



Chemutai (Suing as the Legal Representative of the Estate of William Kipsongok Lagat) v Choi & 5 others (Environment and Land Case E002 of 2022) [2024] KEELC 813 (KLR) (19 February 2024) (Judgment)

Neutral citation: [2024] KEELC 813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT AND LAND CASE E002 OF 2022
MN MWANYALE, J
FEBRUARY 19, 2024**

BETWEEN

**FRANCISCA LAGAT CHEMUTAI APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM
KIPSONGOK LAGAT**

AND

**JANE CHEPKEMBOI CHOI 1ST RESPONDENT
FRANCIS KIPCHUMBA KOGO 2ND RESPONDENT
RAPHAEL KIBET 3RD RESPONDENT
DAVID KIPRONO 4TH RESPONDENT
RICHARD KIPRUTO 5TH RESPONDENT
JULIUS KIBET 6TH RESPONDENT**

JUDGMENT

1. Francisca Chemutai Lagat took out an Originating summons dated 15th July 2024 as a Legal Representative of the Estate of William Kipsongok Lagat against the Respondents Jane Chepkemboi choi, Francis Kipchumba Kogo, Raphael Kibet, David Kiprono Richard Kipruto Julius kibet (all hereinafter referred to as ‘the Respondents’) Claiming ownership over Nandi/ollesos/80 (hereinafter referred to as “the suit property”) by prescription and/or adverse possession. In her Originating Summons the Applicant sought determination of the following issues;
 - a. A Declaration that the Respondent's right to recover 7.0 (Seven Decimal Zero) Acres of land parcel number Nandi/olessos/80 is barred under the Limitations of Actions Act Cap 22 of Laws of Kenya, and Title over a portion in occupation/use of the Plaintiff thereto



extinguished on the grounds that the Plaintiff herein as openly, peacefully and continuously been in occupation/use and possession of the aforesaid land parcel for a period exceeding 12 years.

- b. That there be an order that the Applicant be registered as the proprietor of land parcel number Nandi/olessos/80, in place of the Respondents and/or the register thereof be rectified to reflect the Plaintiffs ownership of the aforesaid land parcel number Nandi/olessos/80.
 - c. That the Respondents herein be ordered to execute all the requisite conveyance documents necessary to have the Plaintiff be registered as owner of whole of land parcel number Nandi/olessos/80 decreed by the court, in default, the Deputy Registrar and/or Court Administrative Officer be at liberty to execute all such necessary documents to give effect to the Judgment and/or Decree of the Court.
 - d. Costs of this Originating Summons be borne by the Respondents.
 - e. Such further and/or other Orders be made as the Court may deem fit and expedient, in the circumstances of this case.
2. Simultaneous with the filing of the OS the Applicant filed a Notice of Motion application of even date seeking injunctive orders to which a response was filed and the application was disposed off vide the Ruling delivered on 6th February 2023 where the court ordered maintenance of the prevailing status quo on the ground and in the register. Thereafter parties were granted time to comply with order 11 of the [Civil Procedure Rules](#) and to take directions under Order 37 Rule 16 of the [Civil Procedure Rules](#)
 3. On 13.3.2023 Parties took directions for conversion of the Originating Summons to a Plaint, Applicant to be deemed as the Plaintiff, the Replying affidavit to be deemed as a Defence and the Respondents to be deemed as Defendants and the, matter to proceed by way of viva voce evidence. Thus, the Applicant shall now be referred to as the Plaintiff and the Respondents shall now be referred to as the defendants.

The Plaintiff's Case and Evidence

4. It is the Plaintiff's case that;
 - i. she has peacefully and openly occupied and cultivated 7.0 (seven decimal zero) Acres in the suit property for uninterrupted duration exceeding 49 years w.e.f 1973 and has thus acquired ownership by adverse possession.
 - ii. she has continuously openly and without interruption cultivated the said land without interference by the Respondents
 - iii. the Defendants are currently the registered proprietor of Suit property wherein the Plaintiff has freely and continuously occupied and cultivated for over 49 years the defendants are thus holding the title in trust of the plaintiff by operation of the law.
 - iv. The plaintiff has resided on the 7.0 (seven decimal zero) Acres suit property since 1973 planted trees tilled the land openly and without interruption and thus the defendants title over the suit property has been extinguished by operation of law. And the defendants have acquiesced to the plaintiff's acquisition of the 7.0 acres in the suit property.
5. The above grounds in support of the Originating summons as filed were also reiterated in her Supporting affidavit.



