



**REPUBLIC OF KENYA**

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

**E&L 378 OF 2012**

*Formerly HCC 147 of 2007*

**KIMOI RUTO & ANOTHER.....PLAINTIFFS**

**VS**

**SAMWEL KIPKOSGEI KEITANY & ANOTHER.....DEFENDANTS**

***(Adverse Possession; whether adverse possession can be claimed against a statutory corporation; applicant seeking adverse possession against title previously registered in the name of Agriculture Finance Corporation (AFC); AFC having transferred the title 17 years later to 1st respondent; whether the time when AFC was registered could count towards a claim for adverse possession; exceptions in Section 41 of the Limitation of Actions Act; whether Statutory Corporation is part of Government or whether such land form part of land being enjoyed by the Government; held that land registered in the name of a statutory corporation is land being enjoyed by the Government and thus not capable of sustaining a claim for adverse possession; suit dismissed with costs)***

**JUDGEMENT**

**A. INTRODUCTION AND PLEADINGS**

1. This suit was commenced by way of Originating Summons filed on 29 August 2007. The heading of the Originating Summons states that the same is taken out "Under Section 3 & 3A of the Civil Procedure Act Section 37 and 38 of the Limitation of Actions Act, CAP 22, O. XXXVI Rule 3D of the Registered Land Act-Cap 300." In it the applicant seeks the determination of the following questions:-

(a) A declaration that the plaintiff/applicants have jointly acquired title to and ownership of the parcel of land Number Cherangany/Korongoi/1 by virtue of adverse possession.

(b) A declaration and finding that upon expiry of the 12 years from 20th November 1990 the title of defendant No.2 to land parcel No. Cherangany/Korongoi/1 became extinguished by law and defendant No. 2 held the title in land on trust for the plaintiffs.

(c) A declaration that the transfer and/or transmission of land title number Cherangany/Korongoi/1 to the 1st defendant/respondent on 6/7/2007 was invalid and unlawful and the registration should be cancelled as the 2nd defendant had no title to pass to the 1st defendant the same having been extinguished by operation of law.

(d) A declaration that the 1st defendant/respondent's title to the land number Cherangany/Korongoi/1 be cancelled for reasons set out by the plaintiff's affidavits annexed herein and other reasons to be adduced at the hearing of this summons.

The applicants have asked for orders that pursuant to (a) (b) (c) and (d) above, the Land Registrar Iten or the Land Registrar for the time being having lawful custody of the Land Register in respect of the land title number Cherangany/Korongoi/1 (the suit land) be ordered to delete the name of the 1st defendant from the said Register and in lieu thereof, the names of the plaintiffs be entered in the said register as joint proprietors of the said land. The applicants have also asked for costs.

2. The Originating Summons is supported by the affidavits of the applicants . The 1st applicant, Kimoi Ruto, has inter alia deponed that the 1st respondent, Samwel Keitany, is the registered owner of the suit land. It is averred that the 1st respondent acquired the said title fraudulently from the 2nd respondent, Agriculture Finance Corporation (AFC) at a throw away price and behind her knowledge so as to defeat her rights over the said land. It is deponed that on 6 July 2007, she paid a visit to the Branch Manager of AFC at its Eldoret office to find out whether she could pay off a loan taken by her late son, Julius Kipyego Ruto. She has deponed that the Branch Manager told her that if she paid off a sum of Kshs. 41,000/= , she could get the land transferred back to her, or the family of her late husband, because it was still in the name of AFC. She has averred that she went to the lands office at Iten and obtained a search which showed that the land was still registered in the name of AFC. She has stated that she then went to the Branch to pay the amount of Kshs. 41,000/= but was informed to go and pay it at AFC, Nairobi. She has deponed that on 26/7/2007 she went back to check if the land was still registered in the name of AFC but the new search now showed that the land was registered in the name of the 1st respondent the land having been transferred to him at a price of Kshs. 287,000/=. She has further deponed that although herself and her daughter (presumably 2nd respondent) have been on the land for over 42 years since 1966, the new transfer was intended to deprive them of ownership of the land. She has deponed that if the land had been sold by 6/7/2007 there was no reason why the Branch Manager of AFC told her to pay the Kshs. 41,000/=. She has averred that AFC acquired the land on 21/11/1990 when she and her daughter were still living on the land. She has stated that AFC were aware of their living on the land because their stay there was obvious notorious and uninterrupted. She has deponed that the title of AFC got extinguished by operation of law after 12 years since their registration thereof on 21/11/1990. It has been averred that after the 12 years, AFC had no title to pass to the 1st respondent.

