



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.472 OF 2013**

**MARGARET MUTHONI WANYEE.....PLAINTIFF**

**VERSUS**

**MUKENIA CO-OPERATIVE SOCIETY LIMITED.....DEFENDANT**

**JUDGMENT**

**PART A: INTRODUCTION AND PLEADINGS**

***( Suit by the plaintiff through her appointed attorney, seeking to permanently restrain the defendant from certain land and for damages for damage to fence put up by the plaintiff; defendant claiming to have purchased the land and in the alternative claiming entitlement through adverse possession; defendant also attacking power of attorney as forgery through report of a document examiner; conflicting expert evidence from the document examiners, no proof that power of attorney is forgery; no proof of sale to the defendant; no consent of the Land Control Board; claim for adverse possession dismissed; judgment entered for the plaintiff).***

1. This suit was commenced by way of a plaint which was filed on 18 July 2013. In the plaint, the plaintiff, who has filed suit through her appointed attorney, one Benny Kanyi Waweru, pleaded that she is the owner of the land parcel Naivasha/Maraigushu Block 10/11 (Kedong) (hereinafter referred to as "the suit land") measuring 195 acres, which she acquired by virtue of being a shareholder at Kedong Ranch. It is pleaded that the plaintiff took over possession of the property after acquiring title in the year 2008 and later erected a perimeter fence. It is pleaded that in February 2013, she sent her representative on a routine check when it was noticed that the property has been encroached by unknown persons who had surveyed it and put beacons. A search was done which revealed that the defendant had placed a caution claiming a purchaser's interest. The plaintiff has denied ever having sold the suit land to the defendant. It is pleaded that the defendant's agents destroyed the fence that the plaintiff had erected and its members have started laying claim to the land and inviting unsuspecting third parties to purchase plots in the said property. In the suit, the plaintiff has asked for the following orders (slightly paraphrased for brevity) :-

*(a) A permanent injunction restraining the defendant whether by itself, its agents and or servants from trespassing onto, selling, disposing and transferring or in any manner whatsoever interfering with the suit land.*

*(b) An order directing the Land Registrar, Naivasha, to remove the caution lodged by the defendant on 31 April 2011.(sic).*

*(c) A declaration that the plaintiff is the owner of the suit land.*

*(d) Damages for trespassing onto and destroying the plaintiff's fence.*

*(e) Costs of the suit plus interest.*

2. The defendant filed a statement of defence and counterclaim. It is pleaded in the defence that the title deed purportedly obtained in the year 2008 was fraudulently obtained by the plaintiff's holder of power of attorney. It was denied that the plaintiff has erected a wall or taken possession of the property. It was pleaded that the defendant purchased the suit land in the year 1991-1994 from the plaintiff for Kshs. 1,950,000/= which money was fully paid by the shareholders (of the defendant) and a loan facility. It is averred that upon purchasing the land, the defendant engaged M/s Muritu & Associates, a firm of surveyors, to subdivide the land into smaller plots for allocation to its members, and that the land was subdivided into plots measuring 0.350 Hectares, and beacons placed. It is pleaded that the defendant's shareholders balloted for the plots and the plots distributed. It is pleaded that the defendant's members took possession in the years 1991-1994 and have been using the land for various agricultural activities and that some are residing on the land. It is stated that the defendant's members kept possession until 2007/2008 when owing to tribal clashes some of its members were ejected from the land but thereafter reclaimed the plots. It is pleaded that sometimes in the year 2000, a member of the Board of the defendant, but now in a splinter group, by name Evans Kiarie, introduced Benny Kanyi Waweru, to the Board of the defendant and informed the Board that he could assist the defendant to link up with Margaret Muthoni Wanyee, in the USA, with a view to have the property transferred to the defendant. It is pleaded

that Mr. Benny Kanyi Waweru made a condition that 10 acres be allocated to Margaret, as she intended to come back to Kenya after her stint in the USA which the defendant's members agreed. However, it is claimed that later, Mr. Waweru demanded 40 acres, which the defendant's members thought it to be excessive. It is alleged that after Mr. Waweru realized that his demands are not being met, he working in cahoots with the splinter group, arranged for disappearance of all original documents relating to the transaction from the defendant's lawyers and at the defendant's offices and Kedong Ranch. It is pleaded that the title obtained in 2008 was fraudulently obtained by Mr. Waweru. It is further pleaded that the land has not been transferred to the defendant because Margaret Wanyee, left the country in the year 1994.

