

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 184 of 2017

SILVANUS MUSYOKI MULI.....1ST

PLAINTIFF

NAOMI KANYUA MUSYOKI.....2ND

PLAINTIFF

VERSUS

KAPOSHI OLE NJOROGE NAKUMAMA.....1ST

DEFENDANT

JONATHAN KAPOSHI.....2ND

DEFENDANT

NTEENE KAPOSHI.....3RD

DEFENDANT

KENNETH OBIMBO ODHIAMBO.....4TH

DEFENDANT

JUDGEMENT

1. By way of **Originating Summons** dated **18th July 2012**
and **Amended** on **28th November 2012**, first filed at

Machakos High Court before it was transferred to this Court, the Plaintiffs Seek for the following reliefs;

- a) **That the Plaintiffs have by adverse possession acquired an interest in land LR No. Kajiado/Kaputiei-Central/839 measuring approximately 30 acres and or resultant subdivisions LR No. Kajiado/Kaputiei Central/2348, 2347, 2346 and 2345 and the Respondents be ordered to transfer it to the Plaintiffs.**
- b) **The Deputy Registrar of this Hon. Court do sign application for Land Control Board's consent, transfer or any other documents to facilitate transfer of the land in (a) above to the Plaintiff.**

2. Through the **Supporting Affidavit** sworn by **Silvanus Musyoki Muli**, the plaintiffs state that the 1st Defendant sold to them thirty (30) acres of plot No. 23 Ilmamen Settlement Scheme which was his share. They entered into sale agreements dated 7th November 1987, 6th January 1988 and 17th September 1988. The Plaintiffs then

entered the land and have been residing thereon, awaiting transfer and registration in their favour. On or about 18th October 2001, the suit property was registered in the 1st Defendant's name as LR No. Kajiado/Kaputiei Central/839 and he promised that he would initiate the transfer process. The Plaintiffs claim that they had placed a caution on the property, but they had it removed in order to effect the transfer. However, on 15th February 2021, the 1st Defendant transferred; Kajiado/Kaputiei Central/2347 and 2348 to the 2nd Defendant and Kajiado/Kaputiei Central/2346 to the 4th Defendant.

3. He stated that it was therefore necessary to sue all the registered owners because the specific parcels had not been physically demarcated or beacons. He also claimed that they were entitled to the reliefs sought since they had been on the suit property for over twenty four (24) years and any transfer to any other party was fraudulently carried out and ought to be revoked/cancelled.

4. The **1st, 2nd and 3rd Defendants** in their **Replying Affidavit** dated 13th September 2012 sworn by **Kaposhi Ole Njoroge Nakumama**, who admitted that in the year

1987 he entered into an agreement with the Plaintiffs for the purchase of ten (10) acres of unregistered land situated at Ilmamen settlement scheme for Kshs. 20,000. He deponed that they only paid Kshs. 10,000 and the balance was never paid. Upon adjudication and registration, the land was given LR/No. Kajiado/Kaputiei Central/424 registered in the names of the 1st Defendant- Kaposhi Njoroge Nakumama and David Ole Asaape. This land was subdivided and in 2001, the 1st Defendant got title for parcel Kajiado/Kaputiei Central/839 in his name. Upon this registration, the 1st Defendant asked the Plaintiff to complete paying the balance at an increased price to be agreed upon since the value of the land had gone up. There was no agreement on the way forward and in 2003, the Plaintiff together with other purchasers- John Kivuki Wambua and Alfonse Matolo registered a caution against the suit property claiming purchasers' interest.

5. It is his case that in 2010, he agreed to give the Plaintiffs a piece of land to plough for two years and recover the purchase price and in exchange, they would apply for the lifting of the caution. The 1st Plaintiff also requested to be

allowed to utilise the house that had been constructed on the property by one Sammy Akifuma as his storage house and he (1st Defendant) allowed him.

6. In the year 2011 the caution was lifted following a consent entered between the 1st defendant and John Kivuki Wambua. In the year 2012 the 1st Defendant asked the Plaintiffs to vacate the suit property and surrender the store because he had sold the parcel to the 4th Defendant. He then received a demand letter from the plaintiffs. He contested the allegation that the Plaintiffs have been on the suit property for over twelve (12) years. He denied the subsequent sale agreements claiming that they were unenforceable due to lapse of time. He therefore sought that the suit be dismissed with costs.

