



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 635 OF 2017 "OS"**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT**

**BETWEEN**

**JACOB MWANTO WANGORA.....PLAINTIFF**

**AND**

**MARY WARUGA WOKABI.....1<sup>ST</sup> DEFENDANT**

**GEORGE LWANGA KORONTO.....2<sup>ND</sup> DEFENDANT**

**(as beneficiaries and personal representatives of the estate of Soromeeti Kapore(Deceased)**

**BERNARD WOKABI WARUGA.....3<sup>RD</sup> DEFENDANT**

**JOSEPH NJUGUNA WARUGA.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

By an Originating Summons (OS) dated the 22<sup>nd</sup> January, 2014 and filed on 23<sup>rd</sup> January, 2014, the Plaintiff is seeking for the following orders:

1. Upon whom and in what manner shall this summons be served?
2. Had the plaintiff acquired title to the parcel of land comprised in title number Ngong/Ngong/3080 measuring one decimal two one (1.21) hectares (3acres) or thereabouts by reason of adverse possession on thereof since 1978 before it was subdivided into parcels title numbers ?
3. Was Soromeeti Kapore's title to the parcel of land comprised in title number Ngong/Ngong/3080 extinguished upon expiration of a period of twelve (12) years since the Plaintiff took possession thereof in 1978?
4. Upon Soromeeti Kapore's title to parcel number Ngong/Ngong/3080 being extinguished did the parcel cease to be his estate or part thereof?
5. Could or was any right, title or interest over parcel number Ngong/Ngong/3080 vested in the Defendants or any of them claiming as beneficiaries of Soromeeti Kapore after his title thereto had been extinguished?
6. Do the Defendants hold titles to parcels numbers Ngong/Ngong/62257, 62258, 62259 and 62260 in trust for the Plaintiff?
7. Is the Plaintiff entitled to an order of this Honourable Court that the land register be rectified by the cancellation of the subdivision of parcel Ngong/Ngong/3080 and cancellation of the registration of the Defendants as proprietors of the subdivisions thereof viz, parcel numbers Ngong/Ngong/62257, 62258, 62259 and 62260?
8. Is the Plaintiff entitled to an order of this Honourable Court that he be registered as the proprietor of parcel title Ngong/Ngong/3080 in place of Soromeeti Kapore?
9. By whom are the costs of this application payable?

The application is supported by the affidavit of JACOB MWANTO WANGORA the Plaintiff herein where he deposes that he has sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as beneficiaries and personal representatives of the estate of Soromeeti Kapore, deceased while the 3<sup>rd</sup> and 4<sup>th</sup> Defendants have presented themselves as dependants of Soromeeti Kapore and beneficiaries of his purported estate. He avers that in the year 1977 or thereabouts Soromeeti Kapore, deceased, was his immediate neighbor at Kandisi in Ongata Rongai and he was well known to him having been neighbours for many years and having known him for about 30 years. Further that Soromeeti Kapore was then an old man with no wife, children or other dependants that he knew of. He claims in the year 1977, Soromeeti Kapore approached him seeking his assistance to maintain him financially and otherwise as he had no source of livelihood or income and in return they agreed that Soromeeti Kapore would transfer one (1) acre from his three (3) acres parcel of land comprised in title no. Ngong/Ngong/3080 at the consideration of kshs.3,000/- for the acre. Further as agreed he assisted Kapore financially and also built him a semi-permanent house on the parcel of land comprised in title no.Ngong/Ngong/3080 and generally maintained him from month to month. He contends in mid 1978 Soromeeti Kapore went missing and after several futile efforts at tracing him he was informed by an acquaintance of his, one Mr. Simon Ole Karasha, that he had seen him walking along Magadi Road in the direction of Magadi and that he was later seen at Magadi Town. Despite efforts at further tracking Soromeeti Kapore he was unable to establish his whereabouts nor his relatives/ kin that he knew of to contact as to his whereabouts and to-date he has never heard from or seen him. He further claims that by the time Soromeeti Kapore left he had already paid him, in kind and cash, kshs.3,000/- for the one (1) acre they had agreed on as aforesaid. He reiterates that Soromeeti Kapore was nowhere to be found and seeking to safeguard his proprietary interest in the parcel of land Ngong/Ngong/3080 – as his one acre parcel had not yet been excised therefrom, and in August 1978, he fenced off the entire parcel with a barbed wire fence and a kay-apple as well as euphoria hedge. He avers that since August 1978 he has cultivated and developed the said parcel of land comprised in title no.Ngong/Ngong/3080 and have over the years planted crops, fodder, grass and trees. Further that he had earlier instituted Civil Case no.111 of 2011 (O.S) at the Machakos High Court however the Honourable Judge determined the matter on 27<sup>th</sup> November, 2013 that Soromeeti Kapore having disappeared since 1978 was presumed dead by 1985 and a suit could not stand against a non-existent party. He contends that in January 2014 he found the Defendants on the suit parcel of land and when he enquired as to what they were upto they claimed to be related to Soromeeti Kapore and to have inherited the land from him. When he conducted a search at the Land Registry, he found out that land parcel number Ngong/Ngong/3080 had been closed on 17<sup>th</sup> December, 2013 upon subdivision as follows:

- a. Parcel Ngong/Ngong/62257 (0.30ha) to Mary Waruga Wokabi as trustee of Francisca Njeri Waruga.
- b. Parcel Ngong/Ngong/62258 (o.20 ha) to Joseph Njuguna
- c. Parcel Ngong/Ngong/62259 (0.20 ha) to Bernard Wokabi Waruga ; and
- d. Parcel Ngong/Ngong/62260 (0.40 ha) to George Lwanga Koronto.

He confirms that the title deeds to the subdivisions were issued on the following day the 18<sup>th</sup> December, 2013. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants petitioned the High Court at Machakos vide Succession Cause no.108 of 2011 claiming to be the wife and son respectively of Soromeeti Kapore (deceased), while they claimed that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were his children. He further insists that he knew Soromeeti Kapore for over 30 years before he disappeared and never met or knew him to have a wife or children as the Defendants have claimed to be indeed none of them bears Soromeeti Kapore's name and he verily believes that they are not related. He further avers that by the time the Defendants petitioned the court and sought distribution of land parcel number Ngong/Ngong/3080 amongst themselves, Soromeeti Kapore's title over the said parcel had long been extinguished and it was held in trust for him. He contends that he would have sought the declaration that he was the prescriptive proprietor of parcel parcel number Ngong/Ngong/3080 earlier but he could not trace Soromeeti Kapore or any of his relatives to enable him institute the proceedings. He reaffirms that the Defendants erred when they moved the Honourable Court to distribute to them what did not form part of the estate of Soromeeti Kapore and it is only proper that the matter be rectified early by cancellation of the subdivisions and subsequent transmissions to the Defendants.

The Defendants opposed the OS and filed a replying affidavit sworn by MARY WARUGA WOKABI the 1<sup>st</sup> Defendant herein where she denied each and every allegation contained in the application and sought the same to be dismissed with costs. She confirmed that she was a beneficiary and personal representative of the estate of Soromeeti Kapore, deceased, as well as the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. She contended that the averments contained in the supporting affidavit were full of falsehoods and did not entitle the Plaintiff to any rights or reliefs he is claiming. She further confirmed that land parcel number NGONG/NGONG/ 3080 was divided among the defendants through Confirmation of Grant dated the 17<sup>th</sup> October, 2013. Further that the Plaintiff did not object in the said succession cause No. 108 of 2012 despite it being gazette on 11<sup>th</sup> February, 2011 and 20<sup>th</sup> July, 2012 respectively. She insists the Plaintiff's averments that he bought an acre of land from land parcel number NGONG / NGONG/ 3080 are falsehood as no sale agreement is exhibited. She contends that the instant application is an abuse of the process of the Court as the Plaintiff did not in any way try to secure his purported interest in the said land since 1978. She reiterates that the Plaintiff has no locus standi as to issues of land parcel number NGONG / NGONG/ 3080 since his name did not appear in the land registry in relation to the said land. Further that the application is vexatious, as the Plaintiff has approached the court in a wrong manner and the said application should be dismissed with costs.