3. There is also an affidavit of the 2nd applicant which is drawn in similar terms to that of the 1st applicant.

4. The respondents filed separate replying affidavits, through their respective counsels, to reply to the Originating Summons (O.S).

5. The 2nd respondent filed a replying affidavit sworn by Nasieku Taraiya its Chief Legal Officer. She has deponed that AFC advanced a loan of Kshs. 20,000/= to one Julius Kipyego Ruto and the suit land was charged to secure this sum. The registered owner of the land was then Ruto Chesire who had given Julius Kipyego Ruto a power of attorney to deal with the suit land. It is upon the power of attorney that Julius Kipyego Ruto charged the said land to AFC. The charge was registered in November 1979. It is deponed that after receiving the loan, Julius neglected to pay the same and AFC, after issuing the requisite notices, exercised its powers to redeem the land under the provisions of Section 33 (1) and (3) of the Agriculture Finance Corporation Act (CAP 323) Laws of Kenya and the provisions of the Registered Land Act, CAP 300. It has been denied that the applicants have enjoyed uninterrupted user on the land as they have been under constant pressure to vacate. It is averred that owing to the pressure they engaged AFC on how they could "buy back" the land. It has been deponed that after a lock in the negotiations, the family of the applicants, particularly Pius Kiberen Ruto and Vincent Kirwa Ruto, consented to the transfer of the suit land to the 1st respondent. It has further been averred that AFC transferred the suit land to the 1st respondent and they therefore have no business in these proceedings.

6. The 1st respondent on his part in his replying affidavit, averred that he purchased the suit land for consideration from the 2nd respondent and that he now has title to the suit land. He has denied that the applicants have been on the suit land for the period alleged. He has stated that he is an immediate neighbor and is aware that the 1st applicant has been living on the land Cherangany/Korongoi/5 (hereinafter referred to as parcel No. 5) measuring 135 acres which farm belonged to the late husband of the 1st applicant, one Ruto Chesire, and that it was only in the year 2000 or thereabouts, that the 1st

applicant put up a temporary structure on the suit land. It is also deponed that the 2nd applicant is the daughter of the 1st applicant and that she is married and lived in Western Province with her husband upto about the year 1998 when she separated with her husband and joined her mother, the 1st applicant. It has been stated that the 1st applicant's sons and/or step sons consented in writing to the sale which culminated in the 1st respondent having title to the suit land. He has stated that he is a bona fide purchaser for value and since he acquired the land in the year 2007, any rights of adverse possession cannot run against him. He has further deponed that the applicants have denied him access to the land and are putting up structures and selling off portions to 3rd parties.

7. Directions were duly taken on how the matter should proceed and the parties agreed to proceed by way of *viva voce* evidence with the O.S being deemed as a plaint and the replying affidavits as the defences of the parties. The 1st respondent also asked that his replying affidavit be deemed as a counterclaim for eviction of the applicants from the suit land.

## **B. EVIDENCE OF THE APPLICANTS**

8. The matter thereafter proceeded for hearing with the applicants testifying in support of their case. They did not call any witnesses. PW-1 was the 2nd applicant and PW-2 was the 1st applicant. PW-1 testified that on 5 July 2007 she got information that the land control board (LCB) was sitting to give consent to the transfer of the suit land from AFC to the 1st respondent (Keitany). She testified that there was a split in the LCB and that AFC were not represented, but that consent to transfer, was nonetheless granted and the land transferred to the 1st respondent on 6 July 2007. She also testified that the land was initially owned by her father, Ruto Chesire, who died on 7 December 2003. She stated that she is currently 56 years old and that she has lived on the land since the year 1966 and even raised her children on the said land. She testified that she is not married. She further testified that there are about 30 persons on the land who comprise of her family and her mother. The land itself is 15 hectares. She testified that their father also owned the land parcel No. 5 measuring 53 hectares. She knew the 1st respondent as a neighbor. She was aware that the suit land had been charged to AFC. Her brother Julius Ruto, who took the loan died on 17th June 2003. She asked that the sale of the land to the 1st respondent be nullified and be returned to Ruto Chesire, as the title of the 1st respondent, was obtained irregularly. It was her view that the consent of the LCB was obtained irregularly.