7. **Jonathan Kaposhi**, in his Affidavit depones that the Plaintiffs did not complete the purchase of the suit property and that his father allowed them to utilise the property for a period of time to recover the deposit they had paid. It is his case that the Plaintiffs' interest in the suit property was renewed when they learnt that the

Standard Gauge Railway would pass through the suit property and the owners would be compensated.

Evidence of the Plaintiffs

8. **PW1, Silvanus Musyoki Muli**, the 1st Plaintiff adopted his Affidavit as his evidence in chief. He produced his bundle of documents which was marked as P. Exhibit 1 to 4 respectively. It was his testimony that the agreements produced in Court were genuine and the defendants appended their thumbprints on them and they were attested by an advocate. He further stated that they purchased thirty (30) acres of land and paid Kshs. 2,000 per acre. That after the purchase, they entered the suit property and started utilising it with full knowledge of the Defendants. He invited the court to visit the suit land to confirm. He stated that the thirty (30) acres of land was measured using a measuring tape and no beacons were placed. It was his testimony that when the Defendants brought surveyors to install beacons on the land, other buyers contested the demarcation citing that some portions had been fraudulently transferred to other persons.

9. **On cross examination** he stated that he resided on the suit property although he had a rural home in Mwala-Kyamango as well as Machakos town. It was his testimony that he purchased 30 acres of the land when it was plot No. 23 as allotted by the Group Ranch to the 1st Defendant. Upon subdivision it was given title LR No. Kajiado/Kaputiei Central/839 which was further subdivided to parcels 2345, 2346, 2347 and 2348 respectively. He stated that he was not aware of the position of his property among these numbers, because no ground demarcation had been undertaken and that is why this suit was filed so that the 1st defendant would be compelled to transfer to him the thirty (30) acres he is entitled to. He stated that between the year 2012 and 2014, a portion of the land he was claiming was compulsorily acquired by the Standard Gauge Railway, although he was not motivated by the compensation in filing of this suit. He confirmed he received a compensation of Kshs. 5,400,000. It was his testimony that when Kenya Railways visited the suit property, they found him in possession and he used the sale agreements as evidence of purchase. He was not

aware that plot 23 was subdivided to Kajiado/Kaputiei-Central/ 838 and 839 respectively. The 1st Defendant showed him title for Kajiado/Kaputiei-Central/ 839 and he had no reason to believe he was being deceived because they had a cordial relationship.

10. He also stated that he talked to another buyer known as Kivuki who agreed to remove the caution placed on LR NO. Kajiado/Kaputiei-Central/ 839. This was to allow the 1st Defendant to effect transfer in their favour as they had paid the full purchase price. However, the 1st Defendant did not transfer the land to him. He later realised that the land had been subdivided into four portions and some of them were transferred to the 2nd and 4th Defendants. It was his testimony that he had purchased the portion of land in his occupation and had not leased it as claimed.

11. On further **cross examination** he stated that by July 1989, he had finished paying the last instalment of the purchase price. It was however until sometime in 2010 or 2013 when he realised that the 1st Defendant had obtained title to the property. He then instructed a surveyor, one Mr. Kyuli, who visited the property and

showed him the beacons as agreed with the 1st Defendant. Neither the 1st nor the 2nd Defendant were present during this visit. He also stated that he could not recall the exact year the survey was undertaken, but it could be between the year 2001 and 2010. He stated that he took possession of a portion and fenced it although he was not certain of the acreage of the portion in his possession. It was his testimony that he constructed a permanent house although he did not have evidence to prove this. He acknowledged that he got compensation of Kshs. 5,200,000 for the 0.1 hectares of land acquired by Kenya Railways for the Standard Gauge Railways Project.

12. On **re-examination** he stated that he realised that the subdivision of the mother title and titles had been issued in the year 2013. He stated that he filed the suit in the year 2012 in Machakos after he realised that the 1st Defendant had subdivided the land. He also stated that there were boundary markings on the ground and not beacons and that the 2nd Defendant was about 3 to 5 years old when he purchased the land. He (2nd Defendant) therefore did not witness the transaction. He denied that

he was given any house by the 1st Defendant stating that he constructed his own house.