The Defendants also filed a list of witnesses and two (2) witness statements and a Preliminary Objection / Grounds of Opposition dated 5<sup>th</sup> March 2014.

On 29<sup>th</sup> September, 2016, Honourable Lady Justice Gitumbi directed that parties to file their respective submissions and take a date for further directions.

The Plaintiff and the Defendants did not adduce oral evidence but opted to highlight their submissions on 3<sup>rd</sup> October, 2017.

Summary of the respective submissions are highlighted hereunder.

## **PLAINTIFF'S SUBMISSIONS**

The Plaintiff submitted that he has – since August 1978 – been in continuous, open, exclusive, undisturbed and uninterrupted possession, use and enjoyment of the said parcel of land comprised in title number Ngong/Ngong/3080 and by operation of law Soromeeti Kapore's title was extinguished in 1990 and the land could not be the subject of a succession cause in 2011. He insists that Joseph Njuguna Waruga and Francisca Njeri Waruga were not children of the late Soromeeti Kapore as they were born in 1985 and 1984 respectively, long after the deceased had died. The Plaintiff further submitted that the 1<sup>st</sup> Defendant admitted that the parcel title number .Ngong/Ngong/3080 was divided among the Defendants pursuant to the confirmation of grant dated 17<sup>th</sup> October, 2013.

The Plaintiff relied on Section 38(1) of the Limitation of Actions Act, Cap 22 which provides as follows:

**“Where a person claims to have become entitled by adverse possession to land...he may apply to the High Court for an order that he be registered as proprietor of the land or lease in place of the person then registered as proprietor of the land”.**

He referred to annexures “JMW2” and “JMW3(a)” which show that Soromeeti Kapore was registered as proprietor of the parcel of land comprised in Title no.Ngong/Ngong/3080 on 16<sup>th</sup> December, 1977 until 24<sup>th</sup> October, 2013, when the 1<sup>st</sup> and 2<sup>nd</sup> Defendant were registered as proprietors as personal representatives of Soromeeti Kapore.

He relied on the case of *Sisto Wambugu v Kamau Njuguna (1982-88)1KAR* Chesoni Ag JA (as he then was) at page 226 approvingly quoted Lindley MR in *Littledale v Liverpool college [1900] 1 CH 19, 21* as follows:

**“The same point was made by Bramwell LJ in Leigh v Jack [1879]5 Ex D 264,272, where he said referring to the Statute of Limitation; “Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. ”If this is the right way to approach the problem, the question becomes “has the claimant proved that the title holder has been dispossessed, or has discontinued his possession, of the land in question for the statutory period?” rather than “Has the claimant proved that he (through himself or others on whose possession he can rely) has been in possession for the requisite number of years?” it certainly makes it easier to understand the authorities if one adopts the first formulation.” (emphasis added).**

On the question of dispossession his Lordship said:

**“The next question, therefore, is what constitutes dispossession if the proprietor. Bramwell, LJ in Leigh v Jack said at 273, that to defeat a title by dispossessing the former owner” acts must be done which are inconsistent with his enjoyment of the soil for the purpose of which intended to use it.” (he emphasis added).**

The Plaintiff submitted that his sworn affidavit evidence has not been specifically challenged apart from general averments that they are lies. He insists he took possession of the whole suit parcel in 1978 when he fenced it off along its entire perimeter with a barbed wire fence and planted a kay-apple and euphorbia hedge and since then has cultivated and developed the said parcel of land. Further that as per annexures “JMW2(a) to JMW2(j)” in his supporting affidavit which are photographs of the suit parcel, it shows a perimeter fence all round the property, tall trees and semi permanent structures. These are pictorial depictions of the Plaintiff's activities on the suit land. He submits that he has undertaken acts of cultivating the suit parcel from 1978 up to date a period of 38 years which acts have been inconsistent with the enjoyment of the title holder of the suit parcel and which acts have been continuous, open, exclusive, uninterrupted and undisturbed by the title holder against whom adverse possession was running. Further that by so doing he had disposed off the former owner, Soromeeti Kapore, who has discontinued his possession of the subject land for the statutory period of 12 years and over.

