

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KITALE**  
**ELC NO. 51 OF 2018**

**THOMAS RUTO KANDA-----**  
**PLAINTIFF**

**VERSUS**

**WALTER TOROITICH KILIMO-----1<sup>ST</sup>**  
**DEFENDANT**

**MOSES KIPLAGAT-----2<sup>ND</sup>**  
**DEFENDANT**

*As consolidated with KITALE ELC 67 OF 2019 (OS)*

**BETWEEN**

**WALTER TOROITICH KILIMO-----1<sup>ST</sup>**  
**PLAINTIFF**

**SAMWEL YATOR KILIMO-----2<sup>ND</sup>**  
**PLAINTIFF**

**JOSEPH KILIMP KIBOR-----3<sup>RD</sup>**  
**PLAINTIFF**

**AND**

**THOMAS KANDA RUTTO-----**  
**DEFENDANT**

**JUDGMENT**

1. This judgement is the subject of two matters to wit;  
**Kitale No. 67 of 2019 (O.S)** and **Kitale ELCC No. 51 of 2018** which were consolidated vide the order of this

court on 22/4/2021, with **Kitale ELCC No. 51 of 2018** as the lead file.

2. In ELC No. 51 of 2018, the Plaintiff seeks the following orders by way of a Plaint dated 10/5/2018.

**a) A declaration that the Plaintiff is entitled to exclusive and unimpeded right of possession and occupation of all that piece of land known as title number Trans Nzoia/ Suwerwa/1164 and the Defendants whether by themselves or their or their servants or agents or any other person otherwise claiming through them are not entitled to remain on the suit property which they should give vacant possession thereof.**

**b) A permanent injunction restraining the Defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining, entering, trespassing or otherwise interfering with the Plaintiff's quiet possession and enjoyment land title number Trans Nzoia/Suwerwa/1164.**

**c) General damages for trespass.**

**d) Costs of this suit together with interest thereon.**

**e) Any such other or further relief as this Honourable Court may deem appropriate.**

3. In the Amended Joint defence dated 28/2/2019, the defendants denied all the allegations in the plaint and urged that the suit be dismissed. Further, that the plaintiff

became the registered owner of the land comprised in Title No. Trans-Nzoia/Suwerwa/1164 (hereafter referred to as the suit land) on the 30/04/2010 and the land was subdivided from Title No. Trans-Nzoia/Suwerwa/25 and which had been registered in the name of Cheserek Kiptoo and measuring 105 acres or thereabout. Contrary to the averments in paragraphs 5 of the plaint, that the 1<sup>st</sup> defendant moved into the suit land in 2010, the defendants contend that they were born in Parcel No. Suwerwa 25 and which was a settlement fund trustee plot. They were born in 1972 and 1980 respectively. Additionally, that the 2<sup>nd</sup> defendant is not in occupation of any part of the land comprised in Parcel No. 1164.

4. They stated that the title to Parcel No. Trans-Nzoia/Suwerwa/25 was issued to Cheserek Kiptoo in 1998 and the defendant occupation of part of the suit land thereafter was adverse to the title of Cheserek Kiptoo. They urged that the plaintiffs' suit is barred by the Limitation of Actions Act, and for which reason the suit should be dismissed with costs.

### **Reply to Joint Defence**

5. In reply to the joint defence dated 15/2/2019 in ELC No. 51 of 2018 (O.S), the Plaintiffs denied the contents of the defence and averred that he was registered as proprietor by transmission upon confirmation of the Grant of Letters of Administration of the estate of **Cheserek Kiptoo vide Kitale High Court Succession Cause No. 106 of 2007** which Grant has ever been challenged by any person. He reiterated that the Defendants prior to 2010 were not in occupation or use of any portion of land comprised in title No. Trans Nzoia/Suwerwa/1164.
6. The plaintiff averred that Cheserek Kiptoo, deceased was registered as proprietor of the land title No. Trans Nzoia/Suwerwa/25 on the 9<sup>th</sup> day of September 1998 and he died on the 11<sup>th</sup> day of May 2001 hence the Defendants did not acquire any proprietary rights by adverse possession in (and title No. Trans Nzoia/Suwerwa/25 during his lifetime or at all thereafter. He maintained that the Defendants are trespassers onto the suit land and denies that the Defendants occupation of the suit parcel of land was adverse to the title of Cheserek Kiptoo. Further, that by the Defendants relying

on the doctrine of adverse possession it is an admission on their part that parcel of land title No. Trans Nzoia/Suwerwa/25 legally belonged to Cheserek Kiptoo and they did not legally acquire the same.

7. He urged that the claim is not statutorily time barred as the suit herein was instituted before the lapse of twelve (12) years.
8. The Originating Summons, dated 13<sup>th</sup> November 2019 sought the following orders;

**a) A declaration be made that the defendants right to fourteen (14) acres part of the land comprised in Title No. Trans-Nzoia /Suwerwa/1164 (a subdivision of Trans-Nzoia/Suwerwa/25) got extinguished by adverse possession upon expiry of 12 years w.e.f 9/9/1998 and during which time the plaintiffs have remained in open continuous, exclusive and adverse possession of the said land.**

**b) A declaration be made that upon expiry of 12 years w.e.f 9/9/1998 the defendant has been holding the fourteen (14) acres part of the land comprised in title No. Trans-Nzoia/Suwerwa/1164 (a subdivision of Trans-Nzoia/ Suwerwa/ 28) in trust for the plaintiffs.**

**c) An order be made under Section 38 of the limitation of actions Act, Cap 22 of the laws of Kenya, that the name of the Defendant as the**

**proprietor of 14 acres part of the land comprised in title No. Trans-Nzoia /Suwerwa/1164 be cancelled and replaced with the name of the plaintiffs herein, as the registered joint proprietors.**

**d) An order be made that the defendant do execute all such documents as would facilitate the sub-division of the land parcel No. Trans-Nzoia /Suwerwa/1164 in two portions of 14 and 6 acres respectively and then transfer the (14) acres to the plaintiffs herein and failing which the Deputy Registrar of this Hon. Court do execute all such documents, as would facilitate the sub-division and transfer of the 14 acres to the joint plaintiffs.**

**e) An order be made condemning the defendant to pay the costs of this suit.**

**f) Such further or other order or relief that this Hon. Court may deem fit to grant.**

- 9.** In the Supporting affidavit to the Summons, deposed by Walter Toroitich Kilimo, he deponed that he was born in plot No. 25 in Suwerwa Settlement Scheme in 1972 and that his parents have lived there since the early 1960's. Further, that his father welcomed his elder brother, namely Kanda Kiptoo, the father of the defendant into Plot No. 25. His father's position was that he was the one who had applied and was allotted Plot No. 25 in the names of Cheserek Kiptoo. Kanda Kiptoo subsequently

changed his names to Cheserek Kiptoo and on 09/09/1998, the title for parcel No. 25 Suwerwa Settlement Scheme was issued to him. He annexed a photocopy of the extract of title for Trans-Nzoia/Suwerwa/25 marked as WTK-1.

- 10.** That meanwhile, his father had already shared out the land in his possession among his children but part of the land still remained in the possession of Kanda Kiptoo alias Cheserek Kiptoo, and his children. From 1992 some fourteen (14) acres now part of the land comprised in title No. Trans-Nzoia/Suwerwa/1164 and which measures 8.09 hectares (20 acres) was jointly occupied by the plaintiffs and is registered in the name of Thomas Rutto Kanda.
- 11.** The deponent averred that Kanda Kiptoo died on the 11/5/2001 and after his death, the plaintiffs remained in the 14 acres part of the land now comprised in title No. Trans-Nzoia/ Suwerwa/1164. He put up houses and other developments on the land, annexing and marking as "WTK 3(a) - (g)" photographs showing his homestead and trees which he has planted on the land. He further stated that vide Kitale HC Succession Cause No. 106 of 2007,

both the defendant, Thomas Rutto Kanda and Nicholas Korir Kanda (brother to the defendant) obtained letters of administration over the estate of their late father namely Cheserek Kiptoo and he annexed marked as "RK 4" a photocopy of the grant.