13. **PW2 Zachary Gathaara** an Advocate of the High Court adopted his witness statement dated 17th August 2023 as his evidence in chief. He stated that he knew the Plaintiffs and the 1st Defendant and that the Plaintiffs brought to him the sale agreement dated 7th November 1987. It was for the purchase of ten (10) acres of land from the 1st Defendant. He then drafted the agreement dated 6th February 1988 on the strength that the agreement dated 7th November 1987 had been completed. In the second agreement, the 1st Defendant was to sell a further ten (10) acres and the payment of the purchase price was made in full. A final agreement dated 17th September 1988 for a further ten (10) acres was also duly executed by the parties and the 1st Defendant's wife also thumb printed it. He stated that the agreements were not forgeries because he drafted them and he was present when they were attested and executed.
14. **On cross examination** he stated that the Plaintiffs approached him as they wanted to purchase more land.

By this time, the first agreement dated 7th November 1987 had already been executed. He accompanied the Plaintiffs and met the 1st Defendant together with his wife on the suit land where they executed the sale agreement. It was his testimony that the land was demarcated by sisal plants. It was also his testimony that the 1st Defendant received the full purchase price in cash and acknowledged as such. He pointed out that by this time, the 1st Defendant was elderly and he did not have a title in his name. He confirmed that he authored the schedule of payments and that he also stamped the sale agreement

15. On **re-examination** he confirmed that the sale agreement dated 17th September 1988 and the schedule of payments were not signed on the same day.

16. **PW3 Naomi Kanyua Musyoki**, the 2nd Plaintiff, adopted her witness statement and supporting affidavit as her evidence in chief and produced her bundle of documents as exhibits in this case.

17. **On cross examination** she stated that she was present when the agreements were signed and that they purchased a total of 30 acres. The thirty (30) acres were

measured in a traditional way (using footsteps) and boundaries marked. She confirmed that, they were compensated for the land compulsorily acquired for the Standard Gauge Railway Project. She contested the claim that the 1st defendant gave them a house to use as a store. It is her case that they constructed a grass thatched house in 1987, completed payment of the entire purchase price in 1989 and later demolished the same and constructed a permanent house. She also stated that since they took possession, the 1st Defendant had never objected to their occupation. It was her testimony that the suit property was not transferred to them during this time because the 1st Defendant had not acquired a title in his name. However, the agreements stipulated once he acquired the title, he would subdivide and transfer their portion to them which he failed to do hence this suit. She stated that the 1st defendant acquired title in 2001 and they started following up on the subdivision but when it was not forthcoming, they issued him with a demand letter in the year 2012. She stated that there were sale agreements which were duly signed and executed by the

vendor, buyer and advocate, as well as schedule of payments which confirmed that the entire purchase price was paid. The said schedule was signed by the advocate. She stated that every time a payment was made, the seller would put his thumbprint against the schedule of payment as confirmation. She indicated that in the year 2022 a survey was undertaken and the thirty (30) acres they occupied were mapped out in the survey report.

18. **On re-examination** she stated that a survey was undertaken in the year 2022 and that there were traditional markings that showed the boundaries when they purchased the land.

19. **PW4 Joseph Wambua** adopted his witness statement as his evidence in chief. He stated that the Plaintiffs are his long-term friends and he was a witness to the three sale agreements. He stated that the Plaintiffs took possession of the land sometime in the year 1987, started ploughing and planting crops on it. They also constructed a temporary house. It was his testimony that they used a tape measure to measure the size of the first ten (10) acres and thereafter they used footsteps.

20. **On cross examination** he stated that they first used a tape measure and then counted the steps that made up an acre indicating that feet and yard are the same thing. It was his testimony that both the 1st defendant and his wife were present during this transaction and both put their thumbprints on the sale agreements. He confirmed that the Plaintiffs took possession of the land and started utilising it by planting crops. They also constructed a permanent house although he had not been there in the recent past.

21. He went on to state that he was present when part of the purchase price was paid although he did not sign against the schedule of payment as a witness.

22. **PW5 Vincent Mutuku Kyuli**, a surveyor stated that the 1st Plaintiff instructed him in January 2022, to carry out a survey of his land and point out the boundaries. This was done in presence of the 1st plaintiff and when they got to the land, the boundaries were clear because they were fenced. Following the survey, he prepared a report dated 18th January 2022 which he produced as evidence. He further stated that the 1st defendant was the registered

owner of the suit property which occupies parcels Kajiado/Kaputiei Central/2345, 2346 and 2347 respectively. They were subdivisions of parcel Kajiado/Kaputiei Central/839. The suit land occupied by the plaintiffs was not part of parcel Kajiado/Kaputiei Central/2348.

