

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC CASE NO. 63 OF 2019

TECLAH JEPKIRUI	1ST
PLAINTIFF	
WILSON TUWEI	2ND
PLAINTIFF	
(Administrator to the estate of The late MALAKWEN ARAP CHERUIYOT)	
-VERSUS-	
KIMAIYO CHIRCHIR	1ST
DEFENDANT	
JOSEPH KIPROP TUWEI	2ND
DEFENDANT	

JUDGMENT:

1. The Plaintiffs herein commenced this suit by way of an Amended Plaint dated 29th April 2023 against the Defendants seeking the following orders: -
 - a) A Declaration that the Decree in **Eldoret CMC Award No. 40 of 2002** dated **16.07.2002** and issued on **16.07.2002** obtained by the 1st Defendant is null and void ab initio.
 - b) A declaration that the actions of the 1st Defendant in moving the Land Dispute Tribunal, the Chief Magistrates Court and Land Registrar Uasin Gishu with the full knowledge that the proprietor of land parcel No. **MOI'S BRIDGE. /SIRIKWA BLOCK 3 (ZIWA) 8** was deceased was calculated and fraudulent.
 - c) A declaration that **Gazette Notice No. 6163** of **21.8.2015** is null and void.

- d)** An order that the registration of land parcel no. **MOI'S BRIDGE /SIRIKWA BLOCK 3 (ZIWA) 324** in favour of the 1st defendant on **4.7.2016** be revoked and/or cancelled including the sub-division giving rise to it and **MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 325** and they be consolidated and revert back to the original number **MOI'S BRODGE/SIRIKWA BLOCK 3 (ZIWA) 8** and the parcel be registered in the name of the "Estate of the late **MALAKWEN ARAP CHERUIYOT**" pending conclusion of **EDORET HC. SUCC. CAUSE No. 19 of 2012.**
- e)** A permanent injunction to issue against the 1st Defendant his servants, agents family members and any other person through whom he may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and /or in any other manner dealing with land parcel No. **MOI's BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 324** in any way detrimental to the interests of the plaintiffs and the Estate of the late **MALAKWEN ARAP CHERUIYOT.**
- (ee)** A permanent injunction to issue against the 2nd Defendant, his servants, agents, family members and any other person through whom he may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and/or in any other manner dealing with land parcel No. **MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 325** in any way

detrimental to the interests of the plaintiff's and the Estate of the late **MALAKWEN ARAP CHERUIYOT**.

f) There be an order against the 1st Defendant to pay to the Estate of MALAKWEN ARAP CHERUIYOT mesne profits calculated from 04.7.2016 till payment in full.

(ff) There be an order against the 2nd Defendant to pay to the Estate of **MALAKWEN ARAP CHERUIYOT** mesne profits calculated from 01.01.2001 till payment in full.

(g) An order of eviction to issue against the 1st & 2nd Defendants to remove themselves, their servants, agents, family members together with all their properties and belongings and any other person(s) who enter land parcels **MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 324 & MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 325** on the instructions of the defendants jointly and or severally.

h) Costs and interests of this suit be awarded to the plaintiff.

i) Any other and further relief that this Honourable court may deem just and expedient to grant.

Plaintiff's Case;

2. The plaintiffs avers that the 1st Defendant fraudulently claimed to have purchased a portion of the suit parcel. The 1st Defendant then further sub divided the suit parcel into 2 portions to produce **MOI'S BRIDGE. /SIRIKWA BLOCK 3/ZIWA 324** and **MOI'S BRIDGE. /SIRIKWA BLOCK 3/ZIWA 325** respectively and had **MOI'S BRIDGE. /SIRIKWA BLOCK 3/ZIWA 324** registered in his name.

