



Ogolla & another v Oguma & 4 others (Environment & Land Case 49 of 2021 & 23 of 2017 (Consolidated)) [2024] KEELC 16 (KLR) (18 January 2024) (Judgment)

Neutral citation: [2024] KEELC 16 (KLR)

FORMERLY ELC SUIT NO. 268 OF 2016 AND CMC ELC NO. 134 OF 2018

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND CASE 49 OF 2021 & 23 OF 2017 (CONSOLIDATED)

SO OKONG'O, J

JANUARY 18, 2024

BETWEEN

ALEX OMONDI OGOLLA 1ST PLAINTIFF

JOANES ONDEGO OYWECH 2ND PLAINTIFF

AND

OTUNGA OGUMA 1ST DEFENDANT

JOANES ONDEGO OYWECH 2ND DEFENDANT

PETER OMITO OYWECH 3RD DEFENDANT

PAMELA ONYANGO OYWECH 4TH DEFENDANT

ALEX OMONDI OGOLLA 5TH DEFENDANT

JUDGMENT

The Pleadings

ELC Suit No. 49 Of 2021

1. The Plaintiff in this suit brought the suit on 11th October 2016 by way of a plaint dated 10th October 2016. The suit was transferred to the lower court in 2018 where it was given case reference CMC ELC No. 134 Of 2018. The suit was transferred back to this court in 2021 and given its current case reference ELC Suit No. 49 Of 2021. The suit was at the time of the transfer consolidated with ELC SUIT No. 23 Of 2017(o.s). The Plaintiff amended the plaint on 18th October 2016. In his amended plaint, the Plaintiff averred that he was at all material times the absolute registered owner of land parcel Title No. Kisumu/Kanyawegi/4646(hereinafter referred to as “the suit property” while the 1st Defendant was the registered owner of the parcel of land known as Title No. Kisumu/Kanyawegi/4612(hereinafter



referred to only as “Plot No. 4612”). The Plaintiff averred that the 1st, 2nd, and 3rd Defendants were the sons of the 4th Defendant. The Plaintiff averred that on or about 20th January 2016, the Defendants unlawfully entered the suit property and constructed houses thereon. The Plaintiff averred that despite demand and notice of intention to sue, the Defendants had refused to hand over vacant possession of the suit property to the Plaintiff. The Plaintiff sought judgment against the Defendants jointly and severally for:

1. A permanent injunction restraining the Defendants from encroaching, trespassing, transferring, alienating, or interfering with the suit property.
 2. An order of eviction of the Defendants from the suit property with the assistance of the O.C.S Maseno Police Station.
 3. The costs of the suit.
2. The 1st, 3rd, and 4th Defendants (the Defendants) filed a joint statement of defence on 30th July 2019. The 1st, 3rd, and 4th Defendants admitted that the Plaintiff was the registered owner of the suit property while the 1st Defendant was the registered owner of Plot No. 4612 having inherited the same from his deceased father Noah Oguma Ondego. The 1st, 3rd, and 4th Defendants denied that they unlawfully entered the suit property on or about 20th January 2016 and put up houses thereon. The 1st, 3rd, and 4th Defendants averred that they had been residing on Plot No. 4612 since 1957 before land adjudication in the area and that they had never encroached on the suit property owned by the Plaintiff. The 1st, 3rd, and 4th Defendants averred that the 3rd and 4th Defendants resided on land parcel Title No. Kisumu/Kanyawegi/ 4645(Plot No. 4645) and not on the suit property as claimed by the Plaintiff. The 1st, 3rd, and 4th Defendants averred that they had been residing on Plot No. 4612 and Plot No. 4645 even during the lifetime of the Plaintiff’s deceased father, Joel Ogola without any complaints or interruption. The 1st, 3rd, and 4th Defendants averred that the Plaintiff’s suit was an abuse of the court process and an afterthought meant to frustrate the 1st, 3rd, and 4th Defendants who had been residing peacefully in their respective parcels of land. The 1st, 3rd, and 4th Defendants urged the court to dismiss the Plaintiff’s suit with costs.
3. The 2nd Defendant filed a statement of defence on 7th November 2016. The 2nd Defendant denied that the Plaintiff was the absolute registered owner of the suit property. The 2nd Defendant averred that he purchased the suit property from the Plaintiff’s deceased father who was the initial registered owner thereof. The 2nd Defendant denied that he was a trespasser on the suit property. The 2nd Defendant averred that he had lived on the suit property since he was born. The 2nd Defendant prayed that the Plaintiff’s suit against him be dismissed with costs.

ELC Suit No. 23 Of 2017(O.S)

4. This suit was brought by Joanes Ondego Oywech who is the 2nd Defendant in ELC SUIT No. 49 Of 2021 against Alex Omondi Ogolla, the Plaintiff in the said suit. The suit was brought by way of Originating Summons dated 28th August 2017. The Plaintiff in this suit who claimed to have acquired all that parcel of land known as Kisumu/Kanyawegi/4646(the suit property) by adverse possession sought the determination of the following issues;
1. Whether the Plaintiff purchased the suit property from one, Joel Ogolla Olum, deceased (hereinafter referred to only as “the deceased”) in 1988.
 2. Whether the deceased in respect of whose estate the Defendant is the administrator died long after the Plaintiff had lived on and built his home on a portion of the suit property.



