REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL CASE NO. 120 OF 2006 (O.S)

IN THE MATTER OF LAND PARCEL KERICHO/NYAMIRA/NYAMANGA 339 (now subdivided into KERICHO/NYAMANGA/651/652 & 563)

AND

IN THE MATTER OF SECTION 36 OF THE LIMITATION ACTIONS ACT (CAP 221 LAWS OF KENYA)

CHARLES KIPLANGAT BOSUBEN.....PLAINTIFF

VERSUS

WILLY KIPKEMOI KIGEN.....1ST DEFENDANT/RESPONDENT

ELIZABETH C. TONGOI.....2ND DEFENDANT/RESPONDENT

ESTHER CHELANGAT TONGOI.....3RD DEFENDANT/RESPONDENT

CONSOLIDATED WITH

ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL CASE NO. 12 OF 2006

WILLY CHEPKEMOI KIGEN.....PLAINTIFF

VERSUS

CHARLES KIPLANGAT BOSUBEN.....DEFENDANT

JUDGMENT

(Two consolidated suits; one for adverse possession and the second for eviction of the applicant in the adverse possession case; applicant being related to respondents who previously lived together in the original parcel before subdivision; applicant living in one portion of the original parcel; upon subdivision, his occupation falling in land now transferred to the respondents; applicant now suing for adverse possession; occupation of applicant on the land having been founded on loose family arrangements which do not entitle one to claim under adverse possession; such possession is with

permission of the land owner and cannot count towards time; suit for adverse possession fails; suit by registered owner seeking the applicant to vacate succeeds)

This is a consolidated judgment in respect of two suits. The first suit, Kericho HCCC No. 120 of 2006, was commenced by way of Originating Summons on 20th December 2006, taken out pursuant to the then Order XXXVI Rules 3, 3D and 12 of the Civil Procedure Rules. The Originating Summons was commenced by Charles Kiplangat Bosuben against Willy Kipkemoi Kigen, Elizabeth Tongoi and Esther Chelangat Tongoi. In the Originating Summons, the applicant has pleaded that he is entitled by way of adverse possession to 10.25 acres of the land parcel Kericho/Nyamanga/339 which has been subdivided into the land parcels Kericho/Nyamanga/651,652 and 653. He has asked that he be registered as proprietor of 10.25 acres out of the land parcel Kericho/Nyamanga/339 in place of Willy Kipkemoi Kigen, Elizabeth Tongoi and Esther Chelangat Tongoi who are said to be the registered proprietors. He has also asked that the subdivision of the land done on 28 October 2005 be set aside, the titles issued be nullified, and the court to order that subdivision be done after ascertainment of the rights of the parties. He has further sought the respondents to be restrained by way of a permanent injunction from evicting him or interfering with his occupation of 10.25 acres.

In his supporting affidavit, he has averred that he has lived in the land parcel Kericho/Nyamanga/339 since birth. He has deposed that his mother, Recho Chebet Tongoi, owned the said land in common with Elizabeth Tongoi. His mother died in the year 1967 when he was still a young boy but he continued living on the land. He has deposed further that the land has now been subdivided and registered in the names of the three respondents. He has claimed to have been brought up on the land and resident for over 40 years, has planted trees and tea, erected five houses, two stores and a kiosk. He has stated that he has two wives and eight children and they have been residing on the land since their birth. He has averred that he filed a succession cause No. 79 of 2004 claiming an interest in the land but the same was struck out. He then filed another suit being Kericho HCCC No. 79 of 2005 but before the suit was determined, the respondents subdivided the land parcel Kericho/Nyamanga/339 to prejudice his interest.

The second suit is Kericho HCCC No. 12 of 2006 which is a suit commenced by way of plaint filed on 24 February 2006. The plaintiff in this case is Willy Kipkemoi Kigen (1st respondent in the Originating Summons) and the defendant is Charles Kiplangat Bosuben (the applicant in the Originating Summons). In his plaint, Willy Kigen has pleaded that he is the absolute proprietor of the land parcel Kericho/Nyamanga/653. He has pleaded that on an unknown date, the defendant trespassed into the land and has continued occupying a section of it and has erected structures. In the suit, he has asked for the following orders :-

(i) An order of eviction.

(ii) A permanent injunction restraining the defendant from the suit land.

(iii) Costs and any other relief deemed fit.