3. In the counterclaim, the defendant has sought the following prayers :-

*(a) A declaration that the defendant is the owner of the suit land after having purchased it from Margaret Muthoni Wanyee in the years 1991-1994 or thereabouts.*

*(b) An order that the title deed issued in the year 2008 in favour of Margaret Muthoni Wanyee is fraudulent and that the same be cancelled and a fresh one be issued in the name of the defendant.*

*(c) In the alternative and without prejudice to the above prayers, an order that the defendant's shareholders/members and/or purchaser 3rd parties having possessed and/or occupied the suit premises for over 22 years ,the same belongs to the defendant by way of adverse possession.*

*(d) If prayers (b) is granted, the Executive Officer of this Court do execute the transfer forms to facilitate issuance of title to the defendant.*

*(e) Punitive and/or exemplary damages against the plaintiff for his apparent malicious and/or fraudulent acts.*

*(f) Costs and interest.*

#### **PART B : EVIDENCE OF THE PARTIES**

4. PW-1 was Benny Kanyi Waweru (Benny Kanyi). He testified that he is a donee of a power of attorney donated by Margaret Muthoni Wanyee (Margaret Wanyee) dated and executed on 18 June 2013 in the USA and registered in Kenya on 16 July 2013. He testified that the suit land is owned by Margaret Wanyee which she obtained as a shareholder of Kedong Ranch. He stated that it is through her shareholding that she got title to the suit land. He testified that the title to the suit land is intact, despite the allegations of the defendant to the contrary, and the same has never been subdivided. He produced the Registered Index Map (RIM) to demonstrate this. He also stated that there is no subdivision on the ground. He testified that a letter dated 18 May 1994 claimed by the defendant to have been written by the plaintiff, that she has sold the land to the defendant, is a forgery and was never written by the plaintiff. He testified that he has never come across any sale agreement that Margaret Wanyee may have had with the defendant, any proof of payment, or any application for consent to transfer. He stated that the property was fenced in March 2013 but about a week later, he was called by a person from Kedong Ranch and informed that there were some people pulling down the fence. He reported the matter to the police on the following day, but when they went to the ground, they did not find anybody. He took photographs at the scene which he produced in evidence. He hired a valuer to quantify the loss and the same was quantified at Kshs. 2,360,000/=. On investigation, he came across a purported authority to sell, claimed to have been written by Margaret Wanyee, and drawn by a law firm MN Advocates (full name not revealed to protect identity). He went to the law firm and the advocate asked the agents to turn up but they never did. The advocate then realized that there may be a scam and he released to Benny Kanyi an original title deed for the land that he had been given. Mr. Benny Kanyi also wrote to the counsel on record for the defendant to inform him that any notion that the land may have been sold was the work of fraudsters. He also made inquiries from Kedong Ranch, who wrote to him and informed him that they have never been involved in any sale of the suit land. He held meetings with the defendant to ask them remove the caution which they did not.

5. In cross-examination, he was questioned on his power of attorney which he defended to have been properly granted by Margaret Wanyee. He testified that it is Kedong Ranch who applied for issuance of title and not Margaret or himself as they were processing titles for their members. He denied that title was prepared in the early 1990s. He denied making any proposal to sell the suit land to the defendant and denied having asked the defendant for 10 acres of land to be set aside for Margaret when she comes back home. He also denied asking for 40 acres from the defendant. He stated that it was actually the defendant who offered him 40 acres of land if he could manage to have the land transferred to them. He testified that he indeed found beacons on the land but the same were not there prior to the year 2010 as he had gone round the land in the year 2010. He testified that the land was vacant, save for a man of Maasai origin, whom he had allowed to graze his cattle. He stated that he paid land rates between the years 2010 and 2013 after being notified by Kedong Ranch. He did not know exactly who destroyed the post and barbed wire fence that he had put around the farm. He stated that he fenced the whole of the land save for a part that already had an existing fence. He testified that no fence had ever been put up by the defendant. He was not aware of any 3rd party purchasers who had purchased portions of the land from the defendant.

