



REPUBLIC OF KENYA



**KENYA LAW**

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ELC CASE NO. 184 OF 2014 - CONSOLIDATED WITH**

**ELC CASE NO. 6 OF 2015**

1. WILSON BARASA WAUKHILA
2. ELIUD MANYALI WAUKHILA
3. FRANCIS NABILIKA WAUKHILA
4. DICKSON NAMBALU WAUKHILA
5. BENARD KITUKO WAUKHILA
6. STEPHEN KASILI WAUKHILA
7. DAVID KISEKELI WAUKHILA
8. GEORGE KISIAGANI WAUKHILA
9. ELIUD NABILIKA WAUKHILA
10. NELSON WACHIYE WAUKHILA
11. NELSON WACHIYE WAUKHILA
12. ROBERT MANYALI WAUKHILA
13. WYCLIFF NAMBALU WAUKHILA
14. BEN KASILI WAUKHILA.....PLAINTIFFS

**VERSUS**

1. JOHN KISERO ZEBEDAYO
2. AMOS NASIAN KISIERO
3. MARK MEIN CHANANGAT
4. DAVID CHESEBI CHANANGAT
5. JAIRUS WETUNDE KISIERO
6. FRANCIS SAMNONG' CHENANGAT
7. ROBINSON WETUNDE CHENANG'AT.....DEFENDANTS

## J U D G M E N T

By an Originating Summons dated 2<sup>nd</sup> October 2014 and filed in **BUNGOMA ENVIRONMENT AND LAND COURT [ELC] CASE NO 184 OF 2014**, the 14 plaintiffs herein sought as against the 6 defendants the determination of the following questions:-

1. That the plaintiffs be declared as the joint owners of the parcel of land measuring approximately 48 acres to be curved out of land parcel NO MALAKISI/EAST SASURI/553 which they are in possession of having occupied the same for over 12 years.
2. An order that the plaintiffs herein have become entitled to be registered as the joint owners of a parcel of land measuring approximately 48 acres to be curved out of land parcel NO MALAKISI/EAST SASURI/553 by operation of law viz Sections 7, 17 and 38 of the Limitation of Actions Act (Chapter 22 Laws of Kenya) in place of the defendants.
3. That the defendant's names to the said parcel of land be removed and cancelled on the 48 acres curved out of the said land parcel L.R MALAKISI/EAST SASURI/553 to be replaced with the names of the defendants (sic).
4. That the registration of the defendants as the owners of land parcel NO L.R MALAKISI/EAST SASURI 553 in the year 2009 did not interrupt the rights of the plaintiffs as adverse possessors.
5. That in the alternative and without prejudice to the averments 1, 2, 3 and 4 (questions to be determined), a declaration that the defendants hold title to a portion of land measuring 40 acres out of land parcel NO MALAKISI/EAST SASURI/553 in trust for the benefits of the plaintiffs.
6. That costs of this summons be borne by the defendants.

The Originating Summons was subsequently amended on 7<sup>th</sup> July 2015 to include a 7<sup>th</sup> defendant. As is required, the said Originating Summons was accompanied by the plaintiffs' Supporting Affidavits as well as a copy of the Certificate of Search and Green Card in respect of the land parcel NO MALAKISI/EAST SASURI/553 (the suit land) showing that it was first registered in the names of **ZEBEDAYO KUSIMBA** also known as **ZEBEDAYO** arap **KISIERO (ZEBEDAYO)** on 8<sup>th</sup> March 1965. On 2<sup>nd</sup> September 2009 the suit land was registered in the names of the defendants.

In their separate Supporting Affidavits all dated 2<sup>nd</sup> October 2014, it was deponed by the defendants inter alia, that the suit land which measures approximately 47.6 Ha is divided into 2 portions one of which is occupied by the plaintiffs and measures 48 acres while the other portion is occupied by the defendants. That the suit land was previously owned by the late **ZEBEDEYO KISIERO** but was transferred to his sons who are the defendants herein in 2009. That the plaintiffs are sons to the late **SIMON WACHIYE NABILIKI (SIMON)** and were all born on the suit land between 1950 and 1982. That by an agreement entered into on 9<sup>th</sup> January 1964, **SIMON** purchased approximately 48 acres of the suit land from **ZEBEDAYO** and the purchase price was 98 heads of cattle. That **SIMON** immediately took possession of the 48 acres where all the plaintiffs have put up their homes where they live with their families and also grow coffee, bananas, beans and potatoes. That the plaintiffs have all been in quiet continuous, open and uninterrupted occupation of their respective portions given to them by **SIMON** for over 12 years and that their late mother **MILAN NAKHALAKWA**, Grandmother, **ELINA WAUKHILA** and **SIMON** were all buried on the portion measuring 48 acres occupied by the plaintiffs. That the defendants do not occupy the portion measuring 48 acres and neither have they interfered with the plaintiff's occupation thereof and instead the defendants occupy the rest of the suit land. Therefore, the defendant's title to the portion measuring 48 acres has been extinguished.

In response to the plaintiff's Originating Summons the defendants also swore separate Replying Affidavits in which they deponed, inter alia, that their late father **ZEBEDAYO** was on 8<sup>th</sup> March 1965 registered as the proprietor of the suit land free from any encumbrances or overriding interests. The defendants all agreed with the averments of **AMOS NASIAN KISIERO** (2<sup>nd</sup> defendant) that whereas there was an agreement between **SIMON** and **ZEBEDAYO** over the purchase of a portion of the suit land, the portion sold to **SIMON** was **15 BARINGOS** (400 x 36 yards) which is equivalent to 3 acres and not 40 or 48 acres and that out of the purchase price of 93 heads of cattle, **SIMON** only paid 73 heads leaving a balance of 20 heads which he refused to pay and remains outstanding to-date. That the plaintiffs are therefore only licencees at the mercy of **ZEBEDAYO** and have not even been appointed as the legal representatives of **SIMON** and lack the locus standi to file this suit and a Preliminary Objection would be raised. The defendants denied that **ZEBEDAYO** held 48 acres out of the suit land in trust for the plaintiffs or that they are entitled to that portion by adverse possession having lived thereon continuously, openly and peacefully for more than 12 years. They also denied the averments that the plaintiffs were born on the suit land and have permanent structures thereon or that the plaintiffs have buried their relatives on the suit land.