In his statement of defence and counterclaim which was later amended, the defendant pleaded that the land parcel Kericho/Nyamanga/653 was curved out of the land parcel Kericho/Nyamanga/339 which land is subject of the claim in the Originating Summons. He pleaded that the subdivision of the land parcel Kericho/Nyamanga/339 was done to defeat his suit Kericho HCCC No. 97 of 2005. In his counterclaim, he has asked for orders that he is entitled to at least 10.25 acres by way of adverse possession. It will be observed that this is what is claimed in the originating summons.

It was apparent that the two suits were closely tied and on 24 September 2007, the two suits were consolidated and heard by way of viva voce evidence. Before the hearing of the suit commenced, the 2nd respondent in the Originating Summons, Elizabeth Tongoi, died in the year 2008, but no substitution was made. The case against her therefore abated. The hearing commenced on 26 January 2016 with Charles Kiplangat Bosuben deemed plaintiff and Willy Kigen and Esther Tongoi as defendants.

The relationship of the parties is that Charles Bosuben is son to Recho Tongoi (deceased). Recho Tongoi

was daughter of Elizabeth Tongoi (the now deceased 2nd respondent in the Originating Summons). Esther Chelangat Tongoi the 3rd respondent in the originating summons, is Recho's sister. Willy Kigen is son to Alice who is a sister to Recho and Esther, thus a cousin to Charles. Elizabeth Tongoi is therefore grandmother to both Charles Bosuben and Willy Kigen. The land parcel Kericho/Nyamanga/339 (hereinafter parcel No.339) was initially registered in the name of Elizabeth Tongoi (also known as Tapkokwa) and her daughter Recho Tongoi (mother to Charles Bosuben). The two held the said title in equal undivided shares as indicated in the extract of the register. Recho died in the year 1967.

Charles testified that in the year 1977, his grandmother Elizabeth, filed a succession cause in respect of the estate of his mother Recho, and took over the whole of the land. On 10 November 2005, she subdivided the land into 3 portions that is Kericho/Nyamanga/651, 652 and 653 (hereinafter described as parcel numbers 651,652 and 653). The parcel No. 651 is registered in the name of Elizabeth (it will be recalled that she died in the year 2008). Charles testified that this land is currently occupied by his brother Stanley Bosuben and Regina Koske, wife to David Koske, a deceased brother of Charles. David Koske died in the year 1997 leaving his wife Regina and his children on this land. The parcel No. 652 is in the name of Esther Tongoi, an aunt to Charles Bosuben and Willy Kigen. The parcel No. 653 is in the name of Willy Kigen and it measures 2.43 Ha. Charles testified that he lives in the land parcel No. 653. He stated that he has lived in this land for over 50 years and this is where his homestead is and that in the year 1990 he planted about 2 acres of tea. He produced a KTDA planting certificate issued in the year 1993 as proof. In his view, the subdivision of the original parcel No. 339 was done fraudulently. He stated that a meeting of elders was held in the year 2011 to resolve the issue and they held that each person to reside on the place that they occupy. He stated that he wants 6.5 acres of the land parcel No. 653 and a fresh survey be done.

In cross-examination, he revealed that he was born in the year 1962 and was therefore 5 years old when his mother died. He was raised by his grandmother. He stated that it was in the year 1988 that he entered into the area which is now the land parcel No. 653. At that time, the land was undivided and was still held together under the parcel No. 339. Their grandmother used to reside in what is the current parcel No. 652. At the moment, it is Esther who resides there. It is here, in the current parcel No. 652, that their grandmother had a house and it is here that they were raised. In the year 1982 his brothers moved into the portion now registered as land parcel No. 651. Before that, there was nobody residing on this part of the land. When he finished school, Charles testified that did not join his brothers because his grandmother directed him to build a house where he is currently residing. This was in the year 1988. He stated that new titles after the larger parcel of land parcel No. 339 was subdivided were issued in the year 2005. He testified that the subdivision was instigated by Willy Kigen because their grandmother was very old. In his view, Willy is supposed to move to the land parcel No. 652.

He testified that their grandmother had five children, all girls. Apart from Recho and Esther, the others were Susan, Grace and Alice. Grace was not given any land. He stated that Alice was given a share in the current parcel No. 652 and so too Esther. His mother Recho never got married. The whole of the original land was 20.5 acres. He did not agree that if he kept the land that he is claiming, the house of Recho will have received a disproportionately larger share than the rest. He testified that their grandmother gave him 7 acres and gave 3 acres to Willy Kigen. He stated that the manner in which the land has been subdivided has brought problems. It was his view that no survey of the land was ever done. He clarified that he has sued Esther because her title No. 652 is partly in the land that he occupies. On one hand he stated that he only resides in the parcel No. 653 but on the other hand he also stated that the subdivisions have divided his land. In cross-examination, he stated that all his tea is in the parcel No. 653 although in re-examination, he testified that part of his tea is in Esther's land.