6. PW-2 was Pascal Babu Wood, the Managing Director of Kedong Ranch Limited. He testified inter alia that Margaret Wanyee is a shareholder of Kedong Ranch and according to the company records, she is the owner of the suit land. He testified that the company has not received any report of any sale of the suit land by the owner. He stated that Kedong Ranch never received the letter dated 18 May 1994 although the same showed "cc" to Kedong Ranch. He testified that he is familiar with the suit land and nobody is settled on the land and there are no buildings.

7. PW-3 was Mackenzie Mweu, a document examiner. He testified that he was formerly attached to the CID Headquarters in Nairobi as a document examiner where he worked for 30 years before retiring, after which he joined a private firm as a document examiner. He stated that he was trained in document examination at Home Office, Forensic Science Laboratory in Birmingham, England, and later, at The National Police Laboratory in Jerusalem, Israel. The gist of his evidence was that the letter dated 18 May 1994, purported to have been signed by Margaret Wanyee, did not bear her signature. He reached this conclusion after comparing what were "undisputed" signatures of Margaret Wanyee, contained in the power of attorney to Benny Kanyi, and a travel document of Margaret. He was cross-examined on the power of

attorney which in his view was executed by the same hand that executed the ID card of Margaret Wanyee.

8. PW-4 was one Pius Isaiyah Khaoya, a practicing land valuer. He testified that he visited the suit land in June of 2013, and prepared a report dated 6 June 2013. He had been instructed to assess the value of the damage to the fence. He found an open vacant land that had been fenced along 3 boundaries, the 4th boundary being shared by the neighbourhood. The fencing was of 9 strands of electric wire carried by treated timber posts embedded into the ground by concrete. He found the whole fence along the 3 boundaries destroyed. The destruction was done by sawing the support timber posts which made the fence to collapse. He estimated the cost of reconstruction at Kshs. 2,360,000/= and he charged Kshs. 25,000/= for the work.

9. With the above evidence, the plaintiff closed his case.

10. DW-1 was Pauline Wambui Waitiki, one of the founder members of the defendant and its current Treasurer. She testified that the defendant company was started by women in the 1980s with the aim of buying land for elderly women. They purchased 3 farms; the first in Mai-Mahiu and the second in Elementaita. She stated that the Society ran its affairs well, but problems cropped up when they incorporated men into the Society, and when their former chairlady, one Mrs. Shadrack, became unwell. She testified that they purchased the suit land and the vendor went to America, and the men in the Society promised that they would look for her. She testified that the company lost documents including the incorporation certificate and receipts. She stated that the defendant Society has 214 members on the suit land, a list of which she offered. She asserted that Margaret Wanyee sold to the Society the land and that the Society paid for it. She mentioned that at the time of sale, they had Kshs. 300,000/= and they borrowed the rest, Kshs. 1,650,000/= from Cooperative Bank, which they paid to Margaret. She testified that Margaret then wrote the letter dated 18 May 1994. She stated that when the money was paid, Advocate Wathigo was present. She testified that after they bought the land, they engaged a surveyor, one Mr. Muritu who entered the land and subdivided the whole of the land into one acre portions. She testified that amongst the male members that they incorporated, one, Evans Ndungu, promised to look for a member of the family of Margaret Wanyee so that they can have the land transferred to them. Evans then brought Benny Kanyi about 5 years back. She stated that they met with Benny Kanyi, who asked for 10 acres of land as the family of Margaret were left with nothing. They acceded to this request but she stated that later, Benny Kanyi demanded 40 acres which they could not agree to, and that this is what led to their relationship turning sour. She contended that at the time they were having discussions with Kanyi, the defendant's members had been on the land for 20 years.

11. In cross-examination, she gave evidence inter alia that in the year 1994, she was an ordinary member of the defendant society. She testified that they bought the land in dispute in the year 1981. They had Kshs. 300,000/= in the bank and they borrowed the rest in the year 1993 from Cooperative Bank. She stated that the sale agreement was drawn by Mr. Wathigo, Advocate, and that it was Mr. Wathigo who received the money. The sale agreement was drawn in the year 1994 but they had kept the money from Cooperative Bank from the year 1993. She averred that the money to buy the land, Kshs. 1, 950,000/= was paid in cash and that no document was prepared to show that the money was received and acknowledged. She was familiar with sales of agricultural land and was aware that consent of the Land Control Board (LCB) was required. They however did not go to seek consent from the LCB. She stated that after they engaged Mr. Muritu, he did a survey plan. Consent to subdivide was however not obtained. She could not give a date when the company documents got lost but believed that it was in the year 2013. She did not have any minutes of their meetings with Benny Kanyi. She asserted that there were people settled on the land but were evicted in the year 1987.