3. Whether the deceased was the registered owner of the suit property.
 4. Whether the Plaintiff had continuously, openly, and without any interruption occupied the said portion of the suit property for 29 years.
 5. Whether the Plaintiff had acquired an overriding interest under Section 28(h) of the [Land Registration Act](#), 2012 on the whole of the suit property.
 6. Whether the Plaintiff had acquired the suit property by adverse possession.
 7. Whether the court should order that the whole of the suit property be registered in the name of the Plaintiff.
 8. Whether the Plaintiff was entitled to the costs of the suit.
5. The Originating Summons that was supported by the affidavit of the Plaintiff sworn on 22nd August 2017 was brought on several grounds. The Plaintiff averred that he purchased the suit property from the deceased Joel Ogolla Olum (the deceased) in 1988 and that he had since then lived on the whole of the suit property peacefully without any interruption. The Plaintiff averred that he had his homestead on the suit property and a family graveyard where he had buried several family members. The Plaintiff averred that the Defendant who had become the registered owner of the suit property after inheriting the same from the deceased was threatening to evict him from the suit property. The Plaintiff averred that he had lived on and raised his family on the whole of the suit property for the last 29 years. The Plaintiff averred that he was apprehensive that the Defendant may evict him so as to defeat the cause of justice.
 6. The application was opposed by the Defendant through a replying affidavit filed on 27th September 2017. The Defendant averred that he was the registered owner of the suit property and that the Plaintiff without any reasonable cause entered the property and put up structures thereon without any regard to the rights of the Defendant. The Defendant averred that the Plaintiff had interfered with his use and possession of the suit property as well as an access road that runs along the border of the suit property and Plot No. 4612. The Defendant averred that the Plaintiff had trespassed on and taken possession of the suit property and had also blocked the said access road and had threatened the Defendant with violence should he step on the suit property or use the said access road. The Defendant averred that he lawfully acquired the suit property from his deceased father Joel Ogolla Olum after undertaking the process of succession in respect of his estate. The Defendant averred that the Plaintiff was occupying Plot No. 4612 and that he had unlawfully caused his relatives, brother and workers to occupy the suit property. The Defendant averred that the Plaintiff's attempt to revoke the Grant of Letters of Administration that had been issued to the Defendant in respect of the estate of the deceased was dismissed by the court on 26th June 2017.

The evidence and submissions

7. The consolidated cases were heard together. ELC Suit No. 49 of 2021 was treated as the main claim and ELC Suit No. 23 OF 2017(O.S) as the counter-claim. The first to give evidence was the Plaintiff in ELC No. 49 of 2021, Alex Omondi Ogolla (hereinafter referred to only as either "the Plaintiff" or "PW1"). PW1 adopted his witness statement dated 23rd September 2016 as part of his evidence in chief. He produced the documents attached to his list and supplementary list of documents dated 10th October 2016 and 14th February 2017 respectively as Plaintiff's exhibits 1 to 16. He stated that the Defendants started to encroach on the suit property in 2016. He stated that the 2nd Defendant closed the access road in January 2016. He stated that the 2nd Defendant had two wives and both lived on Plot



No. 4612. He stated that after the 2nd Defendant blocked the access road, he took a third wife whom he settled on the suit property. He stated that this took place in early 2016. He stated that a survey was conducted and a report made dated 26th February 2016 which showed the encroachment. He stated that his mother died in 1993 while his father died in 2006. He stated that his grandparents were buried on the suit property. He stated that after the survey, he reported the matter to the Chief who directed them to go to the Lands Office. At the Lands Office, they were directed to go to court and that was when he decided to file the present suit. He urged the court to grant the reliefs sought in his plaint. Concerning the 2nd Defendant's Originating Summons (the counter-claim), PW1 stated that they had had several issues with the 2nd Defendant. He stated that the 2nd Defendant attacked them on the suit property and they reported the incident to the Police. He stated that the 2nd Defendant and members of his family were charged and tried. He stated that he made several reports to the Police and that there was a criminal case that was still pending in court. He produced further documents which were marked as Plaintiff's exhibits 17 to 74.

8. On cross-examination, PW1 stated that he was the son of Joel Ogolla Olum who died on 7th December 2006. He stated that the homestead of his grandparents was on the suit property. He stated that his grandmother died in 1988 while his grandfather died much earlier. He stated that their homestead was on the suit property. He stated that the 1st Defendant was not residing on the suit property. He stated that the 2nd Defendant was occupying Plot No. 4612 and the suit property while the 3rd Defendant was occupying the suit property. He stated that the 4th Defendant was the wife of the 2nd Defendant's brother and that he did not know where she was staying. He stated that a house had been constructed for her on the suit property. He stated that the surveyor who surveyed the land at his request referred to another homestead that had encroached on the suit property. He stated that the homestead belonged to the 2nd Defendant's cousin Were Auko who was not a party to the suit. He stated that he was born on 1st July 1975 and was 13 years old in 1988. He stated that he had nothing to say about the letter dated 24th July 1988 that touched on the alleged sale of the suit property by his father to the 2nd Defendant. He stated that the Defendants' encroachment on the suit property started in 2016. He stated that the 2nd Defendant's first wife and son were buried in Plot No. 4612. He stated that the 2nd Defendant has built the homestead of his third wife on the suit property.
9. The Plaintiff's next witness was Gideon Opiyo Ogolla (PW2). PW2 told the court that the Plaintiff and the Defendants were known to him. He stated that the Plaintiff was his brother while the Defendants were their neighbours. He adopted his witness statement filed together with the plaint on 11th October 2016 as his evidence in chief. He stated that the suit property belonged to the Plaintiff. He stated that the Plaintiff was holding the property in trust for the beneficiaries of the estate of their deceased father, Alex Ogolla. He stated that while their father was alive, they had no dispute with the Defendants. He stated that the 2nd Defendant closed an access road in 2016 and thereafter occupied the suit property. He stated that after the 2nd Defendant closed the access road, he constructed a house for his brother Peter Omito Oywech (the 3rd Defendant) on the suit property. He stated that the 2nd Defendant was occupying Plot No. 4645 which was adjacent to Plot No. 4612. He stated that the Plaintiff reported the encroachment to the Police and the Defendants were arrested and charged at Maseno Law Court. The Plaintiff closed his case with the evidence of the two witnesses.
10. The 2nd Defendant in ELC No. 49 of 2021 who is also the Plaintiff in ELC No. 23 of 2017(O.S), Joanness Ondego Oywech (hereinafter referred to only as either "the 2nd Defendant" or "DW1") was the first to give evidence for the Defendants. The 2nd Defendant told the court that he had two wives but one passed away. He stated that his deceased wife was buried on the suit property. He stated that he was born in 1959 and found his father Silas Oywech living on the suit property. His father died in 1974 and left him living on the suit property on which he put up his homestead. The Plaintiff was the son



of Joel Ogolla Olum, deceased. He was his neighbor. The Plaintiff's father had several parcels of land. On 24th July 1988, he entered into an agreement with the Plaintiff's father for the purchase of the suit property. At the time, the Plaintiff's father needed money. The suit property was under adjudication. The Plaintiff's father wrote a letter of the same date to the District Land Adjudication Officer regarding the sale. The land that he purchased from the Plaintiff's father was ultimately registered as Title No. Kisumu/Kanyawegi/4646(the suit property) on 17th February 2005. He produced copies of the letter dated 24th July 1988 that the Plaintiff's deceased father wrote to the District Land Adjudication Officer, the extract of the register of the suit property and photographs of his homestead on the suit property as Defence exhibits 1, 2 and 3 respectively.

