



*- Dispute Resolution Mechanism in Adjudication process*

*- Doctrine of Proprietary Estoppel*

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC CASE NO. 225 OF 2012**

**DANIEL MURUNGI MWIRABUA ANAMPIU.....PLAINTIFF**

**VERSUS**

**JEREMIAH JOHN ALIAS**

**JEREMIAH GUANTAL.....DEFENDANT**

**BERNARD MUTHAURA M' CHOKERA.....INTERESTED PARTY**

**JUDGMENT**

**Background**

1. Years ago in the **1970s**, the parties herein were friends (now turned foes). They held respectable positions in society whereby Plaintiff was a chief, defendant was a teacher and the interested party was a councillor. It came to be that sometime in the year **1975** defendant had fought with someone resulting in the death of that person whereby, defendant was charged in a court of law. When his trial was over, defendant allegedly sought the help of the plaintiff, whereby he left his land parcel no. **281** and went to stay on the latter's land parcel no. **106** from around year **1978** or thereabout. Defendant never went back to his parcel of land no.281. Years later the two parties were allegedly supposed to exchange their respective parcels of land but this did not materialise. The plaintiff avers that he never accepted the offer to exchange the lands, while defendant avers that they indeed agreed on the exchange, whereby plaintiff took over defendant's land no. **281** which he sold to the interested party passing it on as parcel no. **272**.

2. The suit land no **106** is to date occupied by the defendant, while parcel no **281** is occupied by the interested party. The dispute is rather convoluted by the fact that no actual transfer ever took place, for any of the aforementioned transactions.

3. The suit parcels are within Old Kiare Land Adjudication Section, of which it appears that titles have not been issued although the process of adjudication was finalized many years ago. It is not disputed that in terms of the adjudication records, plaintiff is still the registered owner of Land parcel no **106** while defendant is the owner of land parcel no **281**. Further, a person known as Philip M'theria is the alleged owner of land parcel number **272**, the one the plaintiff allegedly sold to the interested party. It is also not disputed that defendant and the interested parties had lodged **objection proceedings** in the year **2004** in the **cases no 41** and **42** where the plaintiff was a respondent and the said proceedings have been availed by the various parties as exhibits here in.

**Plaintiff's case**

4. The plaintiff instituted this suit on 30<sup>th</sup> November 2012 seeking the following orders;

**1) A declaration that he is the sole and rightful owner of land Parcel No. 106 Old Kiare Land Adjudication Section Tigania West District.**

**2) An Order of eviction against defendant, his family members, servants and or agents from the Land parcel no. 106.**

**3) An order of permanent injunction restraining the defendant his family, servants and or agents from entering, occupying or in any other way dealing with parcel no .106 Old Kiare Land Adjudication Section Tigania West District.**