12. DW-2 was Stephen Mwangi. He stated that he purchased land from members of Mukenia Society. In total he purchased 23 plots in the years 2011 and 2012. The plots were beaconed. In cross-examination, he stated that he took possession and kept some goats but was denied entry from the year 2013. He stated that there are no structures on the land at the moment and nobody is living on the land.

13. DW-3 was also a purchaser of land from members of Mukenia Society. He stated that he purchased some plots in the year 2012. According to him, there was only one house that he saw when he purchased the land.

14. DW-4 was Inspector Benard Cheruiyot who is a document examiner based at CID Headquarters in Nairobi. He holds a Bachelors of Education degree from Maseno University and stated that he was trained as a document examiner at the Regional Forensic Laboratory in Khartoum, Sudan. He has experience of 4 years as a document examiner. According to him, the signatures in the powers of attorney are similar, but were not authored by Margaret Muthoni Wanyee, after comparing those signatures with the signatures contained in the ID Card of Margaret Wanyee and the letter of 18 May 1994.

15. DW-5 was Veronica Nzilani Kimonyi. She produced print outs of Margaret Wanyee's ID card. She testified that the ID Card number in the title deed, is not that of Margaret Wanyee.

16. DW-6 was Harrison Kamau Muritu, the manager of Muritu & Associates, Surveyors. He testified that the firm was contracted by Mukenia Cooperative to subdivide the suit land in the year 1994. They did the subdivision, beaconing, and balloting, and they showed the members their plots. He produced various letters to demonstrate the instructions given. Cross-examined, he stated that the letters he produced indicated that they were to undertake survey work for land measuring 390 acres, shown as LR Nos. 10854/22 and 10854/25. He stated that the subdivisions were done but no subdivision scheme was circulated for approval. The land that they subdivided was formerly owned by GEMA. He could not tell whether consent to subdivide the land was ever obtained from the LCB.

17. DW-7 was David Magonya, a Credit Officer at Cooperative Bank, Nakuru. He confirmed that the defendant Society is its customer and that they made a request for an overdraft of Kshs. 1,650,000/= on 21 June 1993 to purchase property. He stated that the overdraft was advanced and paid. In cross-examination, he conceded that he had not come with the bank statements and stated that he was unable to retrieve them. He had no records to show the overdraft.

18. DW-8 was Mr. James Wathigo, an Advocate of the High Court of Kenya. He testified that between the years 1986 and 2007, he practiced as a partner in the law firm of M/s Sheth & Wathigo Advocates, in Nakuru. He knew Margaret Wanyee and her family and also knew Ruth Shadrack, the former Chair of the defendant Society (now deceased). He stated that he oversaw several transactions on behalf of Mukenia Society. He recollected that in the year 1993-1994, Mrs. Shadrack brought Mrs. Wanyee to his office to transact over land. The land was

being sold to Mukenia Society at Kshs. 100,000/= per acre. He stated that he drew an agreement and released copies to the parties. He testified that the office file, where a copy would normally be kept, could not be traced. He mentioned that the money was to be paid through a bank transfer. He offered that he advised the parties to deposit a copy of the agreement with Kedong Ranch and advised the purchaser to obtain a letter of occupation so as to gain access to the land. He also advised them to obtain consent of the Land Control Board. He stated that a letter of consent for possession was written, and it is the letter dated 18 May 1994, which he said he received a copy from Mrs. Wanyee. In the year 2012, he testified, that the purchaser came looking for the office copy of the sale agreement but the same could not be traced.

19. In cross-examination, he testified that he received instructions orally and did not have an instruction note. He acted for both parties. He could not recall how much fees he was paid and could not recall whether it was by cash or cheque. He did not do a search or confirm ownership from Kedong Ranch. Neither did he do a letter to the company over the sale. He affirmed that the purchase price was not paid through him but was by bank transfer. He never followed up with the parties on whether they obtained consent to transfer. He asserted that the letter dated 18 May 1994 was delivered to him. He was familiar with sales of land in Kedong Ranch and he stated that upon a sale, Kedong Ranch do delete the name of the former holder of land and then insert the name of the new owner, and issue title in the name of the purchaser, after a copy of the agreement is deposited with them.