3. The Plaintiffs further indicates that the 1st Defendant Obtained illegal orders from the Land Disputes Tribunal where he had filed a case against **PETRONILLA JEPTOO MALAKWEN** who the plaintiffs claim was not an administrator to the estate of the deceased.
4. That the 1st Defendant then used those illegal orders obtained in **ELDORET CMC AWARD NO.40 OF 2002** which were issued on **16.7.2002** and illegally presented the said orders to the Land Control Board to transfer the said **MOI'S BRIDGE. /SIRIKWA BLOCK 3/ZIWA 324** to himself.
5. As against the 2nd Defendant, the plaintiffs indicate that 2nd Defendant entered into the suit parcel in 1999 under a lease for one year which extended to the year 2000 and since then, he has refused to vacate the suit parcel which is now **MOI'S BRIDGE. /SIRIKWA BLOCK 3/ZIWA 325.**
6. That the 2nd Defendant has continued to stay illegally in this parcel which was curved out from **MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 8** which belonged to the late **MALAKWEN ARAP CHERUIYOT.**

1st Defendant's Case;

7. The suit was opposed. The 1st Defendant filed a statement of defence and counter claim which was amended on 22nd May 2023. In his defence, the 1st defendant denied all the averments made in the plaint, particularly, that he illegally acquired **MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 324** measuring **6 acres**, and that he was legitimate registered

owner thereof having inherited the same from his late father HENRY KIPSANG who was the lawful owner having purchased it from one PHILIP KIPKOSGEI KEINO in 1976.

8. In his counter claim, the 1st Defendant averred that he legally obtained orders in Arbitration case No. 21 of 2002 and obtained title and that the legal process was duly followed. He further averred that the plaintiff's remained with their share which is **MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 325**.
9. The 1st Defendant's claim against the plaintiffs in the counter-claim was for the court to declare that he is the sole and registered owner of **MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 324 measuring 6 acres** having legally acquired the property and an order of permanent injunction to issue against the plaintiffs.

2nd Defendant's Case;

10. The 2nd Defendant also opposed the suit and filed a defence and counterclaim dated 23rd May 2023. The contents of the plaintiffs amended plaint were denied and further, he stated in his counter claim that he had obtained the ownership of **MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 325** by way of adverse possession as he had been in continuous occupation of the land since 2001 to date, and a declaration that the plaintiffs title had been extinguished by operation of law.
11. The orders being sought by the 2nd Defendant was that the court extinguishes the rights of the plaintiffs over parcel **MOI'S**

BRIDGE/SIRIKWA BLOCK 3/ZIWA 325 and declare the 2nd defendant the rightful owner by way of adverse possession.

12. It was also his prayer that this court issues orders to the plaintiffs to transfer the ownership of **MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 325** to the 2nd defendant failure to which such orders be extended to the land registrar to effect the same.

13. The plaintiffs further filed a reply to the 2nd defendant's defence and also a defence to the counter claim dated 5th June 2023. They denied the allegations stated in the defence and the issue that they raised was the 2nd defendant had filed parallel proceedings claiming adverse possession in **ELDORET ELC NO.4 OF 2020(OS)**.

Trial:

14. The Plaintiffs' case proceeded for hearing where the 1st plaintiff testified as PW1 and the 2nd plaintiff testified as PW2 and they called one witness to testify in support of their case.

15. Tecla Jepkirui, the 1st plaintiff, testified as PW1. She informed the court that she works for Easten Produce Kenya Limited. She adopted her witness statement dated 03.05.2019 as her evidence in chief.

16. It was also her testimony that after her father passed on in November, 1998, they were forcefully evicted from the suit property on the grounds that her father was practicing sorcery. That their neighbours started torching their houses on the

claims that their late father had bewitched one of the neighbours.

17. That the parcel of land in question is known as L.R. No. MOI'S BRIDGE /SIRIKWA BLOCK 3 (ZIWA)/8 (hereinafter known as the suit land)

18. She also produced the following documents as exhibits in support of her case: -

Death Certificate as Pexh. 1

Copy of the Green Card of the suit land - Pexh.2

Copy of the official search of parcel No. 325 - Pexh. 3

Green card for parcel No. 324 - Pexh. 4

Decree - Pexh. 5(a)

Order - Pexh. 5(b)

Gazette Notice - 5(c)

Proceedings in respect to Award No. 40 of 2002 - Pexh. 6(a)

Minutes of the Tribunal - Pexh. 6(b)

Application for the EO to sign the Transfer Forms - Pexh. 7(a)

Transfer Forms - Pexh. 7(b)

Application for Land Control Board Consent - Pexh. 7(c)

Grant Ad Litem obtained in the year 2017 - Pexh. 8

19. She went on to state that they had sued the 1st defendant, who is her cousin from the maternal side, because he is the one who caused the subdivision of the suit land parcel No. 8, and which gave rise to parcel Nos. Moi's Bridge/ Sirikwa Block 3 (Ziwa)/324 and 325. It was her claim that at the time of the

said subdivision, there were no administrators to the estate of his father.

