



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 104 OF 2005 (O.S)

[FORMERLY ELDORET HCCC NO. 234 OF 1991(O.S.)]

CHRISTOPHER SHIVAMBO KARAMOJA.....1ST PLAINTIFF

FRANCIS MOSE MASESE.....2ND PLAINTIFF

RACHEL WANJIRU

JESSY MBURU (*as the personal representative of*

JUDRAPH NDUNGU MWAURA (deceased).....3RD PLAINTIFF

VERSUS

JANE NJERI.....1ST DEFENDANT

JOSEPH K. KIIRU (*as a personal representative of the estate of*

ELIZABETH WANJIRU KARANJA (deceased).....2ND DEFENDANT

MONICA NJERI NG'ANG'A.....3RD DEFENDANT

JUDGMENT

1. The Amended Originating Summons dated 5/11/1999 and filed on 26/11/1999 seeks the following orders:-

(1) That there be possession of the said land and premises.

(2) That the plaintiffs be declared legal owners by adverse possession of the above mentioned plots and a declaration that the defendants jointly and/or severally are not entitled to enter or use the said lands.

(2A) That Christopher Shivambo Karamoja (1st plaintiff) be declared the legal owner by adverse possession of the part he occupies of land parcel known as LR. No. 6628/12 (or its equivalent number under the Registered Land Act, Cap.300).

(2B) That Francis Moses Masese (2nd plaintiff) be declared the legal owner by adverse possession of the part he occupies of land known as LR. No. 6628/12 and the part he occupies of land known as LR. No. 6628/10 (or the equivalent numbers under the Registered Land Act, Cap. 300).

(2C) That Jidraph Ndungu Mwaura (3rd plaintiff) be declared the legal owner by adverse possession of the part he occupies of land known as LR. No. 6628/10 and the part he occupies of land known as LR. No. 6628/11 (or the equivalent numbers under the Registered Land Act, Cap. 300).

(3) That mesne profits be declared at the rate of Kshs.500/= per acre per year from 1985 until possession is delivered up.

(3A) That the defendants interests in the portion aforesaid have been extinguished.

(3B) That the titles to the disputed portions vest to the plaintiffs/applicants respectively.

(4) That general damages hereof be provided for

(5) That there be orders as to costs of this application.

2. The Originating Summons is supported by the sworn affidavit of **Francis Mose Masese** sworn on **8/11/91** filed with the original Originating Summons on **27/11/1991**, the supporting affidavit of **Samuel Kawala Mwaura** sworn on **5/3/1992** and the affidavit of **Mwaura Ngae Wainaina** sworn on **5/3/1992**. It is also supported by the supplementary affidavit of Francis Mose Masese sworn on **5/11/1999**, the affidavit of **Christopher Shivambo Karamoja** sworn on the **10/11/1999**, and the affidavit of **Jidraph Ndungu Mwaura** sworn on **10/11/1999**. In the latter three affidavits reference is made to the supporting affidavit of Francis Mose Masese sworn on **8/11/1991** with which the deponents totally agree. However, the affidavit of Francis Mose Masese sworn on **5/11/1999** was also filed to, inter alia, correct the affidavit of **8/11/1999** by stating the full names of the plaintiffs and numbers of the land parcels owned by him and the 1st and 3rd plaintiffs respectively.

3. The respondents filed a replying affidavit sworn by the 1st respondent, **Jane Njeri** on their behalf on **29/7/1992**.

4. This is a very old suit. On the **5/4/2002** an application was made on behalf of the defendants for orders that the court visits the *locus in quo* and that *viva voce* be taken in this matter. The defendants' issues were filed on **20/11/2009**. By a notice of motion filed on **24/10/2011** dismissal of the suit for want of prosecution was sought by the defendants. The plaintiff filed his list of documents on **20/7/2012**. An application for injunction to restrain the plaintiffs from interfering with the defendants' quiet possession of the suit land was also filed and determined as the suit was pending hearing. An application for substitution of the 3rd plaintiff was filed on **28/2/2014** and he was subsequently substituted with **Rachel Wanjiru** and **Jessy Mburu** as his legal representatives. This suit was dismissed for non-attendance on **15/3/2017**. An application for reinstatement of the suit was filed on **23/3/2017** and struck out on **24th August 2017**. Another was filed on **31/8/2017**, heard and granted and the suit was reinstated vide a ruling delivered on **20/12/2017**.