9. In cross-examination, PW-1 conceded that she and the 1st applicant lived on the land by virtue of being daughter and wife to Ruto Chesire. She admitted that the loan was never paid and that the land was transferred to AFC in the year 1990. She stated that in the year 2004 they went to AFC to find out how much was owing so that they could repay the loan and the land to revert back to them. She also agreed that in the year 2007 they went back to AFC for the same purpose. She denied that they share a grandmother with the 1st respondent nor that he is her step-cousin. She admitted that Vincent Ruto and Pius Ruto were her step-brothers, as her father had two homes, but averred that the two could not represent the family since they live in the land parcel No. 5. She denied any knowledge of a letter dated 25 October 2004 written by AFC offering them opportunity to redeem the land. She also denied that she was ever married in Western Province and that she only came to the land in the year 1998.

10. PW-2 was the 1st applicant. She stated that she is aged about 96 years old. She testified that the suit land belongs to her and that she presently lives on the land. She further testified that the 2nd applicant has never been married and that she lives on the land with her children and grandchildren. She denied that the 1st respondent is their relative. She testified that they want the land back as the 1st respondent has never paid them any money. She testified that she has been on the land for the last 20 years and has never left the land.

11. Cross-examined by Mr. Kiarie for the 1st respondent, the 1st applicant testified that she never entered the land by virtue of being husband to Ruto Chesire, but that the land was her own. She testified that she was the first owner of the land and that when survey was done (probably adjudication), the land became registered in the name of Ruto Chesire. Ruto Chesire got title to the suit land in the year 1972 as first registered proprietor. He was also the 1st registered proprietor of land parcel No. 5. She was aware of the loan taken by their son, but stated that she was not aware that AFC had registered the land in their name.

She thought that the land was still in the name of her late husband. She stated that she herself did not go to AFC but sent her daughter so that they could redeem the property. She testified that Vincent and Pius, her step-sons wanted the land sold because it is not their's as their share is in parcel No.5.

12. With the above evidence the applicants closed their case.

### **C. THE EVIDENCE OF THE RESPONDENTS**

13. The 1st respondent testified as DW-1. He stated that he knows the applicants as he is both a neighbor and relative. He stated that his grandmother is sister to the 1st applicant. He is also a relative through marriage. He testified that he is now the registered owner of the suit land having bought it from AFC. He stated that when he first heard of the land being on sale by AFC, he wrote to AFC and made a request to purchase, with the full knowledge of the applicants. He testified that he visited the applicants and the applicants indeed encouraged him to buy the land. He also discussed the purchase with Pius and Vincent Ruto, sons of the first wife to Ruto Chesire. The two had no objection and wrote a letter dated 27 August 2004 stating as such. AFC accepted to sell the land to the 1st respondent through a letter of 25th October 2004 and asked for Kshs. 287,000/=. He paid the money and later the land was transferred to him. He further testified that the applicants could not have been on the land since the year 1960. He stated that the 2nd applicant was married to one Caled Ogada and were living together in South Kabras. The two separated and Esther came to back in the year 1998 when her father, Ruto Chesire was still alive. It was his evidence that all this time, Ruto Chesire was living in parcel No. 5 together with the 1st applicant who was his wife, and the suit land was only used for grazing. It is when the 2nd applicant came back in the year 1998 that she and the 1st applicant moved into the suit land, and the house that the 1st applicant was living in, in the parcel No. 5, was handed over to her son Julius Ruto. Both Julius Ruto and Ruto Chesire died in the year 2003 and were buried in the land parcel No. 5. He testified that since they moved into the land in the year 1998, 12 years had not lapsed to the year 2007, when this suit was filed. He stated that he has written to them asking them to leave but they have declined. He asked that they be evicted.

