



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 36 OF 2013 (OS)**

**PETER M.N. SIMATWA.....PLAINTIFF**

**VERSUS**

**GATATHA FARMER CO. LTD.....1<sup>ST</sup> DEFENDANT**

**KAITET TEA ESTATE [1977] LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit and *Kitale ELC No. 57 of 2011 - Gatatha Farmers Co. Ltd -vs- Otieno Okiro* share a common background and were heard together though not consolidated.

2. The background is that one **Edmond D'Olier** was **Director of Endebess Estates Ltd** who owned various parcels of land which were sold to **Gatatha Farmers Co. Ltd** while three former employees of **Endebess Estates Ltd** were still in occupation of a portion thereof. The grandfather to the plaintiff herein was one such employee as was the father to the 1<sup>st</sup> defendant in *Kitale ELC No. 57 of 2011*.

3. By the time the Originating Summons herein was filed, Gatatha Farmers Co. Ltd had instituted *Kitale ELC No. 57 of 2011* against the families of the three former employees, seeking the following prayers:-

(a) **A declaration that the plaintiff is the rightful owner of LR. Nos. 5709, 5710/2, 5711/6137 and 8190 all situated at Endebess measuring 1800 acres of thereabouts.**

(b) **A permanent injunction restraining the defendants, their servants and/or agents or any other person claiming through them from entering into, trespassing into and/or encroaching into the plaintiffs LR. No. 5709, 5710/2, 5711/6137 and 8190 all situated at Endebess measuring 1800 acres or thereabouts.**

(c) **Costs.**

(d) **Interest.**

4. The evidence shows clearly that this is not the first piece of litigation involving a claim by a descendant of the grandfather to the plaintiff herein over a portion of that land. During the proceedings in *Kitale ELC No. 57 of 2011*, the plaintiff indicated to the court that the dispute between it and the Estate of the grandfather to the plaintiff herein had been settled out of court. Consequently the suit against the Administrators to the Estate of the plaintiff's grandfather was withdrawn on 5/12/2012.

5. It is noteworthy that the suit in *Kitale ELC No. 57 of 2011* was commenced against, inter alia, one Simatwa (who later came to be known as Samson Masabo Simatwa in the same proceedings) who was sued on his own behalf and as the Administrator of the Estate of the deceased Simatwa Chepingei who is the grandfather to the plaintiff in this Originating Summons.

6. In *Kitale ELC No. 57 of 2011* a notice of motion was filed by two persons by the names Peter Ndiemo Simatwa (who it transpires is the plaintiff herein), and Stanley Kwemoi who sought that the suit against Samson Masabo Simatwa who was sued on his own behalf and as administrator of the Estate of Simatwa Chemtigei, be struck out. The ground upon which the application was made was that the said Samson Masabo Simatwa was not a legal representative or administrator of the estate of the deceased Simatwa Chemtigei.

7. As stated above, soon after this application was filed the suit against the said Samson Masabo Simatwa in both capacities I believe, was withdrawn. However it is important to note that at **paragraph 4** of the supporting affidavit to the notice of motion, the deponent who is the plaintiff herein admitted to being the son to the said Samson Masabo Simatwa. Samson Masabo Simatwa admitted in paragraph 20 of his replying affidavit filed in that suit that he was the son to Simatwa Cheptingei. It is the suit against the plaintiff's father that was therefore withdrawn on the 5/12/2012.

8. After that withdrawal of suit, the Originating Summons herein was filed on 26/3/2013. It raises the following questions for determination:-

**(a) A declaration order that plaintiff/applicant has acquired 38 acres of land out of LR. No. 6137 Trans-Nzoia by virtue of expiry of 12 years the defendants' rights thereto having been extinguished by operation of law.**

**(b) An order do issue to the defendants to jointly to transfer 38 acres to the plaintiff.**

**(c) The plaintiff be awarded costs of this suit.**

9. The Originating Summons is supported by the sworn affidavit of the plaintiff dated 26/3/2013. The grounds for the Originating Summons therein include the following:- That the plaintiff's great grandfather and subsequent generations after him have lived on the land parcel No. LR. 6137 and his great grandfather, his grandfather and his father lived, died and were buried on the suit land; that the plaintiff's great grandfather, his grandfather and his father all subdivided portions of land to their generations out of the suit land; that the plaintiff was personally allocated 38 acres by his late father during his lifetime on which the plaintiff has been occupying and cultivating since he got married; that the defendants have recently laid claim to the land and moved to evict the plaintiff and his family therefrom; further, the defendants have prevented the plaintiff from carrying out his activities on the said land, alleging that the plaintiff is only entitled to 3 acres.

