



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 122 OF 2014 (O.S)

IN THE MATTER OF LIMITATION OF ACTION ACT, CAP 22

AND

IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION PURSUANT TO SECTION 38 OF LIMITATIONS OF ACTIONS ACT

BETWEEN

JOSINTER ATIENO OUMA.....1ST PLAINTIFF

CONSOLATA ADOYO OUMA.....2ND PLAINTIFF

VERSUS

JOSHUA O. OMITI.....1ST DEFENDANT

YONA BON OMITI.....2ND DEFENDANT

(Sued in the personal and representative capacities as the legal administrators of the Estate of JEREMIAH OMITI ODHOK, DECEASED

J U D G M E N T

1. Introduction and the Pleadings:

The plaintiffs commenced this suit by way of an originating summons dated 25th March 2014. In the originating summons the plaintiffs have sought determination of the following questions/ issues:-

a) Declaration that the defendants right to recover the whole of LR Nos Kabondo/Kasewe/844 and 906 respectively are barred under the Limitations of Actions Act Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcel of land for a period exceeding 24 years.

b) That there be an order that the plaintiffs be registered as the proprietor(s) of the whole of LR Nos Kabondo/Kasewe/844 and 906 in place of the defendants and one Jeremiah Omiti Odhok (now deceased).

c) That the deputy registrar and/or the executive officer of the honourable high court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of the said parcels of land, that is, LR Nos. Kabondo/Kasewe/844 and 906 respectively in favour of the plaintiff, in the event of default on the part of the defendants.

d) That there be an order of permanent injunction restraining the defendants either by themselves, agents, servants and or employees from interfering with the plaintiffs peaceful possession and occupation of the said parcels of land that is LR Nos Kabondo/Kasewe/844 and 906 in any manner whatsoever and/or however.

e) Costs of this originating summons be borne by the defendants.

f) Such further and/or other orders be made as the court may deem fit and expedient in the circumstances of this case.

2. As per the plaintiffs originating summons, the 1st plaintiff got married to one Joseph Ouma Ounda (hereinafter also referred to as deceased) in the year 1982 while the 2nd plaintiff was married to the deceased in the year 1990. The 1st plaintiff contended that upon their marriage to the deceased, their husband established homesteads for the 2nd plaintiff and herself on land parcel **LR No. Kabondo/Kasewe/906**. That on the other hand, the plaintiffs used to cultivate **LR No. Kabondo/Kasewe/844** where they also had respective portions assigned to them by deceased. The 1st plaintiff stated that land parcels **LR NoS. Kabondo/Kasewe/844** and **906** at the time they took possession were registered in the names of Jeremiah Omiti Odhok (also deceased) as per the annexed copies of the green card “**JA02(a) and (b)**”.

3. The 1st plaintiff averred that despite **LR No. Kabondo/ Kasewe/844 and 906** being registered in the names of Jeremiah Omiti Odhok (deceased) he neither came nor took possession of the said lands. Hence, she contended that the 2nd plaintiff and herself maintained their cultivation on designated portions of **LR No. Kabondo/ Kasewe/844** while they both resided and also cultivated on **LR No. Kabondo/Kasewe/906**. She further averred that after the death of Jeremiah Omiti Odhok currently **LR No. Kabondo/ Kasewe/906** is registered in the names of the defendants who have also never been in occupation/possession of the said lands.

4. The plaintiffs further contended that their occupation of **LR No. Kabondo/Kasewe/844** and **906** has been continuous, uninterrupted, peaceful and with full knowledge of the defendants and the defendants’ deceased father. The 1st plaintiff attached copies of photographs showing the homestead of the 2nd plaintiff and herself and also the agricultural activities undertaken on **LR No. Kabondo/ Kasewe/844** and **906** which were marked “**JA04**”. She further contended that when their husband died, the defendants did not raise any objection to him being buried on **LR No. Kabondo/ Kasewe/906**.