20. With the above evidence, the defendant closed its case.

#### **PART C: SUBMISSIONS OF COUNSEL**

21. I took in written submissions from both Mr. Kabaiku for the plaintiff, and Mr. Olonyi for the defendant, and I have gone through the same.

22. In his submissions, Mr. Kabaiku, inter alia submitted that no sale agreement had been displayed by the defendant and further pointed out that although it was alleged that the suit land was subdivided, no subdivision exists. He directed me to some photographs produced which demonstrated that the land was not occupied. He referred to the evidence of PW-3 that the letter dated 18 May 1994 was a forgery. He further submitted that no consent of the Land Control Board was ever sought and that there is no evidence of any consideration having been paid. He submitted that the plaintiff is entitled to the prayers sought in the plaint.

23. On his part, Mr. Olonyi inter alia submitted that Benny Kanyi lacks locus to institute this suit on the contention that his power of attorney is forged. He submitted that nowhere in the plaintiff's pleadings were issues touching on the lack of consent of the Land Control Act, mentioned and submitted that parties are bound by their pleadings. He submitted that his client had proved that it had purchased the suit land in question and made reference to the letter dated 18 May 1994 as one which gave the defendant possession. He submitted that the title deed issued herein was fraudulently obtained as the ID card indicated therein was not of Margaret Wanyee but a different person. He thought that this suit was a scheme by Benny Kanyi to fraudulently benefit from the land.

#### **PART D: ANALYSIS AND DECISION**

24. In this suit, the plaintiff wishes to have the defendant permanently restrained from the suit land. On the other hand, the defendant has filed a counterclaim seeking to be declared owner of the suit land on the basis that it purchased the same from the owner, and in the alternative, through adverse possession. In my view, if I hold that the defendant has a valid and enforceable agreement for purchase of the property, and/or is entitled to it by way of adverse possession, then the plaintiff's claim must fail, and if I do not hold for the defendant, then the plaintiff's claim must succeed, subject only to being satisfied that the plaintiff is the duly appointed attorney of the owner of the property, which power of attorney is contested by the defendant. Before I embark on whether or not I find the defendant to have a valid claim, I think I need to sort out this preliminary issue of the validity or otherwise of the power of attorney.

##### ***ISSUE 1: Is the Power of Attorney valid?***

25. The plaintiff has claimed to hold a valid power of attorney donated by the owner of the suit land. He produced the same as an exhibit in this case. The power of attorney that the plaintiff asserts is that signed on 18 June 2013 and said to have been executed before one Kim K. Johnson, a Notary Public in the State of Washington, USA. The said power of attorney was registered on 8 July 2013 at the Lands Office in Nairobi. Now, the defendant claims that this power of attorney is a forgery. The basis of this claim is not coming from the person who is said to have donated the power of attorney, or from the person who is said to have notarized the power of attorney, but is coming from a document examiner who claims that the signature in the power of attorney is not the same signature in the identity card of the donor of the said power of attorney. If the alleged donor of the power of attorney had repudiated the said power of attorney, then I would not have hesitated to declare it a nullity. Again, if the person who is said to have notarized the power of attorney, had denied ever notarizing it, then there would have been good reason to nullify the power of attorney. As it is, neither the donor, nor the notary, have denied that the power of attorney was properly given.

26. It cannot be said that the defendant could not have attempted to reach out to either of these persons, if they were of the view that the power of attorney was invalid. They could have tried to reach Margaret Wanyee, but if they couldn't, then they could definitely have reached the notary, for his address is in the power of attorney instrument. The evidence of the document examiner, in the circumstances of the power of attorney, is very weak evidence. In any event the evidence of the defendant's document examiner in so far as the power of attorney is concerned, has been challenged by the plaintiff's document examiner, whose opinion was that the person who signed the power of attorney is the person who signed the ID card of Margaret Wanyee.

