



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 251 OF 2013 (OS)**

**KOECH KANGOGO.....PLAINTIFF**

**VERSUS**

**CHEBII YEGO.....DEFENDANT**

**JUDGMENT**

**PLAINTIFFS CLAIM**

By originating summons amended on 24<sup>th</sup> April 2013, *Koech Kangogo* has come to court against *Chebii Yego* claiming to have been in adverse possession of a portion measuring 0.89 of an acre being part of that property known as *Baringo/Isaas "A"/452* measuring 1.69 acres and prays for orders that he be declared to have acquired title over a portion measuring 0.89 of an acre being part of parcel No. Baringo/Isaas "A"/452 measuring 1.69 acres by adverse possession and that there be a declaration that the defendant cease to be registered as the proprietor of a portion measuring 0.89 of an acre being part of parcel No. Baringo/Isaas "A"/452 and instead Koech Kangogo, the plaintiff/applicant herein be registered as the proprietor of that portion thereof. That the defendant, his servants and/or agents be permanently restrained from evicting, dealing with and/or interfering with the plaintiff's quiet possession of that portion measuring 0.89 of an acre being part of parcel number Baringo/Isaas "A"/452. That this Honourable court be pleased to make any order it may deem fit to grant. That the cost of this application be provided for.

The originating summons is based on grounds that the applicant has been in occupation of a portion measuring 0.89 of an acre being part of that parcel of land known as Baringo/Isaas "A"/452 measuring 1.69 acres for over 12 years and therefore the applicant has acquired title by adverse possession of the said portion of land being part of that parcel of land known as Baringo/Isaas "A"/452. The applicant's occupation of the said portion has been uninterrupted, quiet and not forceful for over 12 years. The respondent, his agents and/or servants have threatened to forcefully evict the applicant and take possession of the said portion despite the aforementioned facts.

Mr. Koech Kangogo has sworn a supporting affidavit stating that during land consolidation and adjudication at Isaas Adjudication section in 1976, his father gathered and consolidated his parcels and registered them under parcel number Baringo/Isaas "A"/82. That in 1986, 1984, his father gave him a portion of the said land now known as parcel number Baringo/Isaas "A"/452 to occupy, and he took possession of the portion measuring 0.89 of an acre of it, built his house, toilet, water tank and planted trees. However, seven (7) years before filing this suit, the defendant requested the plaintiff to accommodate him after being chased away by his children and he took him in and made him a member of his household, he also allowed him to construct a structure on a portion of the said parcel of land.

That in January 2011, his daughter passed on and when he wanted to bury her in the said parcel of land the defendant objected stating that he owns the whole parcel of land, though he later buried her there. He deposes that he was surprised by the defendant's claim sudden change of events and he conducted a search at the land registry at Kabarnet and to his dismay, he discovered that the portion he was occupying was registered in the name of the defendant.

He further discovered that the defendant and the adjudicating officer had fraudulently colluded and subdivided parcel number Baringo/Isaas "A"/82 into three portions thereby creating parcels numbers Baringo/Isaas "A"/452 and Baringo/Isaas "A"/453 which were registered in the names of the defendant and his late father respectively.

To sanitize the fraud the adjudicating officer and the defendant created fake minutes to the effect that the family met on 18<sup>th</sup> July 1998 and agreed on the subdivision of parcel number Baringo/Isaas "A"/82 into three portions. The purported subdivision in itself defeated the purpose of consolidation in the first place as parcels numbers Baringo/Isaas "A"/ 82 and Baringo/Isaas "A"/453 were separately registered in the name of his late father and that his occupation and possession of the said portion was without permission of the defendant herein and has been continuous for the last 29 years.

He is advised by his advocates on record, which advise he verily believes to be true, that he has acquired title over a portion measuring 0.89 of an acre being part of that parcel No. Baringo/Isaas "A"/452 measuring 1.69 acres adversely against the defendant.

He states that his occupation of the said parcel has been continuous, uninterrupted, quiet and not forceful. That he now prays that he be registered as the owner of a portion measuring 0.89 of an acre being part of that entire parcel known as Baringo/Isaas "A"/452.

