced the fish ponds to protect it from predators as well as for phytosanitary reasons. That there were no reasons to warrant the fencing of the boundary since there was no threat of encroachment.

24. The witness stated that when the Defendant acquired the land there was no one cultivating it until 2016. However, he admitted that the Plaintiffs and the neighbours drew water from the river using the access road provided.

25. As to whether the Plaintiffs have been in occupation of the disputed portions of the land since time immemorial, the Plaintiffs submitted that the farmers have always regarded the river as the boundary between their lands and that of the Defendant and occupied the land in dispute for a lengthy period. PW1 stated that he has lived in the area for 78 years and throughout his life he has seen farmers tilling the disputed land. This was the position even before the 1st land demarcation in central Kenya in 1958-59. To prove this point, he produced RIM PEX 6 which map shows that the 1st Plaintiff's land touches river Makindi. That the District surveyor in his letter in 1985 too regarded the river as the boundary and that they are part of the farmers being referred to in the letter as Nguthuru farmers. That by 1985 they were already in occupation of the disputed area and that explains why on realizing that the Defendants land extended 100 meters into their properties, they sought intervention of the District Officer at Kandara. The Plaintiffs rely on the findings of the surveyors to support their averment that they have occupied the disputed area since time immemorial interalia that the farmers have for a long time regarded the river as their boundary, the boundary of the Defendant's land encroaches into the Plaintiffs land to the extent of 100 meters and having peacefully occupied the land for a long time, they should plead a case of title by adverse possession before the High Court.

26. In further support of their plea of continuous occupation of the disputed land, the Plaintiffs submitted that they have carried out activities on the disputed land such as built 3 water pump houses, installed water pumps for irrigation and domestic use. That neither the predecessors

in title nor the Defendant have questioned the existence of the water pumps on the disputed land. In addition, the Plaintiffs submitted that they have continuously used the disputed land for cultivation of nappier grass and vegetables contrary to the contention by the Defendant that they invaded the land in 2016. That to the contrary the land is arable and not marshy and swampy as the Defendant contends. They however submit that due to the flooding during the rainy season cultivation is rendered seasonal by abandoning it but return and clear the reeds and other natural vegetation in preparation for planting. All in all, they submitted that the farming activities by each Plaintiff on their portion of the disputed land are captured on PEX 10 a-n produced in Court.

27. In respect to the site report prepared by the Hon Deputy Registrar of this Court the Plaintiffs submitted that the report was not accurate as it did not capture the position as it obtained on the ground. An example was given where the report depicted the area is devoid of cultivation whilst the PEX10 a-n variously showed various portions under cultivation. They submitted that the report be disregarded in totality.

28. As to whether the Plaintiffs' possession was adverse to the title of the Defendant, the Plaintiffs submitted that the Plaintiffs have been in occupation of the disputed area for as far as they can remember and neither the predecessors nor the Defendant did interrupt their occupation. That their occupation has been peaceful, open and with the knowledge of the Defendant and its predecessor in title all of whom have failed to assert their title to the disputed area. That their occupation is open and has gained notoriety in the eyes of the authorities who recommended that they should seek to acquire the land by way of adverse possession. That the Defendant too erected its permanent fence along the river to keep away trespassers leaving the disputed land to the enjoyment of the Plaintiffs.

29. When did time start running for purposes of calculating adverse possession? The Plaintiffs submitted that the occupation of the disputed area dates back to pre-independence. Before the 1st demarcation in 1959 they were in occupation and have been todate based on their belief that the boundary was the river. That even if 1985 was to be taken as the commencement date (when they discovered that the boundary is 100 meters from the river), 12 years have long expired in the two scenarios. That the Defendant did not dispossess them even after acquiring the land in 1995. See the case of **Wambugu Vs Njuguna (1983) KLR 173.** That they have occupied the land for a period of 21 years since 1995, a period in excess of 12 years.