5. Lastly, it is the plaintiff’s contention that even though the defendants are the registered proprietors of **LR No. Kabondo/ Kasewe/906** and the legal administrators of the estate of the deceased, they have never possessed, occupied or cultivated the said land at all. The plaintiffs originating summons was opposed by the defendants who also pleaded a counterclaim dated 14th January 2015. In the said counterclaim the defendants affirmed that they are the legal owners of **LR No. Kabondo/Kasewe/ 906** and also the lawful beneficiaries of the estate of Jeremiah Omiti Odhok (who is now deceased) who owned **LR No. Kabondo/Kasewe/ 844**. They further stated that since the year 2012, the plaintiffs and their families have been unlawfully and without consent trespassing upon the said parcels of land by building temporary houses, cultivating and even letting portions to unsuspecting third parties. They further stated that the plaintiffs have been deprived of use, occupation and enjoyment of the said parcels of land hence, they have suffered loss and inconvenience.

6. In the counterclaim the defendants sought the following orders:-

1. An order of eviction be issued against the plaintiffs their agents or workers directing their removal together with any of their items, materials, structures or property from LR No. Kabondo/Kasewe/844 and 906.

2. Costs of the entire suit be borne by the plaintiffs.

7. The plaintiffs in their reply to the above counterclaim dated 14th September 2015, denied that they entered **LR No. Kabondo/ Kasewe/844** and **906** in the year 2012 and stated that by virtue of the longevity of occupation of **LR No. Kabondo/Kasewe/844** and **906** by them, the defendants lost their right to recover the properties. Hence, the plaintiffs stated that the defendants are not entitled to recovery of the properties and consequently, they contended the defendants counterclaim was misconceived.

8. Plaintiffs Evidence:

PW1 was Josinter Atieno Ouma the 1st plaintiff in this case. She told the court that the 2nd plaintiff was her co-wife and that their husband was Joseph Ouma Ounga. She stated that she got to know the 1st and 2nd defendants when they (defendants) filed a complaint to the chief accusing her and her co-wife of trespassing onto their land in 2014. She further stated that the defendants wanted them to vacate **LR No. Kabondo/Kasewe/844** and **906** hence the filing of the instant suit. She stated that she was married to her late husband in 1982, while the 2nd plaintiff was married later on. That when her co-wife and herself got married, individual homesteads were established for them in **LR No. Kabondo/Kasewe/906** and simultaneously, they were cultivating on land parcel **LR No. Kabondo/ Kasewe/844**. She contended that ever since 1982 when she got married, she has occupied **LR No. Kabondo/Kasewe/906** that she did not know Jeremiah Omiti Odhok (defendants’ father), that the deceased (her husband) died in 2012, they buried him in **LR No. Kabondo/ Kasewe/906** and that nobody raised any objection against them burying the deceased in **LR No. Kabondo/Kasewe/906**. She further stated that she has buried her children and mother-in-law in **LR No. Kabondo/Kasewe/906** and still nobody objected to the said burials.

9. The 1st plaintiff further stated that on **LR No. Kabondo/Kasewe/906** she has grown blue gum trees, maize, sweet potatoes and avocados. That the 2nd plaintiff has also planted sugarcane, sweet potatoes and blue gum trees on **LR No. Kaobndo/Kasewe/844**. She further stated that they had not been stopped by anybody from developing the plots and that the plots do not share a common boundary but are separated by a road. That **LR No. Kabondo/ Kasewe/906** is about 8 acres which she uses in its entirety while the 2nd plaintiff’s plot **LR No. Kabondo/Kasewe/844** is about 3 acres which she also fully utilizes.

10. Further the 1st plaintiff stated that the 1st and 2nd defendants were not her neighbours as they reside in Kendu Bay which was a distance from where she lived. The plaintiffs produced a list of documents as per the list at page 17 of the originating summons as “**PEXh. 1 (1-7)**”. The 1st plaintiff confirmed that the photographs appearing on pages 25-27 are those of her plot, her children and herself. She also confirmed that the photographs appearing at the bottom of page 25 as the 2nd plaintiff’s house and that the tree appearing on the photograph was planted by her husband. In reference to page 26 at the top she confirmed that the same showed the 2nd plaintiff’s house and her bananas, the second photograph showed her son’s house. That her son Fredrick Omondi was the one shown on the photograph standing and at page 27 the

photograph showed the 2nd plaintiff and her child. She further stated that the second photograph showed the 2nd plaintiff's house and on the same page at the bottom, she stated that the houses belonged to her son and herself.