14. In cross-examination, DW-1 inter alia stated that he came to know that the land was on sale in the year 2004. He paid the purchase price between the years 2004 and 2007. He testified that he wrote to AFC asking for the land and he wrote the letter on his own behalf and on behalf of the family of the applicants since they had given him consent to purchase.

15. DW-2 was Amitay Mwarabu, a credit officer with AFC. He stated that he has worked with AFC for over 30 years. He testified that they offered a loan to Julius Ruto for dairy development and he produced the agreement as an exhibit. The suit land was placed as security by the same Julius Ruto, who had a power of attorney from the registered owner, Ruto Chesire, who was his father. A charge was then registered, which instrument was produced as an exhibit. The money was not repaid and AFC issued several demand notices and farm visits in vain. AFC then proceeded to foreclose and appointed an auctioneer in the year 1985 to sell the property. However, the bids were below the reserve price. AFC then invoked its powers under the AFC Act, and purchased the property at the reserve price of Kshs. 41,000/= on 14 March 1985. The land was eventually transferred to AFC on 21 November 1990. At that time no one was resident on the land but the same was only used for grazing. He testified that the land is protected since AFC is a State Corporation. He further testified that AFC ordinarily sells the properties they have foreclosed and registered in their name and give first priority to the family of the previous owner. He testified that in the year 1998, the ex-loanee came and requested to be allowed to re-purchase the property and AFC allowed him to do so. But he never came back until the year 2003. This time, he came with the 1st respondent, and introduced him as a family member, and informed AFC that they have allowed him to buy the land. He also stated that Pius and Vincent Ruto, other members of the family, had no problem with the sale to the 1st respondent. He testified that where land is re-purchased by a member of the family, AFC projects the interest plus costs, to the time of purchase, to be the selling price, and does not sell the land at market rates. The projection in this case came to Kshs. 287,000/=.

16. In cross-examination, he agreed that the family of Ruto Chesire continued to use the land even after the land was transferred to AFC in the year 1990. He also stated that AFC never takes actual possession of foreclosed land.

17. With the above evidence, the parties closed their respective cases. I asked counsels to make written submissions which they duly did.

#### **D. SUBMISSIONS OF COUNSELS**

18. In his submissions, Mr. Onyinkwa for the applicants, inter alia argued that the applicants had demonstrated continued occupation of the land, which period in his view, should be calculated from the year 1985, when AFC acquired the land, thus a period of 22 years to the time of filing suit, which is the year 2007. He argued that the appropriate time had lapsed to sustain a claim for adverse possession. He relied on the cases of *Mbugua Njuguna v Elijah Mburu Wanyoike & Another (2002) LLR 5977*, *Kasuve v Mwaani Investments (2004) 1 KLR 184*, and *James Mwangi v Mukinye Enterprises (1986) LLR 8021*. He further submitted that adverse possession can be claimed on land held by AFC since AFC is not part of the Government, but is a separate legal entity, pursuant to Section 3(3) of the AFC Act.

19. Mr. Kiarie for the 1st respondent, argued that the year of entry of the applicants was 1998 and that 12 years had not lapsed to the year 2007, when the suit was filed. He further argued that the occupation of the suit land by the applicants was not adverse as their entry was by permission and licence of Chesire Ruto the previous registered owner. He relied on the cases of *Jandu v Kirpal & Another (1975) EA 225* and *Wambugu v Njuguna (1983) KLR 172* to support the argument that permissive possession is not adverse to that of the title holder. He further argued that the evidence tendered was not in support of a claim for adverse possession but was more of a claim of fraud.