The defendants deponed further that the plaintiffs have been less than candid and have concealed the fact that in 1973 their father **SIMON** filed **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978** claiming to have purchased the entire suit land from **ZEBEDAYO** which suit was dismissed for want of prosecution. That **SIMON** thereafter filed **KITALE HIGH COURT CIVIL CASE NO 90 OF 2005 (O.S)** claiming 40 acres out of the suit land by adverse possession which suit abated following the death of **SIMON**. That upon the demise of **ZEBEDAYO**, **BENJAMIN KISIERO** was appointed as the Administrator of his Estate in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 66 OF 2003** and each of the beneficiaries of the Estate was given a share of the suit land and no objection was made by the plaintiffs or **SIMON**. That in 2005 **BENJAMIN KISIERO** filed **CHEPTAIS LAND DISPUTES TRIBUNAL CASE NO 25 OF 2005** against **SIMON** for trespassing onto the suit land and the Tribunal made an award in **SIMON'S**, favour which was adopted as a Judgment of the Court in **BUNGOMA SENIOR PRINCIPAL MAGISTRATE'S COURT LDT CASE NO 41 OF 2005**. Dissatisfied with the said award, **BENJAMIN KISIERO** filed **BUNGOMA HIGH COURT JUDICIAL REVIEW APPLICATION NO 74 OF 2006** and the said award was quashed. Therefore, the various litigations between the parties herein have had the effect of terminating the licence granted to **SIMON** by **ZEBEDAYO** and therefore the plaintiffs have not acquired any rights over the suit land or any portion thereof and this suit should be dismissed with costs.

On their part, the defendants filed **BUNGOMA ENVIRONMENT AND LAND COURT CIVIL CASE NO 6 OF 2015** on 2<sup>nd</sup> February 2015 seeking the main prayers that the Court declares the plaintiffs to be in illegal occupation and use of the suit land and an order for their eviction therefrom. The basis of their claim is that in 1964 before the land registration process, **ZEBEDAYO** had agreed to sell to **SIMON** a portion of land measuring **15 BARINGOS** at a price of 93 heads of cattle. However, **SIMON** paid only 73 heads leaving a balance of 20 heads but that notwithstanding, **ZEBEDAYO** allowed **SIMON** to utilize a portion of the suit land. In 1965, the suit land was registered in the names of **ZEBEDAYO** following the completion of the adjudication process and instead of paying the balance of the 20 heads of cattle, **SIMON** filed **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978** claiming to have purchased the whole of the suit land. That suit was however dismissed for want of prosecution. In 1986 following the death of **ZEBEDAYO**, **SIMON** filed **KITALE HIGH COURT CIVIL CASE NO 90 OF 2005(O.S)** against **BENJAMIN KISIERO** seeking 40 acres out of the suit land by adverse possession. That suit however abated with the death of **SIMON**. Following the orders issued in **BUNGOMA HIGH COURT SUCCESSION CAUSE NO 66 OF 2003**, the suit land is now registered in the defendants' names as proprietors in common in equal shares. Therefore, the plaintiffs are mere licencees because there was no completion of payment of the purchase price and so no title passed to **SIMON** and besides, there was no consent of the Land Control Board to the transaction which is null and void. The plaintiff's occupation of the suit land is therefore illegal. The plaint was accompanied by the defendants' Verifying Affidavits and statement by **AMOS NASIAN KISIERO**.

In response to that suit, the plaintiffs filed a joint statement of defence in which they pleaded, inter alia, that the registration of **ZEBEDAYO** as the proprietor of the suit land was subject to him transferring **15 BARINGOS** of land to **SIMON** upon being paid the balance of 20 heads of cattle and that it was **ZEBEDAYO** who declined to take the balance of the purchase price. That during the succession process, the defendants did not disclose that the plaintiffs were beneficial owners of almost half of the land comprising the Estate of **ZEBEDAYO**. The plaintiffs denied that they are mere licencees and notwithstanding the lack of consent from the Land Control Board, the occupation of the suit land by **SIMON** and the plaintiffs became adverse to that of the registered proprietors whose rights have been extinguished. That the plaintiffs have occupied the suit land in their own capacity for a period of over 40 years and the defendant's suit is therefore time barred as the plaintiffs have been in peaceful occupation thereof for a period well in excess of the 12 years provided for under the Limitation of Actions Act.

The defendants raised a Preliminary Objection questioning the plaintiffs' locus standi to file the Originating Summons but in a ruling delivered on 27<sup>th</sup> July 2016, the late **MUKUNYA J** dismissed it with costs. An effort by the late Judge to have the dispute settled out of Court did not bear any fruits.

When I took over the case on 3<sup>rd</sup> October 2018, directions were taken that the Originating Summons in **BUNGOMA ELC CASE NO 184 OF 2014** be the plaint and that the plaint in **BUNGOMA ELC CASE NO 6 OF 2015** be the defence and counter – claim.

The plaintiffs called as their witnesses the 5<sup>th</sup> plaintiff **BENARD KITUKO WAUKHILA (PW 1)**, **WILSON BARASA WAUKHILA** the 1<sup>st</sup> plaintiff (**PW 2**), **JOSEPH BIKETI WAUKHILA (PW 3)**, **REUBEN MASAFU WACHIYE (PW 4)** and **SAMUEL WAKORA KHWITOTA (PW 5)**.

The 1<sup>st</sup> and 5<sup>th</sup> plaintiffs adopted as their evidence their Supporting Affidavits contents of which I have already summarized above and I need not repeat here. **JOSEPH BIKETI WAUKHILA (PW 3)** adopted also as his evidence, his statement dated 6<sup>th</sup> November 2017 in which he has stated, inter alia, that he is the eldest son to **SIMON** who initially resided in **TOROSO CHEPTAIS** an area predominantly occupied by the **SABAOT** community in the 1960's. Following tensions between the **SABAOT** and **BUKUSU** communities, **SIMON** started looking for land and agreed to purchase half of **ZEBEDAYO'S** land for 93 heads of cattle and took possession while **ZEBEDAYO** moved to Kitale after receiving 73 heads of cattle. The portions occupied by the plaintiffs and defendants have a seasonal stream that acts as a boundary and when **ZEBEDAYO** returned in 1976, he occupied the other half of the suit land with his family until his death in 1986. That the plaintiffs have occupied their half of the suit land peacefully for over 40 years and there was no dispute with **ZEBEDAYO**.