11. The 1st plaintiff denied that the defendants' father Jeremiah Omiti has a home on **LR No. Kabondo/Kasewe/906** and/or that one Lucas Ominda was buried in **LR No. Kabondo/Kasewe/906** or **844** stating that he was buried in his own land. She denied that the deceased (her husband) trespassed on **LR No. Kabondo/Kasewe/906** and **844** in 1998 or that there has been any efforts at mediation. She asserted that their occupation of the two parcels of land has been uninterrupted, open and peaceful. She averred that **LR No. Kabondo/Kasewe/906** and **844** belonged to them and there would be no basis for them to be evicted as they have no other land which they can move to. She denied that their husband had been arrested for trespass. She prayed that the court declares them as the owners of **LR No. Kabondo/ Kasewe/906 and 844**, and to have title deeds issued in their names and they be awarded the costs of the suit.

12. On cross examination, on being shown the photographs on pages 25 and 27 of the plaintiff's bundle, the 1st plaintiff stated that the same were taken by her son in 2014, that the trees in the photographs were planted in 2002 and were being cut and they grow again. She admitted that in 1998, their husband was charged in Criminal Case No. 260 of 1998 at Oyugis Law Court and sentenced to probation for 2 years. She however stated that she was not aware that the deceased was charged with trespass and damage to property and that she did not know whether Jeremiah Omiti (the defendants' father) was the complainant. She further said that the house appearing on the second photograph at page 27 was built in 2013 after their husband died. That before the deceased died, he was residing on **LR No. Kabondo/Kasewe/906** and he did not use any force to stay there.

13. On further cross examination by Mr. Nyasimi Advocate 1st plaintiff stated that she filed the instant suit because the defendants were attempting to chase them away from the plots by involving the Chief, one Moses Odhiambo Ngere. That the said chief called them for a meeting in his office and the defendants were also present and requested them to vacate from **LR No. Kabondo/Kasewe/906** and **844**. She further stated that at the said meeting with the chief, the defendants did not make any offer of settlement to them. She stated that the deceased (her husband) did not have any other parcel of land. She admitted that her father-in-law had ancestral land which was separate from **LR No. Kabondo/Kasewe/906** and **844** and the 2nd plaintiff stays in the said ancestral land. Lastly, she stated that she cannot move from **LR No. Kabondo/Kasewe/906** because she had nowhere to go. On re-examination the witness reiterated that she resides in plot **906** but the 2nd plaintiff and herself cultivate plot **844** and that nobody has stopped her from cultivating Plot Nos. **906** and **844**. On examination by the court, she stated that her co-wife resides in the ancestral land but cultivates plot **844**.

14. **Defendants Evidence:**

DW1, Yona Omiti, the 2nd defendant herein, confirmed to the court that the two parcels of land in dispute that is **LR No. Kabondo/ Kasewe/906** and **844** were registered as follows:-

a) **LR No. Kabondo/Kasewe/906** was registered in the names of the two defendants as per the copy of the title deed "DEx.1".

b) **LR No. Kabondo/Kasewe/844** is still in the name of the defendants' late father Jeremia Omiti Odhok as per the copy of the title "DEx.2".

DW1 stated that **LR No. Kabondo/Kasewe/906** was purchased by their deceased father in 1964 from Ounda Muma and that his father purchased a second portion from Johana Muma in 1965 as per agreements produced as "DEx.3 and 4" respectively. The witness further stated that his late father purchased land from three people i.e Nicholas Adier Omolo, Johanna Muma and Ounda Muma in an agreement dated 27th November 1968 (DEx.5) and that all the three portions were consolidated and registered to form **LR No. Kabondo/ Kasewe/906** while the portions bought from Ounda Muma and Yohana Muma were registered as **LR No. Kabondo/ Kasewe/844**. He explained that **LR No. Kabondo/Kasewe/906** and **844** were in the same locality and were only separated by a road.