11. The 2nd Defendant stated that apart from his first wife whom he buried on his homestead on the suit property, he also buried his son on the same homestead. He stated that Plot No. 4645 was owned by his father Maurice Obunga Otiende who died on 9th August 1992. He stated that he did succession and had the property transferred to his name. He produced documents as proof of that fact. He also produced an adjudication record for the area and pointed out that there was no road passing between the suit property and Plot No. 4645. He stated that what existed between the two parcels of land was a boundary. He stated that the road existed between the suit property and Plot No. 4612. He stated that he built his homestead between the suit property and Plot No. 4645. He stated that when he purchased the suit property from the Plaintiff's father, there was no road passing through it. He stated that the Plaintiff's father died in 1996 before transferring to him the suit property. He stated that he had openly occupied the suit property since 1986. He stated that after the filing of this suit, he engaged a surveyor by the name of Mr. Opiyo to survey the suit property and prepare a report. He stated that the surveyor prepared two reports dated 16th August 2019 and 26th August 2019 that were filed in court. He stated that the District Land Surveyor and the Land Registrar also visited the suit property and prepared their report dated 17th September 2019. He stated that Plot No. 4645 and the suit property were supposed to be consolidated to become one parcel of land. He stated that he only learnt that that was not done after the death of the Plaintiff's father when the Plaintiff and his siblings claimed that he was occupying their land. He reiterated that on the ground, there was no road between the suit property and Plot No. 4645. He stated that there was a problem with the Registry Index Map(RIM) which indicated that there was a road between the two parcels of land. He stated that there was no dispute over the suit property during the lifetime of the Plaintiff's father. He urged the court to dismiss the Plaintiff's case and to allow his Originating Summons.
12. On cross-examination, the 2nd Defendant stated that the 3rd Defendant was his brother while the 4th Defendant was his sister-in-law. He stated that he was the firstborn child in their family. He stated that the 3rd and 4th Defendants were staying on the suit property. He stated that the 1st Defendant was his cousin and he was also staying on the suit property. He stated that he was staying on the suit property. He denied that he was staying on a different parcel of land. He stated that the homestead of the 1st Defendant was about 1 Kilometer from his homestead. He denied that he had blocked an access road. He stated that the 3rd Defendant's home was within his homestead. He stated that he was the one who settled the 3rd and 4th Defendants on the suit property. He stated that Plot No. 4645 had been subdivided into four portions and that he had remained with Parcel No. 10297 where he lived with the 3rd Defendant. He stated that Plot No. 4612 was owned by the 1st Defendant. He stated that his father Silas Oywech Ondego died in 1974 and that Moris Obunga Ondego who owned Plot No. 4645 was a relative of his father. He stated that it was Moris Obunga who gave him Plot No. 4645. He stated that the Plaintiff and his brothers had their homes on the suit property. He stated that the mother and father of the Plaintiff were buried on the suit property. He stated that he attended their funerals and did not object to their burial on the property.



13. On re-examination, the 2nd Defendant stated that the suit property and Plot No. 4645 were adjacent to each other and that there was an access road between them. He stated that when he was putting up his homestead which he did in 1986, he moved the road and put up the homestead on the suit property and Plot No. 4645. He stated that his wife died in 2001 while his son died in 2015. He denied that he moved to the suit property in 2017.
14. On examination by the court, the 2nd Defendant stated that he initially had a house on his father's homestead on Plot No. 4612. He stated that he then moved to Plot No. 4645 in 1986 where he put up his homestead. He stated that while putting up his homestead on Plot No. 4645, one portion of his homestead extended to the suit property. He stated that he could not remember whether he entered into the agreement dated 24th July 1988 with the Plaintiff's father before or after he had put up his homestead. He stated that when the Plaintiff's father sold him the suit property, the Plaintiff's father was staying on the land with his family and that he sold to him the whole land. He stated that he did not know where the Plaintiff's father was going to move to. He stated that even after the Plaintiff's father sold him the land, he did not move out of the suit property. He remained in occupation with his family and he did not have any issue with him. He stated that his homestead covers only a portion of the suit property. He stated that the rest of the suit property was being used by the Plaintiff and his brothers. He stated that he was occupying a portion of the suit property measuring about 2 acres. He stated that part of this 2 acres is within his homestead while the rest is outside and is used for farming. He stated that he closed the road between the suit property and Plot No. 4645 in 2014. He stated that Plot No. 4645 had since been subdivided and was no longer in existence. He stated that the subdivision was done by him in 2015. He stated that he sold portions of Plot No. 4645 after the subdivision and was remaining only with one portion. He stated that he could not recall the portion of the suit property that he remained with.
15. The Defendants' second witness was Patrick Opiyo Adero(PW2). DW2 told the court that he was a land surveyor and that he was instructed to establish the boundary between Plot No. 4645 and the suit property. Following that instruction, he prepared two reports. His first report was dated 16th August 2019. In that report, he only focused on the boundary of Plot No. 4645 and Plot No. 4646(the suit property). He stated that because this was an adjudication area, he relied on physical boundaries. He went to the ground and was shown by the 2nd Defendant what he believed was Plot No. 4645. He picked the boundaries shown by the 2nd Defendant and reduced them into a drawing. The drawing was attached to his first report. He stated that the boundaries that he was shown and which he drew were not what was in the Registry Index Map (RIM) for the area. He stated that there was a mismatch in the boundaries of Plot No. 4645 as drawn by him and as it appeared in the RIM. He stated that there was a live hedge marked A-B in his drawing which was believed to be the boundary between Plot No. 4645 and the suit property. He stated that since his drawing of the boundaries between the two parcels of land did not match with the RIM, he sought for the adjudication sketch map because the information on the RIM is supposed to come from the adjudication sketch map. He stated that in the adjudication sketch map, there was a road passing through Plot No. 4645 while the suit property was on the lower part of Plot No. 4645. He stated that the 2nd Defendant's family had occupied the areas marked A, B, C and D in his drawing for a very long time. He stated that during the adjudication process, the boundaries between the suit property and Plot No. 4645 were what he had marked as A, B, C, and D a fact which according to him was confirmed by the adjudication sketch map. He stated that when the Registry Index Map (RIM) was prepared, the line A-B in his drawing was forgotten. He stated that this led to the owner of portions A, B, E and F to claim the parcel of land marked D, C, B and A although he had over the years occupied only the portion of land marked A, B, E and F. He stated that the portions marked A, B, C and D should have been part of Plot No. 4645. He stated that the boundaries of the two parcels of land on the ground were confirmed by the area residents. He reiterated that line A-B was