The plaintiff claims that on or about 10.4.2013, the defendant in company of his children, threatened to demolish his dwelling houses and evict him from the said parcel of land which land he has occupied from 1984 and developed it extensively.

The defendants falsely reported to the police that he has illegally trespassed into the said parcel of land as a result he was arrested, harassed and later released on bond pending prosecution.

### **DEFENDANT'S CASE**

In the replying affidavit, Mr. Chebii Yego states that he is the registered proprietor of Baringo/Isaas /452 and that there was no time when the plaintiff registered himself or his father as the owner of LR NO. Baringo/Isaas/452 measuring approximately 0.70 Ha. He claims that his brother Erick Kangogo (deceased) was the owner of Baringo/Isaas/82, and Baringo/Isaas/453 and another parcel in Bartolimo Adjudication Section and they had lived peacefully until his demise in the year, 2011. The plaintiff herein is the Son of his late brother Eric Kangogo (deceased). That he was present during the land consolidation of ISAAS Adjudication section and his father was having a large portion of land of which after his demise in 1970's they agreed that each one of them would take the portion of land each occupies and there was no dispute at all and no land registered in the name of his father or the father of the plaintiff which later was sub-divided.

That he was registered as proprietor of LR NO. Baringo/Isaas'A/452 and parcel LR No. Baringo/Isaas 'A/82 and 453 in the plaintiff's father named Eric Kangogo.

The plaintiff had no land of his own but the lands were registered in the name of his father who participated with him during the land consolidation in ISAAS adjudication section and the plaintiff was not present and he does not know the boundaries. The register of ISAAS adjudication Section was opened on 20<sup>th</sup> May, 2003 hence the Title Deed given to him on 13.12.2004 hence the issue of adverse possession does not arise in this case.

That on 10<sup>th</sup> April 2013, he reported the plaintiff to the Police on trespass to his land hence before he was arraigned before Court but came to this court to file this suit. That on the said date, the plaintiff was arrested for partitioning the defendant's parcel of land and erecting a fence across his land Baringo/Isaas/452. The plaintiff never planted trees in the disputed land but Charles Kangogo and his sons planted some trees but after consolidation they left to their own land.

The plaintiff who is the son of his brother who is now deceased cannot give him accommodation as stated in this affidavit and that is disrespect since now his actual age over is 80 years. That he is the eldest son of the family and Erick Kangogo, the father of the plaintiff is younger than him.

That he has sons and daughters who are over 50 years of age and they have their families and he gave them land also and there is no time his children will chase him and he has never been chased by his children as alleged by the plaintiff in the supporting affidavit.

According to the defendant, Erick Kangogo passed on in 2011 and he had no dispute with him while he was alive hence he could not caution his land in 2011 after he had died long ago and that the plaintiff is mischievous since he cautioned his land in the name of Erick Kangogo, the deceased and signed the caution forms.

The allegation that the plaintiff occupied his parcel since 1984 is a lie since by then Adjudication of ISAAS had not started and the plaintiff has been away in Nairobi, Kitengela since his youth time till now. The Map Sheet does not show LR NO. BARINGO/ISAAS/82 was part of L. R. NO. BARINGO/ISAAS/452 and there was no amendment to the sheet Map (RIM).

The defendant contends that the allegation by the plaintiff that the land belongs to him because he buried his daughter in the land is not true according to the defendant. The place the daughter of the plaintiff was buried used to be grave site and those who passed on long ago were buried there and that is not an issue. Since the plaintiff does not reside anywhere near home, it was decided with the family to bury the remains of his daughter in his land the side where there used to be graves of great forefathers hence there cannot be an issue of ownership. That as from 2003 when the land was registered and title deeds issued only ten (10) years had lapsed hence the issue of adverse possession on the part of the plaintiff does not arise. The plaintiff has never lived or cultivated the land as stated in his affidavit.