**12.** The Grant was confirmed on 30/7/2009 and 20 acres' part of the title No. Trans-Nzoia/Suwerwa/25 was transmitted to the defendant herein. The same upon sub-division was now comprised in title No. Trans-Nzoia/Suwerwa/1163 measuring 8.09 hectares (20 acres) and fourteen (14) acres part thereof is the land that is to date occupied by the deponent and the plaintiffs to the exclusion of the Defendant. He annexed and marked as "RK 5" a photocopy of the Certificate of Confirmation.

**13.** That vide **Kitale HCCC No. 14 of 2010 (Thomas Rutto Kanda - V- Kibilo Kiptoo and 6 others)** filed on 4/2/2010 the plaintiff therein and who is the defendant herein, sought to evict the deponent and his family from parcel No. 25 but the suit was dismissed for want of prosecution on the 14/10/2016. After the sub-division of parcel No. 25 in 2010 a road divided parcel No. Trans-

Nzoia/Suwerwa/1164 into two. The portion occupied by the three of them measuring 14 acres and six acres on the other side of the road, and the Defendant took possession of the six (6) acre portion but the fourteen (14) acres portion has to date remained in the joint possession of the three (plaintiffs). He annexed as "WTK 6" a photo showing the layout of the land parcel No. Trans Nzoia/Suwerwa/1164.

- 14.** From 9/9/1998 they have continually occupied fourteen (14) acres part of the suit land and their possession has all through been adverse to the original registered owner and after sub-division, to the defendant. He also annexed and marked "WTK 7 and 8" the RIM showing the suit land and the mutation form for parcel No. 25. That upon expiry of 12 years, with effect from 9/9/1998, the defendant is holding the land in trust for him.
- 15.** The defendant therein filed a defence on 13<sup>th</sup> December 2019 in opposition to the summons. He urged that the plaintiffs have not acquired title to the suit land by way of adverse possession. He denied that they have been in quiet, continuous and exclusive possession of any part of

the suit property in excess of 12 years. He prayed that the originating Summons be dismissed.

- 16.** As foretasted, vide an order of the court, the two suits were consolidated and the matter proceeded to full hearing.

**Plaintiff's Case**

- 17. PW1 was Thomas Ruto Kanda** who adopted his witness statement dated 10/5/2018 and his further statement dated 13/12/2019 as evidence in chief. He stated that he knew of parcel no. Trans Nzoia/Suwerwa/25 as it used to be his late fathers' - Cheserek Kiptoo, who died in 2001. He stated that he had an allotment letter which his father was issued by the Settlement Fund Trustee on 31/10/1963 which he wished to mark as PMF1-1. His father was registered and given a title deed on 9/9/1998. He produced an extract of title - Green Card for plot Trans- Nzoia /Suwerwa/25 as P. Exhibit 2.

- 18.** After the issuance of the title there was a dispute from the younger brother to his father; William Kilimo Kiptoo, about the ownership, now deceased. He claimed that his father took the title wrongly and sued him in Eldoret High

Court No. 126/1998. It was then transferred to Kitale High Court. The case was dismissed on 10/11/2004.

- 19. PW2 was Nelson Odhiambo**, the Land Registrar in Trans - Nzoia County. He stated that he was the custodian of parcel files in respect of land parcels and that he had a record of parcel no. Trans Nzoia/Suwerwa/25 and the Green Card which is also called the register. He produced the same as P. Exhibit 2.
- 20.** When shown PMFI-2 he stated that before closure the register proprietor was Thomas Ruto Kanda and Nicholas Korir Kanda. They were subsequent registered owners after Cheserek Kiptoo who was registered as proprietor on 9/9/1998. Upon subdivision new parcel numbers were created. They were Trans-Nzoia /Suwerwa/1160-1166. He stated that he had the Green Card of Suwerwa/1164 which was registered in the name of Thomas Ruto Kanda. He was registered on 20/4/2010. He was issued with a title deed. He produced the Green card for Trans-Nzoia/Suwerwa/1164 as P. Exhibit 3.
- 21.** He further stated that there was a mutation form which gave rise to the new parcel from Suwerwa/25 which he

produced as PExhibit 4. Further, that there was a title deed issued to Cheserek Kiptoo before the land was registered to Cheserek. There was a transfer form which was filed with their office and the transferor was the Settlement Fund Trustees. The transferee was Cheserek Kiptoo. The transfer was dated on 9/9/1998 and he produced the transfer form as P. Exhibit 5. He further stated that to date there are restriction placed on parcel no. Trans-Nzoia/Suwerwa/1164 which was placed by the office of the CID. He stated that they said that investigations were ongoing; it says "No until investigations by CID is completed.

- 22.** During cross examination, he was shown P. Exhibit 3 and stated that the Green card shows that on 30/4/2010, Thomas Kanda was registered as the Administrator of the Estate of Cheserek Kiptoo. When shown P. Exhibit 2 he stated that it was the Green Card for Suwerwa/25 and the entry number 1 was in the name of Settlement Fund Trustees (SFT). The said entry was a restriction. That entry 4 and 5 were in respect of the title issued to Cheserek Kiptoo and entry 8 showed there was a

Succession Cause No. 106/2007. When shown P. Exhibit 3 he stated that it was the Green card for 1164. Thomas Kanda was registered as proprietor of the title on 30/4/2010.

**23. PW1** was recalled and continued with examination in chief. He produced the allotment letter as P. Exhibit 1, Copy of title deed for parcel no. Suwerwa/25 as P. Exhibit 6, certified proceedings of Kitale HCC 126/1998 as P. Exhibit 7, and the proceedings in the Succession 106/2007. Certificate of confirmation of Grant, ruling in **Kitale HCC 116 of 2009**, forgery inquiry No. 2/2000, Notice of Withdrawal of suit No. 14/2001 and copy of judgment in Kitale Chief Magistrate's No. 993 of 2011 as P. Exhibit 7-14 respectively.

**24.** He restated his previous evidence and urged that when the first case was brought, the defendant was living on a different parcel of land in the next scheme Keiyo Marakwet. When he started to complain he brought his wife to parcel no. Suwerwa/25 and she is still on the land. He further stated that after his father died he took out letters of Administration in the Succession Cause which

were confirmed and he registered the estate of his father on the parcel No. 25. He was given 20 acres.

- 25.** He stated that it was after the land was subdivided to 7 acres, and of the seven parcels, one was his, Trans -Nzoia Suwerwa/1164 he was issued with a title deed, produced as P. Exhibit 3, which he was given on 30/4/2010. Further, that he started using it but they prevented him from using all of it and thus he used 5 acres. The people who invaded the land were the 2 defendants that was in August 2010. He cautioned them and reported to the police. He further stated that the defendants are lying that they have been using the land since 1998 and prayed that the counter-claim be dismissed with costs.
- 26.** During cross examination he stated that No. Trans-Nzoia/Suwerwa/1164 was registered in his name on 30/4/2010. It was a sub division from Trans-Nzoia/Suwerwa/25 parcel No 25 and he was never the registered owner of parcel No. 25. Additionally, and that the register was closed on 30/4/2010 when it was subdivided and his father was the registered owner of parcel No. 25 until it was subdivided. It was subdivided

into 7 parcels and his was 1164. He further stated that his father was allocated parcel No. 25 in 1963. That five of the defendants are on the land comprising of the initial parcel No. 25. When shown P. Exhibit 4 he stated that it was the mutation of the parcel No. 25. At page 3 it is shown the 7 [Seven] portions. His late father's home was and is on the subdivision shown as A in the mutation. That is where his mothers' home is. It became parcel No. 1160 and his father was buried there.