- a live hedge that had been in existence for several years. He stated that he made a recommendation in his report. He stated that following his recommendation, the Land Registrar called for a meeting on the ground that was held on 26th August 2019. He stated that the meeting was chaired by the County Surveyor. He stated that the County Surveyor, Mr. Mbok prepared a report that was forwarded to the court under a cover letter dated 17th September 2019. He stated that he also prepared a second report. DW2 produced his two reports as Defence Exhibits 8 and 9 and the RIM as Defence Exhibit 10. He stated that the road that he had mentioned split Plot No. 4645 into two and that the same had always been in existence even during the adjudication period. He stated that the 2nd Defendant had created an alternative road.
16. On cross-examination, DW2 stated that the RIM had not been amended to reflect what he had determined to be the boundaries of the suit property and Plot No. 4645. On examination by the court on his sketch map, DW2 stated that according to the said sketch map, the areas marked D, C, B, E, F, A and D constituted the suit property. He stated that on the ground, the areas marked A, B, C and D were occupied by the 2nd Defendant and the areas marked A, B, E and F were occupied by the Plaintiff.
 17. The 3rd Defendant, Peter Omito Oywech (hereinafter referred to only as either “the 3rd Defendant” or “DW3”) was the next to give evidence. He adopted his witness statement filed on 30th July 2017 together with their joint defence as his evidence in chief. DW3 denied that he had trespassed on the Plaintiff’s land. He stated that he was born on the parcel of land claimed by the Plaintiff. He stated that the Plaintiff was his age mate and cousin. He stated that the Plaintiff was the son of his paternal uncle. He stated that the 2nd Defendant was his brother while the 4th Defendant was his sister-in-law. He stated that the other Defendants were members of his family and that they were all occupying the disputed land. He stated that his parents were buried on the disputed land. He stated that their occupation of the land had never been resisted. He stated that he was born on the suit property and was 47 years old. He stated that the land claimed by the Plaintiff should be registered in the name of the 2nd Defendant to hold in trust for them.
 18. The next witness for the Defendants was Margaret Oloo Alois (DW4). DW4 stated that the Plaintiff and the Defendants were her neighbours in Osiri. She stated that she knew the homes of the Defendants. She stated that the said homes had been in place since 1970. She stated that the Defendants’ parents were deceased and that they were buried on the land where the 2nd Defendant had his homestead. She adopted her witness statement filed in ELC No. 23 of 2017(O.S) on 24th March 2021 as her further evidence in chief. On cross-examination, DW4 stated that she knew the Plaintiff’s father and that he was not staying on the disputed property.
 19. The Defendants’ next witness was Andrew Ogol Owino (DW5). DW5 adopted his witness statement filed in ELC No. 23 of 2017(O.S) on 24th March 2021 as his evidence in chief. On cross-examination, DW5 stated that when he was born, he found the Defendants’ parents occupying the suit property. He stated that the Plaintiff’s parents were not buried on the suit property. He stated that it was the Plaintiff’s grandparents who built a homestead on the disputed land around 1954. On examination by the court, DW5 stated that he was born in 1940. He stated that the Plaintiff’s family and the Defendants’ family have lived within the boundaries of their respective parcels of land peacefully over the years until recently when the Plaintiff’s family started claiming land that belongs to the Defendants’ family.
 20. The Defendant’s next witness was Grace Oyoo Okumu (DW6). DW6 adopted her witness statement that was filed in ELC No. 23 of 2017(O.S) on 24th March 2021 as her evidence in chief. On cross-examination, DW6 stated that when she was married in Osiri area in 1957, she found the father of the 2nd Defendant occupying the land in dispute. She stated that the Plaintiff’s father also lived nearby. She



stated that the 2nd Defendant put up his homestead next to his father's home and that was where he buried his father, wife, and son. DW6 stated that the Plaintiff's father sold land to the 2nd Defendant to raise the Plaintiff's school fees. She stated that the parties had no dispute over land when the Plaintiff's father and grandmother were still alive. He stated that the Plaintiff's father was present when the 2nd Defendant was putting up his homestead on the disputed land. The Plaintiff's father did not oppose the construction of the homestead. DW6 stated that the Plaintiff's grandmother was also present. DW6 stated that while putting up his homestead, the 2nd Defendant moved a short distance from his father's homestead.