5. The evidence of the plaintiff's witnesses was taken on **22/10/2015** when **PW1, PW2, PW3** and **PW4** were heard. **PW3** was however stood down. The evidence of **PW5** was heard on **8/3/2018**. **PW3** was recalled on **15/3/2018**. The plaintiffs' case was closed on that day. The hearing of the defence case began immediately thereafter when **DW1, DW2** and **DW3** were heard whereupon the defence closed its case. Submissions were ordered to be filed, the plaintiffs filed their submissions on **25/5/2018** and the defendants filed theirs on **29/5/2018**. The plaintiffs also filed bundle of authorities.

The Plaintiffs' Case

6. According to the filed Originating Summons and the supporting and further affidavits, the plaintiff's case is that the 1st to 3rd plaintiffs were the owners of plots numbers **Trans Nzoia/Sinyerere/22, Trans Nzoia/Sinyerere/23, and Trans Nzoia/Sinyerere/24** situate in **Sinyerere Settlement Scheme** which were allocated to them by the **Settlement Fund Trustees** in the year **1968**; that these plots were situate on land formerly known as **LR No 6629** which was located next to **LR NO 6628** which was bought by **Mwago Farm Ltd** and in which the defendants had plots; that the 1st to 3rd defendants' plots are numbered **LR NO 6628/12, LR 6628/10** and **LR No 6628/11**; that since the **1930s** the two large parcels that bore the subdivisions owned by the plaintiffs and the defendants were separated by a road and there is a barbed wire fence and eucalyptus and cypress trees on either side. When **LR Number 6628** was subdivided by a company known as **Mwago Farm Ltd**, the defendants' plots extended to the road. On the opposite side, when plot No **LR 6629** was subdivided, the plaintiff's plots extended to the same road and the parties used the road as the common boundary and each side used its land on either side of the boundary peacefully. However in **1985** the defendants crossed the road and entered into the plaintiff's lands and premises and wrongfully took possession of an area measuring approximately **9 acres** and deprived the plaintiffs of the use and enjoyment of the land. The defendants are said to have cut the barbed wire fences to the defendants' plots and felled **100 trees** on the 1st plaintiff's land, **15 trees** on the 2nd plaintiff's land, and **20 fruit trees, some cypress trees and banana stems** on the 3rd plaintiff's land. It is also alleged that a residential house, a toilet and a bathroom and **5 fruit trees** on the 2nd plaintiff's land were damaged. The plaintiffs aver that the 1st plaintiff occupies part of **LR NO 6628/12** owned by the 1st defendant; that the 2nd plaintiff occupies **LR NO 6628/12** and also part of **LR NO6628/10** owned by the 1st and 2nd defendants respectively; and that the 3rd plaintiff occupies parts of **LR No 6628/10** and **6628/11** owned by the 2nd and 3rd defendants respectively. The aggregated size of land belonging to the defendants which the plaintiffs had occupied and which the defendants are said to have clawed back is approximately **9 acres**. It is on the basis of those allegations that the orders outlined above are sought.