23. **On cross examination** he stated that the Plaintiffs were the owners of parcel Kajiado/Kaputiei Central/2345-2347 respectively which they mapped and sketched and that the mutation form on record dated 2012 was to be used to subdivide Kajiado/Kaputiei-Central/ 839. It was his testimony that when he visited the property to undertake the survey, he was accompanied by the 1st plaintiff and his farm worker and the Plaintiff pointed out the boundaries. The survey was thus undertaken on the basis of the boundaries pointed out. He then used a GPS in mapping out the coordinates as well as the RIM that had the mutation points Kajiado/Kaputiei-Central/ 839. He confirmed that the markings on the mutation form reflected the position on the ground although there was a small margin of error of about 2 metres. He indicated that

he did not calculate the acreage of the property because that was not the scope of the instructions. He stated that he was in court on behalf of his employer although he did not have the written authority in Court.

24. **On re-examination** he stated that in the survey, he used GPS to produce coordinates to ascertain the proper placement of the parcels as per the existing mutation forms dated 2001 and 2012. He stated that the said documents were availed by the Survey of Kenya office, in Kajjado and there were no other documents contradicting those records.

Evidence of the Defendants

25. **DW1 Joseph Kaposhi**, the 2nd Defendant also testified on behalf of the 1st defendant- Kaposhi Ole Nkumama, his father, and the 3rd defendant- Nteene Ole Kaposhi his mother. He adopted his witness statement and affidavits as his evidence in chief. He also produced his bundle of documents as exhibits which was marked as D. Exhibit 1-9 respectively.

26. **On cross examination** he stated that he saw the sale agreement dated 1987 but he was a child at the time

of execution. He stated that he was testifying based on information given to him by his parents. He disputed the thumbprints on the other two sale agreements indicating that his parents only executed one sale agreement and not the subsequent ones. He acknowledged that several people had purchased land from his father stating that in case ELC 386 of 2017 he had sued several people but judgement was entered in favour of the Defendants. He denied the claim that the Plaintiffs took possession of the suit property in 1987. It was his testimony that in 2003 his father gave them a portion of land to carry out farming to recover the deposit paid. It was his testimony that it was only until 2019, when some people who were acting on the Plaintiffs' authority constructed a house on the land. He further stated that the Plaintiffs moved to the land in 2014 and were compensated by Kenya Railways for the Standard Gauge Railway project. He admitted that his father was not compensated. He also confirmed that there was a land dispute involving his father and some people in the year 2007, whereby he refunded the money paid and the suit was withdrawn. He also confirmed that a

caution was placed against the suit property by the Plaintiffs because they wanted title in their favour. It was also his testimony that the Plaintiffs entered the land in 2010 with his father's permission and they were to utilize the land until 2012 in order to recover the deposit paid.

27. He further stated that his parents are senile and that he had authority to testify on their behalf. He however had not filed any proceedings under the Mental Health Act. He acknowledged that the 1987 sale agreement was legitimate although the Plaintiffs did not pay the entire purchase price. They paid Kshs. 10,000 only leaving a balance of Kshs. 10,000. He however confirmed that the sale agreement did not give the timelines for payments of the balance of Kshs. 10,000. It was his testimony that in 2003, the 1st Plaintiff approached his father indicating that he wanted to complete payment. His father asked for Kshs. 20,000 per acre since the value of the land had gone up. There was no agreement to this effect and the 1st plaintiff left only to return in the year 2010 asking for the land. It was then that his father asked him to utilize the land for two years from 2010 to 2012 to recover the

deposit paid in 1987. This agreement was not reduced into writing. It was his testimony that the 1st plaintiff returned in 2010 in order to get compensation, for the Standard Gauge Railway Project and has been on the land since then.

28. When being asked about the house on the suit property, he stated that it was constructed by one Akifuma for his father as payment of balance of the purchase price which was Kshs. 70,000. The said Akifuma was introduced to his father by the Plaintiffs as he wanted to purchase a portion of the land. His father refunded the deposit to Mr. Akifuma.

29. He stated that the land was subdivided into four portions with one of the portions being registered in the 4th Defendant's name. His portion; Kajiado/Kaputiei North/2345 measures approximately 70 acres. It was his testimony that consent from Land Control Board was obtained and he paid a stamp duty for the transfer although these documents were not filed in Court.