21. The Defendants recalled DW2 to give further evidence. In his evidence in chief on recall, DW2 stated that when he visited the disputed properties, he took measurements. He stated that he had produced Google images of the disputed properties which were part of the documents in the Defendants' further list of documents filed on 13th February 2023. He stated that he had marked the properties in various colours. He stated that the parcel of land marked in colour blue on the first map was the suit property and was occupied by the Plaintiff. He stated that that portion of the suit property measures 0.89 hectares. He stated that there was a physical boundary in the form of a fence put up by the Plaintiff. He stated the parcel of land coloured in blue on the first map is the portion of the suit property which is occupied by the Plaintiff on the ground which may differ from what is in the RIM.
22. DW2 stated that the parcel of land marked in colour green is Plot No. 4645 and the same is occupied by the 2nd Defendant. He stated that the upper portion of Plot No. 4645 was measuring 1.31 hectares and the same was being used by the 2nd Defendant. He stated that the small square plot on the upper part of Plot No. 4645 was the homestead of the 3rd Defendant who was a brother to the 2nd Defendant. He stated that the homestead was within 1.31 hectares of land used by the 2nd Defendant. He stated that the parcel of land marked with a faint red colour was the homestead of the 2nd Defendant which he was told was established in 1984. The said homestead measured 0.27 hectares. He stated that there was a road passing through the homestead splitting it into two. He stated that the road was no longer in existence on the ground as it had been closed and moved by the 2nd Defendant to another location within Plot No. 4645. He stated that the second map was an improvement of the first map. He stated that the parcel of land on the lower part of the second map is part of Plot No. 4645. He stated that Plot No. 4645 measured 2.33 hectares in total according to ground measurement. He stated that on this map the suit property, Plot No. 4646 remained the same and that is how it was on the ground. He stated that the parcel of land marked in light blue colour at the top left corner was not part of Plot No. 4645 although it also belonged to the 2nd Defendant. He stated that the third map showed an amalgamation of the suit property and Plot No. 4645. He stated that the white colour shows the boundaries of the two parcels of land. He stated that Plot No. 4645 had been subdivided. He stated that RIM is not an authority on boundaries. He stated that the way the RIM was drawn as concerns these two parcels of land was erroneous. He stated that the only way of resolving the dispute between the parties was for them to accept the boundaries as they were on the ground. He stated that that was how the parties had lived over the years. He stated that even the Land Registrar visited the ground and upheld the boundaries as they were on the ground. He stated that it was the RIM that was causing the problem. He stated that the Director of Surveys should amend the RIM to reflect the situation on the ground.
23. On cross-examination, DW2 stated that he prepared the Google Maps in January 2023 after his first testimony. He stated that what he captured in the Google Maps were the measurements of the land occupied by various parties on the ground. He stated that the other Defendants were under the 2nd Defendant and that was why he did not mention them. He stated that he was aware that title deeds had been issued on the strength of the RIM that he considered erroneous and that the same are authoritative



on the contents thereof. He stated that Plot No. 4645 was no longer in existence. He stated that the subdivision of Plot No. 4645 gave rise to among others Plot No. 10096 and Plot No. 10296. He stated that the 2nd Defendant's home was on Plot No. 10296. He stated that he did not measure that plot as well as Plot No. 10096.

The Plaintiff's submissions

24. After the close of evidence, the parties made closing submissions in writing. The Plaintiff filed submissions dated 22nd June 2023 while the Defendants filed submissions dated 28th July 2023.
25. The Plaintiff submitted that the Defendants encroached on the suit property immediately after the death of the Plaintiff's father. The Plaintiff submitted that after doing succession in respect of the estate of his deceased father, the suit property was registered in his name to hold in trust for himself and his brothers. The Plaintiff submitted that he produced in evidence a report by a Government Surveyor dated 26th February 2016 which showed the extent of the Defendants' encroachment on the suit property. The Plaintiff submitted that in his evidence, the 2nd Defendant admitted that his homestead had encroached on the suit property. The Plaintiff submitted that the 1st Defendant admitted that he was the registered owner of Plot No. 4612 and that the property was adjacent to the suit property. The Plaintiff submitted that the 3rd Defendant admitted that he was occupying the suit property but claimed that the land he was occupying belonged to the 2nd Defendant. The Plaintiff submitted that the 2nd Defendant intended to defraud the Plaintiff and his siblings of the suit property. The Plaintiff submitted that the evidence of Patrick Opiyo Adero (DW2) was unreliable and that DW2 left no doubt that he was siding with the Defendants. The Plaintiff submitted that DW2 was an untruthful witness. The Plaintiff submitted that DW2 did not come out clearly as to when he conducted the survey that led to the measurements he gave to the various parcels of land occupied by the Plaintiff and the Defendants. The Plaintiff also took issue with the fact that Plot No. 4645 whose measurements were given by DW2 did not exist on the ground. The Plaintiff submitted that the conclusions reached by DW2 were not supported by evidence.
26. With regard to the 2nd Defendant's Originating Summons, the Plaintiff submitted that the burden was upon the 2nd Defendant to prove that he had met the conditions for an adverse possession claim. The Plaintiff submitted that the 2nd Defendant had not occupied the suit property peacefully. The Plaintiff submitted that he tendered evidence showing that there was a pending criminal case against the 2nd Defendant for forcible detainer. The Plaintiff submitted that the 2nd Defendant's adverse possession claim was not proved. The Plaintiff submitted that in their defence, the 1st, 3rd and 4th Defendants contended that they were occupying Plot No. 4645 and that there was nowhere they claimed to have occupied the suit property. The Plaintiff submitted that for the 1st Defendant, he claimed to be the registered owner of Plot No. 4612. The Plaintiff submitted that the 1st Defendant did not claim to be occupying the suit property. The Plaintiff submitted that the 4th Defendant had vacated the portion of the suit property that she had occupied. The Plaintiff submitted that he produced evidence showing that he was the owner of the suit property. The Plaintiff submitted that the court should find that the Defendants had encroached on the suit property and had also closed a public access road that was being used by the Plaintiff. The Plaintiff submitted that the issue of the ownership of the suit property was settled in High Court Succession Cause No. 296 of 2014. The Plaintiff submitted that the decision of the court on that issue had not been set aside. The Plaintiff urged the court to enter judgment in his favour as prayed in the plaint and for the 2nd Defendant's counter-claim to be dismissed with costs.



