



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 200 OF 2012

Formerly HCC 16 OF 2005

JABER MOHSEN ALI..... 1ST PLAINTIFF

CHELUGOI MOHSEN ALI.....2ND PLAINTIFF

VS

PRISCILLAH BOIT.....1ST DEFENDANT

JAMES C. BOIT2ND DEFENDANT

(Suit by the plaintiffs seeking possession of land; defendants filing counterclaim that they are entitled to the land by way of purchase and adverse possession; suit land initially purchased from the SFT in the year 1964 by the plaintiffs' mother; allegation that the land was sold in the year 1972 to defendant's father; agreement for sale produced; agreement for sale of doubtful authenticity; in any event no consent of land control board was ever given; purchase transaction null and void; land having been registered under SFT until the year 2003 when land was transferred to the plaintiffs; time for adverse possession cannot run for land under the SFT; 12 years period to sustain a claim for adverse possession not shown; plaintiffs' suit succeeds and defendants' counterclaim is dismissed)

JUDGMENT

A. INTRODUCTION AND PLEADINGS.

This suit was commenced on 24 February 2005 by way of plaint. In the plaint, it is pleaded that the plaintiffs are the registered owners of the land parcel Uasin Gishu/Sosiani/28 measuring 19.5 hectares. It is pleaded that on or about the 13 January 2004, the defendants without any colour of right unlawfully encroached into the suit land. The plaintiffs thus seek an order of eviction and an order to have the defendants permanently restrained from the suit land.

The defendants filed defence which they later amended to include a counterclaim. They pleaded that the suit land was sold by the previous owner, Aziza Chepkemboi (the plaintiffs' mother), to the late Paul Kipkorir Boit, and that vacant possession was given. The 1st defendant is wife to the late Paul Boit and the 2nd defendant is son to Paul Boit. They are both administrators of the estate of the late Paul Boit.

It is pleaded that after the sale, the said Paul Boit and his family, including the defendants, took possession of the land and have been in occupation to the time of filing suit. They have pleaded that their occupation has been open, continuous, and uninterrupted, and adverse to that of the plaintiffs and the previous registered owner, Aziza Chepkemboi. They have pleaded that the rights of the plaintiffs over the suit land have been extinguished by the Limitation of Actions Act and that the suit is time barred. In the

Counterclaim, they have pleaded that the plaintiffs' title should be cancelled and the suit land be registered in the name of the defendants. They have pleaded that the said title was obtained by way of fraud. The particulars of fraud pleaded inter alia include the averments that the plaintiffs proceeded to transfer the suit land to themselves while well aware that the late Aziza Chepkemboi had sold the land to Paul Boit. It is also averred that the plaintiffs obtained title secretly by discharging a charge held by the Settlement Fund Trustees over the said land. They have sought orders to have the land declared to be of the estate of Paul Boit through purchase and through adverse possession. They have asked that the land be registered in their names as administrators of the estate of Paul Boit.

The plaintiffs filed a Reply to Defence, and, Defence to Counterclaim, in which they refuted all the claims of the defendants. They denied that the suit land was ever sold and they stated that they have all along been in possession of the suit land.

PART B : EVIDENCE OF THE PARTIES

(i) Evidence of the Plaintiffs

The first plaintiff testified as PW-1. He testified that Aziza Chepkemboi was his biological mother. When she died, they filed a succession cause in respect of her estate and the suit land then became registered into their names by way of transmission. They were then issued with title in their name. The title shows that they became registered owners on 5 June 2003 as second registered proprietors. The first proprietor was the Settlement Fund Trustee (SFT), who became registered as proprietor on 19 May 1979. PW-1 stated that before being registered as proprietors, they paid the SFT, on 3 April 2003, whatever money was outstanding to them. The land was registered in the name of Aziza Chepkemboi at the SFT. He stated that the defendants are neighbours, but that they have encroached into the suit land. He stated that the father of the 2nd defendant could not have purchased the land, for if he did, the land would be in his name. He was not aware of any sale between their mother and the late Paul Boit. He also denied that Paul Boit has ever been resident on the said land, but that it is the 2nd defendant, who entered the land in the year 2004.