6. The Plaintiff called 7 witnesses in support of her case and she testified as PW1 she adapted her witness statement dated 6th February 2023 as part of her evidence in chief and stated that she was the widow of William Kipsongok Lagat and Administrator of his Estate she marked a copy of the Grant of Letters of Administration Ad Litem dated 14/7/2022 as P MFI 1.
7. It was her further testimony that her late husband had in 1993 purchased from the late William Kipsongok Lagat and she produced an agreement and an acknowledgement as P Exhibit 2(a) and 2(b). the witness produced 26 photographs as p Exhibit 3(a-z) showing the developments she had undertaken on the property and p exhibit 4 was the copy of the register of the suit property which she equally produced revealing the defendants as the Registered owners.
8. On Cross examination the witness stated that she did not have a copy of the Grant neither did she have the original acknowledgment note and that the property number was not written on the Agreement. The witness stated that she had another property Nandi /olessos /90 which had belonged to her father in law but her late husband had registered himself as the proprietor and that there was a river between the suit property and Nandi / Olessos /90.
9. With respect of the suit property her late husband had registered himself a proprietor vide Kapsabet CM succession cause no 34/1993 but she was not aware that the succession *cause no 34 of 1993* had been revoked. Her husband was not a son of the late Kiplating arap Choi. 10. On further cross examination the witness stated that she was not aware when the green card had been opened and that her late husband had been chief but she was not aware when he retired. She stated that her 3 children lived on the suit property while others live in the Nandi/ Olessos /90. One of her sons was the current chief.
11. The witness went on to state in further cross examination that she had attended proceedings before the High court which involved the revocation of a Grant. That the agreement for sale had been written by Francis Kosgey while the acknowledgement was not signed by a village elder and had no parcel number written on it, although her late husband had signed the same and the persons present had their names written thereon. The agreement for sale was thumb printed but her husband's name was not written on it.
12. On Re examination PW1 stated that she and her late husband had taken possession of the of the 7 acres in the suit property about 50 years ago after her late husband had entered into an agreement for purchase with the registered owner. She stated that the building on the photograph was her house that had been built by her late husband. She stated that the money mentioned in the acknowledgement note related to the suit property and that she had lived on the suit property peacefully since 1973.
13. PW2, Philip Kaptingei Kipsongok testified and adopted his witness statement dated 6/2/2023 as part of his evidence in chief. It was his further testimony that he knew both the late William Kipsongok Lagat and the late Kiplating Choi who had been neighbours and that William Kipsongok lagat had purchased a portion from the late Arap Choi in about 1973 or 1974 and had built on the said portion.
14. On Cross Examination the witness stated that he knew the late William Kipsongok but was not related to him and that he was present when last installment of Kshs 3000/= was made but he did not sign the acknowledgement letter neither did the acknowledgement show the parcel number and the vendors and purchasers name.
15. The witness did not remember who wrote the acknowledgement but the same had been written at the home of William Kipsongok who was then working at the ministry of Agriculture in about 1973 or 1974. The witness stated that his home was about ½ a kilometer away. He was absent during the succession cause but he knew that William Kipsongok was not the son of Arap choi.



16. The witness stated in further cross examination that William Kipsongok later on become an Assistant chief and later on a chief and that it is Chiefs who generally write succession letters. He stated that he witnessed the last payment and in that regard paragraph of his statement was incorrect.
17. On re-examination the witness stated that he was present when the last installment was paid but was not aware of any cases between the two (William Kipsongok and Arap Choi). That William Kipsongok used to live in the suit property but did not live in the neighboring farm Nandi /olessos/90. He stated that William Kipsongok was not related to Arap Choi.
18. PW3, Henry Cheruiyot Chemobo testified and adopted his witness statement dated 6.2.2023 as a part of his evidence in chief. It was his further testimony that he was a teacher and clergy but now retired, he stated that he knew William Kipsongok who was his neighbor and friend but was now deceased.
19. It was his further testimony in chief that he knew the late Kipleting Arap Choi who was his friend and neighbor too. He testified that the late William kipsongok had a property at his home but had later purchased from Arap Choi in 1973 and started living thereon after the purchase till his death and was buried thereon.
20. On Cross Examination the witness stated that he was born in Uasin Gishu in 1942 and moved to Nandi in 1948, that he lived in Nandi /olessos /91 and had been neighbours with the late William Kipsongok. He stated that he knew the late Arap Choi but did not remember when he died, that Arap choi lived in the suit property, William lived in Nandi/olessos/90 and the witness lived in Nandi/olessos/91.
21. The witness on further cross examination answered that he was present when the acknowledgement notes P exhibit (2b) was written. The same had been written by Francis Kosgey who was a village elder and written on the parcel that had been bought. The property had no parcel number. He had not signed the same neither did Philip Kipsongok as well as the late William Kipsongok and Kipleting Choi.
22. It was the witness's further answer in cross examination that the survey had been done in 1972 and the Titles issued in 1977 that he had been present when the first agreement was made but his name was not recorded. He confirmed that William was not a son of Arap Choi but had purchased 7 acres but had not gone to the Land Control Board (LCB) he did not know of the cases between the two, he also did not remember when Chelimo Choi Tabusirei the widow of Kipleting Choi had died but he knew the children of Kipleting Choi.
23. On Re- examination the witness stated that the Agreement (P exhibit 2a) and acknowledgement (P exhibit 2b) relates to sale of the suit property between William Lagat and Arap Choi. He stated that once William purchased he moved to the suit property.
24. PW4, Nelson Malakwen Kata testified and equally adopted his witness statement dated 6/2/2023 as part of his evidence in chief. It was his testimony that he knew the late William Kipsongok who was his neighbor who had worked in the Ministry of Agriculture and later on as a Chief and knew the Plaintiff as his widow.
25. It was his testimony that he knew Arap Choi too who was a neighbour of William Kipsongok but were not related. That William stayed with his parents then he bought from Arap Choi in the 1970s. That William Kipsongok was buried in the suit parcel he had bought and his family stays thereon, the Defendants live thereon but he was not sure of the acreage.
27. On Cross- examination the witness stated that when the property was sold he was in school and he did not witness the agreement. he confirmed that there were tea bushes on the farm, a permanent house and semi- permanent houses. He stated that his property was Nandi/olessos/132 and that they were two properties between his property and the suit property. The suit property and Nandi/olessos/90



had a common boundary and that William Kipsongok stayed with his parents and thereafter moved to the property that he had bought.

