

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELC CASE No. E003 OF 2022 (OS)

BENJAMIN KIPYEGO MALAKWEN **1ST**
PLAINTIFF

SIMION KIPSEREM **2ND**
PLAINTIFF

VERSUS

SIMION SAWE RONGOEI
DEFENDANT

JUDGMENT:

1. The Plaintiffs commenced this suit by way of Originating Summons dated 14th February, 2022 seeking the following orders:-
 - (1) THAT **BENJAMIN KIPYEGO MALAKWEN** be registered as owner of one decimal two five acres (1.25 acres) in title no. Uasin Gishu/Kormaet Scheme/273.
 - (2) THAT summons herein be served upon **SIMION SAWE RONGOEI**.
 - (3) THAT during the pendency of this suit the said title no. Uasin Gishu/Kormaet Scheme/273 of 1.25 acres is in actual possession by the 1st Plaintiff.
 - (4) THAT the Defendant be condemned to pay costs of this Originating Summons.
2. The Originating Summons (OS) is premised on the 1st Plaintiff's Supporting Affidavit of even date. He deponed that the Defendant is the registered owner of Uasin Gishu/Kormaet

Scheme/ 273 measuring 1.25 Acres (the suit property herein). He averred that the 2nd Plaintiff purchased the entire suit property from the Defendant in the early 1990's and took immediate possession thereof. That the 2nd Plaintiff obtained Land Control Board (LCB) Consent to transfer the land from the Defendant but all efforts to effect the transfer bore no fruit.

3. The 1st Plaintiff averred that he purchased the suit land from the 2nd Plaintiff on 13th January, 1997 for KShs. 82,500/- and took immediate possession. That he had enjoyed quiet, peaceful and uninterrupted occupation of the entire parcel for 24 years and has thus acquired it by way of adverse possession. Further, that the Defendant's title had been extinguished under the Limitation of Actions Act. He claimed that the Defendant had in the year 2020 been interfering with his quiet possession, thus he lodged a caution on the land on 25th May, 2021.
4. The 1st Plaintiff further deponed that in February, 2022, he issued a demand letter warning the Defendant not to trespass onto the land. That, however, on 11th February, 2022 the Defendant brought over 50 people to force entry into the land. The Plaintiff avers that they repulsed them and prevented him from trespassing by force. He asked the court to grant the prayers sought to protect his proprietary interests. He claimed that he stood to suffer irreparable loss and harm if the prayers sought are not granted, whereas the Defendant will suffer no prejudice.
5. Upon being served, the Defendant opposed the OS through his Replying Affidavit sworn on 19th April, 2022 denying all the averments in the OS and its Supporting Affidavit. He admitted

that he was the owner of the suit property having been so registered on 29th November, 2015 and issued with a title on 10th May, 2019. He averred that he had never sold the land to the Plaintiffs or any other person, and denied signing their annexed Agreement for Sale. He explained that at the time of the purported sale, he was away in Narok and had no intention to sell the land.

6. The Defendant deponed that he neither signed the Application for LCB Consent nor attended the LCB Meeting where the purported consent was granted since he was also away in Narok. The Defendant denied the claim that the 1st Plaintiff has been in possession, use and occupation of the suit land. The Defendant averred that the land is adjacent to his parcels of land and he had been tilling the same throughout without any interruption as confirmed by the letter from the area chief dated 8th March, 2022. He averred that he was surprised that the 1st Plaintiff placed a caution on the register of the suit land.
7. The Defendant pointed out that in the Statutory Declaration dated 25th May, 2021, the 1st Plaintiff lied on oath by claiming that he as the Proprietor of the land was dead and he was a beneficiary of his estate. Further, that the 1st Plaintiff claimed in the Statutory Declaration that he had been in occupation of the suit property since childhood and not from 1997 as he is claiming in this suit, yet the 1st Plaintiff is older than him. The Defendant averred that he had ploughed the suit land and planted maize for the 2022 planting season. He deponed that the orders of adverse possession are inapplicable since the 1st

Plaintiff has not been in use, occupation and possession of the suit land as alleged.