The Defendants' submissions

27. In their submissions, the Defendants framed two issues for determination by the court namely; whether the Plaintiff was entitled to an order of eviction of the Defendants from the suit property, and whether the 2nd Defendant had acquired registrable interest in the suit property. On the first issue, the Defendants submitted that the Plaintiff admitted at the trial that the 1st Defendant was not in occupation of the suit property. The Defendant submitted that in the circumstances, the Plaintiff was not entitled to an order of eviction against the 1st Defendant. The Defendants submitted that the Plaintiff testified that the 2nd, 3rd and 4th Defendants had constructed houses on the suit property but the 4th Defendant had vacated the property and as such he had no further claim against the 4th Defendant. This left the Plaintiff's claim against the 2nd and 3rd Defendants. The Defendants submitted that the Plaintiff admitted that the 2nd and 3rd Defendants were his neighbours and owned a parcel of land adjacent to the suit property namely, Plot No. 4645. The Defendants submitted that for the court to determine whether the reliefs sought by the Plaintiff should be granted, the court must first determine the boundaries of Plot No. 4645 and the suit property.
28. The Defendants submitted that the jurisdiction to determine boundaries is conferred upon the Land Registrar under section 18(2) of the *Land Registration Act*, 2012. The Defendants submitted that this court has no jurisdiction to determine disputes over the boundaries of land. The Defendants submitted that until the Land Registrar determines the boundaries of the suit property and Plot No. 4645, the court cannot determine whether the Defendants were trespassers on the suit property or not. In support of this submission, the Defendants cited *Azzuri Limited v. Pink Properties Limited*[2018]eKLR, and *Estate Sonrisa Ltd. v. Samuel Kamau Macharia & 2 others*[2020]eKLR. The Defendants submitted that on this ground alone, the Plaintiff's claim should fail.
29. The Defendants submitted further that the Plaintiff did not prove his case against the Defendants. The Defendants submitted that they produced sufficient evidence to justify their occupation of the suit property. The Defendants submitted that the evidence that they placed before the court demonstrated that the 2nd, 3rd and 4th Defendants were entitled to the portions of the suit property which they were occupying and which they occupied even before the land adjudication in the area. The Defendants submitted that it was after the death of the 2nd Defendant's father and the adjudication process that the 2nd Defendant discovered that the portion of land that they were occupying was part of the suit property. The Defendants submitted that it was upon this realisation that the 2nd Defendant decided to enter into an agreement with the Plaintiff's father to purchase the said portion of land to formalise their ownership of the land. The Defendants submitted that the Plaintiff did not dispute the agreement that the 2nd Defendant entered into with his father in respect of the suit property nor the burial of the 2nd Defendant's first wife and son on the property. The Defendants submitted that the Plaintiff's claim against them in respect of the portion of the suit property they were occupying was time-barred under Section 7 of the *Limitation of Actions Act*. In support of this submission, the Defendants cited *Mehta v. Shah*[1965] E.A 321, and *Gathoni v. Kenya Cooperative Creameries Ltd.* [1982]KLR 104. The Defendants submitted that the Plaintiff's eviction claim was brought after 12 years from the time the Defendants entered the suit property. The claim was therefore time barred and as such unsustainable.
30. On the second issue, whether the Defendants had acquired a registrable interest in the suit property, the Defendants submitted that the 2nd Defendant's case which was supported by his evidence and the evidence of his witnesses was that the portion of the suit property which he was occupying formed part of his deceased father's land on which he was born and brought up. The Defendants submitted that during land adjudication, the said portion of land they were occupying was registered alongside the land that was owned by the Plaintiff's deceased father as part of the suit property. The Defendants



submitted that the 2nd Defendant entered into a sale agreement with the Plaintiff's father in respect of the suit property and the parties lived peacefully on the said parcel of land until the death of the Plaintiff's father on 7th December 2006. The Defendants submitted that after the Plaintiff inherited the whole of the suit property from his deceased father, he sought to evict the Defendants therefrom. The Defendants submitted that the 1st Defendant did not reside on the suit property and as such he was wrongly joined in the suit. The Defendants submitted that it was the 2nd, 3rd and 4th Defendants who were residing on the suit property. The Defendants submitted that they had occupied the suit property for more than 12 years as at the time the Plaintiff sought to evict them from the property. The Defendants submitted that photographs of the 2nd, 3rd and 4th Defendants' houses and the grave sites for the 2nd Defendant's wife and children demonstrated that the Defendants had occupied the suit property longer than the Plaintiff claimed they had been in occupation. The Defendants submitted that the 2nd, 3rd and 4th Defendants having occupied the suit property for over four decades, the 2nd Defendant had acquired a registrable interest in the property. The Defendants cited Sections 7, 16, 17 and 33 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya and submitted that the 2nd Defendant had acquired the suit property by adverse possession and was entitled to be registered as the owner of the suit property in place of the Plaintiff. The Defendants submitted that the 2nd Defendant was not seeking specific performance of the agreement of sale of the suit property between him and the Plaintiff's father. The Defendants submitted that the 2nd Defendant was only using the agreement of sale to prove the date when he took possession of the suit property. The Defendants cited several cases in support of their submission that an agreement of sale can be used as evidence of possession of land the subject thereof.

31. The Defendants submitted that the 2nd Defendant had proved his adverse possession claim. The Defendants cited *Kasuve v. Mwaani Investments & 4 others*, 1 KLR 184 in support of that submission. In the alternative, the Defendants submitted that the court could make an order in accordance with the professional opinion of DW2 who suggested that the RIM in which the suit property and Plot No. 4645 fall should be amended to reflect how the parties occupy the said parcels of land on the ground.
32. The Defendants urged the court to dismiss the Plaintiff's claim for eviction of the Defendants from the suit property and make a declaration that the 2nd, 3, and 4th Defendants had acquired the portion of the suit property they were occupying by adverse possession. The Defendants have prayed further that the suit property be subdivided into two portions and the portion thereof occupied by the 2nd, 3rd and 4th Defendants be registered in their names. The Defendants prayed in the alternative that an order be issued for the Registry Index Map in respect of the suit property to be amended to reflect the position on the ground. The Defendants also prayed for the costs of the suit.

Analysis and determination

33. I have considered the pleadings, the evidence tendered and the submissions filed by the advocates for the parties in the consolidated suits. Although many parcels of land have been mentioned in the course of the hearing of the suits, the claims by the Plaintiff and the 2nd Defendant relate only to the land parcel Title No. Kisumu/Kanyawegi/4646 measuring 2.30 hectares (the suit property). The Plaintiff who claims to be the registered owner of the suit property has claimed that the Defendants have entered and occupied a portion of the suit property without his permission and as such they are trespassers on the suit property and should be evicted therefrom. The 2nd Defendant on the other hand has claimed that he has occupied the portion of the suit property claimed by the Plaintiff since 1986 and as such, he has acquired the same by adverse possession. The 2nd Defendant has contended that the suit property should be registered in his name.



34. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. This means that if one has a title to a property, he can maintain an action for trespass even if he is not having physical possession. It is not disputed that the Plaintiff is the registered proprietor of the suit property and that the 2nd, 3rd, and 4th Defendants are in occupation of a portion of the suit property. As the owner of the suit property, the Plaintiff is entitled to quiet possession and enjoyment thereof. To prove trespass, a land owner or occupier of land must establish that the defendant's entry on the land is without a justifiable cause. Mere occupation of land by a defendant is not sufficient proof of trespass. The Plaintiff having established that he is the registered owner of the suit property and that the 2nd, 3rd, and 4th Defendants have entered and occupied a portion thereof without his permission, the burden shifts to the said Defendants to prove that they have sufficient cause for occupying the suit property. The legal burden of proof is static but the evidential burden of proof keeps shifting during the trial. The majority of the Supreme Court in *Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others* [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law...”

35. It was established at the trial that the 1st Defendant was not occupying the suit property. The 1st Defendant was in the circumstances cleared of the Plaintiff's trespass claim. The 2nd Defendant contended that he was occupying the suit property as of right having acquired a portion thereof by adverse possession. The 3rd Defendant who is a brother to the 2nd Defendant and the 4th Defendant who is the 2nd Defendant's sister-in-law contended that they were occupying the suit property with the permission of the 2nd Defendant who was the owner thereof. The 3rd and 4th Defendants' interests in the suit property were therefore derived from the 2nd Defendant's adverse possession claim over the suit property. The burden therefore fell upon the 2nd, 3rd, and 4th Defendants to prove that the 2nd Defendant had acquired the portion of the suit property occupied by them by adverse possession. In *Gabriel Mbui v. Mukindia Maranya* [1993] eKLR, the court stated that;

- a. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.



- b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 - g. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
 - i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.
36. In *Kimani Ruchine & Another v. Swift, Rutherford Co. Ltd. & another* [1977] KLR 10 Kneller J. stated as follows at page 16:

“The Plaintiffs have to prove that they have used this land which they claim as of right, necvi, nec clam, necplecario (no force, no secrecy, no evasion) ...The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”

37. In *Wambugu v. Njuguna* [1983] KLR 172 the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The *Limitation of Actions Act* (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not



whether or not the claimant has proved that he has been in possession for the requisite number of years.”

38. In *Githu v. Ndeete* [1984] KLR 776 it was held that:
- a. “Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.
 - b. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land which the owner holds title.”
39. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:
- “18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?”
 19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* (supra).
 20. We cannot help but note that the evidence tendered in support of the respondents’ case was by five respondents. These respondents only gave evidence in relation to the dates they each entered into possession of the suit property. There was no evidence to show that such possession was without the consent of the former registered owner. The photographs of the structures erected on the suit property could equally not establish the absence of consent from the previous registered owner. In addition, we, unlike the learned Judge, find that no further evidence was given with respect to when the other respondents took possession. Without such evidence there was nothing to support the respondents’ contention that they had been in adverse possession of the suit property prior to the appellant’s title.
 21. Even if we were to accept that the five respondents who testified had established that they had been in an open and uninterrupted occupation of the suit



property in excess of 12 years after the appellant acquired title still their claim fell short. There is a further problem because none of them tendered any evidence with regard to identifiable portion(s) of the suit property which they each occupied which was essential to their claim. More so, taking into account that there were allegations that apart from the respondents over 200 people were also in occupation of the suit property. In *Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & Another* [2015] eKLR this Court observed: -

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu vs. Ndete* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

40. It is on the foregoing principles that the 2nd Defendant’s claim over the suit property falls for consideration. The suit property measures 2.3 hectares. According to the 2nd Defendant’s affidavit in support of the Originating Summons, the 2nd Defendant entered the suit property and put up his homestead thereon in 1988 upon purchasing the property from the Plaintiff’s father. The 2nd Defendant averred that his occupation of the suit property was peaceful, continuous and undisturbed from 1988 until 2017 when the Plaintiff sought to evict him from the property. In his undated witness statement filed in court on 17th June 2019 in ELC No. 49 of 2021, the 2nd Defendant stated that he was the registered owner of Plot No. 4645 which was given to him by one, Maurice Obunga Otiende, deceased before his death on 19th August 1992. He stated that Plot No. 4645 was registered in his name on 14th August 2009. He stated that Plot No. 4645 shared a boundary with the suit property that was initially owned by the Plaintiff’s father. He stated that on 24th July 1988, he purchased the whole of the suit property from the Plaintiff’s father at a consideration of Kshs. 5000/-. When he purchased the suit property, the same was still under adjudication and it was not until 17th February 2005 that the property was registered. He stated that the Plaintiff’s father died on 7th December 2006 before transferring the suit property to him. He stated that he had occupied the suit property for over 30 years as a purchaser thereof for value. He stated that he built his home on the suit property “many years ago”. He stated further that he had buried his wife, son, brother, and cousin Timothy Were Ouko and his 8 children on the suit property without any objection from anyone. He stated that it was not until the Plaintiff obtained a Grant of Letters of Administration in respect of the estate of his father and got registered as the owner of the suit property that he started laying a claim to the suit property. In his oral testimony, the 2nd Defendant told the court that he was born in 1959 and found his father, Silas Oywech who died in 1974 living on the suit property. He stated that his father left him on the suit property. He stated that on 24th July 1988 he purchased the suit property from the Plaintiff’s deceased father Joel Ogolla. He stated that he built his homestead on the suit property and had buried his wife and son on the property. He stated that he had occupied the suit property since 1986. He stated that the Plaintiff started claiming the suit property after the death of his father. On cross-examination, the 2nd Defendant stated that the Plaintiff and his brothers were also residing on the suit property and that both the Plaintiff’s father and mother were buried on the suit property. On examination by the court, the 2nd Defendant stated that when the Plaintiff’s father sold to him the suit property, he was staying on the suit property with his family and he did not move out of the land even after he had sold the



same and he did not object to his continued stay. He stated further that only part of his homestead was on the suit property. He stated that his homestead is partly on Plot No. 4645 and partly on the suit property. He stated that he was occupying a portion of the suit property measuring about 2 acres. He stated that he could not remember whether he entered into an agreement of sale with the Plaintiff's father after or before he put up his homestead on the suit property.

