



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**ELC No. 215 OF 2017**

**IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATION OF ACTIONS ACT, CAP. 22**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTIONS 30(f) AND 30(g) OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF SECTION 28(h) OF THE LAND REGISTRATION ACT 2012**

**AND**

**IN THE MATTER OF LAND PARCEL KNOWN AS MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225**

**BETWEEN**

**FELIX KIPCHOGE LIMO LANGAT.....PLAINTIFF**

**AND**

**ROBINSON KIPLAGAT TUWEI.....DEFENDANT**

**JUDGMENT**

By an originating Summons dated 31<sup>st</sup> May 2017 the plaintiff herein sued the defendant and sought for the determination of the following issues:

- a) WHETHER the plaintiff has been in open, continuous and uninterrupted occupation of 1.214 Hectares of the land parcel known as MOGOBICH/ CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225.
- b) WHETHER the occupation has been without the consent of the defendant.
- c) WHETHER the defendant's title is valid since the title of Salome Cheptalam Mutai had been extinguished by adverse possession and her right to recover the land by action had also been extinguished and therefore she could not convey any interests to the defendant.
- d) WHETHER the plaintiff is entitled to be registered as the proprietor of 1.214 Hectares comprised in the land parcel known as MOGOBICH/CHEPTILILIK/ BLOCK 1 (KIPSEBWO)/225 in place of the defendant.
- e) WHETHER the defendant should execute the requisite instruments of transfer and in default the Deputy Registrar of this Honourable Court to execute the same.
- f) WHO should meet the costs of the suit?

The defendant filed his replying affidavit in opposition to the originating summons and the suit proceeded by way of viva voce evidence with

the parties testifying and calling witnesses. Documentary evidence was also given by the parties. Counsel for the parties therefore filed written submissions in respect of their clients' cases.

### **Plaintiff's Case**

The plaintiff gave evidence and stated that he is a farmer and a former athlete and has a farm in Nandi Hills. It was his testimony that land parcel known as MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225 measuring 1.214 Hectares was registered in the name of ROBINSON KIPLAGAT TUWEI on 17<sup>th</sup> December 2012 while the previous owner SALOME CHEPTALAM MUTAI was registered on the 14<sup>th</sup> May, 1997. The plaintiff produced a certified copy of the extract of the register as an exhibit.

It was the plaintiff's evidence that he purchased ½ acre of the suit land from James Kipkemboi Lagat vide an agreement dated 31<sup>st</sup> May 2000 which he produced as an exhibit. He stated that he took immediate possession of the land and planted tea on the land. He also told the court that on the 29<sup>th</sup> October, 2000 he purchased a portion of 0.1 acres MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225 which measures 1.214 Hectares from Salome Cheptalam Mutai at a consideration of Ksh.14,000/ which was witnessed by the village elders Daniel Sanga and Robinson Kiplagat Tuwei. The sale agreement was produced as an exhibit and he stated that he took immediate possession of the suit parcel of land.

It was the plaintiff's evidence that he further purchased 0.5 acres on 31<sup>st</sup> May, 2000 of land parcel known as MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225 which measures 1.214 Hectares at a consideration of sh. 70,000/ from the same proprietor Salome Cheptalam Mutai and took possession immediately which agreement was produced as an exhibit before the court.

The plaintiff further testified that on 26<sup>th</sup> July, 2000 he purchased a portion of 0.1 acres of land parcel known as MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225 which measures 1.214 Hectares at a consideration of sh. 13,500/ from the proprietor Salome Cheptalam Mutai of which he produced a sale agreement for the transaction.

He stated that on the 28<sup>th</sup> December, 2001 he purchased a portion of 0.2 acres of land parcel known as MOGOBICH/CHEPTILILIK/BLOCK 1 (KIPSEBWO)/225 which measures 1.214 Hectares at a consideration of sh. 28,000/ from the proprietor Salome Cheptalam Mutai and took possession immediately. He further purchased 0.1 acres, 0.2 acres and 1 acre for a consideration of Kshs. 14,000/, 25,000/ and 260,000/ on 14<sup>th</sup> March 2002, 11<sup>th</sup> April 2005 and 8<sup>th</sup> June 2005 respectively from Salome Cheptalam Mutai of which he produced the sale agreements in court as exhibits.

The plaintiff further gave evidence that he had constructed on the land, grew crops and kept cows for milk production of which he produced documents from the Co-operative Society where he took the milk and further demonstrated that he was supplying tea to a factory near the suit land.