5. **Pw1 Daniel Muriungi Mwirabua Anampiu**, the plaintiff herein testified that he knew the 1<sup>st</sup> Defendant from the year **1975**. He mentions the month of June and July as the period when he learnt that defendant had killed someone known as Turibo. Thereafter, defendant was charged with the offence of murder but was later acquitted. That upon his acquittal, in the year **1978**, defendant approached Pw1 with a request to stay on land parcel no **106** belonging to the plaintiff as defendant feared to be killed by the kinsmen of Turibo. The plaintiff obliged as he was not residing on parcel no. **106**.
6. In the year **1996** the defendant approached him with a request for the two parties to exchange their respective parcels of land where plaintiff was to take over defendant's parcel No. **281**, while defendant was to take over plaintiff's parcel No. **106**. Plaintiff contends that he never agreed to this proposal. Plaintiff avers that thereafter, he issued demand letters for the defendant to move out of his land but the latter refused.
7. Plaintiff further testified that Defendant and the interested party instituted proceedings in the **Kiare Arithi Land Adjudication Commission** but the case was held in his favour (**Official receipt and proceedings attached as Pexh 1**). That he approached the chief who wrote to the Defendant a letter dated 14/5/2012 (**produced as Pexh 2**) and defendant therefore stopped building on the land. However, in the year 2012, defendant started building again, prompting the plaintiff to approach his advocates who wrote to the Defendant, a letter to leave the land dated 4/9/2012 (**Demand letter produces as Pexh 3**).
8. The plaintiff also testified that he knows the interested party as a business man and a councillor in Akithi. He testified that in the year **1983** he sold to the interested party **plot no. 272** on behalf of a person known as **Phillip M' Ithiria** at a price of Kshs 17,000 and the interested party paid the full purchase price. Plaintiff identified the agreement availed by the interested party (document no. 1) as the true agreement concerning the sale of parcel no **272**. It was his testimony that Phillip never gave the land to the interested party since he got another parcel at Micii Mikuru. Further, plaintiff stated that he did not tell the interested party that the land parcel no. 272 belonged to Phillip. Plaintiff had therefore paid Kshs 10,000 to the advocate Kiautha Arithi & Co. Advocates which was money for the default of the Agreement.
9. Plaintiff produced a certificate of **confirmation of ownership as Pexh 4 and consent from the Land Adjudication office as Pexh 5**. He therefore prays that the 1<sup>st</sup> Defendant be removed from his land.
10. During cross-examination plaintiff stated that defendant's father's place was known as Thinyaine, in the vicinity of parcel no **106**. This is the area where defendant hailed from but he later relocated to Athwana. However, when defendant killed someone, he relocated back to Thinyaine in year 1978. Plaintiff further stated that they never discussed with the 1<sup>st</sup> Defendant the period within which the latter was to stay on the land no **106**.
11. The plaintiff also confirmed that he was aware that defendant owned land parcel no **281** which is also at Kiare scheme. Though plaintiff admitted that he was selling land to the interested party, the same being parcel no. **272** in **1983**, he averred that he never pointed this land to the interested party at the time of sale or at all. He never showed him the land as being parcel no 281. He also does not know that the interested party stays on parcel number **281**.
12. On being cross-examined by the interested party he told the court that he has nothing to show that he sold the land on behalf of Phillip and that he did not know that Kshs.17,000 could buy 15 acres of land as it did in **2004**. He also stated that both defendant and the Interested Party started developing the respective two parcels of land nos. **106** and **281** in the year **2004** and since then, he has not gone to that place.
13. In re-examination, the plaintiff had stated that there were objection proceedings lodged by defendant and the interested party of which the suit parcels were visited in the course of these proceedings and that there were no developments on Parcel **No. 281**.
14. **Pw2 Francis M'Akotha M'Minyori** testified and adopted his statement dated 30.11.2012 as his evidence. He was the area Assistant chief from the year June **1966**. It was his testimony that plaintiff allowed the defendant to settle on plaintiff's land on temporary basis as defendant feared to be killed by the people whose relative he had killed. Generally, this witness delved more on the issue of the murdered person than the dispute at hand. While being cross examined by the counsel for the interested party, he stated thus;
- “what I know clearly is about the killing and not the land”*
15. During cross examination by defence side, pw2 stated that he doesn't know the land of defendant, though he is aware that parcel number **106** belonging to the plaintiff is in his location. However, he does not know the person who occupies parcel **106** but defendant used to occupy the same. While being cross examined by the side of the interested party, he stated that defendant has been in occupation of plaintiff's land parcel **106** since **1970** to date and that defendant built his home there and he never went back to his original land.
16. **Pw3 Joseph Mwana Chokera** testified and also adopted his statement of 30.11.2012 as his evidence. He was a police officer for the years **1972 to 1981** and later he became an Assistant Chief till the year **2004**. That during the years he was a police officer he used to be sent by the plaintiff to check the land. At the time there was no one on the land. That the Defendant entered the land no. **106** as from the year **1983** and stays on the same continuously to date. However, defendant had only been given the land to farm for a while. He also told the court that he knows that the plaintiff resides in a land 20 km away from plot No. **106**. While the interested party also stays 5 km. away from plot No. **106**. That from the interested party's home to the Defendants home is very near. He further stated that he does not know whether anyone has built on Defendant's land.
17. During cross examination, pw3 stated that he doesn't know the circumstances under which the defendant came to occupy plaintiff's land. He added that defendant has settled on the parcel number **106** where he has built a home since **1983** to date.
18. **Pw4 M' Mutia M'Akwalu M'Aruki** testified and also adopted his statement recorded on 18.8.2016 as his evidence. In his recorded statement, this witness stated that he was a committee member tasked with the distribution of land in **Kiare scheme in the year 1970**

(currently **old Kiare settlement scheme**). He knows the plaintiff as his neighbour and that the plaintiff is the owner of plot No. **106** and that defendant was awarded parcel no **281** during the adjudication process.