In cross-examination, PW-1 stated that he was born in Kakamega although he went to Primary School within the vicinity of the suit land, where they used to live. His mother died in the year 1982. She was not buried on the suit land but in a moslem cemetery. He knew the late Paul Boit, a former Provincial Commissioner, as their neighbor. He denied knowledge of any agreement over the suit land between his mother and the late Paul Boit, which was entered into in 1972. He himself does not live on the suit land, as he is resident in Kakamega, but he considers the suit land his rural home. He stated that it is his brother, the 2nd plaintiff, who is permanently resident on the suit land, since 1982 when their mother died, and that he ploughs about 5 acres, and grazes cattle on the rest of the land. He testified that the 2nd defendant has encroached into about 10 acres of the land since the year 2004, and does not occupy the whole land. He denied that the defendants and the family of the late Paul Boit have been in occupation of the land since the year 1972.

PW-2 was the 2nd plaintiff, and brother to PW-1. He is the last born in their family. He echoed the evidence of PW-1. He stated that he has been living on the suit land with his late mother since his mother purchased it. He testified that his mother, Aziza Chepkemboi, moved into the land in the year 1964. He continued living on the land even after his mother died in the year 1982. He stated that he ploughs the land and keeps cattle. He testified that the defendants entered the land in the year 2004. He stated that they destroyed his dairy and his servants' houses and that is when they filed this suit. He testified that the 2nd defendant uses about 10 acres of the land but that this is by force. He stated that there have been incidences where his structures on the land and the fence have been destroyed by the defendants of which he has been reporting at various police stations. He testified that the land was charged to the SFT by their mother, and that they paid whatever amount was owing before the property was discharged and later transferred to them.

With the above evidence, the plaintiffs closed their case.

(ii) Evidence of the Defendants

DW-1 was the 2nd defendant. He ordinarily lives and works in Nairobi. He testified that he also occupies the suit land which he considers his home. He testified that in the year 1972, his father, the late Paul Boit, purchased the suit land on a willing buyer willing seller basis from the late Aziza Chepkemboi. He testified that she is the one who approached his father to buy the land since she wanted to move to another parcel of land. He testified that the two drew an agreement on 11 August 1972. The purchase price was Kshs. 20,060/=. At that time, DW-1 was in secondary school and was not present when the agreement was drawn. But he obtained a copy of the agreement and he stated that his father also informed him of the transaction. From the agreement, a sum of kshs. 15,000/= was said to have been paid which left a balance of Kshs. 5,068/=. He stated that he was informed by his late father that this balance was paid. The late Paul Boit died in the year 1992 and the two defendants became administrators of his estate. They took possession of all the documents including the documents touching on the suit land. These documents included the agreement and a demand, dated 24 July 1989, from the SFT, asking the late Paul Boit to pay a sum of Kshs. 18,847.40/= to the SFT. There was also a demand, dated 21 January 1988, from the County Council of Wareng for rates, and another letter waiving interest on accumulated rates and a receipt for payment of rates.

He testified that when Aziza sold the land, she moved out around September 1972, together with her whole family, to another farm which she bought. His parents then moved into the suit land and occupied it. They planted trees, ploughed the land and kept cattle. He stated that to date, he utilizes the whole of the suit land. When Aziza sold the land, there was an outstanding loan to the SFT. The 2nd defendant stated that his late father continued paying the loan, but had not completed paying at the time that he died. When they took over the estate, they continued paying the loan and did pay a sum of Kshs. 27,932/= on 15 June 1995. It came as a "shock and surprise" that the plaintiffs have obtained title to the suit land. He testified that they were never informed when the plaintiffs filed the succession cause for their late mother. They lodged a caution when they realized that the plaintiffs had the title deed.

In cross-examination, DW-1 testified that he has built a permanent house on the suit land, which he completed in the year 2000. He stated that the plaintiffs were nowhere on the scene until they got title in their name. They initially came to the defendants and asked for a small portion of the land. When the defendants told them that they have no land to give out, that is when they displayed the title deed. He testified that his parents and the mother of the plaintiffs were close family friends and they grew up in the same area with the defendants while they were children. His late father moved into Sosiani, where the land is situated, around the year 1964, about the same time that Aziza also moved into the area. He insisted that Aziza sold the land. However they never went to the Land Control Board.

He stated that the current dispute started in the year 2004 when the plaintiffs got title and emerged to claim the land. The defendants refused to allow them entry into the land. It is when the 1st defendant became sickly and had been taken to Nairobi for treatment, that the plaintiffs forcefully moved into the land. The 2nd plaintiff settled into about 2-3 acres of land and put up a structure. He was unable to remove him as the court made an order of status quo to be maintained. He stated that the plaintiffs did not obtain title in the proper manner as it was never established who was on the ground. He also stated that the SFT knew that the land had been sold to his father.