The Plaintiff contended that neither the 1<sup>st</sup> Defendant, in her Replying Affidavit, nor the other Defendants deny that Soromeeti Kapore has not been in possession of the suit property since 1978 nor have they challenged the Plaintiff's assertions that he entered possession of the same land in August, 1978 or the Plaintiff's possession of the suit land has since then been exclusive and continuous.

The Plaintiff further relied on section 17 of the Limitation of Actions Act, Cap 22 provides that:

**“subject to section 18, at the expiration of the period prescribed by this Act for a person to bring an action to recover land(including a redemption action), the title to that person to the land is extinguished.”(emphasis added).**

He explained that the period prescribed by the Limitation of Actions Act for a person to bring an action to recover land is, according to Section 7 thereof, twelve(12) years from the date the right of action accrued. He referred to the case of *Public Trustee v K Wanduru [1982-88] 1KAR Kneller,JA* at page 504 in interpreting Section 37(a) of the Limitation of Actions Act, Cap 22 held as follows:

**“The title of the registered owner is not extinguished but is held by him in trust for the person who, by virtue of the Limitations of Actions Act, has acquired title against the proprietor.”(emphasis added).**

He submitted that the title to the suit parcel has been held in trust for him since August, 1990-when the 12 years limitation period lapsed. He insisted that having taken possession in 1978 acquired the title to land parcel number Ngong/Ngong/3080 in 1990 when the period of twelve(12) years ran out and since then the said title has been held in trust for him.

The Plaintiff further stated that the sale between himself and Soromeeti Kapore never really crystallized as it was never reduced into a written contract as is mandatory in law. He did not enter upon the land as a licensee but did so adversely when Soromeeti Kapore could not be found, and time started running upon such adverse entry in August,1978. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants petitioned the court for a grant to the estate of Soromeeti Kapore in the year 2012 by which time the title of the deceased to the parcel of land No. Ngong/Ngong/3038 had

been extinguished as it was held by him in trust for him, since he had acquired it by virtue of adverse possession. He submitted that the land (Ngong/Ngong/3038) did not form part of the intestate estate of Soromeeti Kapore and could not be subject to inheritance by his alleged wife and children.

He further relied on the case of **Samwel Nyakenogo v Samwel Orucho Onyaru [2010]Eklr** where Justices of the Court of Appeal considered a suit not quite dissimilar to this and upheld the claim of the adverse possessor and held inter alia that the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession. The Defendants' acts of obtaining the title to parcel No.Ngong/Ngong/3038 were void ab initio, of no legal effect, and the proper order would be to order the rectification of the register by cancelling the subdivision of that title and restoring the original title and subsequent entry registering the Plaintiff herein as the proprietor of the said parcel by adverse possession.

## **DEFENDANTS' SUBMISSIONS**

The Defendants' provided a chronology of events and stated that they relied entirely on the 1<sup>st</sup> Defendant's replying affidavit dated the 5<sup>th</sup> March 2014 and filed in court on 12<sup>th</sup> March 2014. They submitted that through their previous Advocates messrs Mathenge Gitonga & Co. Advocates they filed a list of witnesses that dated 5<sup>th</sup> March 2014 and the witnesses were;

- James Gathecha Karanja
- Peter Shombore Leroka
- Mary Wagura Wokabi
- George Lwanga Koronto
- .Bernard Wokabi Warugu

Further that witness statement were filed by JAMES GATHECHA KARANJA, PETER SHOMBORE LEROKA, GEORGE LWANGA KORONTO among others.