19. During cross examination, pw4 stated that he doesn't know Jeremiah John. The court even made an observation that the witness was inquiring from the court gallery as to who Jeremiah John, was which triggered loud laughter from the gallery. He then went on to repeatedly state that he knows parcel number **281** at Kiare belongs to the plaintiff but he is not aware of any land parcel number **106**. At some point, pw4 stated that parcels numbers **106, 281** and **272** are at Kiare but he cannot tell where they are on the ground. During re-examination, this witness again stated that parcel number **281** is the one which belongs to the plaintiff.

#### Case for the Defendant

20. The Defendant filed his Statement of Defence and Counterclaim on 23.1.2013 denying the averments in the plaint and stating that they exchanged with the plaintiff their respective parcels of land namely **Land parcel number 106 old Kiare Adjudication Section** belonging to the plaintiff and **Land parcel No. 281 Old Kiare Land Adjudication Section** belonging to the defendant and the transaction was conducted verbally in the year **1981**. He therefore sought the following orders in his counterclaim;

**(i) A declaration that the defendant is the sole and rightful owner of land parcel No. 106 old Kiare Land adjudication section Tigania west district.**

**(ii) An order of permanent injunction restraining the plaintiff, his family member's assigns, succession in title, servants and/or agents from meddling with parcel No. 106 Old Kiare Land Adjudication Section Tigania West District.**

**(iii) An order authorizing the plaintiff to cause transfer of land parcel No. 106 Kiare land adjudication section Tigania West District in the names of the plaintiff.**

**(iv) Cost of the suit and interest.**

21. **Dw1 (the defendant) Jeremiah John alias Jeremiah Guantai** adopted his statement recorded on 23.1.2013 as his evidence and he also relied on the documents in his list filed on the same date. These documents are an Agreement for Sale of land marked as DMF-1 and **Proceedings from Land Adjudication produced as Dexh 2**. He testified that he is the owner of parcel **No. 281** but they exchanged the same with the plaintiff in the year **1981**, reason being that he wanted to stay close to his father and that he was not in good terms with his neighbours who he feared would seek vengeance for the death of their kin. He entered parcel No. **106** in the year **1981**. That the plaintiff entered his land in **1981** but left the same in the year 1983 and during the years **1981 to 1983** the plaintiff cultivated on the same.

22. Defendant further stated that he filed **objections proceedings** in the year **2004 (objection cases no. 41 and 42)** but the same were dismissed. They were given a right to appeal to the minister. They appealed but they have never been summoned to date. He however conceded that he has nothing to show that he appealed to the minister. By the time he was recording his statement in year 2013, defendant stated that he had been on land parcel no. **106** for **32 years**.

23. The defendant also stated that the interested party was their witness, hence the evidence of that interested party was treated as part of defence case and vice versa.

#### Case for the interested party

24. On 16.6.2015, the interested party filed an application to be enjoined in these proceedings as an interested party, which application was allowed by this Court on **29. 6.2015**. The Interested party subsequently filed his statement of defence on 2.9.2015 where he averred that he bought Land Parcel No. **281** Old Kiare Land Adjudication Section Tigania West District, from the plaintiff in the year **1983** but the plaintiff erroneously passed out the same as land Parcel **272** Kiare Settlement Scheme. He has further pleaded that he took possession of Land Parcel No. **281**. **He prays for Orders that the plaintiff be ordered to transfer Land Parcel 106 to the defendant and the defendant to transfer Land parcel 281 to the interested party.**

25. **Dw2 Benard Muthaura M'Chokera** is the interested party herein. He adopted as his evidence, his statement dated 28.8.2015, and he also produced the **documents in his list dated 28.8.2015, items 1-7 as exhibits 1-7 respectively**. It was his testimony that he was a councillor while the plaintiff was a chief. He bought land no. **281** from the plaintiff but the latter presented this land as number **272** at Old Kiare settlement scheme erroneously by default or by design. During the objection case, they went to the ground and they realised that the land he was shown as **272** was different on the ground whereby, parcel no. **272** actually belonged to one Phillip M'Itheria. That when he insisted that he did not want the land in that area the plaintiff exchanged land with the defendant. The defendant resided on plot **no. 106** while he occupied **plot no. 281**. Both plots are still in the names of the plaintiff and the defendant respectively. He contends that he has occupied the land **no.281** for the last 36 years. He conceded that the objection proceedings were dismissed and that he never sought to appeal.