DW-2 was one Samson Kipkesio arap Too. He never completed his evidence as he became unruly during cross-examination. Miss. Isiaho, counsel for the defendants, then applied to have his evidence withdrawn. His evidence was expunged and the witness stood down.

DW-3 was one Elkana Keino. He lives in Sosiani within the vicinity of the suit land. He testified that Aziza sold the land to the late Boit in the year 1972. He witnessed the agreement of 11 August 1972 between Aziza and Boit. He stated that the purchase price of Kshs. 20,068/= was paid in two installments. The first installment of Kshs. 15,000/= was paid on the day of the agreement and the balance of Kshs. 5,068/= was paid on 31 August 1972. He testified that he signed on the agreement as a witness. He produced a document dated 31 August 1972 said to be an acknowledgement of the balance as defence exhibit No. 6.

In cross-examination, DW-3 testified that when the acknowledgment of 31 August 1972 was signed, Paul Boit was not present. He stated that Aziza was however present and that she placed a thumb-print. He was intensely cross-examined on various differences between defence exhibit 6, and the same document, as disclosed earlier in the defendants' list of documents.

DW-4 was Amos Ruto, a Settlement Officer with the Ministry of Lands based in Uasin Gishu. He testified that the suit land is in Sosiani Settlement Scheme. He testified that when a person is allocated land in a settlement scheme, he is given a letter of offer and advised to pay at least 10% of the value of the land. Once the deposit is paid, three documents are prepared and signed, being a Charge, an Auxiliary Agreement, and Conditions of Offer. He testified that the suit land was allocated to Aziza Chepkemboi who signed the required documents on 9 December 1964. The land was offered at Kshs. 4,500/= and Aziza paid the deposit of Kshs. 450/=.

He testified that it is possible to sell land in a settlement scheme. In such instance, they advise a settler to avail the agreement of sale, and also seek the consent of the Land Control Board. A transfer is then prepared between the buyer and seller which is witnessed by a District Settlement Officer. This is done so that the SFT can be aware of the transfer. After this, the documents are sent to their Legal Office in Nairobi, to effect transfer to the buyer. He testified that in their SFT file, they have a copy of an agreement signed on 31 August 1972. But the parties stopped at that stage. No changes were therefore effected on the legal documents. As far as the SFT was concerned, the original owner Aziza Chepkemboi remained owner, and they continued to receive payments in her name. He testified that if an owner dies, they keep the death certificate in the file, and forward letters of administration to their Nairobi Legal Office. There was however no Death Certificate in the SFT file. He testified that when a settler clears the loan, he is issued with a discharge of charge and a transfer. He stated that the last payment was made on 3 April 2003 in the name of Aziza Chepkemboi. Strictly the discharge and transfer ought to have been in the name of Aziza. He stated that in the year 1998, the Director of Lands and Settlement requested their office to do a ground report of the land. This was done. It was observed that on the ground, it is the family of the late Paul Boit who were utilizing the land and that the sellers could not be traced. He produced a copy of their SFT file as an exhibit.

In cross-examination, DW-4 testified that the SFT did not give consent to the transaction between Aziza and the late Paul Boit. He agreed that the document dated 31 August 1972 in their SFT file and defence exhibit No. 6 had differences. He could not tell who drew the Discharge of Charge and the Transfer in favour of the plaintiffs since the same are not in their file. They however have a similar file in their head office in Nairobi.

PART C : SUBMISSIONS OF COUNSEL

Only counsel for the plaintiffs filed submissions. Despite being granted additional time, counsel for the defendants did not file any submissions.

In his submissions, counsel for the plaintiff pointed at the discrepancies between defence exhibit No. 6 and the other documents alluding to the same agreement. He submitted that its authenticity is doubtful. He stated that if at all the land was registered fraudulently in the name of the plaintiffs, the proper party to complain was the SFT, and that no complaint has been raised by them. He submitted that in any event the agreements of 1972 are null and void for failure to obtain the consent of the Land Control Board. He also submitted that no adverse possession has been established as there can be no adverse possession against the SFT. He relied on Sections 41 (a) (i) of the Limitation of Actions Act, CAP 22, Section 167 of the Agriculture Act, and the case of *Gitu v Ndungu (2001) 2 EALR 379*. He further submitted that no fraud has been established. He also submitted that the counterclaim is time barred coming 12 years after the year 1972 when such right accrued. He asked that the plaintiff's case be allowed.

