



**Kessio v Birgen & another (Environment & Land Case 98 of 2021)
[2024] KEELC 360 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 360 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 98 OF 2021
MN MWANYALE, J
JANUARY 25, 2024
(FORMERLY ELDORET E & L CASE NO 45 OF 2020)**

BETWEEN

LEONIDA CHEPWAMBOK KESSIO PLAINTIFF

AND

ESTHER JEROTICH BIRGEN 1ST DEFENDANT

DAISY JESONDIN BIRGEN 2ND DEFENDANT

JUDGMENT

1. Vide her Originating Summons dated 18th August 2024, Leonida Chepkwambok Kessio sued Esther Jerotich Birgen and Daisy Jesondin Birgen; over Nandi/Sarora/122 claiming ownership thereof by adverse possession.

The orders sought are;

- a) A declaration that the Defendants' right over the whole of that parcel of land known as Nandi/Sarora/122 got extinguished by adverse possession upon expiry of 12 years and when the Plaintiff and his family were in possession.
- b) An order under Section 38 of the Limitation of Action Act Cap 22 Laws of Kenya that the parcel of land known as Nandi/Sarora/122 measuring approximately 21.0 hectares be registered in the name of the Plaintiff herein as a proprietor or owner. The Land Registrar – Nandi County to execute all such documents as could facilitate the transfer of the whole of that parcel Nandi/Sarora/122 to the Plaintiff.
- c) Costs of this suit.
- d) Any further or other order relief this Honourable Court shall deem just to grant.



2. Upon transfer of the suit from ELC Eldoret to Kapsabet ELC, the Advocates for the parties appeared before Court and took direction on 16/12/2021 to proceed by way of viva voce evidence.
3. No specific directions were taken on the conversion of the originating summons to a plaint and the Replying Affidavit to a defence, but by choosing to proceed by way of viva voce evidence and under the authority in the decision Shadrack Bungei Vs. Selina Jerotich Civil Appeal No. 4 of 2018 Eldoret thus Originating summons is deemed to have been converted to a Plaint and the Replying Affidavit to a Defence.

Leonida Chepkwambok Kessio is now the Plaintiff while 1st and 2nd Respondents Esther Jerotich Birgen and Daisy Jesondin Birech are not the 1st and 2nd Defendants respectively.
4. Upon an oral application by Ms. Tum Learned Counsel for the 1st Defendant made on 21.02.2022, to refer to matter to the Court Annexed Mediation, which application was opposed by Mr. Kirui for the Plaintiff, but supported by Ms. Mitey for the 2nd Defendant the court referred the matter to the Court Annexed Mediation so that the parties who have enjoyed good relations before the suit would explore the Alternative Dispute Mechanism.
5. Whilst the matter was pending resolution at the Court Annexed Mediation; a Notice of Motion application dated 21st February 2022 was filed which sought the joinder of Tamar Cheptoo Birgen as an interested party to the suit. The application was considered and vide the ruling dated 26th May 2022, the application for joinder was disallowed; thus paving way for the Court Annexed Mediation.
6. On 26th July 2022, it was reported to the court that the Plaintiff had walked out of the mediation process thus the Court Annexed Mediation Process failed and as a result the court fixed the matter for hearing.

Plaintiff's Case and Evidence

7. In support of the Originating Summons a supporting affidavit was filed, were the deponent stated that
 - (i) She had lived thereon for more than 30 years.
 - (ii) That the property was initially registered in the name of Meshack Kiptoo Birgen from 1983 where it was now registered in the joint names of the Defendants.
 - (iii) That the Plaintiffs husband Kipsang Kessio and one Julius Kiptoo Sang were buried on the suit property in 2010 in respect of Kiptoo Sang and 2019 in respect of Kipsang Kessio.
 - (iv) That her possession had been uninterrupted and peaceful occupation for over 12 years, whilst utilizing the whole of land, and openly without interruption for more than 30 years.
 - (v) The said occupation had been exclusive of the Defendants and had developed the said property and farming on it, planting trees and keeping cattle on it, there was no hostility and or non permissive disturbances.
 - (vi) The Plaintiff's occupation was adverse to the Defendants; title.
8. The Plaintiff; annexed a copy of an official search, a copy of the green card/ register of the parcel, death certificates and photographs of graves and the photographs of houses, maize crops planted on the parcel.
9. A total of 5 witnesses testified in support of the Plaintiff's case. PW1 the Plaintiff adopted her supporting affidavit and supplementary affidavit as part of her evidence in chief. She stated that her late husband had bought the property fin 1987 and settled there till 2019 when he died. She stated that



she was claiming the whole property which initially belonged to Meshack Kiptoo Birgen but was now owned by the Defendants. She produced P. Exhibits 1 to 5 as listed in as annexures in her supporting affidavit