**REUBEN MASAFU WACHIYE (PW 4)** confirmed in his statement dated 6<sup>th</sup> November 2017 that he was present when **SIMON** and **ZEBEDAYO** were negotiating over the purchase of a portion of land measuring **15 BARINGOS** at the price of 93 heads of cattle after which **SIMON** took possession and utilized the portion until the time of his death. He brought up his family there and was buried on the suit land. The suit land is also divided into two portions by a boundary.

**SIMON WAKORA KHWITOTA (PW 5)** also adopted as his evidence his witness statement dated 6<sup>th</sup> November 2017 in which it is stated, inter alia, that the suit land is divided into two portions one occupied by the plaintiffs and the other by the defendants. That the suit land was originally registered in the names of **ZEBEDAYO** but has since 2009 been registered in the names of the defendants and that by an agreement dated 9<sup>th</sup> January 1964, **SIMON** purchased from **ZEBEDAYO** a portion measuring 40 acres from the suit land at an agreed price of 93 heads of cattle and took possession of that portion which is demarcated and distinctly mapped out to distinguish it from the portion occupied by **ZEBEDAYO**. That during the land adjudication process, the whole of the suit land including the portion occupied by the plaintiffs was registered in the names of **ZEBEDAYO** to hold in trust for **SIMON** who had not cleared the balance of the purchase price. He added that he was born on the suit land in 1967 and has lived there with the other plaintiffs who are his siblings and some of whom were born earlier than him. That each of the plaintiffs has been assigned a portion of the suit land by **SIMON** where they have put up permanent houses where they live with their families and also plant coffee, bananas, maize beans and potatoes and the defendants have never interfered with their occupation, asked them to vacate or even demanded a refund of the purchase price. That the registration of the defendants as proprietors of the suit land in 2009 happened after the plaintiffs had already acquired rights thereon and buried their Grandfather, mother and **SIMON** on the 40 acre portion that they occupy.

The defendants called only the 2<sup>nd</sup> defendant **AMOS NASIAN KISIERO (DW 1)** as their witness. He too asked the Court to adopt as the defendants' evidence his statement dated 22<sup>nd</sup> December 2014 filed in support of their claim in **BUNGOMA ELC CASE NO 6 OF 2015** and also Replying Affidavit dated 18<sup>th</sup> November 2014 filed in response to the plaintiff's Originating Summons in **BUNGOMA ELC CASE NO 184 OF 2014** as well as the defendants' list of documents. He added that the suit land is 39.6 Ha in size which is approximately 99 acres and was originally registered in the names of his father **ZEBEDAYO**.

Submissions were thereafter filed both by **MR WERE** Counsel for the plaintiffs and **MR IKAPEL** Counsel for the defendants.

I have considered the parties evidence as contained in their respective affidavits, statements, documents as well as oral testimony during trial. I have also considered the submissions by Counsel.

The plaintiffs claim a portion of the suit land measuring 48 acres by way of adverse possession whereas the defendants counter-claim that the plaintiffs are trespassers on the suit land and should be evicted therefrom because, although the plaintiffs' father **SIMON** purchased a portion thereof, he did not pay the full purchase price and in any event, the sale agreement between him and the defendants' father **ZEBEDAYO** was null and void for lack of the requisite consent of the Land Control Board. The defendants also claim that what **SIMON** purchased was a portion measuring **15 BARINGOS** which is equivalent to 400 x 36 yards and not 48 acres as claimed by the plaintiffs.

It is not in dispute that the suit land which measures approximately 39.6 Hectares (as per Certificate of Search dated 23<sup>rd</sup> December 2009 and Green Card dated 27<sup>th</sup> July 2005) was originally registered in the names of **ZEBEDAYO** on 8<sup>th</sup> March 1965. On 2<sup>nd</sup> September 2009, it was registered in the names of the defendants. 39.6 Hectares is equivalent to 97.812 acres (39.6 x 2.47) and not the 96 acres referred to by the parties herein. What I am required to determine is whether the plaintiffs have proved a case to warrant the registration of 48 acres of the suit land in their names by virtue of adverse possession thereof or whether they are infact trespassers who should be evicted therefrom.

#### **ADVERSE POSSESSION:**

I shall first consider if the plaintiffs have established their claim to 48 acres out of the suit land on the basis of having adversely occupied the same and if therefore the defendants' right have been extinguished.

In **KASUVE .V. MWAANI INVESTMENT LTD & OTHERS 2004 I. KLR 184** the Court of Appeal re-stated what a party claiming land by adverse possession must prove and said:-

*“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner of his own volition.”*

It is now well established that the combined effect of the provisions of **Sections 7, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of twelve (12) years of the adverse possession of that land – **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2132 OF 1996**. The new Land Laws enacted after 2010 recognize the doctrine of adverse possession. **Section 28(h) of the Land Registration Act 2012** identifies the following overriding interests in land:-

*“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”*

**Section 7(d) of the Land Act 2012** provides as follows:-

*“Title to land may be acquired through:-*

*(a)*

*(b)*

*(c)*

*(d) prescription.”*

**Section 38(1) of the Limitation of Actions Act** provides that:-

*“where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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.”*

The claimant must also prove that he has been in occupation of the land in dispute *nec vi nec clam nec precario* i.e no force, no secrecy no persuasion – **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1976 – 80 I KLR 1500 (1980 KLR 10)**. There can be no adverse possession of another person's land if the entry was with the consent of the registered proprietor – **JANDU .V. KIRPAL 1975 E.A 225**. See also **WAMBUGU .V. NJUGUNA 1983 KLR 172**. It is also well settled that a change of ownership of land being claimed by the adverse possessor does not interrupt such adverse possession. Further, that a party can acquire by adverse possession only a part of the land registered in the names of another and that such adverse possession can only be interrupted when the registered owner of the land in dispute files a suit to evict the party claiming it or by making an effective entry or when the owner's right is admitted by the adverse possessor – **GITHU .V. NDEETE 1984 KLR 776**. Possession of the land being claimed by the adverse possessor is a matter of fact to be observed on the land in dispute – **MAWEU .V. LIU RANCHING & FARMING CO-OPERATIVE SOCIETY LTD 1985 KLR 430**.