27. It is not unusual to find two expert witnesses giving conflicting evidence. In fact, I faced a more or less similar situation in the case of ***Sammy Some Kosgei vs Grace Jelal Boit, Eldoret E&L Case No. 411B of 2012***. In the said case, an issue arose as to whether a document had been signed by a deceased person. The plaintiff's and defendant's document examiners came to different conclusions and I had to make a determination on which examiner's report I should uphold. I was guided by the Court of Appeal decision in the case of ***Amosam Builders Developers Ltd vs Betty Ngendo Gachie & 2 others (Nakuru Court of Appeal Civil Appeal NO.193 of 2001) (2009) eKLR***, where the court

of appeal assessed a situation in which the evidence of experts was in conflict. It stated as follows (where relevant) :-

*“There is no doubt that the witnesses called by both sides as experts were each qualified in their respective fields. That notwithstanding, as a general rule evidence by experts being opinion evidence is not binding on the court. The court has to consider it along with other evidence and form its own opinion on the matter in issue. The court is at liberty to accept or reject evidence of experts depending on the facts and circumstances of the case before it... In the case before us there is a conflict of opinion by the experts called by both sides. It was the responsibility of the trial court to come to a decision one way or the other after analyzing all the evidence before it. In a case as this where evidence of experts is conflicting a decision one way or the other depends on the credibility of witnesses.”*

28. As will be seen from the above Court of Appeal decision, the evidence of experts is not binding on the court. What the court does, is to consider it alongside other evidence that has been tendered, and then form its own opinion on the issue at hand. The court can indeed accept or reject the evidence of one expert, depending on the circumstances of the case before it.

29. Given that I do not have corroborative evidence of the allegation that the power of attorney was not signed by Margaret Wanyee, save for the contested opinion of the defendant's document examiner, I am unable to come to the conclusion that the power of attorney presented before me was not one that was executed by Margaret Wanyee. Having heard and seen the witnesses, I am more inclined to accept the evidence of Mr. Mackenzie over the evidence of Mr. Cheruiyot on the authenticity of the power of attorney. 30. I therefore find that the plaintiff is properly before this court as the appointed attorney of Margaret Wanyee.

### ***Issue 2: Is the defendant entitled to the suit land arising out of a purchase ?***

31. It is the contention of the defendant that it is entitled to the suit land because it purchased it from Margaret Wanyee. I need to find out if I have sufficient pleadings and evidence to support this allegation. On this point, if find it necessary to copy verbatim the defendant's pleading, which is drawn as follows in paragraph 8 of its defence :-

*“The defendant further avers that it purchased the suit property in the year 1991-1994 or thereabouts from Margaret Muthoni Wanyee the original owner for valuable consideration of Kenya Shilling One Million, Nine Hundred and Fifty Thousand (Kshs. 1,950,000/=) only which amounts were fully paid to Margaret Muthoni Wanyee by the shareholders and a loan facility.”*

32. It will deduced from the above, that the defendant's pleading is that it purchased the suit land *“in the year 1991-1994 or thereabouts...”*. I have a serious problem with this pleading. There is no precise year, no precise month and no precise date. One would expect that a sale agreement will have a specific date, or if a series of sale agreements are entered, then one would expect specific dates of these sale agreements. If indeed there was a sale agreement, I would expect that there be a pleading stating that on such and such specific date, we did enter into a sale agreement. There is no such pleading in this case. The defendant's pleading in fact ends with the rather ambiguous word, *“ or thereabouts”*.

33. Apart from the pleadings, I do not have any evidence, which informs me that the defendant did indeed enter into an agreement of sale on any date. The defendant's evidence of the alleged time of purchase was presented by DW-1 and DW-8. The evidence of DW-1 was that the defendant purchased the suit land in the year 1981. She further stated that they paid for the land in the year 1994 after having received the sum of Kshs. 1,650,000/= from Cooperative Bank in the year 1993. To me, this is rather unusual and does not tally. I wonder how DW-1 can purport to state that they purchased the land in the year 1981 yet payment was made more than 12 years later. That to me does not sound like a purchase. I am also at a loss as to why the defendant would borrow money in the year 1993 then do a sale agreement in the year 1994. One would expect that you first commit to a sale agreement, then borrow money on the strength of it, not the other way round.

34. Further, the evidence of DW-8, did not tally with that of DW-1, not that his said evidence was any better. Mr. Wathigo stated that the agreement to purchase was done in the years 1993-1994 and no exact date was given. As matters stand, I have no precise date of a sale agreement in the pleadings and in evidence. That is extremely unusual for an entity that has bought 195 acres of land at an amount that was colossal in the year 1994. I wonder how nobody in the said Society can give a specific year, leave alone a specific date, for the alleged sale agreement.