28. In further cross examination the witness stated that he had not seen the agreement for sale and he could not tell from the photographs where the houses were since it looked like an aerial photograph. The witness stated that he attended the burial of William Kipsongok and the former Minister Henry Kosgey was in attendance. He was not aware whether William had undertaken succession and that William had moved on the suit property in 1974.
29. On re-examination the witness stated that there is a common boundary between the suit property and Nandi/olessos/90 the properties were separated by a fence. That William Kipsongok had taken possession in the 90s and his family lived on the suit property.
30. PW5, Peter Some Chumo testified and adopted his witness statement 6/2/2023 as part of his evidence in chief. It was his testimony that he knew the late William Lagat who was the husband of Franscesca Lagat (the Plaintiff). He also stated that he knew the late Kipletting Arap Choi, it was his testimony that William Lagat had purchased a property from Kipleting Choi and Fransisca had lived thereon for more than 40 years She had built a thatched house initially and now a permanent house and had live thereon from 1973, had kept cows and fenced the same.
31. The witness stated that the late William Kipsongok had been buried thereon and that Jane Choi had been married through a woman to woman marriage to Tabusirei Choi and that Jane and her children lived on a portion of the suit property while William 's Family lived on the other portion and that Williams portion was larger than Jane's portion.
32. On Cross Examination the witness stated that he was a neighbour to William lagat there being two properties between them. He stated that he had been a village elder from 2000 and he was 66 years, he was young when the property was sold and he had not seen an Agreement for Sale. He stated that there were two big houses on the suit property one belonging to the late William and the other belonged to Japheth Songok. The other children of the late William had no houses on the suit property. There was a posho mill and workers on the suit property who kept changing hence he did not know their names. He stated that William did not have a title deed. He was not aware of the succession undertaken by the Choi family.
33. On re-examination the witness stated that William Lagat had lived on the property for more than 40 years. he had found him there. That some of Fransisca's children lived on the suit property while other lived on the other property.
34. PW6, Kimaiyo Manyur testified through a Nandi translator and adopted his witness statement dated 6/2/2023 as part of his evidence in chief. It was his further testimony that he knew the late William Lagat together with his wife known as Fransisca Lagat. that initially William lived in Nandi/olessos/90 but moved after he purchased a portion in the suit property. The witness stated that he was a neighbor in respect of the suit property and the suit property and Nandi/olessos/90 shared a boundary which a fence that separated the two. The witness did not know where Jane Choi lived and her relationship with the late Kipleting Choi.
35. On Cross- examination the witness stated that he did not know the relationship between John Choi and Kipleting Choi. He stated that he owned Nandi/olessos/89 while the late William had purchased the suit property and that William 's family utilizes the suit property. The witness had not seen the agreement for sale since it was verbal. The witness stated was not aware of previous Court case.
36. The Witness stated in further cross examination that the children of the late William were living on the suit property. The witness was not aware how many acres were under tea, the witness stated that



he thought that the late William had been bought 6 acres of which 2 acres were under tea and the rest were occupied by Fransisca and her sons who had built 4 houses but he did not know their names and could not tell them apart.

37. On re-examination the witness stated that Fransisca utilized 6 acres.
38. The last plaintiff witness was Isaac Kipchoge Keino who equally adapted his witness statement dated 6/2/2023 as part of his evidence in chief. it was his testimony that he was a neighbour of the late William Lagat and he also knew the late Arap Choi who was not related to William Lagat. He stated that Jane Choi was the wife of Tabuserei Choi who had been married by Kipletting Choi, William Lagat had originally lived in the suit property while Nandi/olessos/90 which belonged to his parents. The late William had lived thereon since the witness was born and he was now 50 years old.
39. It was the witness's further testimony that Jane Choi the 1st defendant lived in the suit property together with the Plaintiff and the portion belonging to William was large than the portion belonging to Jane and William lived on the suit property. That the suit property and Nandi/olessos/90 were separated by a fence.
40. On cross examination the witness stated that he was 50 years old. And that he was aware Nandi/olessos 90 belonged to William Lagat's parents but William had been issued a title to it. PW7 Stated that he had not met Kipletting Choi in person but knew Tabuserei Choi and Jane Choi. He was not aware of the other cases, he had not seen the agreement for sale but was aware that William owned the suit property since he had lived thereon. The witness indicated that he had heard that the late William Lagat had been an Agricultural officer before becoming an Assistant chief and eventually a Chief.
41. It was the witness's further answer in cross examination that he was not related to the parties, he knew the 3rd 5th and 6th Defendants live on the suit property and that Japheth Songok who was younger than him lived on the suit property but on Williams side, that there was a fence between the suit property and Nandi/ Olessos/90. The witness had nothing to show that there was a house on the suit property. He stated that Fransisca was the legal representative had had peaceful occupation of the suit property.
42. On Re-examination the witness stated that the Defendant's used a smaller portion of the suit property than the Plaintiff's and that Japheth and his mother utilized the suit property and that he was a neighbour living about 600 metres away.
43. On an oral application by Mr. Kiprono for the Plaintiff to recall the Plaintiff which application was not opposed by Mr. Choge for the defendants the plaintiff was recalled and she produced the Grant of letters of administration earlier marked as MFI 1 as P Exhibit 1, where after she was cross examined by Mr. Choge and she stated that she had obtained the Grant on 17th October 2023 and she did not have the Grant at the time she filed the case. She confirmed the same on Re-examination by her counsel Mr. Kiprono.
44. After the testimony on the 7 witnesses for the Plaintiff the Plaintiff was closed.

Defendant's Case: -

45. The 1st Defendant had filed an Amended Replying Affidavit to the Originating Summons deponed on 20th March 2022 which was converted to a Defence as noted at paragraph 3 of this judgment. It the defendant's case that herein that;
 - i. The 1st and 2nd Defendants were the administrators of the Estate of the late Kipletting Arap Choi vide Kapsbet High Court succession cause number 001 of 2022.