26. **Dw3 Patrick Mithika Ambau** is a retired assistant Chief and he adopted as his evidence, his statement filed in court on 2.9.2015. He knows the parties herein and that plaintiff was his area chief and even worked under him as an assistant chief. He avers that the interested party resides in the land which belonged to the defendant while the defendant resides in the land that belonged to the plaintiff. That he found the interested party in the land of defendant in the year **1994** when the interested party informed him that he had bought the same from the plaintiff and the plaintiff confirmed the same. He added that to date, it is the interested party who uses the land of defendant, (**parcel No. 281**).

27. It was his further testimony that he was tasked during the A/R objection proceedings to look for Phillip which he did as it had turned out that parcel no. **272** belonged to one Phillip. Phillip informed him that he too had worked under the plaintiff and his number had gone missing.

He also told the court that the plaintiff informed him that the parcel of land he exchanged with the defendant is not 272 and it is the one he sold to the interested party.

**Analysis and Determination:** I proceed to frame the issues for determination as follows:

28. I have carefully considered the entire record particularly the pleadings, the evidence tendered and the rival submissions of the parties herein. What emerges is an intricate web of facts, transactions based on unclear gentlemen understanding and other transactions based on false-hood. Much of the evidence of the witnesses for the litigants is nothing but hearsay.

#### **Undisputed facts**

29. The dispute herein touches on two parcels of land namely; **No. 106 old Kiare land adjudication section and No. 281** in the same area. The ownership of the two parcels in terms of registration is not disputed. Parcel No. 106 is registered in the name of **Daniel Murungi Mwirabua Anampiu** (the plaintiff) whereas parcel **No. 281** is registered in the name of **Jeremiah John**, the defendant. It is also not disputed that none of the two litigants occupy their respective parcels of land.

30. The genesis of the dispute dates back many years ago in the mid 1970's. It is admitted by the parties herein that defendant had killed someone and so he left his land no. **281** and he was then accommodated by the plaintiff on the latter's parcel no. **106** around year **1978**. It is also not disputed that defendant never left that land No. **106** to date.

31. It is also not in dispute that sometime in year **2004**, **objection proceedings** were filed in cases **41 & 42** in respect of parcels **No. 106** and **281** and all the litigants appear to have a set of the said proceedings as exhibits.

#### **Issues for determination**

(i) Whether this court has the mandate or jurisdiction to determine the dispute in light of the Dispute Resolution Mechanism in Adjudication process.

(ii) Whether the doctrine of constructive trust and proprietary estoppel is applicable herein.

(iii) What relief is available to the parties.

#### **Dispute Resolution Mechanism in Adjudication process**

32. I have found it necessary to determine this issue in view of the fact that the suit parcels mentioned are in an area where adjudication took place and no one appears to have titles in respect of the suit parcels. Further, it is quite apparent that objection proceedings were filed in year **2004** in **case No's 41 & 42** which is a further confirmation that adjudication process had taken place.

33. The two main statutes concerned with adjudication process are the **Land Adjudication Act (cap 284)** and the **Land Consolidation Act (cap 283)**. The two statutes contain elaborate dispute resolution mechanism whereby objection proceedings are lodged under section 26 of both acts. It has been submitted for the plaintiff that the defendant and the interested party having filed and lost the **objection cases numbers 41 & 42**, they ought to have pursued an appeal before the minister as is provided for under **section 29 of the Land Adjudication Act cap 284**. On this point the plaintiff cited the case of **Kanampiu M'Rimberia vs Julius Kathanje & 3 others (2019) eKLR** where I held that;

***"the bottom line of this matter is that the rectification of the register pursuant to the AR objection proceedings is grounded under Section 26 of the Act. As a matter of fact under section 27 of the Act the register is taken to be final only subject to appeal..... It was therefore not open for the plaintiff to opt to come before this court. Recourse lies with the minister..... My conclusion is that this court has no jurisdiction to determine the dispute at hand, the suit is hereby dismissed".***

34. In light of the foregoing, does this court have jurisdiction to determine the dispute at hand? In order to have a better perspective on this issue, I have found it crucial to consider the nature of this dispute as well as the findings in the **objection cases no.41 and 42**. To this end, I have endeavoured to reproduce the said decision of the Land Adjudication Officer delivered on **27.2.2004** even though some parts are not very legible; (The proceedings are Pexh 1, Dexh 2, interested party's Exh – 4).