PW- 2 was one Kiplangat arap Tongoi. He is 95 years old. He testified inter alia that Elizabeth, gave the mother of Willy Kigen 3 acres of land but he did not know how many acres the mother of Charles was given. He stated that at some point, he was among elders who met to resolve the dispute between the litigants. They awarded Willy Kigen 3 acres.

PW-3 was Stanley Kipketer Bosuben. He is brother to Charles. He testified that their grandmother had no sons and retained Recho (their mother) to be the owner of the land. Recho alongside her sister Esther,

never got married. Alice, another of her sister (and mother to Willy Kigen), at some point got married but she came back home. In his view, the whole of the land is 21 acres and he testified that the clan held a meeting and resolved that 7 acres be given to Charles, which acreage is where he has been resident; 3 acres each was resolved to be given to Alice and Esther. The remainder was decided will be shared between himself and his late brother David. He confirmed that he and the family of David occupy the land parcel No. 651; parcel No. 652 is occupied by Alice and Esther, the two sisters; whereas Charles occupies the parcel No. 653. He stated that the way their grandmother allocated land is that he and Regina (David's wife) should have 7 acres; Charles 7 acres; Alice and Esther combined 6 acres. He stated that Willy should claim land under his mother Alice. He testified that Charles has been in occupation for over 20 years and has developed his home. He stated that he has a canteen and has planted trees. He also has 3 heads of cattle and 6 semi-permanent houses. He has two wives and 11 children. He has also planted tea.

In cross-examination, he stated that the original land parcel No. 339 comprised of 14 acres of family land and 7 acres of land that his mother (Recho) purchased (although the acreage is actually 20.5 acres). The parcel numbers 651 and 653 combined are 14.5 acres whereas the parcel No. 652 is 6 acres. He testified that it was the intention of their grandmother that their family (that of Recho) occupy 14.5 acres and this is also what the clan decided. He was not aware that the parcel No. 651 is 8.5 acres or that parcel No. 652 and 653 are 6 acres each. He was also not aware that Willy Kigen has title to the parcel No. 653. He stated that they were raised up by their grandmother in the current land parcels No. 652 and 653 when the land was still undivided.

With the above evidence, the applicant closed his case.

DW- 1 was Willy Kigen. He is a farmer and teacher. He was born in the year 1972. He testified that the land parcel No. 653 belongs to him and he has a title deed in his name. The land was transferred to him by his grandmother in the year 2005. According to him, the history of the land is that it was acquired by their grandfather, Kiplel Tongoi, in the 1920s. Kiplel died in the year 1943 before the land was registered in his name. He had five children, only Recho being deceased. He stated that he grew up in the current parcel No. 652 under the care of his mother, Alice, and aunt Esther. He stated that Recho had four children, that is Charles (the plaintiff), David (now deceased), Stanley (PW-3) and Leah Chemutai. They all grew up in the current land parcel No. 652. Willy is the only child of Alice whereas Esther has two children namely Dominic Chepkwony and Janet Malel. The parcel No. 652 is now registered in the name of Esther.

He testified that the land comprising the current parcel No. 653 was initially used as a grazing area, whereas Recho had began some developments before her demise in the current land parcel No. 651. Recho started planting tea bushes in this area but she soon died. Their grandmother continued with planting of tea which was cared for by Alice and Esther. In 1983, David was allotted by their grandmother about 1,000 tea bushes, being about 1/3 of the total of the tea planted. He was also given the house built by their mother in the year 1967 and he brought a wife. He stated that in the year 1986, Charles (the plaintiff) was allocated the remaining 1/3 of tea bushes after bringing in a wife. According to him, all tea bushes are in the parcel No. 651 and cover about 2 acres. In 1990, Stanley was given the other 1/3rd of tea bushes. He testified that upon allocation of the tea bushes, Charles was asked to move to the current land parcel No. 651 but he refused and remained in the current land parcel No. 653. This was in the year 1988. All this while the land comprised in the land parcel No. 653 was grazing land. In the year 1988, the mother to Willy tried to open a gate to put her cows to pasture in this area but was slapped by Charles. He himself (Willy) tried to open the gate in the year 1989 but was warned that he would be beaten. Since he was young he did not pursue the matter. In the year 1989, Charles decided to block the whole of the land parcel No. 653.