The Defendants' Defence

7. On the **30th July 1992** the defendants filed an affidavit sworn by the 1st defendant on **29th July 1992** in reply to the Originating Summons. In that replying affidavit the deponents states that: **Title Number 6628** purchased by **Mwago Farm Ltd** has been closed on subdivision and new titles have issued; that the occupants of the land formerly known as **LR 6628** and **LR NO 25917** have never acknowledged the road as the boundary; that the boundary was marked by beacons placed by surveyors; that the road between the two parcels was never meant to be a boundary since the two parcels used to belong to husband and wife who were members of one family; that the defendants moved into **LR NO 6628** in **1965** and were clearly shown the beacons to the boundary of their farm; that however the plaintiffs moved into their land parcels in **1968** and wrongfully removed the said beacons and forcefully extended their land to the road; that the defendants have never accepted the road to be the boundary; that the plaintiff's use of the land beyond the beacons was by use of force; that surveyors re-established the beacons in **1984**, and even then, the boundary was confirmed to be beyond the road on the side claimed by the plaintiffs and the then District settlement officer confirmed it as the correct boundary; that thereafter the local administration witnessed the erection of a barbed wire fence by the defendants along the boundary line; that the defendants then re-occupied the land and have been in such occupation to date; that the total land reclaimed was about **4 acres** and **not 9 acres** as claimed by the plaintiffs and that it never belonged to the plaintiff anyway and so they have not sustained any loss or damage and they have not acquired any rights by adverse possession; that even after re-establishment of the boundary in **1984**, the beacons have been removed and some trees cut by some of the defendants and there have been criminal cases against them.

EVIDENCE OF THE PARTIES

The Plaintiffs' Evidence

8. The 1st plaintiff testified on 22/10/2015 as **PW1**. He stated that his dispute with the 1st defendant is over **0.813 acres**. He produced the green card to his land parcel and averred that the 1st defendant started making claims over the 0.813 acres in **1984** though she had never utilized the said 0.813 acre portion. He claimed that he had used the said portion for a period of **12** years without any interference from the 1st defendant and sought that this court do declare that he has acquired it by way of adverse possession. He testified that he was aware of **Eldoret HCCC No 12 of 1988** which, according to him, was discontinued due to wrong procedure.

9. **PW2**, testifying on 22/10/2015 stated that his land bordered that of the 1st and 2nd defendants; that he has occupied it peacefully and uninterruptedly since **1968** and has planted trees and crops; that he seeks the court to declare him owner of the land by way of adverse possession. He produced a green card to his land showing that it was **12.4 ha**. The size of land he claims from the 1st and 2nd defendants is **1.497 acres**. He does not specify what specific size is claimed from each of the defendants he claims from.

10. **PW3** testified on 22/10/2015. She stated that her husband, the original 3rd plaintiff is now deceased; that she obtained a grant alongside one **Jessy Mburu**; that she is now claiming **1.20 acres** but she does not know whom the land she is claiming belongs to. She was stood down until 15/3/2018 when she testified again. On this latter date she stated that her land in Sinyerere Scheme is **Plot No 24**, that it measures **12.7 ha.**; that it borders the 3rd defendant's land; that the area that she occupies in the 3rd defendant's land is **1.20 acres**; that she has been in occupation of the portion since 1986 to the exclusion of the 3rd defendant; that the land is developed with trees that were planted by the original 3rd defendant(now deceased) growing thereon and that the prayers in the Originating summons should be granted.

11. **PW4** testified on 8/3/2018. He stated that he is a surveyor with the County Government who previously worked with a surveying firm called **Olweny and Associates**; that on **2nd December 2010** the plaintiffs approached him to verify the boundaries between them and "**Mukunga**" Farm; that he went to the ground and did some measurements; that all the plaintiff's plots could not reach the main road; that plot number **22** encroached upon "**Mukunga**" farm by **0.813 acres**; **plot no 23** by **1.479 acres** and **plot no 24** by **1.2 acres**. These encroachments form the stretch that runs along the road between the plots and "**Mukunga**" Farm; Both sides of the road have live fences; Trees mark the boundary between Sinyerere and "**Mukunga**" Farm the road is in "**Mukunga**" Farm; According to him, there is no other boundary between the two sides except the road. He produced his report as **P.Exh 6**. At this juncture, I must point out that the evidence of PW4 is to be disregarded for two reasons. First, he never demonstrated that he was qualified to conduct the survey exercise and secondly, he refers to "**Mukunga Farm**" rather than "**Mwago Farm**".

The Defendants' Evidence

12. The 1st defendant testified on 15/3/2018; she stated that she went to Mwago Farm in **1965**, that she lived there until **2017**; that the plaintiffs took up their respective parcels in the neighbourhood in **1968**; that the boundary dispute began in **1974** and when the defendants discovered the trespass, the Mwago Farm Ltd Clerk wrote to the Government regarding the dispute and a surveyor came that year and fixed the beacons; that beacons were also replaced in the year **1984**; that the plaintiffs then removed the beacons and sued the defendants in **1988** seeking to be granted the land and *mesne profits* since **1985**; that they later withdrew the case and the defendants continued using the land; that after the court ordered that no more trees be cut, the defendants complied with that order.