10. In Cross-Examination by Ms. Tum for 1st Defendant, she stated that she had sued in her own right and not on behalf of the Estate of her late husband. She was claiming 52 acres, since all the persons in the property were her children, she stated that they were other people who had built thereon. She stated that her late husband and the late Meshack had been close friends; but she was not aware of any permission granted to her late husband, to occupy the suit property.
11. On further Cross-Examination by Mr. Simiyu for 2nd Defendant, the witness stated that her late husband's entry into the property was due to the friendship between him and the late Meshack Birgen. She stated that she did not live on the property alone, and that the widows of Meshack Birgen underwent succession without her knowledge.
12. In Re-Examination, she stated that the houses in the photographs belonged to her.
13. PW2 Alexander Gilbert Bett a businessman from Sarora testified and adopted his witness statement dated 31.5.2021 as part off his evidence in chief.

In Cross-Examination by Ms. Tum for the 1st Defendant, the witness he knew the late Kipsang Kessio and Meshack Birgen but did not know the nature of their relationship. He said he knew other people who had purchased portions of the property and that the Plaintiff did not utilize the whole property. It was his evidence that the late Meshack had permitted Kipsang to live on the property and as a result the Plaintiff lived on the property too.

14. In further Cross-Examination by Mr. Simiyu for the 2nd Defendant, the witness stated that the late Kipsang and the late Meshack were friends, but he did not know how the late Kipsang gained entry on the disputed property. There had been a meeting which had resolved that the late Kipsang had bought the suit property and that the Plaintiff lived on the property because of her late husband's purchase.
15. In Re-Examination, the witness stated that he never knew how the late Kipsang had gained entry into the suit property.
16. PW 3, Isaack Maiyo KIpkolum a farmer from Kipkaren Salient area also testified, and adopted his witness statement dated 31.5.2021 as part of his evidence in chief.
17. In Cross-Examination by Ms. Tum for the 1st Defendant, the witness stated that the late Kipsang and the late Birgen were friends and the late Birgen had allowed Kipsang to live thereon, and that the Plaintiff had lived hereon because of the permission granted. He stated that only the Kessio family lived thereon and that the property was about 52 acres and the Plaintiff cultivated and kept cows thereon.
18. On further Cross-Examination by Mr. Simiyu for the 2nd defendant, the witness stated that the late Kipsang and the late Birgen were friends and that late Kessio had bought the property, he did not know how much had been paid and had not seen any Agreement for sale. He stated that he had attended a meeting where it had been resolved that the suit property have been bought by the late Kessio.
19. In Re-Examination, the witness stated that the late Meshack Birgen had given permission to the late Kipsang Kessio but he was not sure how the permission had been granted, it could have been because of a purchase, he stated he remembered Meshack asking Kipsang to pay the balance for the property and the money was left at his shop for Meshack Birgen to collect.
20. PW4 Mr. Joshua Kiptanui Sang, testified and adopted his witness statement dated 31.05.2021 as part of his evidence in chief.



On Cross-Examination, the witness stated that he was the second son of the Plaintiff. He stated that he lived on a different parcel of land but his mother and 3 siblings lived on the suit property. He did not know whether they were other people living on the suit property which was not fenced. He stated that the late Meshack had been a friend of his late father but he was not aware of any arrangements between them. (his late father and Meshack Birgen).