10. The plaintiff states that he had been in continuous and uninterrupted occupation of the land till 2012 but in 2013, he received a summons in form of a letter from the District Commissioner Kwanza whereupon he found that the defendant wanted to evict him using the Provincial Administration. The plaintiff avers that other settlers on the land who were descendants of his grandfather were compensated by the 1<sup>st</sup> defendant for the portions they had occupied on LR. No. 5711/3 but he was not included in the said compensation. The plaintiff finally alleged that the land was transferred to the 2<sup>nd</sup> defendant in order to defeat his claim of ownership.

11. The 1<sup>st</sup> defendant opposed the Originating Summons through the sworn affidavit of its Director one Peter Mburu Gakwa dated 12/7/2013 and filed on the same day. In that replying affidavit the deponent states that the plaintiff has failed to disclose on what basis the generations have occupied the suit land, and avers that the occupation was by virtue of being employees of the registered owner. The deponent disputes the allegation that the plaintiff was allocated 38 acres and avers that the plaintiff's father who was an employee of Endebess Estates Ltd remained on the suit land after it was bought by the 1<sup>st</sup> defendant on condition that he would reside there during his lifetime and his family would vacate upon his demise. The deponent deposes that the plaintiff has not been in uninterrupted occupation of the land as the 1<sup>st</sup> defendant on various occasions attempted to gain possession of the suit land in vain.

12. The second defendant defended the Originating Summons through a sworn affidavit of one of its Directors, Peter Kipng'eno Kotut dated 10/9/2013 and filed on 13/9/2013. The highlights of the 2<sup>nd</sup> defendant's defence are that it is the registered proprietor of the land; that it took possession immediately upon registration as proprietor; that it was informed that three persons, that is Samson Masubo Simatwa, Richard Ndiwa Ndiemo and Otieno Okiro, were in occupation of a total of 12 acres within LR. No. 5709, 5710/2, 5711/3, 6137 and 8190 as a result of their father's life interest therein; that among these was the family of the plaintiff who occupied 3 acres on LR. No. 5711/3; that it left them in possession on purely humanitarian grounds as *Kitale ELC No. 57 of 2011* was being pursued; that a settlement was reached in good faith and on humanitarian ground between it and the families of Samson Masubo Simatwa, Richard Ndiwa Ndiemo and Daniel Chemtingei Boiyo in which they were compensated in the sum of Kshs.5,000,000/= to enable them settle elsewhere, and that the Simatwa family has since received the money payment and settled elsewhere. The defendant avers that the plaintiff belongs to the Simatwa family which was compensated and which had been on the land on account of their father's life interest therein. The plaintiff's claim to 38 acres is therefore denied and it is averred that the 2<sup>nd</sup> defendant's title is indefeasible and any rights the plaintiff may have had over the suit property were determined upon the demise of his late father who had a life interest only one a 3 acre portion thereof.

13. The plaintiff, not yet done, filed a supplementary affidavit he swore on 13/12/2013 denying that his great grandparents have ever been employees of the 1<sup>st</sup> defendant and that this fact does away with any purported understanding between the 1<sup>st</sup> defendant and his father regarding a life interest. He questions the logic of the "life interest" deal on the basis of what would be the fate of the deceased's children. He states that his predecessors were born, raised, died and were buried on the said land. According to the plaintiff, his predecessors were on the land as at the time the 1<sup>st</sup> defendant purchased it from one Edmond D'Olier, that he has made developments on the said land including planting trees and constructing structures thereon.