8. The 1st Plaintiff filed a Supplementary Affidavit dated 5th February, 2024 in response to the Replying Affidavit. He accused the Defendant of lying and asserted that he in fact sold the land to the 2nd Plaintiff in the early 1990s. He averred that the letter of consent from the Ainabkoi LCB was granted on 19th December, 1995 while the 2nd Plaintiff had been in possession of the land since the 1990s until he sold it to him on 13th January, 1997. That he remained in peaceful possession from then until February, 2022 when the Defendant forced his way with about 50 people including Police Officers from Simat Police Post.
9. He reiterated that the Defendant only forced his way since February, 2022 till the date of the suit, however all the other subsequent years, the Defendant was not in possession. He admitted that the Defendant is alive and not deceased, and claimed that the statement in the Statutory Declaration dated 25th May, 2021 was an error by the typist who pasted it wrongly. Further that the claim that he had been in possession of the suit property since childhood was an error that was regretted, and clarified that he had been in actual occupation of the land since 1997. He claimed that the area chief relied on what she had been told since she lives about 20 kilometres away, and that had she visited the land, she would have written a different letter.

Hearing and Evidence:

The Plaintiffs' Case;

10. During the hearing of the case, the 1st Plaintiff testified as PW1 and adopted his witness statement dated 14th February, 2022 as his evidence-in-chief. He testified that he is a resident of Kapseret location, Lemook Sub-location. He testified that he bought 1.25 Acres from Simion Kipserem, who had purchased the same from the Defendant. That he took possession immediately from 1997 to date, which is about 24 years. PW1 testified that he conducted a search on 15th October, 2022 with a view to transferring the land to his name and he discovered that the land belonged to the Defendant and not the 2nd Plaintiff.
11. PW1 testified that in 2022, the Defendant, in the company of police officers, evicted him from the suit land, removed his fence and erected his own. That from then, he no longer uses the land. He prayed that the Defendant transfer the land to him. He testified that the Defendant was present when they went to the Land Control Board. He testified that it was true the Defendant was in Maasai land, but he came to the LCB, and that there were other people present. PW1 produced the documents in his List of Documents dated 14th February, 2022 as PEXb 1-10. PW1 also produced a copy of the mutation form in his Further List of Documents dated 9th May, 2024 as PEXb 11 and stated that he wished to also rely on his supporting affidavit.
12. PW1 was cross-examined by Mr. Sambu and he testified that the suit property is now registered in the Defendant's name. He was referred to the Agreement produced as PEXb5 and testified that the seller was shown as Cecilia Chemosbei Tiony, the Defendant's wife. PW1 testified that the 2nd Plaintiff was not

present at the time of signing the said agreement and was also unavailable to sign for him a transfer. He admitted that he did not do a search on the land. PW1 admitted that the Defendant was also not present.

13. With regards to the letter of consent dated 19th December, 1995 (PEXb3), PW1 testified that the date appears to have been corrected and that it was in reference to an application dated 21st October, 1995. PW1 was then referred to the mutation form (PEXb11) and testified that it was registered on 29th November, 1995 before the application for consent was made. PW1 testified that there were errors in the Affidavit in support of his caution. He however stated that the signature thereon was his. PW1 confirmed that the Defendant was alive and in court, and was no deceased as stated.
14. PW1 testified that he entered the land in 1997 and put up a structure which the Plaintiff pulled down and planted grass. He conceded that the Defendant is currently the one who has fenced the land and leased it out to 3rd parties. He was referred to the Chief's letter dated 8th March, 2022 and testified the Defendant has been using the land for 20 years.
15. On re-examination, PW1 testified that he did not agree with the Chief's letter since she stays a distance from the suit land. PW1 further testified that the claim in his statutory declaration that he had been on the land since childhood was also an error and he had corrected it in his supplementary affidavit of 5th February, 2024. He admitted that the land was subdivided before they went to the LCB. He stated that after selling the land to him, the Defendant left for Maasai land, but claimed that

he went there to find him so he could attend the LCB. He reiterated that the seller in the agreement was the Defendant's wife and that he paid her the purchase price, which the Defendant has not disputed.

16. The 2nd Plaintiff testified as PW2 and adopted his witness statement dated 14th February, 2022 as his evidence-in-chief. He testified that both the 1st Plaintiff and the Defendant were his neighbours. PW2 told this court that he purchased the suit land from the Defendant in 1995 for KShs. 82,000/-. That the money was paid through his wife Cecilia who then paid it to the Defendant, after which he fenced the land and left it. That he later sold it to the 1st Plaintiff who paid the agreed purchase price in full, but because he was not around, his wife signed the agreement with the 1st Plaintiff.
17. PW2 further testified that having sold the land to the 1st Plaintiff, he went to the LCB for the transfer. According to PW2's testimony, a mutation is done first before the LCB Consent is given. PW2 told this court that the 1st Plaintiff used the land from the time he purchased until 2022. He testified that he was not present when the Chief's letter of 8th March, 2022 was written. He said that he would have no objection if the court were to direct the Defendant to transfer the land to the 1st Plaintiff, but testified that he would abide by the court's decision. He further testified that the land belongs to the 1st Plaintiff.
18. On being cross-examined, PW1 testified that he purchased the suit land from the Defendant in 1995. That there is an agreement between the Defendant and his wife, although he

did not bring it to court and he could not remember the date of the said agreement. He testified that he did not attend the LCB for consent to transfer. PW2 was referred to the Application for LCB Consent (PEXb2) and he testified that he did not sign it. He further testified that he did not attend the LCB meeting and that his wife did. He also told this court that he has never gone back to the land after selling it to the 1st Plaintiff, but confirmed that it is currently occupied by the Defendant.