20. That the 2nd defendant became the registered owner of parcel No. 324 while parcel No. 325 is registered in the name of Malakwen Arap Cheruiyot.
21. It was also her testimony that her mother was forced to attend the deliberations in the Tribunal Proceedings. She referred to the court proceedings in respect of Award No. 40 of 2002 and stated that there is no evidence that her mother was present during the adoption.
22. She testified that the application for consent of the Land Control Board was signed by the Executive Officer and the request was to have the suit land subdivided into two portions. She maintained that her father's estate was not represented.
23. Further, it is her claim that the 2nd defendant has forcefully stayed on the suit land since the year 2002. That the 1st defendant is occupying parcel No. 324 while the 2nd defendant is occupying parcel No. 325.
24. She went on to state that even though the 2nd defendant filed an objection in the Succession Cause in respect to her father's estate, claiming purchaser's interest over the entire suit land, the said objection was dismissed.
25. She testified that during the pendency of the succession cause, the 2nd defendant filed another suit vide Eldoret ELC Case No. 4 of 2020 (OS) claiming adverse possession in respect to parcel No. 325, and the suit is still pending in court. It is her contention that parcel No. 325 was created in the year 2015.

She however added that the 2nd defendant went and convinced her late brother to allow him plough a portion of the suit land.

26. It was her claim that the proceedings at the Tribunal were done fraudulently. That in May, 2023, they ploughed parcel No. 325 but the 2nd defendant went and stopped them and issued threats against them, warning them never to go back to the suit parcel.

27. In concluding her examination in chief, she urged the court to allow the claim and grant the orders sought in her Amended plaint and that the counter-claims by the defendants be dismissed.

28. On cross-examination by Ms. Kosgei for the 1st defendant, it was her testimony that she filed the suit against the 1st defendant because he illegally subdivided the suit land parcel No. 8.

29. When referred to Pexh. 5(a), she conceded that she did not appeal against the said decree or filed any Judicial Review proceedings seeking to set aside the decree. She also admitted that there were no any objections raised to oppose what the Gazette Notice called upon persons to do as captured in Pexh. 5(c). She further admitted that there was no appeal against the decree when referred to pexh. 6(a) arising out of the Award No. 40 of 2002.

30. When referred to pexh. 6(b), she acknowledged that the Tribunal ruled that the 1st defendant had a right to own 6 acres and that there was no appeal against the said decision/award by the Tribunal.

31. She further conceded that pexh. 7(a) was an order of the court and that there was no appeal or review against the said order. Further, that from the judgment in the Succession Cause No. 19 of 2012, there was no nullification of the award issued in Award No. 40 of 2002. She reiterated that they were evicted from the suit land in the year 1998.
32. She admitted that the 1st defendant is in possession of parcel No. 324 but maintained that his possession thereon is illegal.
33. On cross-examination by Mr. Keter for the 2nd defendant, she reiterated that her father died in the year 1998 and in the same year, they were forcefully evicted from the suit land.
34. It was her testimony that they discovered that the 2nd defendant was on the suit land in the year 2002 and admitted that he had been in the property for over 12 years.
35. On re-examination, she clarified that she did not file any objection as regards the Gazette Notice since she was not aware of the same. That the particulars of fraud have been explained in the amended plaint. It was her testimony that the suit land parcel No. 8 was in her late father's name. Further, that no appeal or review was preferred in the previous proceedings for the reason that they did not have letters of administration.
36. Wilson Kipngetch Tuwei testified as PW2. He informed the court that he is a peasant farmer. He adopted his witness statement dated 30.05.2019 as his evidence in chief.