20. Mr. Namiti for the 2nd respondent, argued that the evidence tendered does not support occupation that exceeds 12 years. He stated that the evidence of DW-1 points at an occupation from the year 1998. He also submitted that from the applicants' evidence, it is not clear when exactly they started occupying the land as various years were given being 1940s, 1970s, and 1990s. He further argued that the process of transfer of the land to the 1st respondent was lawful. He submitted that the standards required for proving possession have not been met and relied upon the cases of *Kazungu Maleja Mbaru & Another vs Thathini Company Ltd, Mombasa Misc. Civil Application No. 503 of 2005*, and *Walter Adede Damba v Churchill Omondi Damba & Another, Kisii E&L No. 282 of 2009*. He further argued that a claim for adverse possession cannot be sustained against a state corporation. It was his view that AFC, being a government owned corporation, falls within the ambits of Sections 41 and 42 of the Limitation of Actions, Act.

21. It is with the above pleadings, evidence and submissions, that I need to decide this suit.

#### **E. DETERMINATION**

22. First, some facts are clearly not in dispute. It is not contested that the suit land was originally registered in the name of Ruto Chesire in the year 1972. Ruto Chesire had a son called Julius Ruto, and he donated to his son a power of attorney over the suit land. Pursuant to the power of attorney, Julius Ruto charged the suit land to AFC to secure an amount of Kshs. 41,000/=. There was default and AFC foreclosed in the year 1985 and eventually transferred the property to itself in the year 1991. In the year 2007 AFC transferred the land to the 1st respondent as purchaser.

23. In this suit, the applicants assert that they are entitled to title by way of adverse possession. I do not have any other claim before me, and although there have been various averments in the pleadings and indeed in the evidence, that the land was unprocedurally sold and irregularly acquired by the 1st respondent, the case of the applicants is not one in which they want to cancel the title of the respondents as having been acquired by fraud. Their case is brought under the provisions of the law seeking land by way of adverse possession and that is the pleading that has been responded to by the respondents. The suit squarely remains one of adverse possession and it follows that the contentions that the land was transferred to the 1st respondent by way of fraud, are irrelevant and are not the subject matter of this suit. The main issue in this suit is whether or not the applicants are entitled to the suit land by way of adverse possession.

25. In our statutes, such claim is recognized inter alia by Sections 12, 13 and 38 of the Limitation of Actions, Act, CAP 22. The provisions of law quoted in the O.S, state that the O.S is brought under the provisions of "Section 3 & 3A of the Civil Procedure Act Section 37 and 38 of the Limitation of Actions Act, CAP 22, O. XXXVI Rule 3D of the Registered Land Act-Cap 300." I on my part do not see the applicability of Sections 3 and 3A of the Civil Procedure Act, which are general provisions giving the court inherent power to do justice to the parties where no clear provisions of the law apply. Further O.XXXVI Rule D, cannot be part of the Registered Land Act, as set out in the title, but can only refer to the provisions of the old Civil Procedure Rules, existing before the amendments in the year 2010. I must say that the drafting of the title is rather poor, of which counsel needs to take note, but this will not affect my decision, and I will delve to the substance of the matter irrespective of the sub-standard quality in drafting.

26. To sustain a claim of adverse possession, an applicant must prove continuous, quiet, and uninterrupted possession of the land in issue for a duration of at least 12 years. The latin terminology is that such possession must be *nec vi, nec clam, nec precario* (without permission or force, without secrecy and without interruption. One also needs to demonstrate what is termed as *animus possidendi*, or intention to possess.

27. In the case of *JA Pye (Oxford) Ltd v Graham (2003) 1 AC 419*, it was stated by Lord Browne-Wilkinson, that in order for possession to be one that is able to sustain a claim for adverse possession, such possession must have two necessary elements being ; (1) a sufficient degree of physical custody and control - 'factual possession'; and (2) an intention to exercise such custody and control on one's own behalf and for one's own benefit - the 'intention to possess' (at para 40). Thus simple, mere possession, without these two elements, is not enough to hold up a claim for adverse possession.