#### **"Findings;**

***The disputants in this case are before me, the first objector Bernard Muthaura objected against plot no. 106 registered under Daniel Murungi and occupied by John Jeremiah. The 2<sup>nd</sup> objector Jeremiah John objected against plot no. 281 registered under his name. The bone of contention in this case is the intricate web whereby the 1<sup>st</sup> objector claims he bought land from the defendant Daniel Murungi. He states that after Daniel Murungi exchanged his lands with John Jeremiah he went ahead and purchased the area (land) left vacant by John Jeremiah. John Jeremiah on his part claims that he exchanged his piece of land with Daniel Murungi hence vacating plot 281 belonging to him and occupied plot 106 registered under the defendant's name Daniel Murungi. I adduced evidence of all the disputants and found that an agreement of same was entered between Daniel Murungi and Benard Muthaura on plot No. 272 and before an advocate. The agreement was sealed and both parties are aware of this. However, plot no. 272 is not in the name of the vendor. Plot 272 is registered in the names of Philip Mithilia and on his part claims was not aware of this agreement. I visited both sites of disputed land and found that plot 106 is occupied by John Jeremiah with a semi-permanent structures and cultivation of maize, beans, trees among others for the applicant. Likewise plot***

281 is inhabited by Bernard Muthaura and registered under John Jeremiah. The area is cultivated with grains and other common food stuff some areas are under grass for the complainant (emphasize added). From the findings there seems to be an intricate web whereby all what is claimed that took place never involved the office neither was it put in writing. I did not get the evidence in writing of the exchange of these lands as claimed. Their witnesses Samuel and Thibaru appearing for the witnesses of the objectors agree to be aware of the exchange of lands though no formal agreement was made. Consequently, the sale agreement quoted does not reflect the areas in dispute (emphasize added). Defendant on his side claims to have had an agreement with Bernard Muthaura and goes on to narrate that when the whole deal went sour he refunded the money of the cost of land and the penalty for the breach of contract. This is a fact we cannot establish.....

(some content herein not legible).

.....not in a position to summon the advocates who have henceforth relocated to different fields and cannot also question their integrity. This is a matter effectively dealt with by a court of law. In my understanding I cannot evict the objectors who have lived in these lands for over two decades and have developed rights equivalent to ownership (emphasize added). On the other hand, transactions done on all these lands are not supported by formal documents as is law!

Decision: Objections 41 & 42 dismissed on technical ground, parties to seek redress in appeal as objections were wrongly entered. 60 days Right of Appeal (emphasize added). Signed on 27.2.2004”

35. It appears that the applicable law was the Land Adjudication Act (cap 284) Laws of Kenya since the land adjudication officer did not conduct the proceedings with a committee as provided under the Land Consolidation Act (cap 283) Laws of Kenya. What is discernible from this decision is that the dispute was not determined and the Land Adjudication officer found that **a court of law was better placed to deal with the matter**. Rightly so because not all land disputes emanating from areas under adjudication fall under the dispute resolution mechanisms provided for under the act. In order to discern the nature of the disputes covered by the dispute resolution mechanisms provided for under the Act, one needs to look at the preamble thereof.

36. The preamble of the Land Adjudication Act provides that

*“An Act of Parliament to provide for the ascertainment and recording of rights and interests in community land, and for purposes connected therewith and purposes incidental thereto”.*

37. In the case of Judicial Review No. 13/14 Nakuru, Joseph Lesaloh Lekitio & others ex parte applicant vs Musanka Ole Runtas Tarakwa & others, the court held that;

*“In a situation regarding land under adjudication, there is an elaborate process that is laid down by the Land Adjudication Act, on how to determine which persons are, and the extent to which, they are entitled to interests in the land under adjudication. There would be no bar to instituting Judicial Review proceedings, to question the process being undertaken, and in my view, such proceedings, which go to question the process undertaken in the adjudication process would not require the consent of the Land Adjudication Officer. This is because such a dispute would not be a dispute “concerning an interest in land” which is what Section 30 (1) specifically bars. The term “interest”, in relation to land under adjudication, as defined by Section 2 of the Land Adjudication Act, “... includes absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered Land Act (Cap. 300)”*