37. He stated that PW1 is his sister and co-administrator in respect to the estate of their mother. That the 1st defendant is his cousin while he has no relationship with the 2nd defendant.
38. It was his testimony that in the year 2012, while pursuing succession in respect to their father's estate, they noticed that a part of their father's land had been carved out by the 1st defendant. That the 1st defendant subdivided the suit land which resulted into parcel Nos. 324 and 325.
39. The witness was referred to the contents of the plaintiffs' exhibits produced by PW1 and he confirmed/verified the contents therein. He added that when the Tribunal proceedings were going on, the land was still registered in the name of his late father. He confirmed that the Transfer forms were signed on behalf of his mother by the Executive Officer after his mother refused to sign the same and maintained that his late mother did not participate in the signing of the said forms.
40. He gave narration of how his late father purchased the suit land measuring approx. 9 acres and how the 1st defendant's father lent them money towards the purchase of the 6 acres out of the 9 acres. He admitted that the money lent out by the 1st defendant's father of Kshs. 4,000/= was never refunded.
41. He however maintained that there was no sale agreement between his father and the 1st defendant. He reiterated the particulars of fraud outlined in the amended plaint attributed to the 1st defendant.

42. It was also his testimony that the 2nd defendant entered the suit land through a lease issued in the year 1999 from his brother but that the 2nd defendant refused to leave the land even after the lease had terminated.
43. In conclusion, he urged the court to allow their claim and grant the prayers sought in the amended plaint.
44. On cross-examination by Ms. Kosgei, it was his testimony that his father purchased 15 acres. That out of the 15 acres, 6 acres were forming part of his father's younger brother, who later sold the said 6 acres portion to his father. He however conceded that he had no evidence of the said sale of the 6 acres portion.
45. He reiterated that the Kshs. 4,000/= which his late mother's brother gave/lent was not refunded. When referred to the Tribunal minutes, he confirmed that Kipkosgey Arap Keino stated that the 6 acres belonged to Kimaiyo Chirchir and that the tribunal verdict has never been challenged.
46. When referred to pexh. 6(b), he confirmed that from the minutes, 3 people testified at the tribunal and a verdict was reached. That according to the said verdict, the Tribunal ruled that Kimaiyo Chirchir, who was the plaintiff therein, was entitled to own 6 acres.
47. He also acknowledged that the Tribunal also ruled that the title deed that was held by the late Malakwen Arap Cheruiyot was not valid. He conceded that no judicial review was filed by any of the 3 people who participated in the tribunal proceedings.

48. When referred to pexh. 5(a), he confirmed that the same was issued at the Chief Magistrate's Court at Eldoret. He also acknowledged the order made therein that Kimaiyo Chirchir has every right to own 6 acres. He conceded that no appeal or judicial review seeking to set aside or challenge the said orders has ever been preferred.
49. When referred to pexh. 5(b), he confirmed that the same ordered/directed the E.O of the court to sign the transfer forms. He confirmed that the said orders were not challenged. That Pexh. 5(c) has also never been challenged nor challenged the decision by the Land Registrar. He admitted that the present suit is seeking the court to nullify the said orders that were issued by the Magistrates Court.
50. It was his testimony that in Succession Cause No. 19 of 2012, the subject land is the suit land herein No. 8 and not parcel No. 324, which was in existence as at the time of the succession cause. That the confirmed grant thereto was issued in the year 2019.
51. He conceded that he has never been in possession of parcel No. 324 for over 20 years. He however maintained that the 1st defendant is in possession of parcel No. 324 fraudulently. He reiterated that the suit seeks to have the decree in Eldoret CMC Award No. 40 of 2002 dated 16.07.2002 and the Gazette Notice No. 6163 of 21.08.2015 be declared null and void.
52. On re-examination, it was his testimony that pexh. 6(b), the minutes are dated 03.05.2002 whereas his late father died on

28.10.1998. He also confirmed that from the said minutes, the three people present were Kimaiyo Chirchir, Petronila Jeptoo and Malakwen Kimaiyo Chirchir.

53. Kipkosgei Arap Keino testified as PW3. He stated that he went to the advocate's office and signed a witness statement but he does not know what was written in the statement.