35. The above aside, I do not have any document that can term itself an agreement for sale, or indeed any document that can be said to be evidence of a transaction between Margaret Wanyee and the defendant, and the terms thereof. It is trite law that if one wishes to enforce an agreement over land, then such transaction must be in writing. Without such documented agreement, then one cannot enforce a sale agreement over land. This is brought out by Section 3 (3) of the Law of Contract Act, Cap 3, Laws of Kenya, which provides as follows :-

*(3) 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;*

*Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.*

36. The above law is in black and white and I need not cite any authority. One cannot bring a suit to enforce an agreement for sale of land unless such agreement is in writing. We can only know that there is such agreement if the document itself is produced as evidence in the case. In our instance, no sale agreement was ever produced. The only evidence tendered was oral evidence by the defendant that there was a sale agreement. The existence of such sale agreement is denied and it was therefore incumbent on the defendant to produce documentary evidence of it. In our case, apart from no sale agreement being produced, I was not given anything to prove payment of the alleged sale. The defendant's witnesses claimed that a sum of Kshs. 300,000/= was paid immediately from their own resources and later a sum of Kshs. 1,650,000/= was paid following a loan advanced by Cooperative Bank. I was not given any document showing transmission or acknowledgment of either sum, whether Kshs.300,000/= or Kshs. 1,650,000/=. This was 1994, and as I have said, the said sums of money were colossal at the time. One would certainly have expected that there be some document to demonstrate the movement or receipt of this money. In fact, one would expect the bank to have a record of transfer of this money. DW-7, the bank official did not refer to a single document evidencing the movement of this money. If the defendant had been loaned Kshs. 1,650,000/= one would also have expected that this money be secured by a charge or other security. No security was referred to me.

37. But even if there was a sale between the plaintiff and defendant, such sale would be void, for the reason that no consent of the Land Control Board (LCB) was ever obtained. The Land Control Act, Cap 302, Laws of Kenya, does require that transactions over agricultural land be subject to grant of consent by the relevant LCB. The specific provision is Section 6 which is drawn as follows :-

*6. (1) Each of the following transactions -*

*(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.*

38. It will be seen from a reading of Section 6 (1) (a) that a sale of agricultural land is one of the transactions that require consent of the LCB and if no consent is given, then the transaction will be rendered void. The remedy given in Section 7 of the statute, for an agreement rendered void for lack of LCB consent, is a refund of the purchase price paid.

39. In their evidence, the defendant's witnesses agreed that no consent of the LCB was ever applied for and none was issued. Given this position, even if there was a sale of the suit land to the defendant, such sale is null and void and cannot be given effect.

40. In attempting to prove that there was a sale to the defendant, the defendant placed heavy reliance on a letter dated 18 May 1994, claiming that it was written by the plaintiff. For full import, I find it necessary to copy the contents of the said letter. It is drawn as follows :-

*Margaret Muthoni Wanyee*

*P.O Box 74242*

*NAIROBI.*

*18 May 1994*

*To Mukenia Co-operative Society*

*P.O Box 2348*

*NAKURU.*

*Dear Sirs,*

*RE : SALE OF PARCEL NO 11 - KEDONG RANCH*

*This is to confirm that I have sold the above Parcel of land measuring approximately 195 acres to Mukenia Co-operative society Limited and I hereby authorize you to take possession.*

*Yours faithfully,*

*(signature)*

Margaret Muthoni Wanyee

CC. Kedong Ranch Limited

Naivasha.

41. The above letter is neither an agreement for sale nor evidence of payment for a land sale. It is also a hotly disputed document with the plaintiff asserting that the document is a forgery. The plaintiff called a document examiner who concluded that the said letter was not written by Margaret Muthoni Wanyee. The defendant's document examiner was to the effect that the letter was written by Margaret Wanyee.

42. I find it completely unnecessary to reconcile the two reports because it really doesn't matter even if I was to hold that the letter was written by Margaret Wanyee. The sale would still be void and unenforceable for want of consent of the Land Control Board.

43. In essence, the defendant cannot succeed to have the land by claiming that it purchased it from the plaintiff. There is no proof of purchase, but even if there was an actual purchase, such purchase is void for want of consent of the Land Control Board. The defendant's claim for the suit land based on purchase therefore fails.

***Issue 3: Is the defendant entitled to the suit land through Adverse Possession?***

44. Let me now go to the alternative claim of adverse possession. It is trite law that for one to prove a claim based on adverse possession, one must demonstrate that he/she has been in possession of the land for a continuous, uninterrupted period of at least 12 years. Such possession must be peaceful and open, without secrecy and without force. There must also be proof of intention to keep the land as one's own (animus possidendi).