### **THE PLAINTIFF'S EVIDENCE**

When the matter came up for hearing, the plaintiff stated that he stays in Baringo County in Baringo/Isaas "A" 452. In 1984, his father gave him a portion of the suit land to erect his house. He stayed in the land and developed the land built a house, a water tank. He fenced, planted trees and cultivated. He stayed in the house until 1999.

Parcel No. Baringo/Isaas "A"/452 was originally in parcel land No. Baringo/Isaas "A"/ 82. Which was subdivided to create 3 parcels of land thus Baringo/Isaas "A" 452, Baringo/Isaas "A" 453 and Baringo/Isaas "A" 82. The plaintiff claims that the defendant was threatened by his son hence the plaintiff was told to accommodate the defendant. He agreed to accommodate him in his parcel of land but after 10 years, he was bereaved and wanted to bring his daughter in his land. The defendant refused and claimed that the land was his. He became so agitated and decided to establish the truth. He went to Lands, Kabarnet and discovered that parcel No. Baringo/Isaas "A"/82 had been subdivided into three entities thus, Baringo/Isaas "A"/452, in the name of Chebii Yego, Baringo/Isaas "A"/453 in the name of Erick Yego and 82 in the name of Erick Kangogo Yego. He produced the Search as P.Ex1. He produced a copy of green card in the name of Chebii Yego. He produced it as P.Ex.2.

The plaintiff produced photos showing the developments as evidence that he has been on the land since 1984 with his children. He has planted trees and has fenced. He has stayed in the land peacefully. In 1976, land registration was done and that the land was No. Baringo/Isaas "A" 82 after gathering the consolidated portions. When he discovered that his paternal uncle was claiming that where he stays was his land, he reported to the police and the defendant was arrested. He has looked at the Tracing Parcel No. Baringo/Isaas "A" 452 which is in the name of Chebii Yego. Parcel No. Baringo/Isaas "A" 82 is in the name of Erick Kangogo his father.

There is parcel of land known as Baringo/Isaas "A"/202 which was given by the defendant to his son. He does not agree that his father was given a bigger parcel of land. There was no objection to the adjudication. His father never intended to give the land to someone else. The land is 1.69 acres. He claims that the place he occupies is approximately 0.89 acres. He prays that he be awarded 0.89 acres. The rest should remain with his paternal uncle. He does adopt the evidence in the witness.

On **Cross examination by Tarus**, he states that he was born in 1962. His father is Erick Kangogo Arap Yego. His father had two brothers namely:

1. **Chebii Yego**

2. **Wesley Mining'o Yego**

His grandfather who died in 1978 lived in parcel No. Baringo/Isaas "A"/ 202 and was buried in the said place. The defendant used to stay with the plaintiff's grandfather (defendants father) in Baringo/Isaas "A"/202. The plaintiff's father was staying at Baringo/Bartolimo/692. The land is approximately 3 acres. Bartolimo was demarcated first before Isaas land. Baringo/Bartolimo is registered in the plaintiff's father's name who died in July, 2012. Isaas area demarcation was done in 1976 when the plaintiff's father was alive. The plaintiff was 14 years old when demarcation was done. He followed demarcation step by step as the eldest son and was also interested in the outcome but was chased away by his son. The land was initially a large family land. Plot No. Baringo/Isaas "A" 82 was subdivided erroneously. His father was alive during the subdivision. The plaintiff has land in Kitengela which he bought in 1997. He has been living in Kitengela since 1997. When his daughter died, there was a dispute as the place of burial. The titles in Isaas were opened in 2004 – 2005. He did not check on the titles because it was the work of his father. He did a search and confirmed that the names on title were of Chebii Yego. His father never objected before titles were issued. His uncle never made any objection.

In April 2013, when he went to make a fence, he was arrested but came out on bond. He was not fencing but rehabilitating the fence but was stopped by the defendant. He states that before consolidation, nobody was living in the same. Wesley lives in the other portion thus, Baringo/Isaas/76. Chebii Yego now lives in Baringo/Isaas "A" 452. Nobody lives in Baringo/Isaas "A" 453 but it should have been part of his land. Baringo/Isaas "A" 82 was his father's land. It was subdivided into 4 portions. He accommodated the defendant with no coercion.