PART D : DECISION

It is with the above pleadings, evidence and submissions that I need to make a decision in this matter. In my view, the following issues will settle this matter.

- (i) Was there a sale agreement between the late Aziza Chepkemboi and the late Paul Boit of which the plaintiffs and defendants are successors ?
- (ii) If at all there was such sale agreement, is the same binding and enforceable ?
- (iii) Can the defendants' counterclaim on the aspect of purchase of the suit land be maintained ?
- (iv) Was possession of the suit land given to the late Paul Boit in the year 1972 ?
- (v) Was possession and occupation of the suit land continued openly, peacefully and without interruption for a period in excess of 12 years ?
- (vi) Is the defendants' claim over the suit land based on the doctrine of adverse possession maintainable?
- (vii) Is the plaintiffs' suit time barred ?
- (viii) Are the plaintiffs entitled to the prayers sought ?
- (ix) Who should bear the costs of this suit ?

I will straight away deal with the issues.

Issue 1 : Was there a sale agreement between the late Aziza Chepkemboi and the late Paul Boit of which the plaintiffs and defendants are successors ?

One of the grounds upon which the defendants seek entitlement to the suit land, is the ground, that the late Paul Boit purchased the suit land from the late Aziza Chepkemboi. It is the case of the defendants that Paul Boit entered into an agreement with the Aziza Chepkemboi, which agreement is said to have been entered into on 11 August 1972. It is said that the land was offered at the price of Kshs. 20,068/=. The said agreement of sale was never produced as an exhibit. What was produced to prove the sale was a document said to have been dated 31 August 1972. It is written in Kiswahili as follows :-

MAAGANO

Hii ni kuthibitisha n kukamilisha maagano tuliyofanya tarehe 11/8/72 ya kwamba mimi Aziza Chepkemboi nimekubali na nimemuuzia shamba langu (No. 28) katika Sosiani Settlement Scheme kwa Paul Kipkorir Boit, kwa Sh. 20,068/- (shilling Elfu Ishirini na Sitini na nane).

Nilipokea Sh.15,000/- (shilling Elfu kumi na tano) tarehe 11/8/72 na leo nimepokea Sh. 5,068/- (Elfu Tano na Sitini na nane). Yaani nimepokea pesa zote jinsi tulivyo kubaliana na kuagana hapo mbeleni. Nimemwachia Paul K. Boit ngombe moja na watoto wake walio dume wawili. Kutoka leo shamba limekuwa yake.

Aziza Chepkemboi

(thumbprint)

Nina kubaliana na maagano haya kama ilivyoelezwa hapa juu.

(signature and date 31/8/72)

Paul Kipkorir Boit

Washahidi

(4 signatures)

Although the document above refers to an agreement of 11/8/72, in my view the document of 31/8/72 could very well pass for a sale agreement. The document that was produced as defence exhibit No. 6 was a typewritten carbon copy. It is a heavily contested document. Counsel for the plaintiffs contested it at the hearing and in his submissions. His core complaint is that the document that was produced is significantly different from what was annexed in the defendants' list of documents and is also different from the copy in the SFT file. I agree.

The purpose of requiring a party to adduce his evidence in advance, by filing witness statements and documents before the hearing, is so that the other party, may be aware of the evidence that he is going to face at trial. The evidence tabled during pre-trial and the document tabled as an exhibit are not the same. The document that was produced as an exhibit, has 4 attesting witnesses but what was annexed in the defendants' bundle of documents, has 5 attesting witnesses. The signatures of Paul Boit on the two documents are clearly not the same, and so too, the positioning of the thumb-print of Aziza Chepkemboi. In one, the thumbprint is below the line where the name of Aziza appears, and in the other, the thumbprint is above the line. The copies are therefore not the same as the original. These discrepancies were not properly addressed by the defence witnesses. In fact there were serious contradictions in the evidence of PW-3. PW-3 who stated that he signed defence exhibit No. 6 as a witness stated that he did not know Pius K. Tiony, whose name appears as an attesting witness in both the copy and the original of the said agreement. He also stated that Paul Boit came with the agreement already typed and also with the money. In the same evidence he testified that Paul Boit was not present when they signed the document. These contradictions cannot be reconciled which puts into serious doubt the authenticity of defence exhibit No. 6. I am therefore unable to hold that the document, defence exhibit No. 6, is authentic, and given that position, I am not therefore convinced that there was any agreement between Paul Boit and Aziza Chepkemboi entered and executed in the year 1972.