***“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential pre requisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act .....*”**

I will be guided by the above precedents and statutes among others in determining whether the plaintiffs have made out a case to warrant the grant of the orders sought in their amended Originating Summons.

The plaintiffs' case is that their late father **SIMON** took possession of 48 acres out of the suit land when he purchased the same through an agreement with the defendants' late father **ZEBEDAYO** in 1964 and that all of them live on the suit land where they were born between 1950 (1<sup>st</sup> plaintiff) and 1982 (13<sup>th</sup> and 14<sup>th</sup> plaintiffs). It is also their evidence that they have lived on their respective portions of the 48 acres given to them by **SIMON** peacefully, openly and without interruption either by **ZEBEDAYO** or the defendants and have established homes and also grow crops on the land where they buried their grandfather, mother and **SIMON**. Although the defendants rebutted those averments, it is clear from the evidence on record that the occupation of part of the suit land by the plaintiffs, and before that, by **SIMON** is really irrefutable. Firstly, there is the sale agreement dated 9<sup>th</sup> January 1964 between **SIMON** and **ZEBEDAYO** and which is part of the documents herein. It is clear from the agreement that **SIMON** was purchasing a portion measuring 400 yards by 36 yards out of the then un-registered land at a price of 93 heads of cattle. This Court makes a finding that **SIMON** took possession of that portion in 1964 after he gave **ZEBEDAYO** the first 40 heads of cattle. The agreement shows that subsequently, **ZEBEDAYO** received other heads of cattle and it is common ground that to-date, 20 heads are still outstanding. The plaintiffs' case is that **ZEBEDAYO** refused to accept the 20 heads while the defendants' case is that, as per paragraph 8 of their plaint in **BUNGOMA ELC CASE NO 6 OF 2015**, the plaintiff's father:-

***“..... failed, refused and/or neglected to pay the remaining 20 heads of cattle to complete the purchase of the land .....*”**

It is also instructive to note that in paragraph 6 of their plaint in **BUNGOMA ELC CASE NO 6 OF 2015**, the defendants in this case pleaded that:-

***“In anticipation of and pending payment of the balance of 20 heads of cattle, the plaintiff's father allowed the defendants' father to enter upon, occupy and use portion of the said land.”***

Finally, among the orders sought by the defendants in **BUNGOMA ELC CASE NO 6 OF 2015** where they were the plaintiffs were:-

- (a) A declaration that the defendants are in illegal occupation of the suit land and,**
- (b) An order to evict and remove the defendants, their servants agents, assigns or legal representatives from the suit land.**

When I cross-examined the 2<sup>nd</sup> defendant **AMOS N. KISIERO (DW 1)** during the trial, this is what he said with regard to the plaintiff's occupation of a portion of the suit land:-

***“The whole land MALAKISI/SOUTH SASURI/553 measures 96 acres or 39.6 Hectares. I don't know what area we occupy or what the plaintiffs occupy. They have said they occupy 48 acres which is half. I don't know the exact acreage because we have not measured it.”***

It is also not lost to this Court that in paragraph 5 of his Replying Affidavit dated 18<sup>th</sup> November 2018, **AMOS N. KISIERO** has deposed as follows:-

***“That in anticipation of completion of the purchase price, my father allowed the Applicants' father occupation and use of a portion of the land. It was not demarcated with any boundary as that was to be fixed upon full payment of the purchase price.”***

That, in my view, is enough evidence by which this Court can conclude, which I hereby do, that the plaintiffs' late father **SIMON** took possession of part of the suit land in 1964 at the signing of the agreement with **ZEBEDAYO** and by the same token, those of **SIMON'S** children born after 1964 were born on the suit land after he (**SIMON**) had migrated from **TOROS** in **CHEPTAIS** area following tensions between the **BUKUSU** and **SABAOT** communities. There is no evidence suggesting that **SIMON**, or any of the plaintiffs, utilized any other land apart from the suit land which they now claim through their amended Originating Summons. It must also be remembered that the plaintiffs are not seeking to enforce the sale agreement by which their late father **SIMON** purchased a portion of un-registered land measuring 400 yards by 36 yards from **ZEBEDAYO** on 9<sup>th</sup> January 1964. The plaintiff's claim is now hinged on the fact that since 1964, **SIMON**, and thereafter, the plaintiffs in their own capacities, have continued to occupy 48 acres out of the suit land peacefully openly and without interruption for a period well in excess of the 12 years provided for in law which entitles them to orders in adverse possession since they have dispossessed the defendants. That is what I shall now consider.

I have already quoted the 2<sup>nd</sup> defendant **AMOS N. KISIERO (DW 1)** who admitted that he does not know the acreage occupied by the plaintiffs or even what the defendants themselves occupy. The plaintiffs averred in their Supporting Affidavits that they occupy 48 acres out of the suit land while the defendants occupy the other portion. Taking into account the fact that the defendants by their plaint in **BUNGOMA ELC CASE NO 6 OF 2015** had sought the eviction of the plaintiffs from the whole suit land and not merely a portion

measuring 400 yards by 36 yards, it is clear to me that what the plaintiffs occupy is a sizeable portion of the suit land and that must be half of the suit land as they claim in their Originating Summons. In any case, it cannot be possible that the fourteen (14) plaintiffs and their families all live and plant crops on a portion measuring only 400 yards by 36 yards. That is of course the portion that **SIMON** purchased in 1964 when only the 1<sup>st</sup> plaintiff (born in 1950), the 3<sup>rd</sup> plaintiff (born in 1961) and the 10<sup>th</sup> plaintiff (born in 1956) had been born. It is clear however that although **SIMON** had only purchased a portion of the suit land measuring 400 yard by 36 yards in 1964, he gradually dispossessed **ZEBEDAYO** of a bigger portion of the suit land and bearing in mind the evidence of **AMOS N. KISIERO** that he does not know the acreage of the land occupied by the plaintiffs or the defendants, there is no reason to doubt the plaintiffs evidence that they have been in occupation and possession of half of the suit land which is 48 acres.