He testified further that in the year 2004, their grandmother told Charles to move to the parcel No. 651 to pave way for Willy to occupy this land. According to Willy, the land parcel No. 651 is supposed to be shared equally between the children of Recho. In the year 2004, Charles filed a succession cause for the estate of his mother but this was dismissed as a succession cause had earlier been filed by Elizabeth. In the year 2005, Elizabeth proceeded to subdivide the land parcel No. 339 into the parcels No. 651, 652 and 653. He testified that the parcel No. 651 is registered in the name of Elizabeth because the family of

Recho declined it and wanted the whole of the 20.5 acres of the original land. Nevertheless, he testified that the same has been assigned to the family of Recho. At the moment, he (Willy) occupies the land parcel No. 652 together with his mother Alice, and Esther. He stated that Esther lives with her son Dominic who is married with one child. Willy himself is married with 4 children. They collectively occupy 5 acres since Charles is in occupation of one acre. Charles also occupies the whole of the parcel No. 653. He stated that they are now squeezed in the 5 acre portion whereas Charles occupies 7 acres, being the 6 acres in parcel No. 653 and the one acre in parcel No. 652. Willy considers himself a squatter in the parcel No. 652 which is owned by Esther.

In cross-examination, he testified inter alia that Charles started his occupation of the parcel No. 653 in the year 1988. That is when he started constructing his houses, which are about 8 in number. He took over about 1500 tea bushes and added some more. In 1988 there was a live fence and a gate leading to this area of land. When his mother tried to access this land, she was assaulted by Charles. He stated that their grandmother subdivided the land into three to suit her three unmarried daughters.

In his submissions, Mr. Mbeche for the applicant submitted inter alia that his client is entitled to be declared to have acquired title by way of adverse possession. He relied on the case of ***Isaac Cypriano Shingore vs Kipketer Togom (2016) eKLR***. On his part, Mr. Mutai for the respondents, questioned why the applicant claimed 10.25 acres in his Originating Summons yet he testified that he only occupies 7 acres. He submitted that the respondents did not sleep on their rights as they gave notice to the applicant to vacate the property. He submitted that the applicant is claiming the land fraudulently and disregarding the need to equitably share the land. He submitted that Elizabeth intended to subdivide her land amongst her 3 daughters and reserved a bigger portion for the children of Recho. He contended that it is only fair that the applicant move to his share in the parcel No. 651 so that everyone remains peacefully where they were legally allocated. He submitted that her wishes should remain in force. He submitted that Willy and his mother are squatters in the land parcel No. 652 yet they are registered as proprietors in the land parcel No. 653. He was of the view that in this case, the applicant is relying on Kipsigis customary law which cannot override the Constitution. He also submitted that under Article 27 of the Constitution, all persons are equal before the law. He averred that under Section 29 of the Law of Succession Act, the applicant and respondents are all dependants of Elizabeth whose property is being distributed and they all deserve equal treatment as regards the estate of the deceased. He also mentioned Section 38 of the Law of Succession Act to argue that the land of Elizabeth should be distributed equally. He relied on the case of ***Kahindi Ngala Mwagandi vs Mtana Lewa, Malindi ELC No. 108 of 2011 (OS) (2014) eKLR***.

I have considered the matter. There are two claims before me. The first is that of adverse possession instituted by Charles Bosuben. The second is the suit by Willy Kigen seeking to have Charles evicted from the parcel of land Kericho/Nyamanga/653. If I am to allow the claim for adverse possession, then automatically, the suit by Willy Kigen will fail. I therefore opt to start with an assessment of whether or not Charles Bosuben is entitled to an order of adverse possession as claimed.

Before I go far, I wish to mention that I have not seen the place of the case of ***Kahindi Ngala Mwagandi vs Mtana Lewa, Malindi ELC No. 108 of 2011 (OS) (2014) eKLR*** . This was a case which tried to press the point that a claim for adverse possession is contrary to Article 40 of the Constitution which protects the right to own property. That contention was dismissed by Angote J, in the said decision. I don't see how it helps the cause of Mr. Mutai's clients who cited the said case.

I also observe that there was also a lot of mention of decisions of elders who tried to mediate this dispute. Again, these (decisions of elders) have no place in a claim for adverse possession. The claim is a personal claim based on settled principles of land law and which can only be asserted in court. The opinions of the elders are therefore of no consequence and I have not taken the same into account.

I will now get to the substance of the matter.