Issue 2 : If at all there was such sale agreement, is the same binding and enforceable ?

I have already held that I am not convinced that there was such agreement between Aziza Chepkemboi and Paul Boit. But if at all it existed, is the same binding and enforceable ? I do not think so.

It is not disputed that the suit land is agricultural land which is subject to the provisions of the Land Control Act, CAP 302, Laws of Kenya. The Land Control Act, requires that the consent of the Land Control Board be granted before any transaction touching on agricultural land can be completed. Such consent is required to be issued within a period of 6 months of the agreement according to the provisions of Section 6 of the Land Control Act. The effect of failure to obtain the consent of the Land Control Act, is that the transaction is declared null and void. This is what the Act says :-

6. (1) Each of the following transactions -

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area,

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

One of the controlled transactions is a sale of land. If no consent of the Land Control Board is granted, then the sale is automatically nullified. This position has been affirmed in various decisions, key of which is the Court of Appeal decision in the case of ***Kariuki v Kariuki (1983) KLR 225***. In the said case, it was

affirmed that any sale of agricultural land for which consent of the Land Control Board is required but not given, is null and void. An agreement which is null and void cannot be enforceable.

It follows that even if I were to hold that there was the agreement of 31 August 1972 between Aziza Chepkemboi and Paul Boit, that agreement cannot be enforced, for failure to obtain the consent of the Land Control Board.

In addition to not seeking consent of the Land Control Board, no consent was sought from the SFT under whom the land was registered, so that they can also give consent to the transfer of the loan from Aziza Chepkemboi to Paul Boit.

In all respects the relevant consents required to complete the transaction were never sought nor obtained, rendering the agreement of 1972, if at all it existed, unenforceable.

Issue No. 3 : Can the defendants' counterclaim on the aspect of purchase of the suit land be maintained ?

I have already held that the defendants have failed to prove on a balance of probabilities that the agreement for sale produced as defence exhibit No. 6 is a genuine document. I have also held that even if it were a genuine document, it cannot confer any proprietary rights, since it has been declared null and void for want of consent of the Land Control Board. It follows therefore, that the defendants cannot sustain their aspect of the counterclaim based on purchase of the suit land. Their counterclaim, in so far as it attempts to assert title over the suit land by virtue of purchase therefore fails.

Issue No. 4 : Was possession of the suit land given to the late Paul Boit in the year 1972 ?

This is a critical issue in the suit in so far as the claim for adverse possession is concerned. On this score, I have conflicting evidence from the plaintiffs and defendants. The plaintiffs assert that they never parted with possession, whereas the defendants, assert that possession was handed over to them in the year 1972.

PW-2 testified that all along his mother, Aziza, continued to be resident on the suit land, and he himself continued with possession even after her death in the year 1982. The 2nd defendant testified that his father Paul Boit was on the land as far back as the year 1972 and after his demise in 1992, his wife (1st defendant), and himself (2nd defendant) as son to Paul Boit, continued to be in possession. PW-2 stated that he developed the land and lives in it, and that it was only in the year 2007, that the plaintiffs came and took possession of part of the suit land.

On this point, I am inclined to believe the defendants. I am more swayed by the Ground Report that was prepared by the SFT on 10 June 1999, which report is within defence exhibit No. 7, the SFT file for the suit land. The Ground Report states that upon visitation of the land, the District Land Adjudication and Settlement Officer, found out that it is the family of Paul Boit who were utilizing the land, and had developed the land with paddocks, food crops, pasture and afforestation. This is an independent report, made neither by the plaintiffs nor defendants, and prepared when there was no dispute before the court. I am persuaded by it. It also seems that the family of the late Boit made payments for land rates which receipts were produced as exhibits.

I think the family of Paul Boit were in possession, and I am prepared to hold that their possession over this land has been for a considerable duration of time. They seem to have been in possession at the latest in the late 1980s, when there are several correspondences, one asking Paul Boit to pay off the loan. This is certainly a period which cannot be less than 12 years before the filing of this suit.

Issue No. 5 : Was possession and occupation of the suit land continued openly, peacefully and without interruption for a period in excess of 12 years ?