30. Quoting the case of **Mbira Vs Gachuhi (2002) 1 EALR 137**, the Plaintiffs submitted that their occupation has never been permitted by neither the Defendant nor its predecessors in title. They relied on the case of **Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) EKLR** where the Court of Appeal held that adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period which in Kenya is 12 years. The Plaintiffs submitted that in the instant case the Defendant has failed to claim and or assert its rights over the disputed land for the period hence has been caught up by limitation of time from doing so. That the Defendant's attempt to assert its rights over the property in 2014 by reestablishing the beacons failed when the exercise was discontinued because the farmers protested. In addition, the Plaintiffs faulted the Defendant for failing to file any counterclaim to evict the Plaintiffs whom it alleges invaded the land in 2016.

31. In respect to whether the Plaintiffs have been in peaceful occupation of the disputed land for a period of 12 years, the Defendant submitted that it acquired the land in 1995 and the portion in dispute was designated as a wetland and so is not under cultivation. That there was no cultivation in the area at all. It further submitted that on acquisition it was showed the beacons by Olweny & Associates and in 2014 with the aim of fencing this part of the land it sought the help of the District Surveyor to identify the beacons. The District Surveyor invited the Plaintiffs and other owners of neighbouring lands for the exercise. In their presence two beacons were re-established and fixed and as they were proceeding on the 3rd one the 1st Plaintiff lit a fire on the reeds and the crowd became unruly causing the exercise to be abandoned for security reasons. That the Plaintiffs alleged occupation has not been peaceful and the same, if any, was interrupted in 2014 when the Defendant re-established the beacons of its land until 2016 when they invaded the land. Relying on the case of **Joseph Gachuhi Kiritu Vs Lawrence Munyambu Kabura (1996) EKLR** the Defendant averred that its re-establishment of the beacons on its land in 2014 was an effective entry into the land. The Court held that;

> "time which has begun to run under the Act is stopped either when the owners assert his right or when his right is admitted by adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry in to the land. The old rule is that a mere formal entry was sufficient to vest possession in the owner and to prevent time from running against it … he must therefore make a peaceful and entry to sue."

That the Plaintiffs admitted the position of the said beacons during the site visit on the 17/10/17 which shows they recognize the rights of the Defendant in the land and its extent (beacons).

32. In addition, the Defendant submitted that before 2016 the Plaintiffs did not occupy the disputed land. That their encroachment happened in 2016. Indeed, the Defendant admits that the Pex10 a-n were taken in 2017 during the site visit which was one year after the encroachment. It asserted that the Plaintiffs have failed to tender any evidence to show their alleged occupation of the land prior to 2016. That this position is further supported by the site report by the Hon Deputy Registrar which showed that the Plaintiffs do not live on the disputed land. That the Plaintiffs have constructed and made developments on their own lands and not on the disputed land. That evidence was led by the 1st Plaintiff that each know the size and extent of their parcels.

33. In respect to the boundary dispute in 1985 the Defendant has faulted the findings on the basis that the Plaintiffs were not the complainants, the Plaintiffs had not become the registered owners of their current parcels of land, the present Defendant did not own the disputed land, the authenticity of the letters are in doubt. That since the report purports to say that 100 meters of land spreads through Othaya, Gitimae, Methi and Kandara Holdings the Plaintiff was faulted for not suing the said entities. In addition, it faulted the Plaintiffs for not specifying the acreage of the land that they are claiming making its claim superfluous given that there are other third parties cultivating the land as well.

34. Further that the Plaintiffs have not proven open and notorious occupation of the land. The Defendant contends that save for the invasion in 2016, there were no activities on the land being carried out by the Plaintiffs so support a claim of open occupation.

35. The Defendant submitted that the suit is fatally defective on account of lack of proper authorization as to representation of the 4 co-

Plaintiffs by the 1st Plaintiff. That the resolution relied on by the 1st Plaintiff was signed in 2014 and there is no evidence that it relates to the present case. In conclusion it submitted that the Plaintiffs have failed to prove title by adverse possession over the disputed land.