14. Regarding *Eldoret HCCC No. 113 of 1987* the plaintiff avers it was abandoned while the suit *Kitale ELC No. 57 of 2011* against Samson Masabo Simatwa was in the first place commenced against a defendant without Letters of Administration and, secondly, was settled in order to defeat the plaintiff's interest and without involving him whereupon the plaintiff filed the current suit. The plaintiff believes that his claim enjoys protection of the law, and having purportedly been in occupation of 38 acres for over 30 years, he states that he is entitled to be declared as owner.

15. The hearing of this suit took place on 29/5/2014, 28/7/2014, 12/5/2016 and 9/11/2017. The plaintiff testified and called two witnesses and the defendants called two witnesses one for each defendant.

## **EVIDENCE OF THE PARTIES**

### **The Plaintiff's Evidence**

16. The plaintiff's evidence was that he and his father were born on the Farm owned by D'Olier; that his father was not working for D'Olier, but D'Olier allowed him to utilize 38 acres of the land. When D'Olier died, his son sold the land in 1977 to the 1<sup>st</sup> defendant who started disturbing the plaintiff. In 1987 the 1<sup>st</sup> defendant sued the plaintiff's grandfather in *Eldoret HCCC No. 113 of 1987*, seeking to evict his grandfather. When his grandfather died, his father took over the case but he also later died. That is what the witness said when he testified

on 29/5/2014. After he was stood down, the hearing resumed on 28/7/2014. When he restarted his testimony by saying he was grandson to **Simatwa Chemtingei** and that his father was called **Simatwa Ndiemo**; when the colonialist came, his grandfather remained on the farm and he used to utilize about 38 acres of land. His grandfather used to work for Edmond D'Olier; he used to leave his farm to go and work for D'Olier. However, as he had stated before, he restated that his father never worked for D'Olier then D'Olier died and his son took over and later the 1<sup>st</sup> defendant took over the land who later sold it to the 2<sup>nd</sup> defendant who began harassing the plaintiff to the extent that in 2011 he ploughed 15 acres and in 2014 he ploughed only 1 acre.

17. The PW1 testified that he had been utilizing 38 years over the years, of which he seeks to be declared owner in this suit by virtue of adverse possession. He denies that either his father or grandfather were squatters on the land. He produced Letters of Administration to his father's estate.

18. Under cross examination the witness stated he did not know the Land Reference Number of the plot he was claiming but averred that the land is registered in the name of **Simatwa Chemtingen**. He stated that he inherited the land from his father, but not before he and his kin were taken to the Provincial Administration by the 1<sup>st</sup> defendant on several occasions, and also not before a case, was filed by the 1<sup>st</sup> defendant against them in 1987. He denied that his brothers were paid and consequently moved out of the farm. He stated that Samson Masabo Simatwa is his uncle. He also did not know when D'Olier first came to the land. He admitted that he has not lived peacefully on the land ever since the 1<sup>st</sup> defendant purchased it. In re-examination however, he averred that he is claiming 38 acres out of LR No. 6137 and that his relatives were living on LR. No. 5711/3.

19. Before departing from the plaintiff's evidence it is vital to note that first, in the oral evidence, he contradicted his sworn evidence in the affidavit he filed in **Kitale ELC 57/11** by saying that the **Samson Masabo Simatwa** named therein as the 3<sup>rd</sup> defendant is his uncle. "Samson Masabo Simatwa" is the person who was, according to the plaintiff's supplementary affidavit dated 13/12/2013 filed in this suit on 23/1/2014, a beneficiary of the settlement in **Kitale ELC 57/2011**. Clause 2.1 (a) of the agreement in that settlement required the said Samson Masabo Simatwa and his beneficiaries to render vacant possession of the land within one month but not later than 1/7/2012. In that supplementary affidavit the plaintiff disowns Samson Masabo Simatwa as **an uncle**. It is quite strange to me that the plaintiff referred to Masabo as his father in the affidavit he swore on 16/11/2012 in support of the notice of motion in **Kitale ELC 57/2011**. It is also vital to note that the said Masabo was being sued on behalf of the Simatwa family and the only grudge the plaintiff had with his joinder thereto was that he did not hold letters of administration to the plaintiff's grandfather. To me this evidence shows that this is a tussle between the father and the son which the father won when he received compensation and left the land. The plaintiff who must be considered to have been claiming under his father did not, and he remained to file this originating summons.