I have also considered whether **SIMON** entered the suit land with the consent of **ZEBEDAYO** because in that case, a claim for adverse possession cannot be sustained – **WAMBUGU .V. NJUGUNA** (supra). It is common ground that **SIMON** entered the suit land in 1964 as a purchaser. The “*home –made*” agreement drawn by the parties without the assistance of legal advice did not have a completion date. I have also looked at the agreement which, as per the list of the defendants’ exhibits dated 6<sup>th</sup> November 2017, was executed in three (3) parts. The first agreement is dated 16<sup>th</sup> April 1964 (defendants’ exhibit No. 5), the second agreement is dated 15<sup>th</sup> February 1966 (defendants’ exhibit No. 3) and the last agreement is dated 2<sup>nd</sup> April 1967 (defendants’ exhibit No. 4). Though not very legible, it would appear from the agreement dated 2<sup>nd</sup> April 1967 that that was the date when **SIMON** paid the last instalment of 6 heads of cattle leaving a balance of 20 heads out of the agreed purchase price of 73 heads. The agreement itself is written in Kiswahili language. Under **Section 23(1) of the Environment and Land Court Act**, it is provided that:-

**“The language of the Court shall be English and Kiswahili.”**

I shall therefore reproduce the relevant portion of the agreement dated 2<sup>nd</sup> April 1967 verbatim:

**“MNAME TAREHE 2-4-67 SIMON WACHIYE AMELIPA NGOMBE SITA (6) KWA ZEBEDEYO KISHERO YA SHAMBA YAKE. YOTE SASA NI NGOME SABINI NA TATU (73) ZIMEBAKI NGOME ISHIRINI (20).”**

There is then the agreement dated 15<sup>th</sup> February 1966 showing that on that day, **SIMON** paid **ZEBEDAYO** 8 heads of cattle. On another date which is not clear, **SIMON** paid **ZEBEDAYO** Kshs. 1,000/= and 10 heads of cattle and on 19<sup>th</sup> April 1964, he paid 8 heads of cattle bringing the total to 58 heads of cattle and leaving a balance of 35 heads of cattle. As stated earlier, the sale agreement was executed in parts but what is clear is that the last instalment that **SIMON** paid on 2<sup>nd</sup> April 1967 was 6 heads of cattle leaving a balance of 20 heads of cattle which remains un-paid to-date. The agreement was therefore repudiated on 2<sup>nd</sup> April 1967 when **SIMON** paid the last instalment. Time for purposes of adverse possession would therefore begin to run from 2<sup>nd</sup> April 1967 on the authority of **WAMBUGU .V. NJUGUNA** (supra) where the Court held that:

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

On the other hand, in **SAMUEL MIKI WAWERU .V. JANE NJERI RICHU C.A CIVIL APPEAL NO 122 OF 2001**, the Court took the view that where the adverse possessor takes possession following a sale agreement which is subject to the Land Control Act and which becomes null and void for lack of the consent of the Land Control Board, then time for purposes of adverse possession begins to run from the moment the agreement becomes void under Section 6 (1) of the Act. In a contrasting decision in **MBUGUA NJUGUNA .V. ELIJAH MBURU WANYOIKE & ANOTHER C.A CIVIL APPEAL NO 27 OF 2002**, it was held that where the transaction for sale of land is frustrated for lack of the consent of the Land Control Board, time starts to run on the day that the claimant is put in possession of the land and not on the last day when the application for the Board’s consent ought to have been given. In this case, the agreement between **SIMON** and **ZEBEDAYO** was executed in 1964 some three (3) years before the enactment of the Land Control Act in 1967. The Land Control Act cannot therefore retrospectively apply to an agreement executed in 1964. It is clear from the cases cited above that time for purposes of adverse possession in this case can be computed from either 1964 when **SIMON** took possession of a portion of the suit land or 1967 when he paid the last instalment.

Counsel for the defendants has submitted that the plaintiffs in their Supporting Affidavits claim to have been born on the suit land at various times between 1960 and 1983 and the Court must take into account the period of disability when they were under 18 years of age. While this Court agrees that the period of disability must be considered, it is however clear from the plaintiffs’ Supporting Affidavits dated 2<sup>nd</sup> October 2014 that they were born on the following dates:-

1. **WILSON BARASA WAUKHILA (1<sup>ST</sup> PLAINTIFF) - 1950**
2. **ELIUD NABILIKI WAUKHILA (2<sup>ND</sup> PLAINTIFF) - 1975**
3. **FRANCIS NABILIKI WAUKHILA (3<sup>RD</sup> PLAINTIFF) - 1961**
4. **DICKSON NAMBALU WAUKHILA (4<sup>TH</sup> PLAINTIFF) - 1968**
5. **BERNARD KITUKO WAUKHILA (5<sup>TH</sup> PLAINTIFF) - 1967**

6. STEPHEN KASILI WAUKHILA (6<sup>TH</sup> PLAINTIFF) - 1968
7. FRED WACHIYE WAUKHILA (7<sup>TH</sup> PLAINTIFF) - 1968
8. DAVID KISEKELI WAUKHILA (8<sup>TH</sup> PLAINTIFF) - 1966
9. GEORGE KISIANGANI WAUKHILA (9<sup>TH</sup> PLAINTIFF) - 1968
10. ELIUD MANYALI WAUKHILA (10<sup>TH</sup> PLAINTIFF) - 1956
11. NELSON WACHIYE WAUKHILA (11<sup>TH</sup> PLAINTIFF) -1976
12. ROBERT MANYALI WAUKHILA (12<sup>TH</sup> PLAINTIFF) - 1980
13. WYCLIFFE NAMBALU WAUKHILA (13<sup>TH</sup> PLAINTIFF) - 1982
14. BEN KASILI WAUKHILA (14<sup>TH</sup> PLAINTIFF) - 1982