36. Having considered the pleadings, the evidence as adduced at the trial, the submissions and case law where supplied, the issues that commend themselves for determination are; whether the Plaintiffs have proven possession and or occupation on the disputed land; was the possession adverse to the title of the Defendant? who meets the costs of the suit.

37. It is not in dispute that the Plaintiffs are the registered proprietors of parcels No LOC 4 / NGUTHURU/ 473, 376, 4, 1017 and 1016 respectively having been become registered as such in 1974, 1982, 1967, 2001 and 2001 respectively. The parcels are measured 0.85, 4.0, 1.74, 0.94 and 0.94 hectares respectively.

38. The Defendant's land, LR No 5991 measures 198.5 acres. According to the copy of title on record, it was acquired by Makindi River Estate Limited in 1961 from a previous owner. On the 1/3/1974 it was acquired by Methi & Swani Farmers' Cooperative Society Limited (with other lands) and charged to the Cooperative Bank Limited on even date. On the 7/7/1995 the land was acquired by Makindi Banks Limited, the Defendant and remains in its ownership to date.

39. It is also commonly admitted by the parties that they are neighbours and their lands share a common boundary. The Plaintiffs' lands lie opposite the Defendant's land. The Plaintiffs live on their parcels of land but claim that their parcels described above run all the way upto the riverbed. This is the land they claim to have occupied through construction of 3 water pump houses and cultivation of nappier grass and vegetables for a long time without any interruption from the current and former owners of the disputed land.

40. The land in dispute is said to be 100 meters between the river bed to the yellow line (the beacons) shown in PEX No 10 e-I and PEX 10 l-n. This yellow line is commonly admitted as the boundary between the Defendant's land and that of the Plaintiffs. This is supported by the findings contained in the letter dated 19/9/1985 (PEX12) when the surveyors confirmed that the boundary of the 4 settler farms, Methi included, jumped 100 meters across the river Makindi. The District Surveyor in his report dated 11/11/17 showed the boundary which conforms with the yellow line mentioned above. The 100 meters disputed land therefore is within the Defendant's land.

41. It is the Plaintiffs case that since time immemorial, they have occupied and utilized their parcels of land all the way upto the river bed including the disputed land. That they always believed that Makindi river bed was the boundary between their parcels and the previous settler farms. That this long held belief was interrupted in 1985 when the surveyors established that the Defendant's land encroached onto their land to the extent of 100 meters. That even with this realization, the then owners of LR NO 5991 did not interrupt their occupation which has continued to date under the ownership of the Defendant. That the Defendant acquired the land 21 years ago and has not interrupted their occupation and possession of the disputed land either. The Plaintiffs alluded to attempted evictions by Methi in 1985 which they claim to have been repulsed by the Nguthuru farmers, the Plaintiffs included. They however did not adduce any evidence to support this averment. That the Defendant was also repulsed when he attempted, albeit with partial success, to reestablish its beacons in 2014.

42. The first limb of the Plaintiffs' case therefore is that they have established adverse possession over the 100 meters disputed area. The second limb of their case is that the Defendant's land has encroached onto their land to the extent of 100 meters. I shall return to the claims shortly.

43. The Defendant has denied the Plaintiffs case stating interalia that it acquired the suit land LR 5991 in 1995 from Cooperative Bank Limited. The property was owned by Methi & Swani Limited before. From the entries in the title Methi & Swani charged the land to the bank and in default the bank sold the land to the Defendant. That all the boundaries were pointed out to it by Olweny & Associates surveyors whereupon it took actual possession in February 1996. It is their contention that from 1995 – 2016, the Plaintiffs never occupied the disputed land. It conceded that the Plaintiffs like other villagers in the area living in the upper side of the river have always had access to the river through the access road provided. That the Plaintiffs invaded the disputed land in 2016 and therefore have not established the threshold to a claim for adverse possession. That if any, (which is denied) occupation was present, the same was interrupted by the Defendant in 2014 when it asserted its rights by establishing its beacons on the boundary, in which event then time for adverse possession has not matured as at the time of filing the suit in 2016.