45. Has the defendant proved quiet, continuous, peaceful, uninterrupted possession for a period of 12 years? I think not.

46. I have no proof that the defendant through its membership took possession of the land in the year 1994 or at all. The valuation report presented by the plaintiff, shows clearly that the land is unsettled save for one structure which was put up by a person authorized by the plaintiff to graze cattle on the land. This is confirmed by DW-2 and DW-3, who claim to have purchased plots in the suit land. They stated in their evidence that there are no settlements on the land. I also have no evidence at all that the land was ever subdivided. The evidence of DW-6 was rather convoluted on whether or not it was the suit land which was surveyed pursuant to instructions received from the defendant. The fact of the matter is that no formal survey has ever been registered against the suit land. The other fact of the matter is that the defendant through its members do not occupy the land. That is why the plaintiff's agent was able to fence it in the month of April 2013. Without proof of occupation, which I do not have, one cannot prove a claim for land through adverse possession.

47. On the simple finding that the defendant has not proved occupation of the land, the claim for adverse possession must fail and is hereby dismissed.

***Issue 4: Is the plaintiff entitled to the prayers sought?***

48. Having dismissed the counterclaim for the land based on purchase and adverse possession, I have no reason not to allow the plaintiff's case for a declaration that the suit land belongs to the plaintiff and for removal of the caution lodged by the defendant, since the defendant has not proved that it has a legitimate interest over the suit land. There is no question that the suit land belongs to the plaintiff pursuant to evidence given by officials of Kedong Ranch and the plaintiff's agent. The land parcel Naivasha/ Maraigushu Block 10/11 does belong to the plaintiff, Margaret Muthoni Wanyee. There is of course an issue with the ID Card noted in the title deed but to me that is an issue that can be resolved administratively so that the correct ID card is reflected. It does not in any way negate that fact that the land is owned by Margaret Muthoni Wanyee.

49. The other prayer is for damages for damages for trespass and damages for destruction of the fence erected by the plaintiff. The defendant did not actually deny in its evidence that it is not the entity responsible for damaging the plaintiff's fence. It is only the defendant who would have been motivated to damage the fence and I do find that the plaintiff has proved on a balance of probabilities that the fence erected was put down by the defendant and/or the defendant's agents. The defendant is therefore liable to compensate the plaintiff for the damage to the fence. The plaintiff brought a valuer who quantified the loss at Kshs. 2,360,000/=. The defendant did not call any evidence to challenge this quantification and I have no reason to question it. I therefore award the plaintiff the sum of Kshs. 2,360,000/= as damages for destruction of the fence and I further make an award of Kshs. 500,000/= as general damages for trespass in recognition of the fact that the defendant did violate the plaintiff's right to exclusive possession and use of the suit land.

50. The plaintiff has succeeded and the defendant has failed. I have no reason not to award the plaintiff the costs of the case and of the counterclaim and I do so award the plaintiff.

51. I now make the following final orders :-

**(i) That a declaration is hereby issued that between the plaintiff and the defendant, it is the plaintiff, Margaret Muthoni Wanyee, who is entitled to ownership of the land parcel Naivasha/Maraigushu Block 10/11.**

**(ii) That the defendant and/or its members/employees/agents and/or assigns are hereby restrained by way of a permanent injunction from entering, being in possession, occupying, or entering into any dealings over the land parcel Naivasha/Maraigushu Block 10/11.**

(iii) That the Land Registrar, Naivasha, is hereby ordered to remove the caution placed by the defendant in the register of the land parcel Naivasha/Maraigushu Block 10/11.

(iv) That the defendant do pay the sum of Kshs. 2,360,000/= for causing destruction to the plaintiff's fence and further do pay the sum of Kshs. 500,000/= as general damages for trespass.

(v) That the plaintiff is entitled to interest on the sum of Kshs. 2,360,000/= from April 2013, and interest on the sum of Kshs. 500,000/= from the date of judgment.

(vi) That the plaintiff shall have the costs of the suit and of the counterclaim.

52. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 8th day of February 2018.

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Kabaiku for the plaintiff.

Mr. Imbwaga holding brief for Mr. Olonyi for defendant

Court assistant : Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**