**27.** He stated that when they were growing up they lived on the portion that became 1164. He stated that at page 3 of the mutation P. Exhibit 4, there is a main road which cuts across 1164 in some sections. The section through which the road passes is where he resides and is about 5 acres. He stated that parcel No. 1164 is 20 acres and from the 20 acres when 5 acres are taken out 15 remain. That is the parcel part where his two brothers the 2nd defendants in ELC 51 of 2018 reside.

**28.** When referred to Kitale OS No. 67/2019 filed on 14/11/2019, and annexures No. 6 with the affidavit sworn on 13/11/2019, he stated that on the photo, he saw three

houses [Samuel, Walter and Joseph's]. That the house for Joseph was on a different parcel of land known as 1165. According to what is shown on WTK 6, the house of Joseph is cut into two or lies between two parcels. The photograph is marked DMFI-6. According to the map the house for Moses is on parcel No. 1160 but what he knew was his is on 1164. He urged that the names have been interchanged or swapped and that according to the map only the two houses should have indicated as for being for Moses and Walter.

- 29.** He stated that in the annexure marked WTK 3[b] of the Affidavit sworn on 13/11/2019 he saw Walter, his brother. The parcel on which his house is and he is standing outside is parcel No. 1164. The upper photo shown as WTK 3 [a] is of Walter. At the next page are two photos of Walter. The photos were taken in a different place than on parcel No. 1164. On his land which is 1164, there are no gum trees. That the photo WTK 3 [e] does not represent the position on his ground. He stated that he recognized Samwel Yator in photos SYK 1 [a] - [g]. That the photos are in the market place but not on parcel No.

1164. At page 3 which shows annexures SYK1 [f] and [g], the houses are in his compound.

**30.** When shown Affidavit of Joseph K. Kibor sworn on 13/11/2019, he stated that it was Joseph's house and photo JKK I[b] shows trees but they are not on parcel No. 1164. He stated that he has not pleaded that he used to occupy the 15 acres of the parcel 1164 and was evicted therefrom. Further, that in the 2010 case, he filed it in his personal capacity. In paragraph 4 of the plaint he stated that he was the registered owner of parcel No. 25 and his name was registered as owner by then. It is shown in the Green card as such. He was registered as per the Green Card of 2010. When shown P. Exhibit 2 he stated that it was the original Green Card for parcel No. 25. Page 2 of the Green Card shows they [Thomas Kanda and Nicholas] were registered as Administrators of the estate of his father.

**31.** He stated that in paragraph 5 of the plaint he pleaded that the defendant and her children entered the parcel of land but did not say which year they entered the land. That they were living in their mother's homestead. That

the parcel belongs to his brother by name Joseph Kimutai. Additionally, that he has a different case with the lady or mother in Kitale Lower Court being **Kitale CM CC 92 of 2021 [CMCC 93 of 2021]**. That **Kitale HC 14/2011** was dismissed for want of prosecution on 11/10/2014 and he was not aware that was what happened.

- 32.** In his defence to the **Originating Summons 67/2019**, he referred to other cases such as **Kitale HCC 126 of 1998**. When referred in P. Exhibit 7, he stated that the case was also dismissed for want of prosecution. He referred to **HCC 116 of 2009**, where William Kiptoo sued him and his brother. It was also dismissed for want of prosecution.
- 33.** The Plaintiff closed his case and the Defendants called their witnesses in support of their case.
- 34. DW1** was **Walter Toroitich Kilimo** who adopted his witness statement dated 28/2/2019 as evidence in chief. He stated that Trans Nzoia/Suwerwa/25, was for Cheserek Kiptoo. His father William Kilimo Kiptoo and Kanda Kiptoo were the ones residing on it since 1960's when the land was allocated. Between his father and Kanda Kiptoo, the

land was divided into two. There is one section on which their family resided and another where the family of Kanda resided. In their family they were 8 in number, six brothers and 2 sisters of the eight all of us were born on the land. His father had subdivided the land between the sons in 1992. Further, that he still resides on that part or portion he was allocated and has born children on it. The land No. 25 was initially of Settlement Fund Trustees (SFT). He stated that he filed a copy of the green card for parcel No. 25. The title was first given on 9/9/1998 in the name of Cheserek Kiptoo. Later on 30/4/2010, it was transferred to Thomas Ruto Kanda and Nicholas Korir Kanda who are brothers. They were administrators of the estate of Cheserek Kiptoo.

- 35.** That Cheserek Kiptoo died on 11/5/2001. He produced the Green Card as D. EXhibit 1 and stated that after he died he still remained on the land, at the portion which was given to them by their father. Each of them was shown where we were to reside. He stated that he took seven photographs on the place. The 1<sup>st</sup> one shows material he had on the ground before building. The 2<sup>nd</sup> and 3<sup>rd</sup> show

the house he built. The 3<sup>rd</sup> one shows Cyprus trees that he planted. The 4<sup>th</sup> shows bricks he used for buildings. The 5<sup>th</sup> shows blue gums he planted. The 6<sup>th</sup> is showing tilled land and the 7<sup>th</sup> is of trees he planted.

**36.** Counsel for the defendant objected to the production of the photos and the court held that there is no certification of the photographs in terms of Section 106 (b) (4) of the Evidence Acts the authenticity of the photographs comes sharply in focus. Thus, the objection was upheld.

**37. DW1** produced a copy of letters of Grant of Administration in respect of the estate of Cheserek issued on 13/11/2008 and confirmed on 30/7/2009 as 1 D. Exhibit 4 & 5. After the confirmation the land which was approximately 105 acres was subdivided among seven (7) people. Thomas Kanda was given 20 acres. When the grant was confirmed a surveyor did not visit the ground to fix boundaries. Thomas Kanda claimed parcel No. Trans Nzoia/Suwerwa/1164. He came across a copy of the Mutation from the Lands Office which showed he occupies parcel No. 1164 which was the same one which was to fall to the plaintiff. The portion on which he was on is portion

E, in the Mutation. It is shown as 1164 which is 8.09 Hectares in size. The mutation shows a road that cuts into the land.

- 38.** On portion E, his two brothers and himself occupy reside on 14 acres on the lower part of the road. On the 6 acres remaining on the upper part resides Thomas Ruto Kanda. Thomas started occupying the upper part of the land in 2012, after the grant was given. He planted blue gums. He produced the mutation form as D-Exhibit 7.
- 39.** He stated that there was a Registry Index Map [RIM] of the area to show how the photos as shown about the ground were on the ground. He produced the RIM of Suwerwa Settlement Scheme was produced as 1 D-Exhibit 8. He stated that Thomas did not enter the land when the title was first given. He lied to the court. In **ELC No. 51/2018**, in the Plaint, Thomas did not place the year they entered onto the land.
- 40.** He stated that at paragraph 15 of the Originating summons, Thomas referred to **Kitale HC Civil Suit No. 14/2010**. In it he had prayed for eviction from the land. By 4/2/2010, he had not gotten title to parcel No. 1164.

The green card produced as D-EXhibit - 1 actually shows Thomas was registered on 30/4/2010. From 1998 to 2018 when **ELC No. 51/2018** was filed they had stayed on the land for over 12 years.