44. I wish to deal with the second limb of the Plaintiffs claim which is that the Defendant's boundary encroached onto their lands by 100 meters. Going by para 38-40 the parcels of land in question including the 100 meters is identifiable. The question is can the Plaintiffs claim adverse possession on land that they claim to own? If the Plaintiff's claim that the Defendant's land has encroached theirs to the extent of 100 meters is valid, then the import is that 100 meters is part of their land. A claim on adverse possession on the 100 meters cannot succeed for the simple reason that the Plaintiffs cannot establish title by adverse possession on its own land. Section 13 of the Limitations of Actions Act states as follows;

> "A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 this 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."

45. Going by the above section of the law, this limb of the Plaintiffs claim seeks to defeat the claim of adverse possession. It points to something akin to a boundary dispute. It is however borne out of the evidence adduced that there is no dispute in respect to the boundary. It is trite that parties are bound by their pleadings. This claim was not adverted to its logical conclusion. It only served to confiscate the issues in the case and it is disregarded for the misadventure that it is.

46. In the main, the Plaintiff seeks to establish title by way of adverse possession. It is their case that they have occupied the disputed land openly, peacefully and without interruption since time immemorial. The 1st Plaintiff led evidence that he is 77 years and was born and bred in the Nguthuru village. However, it is also on record that he acquired his parcel of land in 1974 while the co -Plaintiffs became registered

proprietors between 1992 – 2001. No evidence was led to show whether the Plaintiffs occupied the disputed land before the dates disclosed on their titles.

47. Be that as it may, the 1st Plaintiff led evidence that they have always regarded the river as the boundary between their parcels and that of the Defendant's land. That as a result they have occupied the disputed land in the belief that it is part of their lands. In support he adduced PEX NO 5 – Cadastral map No 75247 and PEX NO 6 -Sheet No 12 Nguthuru Unit which shows parcel No 373 (belonging to the Plaintiff). According to the Plaintiffs this cadastral map depicts the river as the boundary. My perusal of both cadastral plans shows that the boundary is depicted not as the river but on the yellow line. For example, PEX No 6 shows the 1st Plaintiff's land parcel 374 and below it is a boundary line. There is no indication of a river or river bed. PEX No 5 – shows the river bed center line beacons as well as the boundary of the river. This map was prepared in 1968. The deed plan of LR No 5991 is dated the 24/1/1929 and attached to the title deed shows an **insert plan** of a river enlargement with measurements from the riverbed measuring variously 300, 269, 190, 51, 62, 110, 100, 175, 170, 175, 165, 111 and 193 meters (scale is 1;5000) to the boundary of the Defendant's land. This means that the measurement from the river bed to the boundary (yellow line) is not uniformly 100 meters as alleged by the Plaintiffs. This agrees with the sketch plan annexed to the Land Surveyors Report dated the 11/11/2017 showing the boundary aforesaid as well as PEX 6 (sheet No 12). It is trite that cadastral maps are not authorities on boundary because they represent general boundaries and therefore the deed plan being a fixed boundary is more credible than the general boundary survey. It therefore shows that the boundary of the Defendant's land has not been altered since 1929, the date of the deed plan. It also means that the land demarcations of 1959 and that of 1966 -68 did not affect the boundaries of the settler farms, the Defendant included. The Plaintiffs did not adduce any evidence to show that it ever did.