It was further the plaintiff's testimony that his occupation of the land had been open, without secrecy, without consent and uninterrupted for over 12 years. That the defendant started destroying his property in May 2017 with the aim of evicting him.

The plaintiff gave evidence and stated that the defendant became registered as the proprietor of the suit land on the 17<sup>th</sup> December, 2012 which prompted the plaintiff to place a restriction on the suit land on the 16<sup>th</sup> May, 2014 seeking to restrict any dealings without his knowledge and asserted a purchaser's interest therein. The plaintiff also stated that the agreements for sale were witnessed by the defendant who is a son to Salome Cheptalam Mutai the vendor.

The plaintiff called his three witnesses to confirm his claim being Daniel Kibungei Sanga who was a Village Elder at the time the plaintiff was acquiring various portions of the suit land, Sammy Kipkorir Bitok who was the plaintiff's Manager and was in some instances involved in the acquisition of the land on behalf of the plaintiff and finally Joshua Kimeli Sang who operated a Tea Nursery within the locality of the suit land and had been contracted by the plaintiff to plant the tea.

On cross examination by the defendant's Counsel the plaintiff stated that he is claiming 2.1 acres and not the whole parcel of land. He also stated that he had registered restriction on the suit land because the defendant wanted to take a loan with the land and that he would be the one to lose in case of default or non-payment. He also confirmed that he paid the purchase price in full to the vendor.

The plaintiff confirmed during cross examination that the vendor became ill and had asked him to wait until she recovers but later learnt in 2014 that she had transferred the land to the defendant. He also stated that when Salome the vendor was selling the land she had two sons who were living on the suit land and one of them moved out and he bought his share that had been given to him by the mother Salome Mutai. He further reiterated that the tea on the suit land belongs to him and not the defendant.

On reexamination by his Counsel, the plaintiff confirmed that he paid the purchase price in full and no one is claiming any money from him. When asked why he did not process the title deed to the suit land, the plaintiff stated that the defendant beseeched him to hold on as he was applying to be a Chief of the area and that the neighbours would object that he does not have any land. It was his evidence that he did not receive any notice for removal of the restriction from the Land Registrar. He further stated that the defendant is staying on the portion of the land that he did not purchase and that he is only claiming 2.1 acres which he is in occupation of.

### **PW 2's Evidence**

PW2 DANIEL KIBUNGEI SANGA gave evidence and stated that he is a retired village elder at Koimur village in Kipseibwo Sub Location, Nandi Hills Sub County having worked as such for over 20 years. He stated that he served as a Village Elder from 1996 until August 2016 when he retired. It was PW2's evidence that he knew the plaintiff in 1997 when he was staying at his brother's land in the said village and

that the plaintiff was a trainee Athlete in the village.

PW 2 confirmed that the plaintiff bought the suit land from the late Salome Cheptalam Mutai and that he was one of the witnesses in the sale agreements. He further stated that the plaintiff bought the land when it was fallow and later planted tea on it which he used to sell to KTDA factory and later to Eastern Produce Ltd. It was his evidence that the plaintiff has workers and a manager who live on the farm. He further stated that the late Salome who died in 2014 was buried on her portion of land which had not been sold.

On cross examination by Miss Biwot he reiterated his evidence and added that the late Salome did not transfer the land as the plaintiff was buying the land piecemeal and that the plaintiff was travelling out of the country often.

PW 3 gave evidence and stated that he was the Manager at the plaintiff's farm and knew how the suit land was acquired as he had worked there since 2000. He stated that he did the land transactions with the authority of the plaintiff who was in Netherlands and that his name appears on the sale agreements. He also stated that he left the employment of the plaintiff in 2013 before Salome died in 2014. He confirmed that the land belongs to the plaintiff and that he had taken possession of the suit land. It was further PW3's evidence that the defendant and the plaintiff stayed without any problems until the month of May, 2017 when defendant who is also the area Chief started to disrupt the activities of the plaintiff on the land by trying to evict him and picking his tea. He also stated that he assisted in the planting of tea on behalf of the plaintiff and took the same to collection points/ sheds in Kipsebwa and Nandi Tea Estates. He finally confirmed that the plaintiff also bought the share of the Salome Cheptalam Mutai's son called Jacob Tuwei (deceased) of 1.1 Acres.