- 41.** During cross examination he stated that his father William Kilimo Kiptoo was also known as Cheserek Kiptoo. That he was given land parcel No. Suwerwa/25 by the Scheme Fund Trust (SFT). He had not brought to court any documents to show that the land was given to Cheserek Kiptoo and not his father. After Cheserek was given the land they reside on it well without any dispute. Between 1972 and 2007 when his father died, there was a dispute between his father and his brother. It was on parcel No. 25 Suwerwa. The dispute came to a court of law.
- 42.** He stated that his father sued Cheserek Kiptoo. There was for instance case No. **Kitale HC 126 of 1998** where William K. Kiptoo sued Cheserek Kiptoo but the case was dismissed. Kanda Kiptoo died in 2001. Before Kanda died his father raised or made a claim of forgery in the DCI Offices. It was **No. 2 of 2001**. The complaint was over land. Each of the two were claiming the entire

Suwerwa/25. The complaint was dismissed. Thomas Kanda and his brother took out letters of Administration in **Kitale High Court No. Succession No. 106 of 2007**. In the Succession his father filed an objection so as to block it. The objection was dismissed.

**43.** He stated that he knew **Kitale High Court Civil Case No. 116 of 2009**. William K. Kiptoo sued Thomas Kanda and Nicholas Kanda. It was in respect of Suwerwa/25. The suit was dismissed. After the confirmation of grant he knew a Grant was issued. He did not Appeal against the Grant. After the Grant, title deed were issued, Thomas Kanda got his title deed in 2010. Before 2010, Thomas R. Kanda was not a registered owner of parcel No. 1164. He stated that he was using 14 acres of the land No. 1164 but he had not given evidence to show that he uses 14 acres of 1164.

**44.** He stated that the photographs taken, marked as DMF1 3(a) - (g) were taken by a photographer. He was not the one who took them and the photographer was known as Malachi Toroitich. He further stated that they called a surveyor to the ground after they were sued and that by

the time he sued in the **Originating Summons 61 of 2019**, the surveyor had already visited the ground. He urged that they used to be peaceful but there have been cases in court over the land.

**45. DW2** was **Samwel Yator**, the 2<sup>nd</sup> Plaintiff in the originating summons in the suit No. 51, the 1st Defendant was not a Defendant. In the Originating Summons he swore an Affidavit on 13/11/2019. He stated that he resides in Suwerwa Settlement Scheme on plot No. 25 on a plot that used to belong to Cheserek Kiptoo since he was born in 1982. Cheserek Kiptoo was registered as owner No. 1998. On the parcel he resides with his brothers Walter and Joseph Kilimo. That they were settled on the place by their father, William Kilimo Kiptoo.

**46.** He stated that Cheserek died in 2001 and parcel No. 25 was finally subdivided. The one who was given the number on which they reside was Thomas Ruto Kanda. The number of the parcel is 1164. The parcel No. 1164 is approximately 20 acres. They occupy 14 and Thomas has 6 acres. There is a separation of the two portions by a road. Thomas is on the upper side while we are in the

lower side of the road division. He stated that Photos SYK 1 [c] shows blue gum trees and the 2<sup>nd</sup> photo SYK [b] is a forest of trees he has planted. That the 3<sup>rd</sup> photo SYK 1 [a] are bricks he had worked and the 4<sup>th</sup> photo is 1 [d] which his bananas and fruits trees are. The next two are his houses. SYK [f] - a store and the trees around it [SYK [g] is the back yard of his home.

- 47.** During cross examination, he stated that he has been residing in plot No. 25 Suwerwa. The parcel was subdivided and he did not see Surveyor come to the site. The parcel was divided into 7 portions of which 1164 is one. That is the suit land. He stated that he did not have a report to show it is which size Walter has built on 1164 too and he plants and grazes. He occupies about 5 acres. Joseph Kilimo too uses about 7 acres of the 1164 parcels. That is the only portion of the parcel 25 we use. I do not occupy plot No. 1160. That is a lie. That plot No. 25 was subdivided to plots 1160-1166. His 2 brothers and himself use only 1164.
- 48. DW3 was Joseph Kilimo Kibor** who adopted his affidavit as evidence in chief and stated that he resides on parcel

No. 1164 registered in the names of Thomas Ruto Kanda. The photos annexed to the affidavit as JKKI [a] and 1 [b] show his house in photo 1 [a] and blue gum. He produced the photos marked as DMF1-1 [a] and [b].

**49.** During cross examination, he stated that his father was known as William Kilimo Kiptoo. That Plot 25 was owned by Cheserek Kiptoo. That Cheserek Kiptoo applied for allotment and got it. Walter did not say right. That Cheserek Kiptoo died in 2001 and before his death he and his father did not have a dispute over the plot No. 25. When referred to a case filed in 1998 he agreed that there was a case and by that time Cheserek Kiptoo was alive. He died in 2001 and he stated that he did not know what the case was about.

**50.** He stated that he knew **Succession Cause 106 of 2007** about the Estate of Kiptoo but he did not know whether his father objected in it. When referred to 116/2009 HC Kitale he stated that it was in relation to parcel No. 25. He stated that Thomas Ruto Kanda got registered in 2010. Further, that he claims plot No. 1164 and he has lived on the land for more than 12 years since he got title.

- 51. DW4** was **Okwano Alfred** who stated that he usually keeps Registry Records in Kitale. He produced **Kitale High Court Civil Suit No. 14/2010 between Thomas Ruto Kanda -vs- Kobil Kiptoo and 6 others**. The suit was determined on 1/10/2016 and was dismissed for want of prosecution by Justice E.O Obaga. He produced the original court file produced as Exhibit 9.
- 52.** During Cross -Examination he stated that the parties in the matter are Thomas Ruto Kanda -vs- Kobil Kiptoo, Walter Kilimo, Robert Kilimo, David Kilimo alias Joseph Kibor, Samuel Kilimo, Moses Kilimo and Edward Kilimo, in Relation to the instant matter in court in ELC he only knows Kanda. Further, that he could confirm that in the **High Court 14/2010** there was a counterclaim. It was filed on 25/7/2011. It was by the 1<sup>st</sup> to 7<sup>th</sup> Defendants. He stated that the dismissal of the suit for want of prosecution as in 2016.
- 53. DW5** was **Simiyu Edward David**, a Land Surveyor. He stated that in 2018, he got instructions from Mzee William family, a father to Walter and Moses to go and determine the area of land Mzee Williams family was occupying. He

went to the land office to get an RIM for the area and a copy of the mutation of Trans-Nzoia/Suwerwa/25. He got the documents to visit the site, and found Walter and his team. They assisted him to identify the external boundaries of the land. The boundaries were marked by Cedar posts and barbed wire. He then used a GPS machine to pick coordinates of the corner points. He used his laptop with the GPS coordinator to project to WGS 1984 i.e. World Geotactic System 1984. It is a satellite system which navigates to determine the ground position of a place. The WGS was linked to Arch 1960. The WGS gives a spherical projection shade of the place. The Arch 1960 connects the Spherical Projection to plan metric in projection. The image is received by the laptop and then the map is printed. After printing the map which is the image given by the Satellite the map compared with ground the mutation that had been used and the RIM the figures matched. He then picked the homesteads using the GPS and the housed on the land. He used the coordinates to compute the area under occupation.

**54.** After matching the satellite image and the RIM, he was able to determine the other area occupied by the other family. On computing the acreage, parcel 1 which was occupied by William's family was 25.8 hectares and parcel 2 was 18.9 hectares. His observations were; -

- 1] Parcel 1 has a perimeter of Cedar posts and barbed wire. The cedar posts were not new. They were old.**
- 2] There was a rain forest of gum trees and Cyprus trees which were old enough. The trees appeared to be more than 10 years old.**
- 3] There were no visible sub divisional boundaries on parcel No. 25 [Suwerwa]. He was informed that no survey had been done to fix the boundaries.**
- 4] He was informed that Mzee William had been on the parcel of land from 1960s when it was allocated.**

**55.** He stated that the homesteads he located are visible on the photographs. He indicated names of occupants of the homesteads. He saw the mutation and RIM. From the mutation of the area shows the homesteads of Samwel and Walter and part of Joseph's are on parcel no. Suwerwa/1164. They occupy part of the land. There is a road that passes through the parcel of land No. 1164. The acreage not occupied by the three which is on the other

side of the road is 2.6 hectares, approximately 6.4 acres. The acreage of the total parcel No. 1164 was 8.09 hectares as per the mutation form. That translates to 5.49 hectares when the 2.6 hectares is taken off. The balance of 5.49 hectares translates to 13.6 acres. On the parcel occupied by the 3 person, he indicated were the only ones on 1164. The other members of family are on other parcels of land. He stated that he did a report and signed on 15/11/2018. He also did a certificate of photographic print. I did it on 15/1/2024. He produced the report and the certificate of photographic print and their photographs as D-Exhibit 6; 6(a) - Certificate; 6[b] - Survey report 6(c) three prints.