13. **DW2** testified on 15/3/2018. He stated that he was the Mwago Farm Ltd Clerk at the beginning of the dispute and he still is; that the farm administration got to know in **1974** that the fence and some beacons to the common boundary between Mwago Farm Ltd and Sinyerere Settlement Scheme had been removed; that he reported to the police who referred him to the Survey Department; that the Farm administration made a report to the Nairobi Department of Surveys Office; that Government Surveyors were busy and it was given a list of private surveyors to choose from; that though the request for a survey was made in the year **1974**, the survey was done in **1984** and the beacons were fixed in the same year; that the defendants entered the land after the beacons were restored; that in **1987** the plaintiffs uprooted the beacons; that the farm management reported to the police again and the police required that a surveyor go to the site; that the defendants therefore went to the DO who said he would send a surveyor; that the chief, the surveyor and policemen came and the plaintiffs were present, having been served with a summons by the chief; that the boundary was restored and thereafter in **1987** the plaintiffs were prosecuted for uprooting the beacons.

14. **DW3** testified on 15/3/2018 as administrator to the estate of the deceased original 2nd defendant. He stated that his family moved to the Mwago Farm when he was **12**; that in **1975** the plaintiffs removed the beacons that marked the common boundary between the plaintiff's land and theirs; that a letter was written to the Survey Department; that a report was made to the police; that the farm was asked to seek a licensed surveyor to restore the beacons; that restoration of beacons was done and the defendants took possession of the land; that even after that the plaintiffs still interfered with the boundary again; that when the matter was reported to the surveyor he termed the plaintiff's conduct as criminal; that police declined to visit the site without a surveyor, that the plaintiffs filed a suit in which they sought to be declared owners of the land and *mesne profits*; that the advocate wrote to the DO asking for assistance to get back to the land as there was no peace; that however after that letter was served upon them the plaintiffs filed the instant suit. He states that no one has been using the land since **1985**.

Determination

15. The following are the issues that arise for determination in this matter:-

(1) *Whether the plaintiffs are entitled to be declared owners of portions of the land owned by the defendants which they claim to occupy by way of adverse possession.*

(2) *What orders should issues?*

(1) Whether the plaintiffs are entitled to be declared owners of portions of the land owned by the defendants which they claim to occupy by way of adverse possession.