PW 4 the plaintiff's final witness gave evidence and stated that he knew the plaintiff in 1997 and operated a Tea Nursery at Kipsebwo on his land. Which he had been operating since 1998. It was his evidence that the Plaintiff's Manager gave him work to assist clearing tree stumps on the suit land in 2001. He stated that he cleared, ploughed and planted tea for the plaintiff numbering a total of 3,200 seedlings. He continued to manage the tea with the assistance of the plaintiff's Manager and the workers for a period of five months. His contract came to an end. All along he had known the plaintiff as occupying the land and he had continued to plant more tea. The plaintiff therefore closed his case at this juncture.

### **Defendant's Case**

The Defendant gave evidence and stated that he is the Chief of Kipsebwo Location. He also testified that the suit land originally belonged to Salome Cheptalam Mutai who is his deceased mother. It was his evidence that the mother applied for Land Control Board consent and transferred the land to him which he produced as an exhibit before the court. He also stated that he got a title to the suit land which he produced as an exhibit together with a copy of official search which indicated that he was registered as owner from 17/12/2012. He also produced a certified extract of the register as evidence.

The defendant further stated that a restriction was placed on the land by the plaintiff on 16<sup>th</sup>. May, 2014 but the same was removed on the 23<sup>rd</sup>. May, 2017. He also stated that three letters were written seeking the removal of the restriction which he produced as exhibits before the court.

He stated that he is the one in occupation of the land since he was born in 1975 and has planted trees of which he produced photographs as exhibits. The defendant stated that his mother died on the 25<sup>th</sup>. May, 2014 and was buried on the suit land. It was the defendant's evidence that he knew the plaintiff who owns parcels of land in the area but denied that the plaintiff resides on the suit land.

On cross examination the defendant stated that the late mother subdivided the suit land and gave his brother and remained with parcel No. 225. He confirmed that he was not given land until 2012. He further confirmed that he was a witness in the first, third and fifth sale agreement between the plaintiff and the mother for the sale of land and that his late brother Jacob Tuwei was a witness in the agreement. The defendant also stated that the late mother did not take the plaintiff to the Land Control Board.

DW2 a Senior Manager at Nandi Tea Estate stated that he knows the defendant who is a registered tea supplier to the factory from 2013 from a one acre parcel of land. He also stated that the plaintiff had been supplying tea in 2012 but it became dormant and they destroyed records which they do after every 3 years.

On cross examination he confirmed that the plaintiff and the defendant appeared on their records on the same parcel of land and the same buying center. DW2 stated that for a person to be entered in the system, he must own or lease land with proof of title documents, a sale agreement or a statement. He further confirmed that proper procedures were followed to enter the plaintiff in the system as he was a registered farmer. He also stated that from the records the defendant had indicated that he had 2.5 acres but was later crossed and rectified to 1 acre after they sent a representative to the ground.

DW3 testified and stated that he left the suit land before his mother sold the suit land and that she was buried there. On cross examination he stated that he does not know anything about the suit land after 1992.

DW4 just confirmed that he knows both the plaintiff and the defendant and that the land originally belonged to the defendant's mother which is not in dispute. On cross examination he stated that he lives in Nairobi and occasionally goes to the village whereby his father's land is 50 meters from the suit land.

DW5 stated that he is a brother of the defendant testified that their mother subdivided the suit parcel of land and gave him parcel No. 226 and remained with parcel No. 225 in 1992. He also stated that the land was later transferred to the defendant in 2012 and that the defendant stays on the suit land. He further stated that he does not know whether the mother sold the land and that he knows the plaintiff who is his friend and has parcels of land around the area. He also stated that the plaintiff does not live on the suit land.

On cross examination he stated that he does not know why the defendant was not given land in 1997 when he was given his portion.

The defendant therefore closed his defence at that juncture.

### **Plaintiff's Submissions**

The plaintiff filed written submission and gave facts of the case and the evidence tendered by the witnesses. He relied on Section 28 of the Land Registration Act, 2012 which provides as follows:-

"unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register:

(a).....

(h) Rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription....."

It was his submission that the defendant acquired title over the suit land in the year 2014 while he was aware of the plaintiff's interests in the suit property. He submitted that the plaintiff's interest on the suit land are valid. He cited that case of Wasui —V- Musomba (2002) 1 KLR 396 where Ringera J. as he then was stated,

"Prescriptive rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof."

It was therefore his submission that the defendant could not have obtained a valid title when the plaintiff had prescriptive rights over the suit land. Counsel further relied on the case of Mwangi & Another —v — Mwangi, (1986) KLR 328, in which it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Further in the case of Public Trustee — v- Wanduru, (1984) KLR 314 at 321 it was stated that a purchaser in possession has an overriding interest under the provisions of the Registered Land Act.