54. It was his testimony that they bought the suit land together at Ziwa with Malakwen Arap Cheruiyot. That he took 6 acres while Malakwen took 9 acres. He confirmed that he sold his 6 acres portion to Malakwen Arap Cheruiyot. He maintained that the 6 acres portion belongs to Malakwen Arap Cheruiyot and not the 1st defendant.

55. On cross-examination by Ms. Kosgei, he reiterated that he does not know the contents of his witness statement for the reason that he did not have anyone interpret the contents of the said witness statement at the time of signing the same.

56. He further reiterated that he bought the suit land together with the late Malakwen Arap Cheruiyot but he later sold his portion to Malakwen Arap Cheruiyot and gave him the authority to register the same in his name.

57. Upon close of the plaintiffs' case, the matter proceeded for hearing of the defence case. Kimaiyo Chirchir, the 1st Defendant testified as DW1. He adopted his witness statement dated 24.06.2019 as his evidence in chief.

58. He produced the documents in his list of documents as exhibits in support of their case as follows: -

- Dexh. 1 - Tribunal proceedings
- Dexh. 2 - Award No. 40 of 2002
- Dexh. 3 - Green Card for parcel No. 8
- Dexh. 4 - Green Card for parcel No. 324
- Dexh. 5 - Green Card for parcel No. 325

59. It was also his testimony that he is the registered owner of the suit land known as Moi's Bridge/Sirikwa Block 3/Ziwa/324 measuring 6 acres and he has a title deed thereto.
60. It was his testimony that he got the suit land from Phillip Kipkosgei Keino and Petronilla Jeptoo Malakwen. That Phillip Kipkosgei Keino is the younger brother to Malakwen Cheruiyot and the 2 jointly purchased the suit land originally parcel No. 8 measuring 15 acres and Malakwen Cheruiyot's share was 9 acres while Phillip's share was 6 acres.
61. It was his testimony that his father, Henry Kipsang Busienei purchased the 6 acre share portion of Phillip Kipkosgei Keino in the year 1976 for Kshs. 4,800/=, when the original land No. 8 had no title and under Malakwen Cheruiyot.
62. That his father entered the purchased portion and they were given possession of the 6 acres. That Malakwen Cheruiyot refused to give them their share and transfer the 6 acres portion in their favor hence the present dispute.
63. He testified that the Tribunal ruled that the 6 acres belonged to their family. He thus denied the allegations that he entered the suit land fraudulently. He maintained that the award from the Tribunal has never been appealed against.

64. On cross-examination by Mr. Otieno, he restated that he is the registered owner of parcel No. 324 and confirmed that the original parcel No. 8 was in the name of the late Malakwen Arap Cheruiyot.
65. He confirmed that at the time of filing the Tribunal case, on 03.05.2002, Malakwen Arap Cheruiyot and his father Henry Kipsang were already dead. He confirmed that the suit land was registered in the name of Malakwen Cheruiyot.
66. It was his testimony that his father, Henry Kipsang Busienei, was the one who purchased a portion of the suit land No. 8. Although it was his claim that he applied for letters of administration in respect to the estate of his father, he conceded that from dexh. 1, the proceedings before the tribunal, he sued as the plaintiff in his own capacity.
67. It was his contention that the same was an error since he was suing on behalf of the estate of his late father. He further conceded that he cannot remember the cause number in which he applied for a grant neither does he have a copy of the grant. He stated however, that at the time of the tribunal case, Malakwen Cheruiyot was already deceased.
68. He confirmed that he was in the Tribunal. He was not however sure whether the Land Registrar was present in the Tribunal. It was also his testimony that the dispute at the Tribunal was over title and/or ownership and that he did not know that the tribunal could deal with issues of title.