28. In our case, it is the position of the applicants that they have been on the suit land for an incredibly long duration of time. The 1st applicant stated that she was on the suit land even before it was registered in the name of Ruto Chesire and the 2nd applicant testified that she was upon the suit land from the year 1966. But these years of occupation, long as they are, cannot be computed in a claim for adverse possession, for at that time, they were not occupying the land with intention to acquire it from their father and husband, Ruto Chesire, the then registered owner of the land. Indeed, they could probably be classified as licencees, living on the land by virtue of their consanguinity and relationship with the registered proprietor. A licencee cannot assert title by way of adverse possession, a position that has been cemented by various authorities. It was stated by Hart J, in the case of *Clowes Developments (UK) Ltd vs Walters (2005) EWHC 669 (Ch)* (at para 40), that "*A person who is in factual possession and who intends to remain in possession (and to use that factual possession for his own benefit) so long as the true owner continues to permit him to do so does not have the necessary intention to possess for the purpose of starting a period of limitation running in his favour.*"

28. Closer home in the case of *Jandu v Kirpal & Another (1975) EA 225*, cited by counsel for the 2nd respondent, it was held inter alia that possession does not become adverse before the end of the period for which permission to occupy has been given. (See also the case of *Hughes v Griffin (1969)1 WLR 23* and *Wambugu v Njuguna (1984) 1 KLR 172* which amplify the same position that a licencee cannot have time running in his favour to assert a claim for adverse possession).

29. In my view, any occupation of the land, before the registration of AFC in the year 1990, is irrelevant to prove adverse possession in the circumstances of this case as it was not a possession that was accompanied by the necessary *animus possidendi* but was one that was under licence.

30. The question then remains, whether the possession of the land, if any, after the period of 1990, when AFC became registered as proprietors, was adverse, so as to be able to accumulate the years to an excess of 12 years, as at 2007 when this claim was filed.

31. There is divergent evidence on how the land was occupied and utilized after the year 1990. It should be noted that both the previous registered owner, Ruto Chesire and his son, Julius Ruto who is the one who procured the loan, were still alive upto and until the year 2003 when they both died. In my view, and

considering the evidence tendered, I have not seen how, and when, the applicants herein developed any intention to occupy the suit premises and have it as their own, separately from the way Ruto Chesire had organized his family to live. The family appears to have been settled in the land parcel No. 5 and I have not been persuaded that the applicants, separately acquired an intention to possess the suit land and have it as their own, before the demise of Ruto Chesire and Julius Ruto. I am buttressed in coming to this conclusion by the own admission of the applicants in their evidence, where they stated that in the year 2004 and 2007, they were making attempts to redeem the property from AFC and have it revert back to the family. If at all they had developed any interest to acquire the property as their own, then this must have come after the year 2003 when Ruto Chesire died, and not before. I am therefore not convinced that given this length of occupation, the applicants had developed the intention to possess the suit land for a continuous period of at least 12 years, that would allow them to assert title by way of adverse possession. Indeed, from the evidence tendered, the applicants seemed to be more aggrieved by the fact that AFC sold the land to the 1st respondent, rather than being interested in asserting any prescriptive rights acquired after 1990. For the reason that I have not been persuaded that the applicants had not the requisite ***animus possidendi*** maintained peaceably and openly for a continuous uninterrupted duration of 12 years, to enable them acquire the land by way of adverse possession, this suit must fail.

32. It was also argued that the suit must fail because one cannot claim adverse possession against a State Corporation. In this case, AFC is not the registered proprietor; the 1st respondent is. However, the number of years being claimed are years that cover periods when AFC was proprietor and when the 1st respondent was proprietor. It should be noted that it is permissible for an adverse possessor to accumulate time over the land irrespective of the change of ownership of the land. This was affirmed in the case of ***Githu v Ndeete (1984) KLR 776*** where it was inter alia held that the mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession. However, if the time in which AFC held title to the land cannot be computed because they are an entity protected against a claim for adverse possession, then obviously this claim must fail, since AFC held the land upto the year 2007, which is the same year that this suit was instituted.