16. The Court of Appeal stated in the case of **Joseph Mutafari Situma Versus Nicholas Makhanu Cherongo Kisumu Civil Appeal No 351 of 2002** that what constitutes adverse possession is a question of fact and degree and depends on all the circumstances of the case.
17. As the objection has already been raised by the defendants, this court must consider whether the plaintiffs have specifically identified the portions and the sizes and location of the properties sought to be registered in the claimants' names by virtue of adverse possession. The defendants cite the case of **Wilson Kazungu Katana & 101 Others Vs Salim Abdalla Bakhshwein & Another (2015) eKLR** for the proposition that there is no such precise definition of the property in the instant suit.
18. But what do the pleadings and the evidence on the record say?
19. **Christopher Shivambo Karamoja** (1st plaintiff) seeks to be declared the legal owner by way of adverse possession of the part he occupies of land parcel known as **LR. No. 6628/12**. The Amended Originating Summons does not plead the exact acreage he individually seeks.
20. **Francis Moses Masese** (2nd plaintiff) seeks to be declared the legal owner by way of adverse possession of the part he occupies of land known as **LR. No. 6628/12** and the part he occupies of land known as **LR. No. 6628/10**. The Amended Originating Summons does not specify how much land he individually seeks from the each of the two defendants.
21. **The Estate of Jidraph Ndungu Mwaura** (3rd plaintiff) seeks that he be declared the legal owner by way of adverse possession of the part he occupies of land known as **LR. No. 6628/10** and the part he occupies of land known as **LR. No. 6628/11**. Similarly the Amended Originating Summons does not specify how much land he seeks from each of those portions.
22. The undated supplementary affidavit of Francis Mose Masese and the affidavit of Jidraph Ndungu Mwaura both filed on an unknown date in **May 2000** and said to be in support of the Originating Summons do not reveal the acreage claimed by the deponents.
23. However the acreage claimed by all the plaintiffs is stated in the second paragraph of the Amended Originating Summons and the 6th paragraph of the supporting affidavit dated **8th November 1991** to be aggregate and aggregate **9 acres**. This is disputed by the defendants who opine that it is **4 acres**.
24. It is in their evidence that the plaintiffs stated that the sizes of the portions of land that they seek from the defendants are as follows: the 1st Plaintiff's dispute with the 1st defendant is over **0.813 acres**; the size of land that the 2nd plaintiff claims from the 1st and 2nd defendants is collectively given as **1.497 acres**. He does not however specify what specific size is claimed from each of the defendants he claims from. The 3rd plaintiff's claims from the 3rd defendant's land a portion measuring **1.20 acres**. This brings it close to the four acres admitted by the defendants to be the land in dispute.
25. Though the 2nd plaintiffs claim from each of the two defendants he is in a tussle with is not defined, I find that from his evidence it is capable of being defined if it became necessary in the end.
26. In this court's view, the plaintiffs are therefore deemed to have satisfactorily specified the sizes of land of which they seek to be declared owners by virtue of the doctrine of adverse possession.
27. An examination of whether the plaintiff's claim meets the other quintessential ingredients of adverse possession are this Court's next stop. The claimants must prove that they have been in uninterrupted and peaceful and open occupation of the land for a period of more than **12 years** in order to obtain the relief sought.
28. The plaintiffs submitted that they lived on the claimed portions from the year **1968 to 1984**. **Paragraph 8** of the Replying Affidavit of the 1st defendant sworn on **29th July 1992** admits that at one time the plaintiffs were in occupation of the suit land.
29. The plaintiff's further submission is that the sending of a letter to the Director of Surveys did not stop time from running for the purposes of their claim under adverse possession and for this proposition they cite the case of **Joseph Mutafari Situma Versus Nicholas Makhanu Cherongo Kisumu Civil Appeal No 351 of 2002**.
30. Alongside this is the further submission based on **Section 7** of the **Limitation of Actions Act**, to the effect that the plaintiffs have been in possession for 16 years and have therefore proved adverse possession.
31. I will examine the effects of that dated **27th December 1974** written by the defendants to the Director of Surveys first. It is noted that **DW2** produced a copy of a letter addressed to him by the Survey of Kenya Nairobi office dated **28th December 1974**. That letter acknowledges his letter dated **27th December 1974**. His quoted letter seems to have asked the Director of Surveys to show him the boundary between Mwangi Farm and Sinyere Farm.
32. The response from the Surveys Department suggests that he should seek a private surveyor to conduct that exercise as government surveyors were engaged in "new grant surveys."
33. It has not been demonstrated by the defendants that any engagement between them and the plaintiffs over the matter took place between

the year 1974 and the year 1984 pending the requested survey. That assertion is therefore not controverted.

34. The defendants also correctly argue that the evidence of **PW4** who admitted having known the plaintiffs first in **1970**, could not establish that the plaintiffs had been in occupation of the land since **1968**.

35. Having examined the admission in the replying affidavit of the first defendant, this court will however take the year **1968** as the year of entry of the plaintiffs into the suit premises.

36. Computation of the period from **1968** till **1984** gives a period of more than 12 years, and therefore prescriptive rights could still have accrued in favour of the plaintiffs during this period and they were capable of being enforced after the 12th year.

37. In the case of **Joseph Mutafari Situma Versus Nicholas Makhanu Cherongo Kisumu Civil Appeal No 351 Of 2002** the Court of Appeal stated as follows:

“From the foregoing findings, we have come to the conclusion that the appellant did not prove his claim to the land by adverse possession to the required degree.