69. He was also not aware that one cannot deal with the property of a deceased person without a grant. He however maintained that at the time of nullifying the title, there was no grant in respect to his father's estate.
70. That from the Gazette Notice No. 6163, pexh. 5(c), the same states the efforts that were made to compel Malakwen Arap Cheruiyot, yet he was already dead at the time.
71. On re-examination, he confirmed that he did not know whether Petronilla had obtained a grant but that she testified that she was representing the deceased.
72. He reiterated that no one appealed against the award of the tribunal. That from the proceeding in the tribunal (dexh. 1), PW3 stated therein that he had sold the suit land to his late father but changed his testimony before this court.
73. Upon close of the re-examination, the defence closed their case.
74. Upon close of the defence case, this court issued directions on the filing of final written submissions. Both the plaintiffs and the 1st defendant filed their rival submissions together with authorities, which I have read and duly considered.
75. The 2nd defendant on his part never participated in the hearing of the matter to prosecute his counter-claim and defend the suit against him nor filed final submissions. Be that as it may, I will proceed to render my decision as hereunder: -

Analysis and Determination:

76.I have critically considered and reviewed the Amended Plaintiff herein, the respective responses by the 1st and 2nd defendants including the counter-claims, the respective testimonies and exhibits produced during trial as well as the rival submissions and authorities in totality.

77.Consequently, it is my considered view that the following issues arise for determination: -

a. Whether the Land Dispute Tribunal was vested with the requisite jurisdiction to hear and determine the dispute which gave rise to the Award and Decree in Award No. 40 of 2002.

b. In light of (a) above, whether the subsequent registration was procedural, lawful and legitimate.

c. Whether the 2nd defendant proved his claim on Adverse Possession to the required standard

d. Whether the Plaintiffs are entitled to the reliefs sought in the Amended Plaintiff

e. Who shall bear the costs of the suit and Counter-claims.

Whether the Land Dispute Tribunal was vested with the requisite jurisdiction to hear and determine the dispute which gave rise to the Award and Decree in Award No. 40 of 2002;

78.At the centre of the dispute herein are the proceedings before the Land Disputes Tribunal and resultant Award and subsequent Decree from the Chief Magistrate's Court.

79. The plaintiffs aver that the proceedings before the Land Tribunal was conducted without the requisite jurisdiction. That the Land Tribunal is not vested with the jurisdiction to entertain ownership and title to land claims and further that the estate of the late Malakwen Arap Cheruiyot was not procedurally represented. That at the time of filing the dispute before the tribunal, they had not filed succession proceedings in respect to the estate of their late father and thus the late Petronila did not have the requisite capacity to be sued on behalf of the estate of their late father.
80. The 1st defendant, whose registration and title of parcel No. 324 heavily relies on the said proceedings, Tribunal Award and the subsequent decree from the chief magistrate's court, maintained that the said award and the resultant decree have never been appealed against, reviewed and/or set aside by the plaintiffs despite being fully aware of the same. That the plaintiffs have equally never instituted any judicial review proceedings to quash the said Award. They therefore dismissed the said averments by the plaintiffs.
81. The importance of jurisdiction cannot be overstated; jurisdiction is everything and without it any step undertaken by any body or person is void and cannot stand. The Tribunal's jurisdiction under **Section 3 (1)** of the **Land Disputes Tribunal Act** (repealed) was limited to determining all cases of a civil nature involving a dispute as to:-

- a) the division of, or the determination of boundaries to land, including land held in common;
- b) a claim to occupy or work land; or
- c) trespass to land

82. The question that therefore follows is whether the tribunal proceedings were in respect of the 3 grounds outlined above or whether the decision of the tribunal was outside its statutory mandate.

83. It is not in dispute that the findings of the Land Tribunal and which were adopted by the court, held that, and I wish to reproduce the same as hereunder;

“Kimaiyo Chirchir has every right to own 6 acres in dispute. That the title deed by the defendant over parcel No. 8 is not valid.”

84. Did the above finding fall within the ambit of section 3(1) of the Land Disputes Tribunal Act? My answer is in the negative.

85. The court in the case of **BEATRICE M’MARETE V. REPUBLIC & 2 OTHERS EX-PARTE JOHN GITONGA MBUI, [2004] eKLR** stated as follows:-

“In our view, the dispute before the Tribunal did not relate to boundary, claim to occupy or work land, but a claim to ownership. Taking into account the provision of Section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction

when it purported to award parcels of land registered under Registered Land Act to the applicant. In our view, the Tribunal acted in excess of its jurisdiction.”