- ii. that the entry of William Kipsongok Lagat on the suit property was when he was a Local Chief exerting terror and wielding immense power over the 1st Defendant's woman to woman 'husband'. And efforts to aid her 'husband' were met with brute force, terror and the use of the criminal Justice system and powered by William Kipsongok Lagat.
 - iii. the entry of William Kipsongok Lagat on the suit Property was through deceit, fraud and misrepresentation that was sustained by force, threats, fraud and misrepresentation and coercion: forceful entry and detainer, Forgery of an agreement allegedly as a purchase of a portion of the suit property Presenting himself as the son of the deceased Misrepresenting himself as the administrator of the estate of the deceased
 - iv. Upon discovery of the fraud the 1st defendant moved to the high court for cancellation of William Kipsongok lagat's actions and deeds and the same way sustained by way of cancellation and deletion of the entries that had given William Lagat foothold on the suit land.
 - v. William Kipsongok Lagat never claimed the suit land after removal from his register which removal was by consent which consent order binds the plaintiff as representative of his Estate.
 - vi. That the introduction letter done while doing the succession cause was authored by William Lagat and/or his office as well as the Agreement for sale that he claimed to have purchased the suit property. The said Agreement for sale was not referred to the Land control Board for consent to subdivide and was transfer and was thus a nullity for want of Compliance of the Land Control Act, Limitation of Actions Act, The law of Contract Act and now the Land Act.
 - vii. That this Honourable court has no jurisdiction to vary, set aside, vacate or review the certificate of confirmation of Grant issued by the High Court, a court of concurrent jurisdiction.
 - viii. That the summons was in bad in law, incompetent, incurably and fatally defective and it is an attempt by the Plaintiff to stretch her lack after the revocation, review and setting aside the certificate failed.
 - ix. That failed, neglected and/or ignored to make his claim after revocation of the grant, William Kipsongok Lagat conceded to the defendants claims over the suit land and his widow and/or the administrator could not inherit any portion section and/or rea of the suit land there having been no lawful arrangements allowing them to any part, portion section or area.
 - x. That there were proceedings before the Land dispute tribunal that were engineered by the late William Kipsongok Lagat.
 - xi. The Defendants prayed for declaration that the suit property was rightfully theirs and sought for mesne profits and dismissal of the originating summons before court.
46. The defence called a total of 4 witnesses. DW1, Jane Chepkemboi Choi, also known as Katarina Chepkemboi Chepkosion testified. It was her testimony that the late Kipleting Choi was an uncle to her mother and that Tabusienei Choi was her grandmother, and the wife of Kipleting Choi. She had undergone a woman to woman marriage to Chelimo Choi under the Nandi Customary marriage and they got 11 children.
 47. It was her evidence that Kipleting Choi was the owner of the suit property, but she did not know the acreage he owned. She stated she did not see the agreement between William Songok and Kipleting.
 48. It was her testimony that she was married in 1962 and that William Songok had burnt her house in 1973, and Kipleting Choi had died in 1973. That William Songok was the owner of Nandi/lessos



- No. 90, about 15 ½ acres, although one of his sons and the Plaintiff resided on the suit property. The suit property was surveyed in 1964 and register was opened in 1976, same year the register for Nandi/olesos/90 was opened.
49. It was her testimony that no agreement was done in 1973, and no acknowledgement was done in 1975. The witness could not remember when Kiplating Choi died, she stated that there has been no peace between the Plaintiffs and herself. She had been taken to police cells and accusation of peddling bhang and brewing illicit bre known as changaa.
 50. That William Songok had been a chief for almost 24 years. She further stated that the Plaintiff's children are no on the suit property and they are 2 houses on the suit property.
 51. They had a dispute at the Tribunal went to High Court at Eldoret, the Plaintiff had her won property. She was no present in any dispute meeting settling the matter. She stated that the Plaintiff's witnesses did not know anything about the property but were all grabbers. The witness produced a copy of the register of Nandi/olesos/80 as D exhibit 1, copy of search for Nandi/olesos/90 D Exhibit 2.
 52. A copy of the agreement and acknowledgement as D Exhibit 3 (a) and (b) and grant of letters of administration, and certificate of confirmation of grant as DMFI 2, Ruling delivered on 26/01/2022 in Kapsabet Succession Cause No. 001/2022 formerly Eldoret Succession Cause No. 221/2006 as DMF3. The entire file of Kapsabet Succession *Cause No. 001/2022* as DMFI 4.
 53. In cross – examination, the witnessed stated that she was the Administrator of the Estate of Kiplating Choi. The Grant was confirmed and distributed. She stated she did know the agreements for sale and whether they were forged.
 54. The witness stated that she knew the late William Songok who lived in a nearby property. She stated that he knew the late Kiplating Choi owned the suit property but did not know when he was registered. She stated that Kiplating Choi was registered and that he had died in 1976, and he had been issued with a title; in 1973 when she was at property.
 55. The witness stated that the Plaintiff and his sons utilize the suit property and had built houses on the suit property, that William Lagat had planted tea on the property; and had the property Nandi/olesos/90 the two properties were demarcated by a swamp and barbed fence.
 56. The witness stated that she utilized 3 acres in the suit property while the Plaintiff utilizes 7 acres; there was a posho mill on the suit property. There were no proceedings from the Tribunal. That they had been cases with William Songok since 1973, she had been charged with possession of bhang and illegal brews, she had not filed any previous case. William Songok entered the property by force in 1978 since he was the chief. The witness did not want the Plaintiff to eb given 7 acres. She did not attend Williams funeral, but he was buried in the suit property.
 57. On re-examination, the witness stated that William Songok had been buried on the suit property by force since the police were in alternative. The fence was erected in the 1960's. Posho mill was commissioned 5 years ago, and that the son's house was built 5 years ago, the tea had been planted about 10 years ago, and the witness had planted tea on the property. The witness stated that Kiplating Choi was the first registered owner and he took the title deed, and that the name Kiplating Choi is not on the acknowledgement and that the name of Chelimo Kamunene Chelimo was a strange name.
 58. DW2 Raphael Kibet Phiri, stated that he knew the Plaintiff and the Defendants, the 1st Defendant was his mother and while the other Defendants were his siblings. The witness stated that the Plaintiff should not be given 7 acres since they had not been living in peace.