48. Were the Plaintiffs in occupation of the land since time immemorial or such other time? The Plaintiffs have averred that in 1985 Methi reestablished the beacons on its land and confirmed that the boundary was not the river bed contrary to their long held belief. It is their case that alarmed by the discovery they lodged a complain through two of their representatives Kariuki Kabiri and Muiruri Nganga with the District Officer, Kandara. See PEX NO 11 and 12 letters dated the 22/8/1985 and 19/9/1985. This prompted the District Surveyor to write to the surveyor of the settler farms of Mehti, Othaya Gitimae and Kandara Holdings informing him that the two farmers being owners of LOC 4/NGUTHURU /51 and 778 have lodged a boundary dispute that the survey of the 4 farms encroached on their parcels interalia. The letter went on as thus;

> "You have interfered with the land **between parcels No LOC4/NGUTHURU/22-352 that lay across the river (see RIM sheet No 12).** According to the RIM, the river seems to be the boundary. Could you furnish the cadastral map you are using for my scrutiny?"

49. The above letter is copied to the District Officer, Kandara and the two farmers. The findings of the two surveyors revealed that the farmers in Nguthuru area have regarded the river as the boundary between their farms and the settler farms as supported by the RIM sheet No 12 of 1968. That the farmers have enjoyed and utilized their land parcels without any disturbance before the publication of the map. It confirmed that according to the cadastral map whose survey was carried out in 1959 the boundary of the settler farms jumps across the river encroaching approximately 100 meters into the plots of the farmers in Nguthuru. That the beacons were intact as pointed out by Olweny & Associates in 1985. It went on to state that there is a common overlap of the two maps.

50. From the two letters it is clear that the lands in question were parcel LOC4/NGUTHURU/22-352. None of the Plaintiffs lands that is to say parcels LOC4/NGUTHURU 473, 376, 4, 1017 and 1016 were subject of a boundary dispute. It is therefore doubtful that the Plaintiffs lands were subject of this finding. A close perusal of PEX 6 shows that the parcels Nos. 22-352 are not opposite the Defendant's land. With the exception of parcel 352 which is indicated at the left corner of the Defendant 's land, the rest are not shown on all maps adduced in evidence giving the impression that the lands in question were situated elsewhere but perhaps along the river Makindi. The Plaintiffs could not have been living on parcels 22 -352 and at the same time in their current parcels. My perusal of the green cards shows that except for parcels 1016 and 1017 which were resultant subdivisions of parcel 19, the rest of the titles are original titles. Indeed, parcel 19 would still be outside parcels 22-352.

51. I agree with the Defendant's submission that neither the lands nor the Plaintiffs were subject of the surveyor's findings and therefore the evidence cannot aid the Plaintiffs to show that they were in occupation and or possession of the disputed land as at 1985. The Plaintiffs failed to call witnesses including the two farmers to give evidence in their support.

52. Were the Plaintiffs in occupation of the disputed land from 1995 when the Defendant acquired the land? It is the Defendants defence that it acquired the land in 1995 and took possession. It claimed that the Plaintiffs did not occupy the land until 2016 when they invaded the land unlawfully. The Plaintiffs position is that despite acquiring the land the Defendant has not interrupted their occupation however open, notorious and peaceful as it has been. That the Defendant had full knowledge of their possession.

53. In the case of L**eonola Nerima Karani v William Wanyama Ndege[2012] EKLR** the Court citing the case of **Wambugu versus Njuguna (1983) KLR 171** laid down the following guiding principles in respect to adverse possession:-

> a. The general principle is that until the contrary is proved possession in law follows the right to possess.
>
> b. In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
>
> c. The limitation of Actions Act, in adverse possession contemplates two concepts, disposition and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.
>
> d. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or

agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.

e. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.

f. Adverse possession means that a person is in possession in whose favour time can run…

g. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase, the vendors would have evicted him. The possession can only become adverse once the contract is repudiated…

h. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.