Parcel No. Baringo/Isaas "A" 453 is in the name of Erick Kangogo. Parcel No. Baringo/Isaas "A" 82 is 0.31 acres in the name of Erick Kangogo. He was once living with his father in Bartolimo section. In consolidation, you can be moved. The subdivision was done through the backdoor. He has not done succession for his father.

PW2, Nehemiah Chesang states that he lives at Kabarnet Location nor village Baringo County. He is a farmer by profession and knows Kipkoech Kangogo and Chebii Yego as they are neighbours and knows that Kipkoech has sued his elder uncle. The land in dispute belonged to Erick Kangogo Yego. Kipkoech Kangogo is Erick Kangogo's elder son. Kipkoech Kangogo stays in Baringo/Isaas "A"/82 Chebii Yego stays in Baringo/Isaas/"A"/82. The land was subdivided by Chebii Yego into 3 parcels. Chebii Yego used to stay in 202 but moved to "A" 82. Kipkoech Kangogo also has a home in "A" 82 and has constructed a water tank and has planted trees. He has lived on the land since he married.

On Cross examination by Tarus, he states that he does not remember when he was born but his Identity Card reads 1945. Before the survey and demarcation, the land belonged to his grandfather. He subdivided it and gave it to his sons. The grandfather was Yego Ruto. He had three sons:

1. **Chebii Yego (defendant)**

2. **Erick Kangogo Yego**

3. **Miningwo Yego**

Kipkoech Yego is the son of Erick Kangogo Yego. Erick Yego had 3 sons:

1. **Kipkoech Yego (Plaintiff)**

2. **He does not remember the rest.**

Chebii Yego had 2 sons:

1. **John Chesang Chebii**

2. **David Chebii**

Isaas/82 was in the name of Erick Kangogo Yego but was divided into 3 parcels during demarcation of Isaas in 1976 and that the titles were

issued later. Baringo/Isaas/82 is in the name of Erick Kangogo. The Search Certificate is marked DMFI.1. Erick Kangogo, the father of the plaintiff had 2 parcels of land, in Kabartonjo and Isaas. He bought the land Kabartonjo.

Chebii Yego's land is to be inherited by his sons. Erick's land should be inherited by his sons. During demarcation, the land was registered in the name of Erick Kangogo Yego. Kipkoech lives in Kitengela but that is business. They often come home and go back to Nairobi.

PW3, Mininywo Arap Yego states that he knows the plaintiff as his nephew whilst the defendant is his brother. Their father and plaintiffs grandfather was called Yego Ruto. Their father sat down and gave them land during demarcation. Chebii Yego was given Baringo/Isaas "A" 202 and Baringo/Isaas "A" 69. Erick Kangogo was given Baringo/Isaas "A" 82. PW3 was given Baringo/Isaas "A" 76

Chebii's son quarreled with Chebii and therefore Chebii asked for a place from Erick Kangogo's son. He was given the place to stay on No. Baringo/Isaas "A" 82. Chebii later said the land was his. They tried settling the matter at home but they did not succeed. During the burial of the daughter of Kipkoech Kangogo, they realized that the dispute was still live. Chebii objected to the burial of Kipkoech's daughter on the parcel of land. He heard that Wilson had been arrested but was later released. They were shocked to find that Mr. Chebii took title.

Chebii Yego had subdivided the land without the agreement of the family. Chebii went to the Chairman of Adjudication and was given the land. The plaintiff has lived on the land since 1986 and the defendant has lived on the land since 2002.

**On Cross examination by Tarus**, he states that he is the brother to the defendant. They were three brothers; Chebii Yego, Erick Kangogo Yego, Mininywo Arap Yego (himself). Their father was called Yego Ruto. When they were born, he used to stay at Keten at Isaas sublocation, Kapkibirengwa, Baringo County. His father had many parcels of land. During demarcation in Isaas, everybody was given part of his parcels of land.