So the plaintiffs were actually born between 1950 and 1982 and not between 1960 and 1983 as submitted by **MR IKAPEL** Counsel for the defendants. And since, by the plaintiffs own admission, **SIMON** only took possession of a portion of the suit land in 1964 following the execution of the sale agreement with **ZEBEDAYO**, it follows that only the 1<sup>st</sup>, 3<sup>rd</sup> and 10<sup>th</sup> plaintiffs were not born on the suit land. They could only have moved onto the suit land where they established their homes after 1964. The 1<sup>st</sup>, 3<sup>rd</sup> and 10<sup>th</sup> plaintiffs could only therefore have been born in **TOROSO CHEPTAIS** area from where **SIMON** migrated as per the statement of **JOSEPH BIKETI WAUKHILA (PW 3)** dated 6<sup>th</sup> November 2017 and which he adopted as his evidence. This Court is satisfied however that all the plaintiffs were minors by the time **SIMON** bought and took possession of part of the suit land. This suit was filed by the plaintiffs not through the Estate of their late father **SIMON** but in their own capacities. Therefore, since the plaintiffs were minors when their father **SIMON** took possession of the portion of the suit land, they lacked capacity to hold land and as such, they lacked the capacity to hold any title to land. Time for purposes of adverse possession could not run in their favour as long as they were minors but could only commence when they became of age – **WAMBUI GIKWA .V. PAUL KIMANI MURABA C.A CIVIL APPEAL NO 161 OF 2013 [2016 eKLR]**. That means that for each of the plaintiffs, time would begin to run after they attained the age of 18 years which is the age of majority as defined in **Section 2 of the Age of Majority Act [CHAPTER 33 LAWS OF KENYA]**. That means that the plaintiffs attained the age of majority as follows:-

1. 1<sup>ST</sup> PLAINTIFF - 1968
2. 2<sup>ND</sup> PLAINTIFF - 1993
3. 3<sup>RD</sup> PLAINTIFF - 1979
4. 4<sup>TH</sup>, 6<sup>TH</sup>, 7<sup>TH</sup>, AND 9<sup>TH</sup>, PLAINTIFFS - 1986
5. 5<sup>TH</sup> PLAINTIFF - 1985
6. 8<sup>TH</sup> PLAINTIFF - 1984
7. 10<sup>TH</sup> PLAINTIFF - 1974
8. 11<sup>TH</sup> PLAINTIFF - 1994
9. 12<sup>TH</sup> PLAINTIFF - 1998
10. 13<sup>TH</sup> AND 14<sup>TH</sup> PLAINTIFFS - 2000

**MR. IKAPEL** Counsel for the defendants cannot therefore be correct when he submits at page 7 of his submissions that:-

*“If on the other hand we assume that all the plaintiffs were born in 1982 and take into account the period of disability, they would attain the age of 18 years in the year 2000. A possible period of adverse possession would then start running to mature after 12 years in 2012. This scenario would also not favour the plaintiffs because the **KAKAMEGA** case ended in 2001 as in 2005 the cases between their father and the defendant’s brother **BENJAMINE KISIERO** started and ran upto 2011. The only time that the land remained free of litigation was in 2002, 2003 and 2004. No qualifying period of 12 years was achieved.”*

That submission, though attractive, is not supported by the evidence on record.

Firstly, we cannot assume that the plaintiffs were born in 1982 when their dates of birth are clearly indicated in their respective affidavits.

Secondly, the record shows that the first litigation involving the suit land was **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978** in which **SIMON** had filed a suit seeking to recover the suit land from **ZEBEDAYO**. On his part, **ZEBEDAYO** counter – claimed seeking the eviction of **SIMON** from the suit land. That suit was dismissed on 26<sup>th</sup> October 1984 for want of prosecution but by a Judgment (should have been a ruling) delivered by **AGANYANYA J** (as he then was) on 13<sup>th</sup> March 1986, the orders dismissing **SIMON’S** suit was set aside and the parties ordered to set down the suit for hearing. On 21<sup>st</sup> March 2001 **WAWERU J** dismissed the suit because neither of the parties had taken any action for 13 years. **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978** could not have interrupted **SIMON’S** adverse possession of the suit land because, having acquired the registration of the suit land in his names on 8<sup>th</sup> March 1965 and **SIMON** having taken possession on 9<sup>th</sup> January 1964, it follows that **ZEBEDAYO’S** counter claim in **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978** was caught up by the provisions of **Section 7 of the Limitation of Action Act** which states that:-

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

By the time **ZEBDAYO** filed his counter – claim in **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978**, **SIMON** had been in occupation and possession of his portion of the suit land for 14 years having entered in 1964. Therefore, whereas **ZEBEDAYO’S** counter – claim in **KAKAMEGA HIGH COURT CIVIL CASE NO 96 OF 1978** could legally have interrupted **SIMON’S** occupation of a portion of the suit land, it came too late because by that time, his interest in the suit land had already been extinguished. In short, **ZEBEDAYO’S** counter – claim could not interrupt what had already occurred. The term interruption is defined in **BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION** as follows:-

*“A break in the period of possession of land possibly ending a claim to ownership by prescriptive right.”*

The same Dictionary defines the term legal interruption to mean:-

*“A break in the running of prescription that occurs when the property’s possessor acknowledges another person’s ownership right or the owner (or obligor) sues the possessor (or obligor).”*

**ZEBEDAYO’S** counter – claim could not break **SIMON’S** period of possession which had already run its course in 1978. Indeed it must be appreciated that **ZEBEDAYO’S** interest in the suit land existed long before 1965 when it was registered in his names because he could not have been selling to **SIMON** a portion of the suit land in 1964 if he had no rights over it.

Counsel for the defendants has also submitted that the plaintiffs could only seek orders in adverse possession from 2009 following the death of **SIMON**. Further, that the plaintiffs want this Court to believe that they are not claiming through their father. The truth however, as is evident from the plaintiff’s Originating Summons, is that the plaintiffs are suing in their own capacities as I have already mentioned earlier in this Judgment. They have not come to Court as Administrators of their father’s Estate. Secondly, having pleaded that they were born on the suit land, nothing stops them from filing a claim for adverse possession as the parties actually in occupation of the suit land even if they entered it through their father.