19. PW2 was re-examined and he testified that he did not know when the Defendant regained possession of the land. He however testified that the 1st Plaintiff informed him in 2022 that the land he sold to him had been taken over by someone else. He testified that he did not sign a power of attorney with his wife since they had only agreed as a family.

The Defendant's Case:

20. On the part of the defence, the Defendant testified as DW1. He testified that he lives in Kormaet Scheme and he adopted his witness statement dated 19th April, 2022 as his evidence-in-chief. He produced the original title to the suit property issued on 10th May, 2019 as DEXb1. He testified that he was registered as the owner on 29th November, 2015. He asserted that the land belongs to him and that he is the one using it. He insisted that he had never sold the land, and in particular denied selling it to the 2nd Plaintiff in 1995 since he was in Narok at the time. DW1 testified that he had not seen any agreement and neither did he know the 2nd Plaintiff. DW1 testified that he was not present when the alleged agreement was signed.

21. DW1 said that he was aware of the caution put by the Plaintiff. He was referred to the statutory declaration dated 25th May, 2021 and he testified that it said he was deceased. DW1 produced it as DEXb2. DW1 confirmed that he is the one in occupation of the land. He asserted that the 1st Plaintiff has never used the land. He testified that the suit land is a subdivision of parcel no. 20 which was his since 1971. He testified that he came from Narok in 2004 after his wife died, and has been leasing out the land until now. He refuted the claim that the 2nd Plaintiff sold the land to the 1st Plaintiff in 1997. He prayed that the Plaintiff's suit be dismissed with costs.
22. DW1 was cross-examined and reiterated that he did not sell the land to the 2nd Plaintiff in 1995. He was referred to the Application for LCB Consent and he testified that it is over parcel no. 273 and that both his name and the Plaintiffs are there. He testified that it was dated 21st October, 1995 but he was not there in 1995 and neither was he there when the letter of consent was signed. He denied forcing himself into the land, or that the Plaintiffs occupied the suit land. DW1 testified that the 1st Plaintiff was his neighbour and accused him of moving the boundary to his land, but it was rectified by surveyors.
23. DW1 testified that he had only seen the agreement between the 1st and 2nd Plaintiffs in court. He added that he knew the persons listed as witnesses but he was not present. He was referred to the letter dated 1st September, 2020 from the County Surveyor to the Chief and he testified that the same was written because there was a boundary dispute. He confirmed that he had leased the land to one Arap Bett since 2022. He

stated that if the Plaintiff used the land from 1997 then it was without his consent.

24. Upon being re-examined, DW1 testified that he returned to his land in 2004 and found that the boundary had been moved. He testified that he knew his land was vacant and so he fenced it. He explained that the boundary dispute was sorted out when the surveyors came and corrected the boundary. He denied going to the LCB and testified that the Plaintiffs went on their own. This marked the end of DW1's testimony, after which he closed his case.

Submissions:

25. After the close of the defence case, the court directed the parties to file and exchange written submissions and the parties have complied. The Plaintiffs filed their submissions dated 29th December, 2025 while the Defendant's submissions are dated 26th January, 2026.

The Plaintiffs' Submissions;

26. In the Plaintiff's Submissions, Counsel submitted that the claim is grounded on Section 38 of the Limitation of Actions Act which recognises that continuous, exclusive and open, possession of land for 12 years results in acquisition of ownership against the registered owner. Counsel also cited Section 7 of the said Act which bars action to recover land after a period of 12 years and relied on the case of ***Littledale vs Liverpool College***.
27. Counsel submitted that the 1st Plaintiff purchased the land from the 2nd Plaintiff in January, 1995 and had been in visible and notorious possession from 1997 to the present. That the

Defendant had not entered or asserted possession during that period, thus the Defendant's rights over the portion had been extinguished and the 1st Plaintiff should be declared to have acquired the title by adverse possession.