Counsel further cited the case of Alfeen Mehdimohammed —Vs- Basil Feroz Mohamed & 223 Others (2016) eKLR which was an appeal from decision of the High Court of Kenya at Mombasa, the 224 respondents and their families had been sued by the appellant who sought their eviction claiming they had trespassed on the suit property. The respondents in their response pleaded adverse possession and the trial court found that the respondents and the trial court found that the respondents were indeed entitled to the land by virtue of adverse possession. The Court of Appeal agreed with the High Court in that regard. In dismissing the appellant's appeal with costs to the respondents, the Court of Appeal held as follows:-

"The acts done on the suit land by the respondents as enumerated above are adverse to the owner's title and it is immaterial that the appellant only acquired the suit land recently. His title when acquired was subject to the existence of an overriding interest in the form of adverse possession by the respondents. The occupation and use of the suit land by the respondents had animus possidendi; and was 'nec vi ne clam, nec precario for these reasons we find no substance in this appeal. It is dismissed with costs".

It was Counsel's submission that the plaintiff's evidence was credible and that the witnesses were consistent on the occupation and acquisition of the interest. Counsel submitted that the suit land is agricultural land and it was clear that every time the parties concluded an agreement never went to the Land Control Board rendering the transactions to be void under sections 6 and 8 of the Land Control Act, Cap. 302 of the Laws of Kenya. The plaintiff commenced to assert and acquire interests by dint of the tenet of adverse possession.

Counsel invited the court to be guided by the case of Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR where Honourable Justices Visram, Koome and Odek while allowing the claim for adverse possession held at paragraph 32 as follows:-

"32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of Public Trustee — v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run. By 1971, the appellant had not transferred the suit property to the respondent. In 1978 if any, permission or license to enter the suit property had been given by the appellant, the same was terminated by the letter dated 18<sup>th</sup> August, 1978 from Karuga Wandai & Co. Advocates. From 18<sup>th</sup> August, 1978, onwards, the continued occupation and possession of the suit property by the plaintiff was adverse to the appellant's title. Computing adversity from 18<sup>th</sup> August, 1978, we are satisfied that the plaintiff's claim for open and uninterrupted possession of the suit property for a period exceeding 12 years was proved to the required standard when the Origination Summons was filed on 7<sup>th</sup> February, 1991."

Mr. Kigamwa Counsel for the plaintiff also submitted that the plaintiff has been in quiet possession of the respective portions for over 12 years and based on section 38 of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya, by the time the defendant was taking steps towards ejecting him from the land he had already lost the same by dint of limitations of time.

The section provides,

"(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section

37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

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

It was further submitted by Counsel that it is clear from the evidence on record that the plaintiff has been in occupation of the suit land and a witness who planted the tea on the suit land confirmed the same. He also stated that the village elder confirmed that the plaintiff purchased various portions of land and took occupation with the defendant admitting that he was one of the witnesses during the sale.

On whether time has been interrupted by the act of the defendant interfering with the plaintiff's use in 2017, Counsel submitted that the plaintiff's claim is still meritorious as the defendant could only assert rights to the land or those of his deceased mother as an administrator by bringing a suit for the ejectment of the plaintiff or to restrain his use of the land. That the defendant has not brought any counter-claim against the plaintiff for his ejectment or to restrain his use of the land. The Court of Appeal has settled the issue in the case of Joseph Gachumi Kiritu v Lawrence Munyambu Kabura, Civil Appeal No. 20 of 1993, (unreported) in which it was observed,

"The passage from Cheshire's Modern Law of Real Property to which Potter JA made reference in Githu v Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says-

"Time which has begun to run under the Act is stopped, either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land. "

I agree that the mere filing of a suit or recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes! in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. And on this particular point I will go with Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which is yet to be redressed. "

Counsel finally submitted that the plaintiff has established his claim on a balance of probabilities and urged that the court to enter judgment as prayed in his favour.

### **Defendant's Submissions**

The defendant also gave brief facts of the case and what is contained in his response to the originating Summons. It was the defendant's submission that there was no agreement of sale of land between the Plaintiff and the late Salome Mutai and all the agreements produced as exhibits are forgeries.