The Defendants also filed their list of documents including

- i. Transfer of land form dated 10<sup>th</sup> April 1977
- ii. Green card dated 6<sup>th</sup> February 1996 at 4.15am
- iii. Photographs dated 25<sup>th</sup> March 2014
- iv. Affidavit sworn by Mary Waruga Wokabi the 1<sup>st</sup> Defendant herein on 10<sup>th</sup> July 1996
- v. Letter of chief Olkiramatian location dated 19<sup>th</sup> February 1996.
- vi. Certificate of confirmation of grant dated sometimes October 2013
- vii. Mutation form dated 7<sup>th</sup> March, 1977
- ix. Registration form dated the 7<sup>th</sup> March, 1977
- x. Police abstract dated 10<sup>th</sup> January, 2011.
- xi. Certificate of official search dated 1<sup>st</sup> August 2008 and 21<sup>st</sup> December 2010, 25<sup>th</sup> November 2011, 24<sup>th</sup> October 2013 respectively .
- xii. The Kenya gazette notice of the February 2011
- xiii. Title Deed for LR.No.NGONG/NGONG/62257; 62258; 62259 and 62714.
- xiv. Green card dated 17<sup>th</sup> January 2014
- xv. Demand letter dated 24<sup>th</sup> March 2014

The Defendants invited the Court to refer to the documents mentioned above as they originated from the public offices and were also used to petition for Certificate of confirmation of grant.

The Defendants submitted that according to the green card and the registration form dated the 7<sup>th</sup> March, 1977 the Plaintiff transferred the suit land to the Defendant which fact, the Plaintiff does not deny in his submissions and the same documents filed herein confirm that the

deceased was survived by the Defendants' herein vide succession case No. 108 of 2012 at Machakos High Court.

The Defendants' averred that the Plaintiff had not come to this Court with clean hands to file a suit after 36 years as the deceased disappeared in the year 1978 yet he did not take any step to report the matter to any of the following authorities including the Police Station, Area Chief, Area Assistant Chief and any other relevant office.

The Defendants contended that the Plaintiff failed to call one Simon Ole Karasha to provide evidence and confirm that the Plaintiff had been supporting the deceased prior to his demise. Further that the Plaintiff in his supporting affidavit and submission had not attached any document to demonstrate he was supporting the deceased as stipulated in paragraph five of his supporting affidavit.

The Defendants submitted that they had demonstrated they are the beneficiaries of the deceased having petitioned for Certificate of Grant using the same documents filed herein which the Plaintiff did not contest.

The Defendants insist the Court never made a site visit to confirm if indeed the Plaintiff had ever occupied the suit land. They contend that the Plaintiff filed the originating summons herein as an afterthought, which summons is misconceived and intended to be used to defraud the Defendants. They reaffirm that failure to file Authority of the co – defendants was occasioned by the previous advocates on record for the Defendants and the mistakes of the advocates cannot be visited upon them, and which irregularity can be cured by invoking the provisions of Order 2 of the Civil Procedure Rules and the inherent powers of this honourable court. They invited the Court to invoke the provisions of Article 159(d) of the Constitution. They reiterated that through the replying affidavit, they had demonstrated the following:

- They are the beneficiaries and personal representatives of the estate of Soromeeti Kapore (Deceased).
- The Plaintiff is not entitled to any rights or relief that he is claiming.
- That parcel title NGONG /NGONG / 3080 was shared among the Defendants having petitioned for confirmation of Grant dated 17<sup>th</sup> October, 2013 using the same documents attached herein.
- The Plaintiff took a parcel of land at Fatima Ongata Rongai and the deceased took Kimandiro within KISERIAN, which is the suit property which fact the Plaintiff does not deny.
- The Plaintiff did not object at any stage in the succession cause No. 108 of 2012 which was gazette on 11<sup>th</sup> February, 2011 and 20<sup>th</sup> July, 2012.
- That it is the interest of justice that the originating summons dated the 22<sup>nd</sup> January, 2014 be dismissed with costs.