That finding notwithstanding, we feel bound to say something about the legal basis of the decision of the superior court. We have quoted above an excerpt of the decision of the superior court where the superior court found in essence that the various letters written to the deceased, interrupted the running of time for purposes of adverse possession. Mr. Otieno relied on Githu v Ndeete [1984] KLR 776 where this Court held, among other things, that the giving of notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under Limitation of Actions Act. That statement of law is supported by English decisions. In MEGARRY & WADE, THE LAW OF REAL PROPERTY, 6th Ed. the authors state at paragraph 21 – 018 at page 1309, thus:

“Once factual possession has been established, it will not be terminated merely because the true owner sends a letter to the squatter requiring him to vacate the premises. Time will continue to run in favour of the squatter unless and until he vacates the premises or acknowledges the true owner’s title”.

In Mount Carmel Investments Ltd vs. Peter Thurlow Ltd [1988] 1 WLR 1078; the English Court of Appeal was dealing with adverse possession under section 15 (1) of the English Limitation Act 1980 which section is in substance identical to section 7 of the Limitations Actions Act (Cap 22) which bars actions to recover land after expiry of 12 years from the date the right of action accrued.

In that case, the Court said at page 1084 paragraph B:

“We do not accept that in a case where one person is in possession of property and another is not the mere sending and receipt of a letter by which delivery up of possession is demanded, can have the effect in law for limitation purposes that the recipient of the letter ceases to be in possession and the sender of the letter acquires possession”.

The Court justified that finding at page 1085, paragraph H and page 1086 paragraph A, thus:

“On Mr. Newman’s argument time starts to run afresh by making a demand for possession. That is in flat contradiction to the long-recognized position and statutory scheme where a squatter is in possession of another’s land. Unless the squatter vacates or gives a written acknowledgment to the owner, the owner has to issue his writ within the prescribed time limit. Otherwise, he is barred because by section 15 (1) he is barred from bringing an action to recover land after the expiration of the 12 year period”.

That being the correct position in law the learned Judge, with respect, erred in finding that the letters sent to the deceased interrupted the running of time and that time began to run afresh after making a demand for possession.”

38. The decision in the case of **Njuguna Ndatho Vs Masai Itumo and 2 Others, eKLR** also held that mere letters, notices, chief’s directives and so on are ineffective to interfere with the possession of an adverse possessor.

39. Based on the foregoing, I therefore find that the letter dated **27th December 1974** was insufficient to interfere with possession on the part of the plaintiffs.

40. However it is noteworthy that this suit was commenced in the year **1991** by the plaintiffs. No suit was filed in the year **1984**. The first suit was filed in the year **1988** and later withdrawn. It is vital for to launch an inquiry as to whether that failure to approach the court in time and the events before the institution of suit affect the plaintiff’s claim.

41. Only an action to assert that right within the period of occupation could have entitled them to orders conferring upon them title by way of adverse possession.

42. There is on the record evidence from the plaintiffs themselves that sometime before they lodged this claim, the plaintiffs ceased to be in peaceful occupation of the claimed portions. The plaintiffs have produced **P.Exh 3** which is a letter dated **4/12/1984** from the District Settlement Officer Kitale to the Manager of Mwago Farm which seems to lament that the defendants had interfered with the common

boundary. **P.Exh 3** shows that it was agreed that the District Surveyor and the Settlement Officer do visit the area on **14th December 1984** to verify the dispute on the ground.

43. In contrast with the apparent patience and tranquility of the defendants in the period between 1974 and 1984, these events provoked by the defendants punctuated the timeline of this dispute and demonstrate that there was no peace on the ground during the occupation of the claimed portions by the plaintiffs, at least from the year **1984**.

44. In addition, the submission of the defendants is that the letter marked as **P.Exh 3** at its **paragraph 3** admits that there was interference with the suit land by the defendants and their surveyor in **1984**. Upon an ordinary interpretation of the contents of that paragraph, I find that submission to be correct. It is also submitted that the letter appears to have been written by a person who had an interest in the Sinyerere Scheme. However this court must take that to be the language the author chose to use, although it is clear from other documents in the record such as the letter dated 20/11/1968 exhibited as “**FMM1**” in the further affidavit of the 2nd plaintiff that the second plaintiff, who appears to be the main driver of this litigation, may have been the Settlement Assistant, Sinyerere Scheme No.4. Whether he had a hand in the writing of the letter produced as **P. Exhibit 3**.