86. Consequently, guided by the above statutory provision and the case law, it is the finding of this court that the tribunal was not vested with the requisite jurisdiction to hear and determine the dispute which gave rise to the Award and Decree in Award No. 40 of 2002. The said decision was made in excess of jurisdiction and is null and void *ab initio*.

87. Further, the dispute between the parties in the tribunal was in relation to the property of a deceased person. This fact has not been disputed. Both the plaintiffs and the 1st defendant admitted that at the time of filing the dispute at the tribunal, Malakwen Arap Cheruiyot was already deceased.

88. The law of succession is very clear that the estate of a deceased person is vested in an administrator. It has been admitted that at the time of filing the proceedings in the tribunal, succession proceedings in respect to the estate of the late Malakwen Arap Cheruiyot had not been commenced. Thus, Petronila, who is also since deceased, did not have the requisite capacity to be sued on behalf of the estate of the late Malakwen Arap Cheruiyot in the form of letters of administration.

89. Moreover, DW1 during cross-examination stated that he had instituted the dispute on behalf of his father, Henry Kipsang,

who was the alleged purchaser of the 6 acre portion, but conceded that he had neither instituted the succession proceedings in respect of the estate nor had the requisite letters of administration to represent the estate of his late father.

90.The upshot of the above is that the Land Tribunal was not vested with the requisite jurisdiction and its award and subsequent decree is a nullity and cannot stand.

In light of (a) above, whether the subsequent registration was procedural, lawful and legitimate;

91.Having held that the decision and decree which led to the registration of the 1st defendant as an owner of parcel No. 324 was a nullity, it therefore follows that the subsequent registration and processes, including the Gazette Notice are a nullity and the same cannot therefore stand for the aforesaid reasons.

92.Consequently, it is my considered finding that the registration was not lawful and /or legitimate and cannot therefore confer to the 1st defendant any proprietary rights and interest over a portion of the suit land No. 8 measuring 6 acres.

93.In essence therefore, the registration of the suit land reverts to the estate of the late Malakwen Arap Cheruiyot, to its status before the finding in the land tribunal proceedings.

94.The 1st defendant's claim on a declaration of ownership is therefore not merited and is dismissed.

Whether the 2nd defendant proved his claim on Adverse Possession to the required standard;

95. The 2nd defendant in his counter-claim, relied on the doctrine of adverse possession. It is his claim that he has since obtained ownership and prescriptive rights and interests over the suit land No. 325 by way of adverse possession, having been in continuous occupation of the suit land since the year 2001.
96. It is therefore his contention that the plaintiffs' rights over suit parcel No. 325 has been extinguished by virtue of his possession and occupation. He consequently urged the court to declare him the rightful owner, having obtained overriding and prescriptive rights over the suit land thereto.
97. The plaintiffs in response to the counter-claim dismissed the said claims and maintained that the 2nd defendant's claim is sub judice, the 2nd defendant having filed an earlier suit seeking similar orders under the doctrine of adverse possession vide Eldoret ELC Case No. 4 of 2020 (OS) which case is still pending in court.
98. In addition, they dismissed the claim as having been filed prematurely on the basis that the suit land No. 325 was only registered in the name of their late father on 16.07.2015. Thus, at the time of filing the suit, the 12-year statutory period had not lapsed. They therefore urged the court to dismiss the counter-claim with costs.

99. Sections 7, 13, 17 and 38 (i) and (ii) of the Limitation of Actions Act and Section 28 (h) of the Land Registration Act provides the statutory framework for the doctrine of adverse possession.

100. Makhandia, JA in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** in describing the doctrine of adverse possession held as follows: -

“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 prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence 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...”

101. It is important to note that the 2nd defendant did not testify during trial in support of his ownership or adduced any evidence in support of his averments or called any witness. His

claim thus remain mere unsubstantiated claims with no probative value.

102. Be that as it may, from the copy of the green card for parcel No. 325 produced by the 1st defendant as dexh. 5, it is evident that the said parcel of land was registered in the name of the late Malakwen Arap Cheruiyot on 16.07.2015. The question that therefore follows is whether the 2nd defendant's occupation and possession of the suit land No. 325 had been for the statutory period of 12 years.