20. The plaintiff's wife testified as **PW2**. She averred that they have been living on Kapseta Farm since their marriage in 1983 and that they were utilizing 38 acres of the farm when the 1<sup>st</sup> defendant bought the land. In 2011, they were stopped from using the land. She asserted that they are claiming 38 acres out of LR. No.6137. She admitted that they have not been living peacefully on the land since the 1<sup>st</sup> defendant bought the land.

21. **PW3** was **Tom Otieno Opondo alias Otieno Okiro**. I note that he is the defendant in **ELC Kitale No. 57 of 2011**. He stated that he was born on the farm. He knows the plaintiff herein and he also knew his grandfather Simatwa Chemtingei. According to him the plaintiff's grandfather and father lived on the land before the European settlers came. Edmond D'Olier employed the plaintiff's grandfather who later retired in 1957. The witness said after Edmond died, his son took control of the farm and he did not disturb the Simatwa family. Neither did Gatatha Farmers Co. Ltd when it came along. According to the witness, the 2<sup>nd</sup> defendant wanted to buy off the Simatwa family but the plaintiff refused to take the money. The witness stated that his father and the plaintiff's father were not employees to Gatatha Farmers Co. Ltd or to Edmond's son. According to him the *rightful owner of Plot No. 6137 is the Simatwa family*. He does not however know the acreage the plaintiff is occupying. He confirms that there was a clash between Gatatha Farmers Company Ltd and the plaintiff's father over the land when he was still alive; their stay on the land was therefore not peaceful.

### **The 1<sup>st</sup> Defendant's Evidence**

22. DW1's evidence was given on 9/11/2017. He adopted his evidence given in **Kitale ELC No. 57 of 2011** on 10/6/2015 for purposes of this suit. He also adopted the replying affidavit filed on behalf of the 1<sup>st</sup> defendant, sworn on 12/7/2013. The annexures to that affidavit were marked as **D. Exhibit 1** and **D. Exhibit 2**. **D Exhibit 1** is a statutory declaration by Guy William D'Olier declared on 28<sup>th</sup> November, 1977. It states that he was a principal shareholder-cum-director of Endebees Estates Limited in 1977 and that while it was agreeing to sell its land at Endebees one of the terms of the sale was that the purchaser was to permit inter alia, Simatwa Chepingei to remain on three acres of the land for the rest of his life and that upon his death his family would vacate the it land it occupied. Those terms also applied to two other families. The declaration proceeds to state that written agreements on those terms were executed by the purchaser and by each of the employees and a copy was retained by the purchaser and each respective employee.

23. **D. Exhibit 2** is a bundle of documents including correspondence. The first letter is dated 5<sup>th</sup> June 1984. It reminds one of the employees that the terms of the agreement under which Endebees Estates Ltd gave him the plot was "for his lifetime." The same is reiterated in the copy of the second letter dated 26<sup>th</sup> February 1981. The third document is a record of proceedings of a meeting dated 30/11/1984. It shows a situation in which a greater number of persons other than the three named in **Kitale ELC 57/2011** are seeking land from Endebees Estates Ltd. In those proceedings D'Olier seems to state that he only gave land to the three and that it was only for their lifetime. However, in that same document the elder Simatwa is quoted as saying that Edmond D'Olier is the one who found him on the land and confirmed him otherwise all his ancestors died in the said land. He and the other employees mentioned in **D Exhibit 1** are seen to be asking for title deeds to land.

24. Among the letters in the bundle **D Exhibit 2** is a handwritten letter purportedly from Guy D' Olier addressed to the Chairman of Gatatha Farmers Co Ltd enclosing **D Exhibit 1** which would help in evicting the "children of the late Okiro, Simatwa and Oduori."