59. The witness remembered the entry by the Plaintiff to have been in 1973, and their house was burnt by the chief. Kipleting was an old man then, and his family moved out of the suit property and returned in 1981 and have not been at peace. They had cases from 2001, and Kipleting died in 1970's. the Plaintiff registered himself through a Grant that was revoked by Justice Ibrahim and the new Grant was confirmed by Justice Ogola, the Defendant had not evicted the Defendants since they are following Court procedures.
60. On cross – examination the witness stated that he had no relationship with William Kipsongok. The suit property was owned by their grandfather in the 1970's and the agreement for sale surfaced only in 2001. The late William Kipsongok had died and was buried in the suit property. The family of Songok utilized about 4 acres, the witness stated that he had not filed a witness statement nor an affidavit.
61. William Songok had harvested trees on the suit property and there was a swamp between plot No. 80 and 90 and a fence.
62. The witness stated that they have not been peaceful because of Court cases. Each William had been utilizing the property since 1973, but this entry was by force after the death of Kipleting Choi. The Plaintiff have no title as the Defendant were given property by the High Court. People could inherit property and buy their own properties.
63. On re-examination by Mr. Choge, the witness stated that William Lagat did not take the whole title since they would have challenged it. The certificate of confirmation was issued Justice Ogolla.
64. The revocation process was stated in 2001. After succession the Plaintiff filed this case. All of the Defendants have an interest in the matter. He stated the posho mill was erected about 4 or 6 years ago. There had been no eviction proceedings.
65. DW3 John Kiprotich Keny adopted the witness statement dated 8/4/2019 a part of his evidence in chief. It was his testimony that the 1st Defendant was his sister who was married to Tabusirei Choi the Nandi customary under woman to woman marriage. He also knew Kipleting Choi.
66. The witness stated that his sister and her children were harassed and victimized on allegations of bhang and illicit brews and were taken to Court.
67. The witness undertook investigations so as to unearth the real problem and went to the police station, where he found out from the police that the real issue related to the suit property which was claimed by William Kipsongok Lagat. His sister took out revocation of the succession proceedings. There has been a dispute for long – time, and thus no peaceful existence.
68. On cross – examination, the witness stated that he knew the late William Lagat but was not aware whether he had bought the suit property. The witness did not know which property Jane lives on and which property was owned by Kipleting Choi; he did not know where Kipsongok Lagat lived.
69. It was his answer that the Defendants would be arrested because of illegal brew, but did not know whether Jane Choi brewed any illegal brews. He was told at Olessos Police Station that the Defendants would be arrested on instructions of the chief. He confirmed that it was the chief's duty to prevent brewing of illegal brews. The suit property was fenced but both families were on the same property. He did not remember when Jane Choi was married. He did not know whether the suit property had been fenced.
70. On re-examination, he said he did not find any illegal brews at his sister's place, he had investigated the arrest on illegal brews and the houses were built while case was in Court.



71. The last witness DW4 was Mr. Kipruto Kibet an Assistant Court Administrator, Kapsabet Chief Magistrate's Court. He had received Court Summons dated 3/11/2023 to produce Kapsabet Succession *Cause No. 1/2022* in the Estate of Kipleting Choi.
72. It was his testimony that the said file Kapsabet P & A *No. 1 of 2022* was originally filed in Eldoret High Court as Eldoret High Court Succession *Cause No. 221/2006*.
73. He stated that there was also a Succession Cause, *34/1993* in respect of the Estate of Kipleting Choi that had been filed before the Resident Magistrate Court at Kapsabet.
74. The succession cause related to Nandi/olessos/80 in both Succession *Cause No 221/2006* Eldoret and in *No. 34/1993* Resident Magistrates Court Kapsabet.
75. The Estate related to the same deceased person. In *Misc. 221/2006* Applicant is Jane Chepkemboi Choi while the Respondent is William Kipsongok Lagat & 2 others. In *No. 1/2023* consent order recorded that there be no eviction until matter is concluded.
76. There is a Grant of Letters of Administration and Certificate of Confirmation of Grant, and summons for revocation of Grant and Certificate of Confirmation filed by Francisca Chemutai Lagat and there is a ruling in respect of the summons but there was no notice of appeal. The witness produced DMFI to 4 as D Exhibit 4 to 7 and original file as D exhibit 8.
78. The witness was cross – examined by Mr. Kiprono where he stated that he had produced through the succession Court, 3 files in it, all relating to Estate of Kipleting arap Choi and subject matter Nandi/olessos/80. He stated that the grant that was confirmed, indicate the administrators as Jane Chepkemboi Choi and Francis Kipchumba Kogo and the Estate had devolved to the beneficiaries. The witness had not seen any LDT decision in the matter., the matter was purely a succession cause, the consent had been overtaken by the Certificate of Confirmation of Grant.
79. On re-examination, the witness stated that at paragraph 4 of the consent William Lagat was made a protestor in respect of the Estate of Kipleting Choi; there were two sets of applications, 1st set is in *Misc 121/2001* – Applicant Chepkemboi Choi vs William Lagat.
2nd set of revocation is in *Misc. No. 221/2006* now Kapsabet 01/2023 Applicant Francisca Lagat vs Jane Choi.
80. Both were revocation proceedings by the Plaintiff and there is a ruling in respect of the summons.
81. After the testimony of the 4 witnesses, the Court directed filing submissions on a survey report that had been ordered to be undertaken and filed during the proceedings on 1/11/2023. The said report was to be filed alongside the submissions and was filed on 26/01/2024, the Plaintiff's Advocate upon service of the submission's submission sought and was granted leave to file rejoinder submissions.

Plaintiff's Submissions: -

82. Through her Advocates the Plaintiff in her main submission has identified and submitted on 4 issues to wit;
 - a) whether Plaintiff has the requisite locus standi to sustain this suit.
 - b) when did time start running for purposes of adverse possession?
 - c) whether Plaintiff has proved adverse possession and is entitled to 7 acres
 - d) who bears the costs of the suit?