The plaintiffs also have to establish that they have been in occupation of the portion of the suit land that they claim openly, peacefully and as of right without any interruption having dispossessed the defendants. It is clear from the evidence that the plaintiffs have utilized the portion of the suit land that they claim openly and apart from the 1<sup>st</sup>, 10<sup>th</sup> and 3<sup>rd</sup> plaintiffs who were born in 1950, 1956 and 1961 respectively, the rest of the plaintiffs were born after 1964 when their father had already moved onto the suit land. There is no evidence to suggest that either **ZEBEDAYO** or the defendants made any attempt to regain entry into the portion occupied by the plaintiffs and which is the subject of this suit. There is also no evidence to suggest that the plaintiffs’ occupation of the suit land was by force or stealth. Indeed no objections appear to have been raised when the plaintiffs buried their Grandfather, mother and father thereon. The case filed in 2005 by **BENJAMIN KISIERO** against **SIMON** being **LAND DISPUTES TRIBUNAL CASE NO 25 OF 2005** as adopted by **BUNGOMA SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE NO 41 OF 2005** as well as **BUNGOMA HIGH COURT CIVIL APPLICATION NO 74 OF 2006** all came too late.

It is also clear from the evidence herein that the 48 acre portion claimed by the plaintiffs is identifiable as it has marked boundaries. In paragraphs 3 and 9 of his Supporting Affidavit dated 2<sup>nd</sup> October 2014 and which was replicated by his co – plaintiffs, the 1<sup>st</sup> plaintiff **WILSON BARASA WAUKHILA** has deponed as follows:-

3: *“That the said parcel of land is generally divided into 2 portions one jointly occupied by the Applicants and the other occupied by the Respondents jointly.”*

9: *“That SIMON WACHIYE NABILIKI (Deceased) took possession of the approximately 48 acres immediately upon execution of the agreement, which land was demarcated and the said approximately 48 acres distinctively mapped out to distinguish it from the vest of the land ZEBEDAYO KISIERO (Deceased) retained as his.”*

It is clear therefore that the 48 acres which the plaintiffs occupy is well demarcated. There is also evidence that when **ZEBEDAYO** returned to the suit land from Kitale, he did not take back possession of the said 48 acres but instead occupied the other half of the suit land. This is what the 5<sup>th</sup> plaintiff **BERNARD KITUKO WAUKHILA** told the Court when he testified on 3<sup>rd</sup> October 2018.

*“When ZEBEDAYO KISIERO came back to the land from Kitale, he never evicted us from the portion that we occupy but decided to occupy the other portion where the defendants now occupy. Even our parents are all buried on the portion that we occupy.”*

All that evidence, taken together with the fact that the defendants are, in their counter-claim, seeking the eviction of the plaintiffs from the suit land, is sufficient to demonstrate that not only have the plaintiffs dispossessed the defendants from the 48 acres but also that the portion occupied by the plaintiffs is well demarcated. Indeed the 5<sup>th</sup> defendant also stated that there is *“a seasonal river which acts as a boundary.”*

Finally, the plaintiffs were also required to prove that their occupation and possession of the 48 acres out of the suit land had been for a period of 12 years. Since the plaintiffs have each moved to this Court seeking orders of adverse possession with respect to the 48 acres, I shall now consider their individual claims. This is because they were born at different times.

**WILSON BARASA WAUKHILA (1<sup>ST</sup> PLAINTIFF)**

He was born in 1950 and therefore attained the age of majority in 1968. Time started to run when he attained the age of majority and so by 1980 he had been in occupation of the suit land with his family for 12 years. The Originating Summons was filed in 2014 and by that time, the 1<sup>st</sup> plaintiff had been in occupation for 36 years. He is therefore entitled to orders that he be registered as owner by adverse possession.

**ELIUD MANYALI WAUKHILA (2<sup>ND</sup> PLAINTIFF)**

He was born in 1975 and therefore attained the age of majority in 1993. Therefore by 2005, he had occupied the suit land for 12 years and on the time the Originating Summons was filed in 2014, he had been in occupation for 21 years. He is also therefore entitled to orders that he be registered as proprietor of 48 acres by way of adverse possession.

**FRANCIS NABILIKI WAUKHILA (3<sup>RD</sup> PLAINTIFF)**

He was born in 1961 and attained the age of majority in 1979. By 1991, he had been in occupation of the suit land for 12 years. By 2014 when their Originating Summons was filed, he had been in occupation for 23 years. He too is also entitled to orders that he be registered as a proprietor of the 48 acres by way of adverse possession.

**DICKSON NAMBALU WAUKHILA (4<sup>TH</sup> PLAINTIFF)**

**STEPHE KASILI WAUKHILA (7<sup>TH</sup> PLAINTIFF) and**

**GEORGE KISIANGANI WAUKHILA (9<sup>TH</sup> PLAINTIFF)**

They were all born in 1968 and therefore attained the age of majority in 1986. By 1998, they had been in occupation of the suit land for 12 years and by the time their originating Summons was filed in 2014, they had been in occupation for 28 years. They too qualify for orders that they be registered as proprietors of 48 acres by adverse possession.

**BERNARD KITUKO WAUKHILA (5<sup>TH</sup> PALINTIFF)**

He was born in 1967 and therefore attained the age of majority in 1985. By 1997 he had been in occupation of the suit land for 12 years and by 2014 when their Originating Summons was filed, he had occupied the suit land for 29 years. He is therefore entitled to orders that he be registered as proprietor of the 48 acres of land by way of adverse possession.

**DAVID KISEKELI WAUKHILA (8<sup>TH</sup> PLAINTIFF)**

He was born in 1966 and therefore attained the age of majority in 1984. He had therefore been in occupation of the suit land for 12 years in 1996. He is also entitled to orders to be registered as proprietor of 48 acres by way of adverse possession.