54. Equally in the case of **Francis Gicheru Karini vs Peter Njoroge Mairu (Civil Appeal No. 293 of 2002 (NRB) UR) the** Court of Appeal approved the High Court decision in **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR 10** as per Kneller J. stating:

'…The Plaintiffs have to prove that they have used this land which they claim as of right. **Nec vi, Nec Clam, Nec Precario (no force, secrecy or persuasion**) ...show that the company had knowledge of possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to interrupt it or by way of recurrent consideration.'

55. I have perused the pictures marked as 1-6 taken on the 23/12/16 and compared with those taken in 2017 (PEX No 10 a-n) and I agree with the Defendant's evidence that to a causal eye the overgrowth in 2016 is higher than in 2017 and it is consistent with its evidence that the Plaintiffs cultivation started in 2016 and by 2017 it was fully pronounced. **In the case of Jonathan O. Oyalo Obala & Ano. - Vs- Cornelius Otaya Okumu – Kisumu Civil Appeal No. 208 of 1997** (unreported) the Court held that the mere presence of crops on land may not mean that the grower of the crop is asserting claim of ownership to the land.

56. The Court notes that the Plaintiffs have not adduced any evidence to show that they were in occupation of the land since 1995.

57. It is not in dispute that the Plaintiffs have neither built or fenced the disputed land. In respect to the installation of the water pump, the 1st Plaintiff sought to persuade the Court that the said installation is part of his occupation of the disputed land. That may be so. However, the key requirement in finding for adverse possession is possession with the intention to exclude the owner from the property also known as the ***animus possidendi***. In the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** the Court said;

"…. by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant's rights. That the appellant was such dispossessed of the suit premises by those acts. The respondent's acts were ***nec vi, nec clam,nec precario*** (that is, neither by force, nor secretly and without permission."

58. Similarly, in the case of **Kweyu vs Omutut [1990] KLR** 709, the Court of Appeal, stated as follows:

"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously."

59. The fact of possession must be accompanied with the unequivocal evidence of intention to dislodge the paper owner. Intention is a state of mind which ought to be proved.

60. In the case of **Gabriel Mbui v Mukindia Maranya [1993] eKLR** the Court said this about possession that can found a claim on adverse possession;