15. The witness told the court that Ounda Muma was the father-in-law to the plaintiffs, that the plaintiffs continued to occupy a portion of **LR No. Kabondo/Kasewe/906** where they have built their home and cultivated portions of **LR No. Kabondo/Kasewe/844**. He also corroborated PW1's testimony that PW1 lives on **LR No. Kabondo/ Kasewe/906** and 2nd plaintiff cultivates in their own parcel of land although both plaintiffs cultivate portions of **LR No. Kabondo/ Kasewe/906** and **844**. He further explained that as a family, they had made efforts to remove the plaintiffs from **LR No. Kabondo/ Kasewe/906** and **844**. He stated that in 1990 their late father reported to the assistant chief regarding **LR No. Kabondo/Kasewe/ 844** as the plaintiff had built a house thereon. That the assistant chief and elders ruled that the plaintiffs had occupied parcel **844** unlawfully. The plaintiffs moved out of parcel **844** and settled on parcel **906**. That the deceased (defendants' father) reported the matter to Oyugis Police Station and the plaintiffs husband one, Joseph Ouma Muma was arrested, taken to court in April 1998 and was charged in Criminal Case No. 260 of 1998 and was found guilty of illegally occupying the defendants land and was placed under probation on 9th November 1998 for two years.

16. However, the plaintiffs did not vacate the portions of parcel **906** and **844** that they were using and in February 2014 the defendants reported to the chief that the plaintiffs were preventing them from using their land. The chief summoned the plaintiffs and their eldest son and some elders to hear the case. They (defendants) presented their grievances and the plaintiffs responded to the said grievances. The elders then decided to hold another meeting at the site of **LR No. Kabondo/Kasewe/906** where the chief was presiding but no decision was arrived at. That they again had a meeting at the site of **LR No. Kabondo/Kasewe/906** and it was decided that the defendants family donate to the plaintiffs a portion of one acre from **LR No. Kabondo/Kasewe/844** on humanitarian grounds. That the plaintiff's countered the offer and told them that they were prepared to give back parcel **844** and they remain with parcel **906**. The defendants rejected the said proposal and the elders proposed that they should have another meeting. However, before another meeting could be held the present suit was filed by the plaintiffs and summons to enter appearance served on the defendants. DW1 confirmed that their residential homes are in Rachuonyo, where they relocated to after their late father moved from **LR No. Kabondo/Kasewe/906** in the year 2000. It was his further evidence that they (defendants) cultivate part of **LR No. Kabondo/Kasewe/ 906** and **844** while the plaintiffs were using other portions.

17. On cross examination DW1 stated that his deceased father resided at **Kanyango 98** and that is where he (defendant) was born and has

built his home while his brother's home is at **Kanyango 424**. He further stated that their land at Kanyango is rocky and therefore not suitable for farming hence, their deceased father bought **LR No. Kabondo/Kasewe/906** and **844** for farming. He affirmed that their deceased father was buried in land parcel **Kanyango 98**. DW1 confirmed that the 1st plaintiff built her home on land parcel **906** in 1990 and she has remained there ever since, that nobody has built on land parcel No. **844** but the plaintiffs have leased portions of parcel **844** to third parties.

18. DW2 Moses Odhiambo Ongere a senior chief of Kasewe location confirmed that he knew both plaintiffs and defendants in this case as they were both residents in his locality. He corroborated DW1's testimony that the registered owners of **LR No. Kabondo/Kasewe/ 906** are the defendants and the registered owner of **LR No. Kabondo/Kasewe/844** was the defendants deceased father. He told the court that in 2014 the defendants complained to him about PW1's occupation of **LR No. Kabondo/Kasewe/906** but not about the 2nd plaintiff. He also confirmed that the defendants complained about the plaintiffs invasion on his land hence he summoned both parties for a meeting with the elders. He confirmed that the first meeting was held on 28th February 2014, the second meeting was held on **LR No. Kabondo/Kasewe/906** on 8th March 2014. He produced minutes relating to the second meeting where parties disagreed on the size of the land to be given to the plaintiffs. The chief affirmed that mediation efforts failed to yield any results. The chief confirmed that initially the plaintiffs occupied land parcel **844** but later moved to land parcel No. **906** around 1994. He also corroborated DW1's testimony that the plaintiffs' deceased husband was arrested and charged at Oyugis Magistrates Court and was convicted as per the judgment in that case "**DEx.6**". He confirmed that from 1998 the next time the dispute was handled was in 2014.