25. According to the witness, the Simatwa family had occupied a portion of LR. No. 6137 which D'Olier had given to the senior Simatwa for

his lifetime. They were given 3 acres under that arrangement. The land was to revert to possession of the 1<sup>st</sup> defendant after the senior Simatwa's death but that did not happen as the extended family continued their stay on the land. According to him there has been a simmering dispute between Gatatha Farmers Co. Ltd and the Simatwas since 1977 and there have been attempts to evict them. He recalled the Eldoret case filed in 1987 which also involved the Simatwa family. He did not know for how long prior to 1977 the Simatwa's had been on the land. According to him the 1<sup>st</sup> defendant has been trying very hard to restrict the Simatwa family to three acres.

### **The 2<sup>nd</sup> Defendant's Evidence**

26. DW2 adopted the contents of the replying affidavit dated 10/9/2013 filed on behalf of the 2<sup>nd</sup> defendant. He confirmed that the suit land was purchase by the 2<sup>nd</sup> defendant from the 1<sup>st</sup> defendant whilst the Simatwa, the Okiro and the Nyongesa families were still on occupation of the land. The 2<sup>nd</sup> defendant negotiated a settlement with the Simatwa family whom they gave a sum of Kshs. 5 million to enable them settle elsewhere.

27. According to the witness, the only reason the plaintiff herein did not sign the settlement agreement was because there were internal squabbles in the family regarding his share of the amount. All the others vacated except the plaintiff herein. According to the witness, members of the plaintiff's family have consistently attempted to exceed the 3 acres they were originally allowed to occupy and they have been arrested a number of times by the police upon the complaint of the 2<sup>nd</sup> defendant and so they have not enjoyed peaceful and uninterrupted possession of the land they claim.

### **DETERMINATION.**

#### **Issues for determination.**

28. The plaintiff filed his written submissions on 28/2/2018 and the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant on 25/1/2018. I have considered those submissions and in my view the issues for this court determination are as follows:-

*(1) What was the relationship between the plaintiff and the land owner and how much land was the plaintiff occupying?*

*(2) Is the plaintiff entitled to title by way of adverse possession?*

*(3) Who should bear the costs of this suit?*

**(1) What was the relationship between the plaintiff and the land owner and how much land was the plaintiff occupying?**

29. The plaintiffs Originating Summons filed on 26/3/2013 and the supporting affidavit were originally bare of most of the details that subsequently unfolded after the Originating Summons and the Chamber Summons for interim orders dated 26/3/2012 were filed. In the circumstances, this court on 30/4/2013 disallowed the latter application, stating that the applicant had failed to demonstrate that he has a case with a probability of success.

30. Subsequently to this, the Originating Summons was not amended but the plaintiff filed a supplementary affidavit which he swore on 13/12/2013. It is from these documents that this court must find out whether the claim that the plaintiff occupied 38 acres is true or not.

31. In my view the burden of proof of the fact that the plaintiff occupied 38 acres out of LR. No. 6137 was squarely on the plaintiff's shoulder. As I have already observed above in my analysis of the evidence of the parties the plaintiff's evidence while giving his oral testimony was that D'Olier allowed the plaintiff's father the use and occupation of 38 acres of land.

32. The plaintiff's wife also averred that the plaintiff's family was utilizing 38 acres of the farm. It is curious that both the plaintiff and his father are said to have been in occupation of 38 acres of a farm which was already registered in the name of Endeless Estates Ltd, who were also operating the farm at the same time. The plaintiff qualified this and stated that he had been in occupation of 38 acres part of the suit land since he got married in 1983. In paragraph 7 of the supplementary affidavit of the plaintiff sworn on 13/12/2013 he stated that he utilized the 38 acres uninterruptedly until the year 2000 when his father died whereupon the 2<sup>nd</sup> respondent started harassing him and forcefully attempted to take over the land he was occupying. I have already pointed out the inconsistencies in the plaintiff's evidence earlier. As seen earlier the plaintiff tried to paint a picture of a situation where his father occupied 38 acres and he occupied land of the same size but these attempts have consistently failed.