28. Counsel for the Plaintiff further submitted that the 1st Plaintiff possession was open, peaceful and continuous. That it was also with the Defendant's knowledge since the Defendant himself applied for LCB Consent to transfer the land to the 2nd Plaintiff, and thus meets the test for adverse possession. Counsel argued that the LCB Consent granted on 19th December, 1995 supports the legitimacy of the Plaintiff's occupation and reflects the Defendant's acknowledgement of the transaction.
29. Counsel urged that time for adverse possession ran despite the Defendant's refusal to complete the transfer. Counsel relied on **Mbira vs Gishuhi (2002)1 EALR 137**, **Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR** and **Chevron (K) Ltd vs Harrison Charo wa Shutu (2016) eKLR**. Counsel explained that the Defendant's attempts to interfere with the Plaintiff's possession in 2020 and 2022 were late since they were taken after more than 24 years of uninterrupted possession and time could not be interrupted retroactively.
30. Counsel further submitted that the said attempts were inconsequential and did not legally interrupt time from running. Counsel cited the case of **Joseph Gahumi Kiritu vs Lawrence Munyambu Kabura CA No. 20 of 1993**. Counsel argued that the Defendant's title had been extinguished at the lapse of the statutory period and cited **Public Trustee vs Wanduru Ndegwa (1984) KLR 314**, leaving the Plaintiff the de facto

owner of the land. Counsel urged that the Plaintiff is thus entitled to the reliefs sought and for an order that the Defendant pays costs.

The Defendant's Submissions;

31. On the part of the Defendant, Counsel acknowledged that a party seeking adverse possession must demonstrate non-permissive possession for a period of 12 years, without force and with intent to possess the land. Counsel submitted that there was no sale agreement to demonstrate that the 2nd Plaintiff bought land from the Defendant. Further, that the agreement dated 13th January, 1997 was also not signed by the 2nd Plaintiff.
32. Counsel additionally submitted that the 2nd Plaintiff not being the registered owner of the land held no transferrable interest thereon. Counsel thus submitted that the purported sale in 1997 to the 1st Plaintiff was void ab initio and incapable of creating any enforceable rights against the Defendant. Counsel relied on the case of **St. Thomas Academy Limited vs Githumu Kangema Limited & Others (2024) KEELC 7025 (KLR)**.
33. Counsel submitted that the Plaintiffs bear the legal and evidential burden of establishing that they had acquired the title by way of adverse possession. Counsel relied on the case of **Gitiha vs Farmers' Co-operative Society Limited (2022) KEELC 13664 (KLR)** and **Kimani Ruchine vs Swift Rutherford & Co. Ltd (1980) KLR**. Counsel submitted that the 1st Plaintiff's assertions are unsubstantiated and

inconsistent with the facts on the ground. Counsel submitted that the Defendant was registered as the proprietor of the land on 29th November, 2015 and was issued with a title deed on 10th May, 2019.

34. Counsel asserted that time for adverse possession begins to run after the registered owner is entered in the register as the proprietor of the suit land. Counsel thus argued that as at the time of filing this suit on 14th February, 2022 the statutory period of 12 years had not lapsed. Counsel also pointed out that the LCB Consent produced by the Plaintiffs appears forged and the dates are tampered with. Counsel further pointed out the copy of minutes are not complete as the date of the meeting and signatures are missing, consistent with an attempt to forge evidence.
35. With regards to the falsehoods sworn in the application for caution, Counsel submitted that the 1st Plaintiff had not sworn an affidavit to correct the record before the Land Registrar and the caution remained on the strength of the uncorrected declarations. Counsel further submitted that the Defendant had been in possession of the suit property since he purchased it in 1971 to date. That his possession was confirmed by the letter from the chief dated 8th March, 2022. Counsel argued that the Plaintiff had failed to tender credible evidence to demonstrate that they had been in possession for the requisite 12 years. Counsel therefore prayed that the OS be dismissed with costs to the Defendant.

Analysis and Determination:

36. I have considered the pleadings filed herein, the witness testimonies and evidence adduced as well as the submissions and I am of the view that the following issues arise for determination by this court:-

(i) Whether the 2nd Plaintiff acquired any valid interest over the suit land that he could confer to the 1st Plaintiff;

(ii) Whether the 1st Plaintiff has demonstrated that he is entitled to the suit property by way of adverse possession

(iii) Who shall bear the costs of this suit?

(a) Whether the 2nd Plaintiff acquired any valid interest over the suit land that he could confer to the 1st Plaintiff

37. The claim by the 1st Plaintiff is that he purchased the suit property herein from the 2nd Plaintiff. The Plaintiffs both claim that the 2nd Plaintiff had acquired rights over the suit property through purchase from the Defendant who is the current registered owner. The starting point in this case therefore is to determine whether the 2nd Plaintiff held any interest over the suit property capable of being transferred to the 1st Plaintiff.