Counsel submitted that the question before the court is when time started running for purposes of a claim of adverse possession. Further that it was the defendant's case that the plaintiff never took possession of the suit land either in part or whole. It was the defendant's submission that he had proved that he had been utilizing the suit land through the production of a bundle of documents and the evidence of DW 2 who is a Manger of Nandi Tea estate.

Counsel submitted that the Plaintiff has to prove that he has used the land which he claims as of right nec Vic, nec clam, nec precario and must show that the Defendant had knowledge of the possession or occupation which must be continuous and uninterrupted for a period of 12 years. It was Counsel's submission that the issue of possession by the Plaintiff is not clear as he has not proved the same by any tangible evidence.

Counsel cited the case of James Mwangi & another =vs= Mukinye Enterprises Limited I-ICC No. 3912 of 1986, quoted in Titus Kigoro Munyi =vs= Peter Mburu Kirmani Nyeri Court of Appeal Civil Appeal No. 28 of 2014, where it was stated that a person relying on adverse possession must show clear possession, lack of consent on the part of the owner and uninterrupted occupation for more than 12 years. That the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use.

Miss Biwot Counsel for the defendant also relied on the case of Wilson Kazungu Katana and 101 others =vs= Salim Bakshwei and another Malindi CA No. 11 of 2014, where it was held that the Applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, and adverse to the title of the owner, adequate, continuous and exclusive. It was further Counsel's submission that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent and cited the case of Francis Gitonga Macharia =vs= Muiruri Waitthaka — Civil Appeal No. 110 of 1997, quoted in Titus Kigoro Munyi =vs= Peter Mburu Kirmani Nyeri Court of Appeal Civil Appeal No. 28 of 2014.

Miss Biwot for the defendant further submitted that where a claim for adverse possession is on part of the suit land, it behooves the Plaintiff to identify the specific portion he was in adverse possession of. Counsel cited the case of Joseph Macharia vs= Jonah Kabiru Nyeri Court of Appeal Civil Appeal No. 141 of 2009, which held that where there is no evidence on the particular portion, where there is adverse possession, the claim must fall. Counsel therefore urged the court to dismiss the plaintiff's claim with costs.

### **Analysis and Determination**

The law on adverse possession is well settled and the ingredients that the claimant must prove in order to benefit from this doctrine. Adverse possession is a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a period of twelve (12) years.

Section 7 of the Limitation of Actions Act, provides that :-

***“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.”***

Section 13 further provides 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 afresh 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.”***

The issues for determination in this case are first is whether there was a valid sale agreement between the plaintiff and the late Salome the defendant's deceased mother; second whether the purchase price was paid in full, third whether the transaction between the parties required the consent of the Land Control Board, fourth when time started running for the claim of adverse possession and finally whether the plaintiff has proved adverse possession. I have condensed the issues for determination from the originating summons which is basically whether the claim of adverse possession has been proved by the plaintiff.

On the first issue whether there was a valid sale agreement between the plaintiff and Salome Cheptalam Mutai the deceased mother of the defendant, I am of the view that the plaintiff and his witnesses led evidence to prove that they entered into a sale agreement with one Salome. The witnesses to the agreement gave evidence including the defendant who admitted that he was a witness to the first, third and fifth agreements for sale and that his late brother Jacob Tuwei was also a witness to the agreement. If he was a witness to the agreement when the mother was selling the suit land then he cannot be heard to say that the agreements were forgeries and he does not recognize them. Does it mean that he was also involved in forgery in the transaction against the mother?

The defendant did not plead fraud or lead any evidence to prove that the agreements were fraudulent. It was incumbent upon a person who alleges fraud to specifically plead the particulars of fraud and go a step further to prove it. Fraud is a criminal offence and the defendant knows the steps and the agencies to be involved to investigate a fraudulent transaction. I find that the plaintiff entered into a valid agreement for sale of the suit land with one Salome Mutai hence this is an afterthought by the defendant to deny the plaintiff his land.

On the second issue as to whether the plaintiff paid the purchase price in full, the plaintiff during cross examination confirmed that he paid the purchase price in full and he did not owe any money even though he did not have any document to prove that he had paid in full. If he had not paid the purchase price in full the seller or the defendant could have filed a claim demanding the balance of the purchase price. The defendant was not the seller of the suit land but a witness to the sale. The plaintiff testified that he later bought the portions which had been given to the defendants' brothers. If he had not paid the purchase price in full, would the brother to the defendant have sold to him his portion? From the evidence on record I find that the allegation that the plaintiff did not pay the purchase price in full is not founded.