Before consolidation and adjudication, his father gave each of them a parcel of land. PW3'S parcel was No. 76 measuring 2.5 acres. Erick Kangogo Yego was given Baringo/Isaas "A" 82 measuring 0.51 Ha. The defendant was given Baringo/Isaas "A" 202 measuring two acres which was directly registered in the name of his son. Baringo/Isaas "A" 453 was registered in the name of Erick Kangogo. The land measures 0.27 Ha. Erick Kangogo has another parcel of land at Bartolimo Adjudication Section which he brought himself. This land is Baringo/Bartolimo/696. The land measures 3 acres. Chebii Yego has a title for land parcel No. Baringo/Isaas/452 measuring 0.70 Ha.

When their father sat with them, there was no quarrel. During adjudication in Isaas, there was no dispute. Erick Kangogo died in 2002 or 2011. Erick Kangogo showed his children their parcels of land. His father wanted him to stay where he stayed. His brother used to stay there hence he moved to the other parcel No. 76. Though he was last born, he was given 76 but his father remained on 202. He has given his land No. 76 to his sons. He does not remember when he did the transfer.

He states that Wilson Kipkoech Kangogo has had a dispute with the defendant for a long time. The defendant quarreled with his son and that the defendant's wife ran away in 2002. After the dispute with the son, the defendant came to the disputed land and was given accommodation by Kipkoech Kangogo. Kipkoech allowed him to stay. He constructed a small house in 2002. The house was constructed by Chebon Chebii (his deceased son). The land belonged to Wilson. This land was land No. Baringo/Isaas "A" 82. The defendant still occupies the land to-date. Chebii Yego wrote a letter to the Lands indicating that the family had agreed that they be registered.

The defendant's surveyor surveyed the land and caused the title to be prepared. They were shocked to see the title in the year 2013. When they read the letter from Lands, they were shocked, however, Erick has never put any objection. If Erick Kangogo had given the defendant land, they could have known. Erick was alive when the defendant went to the disputed land. The permission to occupy was given by Erick Kangogo and Wilson Kangogo. The land was there in the name of Erick Kangogo. Parcels of land, Numbers Baringo/Isaas "A" 452 and Baringo/Isaas "A" 453 were initially 82. Erick Kangogo's children have never done succession. Before consolidation, the land was one.

The parties have had disputes but not serious ones. Wilson and Chebii have quarreled over the land until the police intervened. Chebii entered the disputed land in 2002. Demarcation was done at a time they do not know.

**On Re- examination by Chebii**, he states that the land was registered in a year he cannot remember. Demarcation was done when Kipkoech was in occupation. Erick Kangogo, the father of the plaintiff was given parcel No. 82. The subdivision was done in 1982 **by corruption into 452 and 453.**

### **DEFENDANTS EVIDENCE**

The defendant, Chebii Yego (DW1) states that he lives at Kamursors and that he does not work. Erick Koech Kangogo is his is the eldest brother whilst Kipkoech Kangogo is son of Erick Koech Kangogo. Erick Koech Kangogo is deceased. The land at Isaas was their land. His father had three sons, namely

1. *Himself.*
2. *Erick Kangogo*
3. *Minigwa Yego*

The only living brothers are himself and Minigwa. They have never quarreled with Minigwa. They have subdivided the land with survey with Erick Yego. That he is in the middle of the land. Kangogo took the lower side, he took the middle. He has the map which he produced as D.EX1. He was given title on the parcel of land. He produced it as D.EX2. His brother has 3 parcels of land. There is one at Bartilimo. He produced the certificates for Search as D.EX3, D.EX4, D.EX5. He produced his Certificate of Search as D.EX6. He produced the

invitation summons by surveyors as D.EX7. He wants his land and the plaintiff should go to his parcel of land. He has no obligation to give the plaintiff land. They told the plaintiff to demolish his house but he refused and therefore was arrested by police. He had trespassed on the land. He had built a small house on the land. He prays that the house be demolished.

**On Cross examination by Chebii, he states that** he lives in his parcel of land, Baringo/Isaas/452. Before he was living in the land belonging to his father. They did not do consolidation. Everybody was given land by their late father. They were invited by Surveyors. The land was in his name not Erick Kangogo. He denies committing any fraud on the property.