45. The only conclusion that can be reached from the evidence on record is that the plaintiffs lost possession in the year 1984 after the survey was conducted and beacons placed in the ground and the defendants entered the suit land.

46. The next point I wish to consider which will further illuminate on the issue of whether prescriptive rights accrued to the plaintiffs is the nature of the prayers sought both in the instant suit and in **HCCC 62 of 2008**, for they will tell if the plaintiffs have been in possession.

47. The two suits are between the same parties, the only difference being that the instant suit was commenced as an Originating Summons and the former by way of Plaint.

48. First in this suit the plaintiffs seek in their prayers that mesne profits of **Kshs. 500** per acre “**from the year 1985 until possession is delivered up in full.**” This is a clear admission by the plaintiffs that they were not in possession of the suit land as at the time of the commencement of the instant suit.

49. What about as at the time of commencement of **HCCC 62 of 1988**, were the plaintiffs in possession? The answer to this can only be found in the decree whose copy was produced by the defendants. In that decree, it is apparent that the prayers were as follows:

a. Possession of 9 acres of land part of LR NO 25918. (emphasis mine)

b. Adverse possession;

c. Mesne profits from 1985; (emphasis mine)

d.

e.

f.

50. The very fact that the plaintiffs seek possession and *mesne profits* satisfies this court that the plaintiffs were not in possession of the suit land as at the time of the commencement of both sets of proceedings.

51. The defendants cite the case of **Rajan Shah T/A Rajan S. Shah & Partners vs Bipin P. Shah 2016 eKLR** where mesne profits were defined as a claim for damages by the rightful owner against a tenant or a trespasser who has wrongly dispossessed him. Logically, they argue, and I approve of the argument, the plaintiffs would not be seeking *mesne profits* if they were still in possession of the suit land.

52. The defendants further cite the case of **Dakianga Distributors K Ltd Vs Kenya Seed Co Ltd 2015 eKLR** and **Global Vehicles Kenya Ltd vs Lenana Road Motors (2015) eKLR** for the proposition that a party will not be allowed to lead evidence that is contrary to their pleading and that any such evidence will be disregarded. The defendants submit that owing to the admission that the plaintiffs were evicted in 1985 they stated that they have been in uninterrupted occupation of the suit land since 1968.

53. This court is of the view that it is confirmed by the pleading and prayers in these two suits, one begun in **1988** and the other in **1991** [this suit began as **Eldoret HCCC No. 234 of 1991(O.S)**] that the plaintiffs were not in possession of the suit land from the year **1985**, and have not been in possession until now. That conclusion is buttressed by the contents of **paragraph 7** of the 2nd plaintiff’s affidavit of **3rd February 1992**.

54. It is the submission of the defendants that the dispute was settled by the survey of 1984 and that the defendants’ re-entry upon the suit land was peaceful.

55. The manner of retaking possession employed by the defendants, whether forcible or otherwise is of no relevance in the instant suit; all that concerns this court is the positive finding in favour of the defendants: that they are now in actual possession. Therefore whether the plaintiffs had lived on the land continuously for **12** or more years before they were evicted cannot be of any relevance and cannot affect the orders that are bound to be made in the instant suit, their eviction having been established by evidence to have occurred before suit was commenced.

56. When it comes to the taking of possession by the plaintiffs, the defendants rely on the decision in **Mtana Kahindi Lewa Vs Kahindi Ngala Mwangandi (2015) eKLR** for the proposition that if a party enters into a property forcibly, it cannot later make a claim for adverse possession. There is no supplementary affidavit that controverts the statements made in the 1st defendant's sworn affidavit dated **29th July 1992** and the contents thereof are deemed to be unchallenged and correct. From that affidavit dated **29th July 1992** and from the evidence of the defendants it appears that the boundary between the parties' lands were re-established twice and that the defendants were culpable of uprooting both the barbed wire fences and the beacons after each survey.