- 56.** During cross examination, he stated that he visited parcel no. Suwerwa/25 and prepared the report on 15/11/2018 after he had done the field work. He was instructed by William only as the report shows. He stated that there were no Physical features to confirm that subdivision was done on parcel No. 25. Before mutation is registered field work must be done. Registration of the mutation had been done in the land Registry. Parcel No. 1 which is

shows was divided into 2 portions as shown. Portion No. 1 was occupied by the three persons he mentioned. Parcel No. 2 was occupied by the other family. Parcel No. Suwerwa/25 was registered but I did not capture in whose name it was registered. The parcel No. 25 was not registered in William name. He identified the boundaries by physically walking around the farm and the abuttals. Under doing so he was with William children. They are the ones who showed him the area they occupied. They pointed out the external boundaries which were cedar posts.

**57. DW6** was **Oscar Toroitich Chelimo** alias **Malaki** who stated that he knew Thomas Ruto Kanda and the other plaintiff who are his neighbours. In November 28 of 2018 they asked him to take photographs. He took the photographs using his phone. He went to the cyber and printed the photographs and did a certificate to confirm. He produced the photos for Walter as 3 (a) - (g). The photos for Samuel were produced 3 [b] a - [f]. Those for Joseph were produced as D-Exhibit 3 [c] a-b.

**58.** This closed the defence case. Parties were directed to file submissions in the suit.

**Plaintiff's Submissions**

**59.** Learned counsel for the plaintiff submitted on whether the Plaintiff is the absolute and indefeasible owner of the suit land by citing Section 26 (i) of the Registered Land Act. Counsel submitted that the plaintiff attached a green card and a copy of the title to the suit land yet the Defendants on the other hand are only claiming this land by virtue of adverse possession and occupation and have not adduced any title to their names. That it has been said time and again that a Title Deed is an indefeasible evidence of the ownership of land and the Plaintiff clearly established how he acquired the title to his land in the year 2010. There has not been any challenge by the Defendant's on the Plaintiff's title by reason of fraud or otherwise as envisaged under the Land Registration Act.

**60.** Counsel urged the Court to find and hold that the Plaintiff is the rightful registered proprietor of the suit land having been issued with a valid title deed and the boundary properly delineated following a subdivision as a result of

complete succession proceedings and is thus entitled to protection of the Constitution 2010 under Article 40 thereof and the law.

- 61.** On the issue of adverse possession, counsel submitted that the threshold for adverse possession is to be found in the Court of Appeal's case of **Wilson Kazungu Katana & 101 Others v. Salim Ahmedsalim & another [2015] eKLR**. Further, that it is trite law that an owner would be deemed to be in possession of a property so long as there is no intrusion and "non-use" of the property by the owner even for a long time will not affect his title in the absence of prove that the adverse party's possession is "nec vi, nec clam, nec precario", that is, actual, peaceful, open exclusive and continuous occupation for the prescribed statutory period.
- 62.** Citing the Court of Appeal in the case of **Mombasa Teachers Co-operative Savings and Credit Society Limited v Robert Muhambi Katana & 15 others (2018) eKLR**, counsel submitted that this being a claim for Adverse Possession, the burden of proving this is on the person asserting adverse possession lies with the

Defendants and who must demonstrate that they have been in continuous possession of the suit land for 12 years or more; that such possession has been open and notorious to the knowledge of the Respondent and that they have asserted a “hostile title” to the Plaintiffs property.

- 63.** Counsel urged that the Defendants have jointly pleaded that their occupation started sometimes on the 19/09/1998. He urged that when they testified it emerged that their testimonies in respect of the date of entry into the star land was contradictory. DW1 said that he was born there in the year 1972 and DW2 also maintained that he was born there in the year 1982. Surprisingly this is not pleaded at all. DW3 would also say the same story yet they did not have this information in their pleadings. Counsel urged that the Defendants entered the suit land in the year 2011, starting off on the portion then occupied by their mother which is certainly not the suit land herein. Before this the Plaintiff had been using this land grazing his animals and the 5 Acres was being used by him for cultivation of crops.

64. Counsel urged that it is common practice among Africans to settle down or make provisions to accommodate close family members on land widowed from the ancestral land, pointing out that the Defendants admitted that the suit land is not ancestral land at all. They even admitted that they have other land parcels owned by their father which constitute their family land.
65. Counsel submitted that the issue calling for determination is whether the Defendants being close family relatives (cousins) to the Plaintiff are on the suit's land by virtue of adverse possession. That DW3 testified that his father applied to be allotted plot number Trans Nzoia/Suwerwa/25 from which the suit land resulted. He stated that it is now trite that an applicant for adverse possession must prove that the possession is non-permissive and non-consensual. As to Consent or License, he placed reliance on the decision in **Mwinyi Hamisi Ali vs A.G. & Philemon Mwaisaka Civil Appeal No. 125 of 1997** (*sic*), that adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as statutes govern the

court. The court said consent might be oral, written, or implied, which must be a question of fact that the court must determine.

- 66.** He also cited the case of **Rodgers Mwamboje vs Douglas Amboje (2014) eKLR** and the case of **Samuel Kihamba v Mary Mbaisi CA Civil Appeal no 27 of 2013 [2015] eKLR** and urged that the point of entry is doubtful. That Courts have since maintained that without any evidence or finding as to when the possession by the Plaintiff became adverse to that of the defendant or when the suit became barred by limitation a claim of adverse possession should not be deemed to have accrued. It emerged during trial that the Defendants despite being close family members were not privy to all the family transactions in general and in particular between what transpired between their deceased father and the plaintiffs deceased father regarding the suit land.
- 67.** Counsel submitted that there is nothing on record that shows that the Defendants assumed occupation of the suit land in 1998. The Defendants occupation of the suit land from the year 2011 was not without disputes. In fact,

there have been disputes in Court in respect of the parent title from which the suit land herein was subdivided from the same year 1998 between their parents in respect of whom they have since claimed ownership. This was between the years 1998 and 2016 or thereabouts. Counsel urged that if indeed they were in occupation from 2011, then the same “could not have been peaceful” in view of the prevailing circumstances then.

- 68.** Counsel urged that it is trite law that time begins to run when the true owner ceases to be in possession of his land. He cited the **Court of Appeal’s decision of Wambugu -vs- Njuguna (1983) eKLR** urging that the Plaintiff established his presence on the portion now being utilized by the Defendants when he used to graze his animals before they came in. That he uses a portion of approximately 6 Acres himself for cultivation. Counsel urged that whether such possession has been open and notorious to the knowledge of the owner, the Defendants produced copies of uncertified photographs as evidence of their possession and occupation of this property. DW6 was barely in a position to clarify how these photos were

taken and did not know the details of the gadget used. That the photos were not admissible in light of Section 106B of the Evidence Act and Article 50(4) of the Constitution of Kenya 2010.