**ELIUD NABILIKI WAUKHILA (10<sup>TH</sup> PLAINTIFF)**

He was born in 1956 and therefore attained the age of majority in 1974. In 1986 he had been in occupation of the suit land for 12 years and by the time this suit was filed in 2014, that occupation had been for 40 years well in excess of the statutory period to warrant the grant of the orders sought. He too is therefore entitled to orders that he be registered as the proprietor of 48 acres by way of adverse possession.

**NELSON WACHIYE WAUKHILA (11<sup>TH</sup> PLAINTIFF)**

He was born in 1976 and attained the age of majority in 1994. By 2006 he had been in occupation of the suit land for the statutory period of 12 years and that was long before this Originating Summons was filed in 2014. He too is therefore entitled to orders that he be registered as proprietor of the 48 acres by way of adverse possession.

**ROBERT MANYALI WAUKHILA (12<sup>TH</sup> PLAINTIFF)**

He was born in 1980 and attained the age of majority in 1998. By 2010 he had been in occupation of the suit land for 12 years. This suit was filed in 2014 and so he had met the threshold for the grant of orders that he be registered as proprietor of 48 acres by way of adverse possession.

**WYCLIFF NAMBALU WAUKHILA (13<sup>TH</sup> PLAINTIFF) and**

**BEN KASILI WAUKHILA (14<sup>TH</sup> PLAINTIFF)**

They were born in 1982 and so they attained the age of majority in 2000. By 2012 they had been in occupation of the suit land for 12 years and by 2014 when their Originating Summons was filed, they had been in occupation of the suit land for 14 years. They too merit the grant of the orders that the defendant seek they be registered as proprietors of the 48 acres by way of adverse possession.

Having therefore considered the evidence by both parties herein, I am satisfied that the plaintiffs have proved that they are entitled to the orders sought in their amended Originating Summons. They have met the threshold of what is required to prove that they are entitled to orders in adverse possession with respect to the 48 acres out of land parcel NO MALAKISI/EAST SASURI/553.

**DECLARATION THAT THE PLAINTIFFS ARE IN ILLEGAL OCCUPATION OF THE LAND PARCEL NO MALAKISI/SOUTH SASURI/553 AND SHOULD BE EVICTED.**

By their Counter-Claim, the defendants seek the grant of the above orders against the plaintiffs.

It is not in doubt that the defendants have, since 2<sup>nd</sup> September 2009, been registered as the proprietors of the suit land. The registration was under the repealed Registered Land Act which under **Section 27(a)** provided that:-

***“The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”***

However, **Section 30 of the repealed law** also provided as follows:-

***“ Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –***

***(a) –***

***(b) –***

***(c) –***

***(d) –***

***(e) –***

***(f) Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”***

Similar provisions are found in **Section 24 and 28(h) of the new Land Registration Act 2012**. Therefore, as the registered proprietor of the suit land, the defendants, and before them, **ZEBEDAYO** all had the right to evict any trespassers on the suit land including the plaintiffs. However, their ownership of the suit land, though absolute, was always subject to the overriding interests stipulated in **Sections 30(f) of the repealed law and Section 28(h) of the new law**. It is these overriding interests that the plaintiffs are asserting in this case over the 48 acres subject of this dispute. It must be clear by now, however, that having found that the plaintiffs have acquired the 48 acres by way of adverse possession, the defendants’ claim to declare the plaintiffs as being in illegal occupation

of the land in dispute and to be evicted therefrom cannot be granted. This is because, the interests of an adverse possessor and those of a registered proprietor are mutually exclusive. They cannot flourish together. Therefore, the moment that this Court found the plaintiffs’ Originating Summons proved, the defendant’s counter claim with regard to the 48 acres was obliterated and could not stand.

I must also point out that even if the defendant’s counter – claim had not been countered by the plaintiff’s Originating Summons, it was still bound to collapse in law because it is statute barred. Indeed in paragraph 17 of their defence to defendant’s counter – claim, the plaintiffs pleaded that the defendants’ counter – claim, was barred by **Section 7 of the Limitation of Actions Act** and that a Preliminary Objection would be raised. That appears not to have been done but if it had been raised, it would have been well merited. This is because, **Section 7 of the Limitation of Actions Act** states that:-

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

The above provision must be read together with the provisions of Section 7 of the Limitation of Actions Act referred to earlier in this judgment as well as Section 13 of the same Act. And as was held in **BENJAMIN KAMAU .V. GLADYS NJERI** (supra):

***“The combined effects of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 Laws of***

***Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.” Emphasis mine.***

It is obvious therefore that 12 years after **SIMON** took possession of the 48 acres of the suit land and asserted a title hostile to **ZEBEDAYO**, both **ZEBEDAYO** and the defendants as his successors in title became mere trustees holding the 48 acres in trust for the benefit of the plaintiffs. The defendants have no title to the 48 acres and therefore the orders sought in their counter – claim are not available. Their counter claim is dismissed.

Ultimately therefore and having considered all the evidence herein, I make the following orders:-

- 1. The defendants’ counter – claim is dismissed.**
- 2. The plaintiffs’ Originating Summons is allowed and it is declared that they be registered as joint owners of the portion measuring 48 acres out of the land parcel NO MALAKISI/SASURI/553 having acquired it by way of adverse possession.**
- 3. The defendants do execute all the necessary documents to facilitate the registration of 48 acres out of the land parcel NO MALAKISI/SASURI/553 in the names of the plaintiffs within 30 days from to-day and in default, the Deputy Registrar of this Court shall be at liberty to do so on their behalf.**
- 4. The Land Registrar Bungoma shall cancel the title to the land parcel NO MALAKISI/SASURI/553 in the names of the defendants and issue two titles. One shall be in the names of the plaintiffs measuring 48 acres and the remaining portion in the name of the defendants.**
- 5. The parties shall meet their own costs of the suit.**

**Boaz N. Olao.**

**JUDGE**

**9<sup>th</sup> May 2019.**

Judgment dated, delivered and signed in Open Court this 9<sup>th</sup> day of May 2019.

Mr. Milimo for Mr. Were for plaintiffs present

Mr. Ikapel for defendants absent

1<sup>st</sup> and 2<sup>nd</sup> plaintiffs present

Defendants absent

Right of Appeal explained.

**Boaz N. Olao.**

**JUDGE**

**9<sup>th</sup> May 2019.**