57. It is clear from the evidence on the record that the plaintiffs removed beacons and uprooted the boundary fences between their land and that of the defendants and therefore theirs falls into the category of forcible entry. Even if their occupation could have been deemed to have lasted longer than 12 years they cannot therefore obtain the relief of title by way of prescription as sought. In any event, it has been found that that occupation was later interrupted by the retaking of possession by the defendants.

58. The other issue that arises in the instant suit is whether a person can obtain relief in the form of a declaration that he is entitled to land by way of adverse possession after the land owner has repossessed the land.

59. The defendants cite the case of **John Nyabuto Vs James Ombaye Orori and Another (2017) eKLR** for the proposition that if a party has already been evicted he can not sustain a claim for adverse possession.

60. In my view where by the time of filing suit the claimant for title by way of adverse possession has been evicted from the suit land by any means by the land owner who moves in to assert his title, one of the crucial ingredients of adverse possession which is continuity of possession is broken and the claimant's claim is automatically defeated. Only a claim filed before eviction can withstand that test.

61. In the plaintiff's submission it is argued that none of the parties have been using the suit land owing to a High Court order. I must observe that if there was any order that was made to that effect, it must have been made after the plaintiffs had lost possession of the suit land, and that must have been after the year 1988. Loss of possession to the registered owner is incurable. Just as the expiry of the 12 years divests the legal owner of the right to action to recover the land, loss of possession by any means to the legal owner before an action for adverse possession disentitles the occupier from orders of adverse possession as one main ingredient, possession, has been removed from the equation. The non-user of the land, having been enforced by an order of the court does not and can not support the plaintiff's claim. In any event the plaintiff has already submitted that that order was granted solely in order to avoid conflict between the parties till the suit is resolved!

62. The prayer for *mesne profits* is inconsistent with the prayer for adverse possession and can not be granted. The claim that the defendants' title in the suit land has been extinguished can not stand as they hold the title and are in physical possession and were in such possession as at the commencement of the suit.

63. The last issue is whether failure to annex an extract of title to the suit land is fatal to the plaintiff's claim. The defendants have relied on **Order 37 Rule 7** of the **Civil Procedure Rules** and the cases of **Wilson Kazungu Katana & 101 Others Vs Salim Abdalla Bakhshwein & Another (2015) eKLR** and **Mtana Kahindi Lewa Vs Kahindi Ngala Mwangandi (2015) eKLR** for the proposition that the copy of document of title must be exhibited. They cite a passage from the latter case as follows:

"In Teresa Wachuka Gachira v Joseph Mwangi Gachira, Civil Appeal No.325 of 2003, the Court emphasized the important of following the prescribed procedure in adverse possession claims. Because a claim based on adverse possession is anchored on the fact that the suit property belongs to a registered owner, that evidence, in the form of a copy of the document of title must be exhibited. Failure to do this has been found in a long line of cases to be fatal because it is only through such exhibit that the existence and ownership of the suit property can be ascertained by the court.

64. The two decisions are quite eloquent on the matter and I entirely agree with the defendants' submission on the above point.

65. As to the plaintiff's reference to the provisions of **Section 7** of the **Limitations of Actions Act**, I must state that the proceedings herein are by the plaintiffs and not by the defendants. If they had been commenced by the defendants in order to recover the land from the plaintiffs, the provisions would matter. The plaintiff's submission on this point is therefore misguided.

66. For the above mentioned reasons, it is my view that the plaintiffs' claim for entitlement to title by way of adverse possession should fail.

67. I therefore find that there is no merit in the Amended Originating Summons dated **5/11/1999** and it is hereby dismissed with costs to the defendants.

Dated, signed and delivered at Kitale on this 26th day of September, 2018.

MWANGI NJOROGE

JUDGE

26/9/2018

Coram; Before Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the plaintiff

N/A for the defendants

1st plaintiff present in person

Son to Francis Mose, 2nd plaintiff present

Jessy Mburu present in person

Defendants all absent

COURT

Judgment read in open court.

MWANGI NJOROGI

JUDGE

26/9/18