83. On issue No. 1, the Plaintiff submits that she was issued with an order 14th day of July 2022 in Kapsabet Succession Cause No. E070/2022 in the Estate of William Kipsongok Lagat and order was the Grant ad litem which granted her authority to file the suit. She submits the order extracted was not on the prescribed form but nonetheless having filed suit on 18/7/2022 she had the requisite authority and the issue of the date on the grant is form ought not to affect substantive justice under Article 48 and 159 (2) (d) of Constitution the Constitution of Kenya. The Plaintiff submits she had the requisite authority thus to file the suit.
84. On issue 2, the Plaintiff submits while placing reliance on the initial date of the agreement in 1973 as the date as when time started running.
85. The Plaintiff submits that the initial entry was pursuant to permission through the agreement for sale and the permission was extinguished due to lack of the LCB consent and it thus become void and adverse.
86. In this regard the Plaintiff places reliance on the decisions in the case of Kasuve v Mwaani Investments Limited & 4 others (2004) KLR as quoted in the decision in Wilson Kazungu Katana & 101 others v Salim Abdalla Baksbwein & another (2015) eKLR as well as the decision in Mike Waweru v Jane Njeru Richu (2007) eKLR.
87. On issue number 3, the Plaintiff submits that she had proven the ingredients of adverse possession, in that the suit parcel is registered in the name of the Defendants pursuant to succession cause No. E 001/2022 Kapsabet High Court that the Plaintiff had lived thereon for more than 12 years, without interruption in continuity and in publicly and in this regard the Plaintiff has cited the decision in Mtana Lewa v Kalundi Ngala Mwangandi (2015) eKLR.
88. The Plaintiff has also cited the decision in the case of Mary Wangari Macharia v Edwin Onesmus Wanjau 2022 eKLR and the Registered Trustee, Catholic Diocese of Muranga v Micere Njau and 3 others (2022) eKLR on the proposition that succession causes do not amount to eviction proceedings and the mere change of ownership does not affect a claim for adverse possession.
89. On the survey report, the Plaintiff submits that the report detailed the occupation of the two parties, that the Defendants utilizes 5 acres and had 0.98 acres under tea, while the Plaintiff utilized 6.6.24 acres and had 1.07 acres under tea, and that the report is consistent with the testimony of the Plaintiff's witnesses and urged the Court to adopt the report.
90. On costs the plaintiff submits that they be awarded costs of the suit.

Defendants Submission: -

91. The Defendant submits that the Plaintiff had no locus to institute the proceedings as she obtained a Limited Grant after she had testified in support of this the Defendant places reliance on the decision in Alfred Njau v City Council of Nairobi (1983) KLR 625 as well as the decision in Jilian Adoyo Ongunga v Francis Kiberenge Abano Migori Civil Appeal No. 119 /2015.
92. The Defendant submits that the suit as filed was thus void ab intio and urges the Court to dismiss the suit on that score.
93. The Defendant submits that the suit is resjudicata due to the existence of Kapsabet Successio9n Cause No. 34/1993, Eldoret High Court Misc. 34/1993, Eldoret High Court Misc. Application No. 121/2001, Eldoret High Court Succession No. 20/2006, and Kapsabet High Court Succession Cause No. 001/2022, since the subject matter in all the above cases was Nandi/ollessos/80.



94. In support of this limb of submissions the Defendant places reliance on Section 7 of the [Civil Procedure Act](#), the definition of resjudicata on [Blacks Law Disctionary](#) and the decision in *Njangu v Wambugu & another* Nairobi HCCC No. 2340/1991.
95. On the strength of the above the Defendant submits that the suit being resjudicata ought to be dismissed.
96. On adverse possession, the Defendant submits that the Defendant had no knowledge of means of knowledge of occupation by the Plaintiff.
97. The Defendant submits that since William Kipsongok Lagat filed a succession cause in 1993, time stopped running for purposes of adverse possession; and that pursuant to a consent order, William Lagat conceded that he was not entitled to suit property, and therefore time had stopped running. The Defendant places reliance in the decision in the case of [Githu v Ndeete](#) on this regard.
98. The Defendant submits since the owner died in 1977, time could not run for purposes of adverse possession as there was no knowledge by a deceased on the claim by William Lagat.
99. The Defendant submits that the suit is thus time barred under Section 4 and 7 of the [Limitation of Action Act](#), having being filed 50 or so years later, as the Plaintiff is seeking enforcement of the Agreement for Sale.
100. The Defendant thus urges the Court to dismiss the claim.
101. The Defendant submits that this Court lacks jurisdiction to stay execution of the consent order in the High Court which dismissed the summons for revocation of Grant. The Defendant submits that the consent order acknowledged her title.
102. The Defendant further submits that there is no Limitation of Action on Fraudulent claims and Courts should shy from granting claims based on fraud.
103. On the strength of the above submissions the Defendants submits for a dismissal of the suit with dismissal of the suit with costs.

Plaintiff's Rejoinder Submissions: -

104. The Plaintiff had sought and was granted leave to file rejoinder submissions.
105. In her rejoinder submission through her Counsel, the Plaintiff submits that thus suit is not resjudicata as Kapsabet CM Succ. *Cause No. 34/1993*, Eldoret HC. *Misc. 121/2001* Kapsabet High Court Succession *Cause E001/2022* were strictly succession causes which could not had he adverse possession matter exclusively reserved for the ELC Court hence the High Court and Kapsabet CM's Court were not competent Courts.
106. The Plaintiff submits that the consent order dealt with the appointment of an Administrator and distribution of Estate of Kipleting Arap Choi and thus it was not a land claim and hence the issue of resjudicata does not arise.
107. The Plaintiff further submit that the issue of fraud was not determined in any of the succession causes as there was a consent order recorded.
108. And the issues of fraud could not be reopened at this stage and that the entries in favour of William Songok were in any event revoked.



109. On whether the true owner had knowledge of the Plaintiffs presence the Plaintiff in her rejoinder submission and placing reliance on the decision in Titus Kigoro Munyi vs Peter Mburu Kimani, submits that “the prescription law and rights affect not only present holders of title but their predecessors.” And has also cited the decision in *Karuntimi Ranji v Makinya Mithunga* as well as *Mwangi and Another v Mwangi* (1986) KLR 328.
110. On the strength of the above the Plaintiff seeks that the case be allowed.