38. In the case of Tobias Achola Osindi & 13 others vs Cyprianus Otieno Ogalo & 6 others H.C.C.C No. 4 of 2011 Kisii, Okango J. stated that;

*“The Act has a detailed mechanism for resolving disputes that arose during the process of ascertainment of the said rights and interests in land. The process of ascertainment of rights under the act is concluded when the finalized adjudication register is handed over to the chief land registrar by the director of land adjudication ....”.*

The judge went on to state that;

*“Once an area has been declared an adjudication area under the act, the ascertainment and determination of rights and interest in land within the area is reserved by the law for the officers and quasi-judicial bodies set up under the act.....”*

39. What is resonating from the foregoing analysis is that the dispute resolution mechanism envisaged under the adjudication statutes is the one concerning **ascertainment of rights and interests in land and the recording and registration of such rights thereof**.

40. In the present case, there is no dispute as to who was or is the registered owner of parcel no. **106** (plaintiff) and **281** (defendant). The dispute therefore doesn't concern a determination or ascertainment of the rights and interests in land held under a customary tenure system. The dispute appertains to exchange of land as between plaintiff and defendant as well as sale of land between plaintiff and the interested party.

41. It is therefore clear that the case of **Kanampiu M'Rimberia** is distinguishable from the present case since in the Kanampiu M'Rimberia case, the dispute fell squarely under the dispute resolution mechanism in the adjudication statutes where the dispute had even been taken to the arbitration cases filed way back in 1987.

42. I therefore conclude that this court has the jurisdiction to hear the dispute.

### **Constructive trust and proprietary estoppel**

43. The occupation of the suit land **106** by the defendant for many years is not in dispute. However, plaintiffs and his witnesses have not been forthcoming on who occupies parcel **No.281**. The plaintiff had in cross examination by defence counsel stated that; ***"I don't know if Bernard is staying on land no. 281"***, and on being cross examined by counsel for the interested party, he stated that; ***"From 2004, they started developments on both plots 106 and 281 and since then, I have not gone there"***, in reference to the occupation of parcel **106** by defendant and **281** by the interested party.

44. As for Pw 2, he told the court that; ***"What I know clearly is about the killing and not the land"***. And indeed much of the testimony of this witness revolved around the issue of the killing.

45. Pw 3, while being cross -examined by counsel for defendant stated that; ***"Jeremiah also has land at Athwana sub-location but I don't know who stays on that land"***. While being cross examined by counsel for the interested party, he stated that; ***"I do not know if anyone has built on Jeremiah's land and I don't know who is farming on this land"***.

46. Pw 4, is the witness who had to ask from the court gallery as to who Jeremiah John was. He was certainly confused as to which parcel belonged to the plaintiff. He had stated that he didn't know the owner of plot **no. 106** whereas he knew that plot **no. 281** belonged to plaintiff but he didn't know where this land was located on the ground.

47. The plaintiff and his witnesses (save Pw 4 who genuinely appeared to know nothing) were certainly economical with the truth in so far as the occupation of parcel no. 281 is concerned.

48. The proceedings in **objection cases No. 41 & 42 of 2004** indicate that there was a scene visit where the land adjudication officer found that **plot 106** was occupied by John Jeremiah with a semi-permanent, structures and there was cultivation of crops, whereas plot **No. 281** was habited by Bernard Muthaura who was cultivating grains and other crops. The foregoing is a clear indication that the land no. **281** has all along been under utilization of the interested party.

49. I will now proceed to deal with the question as to how the defendant came to settle on land no. **106** and how the interested party came to settle on land no. **281**.

### **Parcel no. 106**

50. The plaintiff has consistently claimed that he only helped defendant to occupy land no. **106** as a good Samaritan gesture since defendant had killed someone. True, defendant was on the run. Indeed, when defendant relocated into plaintiff's land, he never went back to his land number **281**. Defendant claims that the two of them exchanged their respective parcels of land in **1981** but this was done verbally. Indeed, in the objection proceedings, one of the hurdles the Land Adjudication Officer faced in determining the dispute was that the transaction was done verbally. However, regardless of the circumstances which led the defendant to occupy **land no. 106**, the fact remains that defendant was there to stay, and did stay on that land continuously to date.