21. In further Cross-Examination by Mr. Simiyu for the 2nd Defendant, the witness stated that he was 35 years old when his late father moved to the property and that his late father and the late Meshack Birgen had been friends. He did not know whether they had been any sale between the Late Meshack Birgen and his late father, and that the Plaintiff had stayed thereon because of her late husband and that he had stated at the meeting that he did not know whether his late father purchased the suit property.
22. On Re-Examination, the witness stated that there was a meeting that had given the property to the Kessio family. However he did not know whether his father had purchased the property or whether his father was a caretaker of the property.
23. The second last of the Plaintiff's witnesses PW5 was Erick Kipkemboi, a teacher who lived within Sarora Sub-Location and who adopted his statement dated 31st May 2021 as part of his evidence in chief.
24. In Cross-Examination by Ms. Tum for 1st Defendant, the witness identified the suit property as Nandi/Sarora/122 which was registered in the names of Daisy and Esther Birgen as administrators of Estate Meshack Birgen. The witness stated that he was born and brought up on the property and he lived thereon with his family. He indicated that he cultivated about 4 acres but he grazed cattle and that his siblings used the property and a Mr. Samuel Kiprotich used the property while his mother uses about 3 acres, he did not know whether they were other people in the property.
25. On further Cross-Examination by Mr. Simiyu for the 2nd Defendant, the witness stated that he had been born on the suit land and that he utilized about 3 acres, while he did not know the acreages mother utilized, he was testifying on behalf of his mother, and he did not know the whole story.
26. The last Plaintiff's witness PW6 was Mr. Abraham Chepsungui Maritim, the Assistant Chief of Cheptarit Sublocation who adopted his witness statement as part of his evidence in chief. The witness further stated that he had delegated to a village elder to chair a meeting with regard to the suit property; he was not present in the meeting which had resolved that the suit property Nandi/Sarora/112 belonged to the Kessio family since Kipsang Kessio had lived on the property from 1987 and had developed the same and had been buried thereon, together with a child of his family. He produced the minutes as P. Exhibit 6. It was his evidence that the Defendants lived in Nandi/Sarora/83 while the Plaintiffs lived in Nandi/Sarora/112 which was about 1 kilometre apart.
27. On Cross-Examination by Ms. Tum for the 1st Defendant, the witness stated that he had been an Assistant Chief since 2011 and he knew both the late Meshack and the late Kessio, who had been great friends, and that there was possibility of the late Kipsang Kessio having been invited and/ or given permission to live thereon. He stated that he was not part of the meeting of 2017/2020 and could not own the contents but he had appended his stamp on P. Exhibit 6.
28. On further Cross-Examination by Mr. Simiyu for 2nd Defendant; he stated that the late Meshack Biregen and late Kipsang Kessio had been good friends. that he did not know how Kessio had entered the land but there was complaints over ownership of the suit property. He did not know how many people lived on the property and he had not witnessed any agreement for sale. He stated other than the Kessio Kipsang family they were other people who lived thereon. He stated that according to P. Exhibit 6, the entry was through permission.



29. In Re-Examination, he stated that the Kipsang Kessio had been given permission to occupy the property and by permission he meant that they had agreed on the occupation and the Kessio family entered in 1987.
30. With the testimony of the 6 witnesses the Plaintiff closed her case.

Defendant's Case: -

31. Each of the Defendant had filed her own Replying Affidavit which were later converted to Defences. I was the 1st Defendant's case that;
 - (i) Her Co-wife and herself were the Registered owners of the suit property which had hitherto belonged to their late husband.
 - (ii) That the Plaintiff's claim to the property started when they made demand for vacant possession of the suit land and the Plaintiff claim that she had purchased the property which claim was not proven at the Assistant County Commissioner's meeting of Kurgung Division.
 - (iii) The claim for adverse possession was thus an after thought as the Plaintiff as she and her family were merely licenses on the suit property.
32. The 2nd Defendant in her defence equally raised similar issues as raised by the 1st Defendant indicating interalia that:
 - (i) The Plaintiff was a licenses on the property and that burial and interment of deceased persons on land does not confer proprietary rights to their relatives.
 - (ii) That the Plaintiff could not claim ownership based on purchase and adverse possession at the same time.
 - (iii) That the Plaintiff is not a heir of the Estate of the late Meshack Birgen and cannot make any claim in that regard.
33. The 1st Defendant Esther Jerotich Birgen testified as DW1 and she adopted her replying affidavit dated 7th September 2020 as part of her evidence in chief, and she produced D. Exhibits 1 to 3. She equally adopted her witness statement dated 27.5.2021 as further evidence in chief.