30. On **re-examination** he stated that Akifuma filed a case in court but it was dismissed because he could not

identify the portion of land he was claiming to have purchased. The Court ordered for refund of his purchase price which was done.

31. At the close of the oral testimonies, parties tender final written submissions.

Submissions of the 1st Plaintiff

32. Counsel for the Plaintiffs submitted on the following issues for determination.

33. On whether the Plaintiffs have been in exclusive possession of the suit property from 1987, it was submitted that the Plaintiffs have been in possession from the year 1987 and used the land to farm as well as built a permanent structure thereon. It was also submitted that the surveyor's report showed their occupation across parcels 2345, 2346 and 2347 and had even been compensated by SGR due to their possession. To support their claim for adverse possession, reference was made to **Gatimu Kinguru v Muya Gathangi [1976] eKLR**. Other cases on adverse possession were **Mtana Lewa v Kahindi Ngala Mwangadi [2015] KECA 532 (KLR)** and

Nelson Rurira Kang'ethe & another v Joyce Wambui Kamanja & 2 others [2018] KEELC 2348 (KLR).

34. It was also their argument that DW1 had confirmed that the plaintiffs had constructed a house of the suit property. Therefore, lack of a land control board consent did not preclude the court from giving life to equitable principles as held in **Willy Kimutai Kitilit vs Michael Kibet [2018]**. It was also their submission that a court could import constructive trust in land sale agreements to prevent a party from benefitting from their wrongdoing as held in **Shah & 7 others vs Mombasa Brcks & tiles Ltd & 5 others**. Reference was also made to the case of **Kaposhi v Maweu & 4 others [2024] KEELC 1276 (KLR)**, where the 2nd defendant's case was dismissed.

35. On whether the 2nd defendant's evidence was hearsay, it was submitted that his testimony was inadmissible because in 1987 he was a child and was relying on second hand information from other sources. It was also argued that there was evidence of their possession of the suit property as per the survey report on the area shaded in pink. And if there was doubt in the

acreage of the portion owned, the Gatimu Kinguru case directed that land be measured to ascertain the exact portion under occupation.

36. As such, they were entitled to the reliefs sought.

Submissions of the 2nd Plaintiff

37. On whether adverse possession can arise from a sale agreement, it was submitted that from the **Mtana Lewa** case, it was held that adverse possession was from non-permissive possession, but in this suit, the plaintiff gained access by virtue of a sale agreement. However, the said permission turned adverse when the agreement fails and time starts to run when the final instalment was paid. Reference was made to **Gabriel Mbuyi vs Mukindia Maranya (1993) eKLR**. It was their submission that the entire purchase price of the first 10 acres was paid on the day the sale agreement dated 7th November 1987 was executed. They contested the defendants claim that the entire purchase price was not paid and the Plaintiffs were given two years to recover their deposit arguing that a written agreement could not be amended orally citing **Fidelity Commercial Bank Limited vs Kenya Grange**

Vehicle Industries Limited (eKLR). It was also submitted that purchase for an extra 10 acres as per the agreement dated 6th February 1988 was also paid on the day of the execution and it was only the agreement dated 17th September 1988 where the purchase price was paid in instalments. And since the 2nd defendant was a child when these agreements were executed, his testimony was hearsay contrary to **Section 63 of the Evidence Act**. It was their submission that the claim that the 1st and 3rd defendants were senile was not proven. As such, the 2nd defendant's evidence was inadmissible meaning that the plaintiffs' evidence was uncontroverted citing **Trust Bank Ltd V Paramount Universal Bank Ltd & 2 Others [2009] eKLR**.

38. On whether the 1st and 3rd defendants could pass good title to the 2nd defendant, it was submitted that this was not possible because the plaintiffs had already purchased 30 acres of land which the 1st and 3rd defendants purported to transfer to the 2nd defendant.