A review of the evidence actually reveals that most of the basic facts are largely not contested. The evidence shows that the applicant, Charles Bosuben, is son of Recho Tongoi. Recho Tongoi is one of the daughters of Elizabeth Tongoi. Recho had four sisters, namely Susan, Grace, Alice and Esther. It seems

as if Susan and Grace got married and are no longer resident in the properties under dispute and neither have they shown any interest in the same. Initially, the land was registered in the names of Elizabeth and her daughter Recho. According to the register, each holder was to possess a half undivided share of the land parcel Kericho/Nyamanga/339. Recho died in the year 1967. A succession case appears to have been filed in the year 1977, for the register does reflect this although I have no full particulars of it, after which Elizabeth took over the whole of the land parcel Kericho/Nyamanga/339 as sole proprietor. There was a restriction placed by Charles on 29 March 2004, but this was removed on 11 July 2005. The land was officially subdivided into three parcels on 28 October 2005 to bring forth the land parcels Kericho/Nyamanga/651, 652, and 653.

In his pleadings in respect of the Originating Summons, Charles claims to be entitled to 10.25 acres of the land parcel Kericho/Nyamanga/339 by way of adverse possession. However in his evidence, he did state that he wants only 6.5 acres and not the 10.25 acres pleaded in his Originating Summons. There is of course now no such land parcel No. 339 in existence, the same having been subdivided into three portions. It did emerge in evidence that Charles is actually in possession and occupation of the whole of the parcel No. 653, which measures approximately 6 acres and is in the name of Willy Kigen, and also occupies about one acre of the land parcel No. 652 which is in the name of Esther Tongoi, the 3rd respondent and aunt to Charles. Esther did not give any evidence in this case.

There is ample, indeed uncontested, evidence that Charles moved into the area of land that he currently occupies in the year 1988 or thereabout. He moved in and built some structures and brought a wife. He later brought another wife and he now has several children all raised in this portion of land. He has also planted tea in this disputed portion and trees. All this evidence is affirmed by Willy Kigen who did not dispute it.

However, possession alone is not enough for one to sustain a claim for adverse possession. The factors that would entitle one to succeed in a suit for adverse possession are trite. For one to sustain such claim the possession of the land must be for a continuous uninterrupted duration of at least 12 years without the permission of the land owner. Such possession must also be open and notorious without force and without secrecy. This is captured in the maxim *nec vi, nec clam, nec precario*, meaning without violence, without secrecy and without permission. Such possession is not complete without there being the intention to possess or *animus possidendi*. This latter concept is well explained in the case of ***Powell vs McFarlane (1977) 38 P & CR 452, Ch D***. The brief facts of the case were that Powell lived in his grandfather's farm. McFarlane owned the land adjacent to the farm. McFarlane moved overseas. In the year 1956, when he was 14 years, Powell started making use of this adjacent land by grazing the family cow and goat, shooting pigeons and rabbits, clearing trees, making repairs to the fence and hedge among other activities. These activities continued up to the year 1973. All this time, McFarlane was quite unaware that anybody was using his land. The suit by Powell failed as the court was not convinced that he had the requisite intention to possess the land. Slade J, had this to say on the concept of *animus possidendi* :-

> "*What is really meant, in my judgment, is that the* animus possidendi *involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."*

From the evidence, it is clear that the possession of Charles commenced in the year 1988. But this possession, when it commenced, was certainly with the permission of the then registered owner, Elizabeth Tongoi, the grandmother to Charles. Charles himself testified that he built his house here because this is the site that his grandmother referred him to. Leaving alone the fact that this occupation was one with the permission of the land owner, I do not think that at this moment in time, Charles could possibly have had the necessary animus possidendi to acquire this land as his own. I think he was fitting himself into the loose family arrangements on how to settle within the land upon attaining majority. His brothers also occupied areas within the farm where their grandmother allowed them to settle. Indeed, so too the rest of the larger family. When Charles went into occupation, the land was still an undivided whole. Other persons also took occupation of varying areas of the land within the large farm. I actually do not see any difference in the manner everybody else occupied land as compared to the way in which Charles occupied

his land. To me, the occupation was based on a loose family arrangement with the express or tacit permission of the registered owner. I am not of the view that persons occupying family land in this sort of arrangement can assert to have acquired title by way of adverse possession.