It was her evidence that the suit property initially belonged to her late husband Meshack Birgen, she stated that the late Kipsang Kessio did not purchase but was allowed to graze his cows and goats. They had sold to other people and had repaid a loan to avert an auction as the property had been charged. Upon demise of both Meshack Birgen and Kipsang kessio, the witness stated the Defendants wanted back their property back and issued a demand letter dated 18th February 2020 which jolted the plaintiff to seek adverse possession
34. On Cross-Examination by the Mr. Kirui for Plaintiff, the witness stated that the property belonged to them although they lived on Nandi/Sarora/83. She stated that she repaid a loan but did not have evidence of the repayment. She stated that her farmhand had lived on the property, she knew that the Plaintiff's late husband was buried on the property. She stated they had undergone succession but did not involve Leonida the Plaintiff in the succession.
35. On Cross-Examination by Mr. Simiyu the witness stated her late husband and late Kipsang Kessio were friends. She stated that the permission granted to Kipsang Kessio was in his lifetime and it was terminated on his death in 2019.



36. On Re-Examination, the witness stated that the cattle on the suit property did not belong to her but belonged to other people whom she had sold portions of the suit property.
37. The 2nd Defendant testified in support of her case as DW2, she adopted her replying affidavit dated 4th May 2021 as part of her evidence in chief and produced 2nd Defendants D. Exhibits 1 to 3. It was her testimony that the late Kipsang Kessio was a friend of her late husband Meshack Birgen and he had requested permission and was granted the permission to live on the suit property. That her late husband would visit to suit property in his lifetime till his death in 1994, where a clarion call for all his debtors was made and no one claimed the suit property.
38. She further stated that in 1996 the late Kessio informed them of an intended auction of the suit property and they repaid the loan and thereafter undertook succession in 1998. Upon succession, the witness and her co-wife the 1st Defendant allowed Kessio to live on the property and they moved their cattle to Nand/Sarora/83 Kipsang Kessio lived on the property till 2019 when he passed on and was buried on the suit property; and his descendants lived thereon till they were served with a Notice to vacate vide a letter dated 18th February 2020 (D. Exhibit 4) where upon the Plaintiff filed the suit and the dispute was reported to the Assistant County Commissioner who wrote a report on 27th March 2020 - (D. Exhibit 5). The witness stated that the property was theirs.
39. In Cross- Examination by Ms. Tum for 1st Defendant, the witness stated that the 1st Defendant was her co-wife and they were both Administrators of Estate of late Meshack Birgen, and they hold the property for themselves and in trust for their children. The witness stated that she was present when the permission was granted to the late Kessio. The property was not sold. At time of succession, permission was extended to Mr. Kessio to live thereon till his death in 2019 by which time Mr. Kessio had bought his own property. The Kessio's had been given 1 ½ acres to utilize while villagers would graze and farm thereon. The survey report indicated other people were living thereon other than the Kessio's.
40. In further Cross-Examination by Mr. Kirui in for the Plaintiff, the witness stated that they had sold a portion to a Mr. Abraham Rono but she had nothing to show that she had sold 20 acres in 1996. She stated that the suit property was registered in her name together with her co-wife, although the Kessio's lived thereon. She did not recall when the verbal permission was given but she was present, when it was given. It was her testimony that the property had a live hedge and it was in the control of Leonida just like her husband had been in control.
41. She insisted that Kessio had not purchased the property, and that the distance between the farm and her home was about 5 kilometres, Kessio had bought another property, but he was buried on the suit property. They had not sued the Kessios. D. Exhibit 5 had no signatures on the minutes attached to it. They had repaid a loan of Kshs. 400,000/-.
42. On Re-Examination, the witness stated that Kessio had given permission to people to graze cattle but Leonida stayed on the property plus someone else who had purchased. She stated that she had visited the suit property with no hostility from any person' with the testimony of Daisy Birgen the Defence case was closed.
43. Before the testimony of Daisy Birgen the 2nd Defendant and DW2 but after the testimony of all the Plaintiff's witnesses and closure of the Plaintiff's case and the testimony of DW1 Esther Birgen a common (court) witness (a surveyor) testified and produced a survey report. The survey report was to detail the occupation of the suit premises, and hence the surveyor was a common witness;
44. Mr. Antony Rotich the Common witness and Surveyor with the National Government - Officer of the County Surveyor stated that he had received summons dated 30th May 2023 to prepare a survey



report on Nandi/Sarora/122. It was his testimony that he had visited the site on 10th May 2020 and prepared the report, which he produced in evidence as C. Exhibit 1.

45. He observed that the boundaries for the whole parcel were intact and could be established. He observed that they were people who were settled in the parcel together with posho mill, graves insitu; church had been partial demolished. Leonida Kessio cultivated around 2.85 hactares and old built houses on it, the other acreages were occupied by other persons; while 29 acres were unoccupied.