33. At **paragraph 11** of his supplementary affidavit sworn on the 13<sup>th</sup> December 2013 the plaintiff states as follows:-

**“That I and my large and extended family have been using our respective portions of land, my father having his 38 acres subject matter of this suit”.**

34. And therein, inadvertently I suppose, the plaintiff reveals that his claim and that of his father overlap.

35. I find it impossible to believe that the proprietors of the land in question would have allowed each and every descendant of Simatwa Chemtingei, including a grandchild like the plaintiff, to occupy more land than what their father had been allowed to lest the entire size be depleted by the advance of squatterhood on it. In any event it is not possible that the plaintiff, his grandfather, and his father separately occupied a 38 acre portion each during the same epoch.

36. It is noteworthy that the suit that the plaintiff mentions as having been instituted by the 1<sup>st</sup> defendant to effect eviction of persons on the land illegally, never mentioned the plaintiff as a defendant otherwise the plaintiff would have expressly stated so in this original Summons. On the other hand he went into that suit to dislodge his father therefrom, for the reason that his father held no letters of administration to his deceased grandfather's estate. For that reason I find that the plaintiff's claim over the land and his father's claim completely overlap, yet the plaintiff having been born later to his father, can only be deemed to be pursuing the claim that his father could have had over a portion of the suit property for indeed he obtained use and occupation thereof through his father and not by his own right. That explains why the plaintiff produced the two Grants of Letters of Administration to his late father's and his late grandfather's Estate respectively at the hearing of this suit.

37. Besides, his evidence went as follows on 29/5/2014:-

**“I was born in 1955 at a farm owned by a white man called D'Olier. My father was Ndiema Simatwa. My father was also born on the same farm. There were other people living in caves. My father was not working for D'Olier. Mr. D'Olier allowed us to utilize 38 acres. Mr. D'Olier died and his son remained on the land. In 1977 D'Olier's son sold the land to Gatatha Farmers Company Limited. Gatatha started disturbing us. In 1987 Gatatha Farmers filed a civil suit against my grandfather. The case was Eldoret High Court Civil Case No. 113 of 1987. The company wanted to evict my grandfather. When my grandfather died my father took over the case. My father has since died. I filed a Succession Suit and obtained a Grant of Letters of Administration”.**

38. In cross examination by Mr. Ambutsi the plaintiff stated as follows:-

**“I took Letters of Administration in respect of my grandfather in 2000. I took Letters of Administration in respect of the Estate of my father in 2002”.**

39. PW3 testified that the plaintiff inherited the land from his father. In my view, the only reason why the plaintiff would take out Letters of Administration for his grandfather and his father's Estate successively is that he recognized that his claim trickled down from the claim held by those his predecessors. He possessed no more in terms of size or title than what his predecessors could have claimed in respect of the land. It is also an admission that he occupied land by virtue of his being entitled under the claim of the two deceased persons.

40. However, whatever measure of the land the plaintiff's grandfather and father were utilizing before the plaintiff came on the scene has not been established by evidence from the plaintiff. I also find that the measure of land the plaintiff purports to have utilized after their deaths and before he was allegedly to have been subsequently confined to one acre in the year 2012, has not been established by way of evidence.

41. In the case of *Wellington Lusweti Barasa & 75 others v Lands Limited & another [2014] eKLR* the court had this to say where claimants never proved the extent of their actual occupation on the ground:

**“50. Apart from the above, the plaintiffs also never tendered evidence to show their actual occupation on the ground. It was their onus to prove occupation which they never did. They could easily have produced a valuation report or surveyor's report which would have shed light as to their occupation. None was tendered and this court has absolutely no evidence of what possession, if any, the plaintiffs have on the ground, and of what acreage. In their claim, they asserted title to the whole land, yet in their own evidence, they stated that a majority of the land is utilized by the 2nd defendant. They are certainly not in possession of the whole land and cannot therefore assert title to the whole of it. As I have stated above, their own possession has not been clearly demonstrated and it is not clear what and where in the farm, the plaintiffs claim possession. Their case would still have failed for failure to demonstrate exactly what they are in occupation of.”**

42. It is the case of the defendants in the instant suit that the plaintiff has not proved his claim of occupation of 38 acres. Citing the declaration by Guy William D'Olier, dated 28/11/1995 (**marked D Exhibit 1**) the 1<sup>st</sup> defendant's avers that the plaintiff's father was allowed to occupy only 3 acres. There is no evidence to contradict this. In fact the proceedings of a meeting held by the District Commissioner dated 30/11/1984 reflect D'Olier as stating that he gave Simatwa 3 acres - (See line 7 of page 1). This is the only reliable evidence on the land occupied and this court will go by it.