I think the possession of the suit land by the family of the late Paul Boit was open, peaceful and without interruption, for a period in excess of 12 years to 24 February 2005 which is the date of filing this suit. I

have already held that at the latest, in the late 1980s, the family of the late Boit were in possession of the suit land. I have no evidence of interruption of this possession, or of any disturbance or disruption of it, so that it may be declared not to be peaceful possession. The said possession was also open and not in secret. It was a possession that was certainly *nec clam* and *nec vi* (without secrecy and without force). Such occupation was an assertion that they claimed ownership of the land, and was certainly not one that was under licence or permission from the land owner. It was thus accompanied by the necessary *animus possidendi* (an intention to occupy the land as one's own) and that is why the defendants resisted when the plaintiffs came waving the title that they had. Short of any other legal complications, it is a type of possession and occupation that would ordinarily entitle one to the land by dint of the doctrine of adverse possession.

Issue No. 6 : Is the defendants' claim over the suit land based on the doctrine of adverse possession maintainable ?

For one to prove adverse possession, he must demonstrate that he has occupied the land openly without force, without secret, and without licence or permission of the land owner. That is contained in the latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.

In our statutes, adverse possession has its basis on the provisions of Sections 7, 13, and 38 of the Limitation of Actions Act, CAP 22, Laws of Kenya. The general position of the law is that if a person has been in possession of land for a duration of 12 years, then he can claim the land by way of adverse possession. There are however limitations. These limitations are contained in Section 41 of the Limitation of Actions Act which provides as follows :-

S.41 Exclusion of public land

This Act does not—

enable a person to acquire any title to, or any easement over—

(i) *Government land or land otherwise enjoyed by the Government;*

(ii) *mines or minerals as defined in the Mining Act (Cap. 306);*

(a) (iii) *mineral oil as defined in the Mineral Oil Act (Cap. 307);*

(iv) *water vested in the Government by the Water Act (Cap. 372);*

(v) *land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or*

(vi) *land vested in the trustees of the National Parks of Kenya; or*

(b) *affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the*

Government Lands Act (Cap. 280) or any Act repealed by that Act.

For a considerable duration of time, the suit land was registered under the SFT. It was therefore land that either belonged to the Government or was otherwise enjoyed by the Government, so as to fall within the ambit of Section 41 (a) (i) of the Limitation of Actions Act. Time would not therefore be deemed as running for purposes of maintaining an action for adverse possession while the land was under the SFT. The position in Section 41 of the Limitation of Actions Act, is buttressed by Section 175 of the Agriculture Act, CAP 318 (repealed by Act No. 13 of 2013) which was in existence at all material times to this suit. The same provided as follows :-

S. 175. Notwithstanding anything done to the contrary contained in any law relating to limitation, no suit, application or proceeding by the Settlement Fund Trustees shall be rejected or dismissed on the ground only that the suit, application or proceeding is barred by limitation under any such law.

The SFT was therefore all along immune to the provisions of the Limitation of Actions Act. The effect of this, is that the time throughout which the suit land was registered under the SFT, cannot be computed by the defendants for purposes of accumulating the 12 years required to be entitled to the suit land under the doctrine of adverse possession.

This was indeed affirmed by the five bench Court of Appeal decision in the case of ***Gitu v Ndungu (2001) 2 EA 379*** cited by counsel for the plaintiffs. The heart of this appeal, lay in the central question as to whether the Limitation of Actions Act, which gives rise to a claim for adverse possession, can be maintainable where the property is under the ownership of the SFT. Briefly, the facts of the case were that there was a claim for adverse possession filed in March 1988. It was claimed that the plaintiff had moved into possession in the year 1965. Until the year 1987, the property was registered in the name of the SFT. The court held that the duration upto the year 1987, could not be computed for purposes of accumulating the 12 years required for a claim for adverse possession and the claim therefore failed.

In our case, the SFT became formally registered as proprietors of the suit land on 19 May 1979. They were the first registered proprietors. They remained so registered until 5 June 2003. The period upto 5 June 2003 cannot therefore be relied upon by the defendants to compute time for adverse possession. Given this position, it matters not, that the defendants have been in actual occupation of the suit land from the year 1972. All this duration of time, which is considerable, counts to nothing, as it cannot be computed towards accumulating the 12 years required in order to sustain a claim for adverse possession, for the reason that the land was registered under the SFT. Their time, for purposes of claiming under adverse possession, only started running from 5 June 2003, when the SFT was divested of their interest over the suit land. The counterclaim herein was filed on 30 March 2007, and only less than 4 years had lapsed, which is not enough to sustain a claim for adverse possession.