- 69.** Counsel submitted that possession is a matter of fact and there must be actual possession which requires some sufficient degree of physical occupation placing reliance on the case of **William Kipnyor Rotich vs Paul Kiproop Karoney [2020] eKLR** and urged that the photographs cannot satisfactorily demonstrate that the defendants have been in actual occupation and possession with the knowledge of the owner. Further, that if the essential elements of adverse possession are not proved, the claim of adverse possession must fail and the defendants have not proved their case on a balance of probabilities. Counsel urged the Court to find that the Defendants trespassed into the Plaintiffs land.
- 70.** On whether as a result of the same; the Defendants should be permanently restrained, counsel placed reliance on the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A.** and prayed the court grant the orders

sought in the plaint with costs and dismiss the Defendants' Originating Summons brought vide **E & L No. 67 of 2018** (Counter-Claim) for lack of merit.

**Defendants' Submissions**

- 71.** Counsel for the defendants laid down the history of litigation and proceeded to submit on the identified issues for determination.
- 72.** On the issue of When the Plaintiffs in the Originating Summons took possession of 14 acres of the suit land, counsel submitted that in the plaint filed on 10/5/2018 it is pleaded in paragraph 5 that the defendants sometimes in 2010 wrongfully entered and took possession of 15 acres or thereabouts, forming part of the suit property. And in paragraph 6 it is pleaded that the defendants are erecting developments and putting up structures of permanent nature without the consent and knowledge of the plaintiff. The defendants (plaintiffs in the OS) pleaded that they were born in the land comprised in plot No. 25 in Suwerwa settlement scheme. He pointed out that it is the plaintiffs case in the OS, that their parents entered into plot No.25 Suwerwa Settlement Scheme in early

1960's and that the father (William Kilimo) welcomed his elder brother Kanda Kiptoo into the land and which measured 103.7 acres. But the allotment letter and the subsequent title got issued in the elder brother's name (Kanda Kiptoo alias Cheserek Cheptoo).

- 73.** He further stated that the land was shared between the two brothers and analysed the evidence of DW5. He submitted that the land which had been occupied by Williams family (father to the plaintiffs in the O.S measured 25.8 ha (63.7 acres) while the land that had been occupied by Kanda Kiptoo father to the defendant in the OS) was (18.9 ha i.e. 46.68 acres). He testified that he boundary between the two (2) blocks were cedar posts and barbed wire and further, that the cedar posts were old. This witness also confirmed that from the photographs he printed, the homes of the defendants and the standing trees are clearly visible. Further, that from the mutation he could tell that the defendants occupied part of plot No. 1164. The portion occupied by the defendants measured approx. 6.4 ha, while the balance of 2.6 ha, was occupied by the plaintiff (defendant in the

O.S). Further that a road and which was clearly visible in the mutation and the photographs separated the two portions.

**74.** Counsel urged that from the pleadings of the plaintiff, it was not pleaded that the plaintiff had ever occupied the portion comprising the 6.4 ha, occupied by the 3 plaintiffs in the O.S. There were no pleadings that he had been in occupation, and that the plaintiffs evicted him therefrom. Indeed, there was nothing pleaded to the effect that he ever grazed any animals therein.

**75.** Counsel pointed out that the plaintiff's case was that by 1992, their father shared the land among his sons, and that the 3 plaintiffs were given the 20 acres that now comprise parcel No. 1164. They effected their developments from 1992. In terms of buildings, planting trees and food crops and that is clearly evidenced by the photographs that were produced. They used the portion across the road for grazing their animals.

**76.** He urged that DW5 produced his report as D Exh 6 (a) and photographs, Def Exh 6 (c). The said photos clearly show that the 3 plaintiffs are occupying part of parcel No.

1164 registered in the name of the defendants in the OS. In his evidence in Chief, PW1(in the suit herein) stated that the defendants invaded his land in August 2010. He said that he reported to the police, but he had nothing to show for it. Under cross examination, he admitted having filed a suit, being, **Kitale HCCC No.14 of 2010 (Thomas Rutto Kanda -v- Kobilo Kiptoo and 6 others)** including the defendants herein, on the 4/2/2010. As per paragraph 3, of that plaint, it was pleaded that all the defendants had entered on the defendants' land-parcel No. 25 Suwerwa settlement scheme. He did not plead the time of entry. That makes it clear that the plaintiff's entry was well before the sub-division of parcel No. 24 into 7 portions. The plaintiff was extremely economical with the truth and the court should believe the plaintiffs that they entered into the land comprising part of parcel No. 1164 in 1992.

**77.** Counsel urged that under cross-examination, the defendant in the OS stated that after his schooling he put up a house in the land where his father lived. Shown as portion No. A in the mutation, and which became parcel

No. 1160 after the sub-division. It is therefore clear that the defendant in the OS only moved from parcel No. 1160, when he went to plot No. 1164 and occupied the upper portion across the road and which measures 2.6 hectares. He could not take possession of the lower part because it was fully occupied by the defendants all through although from 1992. Although the entry and occupation of part of the land now comprised in parcel No. 1164 was from 1992, yet the land that still owned by the SFT. It is on record that title got issued to Cheserek Kiptoo alias Kanda Kiptoo (father to the defendant in the O.S) on the 9/9/1998. Time under the law of limitation of actions Act could only run after title got issued.

- 78.** Counsel submitted that the registered owner died on 11/5/2001 and the plaintiffs continued to be in possession, and to date they are still in possession. He prayed the court find and hold that by 9/9/1998, the plaintiffs in the O.S were already in possession of fourteen (14) acres that are now comprised in land parcel No. 1164 registered in the name of the defendant in the O.S.

**79.** On whether the suit is time barred, counsel cited Section 7 of the limitation of actions act and urged that the title for land parcel No. Trans-Nzoia/Suwerwa/25 got issued to Cheserek Kiptoo on the 9/9/1998. The death of the registered owner on the 11/5/2001 could not stop the running of time as against the estate of the deceased. A grant of letters of administration over the estate of Cheserek Kiptoo was issued to Thomas Rutto Kanda (defendant in the OS) and his brother Nicholas Korir Kanda, on the 13/11/2008. The grant was confirmed on the 30/7/2009. The two administrators had upto 9/9/2010 to recover the land from the Plaintiffs in the O.S. The 12 years were to lapse on that 9/9/2010, The 2 administrators never filed a suit to recover the land occupied by the plaintiffs in the OS. That is on record that on the 14/2/2010 Thomas Rutto Kanda filed Kitale HCCC No. 14 of 2010 against Kobilo Kiptoo and 6 others, seeking their eviction from parcel No, 25. Under cross examination, he admitted that he was not the registered owner of the land parcel No. Trans-Nzoia/Suwerwa/25. Contrary to what he pleaded in the plaint that he was the

registered owner of that parcel. He further admitted that he filed that suit in his own personal capacity and that his co-administrator Nicholas Korir Kanda was not a party to that suit.

**80.** Counsel urged that as per the evidence of Nelson Odhiambo (PW2) under cross examination, he confirmed that the green card for parcel No. 25 was closed on 29/4/2010. The defendant in the OS was registered as the proprietor of parcel No. 1164 on the 30/4/2010. That by 14/2/2010 when Kitale HCCC No. 14/2010 got filed, the 12 years were short by 7 months and 5 days. The dismissal order for want of prosecution was made on 11/10/2016. The plaintiffs were still in possession. Seven months and five days later would lapse on the 16/5/2017. So that even if for argument sake, time stopped running from 14/2/2010. Yet time would have started running again w.e.f 12/10/2016, and by 16/5/2017, the 12 years would have lapsed since the plaintiffs in the OS were still in occupation.

**81.** The present suit was filed on the 10/5/2018. That was clearly outside the 12 years provided by law. The

suit/claim was therefore filed out of time and it should be dismissed. He placed reliance on **Eldoret C.A. Civil Appeal No. 267 Of 2014 Kenya Forest Service** **Versus Rutongot Farm Limited** (*sic*).