"…. The nonpermissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced

unmistakable *animus possidendi*, that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseised owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper title where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an *animus possidendi* for the requisite time. It must be shown that the owner has ceased to be in occupation and that the claimant is and has continuously been in occupation. An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession. Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where the person in possession goes out and another person takes possession. The term "dispossession" imports ouster, i.e. a driving out of possession against the will of the person in actual possession; there is no driving out where the transfer of possession was voluntary, not against the will of the person in possession but in accordance with his wishes and active consent. There must be some element of force or fraud, with some positive and unequivocal acts, on the part of the person dispossessing, which can be referred only to the intention of obtaining exclusive control over the property. Discontinuance consists in the owner giving up, ceasing to use, and abandonment, of the land, a cessation of occupation. The fact that nothing is done to improve or work a piece of land is not evidence that a person has abandoned the possession or that he has otherwise been eliminated from the land. If a man does not use his land, either by himself or by some person claiming through him, he does not thereby necessarily discontinue possession of it, nor does that fact bring about the elimination of his possession. In our law, the mere fact that for twelve years or more there has been no suit brought against the squatter, or the mere fact that for twelve years the squatter has been in actual possession of the land, is not enough to make the Limitation of Actions Act operative; possession for twelve years cannot *per se* make the Act come into operation against an owner of land. The Act is operative only where there has been exclusive possession for the statutory period by the person to be protected by the statute: it must be shown that the title holder has been dispossessed or has discontinued his possession of the land for the statutory period. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession. It is not sufficient to prove that he enjoyed the use of the land in common with the true owner. It is a fallacy to assume that it is a presumption of law or fact that when two people live on the same land the whole or any part of the land is in view of the law of limitation of actions, in the possession of the person who happens to be using the land for cultivation, building, grazing or howsoever. …… The adverse possessor must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil. He makes out such a case by establishing an aggregate of acts of ownership imaginable, for the purpose of excluding the possession by anybody else. It all depends on facts of each individual case. So, in one case, the action of the trespassers in erecting gates at either end of a piece of land, keeping the gates locked and retaining the keys, which would seem to be of such a nature as to establish such exclusive possession as to create title by limitation, was held not to have that effect (see **Lindley, MR, in Littledale v Liverpool College, [1900] 1 Ch 19 at p 23).** The Court has, in such cases, first to have regard to the intention with which the alleged occupation was made, and secondly, the nature of the land and whether the occupation made of it excluded the owner. Where it cannot be said that the possession was exclusive, where the true owner and others were free to use the ground in question, and there was no assertion of title, a case of adverse possession is not made out. It is not sufficient that there should be an actual possession by the person claiming title by adverse possession; there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by the incoming person. A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in title against the owner or his predecessors in title for the past twelve or more years. It is not enough to show a mere going out of possession by the owner. There must also be exclusive possession for the statutory period by the person to be protected: **Sir Joseph Sheridan, P and Law, CJ, in Hassanali Mamuji v Alibhai Ebrahimji Dar & Sons, (1935), 12 E A C A 11 at pp 113, 114, 115; Sir G Graham Paul, CJ, in Athman Bwana and another v Haji Abdulla Ibrahim and another (1948) 15 E A C A 7 at p 9; Harris, J, in Karanja Matheri v Kahnji [1976] Kenya L R 140 at p 141; Simpson, J (**as he then was**), in Wainaina v Murai and others, [1976] Kenya L R 227 at p 231; Madan, J (as he then was), in Gatimu Kinguru v Muya Gathangi, 1976) Kenya L R 253 at p 259; Chesoni Ag JA, in Sisto Wambugu v Kamau Njuguna, [1982-88]1 KAR 217, at pp 226-227; and Madan, JA** (as he then was), **in Public Trustee and Beatrice Muthoni v Kamau Wanduru Court of Appeal at Nairobi Civil Appeal No 73 of 1982;"**

61. The 1st Plaintiff testified that he installed the water pump in 1983 and drew power from the Defendant 's transformer in its property. That the predecessor in title and the Defendant did not raise any objection. The Defendant in response stated that he has no problem with the water pump at all. That said, the question is whether the 1st Plaintiff has led evidence to show that in installing the water pump he intended or did disposess the Defendant. To my mind he did not. The 1st Plaintiff explained that the water pump supplies water to his residence which is situate in his parcel of land. It is on record that there is an access road leading to the river through which the Plaintiffs and the other villagers use to draw water from the river for their domestic use, a claim that was admitted by the Defendant's witness in his own words when he stated that he had no problem with the Plaintiffs drawing water from the river which water is for all and sundry.

62. In all the activities that the Plaintiffs have listed as forming occupation and use of the disputed land, the Court finds that the Plaintiffs did not prove occupation with unequivocal intention to own the disputed land.

63. Further the Defendant stated in evidence when commending on the cultivated portions of the land in the disputed area that it is aware that save for the Plaintiffs there are other parties that have invaded the land for cultivation during the rainy season. The Plaintiffs did not challenge this evidence. The Court notes that the Plaintiffs have not demonstrated exclusive control of the disputed land to evidence any sign of exclusive use of the disputed area. Such control would interalia be through fencing.

64. It is trite that the acreage of the land being claimed must be specifically ascertained. The burden of proof is on the person claiming adverse possession. In the case of **Gerishon Muindi Baruthi -Vs.- Willays Gatinku Mukobwa & another CA No. 98 of 1998** the Court held that the Plaintiff/ claimant has a duty also to prove that the land he was claiming was definite and identifiable. It was held thus:

"Exclusive possession of a portion of parcel of land which is definite would entitle the appellant to establish his claim on ground of adverse possession provided the period of 12 years has run".