38. In support of their claims, the Plaintiffs have produced a copy of an agreement for sale between the 1st and 2nd Plaintiff. The agreement is dated 13th January, 1997 and although it indicates that it is between the two plaintiffs, it is in fact signed by Cecilia Chemosbei Tiony, who is described in that agreement as the wife of the 2nd Plaintiff.

39. The Plaintiffs also produced an Application for LCB Consent addressed to the Ainabkoi Land Control Board signed by the owner on 21st October, 1995, a Letter of Consent issued by the

Ainabkoi Land Control Board, a copy of minutes, letters referring to a pending boundary dispute and the 1st Plaintiff's application for a caution to be placed on the title to the suit property. The Plaintiff also produced a mutation form registered on 29th November, 1995 showing the 2nd Plaintiff's name indicated as one of the interested persons.

40. The Defendant categorically denies ever selling his land to the 2nd Plaintiff. He insists that at the time of the alleged sale, he was away in Narok. This is admitted by the 1st Plaintiff who testified that the Defendant was in Maasai Land and he had to follow him to attend the LCB. It is trite that for an agreement for the disposition of land to be valid and enforceable, the agreement must not only be in writing, it must be signed by the parties thereto and attested by a witness, who must be present when the contract is signed.
41. The validity of a contract for the sale of land is provided for under the provisions of Section 3(3) of the Law of Contract Act, which is replicated word for word at Section 38(1) of the Land Act. The two statutes provide for the requirements in a contract for the disposition of an interest in land as follows:-

No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

42. The import of the foregoing is that a contract for the sale of land requires a formal, comprehensive written agreement to be legally enforceable. The written agreement or contract for sale must incorporate the essential elements stated at Section 3(3) of the Law of Contract Act and Section 38(1) of the Land Act above. In the present case however, no such agreement has been placed before this court to prove that there was indeed a sale agreement between the Defendant and the 2nd plaintiff.
43. It must be noted that in his testimony, the 1st Plaintiff lied to this court and claimed that Cecilia was in fact the Defendant's wife. The agreement she signed also was for sale of land to the 1st Plaintiff, and going by the PW2's testimony, she was disposing the 2nd Plaintiff's interest and not acting on behalf of the Defendant. The Plaintiff has admitted that the Defendant was also not present at the time of signing the agreement. It cannot be said therefore that the Defendant was a party to the transactions between the 1st and 2nd Plaintiff. In fact, by the 1st Plaintiff's own testimony, it is only when he conducted a search on 15th October, 2022 with a view to transferring the land to his name, that he discovered that the land belonged to the Defendant and not the 2nd Plaintiff.
44. With regards to the purported sale of the suit land from the Defendant to the 2nd Plaintiff, none of documents produced before this court meet the criteria established by Section 3(3) of the Law of Contract Act and Section 38(1) of the Land Act. Moreover, neither the Application for consent nor the Mutation form produced before this court meet the criteria established by Section 3(3) of the Law of Contract Act and Section 38(1) of the

Land Act. The Application for consent does not have the signatures of both the Defendant and the 2nd plaintiff as the parties to the alleged transaction.

45. To make matters worse, I have noted a few contradictions in the Plaintiffs' case. The LCB Consent produced by the Plaintiffs is dated 21st October, 1995 and the LCB Consent issued thereto is dated 19th December, 1995. As indicated hereinabove, the agreement for sale of the land to the 1st Plaintiff was made on 13th January, 1997. Therefore, at the time of the application and issuance of the Consent, the 1st Plaintiff had not purchased the land from the 2nd plaintiff and he had no reason to be running after the Defendant in Narok to get him to attend a LCB for transfer of the land to him as alleged.
46. Secondly, the LCB Consent looks to have corrections and/or amendments on the dates that were not countersigned by the board, which is itself questionable. But more so, in the minutes of the LCB Meeting produced before this court, Minute No. 1651/95 which relates to the 2nd Plaintiff and the Defendant only refers to the subject land as **"UG/Kormaet Scheme"** without specifying the parcel number, whereas all the other minutes specified the particular parcel numbers. It is not possible that the Defendant sought to transfer the entire scheme. By way of practice, consent cannot be issued if the original title is not presented before the Land Control Board. In this case however, the parcel number is not stated at all, and it is not clear what title was presented before the LCB or what parcel exactly the consent granted by the Ainabkoi LCB relates to.