- 82.** On whether the possession of the land by the plaintiffs was adverse to the defendant in the O.S counsel submitted that the answer should be in the affirmative for the following reasons; By the time the title to the property got issued on the 9/9/1998 in the name of Cheserek Kiptoo, the plaintiffs were in possession. The plaintiffs had therefore dispossessed the owner of the land of his land. By the time the registered owner Cheserek Cheptoo died, he had not attempted to recover the land from the plaintiffs in the O.S.
- 83.** That in the suit that had been filed by the defendant in O.S. against Kobilo Kilimo and her six sons i.e. Kitale HCCC No. 14 of 2014, he pleaded in paragraph 5 of the"plaint that the entry into the suit land (Trans-Nzoia/Suwerwa/1164) was without any colour of right and without the consent of the plaintiff and that they were trespassers in the land. That even in the suit herein

**(ELC Land Case No. 51 of 2018)** the plaintiff in the suit clearly pleaded in paragraphs 5 and 8 of the plaint that the entry into the suit land by the defendants (plaintiffs in the O.S) was without any colour of right, and that they were trespassers. May your lordship find and hold that the occupation of the suit land by the plaintiffs in the O.S. was adverse to the plaintiff.

- 84.** That time started running on the 9/9/1998 when title was issued to the defendant's father and who was not in occupation. By the time the defendant in O.S, got registered as the owner of the land on the 30/04/2014, the plaintiffs in the O.S were still in occupation. By the time the suit herein got filed, the 12 years had already elapsed.
- 85.** Counsel urged that the change in ownership did not affect the running of time, placing reliance in the court of appeal decision in **Nairobi C.A. Civil Appeal No. 42 of 1997 (unreported) Peter Thuo Kuria versus Kuria Gacheru.**
- 86.** He urged that the plaintiff never pleaded that the defendant's entry was with the permission of the plaintiff

or his father and therefore cannot be allowed to now change his position and say that he had permitted the defendants entry into his land. Counsel placed reliance in the decision in **IEBC and another v Stephen Mutinda Mule & 3 others (2014) eKLR** in this regard.

**87.** Counsel submitted that it became apparent that the father to the plaintiffs in the O.S. commenced several cases against the defendant's father. Some of the cases were quoted as **Kitale HCC No. 126 of 1998** and **Kitale HCC No. 116 of 2007**. These cases were dismissed for want of prosecution. It was clearly admitted that no counterclaim had been filed by the defendant in the said cases. Time therefore continued to run as against the father to the defendants and subsequently against his estate and against the defendants in the O.S. until 12 years elapsed. Only the filing of a suit to recover land or a counterclaim in a suit filed by the person in occupation can stop time from running.

**88.** Counsel urged that the plaintiffs in the O.S have proved their case on a balance of probabilities and to the requisite threshold. The plaintiff's suit in Kitale ELC Land

Case No. 51 of 2018 should be dismissed with costs. The O.S on the other hand should be allowed in terms with prayers in the said originating summons. The costs of the counterclaim should also be awarded to the plaintiffs in the O.S.

### **Analysis and Determination**

**89.** The following issues arise for determination;

**(a) Whether the Plaintiff is entitled to exclusive possession of the parcel of Land known as LR No. Trans Nzoia/Suwerwa/1164.**

**90.** The suit herein pertains to one issue, the ownership of the suit land. On the Plaintiff's part, his claim to the suit land is based on registration of title. The suit land was part of a portion known as LR No. Trans Nzoia/Suwerwa/25 which he alleges belonged to his father and that the portion that the defendants seek to claim, was sub divided and apportioned to him through succession. The Defendants, on their part, dispute the plaintiffs' ownership of the suit land. According to the defendants, their father welcomed his elder brother, Kanda Kiptoo to **LR No. Trans Nzoia/Suwerwa/25**. They allege that their father applied for plot no. 25 in the names of Cheserek Kiptoo and

further, that the defendant then changed his name to Cheserek Kiptoo and that is how he obtained the title.

**91.** It is trite law that he who alleges must prove. This principle is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

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

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

**92.** Sections 109 and 112 of the same Act states:

***"109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.***

***"112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."***

**93.** In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi**

**M'Nabea vs David M. Wachira [2016] eKLR** held:

***"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will***

**assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.**

**.....The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280* where it was held that:**

**“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”**

**94.** Section 26 of the Land Registration Act, 2012 provides:

**“26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**  
**a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

***b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme***

***(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”***

- 95.** From both the plaintiff’s pleadings in **Kitale ELC No. 51 of 2018** and his evidence, the Plaintiff is not in possession of the 14 acres being the subject of this suit. That is why he prays for general damages for trespass as one of the reliefs. Again, he did not plead for the eviction of the Defendants.
- 96.** Parties are bound by their pleadings. It is not possible for the court to give a relief not sought by the parties through their pleadings.
- 97.** That aside, the Plaintiff produced an allotment letter for LR No. Trans Nzoia/Suwerwa/25 which was issued to Cheserek Kiptoo alias Kanda Kiptoo and transferred from the Settlement Fund Trustee on 09/09/ 1998. He also produced a title deed for the parcel and the green card. The documents showed that the suit parcel was subdivided from parcel no. 25 on 29/04/2010 and registered in the names of the plaintiff; Thomas Rutto Kanda. He

also produced the grant of letters of administration where he was appointed a personal representative of the estate of Cheserek Kiptoo together with Nicholas Korir Kanda. In the succession proceedings, parcel no. 25 was indicated to form the estate of the deceased. It was then subdivided to form 7 parcels as evidenced by the mutation form produced by the plaintiff.

**98.** From the evidence tendered by the plaintiff, it is clear that he obtained the suit land via transmission from his fathers' estate. But his father having not been the original owner obtained the same too by way of inheritance from the grandfather. By virtue of that his father was registered as owner but also in trust for his siblings.

**99.** This moves the court to the next issue for determination.

**(b) Whether the allegation that the father to the plaintiff registered the suit land in the name of Cheserek Kiptoo instead of his name thereby creating a trust.**

**100.** The Defendants did not tender any evidence with regards to this allegation. I also note that they did not address the issue of a trust in their submissions despite pleading it as one of the issues they sought to determine in their Originating Summons. Additionally, the defendants did

not state the type of trust that they alleged was created by the actions of Cheserek Kiptoo. But there is clear evidence, as found above, that the suit land was initially owned by the father to the Plaintiff's father, and the Plaintiff's father was not the only child of the said parent/grandfather to the plaintiff. The question then is, how could the plaintiff's father be registered as sole owner of the land inherited from his father to the exclusion of the other siblings, unless it was by way of a gift *inter vivos*, which was not?

**101.** According to the **Black's Law Dictionary, 9th Edition;**  
**a trust is defined as**

***"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."***

**102.** In the case of **Kazungu Fondo Shutu vs Japhet Noti Charo (2021) eKLR**, the Court of Appeal stated as hereunder;

***The concept of trust must however, be proved. This Court in the case of Mumo v Makau [2002] 1 EA.170, held that "trust is a question of fact***

***to be proved by evidence.....” See also Kanyi Muthiora v Maritha Nyokabi Muthiora, Nairobi Court of Appeal No.19 of 1982.***

**103.**In **Twalib Hatayan Twalib Hatayan & Anor v Said Saggar Ahmed Al-Heidy & Others [2015] eKLR** the court stated as follows: -

***“Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”***

**.....**

***A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained.***

**.....**

***A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee...***

**104.** Keeping in mind the definitions above and the evidence before this court and the deduction is that there was trust created. There was no evidence led to show that the defendants’ father was involved in any way, shape or form with the suit land’s registration. Further, the allegation that the suit land was fraudulently registered in

the name of Cheserek Kiptoo was the subject of **Kitale CMCCR No. 993 of 2011** where the complainant had accused the son to Kanda Kiptoo of fraudulently registering the property in the name of Cheserek Kiptoo. The court found that there was no proof of fraud and acquitted him.