In Cross-Examination by Mr. Simiyu for the 2nd Defendant, the common witness stated that the 29 acres which is unoccupied is rocky, bushy and hilly.

46. He was not sure that the bushy area was the grazing area as he did not find any animals there. He was accompanied during the survey by the area chief, a Mr. Jonah Korir and Assistant Chief as well as village elders whose names appeared in the list attached to the report.
47. Mr. Rotich was also Cross-Examined by Mr. Kirui for the Plaintiff. where he stated that the in the 29 acres he saw scrubs and small trees, he also a small eucalyptus tree but no structures thereon and neither were there any animals grazing. The property was partly fenced with live fences but the unoccupied 29 acres had no fence and the area occupied by Leonida was fenced.
48. He stated that a Mr. Henry Kemboi, the son of Leonida Kessio occupies 2.775 acres and had planted sugarcane, and while on site he met a Ms Josephine Sang at the site who pointed out the area she occupied, while the other occupiers premises were pointed out by the area chief.
49. He stated that Leonida occupied 2.85 acres but the Defendant's though present were not occupying any portion of the property. He indicated that there was a grave which belonged to Jonah Kipsang on the area occupied by Leonida and he saw another grave belonging to a Mr. Julius Kipkemboi.
50. After the close of the Defence case parties were directed to file their written submissions.

Plaintiff's Submissions: -

51. In her submissions the Plaintiff through Mr. Kirui Learned Counsel has framed and submitted on 2 issues, to wit,
- (i) Whether the Plaintiff has sufficiently proved to the required standards the doctrine of adverse possession against the Defendant.
 - (ii) if the answer to (i) above is in the affirmative, whether the Applicant is entitled to the orders sought.
52. The Plaintiff has identified 5 non contested issues as follows:
- (i) it is not in dispute that the suit property is registered in the joint names of the Defendants but was initially registered in the name of Meshack Kiptoo Birgen (now deceased).
 - (ii) ii) It is commons ground that the Plaintiff and her family members are in occupation and use of the suit parcel from the year 1987 to date.
 - (iii) That the Defendants and their families are not in occupation and use of the whole suite parcel.
 - (iv) That it is not in dispute that there was no dispute over the ownership, occupation and use of the suit parcel before the demise of Meshack Kiptoo Birgen in 1994 and Kipsang Kessio in 2019.
 - (iv) Kipsang Kessio and his son Julius Kipkemboi died and were buried in the suit parcel.



On issue No. 1, the Plaintiff places reliance on Section 7 of the *limitation of Actions Act*, as well as Section 38(1) of the said Act and places reliance³ in the case of *Wilson Kazungu Katana and 101 Others Vs. Salim Abdallah Bakswen and Another 2015 (eKLR)*. It is the Plaintiffs submission that she had proved beyond the required standards that she has lived on the suit land from 1987 and that he claim thus crystallized in 1999 and that after the change in title in 1998, her claim crystalized in 2010 hence the Defendants title was extinguished by 2010.

53. The Plaintiff further submits that the occupation was open, continuous without any interruption and reliances in the decision in the case of *Wambugu Vs. Njuguna 1983 (KLR) 173* as well as *Mbira Vs. Gachuhi (2002) e KLR*
54. It is the Plaintiff's further submission that from the surveyor's report (c exhibit 1) it is undoubtedly that it is the Plaintiff and her family who were in occupation of the suit property. The Plaintiff further submits that the ingredients of adverse possession have been proved and that no evidence was led to the issue of permission given to the Late Kipsang Kessio.
55. On issue number 2, the Plaintiffs submits that having proven adverse possession, she is entitled to the prayers sought in the O.S.

1st Defendant's Submission:

56. In her submissions, the 1st Defendant through Ms. Tum Learned Counsel has framed and submitted on 4 issues for determination as here follows:
 - (i) Whether the question for determination as pleaded by the Plaintiff can be resolved by looking at the relevant records.
 - (ii) ii) whether the Plaintiff is a licencees in the suit land.
 - (iii) Whether the Plaintiff has occupation of the entire parcel of suit land Nandi/Sarora/122 measuring 21 hectares
 - (iv) Whether there has been exclusive possession by the Plaintiff.
57. On issue 1, the 1st Defendant submits that the only issue pleaded by the Plaintiff can be answered by looking at the records held by the Lands Department without even looking at evidence. The 1st Defendant submits that as per the certified copies of the Register (green card) the suit property is jointly owned by the Defendants, hence the ownership has been proven by the copy of the green card and it is not disputed so submits the 1st Defendant. On occupation by the Plaintiff the same was not exclusive as there were other persons in occupation. In this regard the 1st Defendant has cited the decision in the case of *Kimani Ruchire & Another Vs. Swift, Ruberford Company Limited and Eret (19765 – 180) KLR*) as well as the decision in *Gabriel Mbuvi Vs Mukindia Maranya (1993) e KLR*).
58. On issue number II, the 1st Defendant submits that from the testimony of PW1 DW1 and DW2 it was confirmed that the Plaintiff's late husband was granted permission to live on the suit land and that the said permission terminated upon the demise of the Plaintiff's husband. On the issuethe Plaintiff being a licencee. The 1st Defendant thus submits since the Plaintiffs occupation was vide a licence thus the element of non-permissive critical in adverse possession was not proved.
59. On issue number 3, the 1st Defendant whilst placing reliance on the survey report submits that the Plaintiff does not have occupation of the whole suit property.



60. On the issue of whether there is an equitable estoppel against the Plaintiff, the 1st Defendant submits that due to the existence of the licence arrangement and since the Plaintiff had now gotten her own property, she was estopped from claiming adverse possession.
61. On the strength of the above submissions the 1st Defendant sought for dismissal of the Plaintiff's suit.

2nd Defendants Submission: -

62. The 2nd Defendant through her counsels on record Messrs Ngigi Mbogua and Company Advocates has framed and submitted on a single issue, to wit, whether the Plaintiff has met the threshold for grant of orders for adverse possession.
63. In her submissions before court and while placing reliance in the decisions in *Maweu Vs. Lio Ranchung and Farming Co-operative Society* 1985 eKLR and *Gabriel Mbui Vs. Mokindia Moranya* 1993 eKLR, the 2nd Defendant submits that the Plaintiff's entry on the suit land was through permission and was thus a licensee.
64. The 2nd Defendant further submits that the Court ought to answer the following: -
 - (a) How did the Plaintiff take possession of the suit property.
 - (b) When did she take possession and occupation of the suit property?
 - (c) What was the nature of her possession and occupation
 - (d) How long has the Plaintiff been in possession.
65. The 2nd Defendant submits that the Plaintiff's late husband had been given the permission to occupy the property, by the Defendant's late husband and the Defendant's themselves.

Since there was permission, the 2nd Defendants submits while placing reliance in the decision in the case of *Kisumu Civil Appeal No. 27 of 2013, Samuel Kihamba Vs. Mary Mbaisi* (2015) e KLR; that the occupation having been with permission does not meet the threshold of adverse possession. The 2nd Defendant thus urges the court, to dismiss the claim.
66. Before framing issues for determination there are a number of non contested issues that the court has observed in the course of determining the matter. In her submissions the Plaintiff listed 5 of the undisputed facts as captured at paragraphs 52 of this Judgment. In addition to the five undisputed factual issues, the court also adds the fact that the late Meshack Birgen and the Late Kipsang Arap Kessio were great friends, a fact that was admitted by both Plaintiff and all her witnesses and both Defendants.
67. Having analyzed the pleadings, the evidence and testimony of the witnesses as well as the submissions by the parties the court now frames the issues for determination as follows: -
 - (i) what was the mode of entry onto the suit property by the Plaintiff and her late husband; was it by purchase from the late Meshack Birgen or by permission from the late Meshack Birgen?
 - (ii) if the answer to (i) above is by way of purchase, has the Plaintiff proved adverse possession, and if the answer to (i) above is by permission, has the Plaintiff, proved adverse possession?
 - (iii) Is the Plaintiff entitled to the prayers sought in the Originating Summons now turned Plaintiff?
 - (iv) Who bears the costs of the suit?