33. The argument has been put forth, that since AFC is a State Corporation, then it must enjoy the protection afforded by Section 41 of the Limitation of Actions Act, CAP 22 which section provides as follows :-

#### *S.41 Exclusion of public land*

*This Act does not—*

34. It will be seen from a reading of Section 41 (a) (i) that one cannot acquire title by adverse possession to Government land, or land otherwise enjoyed by the Government. Government Land would presumably fall under the definition of public land, which in the Constitution of Kenya, 2010 would be :-

#### **62. (1) Public land is—**

*(a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;*

*(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;*

*(c) land transferred to the State by way of sale, reversion or surrender;*

*(d) land in respect of which no individual or community ownership can be established by any legal process;*

*(e) land in respect of which no heir can be identified by any legal process;*

*(f) all minerals and mineral oils as defined by law;*

(g) government forests other than forests to which Article 63 (2)

(d) (i) applies, government game reserves, water catchment areas, national parks, government animal sanctuaries, and specially protected areas;

(h) all roads and thoroughfares provided for by an Act of Parliament;

(i) all rivers, lakes and other water bodies as defined by an Act of Parliament;

(j) the territorial sea, the exclusive economic zone and the sea bed;

(k) the continental shelf;

(l) all land between the high and low water marks;

(m) any land not classified as private or community land under this Constitution; and

(n) any other land declared to be public land by an Act of Parliament—

(i) in force at the effective date; or

(ii) enacted after the effective date.

35. It is not explicitly stated in the above provision whether or not land held by Statutory State Corporations are to be deemed to be Government land. State Corporations are themselves governed by the State Corporations Act, CAP 446, which provides in Section 2, what a State Corporation is. The section provides as follows :-

**“state corporation”** means—

36. It will be seen from the above that State Corporations may be established by the President (Under S.3) or through an Act of Parliament. They are ordinarily body corporates with capacity to sue and to be sued and with capacity to hold property. I find it difficult to hold that they should be considered as "Government" because if they were, then litigation would be governed by the Government Proceedings Act (CAP 40) and I am more prepared to hold that they are not strictly "Government", unless the context otherwise prescribes, but rather, that they are independent agents of Government, formed by Government in order to undertake and perform certain functions on behalf of Government, which functions cannot adequately or efficiently, be performed within the structure of Government Ministries. The Limitation of Actions Act, itself in Section 2, states that the definition of the term "the Government" includes "the Corporations" and in the same Act, "the Corporations" mean the Kenya Railways Corporation, the Kenya Ports Authority and the Kenya Posts and Telecommunications Corporation. The term "Government" in the Limitation of Actions Act, cannot therefore be taken to include all State Corporations but only the State Corporations specified therein.

37. Some State Corporations have, through specific provisions in the law, been immunized against the Limitation of Actions Act. One example is the Settlement Fund Trustees (SFT), established by Section 167 of the Agriculture Act. Section 175 of the same Act provides that no suit or proceeding by the SFT shall be rejected or dismissed on the ground only that the suit is barred by limitation under such law. This position was affirmed by a five Judge bench of the Court of Appeal in the case of ***Gitu v Ndungu & 2 Others (2001) KLR 149***. This decision set the law clear in so far as land held by the SFT is concerned, and the case dispelled the confusion caused by the three Judge bench decision of the Court of Appeal in the case of ***Eliud Nyongesa Lusenaka & Another v Nathan Wekesa Omocha (Kisumu Court of Appeal, Civil Appeal No. 134 of 1993) (1994) eKLR***.

38. But what about the other State Corporations not specifically immunized by an explicit provision of the law ? Can one still claim adverse possession over such State Corporations ? I must confess that my

research has not unearthed an authority that is direct on this point. There have been some decisions, but which in my view did not decide the issue with finality, or which are easily distinguishable. In the case of ***Symon Gatutu Kimamo & 587 Others vs East Africa Portland Cement Company Limited (2011) eKLR***, there was a claim for adverse possession on land held by East Africa Portland Cement, a limited liability company but in which the Government held 25.3% of the shares in the company. An argument was made that since the Government held shares in the company, then the company was immune from a claim for adverse possession, as it was a State Corporation. Ngugi J, did not agree with this argument and was of the view that the holding of 25.3% of the shares, though significant, did not render the land to be deemed as Government land, or land enjoyed by the Government, so as to be entitled to the protection of Section 41 of the Limitation of Actions Act. The case of ***East Africa Portland Cement, (EAPC)*** is of course distinguishable to this suit, since in the ***EAPC*** case, the entity therein was a company registered under the Companies Act, CAP 486, and not a corporation established by statute. In our case, AFC is a corporation established by the Agricultural Finance Corporation Act, CAP 323, Laws of Kenya.