On the third issue as to whether the transaction required Land Control Board consent, the answer is yes because it is agricultural land which is governed by the provisions of the Land Control Act. Section 6 (1) further provides that such a transaction:

***“is void for all purposes unless the Land Control Board for the land control board area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.”***

Section 6 (2) of the Land Control Act provides:

***“For avoidance of doubt, it is declared that the declaration of trust of agricultural land situated within a Land Control Board area is a dealing in land for purposes of subsection (1)”.***

I will rely on the case of Llyods Bank Plc – vs- Rosset, (1991) 1 AC 107,132, which held that a constructive trust is based on “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the

claimant. In the instant case, there was a common intention between the appellants and the respondent in relation to the suit property. Nothing in the **Land Control Act** prevents the claimants from relying upon the doctrine of constructive trust created by the facts of the case'

The plaintiff entered into sale agreement with the seller and took occupation of the suit land. There was a common intention of the parties to the agreement in respect of the suit land which was sold to the plaintiff. What was the intention of the parties when entering into the agreement for sale? The plaintiff had a desire to buy and take possession of the land and the seller had the intention of selling the land for a consideration which was paid in full. Was the seller's intention to sell the land and keep both the money and the land later to transfer to her son the defendant? That would not be feasible in this case.

The Court of Appeal sitting in Eldoret Willy Kimutai Kitilit v Michael Kibet [2018] eKLR, Githinji, Okwengu & Mohammed JJ.A observed that

*'There is another stronger reason for applying the doctrines of constructive trust and proprietary estoppel to the Land Control Act. By Article 10(2) (b) of the Constitution of Kenya, equity is one of the national values (emphasis supplied) which binds the courts in interpreting any law (Article 10(1) (b)). Further, by Article 159(2) (e), the courts in exercising judicial authority are required to protect and promote the purpose and principles of the Constitution. Moreover, as stated before, by virtue of clause 7 of the Transitional and Consequential Provisions in the Sixth Schedule to the Constitution, the Land Control Act should be construed with the alterations, adaptations, and exceptions necessary to bring it into conformity with the Constitution.'*

The court therefore held that the lack of the consent of Land Control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust. I am also of the same view of giving effect to equitable principles.

It is not in dispute that the plaintiff purchased land measuring 2.1 acres from one Salome Mutai and that he paid the purchase price in full. The evidence on record indicates that the plaintiff bought the parcels piecemeal from the year 2000 to 2005. The plaintiff took possession in 2000 whereby he demarcated, fenced and planted tea which was confirmed by DW2 Nandi Tea Estate Manager that the plaintiff was registered as a farmer and supplier of tea with them but his account was dormant. The plaintiff's witness also confirmed that he is the one who planted tea for the plaintiff which he used to supply to KTDA, Eastern Produce Ltd and Nandi Tea Estate.

The plaintiff gave evidence that the seller did not transfer the land to him as she was unwell but later discovered that she transferred the land to the defendant in 2012. The seller had been registered as an owner on 14/5/97. It should be noted that by the time the seller transferred the land to the defendant the seller held the land in constructive trust to the plaintiff.

The fourth issue of time running, the moment the plaintiff paid the purchase price and took occupation of the suit land, time started running against the seller. Even if we base it from 2000 to 2012 when the land was transferred the period was already 12 years. If we base the time from 2005 when the plaintiff bought the last portion of land to 2017 when he moved to court, the period would still be 12 years. The seller could not validly transfer the land to the defendant as her interest in the land had already been extinguished either by virtue of adverse possession or by constructive trust. The issue of identification of the land being claimed is clear as the plaintiff stated that he is claiming 2.1 acres of land which he bought and took possession of. This is distinctive and can be ascertained.

Lastly the on the issue whether the plaintiff has proved adverse possession, from the evidence on record, it is clear that the plaintiff bought the land and has been in open, quiet uninterrupted possession and without the consent of the defendant of the suit land until 2017 when the defendant tried to eject him. This was after more than 12 years.

I have considered the pleadings, evidence adduced by the parties and their witnesses, together with the exhibits produced and I have come to the conclusion that the plaintiff has proved his claim for adverse possession and enter judgment accordingly in his favour. Cost to be paid by the defendant.

**Dated, delivered and signed at Eldoret this 6<sup>th</sup> day of September, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mr. Mathai holding brief for Mr. Kigamwa for Plaintiff and Miss Biwot for the defendant.

Mr. Koech: Court Assistant.