**105.** The evidentiary burden was on the defendants to prove the creation of a trust, preferably by an act of wrongdoing on the part of the plaintiff, or that their father ever had a beneficial interest in the suit land. As for the latter, the court infers it by virtue of the fathers to the parties herein having been siblings. But with regard to the registration by the Plaintiff and with regard to the defendant this court sees no direct link.

**106.** In the criminal case, the claim was based on fraud which was not proved. In the present suit, he has approached the dispute on two fronts, trusts and adverse possession. Having failed to prove that the suit land was held in trust by the plaintiff, the only remaining claim which must be determined is that of adverse possession, as pleaded in the originating summons suit.

(c) **Whether the defendants have acquired title to the suit land by way of adverse possession**

**107.** The doctrine of Ownership by adverse possession has been given statutory underpinning in Sections 7, 13, 17 and 38 of the Limitations of Actions Act (Cap 22 of the Laws of Kenya). Section 7 of the Act states that:

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

**108.** Section 13, on the other hand, stipulates:

***i. 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.***

***ii. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.***

**109.** Section 17 goes on to provide as follows:

***“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.***

**110.** Finally, Section 38(1) and (2) state that:

***“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.***

***(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.***

**111.** The law and requirements for adverse possession was reiterated in the case of **Mbira -v Gachuhi, (2002) 1**

**EALR 137** where it was held that:

***“....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”***

**112.** The principles are that in order to establish a claim of adverse possession, the possession must be:

- i. Adverse to the interests of the owner - meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized superior claim of another;**
- ii. Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;**
- iii. Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;**
- iv. Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;**
- v. Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;**
- vi. Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert**

**dominion against the adverse user for at least twelve years.**

**113.** It is evident that this dispute is one between family members. From the evidence on record, the title to the suit land was opened in 1990. It was then registered in the name of Cheserek Kiptoo in the year 1998. From the testimonies of the parties, their families have been in occupation of the suit land since the 1960s. Additionally, the disputes over the suit land began with the filing of **Kitale ELCC 126 of 1998** which was dismissed on 10<sup>th</sup> November 2004. Additionally, there was **Kitale HCCC No. 14 of 2010** which the plaintiffs raised but it was not clear what the same pertained to and further, it was later withdrawn.

**114.** I have considered the testimonies of the parties and the evidence tendered in court including the report by the County Surveyor. It is clear to me that the defendants are in actual possession of the suit land. Further, it is also clear that the fathers of the parties herein, were both in occupation of parcel no. 25 prior to its subdivision upon the demise of Cheserek Cheptoo. In this context, the party who was in occupation of a portion of the LR No.

Trans Nzoia/Suwerwa/25 had already obtained title by way of adverse possession as the registered proprietors' proprietary rights had been extinguished. I am guided by the provisions of Sections 7 of and 13 of the Limitation of Actions Act whose content I have already given above.

**115.** In light of this provision, a party, such as the Plaintiff, could not bring a claim to recover the land because the right of action accrued at the point of first registration with the defendants' father living on the land after the same had been registered in the name of Cheserek Kiptoo. In fact, from the 1963 until 1998, there was no dispute as to the ownership and occupation of the land.

**116.** The occupation of the land was also shown to have been exclusive, open and notorious. The Defendant had never been dispossessed of the land so as to lose the claim of adverse possession. The County Surveyors' report revealed that indeed, the defendants and the plaintiffs reside on the said land and have built houses on it. This was also corroborated by the photographic evidence and testimonies of the witnesses.

**117.** Despite having found that the proprietary rights of the plaintiff were extinguished well before 1998, I shall also consider the other periods when the time can be considered to have begun running afresh, arising from interruption vide court cases. There are several ways through which time for adverse possession might be stopped or interrupted. Kuloba J. in **Gabriel Mbui vs Mukindia Maranya (1993) eKLR**, explained the instances through which time might be interrupted as follows: -

***“And there are a number of ways in which adverse possession which has begun to grow may be interrupted. Possession may be interrupted***

***1) by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession, with the intention of causing interruption; or***

***2) by the institution of legal proceedings by the rightful owner to assert his right to the land; or***

***3) by any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognised.***

**118.** I have considered the claims that there were suits filed between the parties herein to wit; **Kitale 116 of 2009**

which was established not to have been filed by the plaintiff and therefore did not interrupt the defendants' adverse possession. There was **Kitale ELCC 126 of 1998** which was between the parties herein and was dismissed on 10<sup>th</sup> November 2004. Lastly, there was **Kitale HCCC 14 of 2010**, where the defendants claimed that the Plaintiff attempted to evict them from the suit land but the suit was withdrawn on 16<sup>th</sup> May 2013. Unfortunately, the defendants failed to provide the court with sufficient proof as to the subject of the suit or the parties therein which would have been done by filing of sufficient copies of the pleadings. This was the crucial evidence that could have shown that, indeed, there existed a suit between the parties, and it was over the same subject matter. This court cannot rely on inadmissible hearsay that the suit referred to by that court registration number was material for interrupting the period of occupation. He who alleges the existence or otherwise of a fact must prove it, in terms of Section 107 of the Evidence Act.

**119.** It is my considered view that if the court was to consider that time was running from the date **Kitale ELCC 126 of 1998** was dismissed, the Originating Summons having been filed in 2019, the period of 12 years had clearly lapsed. Therefore, none of the suits could be considered to have interrupted the occupation of the suit land by the defendants.

**120.** The upshot of the foregoing is that the defendants, being the applicants in **Kitale No. 67 of 2019 (OS)** have proved that they have acquired 14 acres of part of the land comprised in title No. Trans-Nzoia/Suwerwa/1164. Despite the Plaintiff proving that he is the registered owner of the suit land, I have considered the provisions of section 7 of the Limitation of Actions act and it follows that his proprietary rights to (14) acres part of the land comprised in Title No. Trans-Nzoia/Suwerwa/1164, a subdivision of Trans-Nzoia/Suwerwa/25 was extinguished by adverse possession.

**121.** I therefore make the following orders;

- 1) I hereby declare that the Plaintiff's title to (14) acres part of the land comprised in Title No. Trans-Nzoia /Suwerwa/1164, a subdivision of**

**Trans- Nzoia/Suwerwa/25 was extinguished by the defendants' adverse possession.**

- 2) I hereby declare that the claimants who are defendants own, and the court bequeaths the Defendants, title to 14 acres part of the land comprised in title no. Trans-Nzoia /Suwerwa/1164 by way of adverse possession having occupied and possessed of the Suit Property has been open, quiet, continuous, uninterrupted and adverse to the Defendant's title to the Suit Property for a period of over 12 years.**
- 3) That an order be and is hereby made directing the Land Registrar, Trans Nzoia County to have the Defendants in the lead suit and or claimants in the originating summons registered as the joint owners of the Suit Property having acquired the same by adverse possession free of encumbrances and any overriding interests.**
- 4) An order of permanent injunction be and is hereby issued restraining the Plaintiff, by herself, servants or anyone claiming under her from demolishing the structures built on by the Defendants, evicting the Defendants, re-entering, charging, leasing, selling, disposing off or in any way interfering with the Plaintiffs'**

**quiet possession, use and or ownership of the Suit Property.**

**5) In default of the Plaintiff executing the documents of transfer of the fourteen (14) acres to the Defendants in thirty (30) days, the Deputy Registrar of the Court to execute the same.**

**6) Since the parties herein are relatives, each party shall bear their own costs.**

**Judgment dated, signed and delivered virtually via the Teams Platform this 10<sup>th</sup> day of December 2025.**



**HON. DR. IUR NYAGAKA  
JUDGE**

**In the presence of:**

Kiarie Advocate for the Defendant in No. 51 of 2018

Mohamed Advocate for Melly Advocate for the Plaintiff