It is indeed not easy to prove a claim for adverse possession where close relations living in one large parcel of land are involved. This is because it is not uncommon for brothers, sisters, and their parents or close relatives, in our African set up, to live in one parcel of land based on loose family arrangements. These arrangements are usually made out of convenience and out of the need to have some balance in the way the family utilizes and occupies the land. Essentially, they are deemed to be occupation with the consent of the land owner. The classic example is the decision of Kuloba J, in the case of ***Mbui vs Maranya (1993) KLR 726.*** In the said case, the learned Judge made this dictum :-

> *"To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow these things ; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession… I would be surprised if anyone pretended to be ignorant of these things… The keeping of our land of landless relatives, clansmen… for long periods of time until they are able to buy their own land is a custom we all know… The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society."*

I am in agreement with the above dictum. As I have mentioned, in our society, it is common for families and close relatives to live in portions of land, out of their own internal arrangements and family dynamics. It would not be easy for one to claim to have assumed title by way of adverse possession because of these arrangements.

To me that is more or less the scenario that I have at hand. It is true that Charles took possession of the portion of land that he now claims, but that to me, was based on family arrangements put in place by his grandmother. These arrangements came to a close when their grandmother finally demarcated the land and distributed it to the various persons within the family. In my view, it is at this time that possession, in the nature of adverse possession could commence. It is at this time that the loose family settlements were dismantled and every person granted what their grandmother thought they deserved. Time, in my opinion for purposes of sustaining a claim for adverse possession would start running from this moment. The previous occupation, being with permission of the original land owner, and without animus possidendi cannot count towards sustaining a case for adverse possession. The demarcation of the land occurred in the year 2005 and the claim for adverse possession was filed in the year 2006 meaning that the 12 years required to establish a claim for adverse possession had not been attained.

When he was giving evidence, I almost got the impression that Charles was attempting to argue the case that since his mother had a half share of the property, then their family are entitled to at least a half portion of the land. He came across as a person who felt that his grandmother shortchanged their family (that of Recho) when she distributed the land in the year 2005. Without deciding the issue, as it is not one for decision in this case, it could be that Charles may have been entitled to sustain a case based on a breach of trust, and an entitlement to half of the whole, on the argument that his grandmother held half of the land in trust for the family of Recho Tongoi.

There was indeed a case based on a breach of trust that was filed. This is the case Kericho HCCC No. 79 of 2005 vide which Charles sued his grandmother for breach of trust. I do not know why Charles did not pursue this case and it seems as if the same has now abated given that Elizabeth died in the year 2008. To me, it is that case which stood a better chance of success and I am at a loss as to why he decided to abandon the said case and pursue this claim, which to me, was based on a weak foundation of interim family settlements.

I regret that the complaint before me does not concern the manner of distribution of the larger land parcel. At times, the litigation was conducted as if that is the issue before me but it is not. Even in their submissions, counsels seemed to have been sucked into the complaint whether the land was fairly distributed by Elizabeth, rather than sticking to the issue whether the case for adverse possession has been sustained. Mr. Mutai for example, in his submissions, argued that there will be inequity in the way the land will eventually be shared out amongst the family of Elizabeth if Charles succeeds in his claim for adverse possession. But we should not lose focus. This case is not about how land ought to be distributed fairly amongst the whole of the family of Elizabeth. It is a case for adverse possession and proof of the elements of adverse possession must be established. I am afraid that in the instance of this suit, the applicant has not proved to be entitled to the land through adverse possession. His case therefore fails and is hereby dismissed.

I will now turn to the claim filed by Willy Kigen. In his suit, he wants Charles Bosuben evicted from his land parcel No. 653. Given that Charles has failed in his quest to be declared the owner of this land by way of adverse possession, and having no other pending claim, there is really no basis upon which he can argue to be entitled to continue living in this land. Willy has established that he is the registered owner of this land having become so registered on 10 November 2005. As registered proprietor, he is entitled to enjoy all rights that such proprietorship entails including the right of exclusive possession. I have no reason to deny him the prayers claimed in his suit and I allow the same.

Charles now needs to vacate the land parcel No. 653. I sympathise with him because he has been here for a long time. He will need to find a place where he can be accommodated. I allow him 6 months to get alternative accommodation. On expiry of this duration of time, if he has not already moved out, Willy Kigen is at liberty to formally apply for an order of eviction. Once he vacates the land, Charles Bosuben is hereby permanently restrained from the said land.

The only other issue is costs. Having considered the relationship of the parties, I think it is best that each party bears his/her own costs.

Judgment accordingly.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 28TH DAY OF OCTOBER 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

In the presence of:

Mr. Caleb Koech holding brief for Mr. Mbeche for the Plaintiff.

Mr. Joshua Mutai present for the Defendants.

G. Wambany Court Assistant