43. I therefore find that the plaintiff's grandfather could only have been occupying 3 acres of land and no more. Logically, the plaintiff, claiming under his grandfather and his father successively, could not be in quest for more land than the two were entitled to use and occupy. I therefore find that the true size of land that the plaintiff should be seeking is 3 acres only and that it came to the plaintiff by way of his relation with his father and his grandfather, the latter who worked for D'Olier.

44. The question that then arises is: what kind of relationship then existed between the plaintiff and the holders of title to the land?

45. Much evidence has been given and analysed on this issue but the plaintiff has not been able to successfully controvert the evidence of the defendants to the effect that the plaintiff's grandfather was given the land owing to his position as a former employee of the Endebess Estates Ltd, and even then, only for his lifetime and that upon his death the persons under him would have to vacate the land. The allegation that the plaintiff's father was found on the land by Endebess Estates Ltd should have been proved by way of evidence, but sadly, none was forthcoming from the plaintiff.

46. Even though the plaintiff submitted that D Exhibit 1 was not signed by the Simatwa family, in the ordinary course of events I would not expect them to sign it. On his submission that it never interrupted their possession, I find that it is not the document but the acts of the defendants that would interrupt possession.

47. In the case of *Wellington Lusweti Barasa & 75 others v Lands Limited & another [2014] eKLR* (supra) the court stated as follows:

**“47. In my view, the entry of the plaintiffs on the suit land and their continued occupation was by virtue of their employment and no more. Even those who were not employed by the defendants remained in possession of the land because they had family who were employed by the owners. Such possession was clearly with the permission of the land owner which permission was granted for the reason that they had an employer-employee relationship. It was a licence granted by the land owner.”**

48. In my view the relationship between the plaintiff and the landowners must have been that of a licensee, for the predecessors of the plaintiff were allowed to occupy land on the farm by Endeless Estates Limited only by virtue of their being employees.

***(2) Is the plaintiff entitled to title to the three acres by way of adverse possession?***

49. This court has already found that the plaintiff occupied the suit land by virtue of a licence granted by the owners to his grandfather. No right of action to recover land accrues unless the land is in the possession of someone in whose favour the period of limitation can run. That disqualifies the plaintiff herein from any claim for adverse possession. And even if that were not so, would his claim have passed the test of adverse possession?

50. The doctrine of “adverse possession” is that by which a person is deemed to have acquired title to land owned by another if his occupation of the land is adverse to the title of the land owner. For adverse possession to be established, the claimant needs prove that he has been in occupation of the subject land *nec per vim, nec claim, nec precario* that is, without force and without secrecy and without interruption for a period of 12 years. Where there is consent of the land owner for such occupation adverse possession cannot occur unless and until such consent is withdrawn.

51. The plaintiff in this case alleges that he has been on the land in question for more than 12 years, having been born on the said land. It must be remembered that the running of time is interrupted each time a landowner attempts to assert his claim to the occupied land. In this case though the plaintiff’s evidence is that he has been in use and occupation of the land ever since he got married in the year 1983, there is ample evidence, even on his own admission that the plaintiff’s occupation on the land has not been devoid of incidents between parties, use of administrative and judicial action by which the 1<sup>st</sup> and 2<sup>nd</sup> defendants sought to assert their right title to the land. Both the plaintiff and his wife testified that the defendants started disturbing their occupation of the land when the land was transferred to them in 1977.