#### **Analysis and Determination**

After perusal of the pleadings filed herein including the list of documents and upon hearing the submissions from the Counsels for the Plaintiff and the Defendants, I find that the following are the issues for determination:

- Whether the Plaintiff has been occupation of land parcel number NGONG / NGONG/ 3080 which was owned by Soromeeti Kapore (deceased) since August, 1978.
- Whether the Plaintiff is entitled to orders of adverse possession over land parcel number NGONG / NGONG/ 3080
- Whether the claim by the Plaintiff for adverse possession should be defeated as the suit land has been transferred by transmission to the Defendants
- Whether the Land Registrar Kajiado North should be compelled to cancel the resultant subdivisions from NGONG / NGONG/ 3080 , rectify the register, to reflect the land belonged to Soromeeti Kapore and proceed to register the Plaintiff as owner of the suit land
- Who should bear the Costs of the suit

Adverse possession is described as a process by which a person can acquire title to someone else's land after continuously occupying the said land, in a way that is not consistent with the owner's rights.

**Adverse possession is governed by Section 38 (1) and (2) Limitation of the Actions Act that provides as follows:**

**(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.**

**(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.**

For adverse possession, to mature into title to land the following conditions must be fulfilled:

1. The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;

2. The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
3. The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
4. The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.
5. The possession has to be *Exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

For a party to succeed in summons for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land. The Plaintiff is expected to furnish in court evidence to prove that the suit land where he/she is claiming adverse possession indeed belongs to the Defendant.

**In the instant case, the Plaintiff claims to have been in occupation of the suit land since August 1978 when the deceased Soromeeti Kapore disappeared. It is the Plaintiff's contention that he took care of the deceased and even built him a house and he did not know of any wife or children to the deceased for the 30 years he knew him. Further, that after the deceased disappeared, he fenced the suit land with barbed wire including kay apple, continued taking care of it and cultivating it by growing food crops and planting trees thereon. The Plaintiff annexed photos of the suit land in his affidavit to prove his claim. The Plaintiff averred that he entered the suit land without the deceased permission and continued to be thereon openly, notoriously and uninterrupted. Further, that since August 1978 no one had come to claim the suit land since the deceased never had a family. The Defendants on the other hand claim they are beneficiaries of the deceased, having obtained letters of administration over his estate vide Machakos HCCSucc Cause No. 108 of 2012 where the suit land was distributed to Mary Waruga Wokabi, George Lwanga Koromo, Bernard Wokabi Waruga and Joseph Njuguna Waruga in equal shares 0.20 hectares each respectively. They insist the Plaintiff's application contains falsehoods and that he has never been on the suit land. They claim the Plaintiff sold the land to the deceased and cannot claim it. The Plaintiff annexed copies of the Green Card to confirm the suit land originally belonged to the deceased since 16<sup>th</sup> December, 1977. I note the death certificate produced by the Defendants indicated the deceased died on 25<sup>th</sup> December, 1978. I further note from a letter dated the 9<sup>th</sup> August, 2011 from the Chief of Olkirimatian indicating the beneficiaries to the deceased, two of them namely Francisca Njeri Waruga and Joseph Njuguna Waruga were born in 1984 and 1985 respectively, yet the deceased had passed on in 1978. I note in an affidavit sworn by Mary Waruga Wokabi dated the 10<sup>th</sup> July, 1996 where she sought the Land Registrar to re-issue her with a title deed of the suit land, at paragraphs 8, 9 and 10 she deposed as followed; (8). That prior to his disappearance, he went and bought land parcel number 3080 at Kiserian Ngong. (9) That the said land was registered in his name and certificate issued to that effect. (10) That the land has remained unused by us as he did not leave any certificate and that I have not been in a position to use the land. '**

**I note in the said affidavit which was sworn almost 18 years after the deceased demise, the 1<sup>st</sup> Defendant admitted she had not used the suit land. The Defendants insist the Plaintiff has not provided proof of support to the deceased and neither has he furnished court with a copy of the Sale Agreement to show he bought one acre of the suit land from the deceased.**

In the case of **Daniel Kimani Ruchine & Others versus Swift Lothorford & Co. Ltd and Anor (1977) eKLR** the court held that ' **The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion)'**.