During demarcation, the plaintiff's house was on the land which house is there to-date. It has a water tank. He stays in his house. He wants his land so that he can construct. He wants the whole of his land. Mr. Minigwa did not say that the land belongs to the plaintiff.

DW2, John Chesang Chebii states that he lives at Isaas sublocation, Baringo. He is a retired civil servant who worked in the Army. The defendant is his father and the eldest among siblings. The plaintiff is the son of Erick Kangogo Yego the 3<sup>rd</sup> born in the family. The 2<sup>nd</sup> is his auntie called Tarkok Yego. The last is Wesley Minigwa Yego. The land in question was family land.

During demarcation, his father and Kangogo Yego went to Isaas and Lands came to distribute the land in dispute. Erick Kangogo was given Baringo/Isaas/453 and Baringo/Isaas "A"/452. The process was through consolidation. There was no quarrel between Erick and Chebii. Kipkoech had constructed a small house on the parcel of land. It was temporary. There was no dispute. They have an alternative land in Bartolimo sublocation thus, Baringo/Bartolimo/696, 1.2 hectares. Mr. Chebii was not given part of this land. Baringo/Isaas/202 belongs to this witness. It is not family land. His grandfather used to live on the land. The plaintiff's mother was married in 1959. The plaintiff was born in 1961. This witness used to take water to plaintiff's mother. Erick Koech Kagongo was buried in the land, Bartolimo/Isaas/696. The plaintiff's mother is alive and lives on Bartolimo/Isaas/696.

According to this witness, Wilson Kipkoech Kangogo does not stay on the land but caused chaos on the land because he wanted more land on the parcel of land. He was arrested by police. Wilson Kipkoech Kangogo is his paternal cousin. He should go to his father's land, Baringo/Bartolimo/696.

On Cross examination by Chebii, he states that at the time of demarcation, the plaintiff had fenced the land and built a timber house and put up a water tank. In 2012, the plaintiff buried his daughter on the parcel of land. The existing fence covers the parcel No. 453 and 452 and 82. The fence was done by Erick Kangogo. The fence covers left side of 453, the lower side of 453 and 452. It was fenced by Erick Kangogo. Erick Kangogo did not take his father in Plot No. 82. His father did file an objection but he does not have proceedings. He was given Isaas/202. His grandfather was buried in 202, where he used to live. His parcel of land was on 202. He does not own land No. 69. His father does not own 69. What was put together were pieces of land he bought.

His grandfather's land was allocated to last born. His father used to reside in 202 before they were born until after demarcation when he moved to 452. His father moved to 452 after demarcation. He did not kick his father out. The plaintiff moved to the land before demarcation. The defendant did not get the plaintiff on the land. He does not stay on the home. The house is on the parcel of land. They gave him ample time to vacate because he is their relative.

DW3, Francis Kimosop states that he lives at Isaas sub-location. He is a farmer. He has lived there for 70 years. He knows Wilson and Chebii (plaintiff and defendant respectively). He has lived with the defendant's family since 1957. His house is 1 km from the defendant's home that is the home of Chebii Yego. He understands the issues of demarcation. The demarcation was done in 1970. People were to construct after the issuance of the number. The elder brother thus Chebii Yego and Erick Yego never quarreled. Erick was an untrained teacher. There is a parcel of land at Bartolimo. The same is Parcel Number 696. The same is registered in the name of Erick Koech Kangogo. Erick suggested that it be registered in his on behalf of Chebii. However, when Erick got title, he tricked Chebii and therefore Chebii got nothing. On the second parcel, Chebii was claimer, he was given 452 and Erick given 82. Yego Ruto parcels of land were distributed to his children. He had land in Bartolimo and Baringo. Mininywo Yego was given part of the land. 202 was connection of land bought by John Chebii. The land in dispute belongs to the defendant. He lived in the parcel of land as a relative. He built a "*thunyira*". The house should be demolished. The uncles never quarreled. The elder brothers loved each other. Demarcation began in 1972 until 2003 when titles were issued. The register was opened in 2003. He does not know where he stays. The two parties have not been living comfortably. Erick's father died long time.