103. It is settled law that time for adverse possession can only start running from the date of registration of the proprietor. The Court of Appeal in the case of **FRANCIS GITONGA MACHARIA vs MUIRURI WAITHAKA [1998] eKLR** held that:

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“The limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case, time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property...”

104. Consequently, in view of the above decision, it is the finding of this court that the 2nd defendant's claim on adverse possession has been filed prematurely. The 12-year statutory period had not been met at the time of filing the counter-claim.

105. This court therefore finds that the counter-claim has been filed prematurely and is hereby dismissed with costs.

Whether the Plaintiffs are entitled to the reliefs sought in the Amended Plaint;

106. In view of the findings in the above issues, it is the finding of this court that the plaintiffs are entitled to the reliefs sought in the amended plaint.

107. However, I must state that the plaintiffs did not prove their claim on mesne profits and the same cannot therefore be awarded as sought.

Who shall bear the costs of the suit and Counter-claims;

108. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

109. In this case, having held that the plaintiffs have proved their claim to the required standard, I find that they are entitled to the costs of the suit as well as the counter-claim.

CONCLUSION:

110. The upshot of the above is that the Plaintiffs have sufficiently proved their claim against the defendants on a balance of probabilities. Consequently, this court enters Judgment in favour of the plaintiffs in the following terms:-

a) A Declaration be and is hereby made that the Decree in Eldoret CMC Award No. 40 of 2002 dated 16.07.2002 and

issued on 16.07.2002 obtained by the 1st Defendant is null and void ab initio.

- b) A declaration is hereby made that Gazette Notice No. 6163 of 21.8.2015 is null and void.
- c) An order that the registration of land parcel no. MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 324 in favour of the 1st defendant on 4.7.2016 be revoked and/or cancelled including the sub-division giving rise to it and MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 325 and they be consolidated and revert back to the original number MOI'S BRIDGE/SIRIKWA BLOCK 3/ZIWA 8 and the parcel be registered in the name of the "Estate of the late MALAKWEN ARAP CHERUIYOT" pending conclusion of ELDORET HC. SUCC.CAUSE NO.19 OF 2012.
- d) An order of permanent injunction be and is hereby issued against the 1st Defendant, his servants, agents, family members and any other person, through whom he may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and /or in any other manner dealing with land parcel No. MOI's BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 324 in any way detrimental to the interests of the plaintiffs and the Estate of the late MALAKWEN ARAP CHERUIYOT.
- e) An order of permanent injunction be and is hereby issued against the 2nd Defendant, his servants, agents, family members and any other person through whom he may act against trespassing, erecting fences, erecting structures, uprooting beacons, ploughing, planting, grazing, transferring, selling, leasing and/or in any other manner

dealing with land parcel No. MOI'S BRIDGE/ SIRIKWA BLOCK 3 (ZIWA) 325 in any way detrimental to the interests of the plaintiff's and the Estate of the late MALAKWEN ARAP CHERUIYOT.

- f) The 1st & 2nd Defendants, their servants, agents, family members together with all their properties and belongings and any other person(s) who enter land parcels, be and are hereby directed to vacate and/or cede vacant possession of the suit land MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 324 & MOI'S BRIDGE/SIRIKWA BLOCK 3 (ZIWA) 325 within a period of 90 days from the date of this Judgment. In default, an order of eviction be and is hereby issued upon strict compliance with the provisions of section 152E of the Land Act on the issuance of eviction notices.
- g) The 1st defendant's counter-claim be and is hereby dismissed.
- h) The 2nd defendant's counter-claim be and is hereby dismissed.
- i) Costs of this suit as well as the counter-claim be borne by the defendants herein.

111. It is so ordered.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on **13TH** day of **FEBRUARY, 2026**.

HON. C. K. YANO
JUDGE

In the virtual presence of; -

Mr. C. F. Otieno for Plaintiffs.

Mr. Omboto for 1st Defendant.

No appearance for 2nd Defendant.

Court Assistant - Laban

ORIGINAL