**Professor Tom Ojienda's Principles of Conveyancing Hand Book, Law Africa Vol II at page 97** clarifies this position further when the author stated as follows:

**"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse."**

**Based on the evidence above, I find that the Plaintiff entered the suit land in August, 1978 without the deceased permission, fenced it and commenced cultivating it. I note that the Defendants despite obtaining letters of administration intestate have not indicated whether from 1978 until 2014 they had attempted to evict the Plaintiff from the suit land. The 1<sup>st</sup> Defendant had admitted not using the suit land and did not controvert the Plaintiff's evidence of fencing, cultivating and using the said land. In the case of Wambugu Versus Njuguna 1983 KLR 174 cited in Karuntimi Raiji Vs. M'makinya (2013) eKLR, the court of appeal held that 'in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.'**

Further in the case of **Samwel Nyakenogo v Samwel Orucho Onyaru [2010] eKLR**, the Court of Appeal held as follows: ' **For about 19 years, the respondent was in exclusive possession of the portion of the land bought from the deceased openly and as of right, and during all this time, the respondent's said possession was not interrupted by the registered proprietor, the deceased. In our view, the purported application for letters of administration in respect of the deceased land West Kitutu/Mwakibagendi/28 which was confirmed on 15th June, 1999 did not interrupt the respondent's adverse possession of the portion he bought from the deceased.'**

It is against the foregoing and in relying on the judicial authorities cited above, I find that from 1990 the deceased Soromeeti's rights to the suit land were extinguished and he was hence holding the land in trust for the Plaintiff. Further, that the Defendants' acts of applying for letters of administration intestate over the suit land and obtaining the Certificate for Confirmation of Grant in which deceased estate was distributed, cannot defeat the Plaintiff's claim for adverse possession because by the time they petitioned for it, the deceased rights over the suit land had extinguished in 1990.

I find that the Plaintiff has proved his case on a balance of probabilities that his right of action as against the Defendants for adverse possession over the suit land had started running in August 1978 and accrued as at August 1990. Insofar as the Defendants' have transferred the resultant subdivisions of the suit land namely **NGONG/NGONG/ 62257; NGONG/NGONG/62258; NGONG/NGONG/ 62259 and NGONG/ NGONG/62260** and transferred it to themselves, this cannot defeat the Plaintiff's claim as espoused in section 38 (1) of the Limitation of Actions Act.

**It is in those circumstances and for the reasons I have given above, that I allow the Plaintiff's Originating Summons dated the 22<sup>nd</sup> January, 2014, with costs.**

**I further make the following orders:**

- 1. The deceased Soromeeti Kapore's title to land parcel number NGONG/NGONG/ 3080 measuring 1.21 hectares extinguished in 1990 upon expiration of 12 years since the Plaintiff took possession thereof in 1978**
  
- 2. The Plaintiff be and is hereby declared to have acquired land title number NGONG/NGONG/3080 measuring 1.21 hectares by reason of adverse possession since 1978**
  
- 3. The subdivision in 2013 of land parcel number NGONG/NGONG/ 3080 into parcels NGONG/NGONG/ 62257; NGONG/NGONG/62258; NGONG/NGONG/ 62259 and NGONG/ NGONG/62260 was void ab initio and the registers to the said parcels be rectified by cancellation of the subdivisions and all entries effecting the Defendants' as proprietors thereof be expunged, registered to the original land parcel number NGONG/ NGONG/ 3080 and restored to reflect Soromeeti Kapore as the proprietor**
  
- 4. The District Land Registrar Kajiado North be and is hereby ordered to register the Plaintiff as the proprietor of land parcel number NGONG / NGONG/ 3080 in place of Soromeeti Kapoore**
  
- 5. Costs of the suit**

**Dated and Delivered in Ngong this 18<sup>th</sup> day of April, 2018**

**CHRISTINE OCHIENG**

**JUDGE**