47. I must point out also, that the Plaintiff claimed that the minutes of the LCB Meeting produced before this court are for 19th December, 1995. However, the said minutes are just but a one page document, which does not indicate which Land Control Area/Board sat to hear the parties and granted the Consent. The document is neither dated nor signed as to enable the court or any party interacting with the said document authenticate it. There is nothing to indicate that it is in fact an official document of any Land Control Board as opposed to a randomly typed document.
48. With regards to the mutation form (PEXb11), the same relates to subdivision of the parcel of land known Uasin Gishu/Kormaet Scheme/20 which as explained by the Plaintiff gave rise to the suit property herein. The name of the 2nd Plaintiff appears as one of the interested persons but it does not specify what the nature of his interest is and what portion of subdivisions his interest relates to.
49. All in all, there being no written agreement duly executed by the vendor and purchaser and attested by a witness, the claim that the 2nd Plaintiff purchased land from the Defendant remains a mere allegation that is worth nothing and is unenforceable under the law. It follows therefore that the 2nd Plaintiff had no valid or good title to the suit property.
50. That being the case, what then is the consequence of the sale agreement between the 1st Plaintiff and the 2nd Plaintiff? In ***St. Thomas Academy Ltd vs Githumu Kangema Ltd & Others [2024] KEELC 7025 (KLR)***, the court held that:-

“62. With regard to the first issue, the main challenge is that of the principle of nemo dat quod non habet which comes into play...

63. The nemo dat principle means one cannot give what he does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else. Accordingly, an unauthorized transfer of the title by any person other than the owner generally has no legal effect, which means the owner continues to hold the title to the property while the person who received the invalid title owns nothing.”

51. The Court of Appeal in **Arthi Highway Developers vs West End Butchery Limited and 6 Others (2015) KECA 816 (KLR)**, the Court of Appeal lent its voice to this discussion and held that:-

“69. It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”

52. From the above-cited authorities, it is clear that an unauthorised sale of land by any person other than the

registered owner of the land has no legal effect. This court has already found that the 2nd Plaintiff had acquired no interest over the suit property capable of being enforced under law that he could transfer to the 1st Plaintiff. In addition, there is no evidence that the 2nd Plaintiff had any authority to act for the Defendant in the purported sale or to dispose of the land on behalf of the Defendant either by himself or through his wife. He and his wife are neither agents nor hold any power of Attorney to act on behalf of the Defendant with regards to the suit property.

53. It is trite that once the original acquisition is found to lack legality, the interests and/or title acquired by subsequent owners even if innocent cannot be protected. As a result, the purported sale of the land by the 2nd Plaintiff to the 1st Plaintiff through the sale agreement dated 13th January, 1997 is of no legal consequence. This is because the 2nd Plaintiff did not acquire any good or valid title that he could confer to the 1st Plaintiff. The title to the suit property remains with the Defendant as the registered owner, and the 1st Plaintiff obtained no interest therein.
54. Before concluding on this issue, I must address the issues arising out of the caution placed by the 1st Plaintiff. The 1st Plaintiff claims that the declarations made in the statutory declaration accompanying the caution were made in error and had been corrected in the supplementary affidavit. He admitted that the Defendant was alive and not deceased as claimed in the declaration. He further stated that the allegation that he had been on the land since childhood was also a regrettable

error. However, going by the fact that he also claimed to be a beneficiary of the estate of the deceased proprietor of the land, I do not believe that the said declarations were made in error.

55. I would say they were calculated at misleading the land registrar into allowing the registration of the caution. In any event, the 1st Plaintiff admitted that he is the one who signed the declaration, thus he ought to have read it before he signed it. It appears however, that despite the obvious errors therein, he still went ahead to sign the declaration and lodge it for registration. It took him 3 years and until the Defendant herein brought these matters to the attention of the court for him to address them. If he really had any intention of correcting the purported errors, he ought to have brought them to the attention of the registrar way before the filing of this suit, but he did not do so. The 1st Plaintiff therefore did not approach this court with clean hands.

(b) Whether the 1st Plaintiff has demonstrated that he is entitled to the suit property by way of adverse possession;

56. Arising from the purported purchase, the 1st Plaintiff herein claims to have been in open and exclusive possession of the suit land herein. The 1st Plaintiff thus wants to be registered as the owner of the suit property owing to the interest allegedly acquired by way of limitation through adverse possession.

57. The doctrine of adverse possession was defined by the Court of Appeal in **Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR** 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, 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.”