39. As such, the reliefs sought should be allowed with costs.

Submissions of the 1st, 2nd and 3rd Defendants

40. Counsel submitted that the Court could not issue an order for adverse possession over a land that was not defined and sufficiently described, because adverse possession was only applicant to an exact area of land. It was their submissions that the sake agreements were not authentic and so was the schedule of payment.
41. They however acknowledged that the plaintiffs purchased 10 acres of unsubdivided land and upon its subdivision and titling, the purchasers were invited to finalise payment of the purchase price for purposes of transfer of their specific portions. However, the plaintiffs failed to complete the said payment and the 1st defendant allowed them to utilise the land for two years as compensation for the deposit paid in 1987.
42. Counsel also submitted that the photographs produced by the 2nd Plaintiff as evidence that there was a house on the suit property, were taken from a far akin to photographs taken by someone who did not want to be seen taking them. It was also submitted that from the said photographs, it was evident that there was no habitation

of the suit property such as a fence, activities, or any sort of development. It was also submitted that the 1st defendant allowed the plaintiffs to use the land and recover their deposit. Therefore, their presence on the land was with authorisation and this negates the claim for adverse possession. It was argued that there was no proof that the actions on the land or improvement on the land was consistent with the allegation that they had been in possession for over 24 years. Pointing out that the plaintiffs acknowledged that they were not aware where their parcel of land was in the subdivided portions.

43. It was also their submissions that time would only start to run when the 1st defendant became the registered owner of the property which was in 2001. However, the Plaintiffs filed this suit in 2012 before the lapse of the statutory 12 years.

44. As such, the suit should be dismissed.

Analysis and Determination

45. I have considered the pleadings, evidence, submissions, and legal authorities. I find that the issues for determination are:

- i. Whether the Plaintiffs have proved that they are entitled to thirty (30) acres of plot No. Kajiado/Kaputiei Central/839 by way of adverse possession;***
- ii. What orders should issue;***
- iii. Who should bear costs of the suit?***

46. The plaintiffs have sought registration of thirty (30) acres of land by way of adverse possession.

They claim that in the years 1987 and 1988 three sale agreements were executed between them and the 1st defendant herein for the purchase of thirty (30) acres of land from his then unregistered parcel of land. They claim that once the agreements were executed, they confirmed the approximate acreage of the land they were purchasing using tape measure and footsteps. It was their claim that they then took possession immediately and have been residing on the property since. It is their case that they

were compensated for compulsory acquisition of their land for the Standard Gauge Railways project.

47. The 1st, 2nd and 3rd Defendants contested this claim acknowledging that only the sale agreement, executed in 1987 was genuine and the other two were forgeries. It was their claim that the Plaintiffs however did not pay the whole purchase price which was Kshs. 20,000 but only paid Kshs. 10,000 and disappeared. When they returned asking for the land, the 1st Defendant asked them to pay more money since the value of the land had gone up. They were not able to agree and the 1st defendant allowed them to utilize the suit land for two years so as to recover the deposit they had paid.

48. It is not in dispute that there was a valid sale agreement between the parties executed on 7th November 1987. The said sale agreement was also produced as an exhibit in this case. It bears thumbprints of the 1st and 3rd defendants as well as one witness. The plaintiffs and other two witnesses also signed the agreement. The agreement also shows that Kshs. 10,000 was paid and this was not

disputed by the defendants. However, what was disputed was the allegation that the full purchase price was paid.

49. The defendants stated that when they sought for completion of the payment, the plaintiffs declined to pay the balance at the market value at the time. The plaintiffs claim that the entire purchase price was paid, as shown in the schedule of payments prepared by then Advocate (PW2). This evidence was not shaken.

50. The plaintiffs also stated that they purchased, additional twenty (20) acres in two other agreements dated 6th February 1988 and 17th September 1988. For the sale agreement dated 17th September 1988, the purchase price is indicated as Kshs. 20,000 and a deposit of Kshs. 6,000 was paid at the execution of the agreement. The plaintiffs produced a schedule of payment which shows that the balance of Kshs. 14,000 was paid by July 1989. PW2 confirmed that the full purchase price was paid. His evidence was not rebutted by the 1st Defendant.

51. The 2nd defendant contested validity of these two sale agreements on the grounds that the thumbprints thereon were not those of his parents. Once again, no

evidence was produced to invalidate their authenticity. The 2nd defendant further stated that the plaintiffs only took possession of a part of the suit property in the year 2010 when they were allowed to enter and cultivate on the land for two years to recover the money paid in 1987. His claim is that their entry was with permission and not adverse as stated by the plaintiffs.

52. The onus of determining whether the claim for adverse possession therefore falls with the court. The Court of Appeal in **Wilson Kazungu Katana & 101 others vSalim Abdalla Bakshwein & another [2015] KECA 728 (KLR)** held:

“... What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at

some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession...”