Issues for Determination: -

111. Before framing the issues for determination, a number of uncontested issues worth noting arose in the course of proceedings, as here follows; -
- a). Nandi/ollessos/80 was first registered to Kipleting Arap Choi in 1976.
 - b). A Grant that had been issued jointly to William Kipsongok as well as Tabusienei Chelimo Choi revoked by the consent of the parties *cause No. 221/2006*.
 - c). This suit herein was commenced by Originating Summons seeking adverse possession in respect of 7 acres by Francisca Lagat Chemutai on behalf of the Estate of William Kipsongok Lagat.
 - d). The Grant that was issued in respect of the Estate of Kipleting Arap Choi was confirmed and Nandi/ollessos/80 was distributed to the Defendants.
112. After carefully consideration of the pleadings, the evidence and the submissions, the Court frames the following as issues for determination;
- i) Whether the Court has jurisdiction to hear and determine this matter in view of
 - a. Consent order recorded in Eldoret P & A 221/2006
 - b. Issue of resjudicata
 - c. Issues of the suit being time barred
 - d. Grant issued in the Eldoret P & A 221/2006 now Kapsabet P & A 1/2022
 - e. Lack of locus standi on the part of the Plaintiff
 - ii) If answer to a) is in the affirmative, then when did time start running for adverse possession and has the Plaintiff proved adverse possession?
 - iii) What reliefs ought to issue?
 - iv) Who bears the costs of the suit?

Analysis and Determination: -

113. The issue of the consent order as well as the issue of resultant Grant of Letters of Administration and the subsequent confirmation of the said grant being interrelated shall be dealt with together.
114. It is the Defendants submission that upon adoption of the consent order, the same become an order of the High Court a Court of equal and concurrent jurisdiction with this Court, and that entertaining this suit would be tantamount to setting aside the said orders; hence this Court has no jurisdiction, so argues the Defendant.



115. In response vide the rejoinder submission the Plaintiff submits that effect of the consent order was not in any way to oust the jurisdiction of this Court to determine a land claim.
116. The Plaintiff submits that parties cannot agree to rubbish a statutory provision and oust the jurisdiction of this Court.
117. The Plaintiff reliance on the decision in the case of *County Government of Kirinyaga v African Banking Corporation* (2020) eKLR as well as *Lee v Showmen's Guild of Great Britain*.
118. I have perused the consent order under reference the same is dated 3/4/2019 and its true import and purpose was to;
- i) to revoke the Grant of Letters of Administration together with a Certificate of Confirmation of Grant issued in Kapsabet Succession *Cause No. 34/1993* in respect of Estate of Kipleting Arap Choi.
 - ii) It was to cancel all subsequent registrations and entries in respect of Nandi/ollessos/80 and the property to revert to deceased Kipleting arap Choi.
 - iii) for the appointment of Administrators in the Estate of Kipleting Arap Choi
119. The said consent order was implemented and new Administrators of Estate of Kipleting arap Choi were appointed and entries 2 and 3 in the register were revoked and the suit land reverted back to Kipleting arap Choi. The copy of the register was produced as an exhibit by both parties and confirmed the implementation of the order, and the subsequent issue of confirmation of grant and distribution of grant.
120. Would the consent order and the fact that the suit property was distributed in the succession cause, be a bar to the jurisdiction of this Court?
121. I am persuaded that a claim of adverse possession can rightly be entertained by this Court irrespective of the distribution of the suit property and revocation of grant.
122. in arriving at the above I am guided various dicta including the decision by the Court of Appeal in *Peter Thuo Kairu v Kuria Gacheru*, where the Court held inter alia “a claim for adverse possession subsists not only against the present holders but also their predecessors in title.”
123. As observed earlier to effect of the consent order and the Grant would be to change ownership of the suit property and as was held in *Githu v Ndeete* (1984) KLR 776 where it was held that “mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”
124. On the strength of the above the Court returns a finding that irrespective of the consents order appointing new administrators in the Estate of Kipleting Choi and the Grant that distributed the suit property to the Defendants as new owners, this Court can hear and determine a claim of adverse possession as the one before Court.
125. On Resjudicata the Defendant has submitted that the suit is resjudicata in view of the succession causes that distributed the suit parcel, and has placed reliance on Section 7 of the *Civil Procedure Act*.
126. In response the Defendant in the rejoinder submissions, submits that the High Court as a succession Court could not adjudicate on an adverse possession matter like this one before Court.



127. Indeed Section 7 of the *Civil Procedure Act* provided for resjudicata and the Supreme Court decision in *John Florence Maritime Services Limited and another v Cabinet Secretary Transport and Infrastructure* 2021 (KESC 39) for the doctrine to apply following elements must be demonstrated.
- a) there is a former judgment or order which is final;
 - b) The judgment or order was on merit
 - c) The judgment or order was rendered by a Court having jurisdiction over the subject matter and the parties
 - d) The must be between the first and second identical parties, subject matter and cause of action
128. It is common ground that the suit property and the same parties were involved, however the succession Court having no jurisdiction to deal with adverse possession matters, the last two elements have not been proven and the Court finds that the plea of resjudicata by the Defendant equally fails.
129. On the issue of suit being time barred, it is the Defendants submissions that the suit is time barred having been founded on an agreement for sale made in 1973.
130. The Plaintiff submits that their claim is purely on adverse possession as defined in the case of *Mtana Lewa v Kabindi Ngala Mangandi* (2015) eKLR.
131. The Plaintiff submits the claim before Court is not tied to the agreement for Sale and/or contract.
132. The reliefs sought by the Plaintiff are purely based on the enforcement of prescriptive rights of adverse possession. The Plaintiffs claimed vide the originating summons is premised an order 37, Rule 7 and 8 of the *Civil Procedure Rules* consequently the present suit is purely a claim for adverse possession and not a claim for specific performance of the agreement prepared in 1973 and the issue of the suit being time barred is not only far fetched but also inapplicable. This issue does also not oust this Court's jurisdiction.
133. The last issue of jurisdiction is whether the Plaintiff had the requisite locus standi to initiate the proceedings before Court. It is the Defendants submission that the Grant of Letters Ad litem (P Exhibit 1) was issued after the filing of the case.
134. The Plaintiff submit that Ad litem was issued by the Court on 14/7/2022 by the Court but the same was not on extracted as an order, and the suit was filed on 18/7/2022.
135. Thus at time of filing the suit, so submits the Plaintiff's Advocate the Plaintiff had the Locus Standi to file suit.
136. In *Evans Obino Nyamoisi v Ndege Okangi* Civil Appeal No. 32/1998, the Court of Appeal held interalia "a party to have capacity to sue or be sued on behalf of an estate of a deceased person he/she must have a Grant of Letters of Administration..."
137. It is not in doubt that the Plaintiff sought for Grant Ad litem and the same was issued on 14/7/2022, but issued as an order as opposed to Grant ad litem in the prescribed form.
138. The issue is thus was the Grant issued before filing of suit or after commencement of the suit.
139. The common practice in Kenya Courts is that orders are extracted, signed and sealed by the Courts. In the present case, an order giving a Grant Ad Litem was extracted not in the prescribed form, the Plaintiff submits that same relates guest to form and not substance of the matter. The Defendant submits that the same is fatal.