51. The plaintiff and his witnesses aver that defendant was only to stay for a short while. In their statements, Pw 1 & 2 termed it a temporary occupation while Pw3 stated that defendant was only to stay on that land for a while. Pw 4 knows nothing. Pw1 mentions year **1978** as the time he gave his land (**106**) to defendant and the issue of exchanging land came about in **1996**. In between, there is a long period of 18 years! There is no evidence to show that plaintiff ever told defendant to leave the land or even took any steps to have defendant leave this land during this period. Indeed, the people who filed the objection case are the defendant and the interested party in **2004** and not the plaintiff.

52. In the circumstances, I find that the claim by the plaintiff and his witnesses that defendant's occupation of parcel no **106** was temporary is baseless. This quiet and long occupation of the suit land no. **106** by defendant does buttress the claim by defendant that they were meant to exchange their suit parcels even if that transaction never crystalized.

53. From **1978** or thereabout to date, defendant is the one who has been on the suit land **106**, a period of 40+ years! This is the place he calls home. He settled there with the full knowledge and permission of the plaintiff. He had developed this land by the time the Land Adjudication officer visited the land in year 2004. I therefore, find that this is a classic case where **the doctrine of proprietary estoppel** snugly fits in. Proprietary estoppel is a doctrine of equity creating an interest in land in the absence of following the correct formalities. The doctrine can be used to create a right of owner ship in land. It is an equity created by estoppel.

54. The **Black's Law Dictionary 9<sup>th</sup> Edition** defined trust as follows:

***"The right enforceable solely in equity to the beneficial enjoyment of property to which another holds title"***.

55. **Section 120 of the Evidence Act** provides that;

***When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.***

56. In the case of **Inwards and others vs. Baker (1965) 1 AllER 446, Lord Denning** stated as follows with regard to the equity;

*“It arises from the expenditure of money by a person in actual occupation of land when he is led to believe that, as the result of that expenditure, he will be allowed to remain there. It is for the court to say in what way the equity can be satisfied.”*

In that case it was held that;

*“Since the defendant had been induced by his father to build the bungalow on his father’s land and had expended money for that purpose in that expectation of being allowed to remain there, equity would not allow that expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as against the trustees (of the will of his father).”*

57. In Kenya National Capital Corporation Ltd. vs. Albert Mario Cordeiro & Another (2014) eKLR, it was stated that proprietary estoppel is established by showing that:-

*“(i) The person claiming the equity believed that he had or was going to have a right in or over the property of the person against whom the equity is claimed. (ii) The person against whom the equity is claimed was aware of the mistaken belief or created the belief or encouraged the belief. (iii) The person claiming the equity acted in reliance on the belief.”*

58. In the case of Alex Nzai Nzombo vs Kadzo Charo Malindi ELC No. 200 of 2014, the court was dealing with a situation where two widows had agreed on the manner of the disposal of their deceased husband’s estate pursuant to which the 1<sup>st</sup> wife decided to dispose of her portion of the land to the plaintiff who then proceeded to occupy the land as from 1998 and he put up a residential house where he lived. In that case, the court invoked the doctrine of estoppel and stated that;

*“By their conduct jointly and severally the two widows of the late Charo Kinda led the plaintiff to believe they would pursue the issuance of letters of administration of their deceased’s husband estate after which they would transfer 6 acres of land to him. In reliance on that understanding, the plaintiff proceeded to build his home on the suit land..... Accordingly, the 2<sup>nd</sup> defendant cannot now be heard to assert that the plaintiff never followed due process in acquiring the land...”*

59. In the case of Macharia Mwangi Maina & 87 others vs Davidson Mwangi Kagiri Court of appeal Nyeri Civil Appeal No. 26 of 27 of 2011, the court considered the rights of a person in possession of land and stated that;

*“The appellants are neither trespassers nor licensees on the suit property as they were put in possession by the respondent. Citing the case of Mwangi & another vs Mwangi (1986) KLR 382, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights.....*

*In Yaxley vs Gotts & another, (2000) Ch 162, it was held that an oral agreement for sale of property created an interest in the property even though void and unenforceable as a contract; but the oral agreement was still enforceable on the basis of a constructive trust or proprietary estoppel emphasize added. In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrines of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in Llyods Bank Plc vs Rosset (1991) 1 AC 107/132, a constructive trust is based on “Common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property”.*

60. In Willy Kimutai Kitilit vs Michael Kibet Civil Appeal No. 51 (2015) Eldoret, it was held that;

*“Equity is law and section 6 (2) (in reference to the Land Control Act) does not prohibit a court in exercise of its equitable jurisdiction in the process of adjudicating a land dispute from declaring that a party holds, land in a fiduciary capacity”.*

61. The upshot of my findings are that defendant’s long occupation over the suit land no. **106** with the knowledge and permission of the plaintiff has given rise to equitable interests thereon. Even the land adjudication officer in his decision of 27.2.2004 in the objection proceedings had stated that he would not evict the objectors (defendant and interested party herein) **“as their rights on the suit parcels were equivalent to ownership”**.