53. Similarly, in **Wambugu Vs. Njuguna (1983) KLR**

172 the court stated as follows;

“First in order to acquire by the statute of Limitations 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Cap 22) on adverse possession contemplates two concepts; dispossession 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.”

54. From the evidence on record it is clear that the plaintiffs have been in continuous and uninterrupted possession of the land since 1987. They have exclusively occupied and utilized the land. They have been in open

and notorious occupation as the 1st Defendant acknowledged their presence and even facilitated removal of a caution from the land registry.

I am satisfied that their possession had been hostile to the title holders under **section 38 of the Limitation of Actions Act.**

55. Having stated that the Plaintiff took possession and the 1st Defendant did not object at the time. It has been held that lack of consent from Land Control Board does not preclude the application of equitable doctrines. In the case of **Willy Kimutai Kitilit Vs. Michael Kibet (2018)** eKLR the Court of Appeal held;

“The lack of consent of Land Control Board did not preclude the Court from giving effect to equitable principles. In particular the doctrine of constructive trust.”

56. Also in the Court of Appeal observed thus; **William Kipsoi Sigei Vs. Kipkoech Arusei & Another (2019)** eKLR;

“We come to the conclusion that in the circumstances of this case the equitable

doctrines of constructive trust and proprietary estoppel were applicable and enforceable. In regard to land subject to the Land Control Act.”

57. Similarly in **Joseph Gichuhi Kariuki & 3 others Vs. Robert Kimani (2020) eKLR** S Okongo J observed thus;

“.....By receiving the purchase price in full and giving the appellants possession of the suit property with an undertaking that he was going to transfer the property to the appellants, the respondent had created a constructive trust in favour of the Appellants that he had an obligation to honour by transferring the suit property to them.”

58. I have considered the evidence presented by the 2nd Defendant. He told the court that he was a child of tender years when the Plaintiffs bought the land and took possession. His evidence lacks any probative value. He disputed the thumbprints on the Sale Agreements as those of his parents. The said thumbprints were no subjected to any analysis to confirm they did not belong to

the 1st and 3rd Defendants. The 2nd Defendant's evidence amounts to hearsay hence this court cannot rely on it.

59. The land the Plaintiffs are in occupation is unidentifiable though they did not have a title. I find that the same can be surveyed so that registration can proceed. This is an exercise that can be carried out.

60. I find that the plaintiffs have demonstrated that they are entitled to the land by way of adverse possession. In the case of **Nelson Rurira Kangethe & another Vs. Joyce Wambui Kamanja & 2 others (2018) KEELC 2348 (KLR)**, the court held;

“The Plaintiffs have met the basic requirements of adverse possession as set out; that is to say; They have enjoyed open and notorious use of the suit land, from which they have been cultivating in that part of the land, besides that the 1st plaintiff buried his father in the suit land; They have shown animus possidendi to possess the suit land by constructing their residential houses; They have resided on that portion of land to the exclusion of the

owner uninterrupted for over 12 years; They have enjoyed actual possession, since they have exercised immediate and direct physical control over that part of the suit land for a period of over 32 years; They have enjoyed non-permissive, adverse use, without the Defendants permission and inconsistent with their rights. The plaintiff's occupation meets the criteria for adverse possession."

61. In conclusion, I find that the plaintiffs have proved their case as against the Defendants on a balance of probabilities.

62. Accordingly judgement is entered for the plaintiffs as follows;

a) That the Plaintiffs have by adverse possession acquired an interest LR No. Kajiado/Kaputiei/839 measuring approximately thirty (30) acres and or resultant subdivisions LR No. Kajiado/Kaputiei Central/2348, 2347, 2346 and 2345 and the Defendants are hereby ordered to transfer it to the Plaintiffs within

Ninety (90) days from the date of this Judgement.

b) In Default the Deputy Registrar of this Hon. Court do execute the necessary documents to facilitate transfer of the land in (a) above to the Plaintiff.

c) That the Plaintiffs shall have costs of this suit.

Dated, Signed and Delivered virtually at Kajiado this 30th day of October 2025.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

Mr. Wandaka for the 1st Plaintiff.

Mr. Kalii for the 2nd Plaintiff.

Mr. Achillah for the 1st - 3rd Defendants.

N/A for the 4th Defendant.

Court Assistant - Peter.

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