19. On cross examination, the chief confirmed parcel number **LR No. Kabondo/Kasewe/844** is being used by the plaintiffs for cultivation. In **LR No. Kabondo/Kasewe/906** there are three houses with a compound. The homes are situated almost at the centre of the land, there is a grazing area, farming area and an area where trees are growing. That the plaintiffs are using the whole of **LR No. Kabondo/Kasewe/906** and **844** and to his knowledge the plaintiffs have occupied both parcels of land since 1994. Lastly, he revealed that the 1st plaintiff's family have planted and cut trees in **LR No. Kabondo/Kasewe/906**. On re-examination, he affirmed that he only got complaints from the defendants' deceased father in 1998 and from the defendants in 2014.

20. **Submissions, Analysis and Determination:**

The parties filed final written submissions. Having considered and reviewed the pleadings, the evidence and the submissions by the parties, the issues that arise for determination in the instant suit are as follows:

1. Whether the occupation and possession by the plaintiffs of land parcels Kabondo/Kasewe/844 and 906 was adverse to the rights and interests of the defendants?

2. Whether the plaintiffs have acquired title to land parcels Kabondo/Kasewe/844 and 906 by reason of being in adverse possession so as to entitle them to be declared as owners of the said parcels of land?

3. Whether the defendants are entitled to an order of eviction against the plaintiffs from land parcels Kabondo/Kasewe/906 and 844 as prayed in the counter claim?

4. What reliefs should the court grant?

21. The law on adverse possession is now settled. Adverse possession has been defined as a method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by law. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years. According to Halbury's Laws of England, 4th Edition Volume 28, paragraph 768.

"No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land."

22. The Court of Appeal in the case of **Ruth Wangari Kanyagia –vs- Josephine Muthoni Kinyanjui [2017] eKLR** while acknowledging adverse possession is a common law doctrine restated the same by citing the India Supreme Court decision in the case of **Kamatika Board of Wakf –vs- Government of India & Others [2004] 10 SCC 779** where the court stated thus:-

"In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*", that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period." [Emphasis added].

23. The possession by the adverse possessor must be continuous open and uninterrupted for a period of not less than 12 years and the adverse possessor must over the period engage in acts in regard to the property which are inconsistent with the rights of the true owner. The acts have to be hostile to the rights and interests of the real owner. In the case of **Githu –vs- Ndeete [1984] KLR 776** the Court of Appeal held that:-

"Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is

admitted by the adverse possessor. Assertion of right occurs when the owner take legal proceedings or makes an effective entry into the land; (See *Cheshire's Modern Law of Real Property*, 11th Edition at p. 894). Giving of notice to quit cannot be an effective assertion of right for purposes of stopping running of time under the Limitation of Actions Act.”

As regards to what would constitute dispossession, it is stated in Volume 24 Halsbury's Laws of England, 3rd Edition at page 252 thus:-

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

24. The sum total is that in order for the plaintiffs to succeed in their claim in this suit, they have to prove that they have used the lands as of right: *nec vi, nec clam, nec precario* (with no force, no secrecy, no evasion) and their possession has been continuous and has not been broken or interrupted (See *Kimani Ruchine & Another –vs- Swift, Rutherford Co. Ltd & Another [1976-80] 1 KLR 1500.*)

In the case of *Wambugu –vs- Njuguna [1998] KLR 173* the Court of Appeal held thus:-

“In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

25. The 1st plaintiff was married in 1982 and there is uncontroverted evidence that ever since she has occupied and has resided on land parcel **Kabondo/Kasewe/906** where she has her home. Her late husband with whom she was residing on the parcel of land with died in 2012 and was buried thereon without any contestation. Her children have also built their houses on land parcel **906**. Her mother in law and 4 of her own children when they died were buried on land parcel **Kabondo/Kasewe/906** again without any contestation. The 1st plaintiff's family has fully settled on land parcel **906** as evidenced by the set of photographs tendered in evidence which show the various houses constructed on the parcel of land together with mature grown up blue gum trees. It was the plaintiffs evidence that they utilized the entire land parcel 906 for farming activities.