58. The law on adverse possession is the Limitation of Actions Act which at Section 7 thereof, provides that:-

7. Actions to recover land

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

59. In addition, Section 38(1) of the said Act further provides that:-

38. Registration of title to land or easement acquired under Act

(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised

in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land

60. Therefore, when a party brings an application for registration under Section 38(1) claiming to be entitled to land by way of adverse possession, they must demonstrate that:-
- (i) They have been in uninterrupted possession for the applicable statutory period of 12 years
 - (ii) Their possession/occupation of the land is non-permissive or non-consensual
 - (iii) That the possession and/or occupation is actual, open, notorious and exclusive
61. The first factor of adverse possession is actual possession of the suit land by the party claiming adverse possession for the period of 12 years. By law, the fact of possession is one for evidence. The party claiming adverse possession bears the burden of proving that they are indeed in actual possession of the land being claimed.
62. In this instant suit, the 1st and 2nd Plaintiff both admitted that the Defendant is the one currently in occupation of the suit property. At Paragraph 9 of the Supplementary Affidavit, the Plaintiff however claimed that the Defendant forced his way since February, 2022. He however claimed that until the moment of the forced entry, all the other subsequent years the Defendant was not in possession. The 1st Plaintiff thus claims that having already been in occupation of the land for over 20

years, then the Defendant's title was extinguished despite his taking back possession of the land.

63. Looking at the evidence produced before this court, there is nothing to show that the 1st Plaintiff was ever in possession of the suit land but was evicted therefrom by the Defendant. There is no police report of the alleged eviction of the 1st Plaintiff. There are no photographs to show that he was indeed in possession or that he had in fact put up the alleged structure/fence on the suit land. There is literally nothing to show that he was ever in possession of the suit property. The same is also true of the 2nd Plaintiff who claims he took immediate possession and put up a fence. However, he also did not demonstrate that he was ever in possession of the land.
64. The testimony of the 2nd Plaintiff also does not lend any assistance to the 1st Plaintiff's case since he told this court that he has never gone back to the suit property after he sold it to the 1st Plaintiff. The 2nd Plaintiff therefore is not a trustworthy witness as he cannot confirm to this court that the 1st Plaintiff was actually in possession of the land, or that he had remained in possession thereof for the requisite period. The 1st Plaintiff not only failed to prove his possession or stay on the land, but also did not call a single witness who could confirm to this court that he has ever at any one point in the alleged timeline been in possession of the suit property.
65. On the other hand, the Defendant claims that he came back to the land in 2004 when his wife passed away and has been utilising it since then. The Defendant has gone a step further and produced a letter from the area chief stating that the

Defendant has been utilising the suit property for the last 20 years. That being the case, the only conclusion on this is that the 1st Plaintiff failed to prove the element of actual possession of the suit land.

66. The Plaintiffs claims that the Chief's letter is not to be believed because she does not live near the suit property. Despite the alleged distance between the Chief and the suit property, the 1st plaintiff has admitted knowing the Chief. He has not disputed that the said Chief is the Chief of their location. The issue of distance does not therefore arise, as by virtue of her office, the Chief is in charge of the entire location and is expected to be aware of what happens in her locality. I am more likely to believe the Chief in this instance, who is a public officer, as opposed to the 2nd plaintiff who has admitted that he has not been to the land since 1997 when he sold it.
67. As to the allegation that the Defendant's title was already extinguished, I am not convinced by this argument. For the Defendant's title to be extinguished, it would need to be shown that the 1st Plaintiff had been in possession of the land for the statutory period of not less than 12 years. In ***Gabriel Mbui vs Mukindia Maranya (1993) eKLR***, Justice Kuloba (Rtd) held that:-

“The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period. This element means that the possession by the adverse possessor must continue without significant interruption for a solid block of time at least as long as

the period of limitation, being at the moment twelve years before the filing of suit...”

68. However, the 1st Plaintiff has failed to even demonstrate that he has been on the land for any period of time. The 1st Plaintiff has admitted that he was forced out of the suit property in February, 2022. Therefore, he cannot claim to have been in possession for 12 years when the suit was brought to court since he had already been ousted from the suit property. His claim for adverse possession fails on the first condition of possession.
69. Furthermore, a party claiming adverse possession is required to demonstrate that his occupation of the land was continuous and uninterrupted for the entire duration of 12 years. In view of this requirement, the Plaintiffs have claimed that the 1st Plaintiff stay on the land has been uninterrupted for the entire duration of 24 years. The Defendant in his submissions however argued that the Plaintiffs cannot have met this requirement, because the register to the suit property was opened on 29th November, 2015 and title issued to him on 10th May, 2019. The Defendant thus argued that time for adverse possession could only start to run after his name was entered in the register as a proprietor. That due to this fact, the Plaintiffs have not met the statutory requirement for time.
70. It has been held that where a party was declared to have acquired land through adverse possession of unregistered land, compliance with Section 38 (1) may be problematic. This is because as at the date of institution of the suit for adverse possession there must be in existence a title which the court

can declare to be extinguished by adverse possession under Section 38(1). Therefore, unless the suit property is registered at the time of institution of the suit under any of the statutes referred to in Section 37 of The Limitation of Actions Act, a claim by an adverse possessor would not only be misplaced, but a court order to that effect would be incapable of being effected.