41. According to the surveyor, Patrick Opiyo Adero (DW2), the Plaintiff is occupying a portion of the suit property measuring 0.89 hectares. According to DW2, the portion of the suit property occupied by the 2nd Defendant and his relatives was supposed to be part of Plot No. 4645 and measures 1.31 hectares. He stated that the 2nd Defendant's homestead occupied land measuring 0.27 hectares. According to the statements by the 3rd and 4th Defendants, they were occupying Plot No. 4645 owned by the 2nd Defendant.
42. On 21st August 2019, the court ordered by consent of the parties that the County Land Registrar and County Surveyor do visit the suit property bordering Plot No. 4612 and open an access road that runs along the suit property and Plot No. 4612 and a report of the exercise be filed in court. The Land Registrar filed a report in court on 17th September 2019. Although their mandate was limited to opening the access road between the suit property and Plot No. 4612, the Land Registrar and the County Surveyor made several observations in their report and even a recommendation to the court. According to them, the portion of the suit property occupied by the Defendants was registered in the name of the Plaintiff's father by mistake and that the said portion should be excised from the suit property and the Plaintiff left only with the portion of the suit property occupied by them.
43. From the totality of the evidence before the court, I am satisfied that the 2nd Defendant entered and occupied a portion of the suit property between 1986 and 1988 and that the 2nd Defendant remained in occupation of the said portion of the suit property openly, peacefully and without any interruption until 2016 after the Plaintiff became the registered owner of the suit property in 2015 and carried out a survey in 2016 that revealed that the portion of land that had all along been occupied by the 2nd Defendant and his brothers was part of the suit property. What is not clear from the evidence on record is the measurement of the portion of the suit property that the 2nd, 3rd and 4th Defendants are occupying. I did not find the evidence of DW2 useful in this regard. DW2 focused much on the portion of the suit property on which the Plaintiff and his brothers had their homesteads instead of putting emphasis on the extent of the 2nd, 3rd and 4th Defendant's occupation of the suit property. The Plaintiff as the registered owner of the suit property was entitled to the whole of the suit property. It was upon the 2nd Defendant to prove the extent of his occupation of the property. I have also noted that in his measurements, DW2 referred to the portion of the suit property occupied by the 2nd, 3rd and 4th Defendants as Plot No. 4645 although according to RIM of Kanyawegi Registration Section that was produced as DEXH. 10, Plot No. 4645 was subdivided on 28th October 2015 into two portions (Plot No. 10095 and Plot No. 10096). Plot No. 10095 was subsequently subdivided into Plot No. 10296 and Plot No. 10297 on 9th May 2017 while Plot No. 10296 was subdivided into Plot No. 10743 and Plot No. 10744 on 21st August 2020. Because of the foregoing, there was no Plot No. 4645 to talk about. According to the sketch map attached to DEXH.9 which contains the particulars of the structures and other features on the portion of the suit property occupied by the 2nd, 3rd and 4th Defendants, I am of the view that the portion of the suit property in actual occupation by the 2nd Defendant and his brothers is almost ½ of the suit property. Apart from the 2nd Defendant's homestead, the 3rd Defendant's homestead, and the house of the 2nd Defendant's deceased brother and the immediate soundings, the 2nd Defendant did not demonstrate that he was in actual occupation of any other portion of the suit property. I mentioned earlier that the suit property measures 2.3 hectares. This means that the 2nd, 3rd and 4th Defendants occupy a portion of the suit property measuring about



1.15 hectares. The 2nd Defendant has occupied the said portion of the suit property from around 1986. This means that as at the time he brought the Originating Summons in 2017, the 2nd Defendant had been in occupation of the property for over 30 years. It is my finding therefore that the 2nd Defendant from whom the 3rd and 4th Defendants derive their interests in the suit property, has established that he has acquired a portion of the suit property measuring about 1.15 hectares by adverse possession. The 2nd Defendant and likewise the 3rd and 4th Defendants have established that they have a justifiable cause for being in possession of the portion of the suit property that they occupy. The 2nd, 3rd and 4th Defendants are therefore not trespassers on the portion of the suit property which they occupy as claimed by the Plaintiff.

44. On the issue of costs, costs follow the event unless the court for good reason orders otherwise. The Plaintiff has failed to prove that the Defendants are trespassers on the suit property. The 2nd Defendant has also failed to establish that he has acquired the whole of the suit property by adverse possession. In the circumstances, I will order each party to bear its costs of the main suit and the Originating Summons.

Conclusion

45. In conclusion, I hereby make the following final orders in the matter;
1. The parcel of land known as Title No. Kisumu/Kanyawegi/4646 shall be subdivided into two equal portions with an allowance being given for access roads as may be necessary and reasonable in the opinion of the surveyor.
 2. The subdivision shall take into consideration the settlements within Title No. Kisumu/Kanyawegi/4646 by the Plaintiff and his brothers, and the 2nd Defendant and his brothers and shall ensure that minimal interference if any is occasioned to the existing homesteads.
 3. The Plaintiff shall be registered as the owner of the portion of Title No. Kisumu/Kanyawegi/4646 on which his homestead and that of his brothers are situated.
 4. The Plaintiff shall execute a transfer in favour of the 2nd Defendant in respect of the portion of Title No. Kisumu/Kanyawegi/4646 on which the homestead of the 2nd Defendant and his brothers are situated.
 5. The subdivision shall be carried out by the Kisumu County Surveyor and the Plaintiff and the 2nd Defendant shall be involved in the process and shall be at liberty to engage private surveyors at their own costs to witness the exercise.
 6. The Plaintiff and the 2nd Defendant shall share the costs of the subdivision and for obtaining the necessary consents and shall cooperate with each other in ensuring that Title No. Kisumu/Kanyawegi/4646 is subdivided and the said portion thereof is transferred and registered in the name of the 2nd Defendant.
 7. The 2nd Defendant shall be responsible for the payment of registration fees for the transfer and stamp duty in respect of his portion of Title No. Kisumu/Kanyawegi/4646.
 8. If any party refuses or fails to execute any document to facilitate the execution of the orders issued herein, the Deputy Registrar of this court is authorised to execute such document/s on behalf of such party.
 9. Either party shall be at liberty to apply in respect of orders 1 and 2 above should any difficulty or challenge arise in the implementation thereof.



10. Each party shall bear its costs.

DELIVERED AND DATED AT KISUMU ON THIS 18TH DAY OF JANUARY 2024.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Mawinda for the Plaintiff

Ms. Omondi for the Defendants

Ms. J. Omondi-Court Assistant

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