26. The 1st defendant (DW1) indeed in his evidence admitted that the plaintiffs were using land parcel **906** where they had their homes. In his evidence DW1 stated that in 1990 his late father had complained to the Assistant Chief about the plaintiffs' occupation of land parcel **844** and that when the plaintiffs moved out of parcel **844** they settled in land parcel **906**. The 1st defendant further stated that in 1998 their late father complained to the police at Oyugis and that the plaintiffs' husband was arrested and charged with the offence of forcible detainer in regard to land parcel **906** for which he was convicted and placed on probation for 2 years. The plaintiffs were however never removed from the suit land parcel **906**. The 1st defendant affirmed this fact when he stated under cross examination thus:-

“...We offered the 1st plaintiff a portion in 844 on humanitarian grounds because she has her home in parcel 906. The 1st plaintiff built her home/house on parcel 906 in 1990 and she has remained there ever since. I would still be prepared to honour the offer I made.”

27. DW2 the chief in his evidence equally affirmed that the plaintiffs have been in occupation of land parcels **844** and **906** over a long period and have been using the same. In his evidence he stated thus:-

“By the time Ouma (plaintiffs' husband) died he was living on parcel 906. Ouma died about 2012 and he was buried in parcel 906.....

Parcel 844 is being used by the plaintiffs for cultivation. They have used parcel 844 for a long period. They were using parcel 844 before moving to parcel 906. In parcel 906 there are 3 houses with a compound. The homestead is situated almost at the centre of the land. There is a grazing area and where trees are growing. The plaintiffs are using the whole of parcel 906 and parcel 844. To my knowledge the plaintiffs have occupied both parcels of land since 1994.”

28. The totality of the evidence adduced by the parties in this matter establishes that indeed the plaintiffs have been in occupation and possession of land parcels **844** and **906** since the 1990's. The 1st plaintiff's husband established a home for the 1st plaintiff on land parcel **906** where she resides to date. The 1st plaintiff's deceased husband was also residing on land parcel 906 before he died in 2012. In 1998 when he was charged with the offence of forcible detainer at Oyugis Magistrates Court, he was already in occupation and possession of the suit properties. His possession then as thereafter was adverse. He had established a home on land parcel **906** and was using the land exclusively. Although he was convicted of forcible detainer he was not removed from the suit land and my view is that the institution of the criminal case at Oyugis Magistrates Court did not disrupt and or discontinue the possession by the plaintiffs and even if there was any disruption the plaintiffs continued in adverse possession from 1998 upto the time of the institution of the present suit on 25th March 2014 and this period was in excess of the statutory period of 12 years. The defendants did not take any legal action to remove the plaintiffs from the land and consequently after the expiry of 12 years the defendants had lost the right to recover the land and the plaintiffs had acquired title to the land by operation of the law.

29. It is my finding therefore that the plaintiffs have proved and established all the ingredients necessary for them to be declared as having acquired title to land parcel **Kabondo/Kasewe/906**. The evidence has established that the plaintiffs have occupied and possessed land parcel

906 from 1990 and the 1st plaintiff has established her home thereon for all this period. The plaintiffs have been utilizing the whole of this parcel of land exclusively as per DW2's evidence. The plaintiffs buried their husband when he died 2012 on this land. The 1st plaintiff's evidence that she has also buried four (4) of her dead children on this land was not rebutted. The plaintiffs' activities on land parcel 906 were clearly consistent with exercising rights of ownership and were therefore hostile to the rights and interests of the true owner. I am therefore satisfied that the plaintiffs' occupation and possession of land parcel 906 was adverse and consequently after the expiry of 12 years from 1990 the title of the registered owner was extinguished. The registration of the defendants as the owners of the property on 7th February 2012 following the death of their father who hitherto was the registered owner did not interrupt the adverse possession by the plaintiffs (see **Githu -vs- Ndeete [1984] KLR 776**). The defendants following their registration as owners held the title to the land in trust for the plaintiffs who had acquired title through prescription.