The claim by the defendants under the doctrine of adverse possession is not therefore maintainable and it fails.

Issue No. 7 : Is the plaintiffs' suit time barred ?

It has been asserted by the defendants that the plaintiffs' suit is time barred. The argument of the defendants is that the land was sold to them in the year 1972 and they entered possession from that period. In their pleadings, they have pleaded that the plaintiffs lost their claim by effluxion of time, as the land has evolved to the defendants by adverse possession.

The Limitation of Actions Act, provides for a period of 12 years within which to assert a claim over land. This is provided for in Section 7 of the Limitation of Actions Act which provides as follows :-

But when does an action accrue, so that it is from that time, that the 12 years starts running ? The answer to this is found in Section 13 of the Limitation of Actions Act, which provides as follows -

S. 13 Right of action not to accrue or continue unless adverse possession

The operative provision in our case is Section 13 (1) above. The cause of action does not start to accrue unless the land is in possession of a person in whose favour the period of limitation can run, so that he may be entitled to have the land through adverse possession. But in our case, time could not start running in favour of the defendants, given that the land was under the SFT. The cause of action for the plaintiffs did not therefore accrue in the year 1972, and time against them, could not start running in the year 1972. Time started running against the plaintiffs, at the same instant that time started running in favour of the defendants, which was from 5 June 2003. It is 12 years from 5 June 2003 that it can be said that the plaintiffs were time barred. We have already established that the plaintiffs filed this suit on 25 February 2005. Twelve years had not yet lapsed from 5 June 2003. It cannot therefore be said that the plaintiffs are out of time. They are actually well within time and their claim is not time barred.

Issue No. 8 : Are the plaintiffs entitled to the prayers sought ?

I have already canvassed the case of the defendants and held that it is unsustainable. I have also held above that the case of the plaintiffs is not time barred. It follows that the plaintiffs are entitled to the prayers sought. They have title to the suit land, and they have come to court seeking eviction of the defendants within the specified time frame. As owners of the suit land they are entitled to all proprietary rights including the right of exclusive possession. These rights were previously captured in Section 27 of the Registered Land Act (CAP 300) (now repealed) and which was operative at all material times to this suit. It provided as follows :-

27. Subject to this Act -

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.

These rights are more or less repeated in the current law in Sections 24 and 25 of the Land Registration Act, Act No. 3 of 2012. The defendants cannot be entitled to benefit from any overriding interests, as their claim over the land being based on adverse possession is not maintainable. It follows that the plaintiffs are entitled to the land, and they are therefore entitled to have the defendants evicted and permanently restrained from the suit land. The defendants have to vacate the suit land. Given the surrounding circumstances of this case, I am unable to give the defendants a considerable duration of time to vacate the suit land. They must vacate together with their servants and assigns within 30 days from the date hereof. They must leave the suit land intact and not attempt to destroy it as they vacate.

Issue No. 9 : Who should bear the costs of this suit ?

I am sympathetic to the defendants who thought that they had entitlement to the suit land. Unfortunately, the law is not on their side. The plaintiffs have succeeded in their suit and the defendants have lost. Ordinarily costs follow the event and I do not see any reason to depart from this. The costs of the suit will therefore be shouldered by the defendants.

I have dealt with all issues in this suit. I now make the following final orders.

(1) That the defendants have failed to prove that they are entitled to the suit land either by way of purchase or by way of adverse possession.

(2) That as against the defendants, the plaintiffs are hereby declared to be the owners of the land parcel Uasin Gishu/Sosiani/28.

(3) That an order is hereby issued that the defendants do vacate the suit land forthwith, and no later than 30 days from the date of this judgment. In default, the plaintiffs be at liberty to apply for their eviction, which will be done at the cost of the defendants.

(4) That a permanent injunction is hereby issued, barring the defendants from the suit land.

(5) That the defendants will bear the costs of this suit.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 31ST DAY OF JULY 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. E.M. Balango of M/s Chebii & Co Advocates for plaintiffs.

Mr. M.K. Rop holding brief for Ms Isiaho of M/s Ngala & Co Advocates for the defendants.