65. In this case the Plaintiffs have claimed 100 meters from the river bed to the boundary (yellow line). Going by para 47 above the

measurements between the river bed and the boundary vary. In some areas it is more and in some it is less than 100 meters. It behooved the Plaintiffs to define the measurement of the land so much so that there is certainty in the Plaintiffs claim. As it is pleaded it is not clear what extent of land the Plaintiffs are claiming under adverse possession.

66. In the case of **Gabriel Mbui-Vs- Mukindia Maranya [1993] Eklr** (supra) held that **;**

> "..it has always been the holding of Courts in the common law world, that acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it; and that acts of user committed upon land which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to adverse possession, and are not evidence of dispossession or discontinuance of possession. Accordingly, when the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year after year for twelve years or more **(see Leigh v Jack [1879] 5 Ex D 264; Williams Brothers Direct Supply Stores Ltd –Vs- Raftery [1957] 3 All E R 593; Hayward and another –VS- Chaloner [1967] 3 WLR 10 68).** The reason is not because the user does not amount to actual possession; it may. The line between acts of user and acts of possession is too fine for words."

67. The Defendant led evidence that it was not using the disputed land because it was a wet land which floods during the rainy season. The Plaintiffs have imputed that the Defendant has left the disputed land to the enjoyment and use by the Plaintiffs by fencing its property at the river bank however the Defendant s response is that the fencing was for phytosanitary and security reason for the fish ponds. In the case of **Kazungu Mateja Mbaru & 5 Others -Vs- Thathini Co.Ltd Misc. Application No. 503 of 2005** , the Court similarly held that the fact that the Defendant had not put any development did not mean that the Defendant had discontinued possession of the suit land or abandoned it. The Court is not persuaded that the Defendant left the disputed land for the enjoyment of the Plaintiffs. Evidence was led by the Defendant that it re-established its beacons on the part of the land to facilitate fencing which beacons are acknowledged by the Plaintiffs.

68. For the registered owner of land to be dispossessed, the party claiming ownership by Adverse Possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. In the case of **Gabriel Mbui v Mukindia Maranya [1993] Eklr** the Court stated that;

> "So, as long as the land in the possession of a squatter is not immediately required by the owner, and as long as the squatter's use of the land in no material way prejudicially affects the owner's practical interests, adverse possession does not arise and the owner need not sue to chase away the squatter. The interest of justice is not served by encouraging litigation to restrain harmless activities merely to preserve legal rights, the enjoyment of which is, for good reason, being deferred"

69. It is my conclusion that the Plaintiffs have not proved possession that can found a claim for adverse possession.

70. It is not in dispute that the disputed area is prone to floods during the rainy season. The Plaintiffs have admitted that the cultivation of the land is done during the dry season. That during the rainy season cultivation is abandoned due to floods. For one to successfully claim adverse possession over the land he must show that possession and occupation are unbroken. The law is also that possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See **Wanyoik**e **Gathure v/s Berverly (1965) EA 514, 519**.

71. The nature of the occupation being seasonal and intermittently temporal as admitted by the Plaintiffs cannot found a claim of adverse possession due to the fact that it is broken. It does not meet the threshold of continuity required for a claim in adverse possession.

72. It is trite that adverse possession is one of the ways of property acquisition in Kenya and in the case of **Peter Njau Kairu v. Stephen Ndung'u Njenga & Another C.A. 57of 1997, CA *the*** Court of Appeal held that evidence must be stringent and straightforward because a property owner should be deprived of his title only in the clearest of cases. In the instant case it is the finding of the Court that the Plaintiffs have not proved adverse possession on a balance of probabilities.

73. In the end the Plaintiffs' case fails. It is dismissed with costs in favour of the Defendant.

74. It is so ordered.

DATED, SIGNED & DELIVERED AT MURANGA BY EMAIL THIS 3RD DAY OF JUNE 2020.

J. G. KEMEI

JUDGE