62. The time is ripe for such rights as those acquired by the defendant to crystalize into full rights of a registered owner. Thus plaintiff’s case is unmerited in so far as suit parcel on 106 is concerned while defendants counter claim is successful.

#### **Parcel no. 281**

63. This land is occupied by the interested party as already established somewhere in this judgment. Both defendant and the interested party have given a chronology of events as to how the interested party came to occupy that land. After the alleged exchange of land between defendant and plaintiffs, plaintiff then sold the **land 281** to the interested party. However, the parcel **no. 281** was passed on as parcel **no. 272**. It appears that the parcels of land did not have numbers at that time, an issue which was observed by the Land Adjudication officer in his findings in the objection case. Plaintiff on the other hand maintains that he was selling land **no. 272** on behalf of one Philip. The plaintiff has emerged as someone devoid of condor. He has admitted that when he was selling land **no. 272** to the interested party, he never stated that the land belonged to Philip. He also never showed Bernard any land but he was fully paid the consideration although he claims that he informed the interested party to go for his money. In the findings of the Land Adjudication officer, he stated that;

**“Plot 272 is registered in the names of Philip Mithilia and on his part claims was not aware of this agreement”.**

64. I have already given a step by step account of how the plaintiff and his witnesses (save Pw 4) have attempted to trash any occupation of the land **281** by the interested party. Plaintiff even stated that when they were doing the objection case the **interested party was not on that land but perhaps he has now occupied that land...**. However, the scene visit during the objection proceedings case had already established that the interested party is the one who was using parcel no. **281** by year **2004**.

65. The interested party has given a plausible account as to why he was not able to establish the particulars of the land he was buying. When he bought land from the plaintiff, he was shown the same. They then proceeded to lands offices where they were told that for Kiare parcels, documents had been taken to Nairobi. This is a common phenomenon since when adjudication process is completed, the data generated including the adjudication register are transmitted to the office of the Director of land adjudication and settlement for further transmission to the chief land registrar for the issuance of titles.

66. I have no doubts that the plaintiff was the master mind in the process that led the interested party to settle on the land of defendant **no. 281**. The logical conclusion to make is that the land the interested party bought from plaintiff is none other than **281**, which land, the plaintiff was passing on as parcel **no.272**.

67. The defendant and the interested party have no quarrel with the occupation of parcel **no 281** by the interested party. If anything the filing of the objection proceedings is a clear indication that they wanted this arrangement settled. **I therefore find that the case for the interested party too is merited.**

68. **Final orders:**

**1) Plaintiffs suit is hereby dismissed.**

**2) The counter claim of the defendant and the claim of the interested party are allowed.**

**3) An order is hereby issued for the transfer of parcel No. 106 old Kiare Land Adjudication Section Tigania West from the name of Daniel Murungi Mwirabua Anampiu to the name of Jeremiah John alias Jeremiah Guantai.**

**4) An order is hereby issued for the transfer of land parcel no. 281 Old Kiare Adjudication section from the name of Jeremiah John alias Jeremiah Guantai to the name of Bernard Muthaura M'Chokera.**

**5) In order to facilitate the implementation of this judgment, the Deputy registrar of this court is hereby authorized to sign any requisite forms to effect the transfer of the aforementioned suit parcels.**

**6) Any orders of injunction or inhibition that may be subsisting in respect of the suit parcels 106 and 281 are hereby discharged in order to give effect to the implementation of this judgment.**

**7) The plaintiff is the author of this mess in this suit. He is hereby condemned to pay the costs of the suit.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 10<sup>TH</sup> DECEMBER, 2019 IN THE PRESENCE OF:-**

C/A: Kananu

Gichunge for the interested party

Plaintiff

Interested party

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**