39. Another suit, ***Tsuma Lewa Deche & Another v Board of Trustees National Social Security Fund (Mombasa HCCC No. 109 of 2008 (2009) eKLR)*** was a suit in which the applicants claimed land owned by the National Social Security Fund (NSSF), by way of adverse possession. The matter did not go to full hearing on merits as it was dismissed on a technicality (on the ground that no certified extract of the title was annexed) which was raised by way of preliminary objection. However, the court (Odero L J), did deal with an objection that the suit was bad in law as it has been brought against a State Corporation. The court was not convinced that the NSSF was a State Corporation and that even if it were, the court was of the view that NSSF is not immune from a claim for adverse possession, as it is not listed among the corporations in Section 2 of the Limitation of Actions Act.

40. It is a fine point whether a State Corporation is a State Organ. If one defines a State Corporation to be a State agency, then a State Corporation would fall under the definition of a State Organ as provided for in Article 260 of the Constitution which provides that a State Organ means "*a commission, office, agency, or other body established under this Constitution.*" Without pretending to decide the point, I am a bit uncertain as to whether an agency of the State, not specifically established within the framework of the Constitution would be a State Organ. If I hold that a State Corporation is a State Organ, then the land held by it would be public land as defined by Article 62 of the Constitution and if not, then it would fall within the ambit of private land. If it is public land, then its holding will fall under either the County Government or the National Land Commission pursuant to the provisions of Article 62 of the Constitution, unless the land is held, used, or occupied by a national state organ. I do not think that the intention of the law would be to make land held by State Corporations to be managed by the Counties or National Land Commission, or that the purchase or sale of land by a State Corporation, would need to go through the stringent provisions provided for in the Land Act, Act No. 6 of 2012, for the sale of public land.

41. That is a bit of a grey area, of which I need not make a definite decision in the circumstances of this case, for I am prepared to hold, that land held by a State Corporation is land "*otherwise enjoyed by the Government*" as to fall within the exception provided in Section 41 (a) (i) of the Limitation of Actions Act. State Corporations are actually vehicles through which the Government performs its operations, and if they hold land, then that land is really for the benefit of the Government and the public at large. The Government "*enjoys*" such holding as it is the actual entity behind the Corporation. When a Corporation is wound up, its assets, including land, will revert back to the Government and to no other entity.

42. AFC is a State Corporation created pursuant to the provisions of Section 3 of CAP 323, and since I have held that land held by State Corporations is land "*otherwise enjoyed by the Government*" then, the duration when the land was held by AFC cannot be counted in accumulating the 12 years required to sustain a claim for adverse possession. It follows that the duration between 1990 and 2007 cannot be relied upon by the applicants. Time therefore started running in favour of the applicants as from 7 July 2007. This suit was instituted on 29 August 2007 and certainly 12 years had not lapsed.

43. From the foregoing it is discernible that I am unable to hold for the applicants and I am unable to enter judgment in their favour. Their suit stands dismissed with costs. The 1st respondent had counterclaimed for eviction. I have no reason to deny him this prayer and his counterclaim must succeed

with costs. I hold that he is entitled to the land to the exclusion of the applicants and I order the applicants to vacate the said land within 30 days of this judgment. If they do not so vacate, the 1st respondent can formally move the court to execute for their eviction and any costs of the exercise shall be borne by the applicants herein.

44. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF APRIL 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET.**

*Delivered in the presence of:*

*Miss G.N. Mooka of M/s Onyinkwa & Co Advocates for the applicants (plaintiffs).*

*Miss S.W. Karuga holding brief for M/s Kiarie & Co for 1st respondent (defendant).*

*Miss J.C. Cherutich of M/s Nyachiro Nyagaka & Co Advocates present for the 2nd respondent (defendant).*