140. There was indeed a mistake in extraction of the Grant on the part of the Court, should this then be visited on the litigant?

The Law is that an Advocate's mistake should not be visited on the litigant, and on the same parity of reasoning, the Court mistake in extraction of the grant should not be visited on the litigant as it is an excusable mistake curable under Article 159 (2) (d). This Court is not alone in holding so, as this was the position taken in case No. E033/2022 *Timothy Oluoch Bala v Samuel Japser Ochoy* before Siaya Environment and Land Court where in similar circumstances the Learned Judge allowed a decree that had been extracted as an order, and found that the Court's mistake could not be visited on the litigant.

I am persuaded by the said reasoning and adopted the same.

141. On the whole of issue number 1, for the reasons advanced above on each of the sub issues, the Court finds that it has jurisdiction to hear and determine the matter before it.
142. The Court shall now examine issue number 2, as to when time started running for purposes of adverse possession and whether the averments of adverse possession have been proven.
143. The Plaintiff and her witnesses alluded to the entry on the suit property to have been in 1973 after the purchase. DW1 and DW2 also conceded that the entry on the suit property was in 1973 in the lifetime of the original owner Kipleting Arap Choi. The agreement for sale produced in evidence was made in 1973, and an acknowledgment note for the balance was made in 1975. The agreement and the acknowledgment note were produced in evidence. The Defendants contends that the agreement did not bear the property number hence it could not have related to the suit property.
144. When entry is made pursuant to an Agreement for Sale time for purposes of adverse possession run from the date of payment of the last installments; in the case it would be in 1975, however since the suit property had not been registered in 1975, time could only start running from the date of registration. The copy of the register places the registration in 1976, and hence time starts running in 1976 for the full span of 12 years.
145. In *Francis Gitonga Macharia v Muiruri Waitbaka*, Civil Appeal No. 110/1997, the Court held that time started running from time of registration. As was held in the decision in *Peter Thuo Kuria v Kuria Gacheru* that the law relating to prescription affects not only the present holders but the predecessors too.
146. It follows that time started running in 1976 and the right to claim adverse possession accrued to the Plaintiffs in 1988 or 1989 thereabouts.
147. The Defendant submits that the death of the original owner negates time from running from running as there was no knowledge of the occupation. The DW1 did confirm that the entry was in the lifetime of the original Plaintiff.
148. Was there assertion of right by way of a suit, for recovery of the land by the Defendants between 1976 to 1989 when the right accrued, the first succession cause was filed in 1993, when the right had already crystallized; hence would not affect the time for purposes of adverse possession.
149. The Defendants evidence and submission is that there had been no peaceful occupation, since the Defendants' would be arrested over claim of illicit brews (changaa) and bhang. The peaceful existence is however required not on the part of the Defendant but the adverse possessor and no evidence had been adduced to show that from 1976 to 1988 the Plaintiff was evicted on the suit land. The issue of the fraudulent claim by William Songok so as to obtain the Grant of Letters of Administration was



made in 1993, after the crystallization of the Plaintiffs claim and would not work backwards to disrupt the time from running or the right from accruing.

150. The Plaintiff has thus proven by way of witnesses, occupation which was continuous from 1976 upto time of filing suit, the said occupation is coupled with use of the 7 acres or thereabouts as was confirmed in the survey report. The survey report filed in the matter was filed pursuant to the Courts direction the Court's direction Order 18 Rule 10 and Section 146 (4) of the *Evidence Act* as additional evidence by the Court.
151. The elements of adverse possession as stated in various "*dicta of "nec vi, nec clam, nec precario"*" having been proven by the Plaintiff, it is the Courts finding that the Plaintiff has proven her claim of entitlement of the 7 acres, in the suit property.
152. Having proven entitlement of 7 acres the registration of the Defendants pursuant to the Grant serves to confirm that the Defendants are holding the 7 acres in trust for the Plaintiff, as it ought not to have formed part of the Estate of Kipleting Choi.
153. The upshot is that the Plaintiff having proven her entitlement to the 7 acres in Nandi/ollessos/80 is hereby awarded the same as was established in the survey report dated 15th January 2024.
154. In view of the Grant issued to the Defendants by the High Court, and having established their claim of 7 acres before this Court. The Plaintiff ought to move to the succession Court for appropriate orders of rectification of the Grant or as they may deem appropriate.

Disposition: - __

155. The Plaintiff having proven entitlement to 7 acres is hereby awarded the same, as per the survey report dated 13th January 2024.
156. A declaration is hereby issued that the Defendant's right to 7 acres in Nandi/ollessos/80 has been extinguished under Section 38 of the *Limitation of Act*, and the Plaintiff's ought to be registered as the proprietors of the 7 acres that the Defendants are holding in trust for them.
157. Noting that the Plaintiffs and Defendants family have lived alongside each other for almost 50 years, each party shall bear its own costs.
158. The Court wishes to acknowledge the industry of Counsels who appeared in this matter Mr. Victor Kiprono for the Plaintiff for well researched submissions and Mr. Kipkosgei Choge for the Defendants for raising all manner of viable defence available to his clients, and the Court thanks both Counsels for their industry.
159. Judgment accordingly.

JUDGMENT, DATED AND DELIVERED AT KAPSABET THIS 19TH DAY OF FEBRUARY 2024.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

1. Mr. Choge for the Defendant
2. Mr. Kiprono for the Plaintiff