52. The plaintiff in his submissions relied on the case of *Njuguna Ndatho Vs Masai Itumo and Patrick Magu Mwangi Kimunyu Vs Joreth Ltd 2015 eKLR* and submits that the filing of a suit for recovery of land would stop time from running but would not disrupt the possession of an adverse possessor. Looking at the decision in the *Njuguna Ndatho* case above it is clear that the court expects the land owner to have taken active steps to evict the adverse possessor in order to be deemed to have dispossessed the latter. In that case the owner went to the wrong forum on each occasion before coming to court for eviction orders after the statutory period had lapsed. An examination of the facts reveals that that was not the case in this dispute. The first case seeking eviction of the families-including the plaintiff- in respect of the suit land was instituted in the year 1987, ten years after the 1<sup>st</sup> defendant acquired the land.

53. The plaintiff submits that he was not a party to *Eldoret HCCC No 113 of 1987* and that the same was never determined, and in any event it never interrupted his possession of the land. On the issue as to whether it was determined or not, I will refer to the direction that this suit and *Kitale ELC 57 of 2011* be heard together, and the adoption by DW1’s of the evidence that he gave in the earlier suit which included a notice of withdrawal of *Eldoret HCCC No 113 of 1987* dated 21<sup>st</sup> April 2011 and filed on 27<sup>th</sup> April 2011; time then stopped running on the filing of the suit in the year 1987 and resumed running upon its withdrawal. However, time stopped running again after *Kitale ELC 57 of 2011* was filed against the plaintiff’s grandfather’s estate. Subsequently, the withdrawal of the suit would have allowed time to run again but for the settlement alluded to hereinabove by which the plaintiff’s father’s claim and hence the plaintiff’s claim over the land was extinguished.

54. However, and it will seem very clear from the observation on why the plaintiff obtained letters of administration in **paragraph 39** above, the reason that the plaintiff was not party to that litigation in *Eldoret HCCC No. 113 of 1987* and in *Kitale ELC No. 57 of 2011* must be presumed to be that the litigation targeted the patriarchs and their descendants, of whom the plaintiff was not one. Failure to be enjoined in the suit does not in my view therefore avail the plaintiff any advantage herein.

55. With all the evidence on the record including the oral testimony of the plaintiff and his wife, I cannot find the plaintiff’s occupation of the land to have been peaceful before he filed this suit. Indeed, there was *Eldoret HCCC No. 113 of 1987* by which the 1<sup>st</sup> defendant attempted to assert title against the plaintiff’s predecessor under whose title he claims herein. The plaintiff must be deemed to have been precluded from being a party to that suit as he was already represented therein. By the year 2012 he had been deprived, in his own words, of all land except one acre and he was already under threat of total eviction and he rushed to this court only to forestall the threat of eviction from the remaining one acre. He filed this case in the year 2013. This contrasts sharply with the situation in the *Ndatho* case (supra) where the court stated as follows:

**“By then the twelve year period by any reckoning had run out. That being the case the respondents were perfectly entitled to invoke the defence of time bar when the appellant sued them for vacant possession. The appellant’s title to the suit land stood extinguished. The respondents quite legitimately used these factors in their defence. The earlier steps taken by the appellant did not interrupt the possession of the respondents”.**

56. The ingredients of adverse possession must all be present at once during any specific statutory period. Where for instance the possession is disturbed by legal action or by eviction or attempts of forcible eviction by the overt acts of the landowner, all the three ingredients cannot be said to have coexisted during that period because the land owner had attempted to assert his right to title. In my view in the present case, assertion of right occurred when the 1<sup>st</sup> defendant filed suit and secondly when he gained effective entry into the land.

57. For that reason I find that even if this court had not found that the claim should fail on the basis of the finding that the plaintiff was a licensee, the plaintiff's claim for adverse possession would still fail for the above reasons.

***(3) What orders should issue?***

58. The plaintiff having failed to prove his claim, the prayers in the Originating Summons dated 26/3/2012 are hereby declined and the Originating Summons is dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this 30<sup>th</sup> day of **May, 2018**.

**MWANGI NJOROGI**

**JUDGE**

**30/5/2018**

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiura for the 1<sup>st</sup> defendant

Mer. Kiura holding brief for Odoyo for 2<sup>nd</sup> defendant

Mr. Bungei for the plaintiff

**COURT**

Judgment read in open court.

**MWANGI NJOROGI**

**JUDGE**

**30/5/2018**