The land in dispute was family land. They have the share. Chebii lodged a complaint before the Isaas land was subdivided into three.

The plaintiff submits that he took possession of the portion of the parcel of land in 1984. He developed it and has been in continuous occupation and possession for the last 29 years. He showed photographs of the portion of land. He states that land consolidation, demarcation and adjudication at Isaas took place between 1972 to 1980 and the plaintiff took possession in 1984 and the same has never been interrupted until 2011. He even buried his daughter on the suit property. He submits that the defendant became proprietor at the time of adjudication and not registration.

The defendant argues that adjudication started in 1970 and the register was opened on 20.5.2003 where L. R. No. Baringo/Isaas "A"/452 measuring 0.70 Ha was registered in the name of the defendant. He argues that time started running on 20.5.2003. Moreover, that the plaintiff is a relative of the defendant hence the issue of adverse possession does not apply against a family member.

I have considered the pleadings, evidence on record and submissions and do find that the plaintiff and the defendant are related and their claims on the parcel of land is based on the fact that they have a lineage with the late Yego Ruto who was the plaintiff's grandfather and the defendant's father. The plaintiff is the son of the defendant's brother hence a nephew to the defendant. The land in dispute is part of land parcel No. Baringo/Isaas "A"/452 measuring 1.69 acres and was registered in the defendant's name after the adjudication process. The plaintiff claims of 0.89 acres of the land is based on adverse possession. The fact that the plaintiff is claiming adverse possession is an admission that the land belongs to the defendant. Otherwise, the plaintiff could not have come by way of adverse possession. I do find that the land in dispute was lawfully registered in the name of the defendant. There is no claim of customary trust, constructive trust or any

equitable remedy in respect of a trust.

The **first issue** to be determined is whether the plaintiff has established a claim under adverse possession. The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title.

Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely **(a) open and notorious use of the property**. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

Secondly, there must be **(b) Continuous use of the property** – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it.

Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

There must be **(c) Exclusive use of the property** – The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

**(d) Actual possession of the property** – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

The actions of the adverse party must change the state of the land, as by **clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings** or other improvements. If the property is residential, such actions may include **mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures** (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. **(e) Non-permissive, hostile or adverse use of the property** – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: **Objective view**—used without true owner's permission and inconsistent with true owner's rights. **Bad faith** or intentional trespass view—used with the adverse possessor's subjective intent and state of mind. **Good faith** view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims.

The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply. In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title.

The court finds that the plaintiff has not satisfied the claim on adverse possession as the plaintiff's occupation of the suit premises is not adverse as he was given permission to be in possession by the defendant. The burial of his daughter on the land was also permitted by the defendant as there was a burial site on the land. There is no element of **non-permissive, hostile or adverse use of the property**.

The law on adverse possession was succinctly summarized by Hon Justices Makhandia, Ouko and M'noti in Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR.

This doctrine in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which is in these terms: -

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”**

The Limitation of Actions Act makes further provision for adverse possession at **Section 13** that:

***“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.***

***(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.***

***(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”***

**Sections 37 and 38** of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

**Section 37** provides that: -

***“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”***

The defendant in this matter became the registered proprietor of the suit land on 20.5.2003. Prior to that, there was the process of consolidation, demarcation and adjudication. This court finds that time does not run during consolidation, demarcation and adjudication. Time starts running on the date of registration. In this case, time started running on the 20.5.2003 when the defendant was registered as the proprietor of the suit land.

I do find the suit to have been filed prematurely and that the plaintiff does not succeed in adverse possession as 12 years had not lapsed at the time of filing the suit from the date the defendant was registered as the proprietor of the land. The plaintiff could have taken possession in 1984, however, the possession did not amount to adverse possession as the land was still under adjudication until 20.5.2003 when the right to recover the suitland from the plaintiff accrued and time started running. The originating summons is therefore dismissed with no order as to costs as the parties are related. Orders accordingly.

**Dated and delivered at Eldoret this 29<sup>th</sup> day of June, 2018.**

**OMBWAYO**

**JUDGE**