30. In the **Githu -vs- Ndeete** case [supra] the Court of Appeal held that:-

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.”

Therefore even though the defendants were registered and issued with a title to land parcel **Kabondo/Kasewe/906** on 7th February 2012 that did not affect the plaintiffs' title that they had acquired through adverse possession.

31. Although the plaintiffs have claimed to have acquired title by way of adverse possession to land parcel **Kabondo/Kasewe/844** this parcel of land as per the evidence adduced is still registered in the name of Jeremiah Omiti Odhok. The evidence of occupation and possession by the plaintiffs' is not cogent as the plaintiffs have merely stated although their homes are on parcel 906 they cultivate on land parcel 844 but have no buildings on it. The 1st plaintiff in her evidence stated that it was the 2nd plaintiff who cultivates on land parcel 844 but does not reside there and has not built thereon. There is also evidence that there may be other third parties who are cultivating on land parcel 844. Further there is evidence that the plaintiffs' during their late husband's lifetime moved from land parcel 844 and settled in land parcel 906 in 1990 following a complaint by the defendants deceased father to the Assistant Chief. On the basis of the evidence I am not satisfied the plaintiffs' have had exclusive use of land parcel 844 and/or that their activities on the said parcel were hostile and/or inconsistent with the rights and interests of the true owner. I hold that the plaintiffs have not proved they have acquired title to parcel **Kabondo/Kasewe/844** by way of adverse possession.

32. **Determination and Decision:**

From my foregoing analysis of the evidence and the law, I have to answer issues 1 and 2 as framed in the affirmative in regard to land parcel **Kabondo/Kasewe/906**. The plaintiffs' occupation and possession of this parcel of land has been adverse and they have acquired title to the said parcel of land through prescription and are therefore entitled to be registered as the owners thereof. As regards land parcel **Kabondo/Kasewe/844**, the answers to the issues are in the negative. The plaintiffs have failed to prove they have been in adverse possession of land parcel **Kabondo/Kasewe/844** and are therefore not entitled to be registered as owners of the same.

33. As relates to issue number 3 the defendants are not entitled to an order of eviction against the plaintiffs from land parcel **Kabondo/Kasewe/906** but as the administrators of the late Jeremiah Omiti Odhok they would be entitled to the exclusive use of land parcel **Kabondo/Kasewe/844**.

34. In the final result, the plaintiffs have been partially successful in their claim and the defendants have been partially successful in their counterclaim. Accordingly, I make final orders as follows:-

1. A declaration be and is hereby issued that the plaintiffs' have acquired title to the whole of land parcel number Kabondo/Kasewe/906 by virtue of having been in adverse possession of the same for a period in excess of 12 years.

2. An order be and is hereby issued that the plaintiffs, Josinter Atieno Ouma and Consolata Adoyo Ouma be registered as the joint proprietors of the whole of land parcel number Kabondo/Kasewe/ 906 in place of the defendants the said Joshua O. Omiti and Yona Bon Omiti.

3. An order be and is hereby issued that the deputy registrar of this Honourable court do execute all the necessary and appropriate documents to effect the transfer of land parcel Kabondo/Kasewe/ 906 to the names of the plaintiffs in the event the defendants default in doing so.

4. An order that the plaintiffs yield vacant possession of land parcel number Kabondo/Kasewe/844 to the defendants in the event that the plaintiffs are in occupation and/or possession forthwith.

5. Each party to bear their own costs of the suit.

JUDGMENT DATED, SIGNED and DELIVERED at KISII this 20TH DAY of APRIL, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Ms. Moguche for Ochwangi for the 1st and 2nd plaintiffs

N/A for the 1st and 2nd defendants

Ruth court assistant

J. M. MUTUNGI

JUDGE