71. For this reason, a claim for adverse possession can only be brought against a registered owner of land, or a person whose name has been entered in the register and is awaiting the issuance of a certificate of title. On this, I find guidance in the Court of Appeal decision in **Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees (2016) eKLR**, where it was held that:-

“17. ... But can time in adverse possession run or start to run against an owner of land who is not registered as proprietor of the suit land but otherwise holds a letter of allotment? It is not difficult to discern that if the suit land is not registered, then compliance with Section 38 (1) may be problematic not least because, a litigant may be unable to show the court that he has become entitled to be registered in respect of land whose title is not yet in place and more importantly, because as at the date of institution of the suit for adverse possession there must be in existence a title which the court can declare to be extinguished by adverse possession under Section 38(1) (supra). Unless such suit land is registered at the time of

institution of the suit under any of the statutes referred to in Section 37 of The Limitation of Actions Act, a claim for the title by a trespassing claimant would be misplaced and, a court order would be incapable of being effected.”

72. None of the parties herein endeavoured to present the register of the suit parcel to establish when exactly it was opened and in whose name. The Plaintiffs produced a certificate of Official Search. This document seems to indicate that the register was opened on 29th November, 1995 in the name of the Defendant.
73. On the other hand, the Defendant has produced a copy of the title deed dated 10th of May, 2019. The proprietorship section of the said title shows that the name of the Defendant was entered in the register on 29th November, 2015 and the title was issued on 10th May, 2019. At the time when the suit was filed on 14th February, 2022 the suit property herein was indeed registered in the name of the Defendant.
74. As to which of these documents is to be believed, Section 26 of the Land Registration Act provides that:-

26. Certificate of title to be held as conclusive evidence of proprietorship

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or

endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

75. The title deed therefore takes precedence as opposed to the Certificate of Official Search, which though signed by the Land Registrar, is not a certified copy of any registered instrument in terms of Section 26(2) above.
76. The Plaintiffs claim that their interest in the land arose in 1995 when the land was first sold to the 2nd Plaintiff and that is when their possession started. The Defendant submitted that he purchased the land in 1971 from Tuiyo Land Estate Company Limited. There is no evidence that at the time the land was already registered in any individuals' name, or the name of the said entity. I would presume that if it was in fact registered under any of the land registration regimes in place in the country at the time, then it would have immediately been transferred at the time of purchase in 1971 but this is not what happened.
77. Going by the title deed therefore, the Defendant's name was entered in the register on 29th November, 2015. Even if time

were to be computed from the year 2015 when the name of the Defendant was entered in the register, still, by 14th February, 2022 when the suit was filed, that would only come to approximately six years. I do agree with the Defendant that for the period before the year 2015 when he was first registered as the owner of the suit land, time for adverse possession could not run. And further, that the time from the date of entry of his name in the register of the suit land to the date of filing suit on 14th February, 2022 is not sufficient to meet the statutory time limit of 12 years. On this element of time, the Plaintiffs claim once more fails.

(c) Who shall bear the costs of this suit?

78. What remains for determination is the issue of costs. On the issue of costs, the guiding law is Section 27 of the Civil Procedure Act (Cap. 21). Under the said provision, the applicable principles are that costs follow the event, but are awarded at the discretion of the Court. A successful party should ordinarily be awarded costs of an action. While a court may depart from the general rule that costs follow the event, such departure can only be for good reasons as was explained by the Supreme Court in **Jasbir Singh Rai & Others vs Tarlochan Rai & Others (2014) eKLR.**
79. The court has found that the Plaintiffs have failed to prove their case against the Defendant on a balance of probabilities. The Plaintiffs having thus failed, it follows that the Defendant has successfully defended his title to the land. I see no reason why

the Defendant should be denied his costs, and proceed to award him the said costs.

Orders:-

80. The outcome of this suit therefore is that the Plaintiffs' Originating Summons dated 14th February, 2022 lacks merit. The same is hereby dismissed. The Defendant shall have the costs of this suit payable by the 1st and 2nd Plaintiffs.
81. Orders accordingly.

DATED, SIGNED and DELIVERED virtually at **ELDORET** on this **26TH** day of **FEBRUARY, 2026** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the virtual presence of;
Mr. Mitei for Plaintiffs.
Ms. Kayeli for Defendant.
Court Assistant - Laban.