68. On issue 1, it is common ground as observed at paragraph 66 of this judgment, that the Plaintiff's Late husband the late Kipsang Kessio and the Defendant's late husband Meshack Birgen were very good friends. This fact was attested by all the Plaintiff's witnesses as well as the Defendants themselves.
69. Whereas on the one hand the Plaintiff stated in her testimony that her late husband had purchased the suit property from the late Meshack Birgen, none of the Plaintiff's witnesses corroborated this.
70. PW4, Mr. Joshua Sang, a son of the Plaintiff stated in Cross-Examination that he was 35 years old when his father moved into the property, he did not know whether there was a sale between the late Meshack and his late father. He was not aware how his father gained entry to the property and whether he had purchased the property but was aware of the fact that the Meshack Birgen and Kipsang Kessio had been good friends.
71. PW3 equally stated that there was no Agreement for sale between Meshack and Kipsang Kessio although he had attended a meeting where it had been decided that Kessio had bought the property, he remembered Meshack Birgen collecting money left at his shop by Kipsang Kessio on account of a balance of purchase price.
72. PW1 also stated about a purchase by her husband, but alluded to the fact that the suit property had been charged to a Bank.
73. From the originating summons and the supporting affidavit as filed, the Plaintiff did not plead the issue of purchase of the suit property. It was brought in evidence without having any basis in the pleadings.
74. It is trite law that that parties are bound by their pleadings and that where evidence and the pleadings are at variance, the evidence should be disregarded as a non-issues as was stated by the Court of Appeal in Independent Electoral and Boundaries Commission Vs. Shadrack Mule) where the Court stated:
- “It is now a very trite principle of law that parties are bound by their pleading and that any evidence led by any of the parties which does not support the averments in the pleadings or put in other way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
75. Since the issue of purchase was not pleaded any evidence on the same thus ought to be disregarded nonetheless there was no evidence of purchase established by the Plaintiff that her late husband had purchased the suit property the court finds that the entry by the Plaintiff and her late husband to the suit property was not by purchase, and the court shall examine the second possibility of entry.
76. As noted elsewhere in this judgment all of the Plaintiffs witnesses and the Defendants did confirm of the existence of friendship between the late Meshack Birgen and the late Kipsang Kessio, a fact that is not in dispute. In their defence the Defendants plead that the late Kipsanga Kessio was permitted to occupy the suit land by Meshack Birgen in their testimony the defendants alluded to the said permission and two of the plaintiffs witnesses said as much and pexhbit 6 also alluded to the entry by permission, the late Meshack Birgen was thus a licensee, and the Plaintiffs as his wife occupied as a licensee.
77. The scenario in this matter where a friends permitted another to use his property, was observed by Kuloba J, in Mbui Vs. Maranya 1993 e KLR) where the court observed as follows: -
- “The Court takes judicial notice and does not feign ignorance, of the prevalent customs and usages under African Socialism, whereby relatives, friends, clansmen and landless and increasingly, the purchasers, under tannulled and avoided agreements and transactions, are



allowed to remain in possession of one's land for indefinite lengths of time for as long as the owner does not immediately require the land so occupied on everybody's understanding that at the time or other, the person so accommodated shall have to leave and go away.....”

78. On a balance of probability and guided by the above observation the court is satisfied that there was permission implied or express granted to the late Kipsang Kessio to occupy the property. This finding is fortified by the fact that the family of the late Kipsang Kessio approached the family of Meshack Birgen to repay a loan when the property was under the threat of an auction. Had the family of Kessio bought the property, they would not have sought assistance from Birgen family to repay the loan as the property would have been theirs in any event.
79. On issue number 1, and for the reasons advanced above the court finds that the entry by the Plaintiff and her late husband was by permission from the late Meshack Birgen the Defendants' husband and that permission terminated upon the demise of Kipsang Kessio in 2019.
80. On the issue number 2, for adverse possession to be proved the claimant must prove that the possession, “nec vi nec clam nec precario”.
81. In our present case, whereas the occupation has been since 1987 and open, and notorious. The said initially entry was with permission hence making the Plaintiff and her late husband as licencees.
82. A licencee however is not able to claim adverse possession as the entry is with permission, as was stated in Hughes Vs. Griffin (1969) All ER 460. Where the court held: -

“a licencee or tenant at will, does not have time running in his favour, for the purposes of adverse possession.”

Consequently, the period between 1987 – 2019 during the lifetime of Kipsang Kessio, time for adverse possession did not run in his favour and or his families favour including his wife the Plaintiff.

83. It follows that as the occupation by Leonida Kessio and her husband was by permission as licencees the Plaintiff has not proven adverse possession and the suit thus fails and it is dismissed with costs to the Defendants.

DATED AND DELIVERED IN KAPSABET THIS 25TH DAY OF JANUARY, 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of: -

Mr. Kirui for the Plaintiff

Ms. Kambiha for 1st Defendant

Ms. Mitey holding brief for Ms. Tum for 2nd Defendant.

